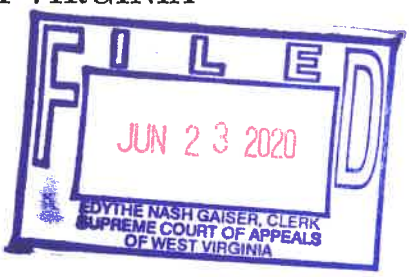
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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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.,
and 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.

**Upon Original Jurisdiction**
**In Prohibition No.** 20-0410
(Circuit Court of Wyoming Co.,
Civ. Ac. No. 18-C-100)

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## VERIFIED PETITION FOR WRIT OF PROHIBITION

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Respectfully submitted,

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## APPENDIX OF EXHIBITS
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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:**

Pursuant to Article VIII, Section 3, of the West Virginia Constitution and Rule 16 of the West Virginia Rules of Appellate Procedure, Petitioners, Hope Clinic, PLLC ("Hope Clinic"), James H. Blume, Jr., D.O. ("Dr. Blume"), Sanjay R. Mehta, D.O. ("Dr. Mehta"), Deschner Medical Services, PLLC ("DMS"), d/b/a Deboss Neurology and Pain Clinic ("Deboss Clinic"), Stephen H. Deschner, M.D. ("Dr. Deschner"), Rhonda's Pharmacy, LLC ("Rhonda's Pharmacy"), Rhonda Rose, R. Ph. ("Pharmacist Rose"), Evan D. Brush, R. Ph. ("Pharmacist Brush"), Bypass Pharmacy, Inc. ("Bypass Pharmacy"), Westside Pharmacy, Inc. ("Westside Pharmacy"), Devonna L. Miller-West, R. Ph. ("Pharmacist Miller-West"), Rite Aid of West Virginia, Inc. ("Rite Aid"), and Walgreen Co. ("Walgreens") (collectively, "Petitioners"), respectfully request that this Honorable Court grant their Petition for Writ of Prohibition and, in support thereof, state as follows:

## I.

## QUESTIONS PRESENTED

1) Does the Circuit Court have subject matter jurisdiction over Respondents' claims when Respondents filed their Complaint **before** serving any of the Petitioners with a Notice of Claim or Screening Certificate of Merit as required by W. Va. Code § 55-7B-6(b), or when Respondents' Screening Certificate of Merit is otherwise materially deficient?

2) Was it appropriate for the Circuit Court to make a determination, before pleadings closed and with minimal written discovery, that the "Discovery Rule" applied to toll the statute of limitations?

3) Did the Circuit Court appropriately determine that the Medical Professional Liability Act's ("MPLA") statute of limitations tolls indefinitely until such time that the MPLA's pre-suit notice requirements are met?

4) With respect to Petitioner Rite Aid, Dr. Mehta, Dr. Blume, and Hope Clinic, did the Circuit Court err in finding that Respondents filed suit within the applicable statute of limitations, even though the Complaint set forth dates certain which prove that the Complaint was untimely filed?

5) Do West Virginia's Long-arm Statutes, or Federal Due Process Analysis, apply to confer personal jurisdiction to out-of-state Petitioner Dr. Deschner?

## II.

## STATEMENT OF THE CASE

This Petition arises out of a civil action pending in the Circuit Court of Wyoming County, West Virginia, before Respondent, The Honorable Warren R. McGraw, bearing Civil Action No. 18-C-100. This Petition for Writ of Prohibition is filed pursuant to Article VIII, Section 3 of the West Virginia Constitution, granting this Court original jurisdiction in prohibition, and West Virginia Code § 53-1-1. This Petition for Writ of Prohibition seeks relief from the Circuit Court's March 13, 2020, "Order Denying Defendants' Motion [*sic*] to Dismiss and Accompanying Findings of Facts and Conclusions of Law." **(App. 0001-0029.)**

### A. The allegations of Greg and Phyllis Shrewsbury.

On or about September 12, 2018, Respondents, Greg and Phyllis Shrewsbury (respectively, "Mr. and Mrs. Shrewsbury"; collectively, "the Shrewsburys" or "Respondents"), filed a Complaint against Petitioners asserting claims of medical negligence, pharmacist negligence, and loss of consortium. **(App. 0040-0056.)** Respondents alleged that in April of 2011, Mr. Shrewsbury was involved in an automobile accident. **(App. 0048.)** As a result, he was referred to the Beckley Pain

Clinic, PLLC ("Beckley Pain Clinic") and Dr. Narciso Rodriquez-Cayro ("Dr. Rodriquez-Cayro") by physicians from Raleigh General Hospital. **(App. 0048.)**

According to the Complaint, Mr. Shrewsbury presented with low back, shoulder, wrist, hand, and hip pain. ***(Id.)*** Respondents allege that Dr. Rodriquez-Cayro's treatment of Mr. Shrewsbury consisted of taking Mr. Shrewsbury's blood pressure, obtaining his weight, and providing prescriptions to him without any reasonable or proper medical examination or no examination at all. ***(Id.)*** Respondents allege that Petitioner, Rite Aid of West Virginia, Inc., d/b/a Rite Aid Discount Pharmacy #113 (Pineville) and d/b/a Rite Aid Discount Pharmacy #1373 (Mullens) ("Rite Aid"), negligently filled the prescriptions for controlled substances for Mr. Shrewsbury during the period of approximately 2011 to 2013, which was purportedly instrumental in the continuation of Mr. Shrewsbury's addiction. ***(Id.)***

Thereafter, Respondents allege that Mr. Shrewsbury began treating at Hope Clinic[1] with Dr. Mehta, a physician practicing medicine under the auspices of Hope Clinic. **(App. 0049.)** Purportedly, Dr. Mehta's treatment of Mr. Shrewsbury consisted of taking Mr. Shrewsbury's blood pressure, obtaining his weight, and then providing him prescriptions without any reasonable or proper medical examination or no examination at all, facilitating Mr. Shrewsbury's continued addiction. ***(Id.)*** Respondents allege that ByPass Pharmacy, its agents, servants and employees, including its pharmacist-in-charge, Pharmacist Cunningham, and Rhonda's

[1] Respondents allege that Dr. Blume is the owner/operator of Hope Clinic. **(App. 0041.)** They also allege that PPPFD Alliance, LLC (owned and/or operated by Mark Radcliffe) operated or participated directly in the operation of Hope Clinic. ***(Id.)***

Pharmacy, its agents, servants, and employees, including its pharmacist-in-charge, Pharmacist Brush and its owner and licensed pharmacist, Pharmacist Rose, negligently filled prescriptions for controlled substances for Mr. Shrewsbury. However, the Complaint fails to specify a time period in which either of these pharmacies allegedly filled Mr. Shrewsbury's prescriptions. **(App. 0049.)**

Then, from April 28, 2015 until April 19, 2016, Mr. Shrewsbury allegedly treated at Ace Medical, Inc. ("Ace Medical") with Dr. David Lee Morgan, D.O., M.D. ("Dr. Morgan"). ***(Id.)*** Respondents allege that, similar to the other treating physicians and pain clinics, Dr. Morgan's treatment of Mr. Shrewsbury consisted of taking Mr. Shrewsbury's blood pressure, obtaining his weight, and then providing prescriptions to him without any reasonable or proper medical examination or no examination at all. ***(Id.)*** Respondents also make allegations related to Westside Pharmacy, its agents, servants, and employees, including its pharmacist-in-charge, Pharmacist Miller-West, filling prescriptions for controlled substances for Mr. Shrewsbury. As with the other pharmacies, the Complaint fails to specify a time period in which Westside Pharmacy purportedly filled Mr. Shrewsbury's prescriptions. **(App. 0050.)**

According to the Complaint, after Mr. Shrewsbury's treatment ended with Ace Medical, he began treating at Deboss Clinic and Dr. Deschner. ***(Id.)*** As with the other treating physicians and pain clinics, Respondents alleged that Dr. Deschner's treatment of Mr. Shrewsbury consisted of taking Mr. Shrewsbury's blood pressure and obtaining his weight, and then, providing prescriptions to him without any reasonable or proper medical examination or no examination at all. **(App. 0050.)**

## B. Procedural History of Pertinent Underlying Issues.

### 1. Respondents' September 12, 2018 Complaint and Numerous Subsequent Notices of Claim and Certificates of Merit.

The facts that make up the tangled "pre-suit" procedural history of this matter are convoluted. To start, Respondents never actually served Petitioners with any documents "pre-suit", i.e., before the Complaint was filed. It was only **subsequent** to filing their September 12, 2018 Complaint that Respondents purportedly (based on references in subsequent correspondence) filed one or more Notices of Claim in an effort to comply with the jurisdictional prerequisites of West Virginia Code §55-7B-6.[2] The first of these supposed Notices was dated November 21, 2018 (the "First Notice of Claim")—more than two months after the filing date of the Complaint. **(App. 0070-0075.)** Although it was addressed to all of the Petitioners, **there is no record that all of the Petitioners received a copy of the First Notice of Claim**. In any event, the First Notice of Claim provided as follows:

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[2] West Virginia Code § 55-7B-6(b) requires that a claimant serve, by certified mail, at least 30 days prior to the filing of his or her medical professional liability action, a proper "Notice of Claim" on each healthcare provider that includes a statement as to the theory of liability upon which the lawsuit is based with a Certificate of Merit prepared by a health care provider who, among other things, is qualified as an expert under the West Virginia Rules of Evidence. Subsection (d) of § 55-7B-6, provides that, except for medical professional liability actions against a nursing home, assisted living facility, their related entities or employees, or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees, 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 statute of limitations, then the claimant must comply with the provisions of subsection (b), except with regard to the Certificate of Merit. Essentially, the claimant or his or her counsel receives a 60 day extension from the date the health care provider receives the Notice of Claim to furnish the health care provider with a Screening Certificate of Merit. An individual cannot file a medical professional liability action against any health care provider without complying with the provisions of West Virginia Code § 55-7B-6. W. Va. Code § 55-7B-6(a).

> "Each of you is hereby notified in accord with the provisions of West Virginia Code Chapter 55, Article 7B, Section 6 of the intent to file a claim or claims against you in the Circuit Court of Kanawha County, West Virginia. The theories of liability upon which the cause or causes of action will be based include the over-prescribing of highly addictive controlled substances, the prescribing of controlled substances without adequate or proper evaluation of the patient and consistently failing to address the patient's actual medical needs. The foregoing resulted in the death of the patient.
>
> A Screening Certificate of Merit will be provided within 60 days as outlined in West Virginia Code Chapter 55, Article 7B, Section 6."

**(App. 0070-0075.)** (Emphasis suppled.)

In addition to there being no evidence that all Petitioners were actually served with the First Notice of Claim, the document itself was legally deficient in a number of ways. As noted previously, at the time Respondents issued the First Notice of Claim, they had already filed a Complaint in the Circuit Court of Wyoming County, and not in Kanawha County, as the Notice of Claim had indicated.[3] ***(Id.)*** Furthermore, **the First Notice of Claim failed to identify the patient/claimant by name or to provide any period of time in which medical or pharmaceutical services were allegedly rendered by Petitioners**. Most peculiar, though, is that upon information and belief, Mr. Shrewsbury is presently alive, and not deceased as was alleged in the First Notice of Claim. ***(Id.)***

[3] To date, Petitioners are not aware of any Complaint filed by Respondents in Kanawha County, West Virginia; nor are they aware of any grounds upon which Respondents could base a Complaint against them in Kanawha County.

It appears that approximately six days later, on November 27, 2018, Plaintiffs issued another Notice of Claim (the "Second Notice of Claim").[4] **(App. 0112.)** Once again, the Second Notice of Claim was provided **after** the Complaint was already filed, and it still did not provide any information about the period of time in which services were allegedly rendered by Petitioners. ***(Id.)***

On January 10 and/or 11, 2019, after already failing to accomplish service of the Complaint on any of the Petitioners within 120 days as required by Civil Rule 4(k), Respondents filed a Motion to Extend Time for Service of Complaint ("Motion to Extend"). **(App. 0098-0100.)** Therein, Respondents requested an extension of time in which to serve their Complaint "in order to allow time for all parties to comply with the provisions of the MPLA . . . Until full compliance with the provisions of the MPLA have been undertaken, service of the summons and complaint on the Defendants is improper and does not comply with the statutory provisions of the MPLA." **(App. 0099.)** **The Motion to Extend also conceded that Respondents did not serve the Petitioners with a Notice of Claim until after they had already filed their Complaint**. ***(Id.)*** They also acknowledged therein that "the statute of limitations may have run on [their] claims against the Defendants." ***(Id.)*** There is no evidence that Respondents ever duly served their Motion to Extend Time upon any of the Petitioners.

[4] The Second Notice of Claim was not made a part of the record before the Circuit Court of Wyoming County.

Respondents' Counsel also filed an Affidavit on January 11, 2019 (the "January 11th Affidavit"), pursuant to the provisions of West Virginia Code §55-7B-6(c), averring that no Screening Certificate of Merit was necessary in this case because Respondents' theory of liability is based upon well-established legal theory of liability which does not require expert testimony supporting a breach of the applicable standard of care. **(App. 0101-0103.)** Below is the "well-established legal theory of liability" that Respondents claimed absolved them of the Screening Certificate of Merit requirement imposed by §55-7B-6(b):

> 3. Based upon my review of the records in the U.S. District for the Southern District of West Virginia, Criminal Action No. 5: 18-00026 in addition to my review of news accounts and other civil and criminal file complaints, and DEA records, these Defendants regularly violated State statutes by prescribing and dispensing controlled substances for reasons which were not medical in nature, and was done to Greg Shrewsbury.
>
> 4. It is well-known in the Kanawha County, Raleigh County, and Wyoming County that these Defendants regularly engaged in the activity complained of herein for numerous years, that is the Defendant Physicians and Defendant Pain Clinics prescribed and the Defendant Pharmacies and Defendant Pharmacists filled prescriptions for controlled substances.

**(App. 0102.)** Once again, there is no evidence that Respondents ever served the January 11th Affidavit upon any of the Petitioners.

Despite the January 11th Affidavit, Respondents' Counsel then issued a letter on January 28, 2019 to Rhonda's Pharmacy, Pharmacist Rose, Pharmacist Brush, Rite Aid, Westside Pharmacy, Pharmacist Miller-West, Walgreens[5], and ByPass

[5] Although Walgreens is listed as an addressee on the January 28, 2019 letter, there is no evidence that it ever received a copy of this correspondence.

Pharmacy, indicating that a Screening Certificate of Service of Merit **would** be provided within 60 days. **(App. 0141-0142.)** This letter also advised that the aforementioned parties were to disregard "the Notice of Claim dated November 20, 2018" (presumably referring to the First Notice of Claim, which was actually dated November 21, 2018). ***(Id.)*** According to the letter, the Respondents' expert, Frank Breve, PharmD, MBA ("Mr. Breve") had experienced a "personal emergency", and the Screening Certificate of Merit would be delayed by an additional two weeks. ***(Id.)*** **This letter was sent 62 days after Respondents purportedly served the Second Notice of Claim, and 68 days after the purported First Notice of Claim.**[6] ***(Id.)***

On March 8, 2019, Respondents' Counsel served **another** Notice of Claim, this time addressed solely to Westside Pharmacy and Pharmacist Miller-West (the "Third Notice of Claim") and included a Screening Certificate of Merit executed by Mr. Breve. **(App. 0144-0152.)** **This was the first actual Notice of Claim from Respondents that Pharmacist Miller-West ever received.**[7] **(App. 0135.)** That same day, March 8, 2019, Counsel for Respondents also served a Notice of Claim solely upon Walgreens (the "Fourth Notice of Claim").[8] **(App. 0352-0371.)** The Fourth Notice of Claim was

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[6] None of the Petitioners consented to an extension of time for Respondents to file their **already late** Screening Certificate of Merit, or to extend any other deadline in this matter.

[7] Pharmacist Miller-West never received the November 20, 2018 (actually dated November 21, 2018) Notice of Claim or the November 27, 2018 Notice of Claim. **(App. 0135.)** The only other correspondence Pharmacist Miller-West received regarding Respondents' claim was the January 28, 2019, letter. ***(Id.)***

[8] The Fourth Notice of Claim was not made a part of the record before the Circuit Court of Wyoming County.

likewise accompanied by a Screening Certificate of Merit signed by Mr. Breve. **(App. _0354-0359.)** Once again, Respondents advised in both Notices of Claim that the Notice of Claim dated November 20, 2018 should be disregarded (again, presumably referring to the First Notice of Claim, which was actually dated November 21, 2018), and that the newly-served Screening Certificates of Merit in fact related to the Second Notice of Claim. **(App. 0144-0152, 0352-0353.)**

Strangely, in both Screening Certificates of Merit Mr. Breve's notarized signature is dated January 28, 2019—**the same day that Respondents' counsel sent his letter indicating that the Certificate of Merit would be delayed by two weeks due to Mr. Breve having a "personal emergency". (App. 0144-0152, 0354-0359.)** And, in any event, these Screening Certificates of Merit were served some 39 days after they were notarized, and 25 days after the expiration of the unilateral two-week extension that Respondents had given themselves. **(App. 0145, 0352.)**

On April 18, 2019, counsel for Westside Pharmacy and Pharmacist Miller-West sent a letter **(App. 0154.)** responding to the Notice of Claim and Certificate of Merit, noting that the Notice of Claim and Certificate of Merit both failed to identify any action or inaction of Ms. Miller-West or Westside Pharmacy that constituted a failure to meet the applicable standard of care and, therefore, did not provide them with sufficient information to potentially mediate this case. On May 15, 2019, Plaintiff's counsel provided a response **(App. 0156-0157.)** that did not remedy the deficiencies

identified in the Certificate of Merit but instead argued that they were not deficiencies.

As it relates to the pre-suit notices provided (or not provided) to the other Petitioners not yet addressed herein[9], Petitioners Dr. Mehta, Dr. Blume, and Hope Clinic received the First and Second Notices of Claim, **but they never received a Screening Certificate of Merit or the January 11th Affidavit. (App. 0111-0122; 170-179.)** Petitioners Rite Aid, Dr. Mehta, Dr. Blume, and Hope Clinic only learned of the existence of Respondents' Screening Certificates of Merit directed to Westside Pharmacy and Pharmacist Miller-West and Respondents' Affidavit when the same were attached to Respondents' Omnibus Response to Petitioners' Motions to Dismiss ("Omnibus Response") (discussed below).

Meanwhile, although the Complaint had been filed in the Circuit Court of Wyoming County, none of the Petitioners had been duly served. Respondents finally undertook efforts to serve their Complaint on July 26, 2019—**more than nine months after it was filed**. On that day, Respondents achieved service on Rhonda's Pharmacy, Pharmacist Brush, DMS, Walgreens, Rite Aid, ByPass Pharmacy, Westside Pharmacy, Beckley Pain Clinic, Dr. Blume, Hope Clinic, PPPFD Alliance, Ace Medical and Dr. Morgan. **(App. 0349.)** Dr. Mehta was served on July 31, 2019. **(App. 0349.)** On August 6, 2019, Respondents served Pharmacist Miller-West. ***(Id.)***

[9] The record that was before the Circuit Court of Wyoming County was unclear as to what Notices of Claim the remaining Petitioners may have received.

### 2. Petitioners' Motions to Dismiss and the Circuit Court's Subsequent Denial Thereof.

As service was achieved on the respective Petitioners, they began filing responsive pleadings.[10] Petitioners filed their Motions to Dismiss as follows: Rhonda's Pharmacy, Pharmacist Rose, and Pharmacist Brush on August 5, 2019 **(App. 0349.)**; DMS and Dr. Deschner on August 23, 2019 ***(Id.)***; Walgreens on August 27, 2019 ***(Id.)***; Rite Aid on August 29, 2019[11] ***(Id.)***; ByPass Pharmacy on August 29, 2019 ***(Id.)***; Dr. Mehta on September 23, 2019 ***(Id.)***; Hope Clinic and Dr. Blume on October 2, 2019[12] ***(Id.)***; and Westside Pharmacy and Pharmacist Miller-West on November 26, 2019[13] **(App. 0350.)**.

While Petitioners sought dismissal of Respondents' Complaint for a number of meritorious reasons[14], for purposes of this Petition, Petitioners universally sought

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[10] PPPFD Alliance, LLC, Mark Radcliffe, Dr. Rodriquez-Cayro, Ace Medical and Dr. Morgan have yet to participate in this litigation. It does not appear that Mark Radcliffe or Dr. Rodriquez-Cayro were ever served with a copy of the Summons and Complaint.

On September 3, 2019, Beckley Pain Clinic, through its counsel, filed a Notice of Dissolution, advising that Beckley Pain Clinic was previously dissolved on August 17, 2015. **(App. 0163-0169.)** Beckley Pain Clinic has made no further filings in this case.

[11] In addition to filing a Motion to Dismiss, Rite Aid filed an Answer on August 7, 2019.

[12] Hope Clinic and Dr. Blume joined in the Motion to Dismiss filed by Dr. Mehta. Additionally, they filed their own Motion on separate grounds that are discussed in Footnote 9.

[13] Westside Pharmacy and Pharmacist Miller-West also filed an Answer on August 23, 2019.

[14] Rhonda's Pharmacy, Pharmacist Rose, Pharmacist Brush, Walgreens, Bypass Pharmacy, Rite Aid, Dr. Mehta, Westside Pharmacy and Pharmacist Miller-West also moved for dismissal on the grounds that Respondents failed to serve their Complaint within 120 days after it was filed, pursuant to Rule 4(k) of the West Virginia Rules of Civil Procedure. **(App. 0106-0124;0180-0269.)**

Walgreens also moved for dismissal on the grounds that Respondents had failed to set forth any factual allegations demonstrating that Walgreens had ever supplied any medication to Mr.

dismissal of Respondents' Complaint on the grounds that the Circuit Court of Wyoming County lacked subject matter jurisdiction, due to Respondents' failure to comply with the pre-suit requirements of West Virginia Code § 55-7B-6(b). **(App. 0031.)** Respondents Rite Aid, Dr. Mehta, Dr. Blume, and Hope Clinic also sought dismissal on the grounds that Respondents' Complaint was barred by the applicable statute of limitations. **(App. 0057-0105; 0106-0124; 0170-0179.)** Petitioners DMS and Dr. Deschner also sought dismissal on the basis that the Circuit Court lacked personal jurisdiction over them. **(App. 0270-0283.)**

The Shrewburys filed their Omnibus Response on January 14, 2020. **(App. 0284-0327.)** Pharmacist Miller-West and Westside Pharmacy Inc. filed a Reply to the Shrewburys' Response on January 21, 2020. **(App. 0328-0339.)** Dr. Mehta filed a Reply to the Shrewburys' Response on January 22, 2020. **(App. 0340-0348.)**

The Court held a hearing on January 22, 2020. Thereafter, on March 13, 2020, the Circuit Court of Wyoming County, West Virginia, issued its Order denying the various Motions to Dismiss. **(App. 0001-0029.)**

## III.

## SUMMARY OF ARGUMENT

**I. The Circuit Court Committed Clear Legal Error in Denying Petitioners' Motions to Dismiss on Subject Matter Jurisdiction Grounds.**

A. Respondents Failed to Comply With the Mandatory Pre-suit Notice Requirements of the West Virginia Medical Professional Liability Act in

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Shrewsbury much less that it had done anything improper. **(App. 0198-0200.)** Without allegations of wrongdoing on the part of Walgreens, Respondents have not met their pleading standard, pursuant to Rule 8 of the West Virginia Rules of Civil Procedure. **(App. 0198-0200.)**

Numerous, Substantive Ways; Yet, the Circuit Court Found That it Had Subject Matter Jurisdiction Over Respondents' claims, in Contradiction of the Precedent Established by *State ex. Rel. PrimeCare Med. of W.Va. Inc. v. Faircloth.*

B. The Circuit Court Also Erred by Concluding that Respondents' Certificate of Merit Met the Jurisdictional Requirements Enumerated in West Virginia Code § 55-7B-6, Even Though it Was Never Served on Petitioners Prior to the Complaint, and Was Otherwise Statutorily Deficient.

**II. The Circuit Court Committed Clear Legal Error When It Found That Respondents Filed Suit Within the Applicable Statute of Limitations.**

A. The Circuit Court Prematurely Concluded That the "Discovery Rule" Applied, Despite That Pleadings Have Not Closed and Barely Any Discovery Has Been Conducted.

B. The Circuit Court Disregarded the Tolling Provisions Set Forth in W. Va. Code §55-7B-6(h), and Erroneously Concluded That the Statute of Limitations is Stayed Until the Pre-suit Requirements of the MPLA are Met.

C. With Respect to Defendants Rite Aid, Dr. Mehta, Dr. Blume, and Hope Clinic, the Circuit Court Erroneously Found that Respondents Filed Suit Within the Applicable Statute of Limitations, Despite That Respondents' Complaint Sets Forth Dates Certain Which Plainly Evince That the Statute of Limitations Had Lapsed.

**III. The Circuit Court Committed Clear Legal Error in Denying DMS and Dr. Deschner's Motion to Dismiss pursuant to Rule 12(b)(2).**

A. West Virginia's Long-arm Statutes Do Not Confer Personal Jurisdiction to the Circuit Court Under the Present Circumstances.

B. Personal Jurisdiction is Likewise Not Proper Under the Federal Due Process Analysis.

## IV.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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. Petitioners respectfully request oral argument under

Rule 20, as the decision below involves novel questions of law, implicates issues of fundamental public importance, and conflicts with the previous decisions of this Court. W. Va. R. App. P. 20(a)(1)-(2), (4) (2019).

## V.

## ARGUMENT

### A. Petitioners Are Entitled to the Issuance of a Writ of Prohibition.

#### 1. The Exercise of Original Jurisdiction is Proper.

The Court should exercise its original jurisdiction here. Under West Virginia Code §53-1-1, "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code §53-1-1 (2019). In determining whether to entertain and issue the writ of prohibition where it is claimed that the lower tribunal exceeded its legitimate powers, this Court generally examines five factors:

> (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 a 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 (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. pt. 1, *State ex rel. Nationwide Mut. Ins. Co. v. Marks*, 676 S.E.2d 156 (W. Va. 2009) (*quoting* syl. pt. 4, *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W. Va. 1996)). The five factors "are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue." *Id.* However, "all five factors need not be satisfied," and "it is clear that the third factor, the

existence of clear error as a matter of law, should be given substantial weight." *Id.* This Court also considers the "over-all economy of effort among litigants, lawyers, and courts." *Hinkle v. Black*, 262 S.E.2d 744, 748 (W. Va. 1979), *superseded by statute on other grounds as stated in State ex rel. Thornhill Grp., Inc. v. King*, 759 S.E.2d 795 (W. Va. 2014).

This Court reviews a Circuit Court's opinion denying a motion to dismiss *de novo*. *Ewing v. Bd. of Educ. of Cty. of Summers*, 503 S.E.2d 541 (W. Va. 1998).

## B. The Circuit Court Committed Clear Legal Error in Denying Petitioners' Motion to Dismiss on Subject Matter Jurisdiction Grounds.

### 1. The Circuit Court Erred in Determining it Had Subject Matter Jurisdiction When the Respondents Clearly Failed to Comply with the Mandatory Pre-Suit Notice Requirements of the West Virginia Medical Professional Liability Act.

It is well-established that, in a medical professional liability action brought pursuant to W. Va. Code § 55-7B-1, *et seq.*, a claimant must satisfy the pre-suit notice requirements by serving a Notice of Claim **before** a Complaint is filed, and, if the pre-suit notice requirements are not satisfied, then a circuit court is deprived of subject matter jurisdiction. Syl. Pt. 2, *State ex. Rel. PrimeCare Med. of W.Va. Inc. v. Faircloth,* 835 S.E.2d 579 (W. Va 2019). Respondents in the matter *sub judice* filed their Complaint long before ever attempting to serve any pre-suit notice upon the Petitioners, and, hence, black letter law in West Virginia unequivocally establishes that the Circuit Court of Wyoming County erred when it concluded it had subject matter jurisdiction. As such, a Writ should issue, and this suit must be dismissed.

West Virginia civil actions rooted in allegations of medical negligence are governed by the MPLA, which is codified as W. Va. Code § 55-7B-1, *et seq.* Pursuant to § 55-7B-6(a) of the statute, "no person may file a medical professional liability action against any health care provider without complying with the provisions of this section." The substantive requirements of the pre-suit notice process are set forth in W. Va. Code § 55-7B-6(b), which provides, in part, "**[a]t least 30 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." [emphasis supplied].

The provisions of § 55-7B-6 were designed to promote "the pre-suit resolution of non-frivolous medical malpractice claims." Syl. Pt. 6, *Hinchman v. Gillette,* 618 S.E.2d 387 (W. Va. 2005). While this Court "has made clear that the pre-suit requirements should not be used to make suits under the MPLA a 'game of forfeits,' the pre-suit objection procedure was specifically established to give the plaintiff 'an opportunity to address and correct the alleged defects and insufficiencies.'" *Cline v. Kresa-Reahl,* 728 S.E.2d 87, 98 (W. Va. 2012), quoting *Hinchman,*618 S.E.2d at 394. "**[T]here would seem to be no sense or utility in allowing amendment of a pre-suit notice and certificate after suit is filed**" since its purpose is to avert frivolous claims and promote pre-suit resolution. *Cline,* 728 S.E.2d at 98, quoting *Hinchman,* 618 S.E.2d at 395 [emphasis supplied].

More recently, in *State ex rel. Faircloth,* 835 S.E.2d 579 (W. Va. 2019), this Court held that the "pre-suit notice requirements contained in the [MPLA] are

jurisdictional, and **failure to provide such notice deprives a circuit court of subject matter jurisdiction.**" *Faircloth,* at Syl. Pt.2 [emphasis supplied]. Indeed, this Court reaffirmed *Faircloth* and its predecessors in a recent memorandum decision affirming the Monongalia County Circuit Court's dismissal of a complaint for the plaintiffs' failure to comply with §§ 55-7B-6(a) and (b) at least 30 days prior to the filing of their complaint. *See Clay v. J.W. Ruby Mem'l Hosp.,* 2020 W.Va. LEXIS 51, 2020 WL 533951 (W. Va. 2020).

Based upon the unambiguous statutory language and case law referenced hereinabove, West Virginia courts cannot exercise subject matter jurisdiction over medical malpractice lawsuits if plaintiffs do not first comply with the pre-suit notice requirements contained in §§ 55-7B-6(a) and (b) of the MPLA. "Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the **forum court must take no further action in the case other than to dismiss it from the docket.**" Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.,* 211 S.E.2d 705 (W. Va. 1975) [emphasis supplied][15].

Respondents acknowledge that the MPLA governs their claim, and compliance with the MPLA's pre-suit notice requirements was mandated by W.Va. Code § 55-7B-

[15] *See also, Whittaker v. Whittaker,* 717 S.E.2d 868, 871 (W. Va. 2011) ("'[A]ny decree made by a court lacking [subject matter] jurisdiction is void.' *State ex rel. TermNet Merchant Services, Inc. v. Jordan,* 217 W.Va. 696, 700, 619 S.E.2d 209, 213 (2005)"); *Cruikshank v. Duffield,* 77 S.E.2d 600, 604 (W. Va. 1953) ("Where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void . . . ."); Syl. Pt. 1, *State ex rel. Preissler v. Dostert,* 260 S.E.2d 279, 280 (W. Va. 1979) ("Where there is no showing on the record that any party has properly instituted proceedings in a court of record, the court cannot exercise jurisdiction over the matter and any purported order or judgment entered is void and its enforcement may be restrained by prohibition.").

6(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." The MPLA requires, at a minimum, for a claimant to serve via certified mail a Notice of Claim **at least 30 days prior to filing a complaint.** W.Va. Code § 55-7B-6(b). Furthermore, a Circuit Court cannot suspend the MPLA's pre-suit notice requirement and permit a plaintiff to serve notice after filing the complaint. *Faircloth,* 835 S.E.2d at 589. However, in the case *sub judice,* that is precisely what transpired in contravention of West Virginia law.

Respondents admitted in their Complaint and Omnibus Response to the Motions to Dismiss that the pre-suit requirements of the MPLA apply. **(App. 0040-0056, 0284-0327.)** Yet, the above timeline unequivocally establishes that Respondents failed to follow the law, and, thus, failed to confer subject matter jurisdiction upon the Circuit Court and deprived Petitioners of their rights to pre-suit notice of Respondents' claims and possible pre-suit resolution.

Despite lacking subject matter jurisdiction, Paragraph 26 of the Circuit Court's Order cites to *Elmore v. Triad Hosp. Inc.,* 640 S.E.2d 217 (W. Va. 2006) and concludes the Respondents "acted in good faith to comply with the mandates and requirements of §55-7B-6." **(App. 0013.)** Respectfully, the Circuit Court's reasoning is misplaced because the *Elmore* decision only invoked a standard of good faith **after** it determined the claimant sent notice pre-suit. This Court in *Elmore* reviewed the legal sufficiency of pre-suit notice, and, confirmed that pre-suit notice was mandatory: "In the provisions of the MPLA, the Legislature has made its intent clear that certain

prerequisites occur before a complainant may initiate a medical malpractice action in the courts." *Id.* at 223. The question in *Elmore* was whether the notice was sufficient, not whether the claimant "impeded pre-suit resolution of the claim." *Id.* at 224. The Circuit Court's finding of statutory compliance is grossly inaccurate as evidenced by the procedural history of this case.

Paragraph 14 of the Circuit Court's Order states the Respondents "filed their Complaint on September 12, 2018 in order to preserve the statute of limitations." **(App. 0007.)** This finding erroneously concludes the Respondents were forced to circumvent the statutory pre-suit mandates to prevent their claim from being barred by the statute of limitations. However, the MPLA specifically anticipates this very instance where a claimant is up against a filing deadline and allows for tolling of the statute of limitations when a claimant files a **proper** Notice of Claim: "...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..." W. Va. Code § 55-7B-6 (i)(1). Further, W. Va. Code 55-7B-6(d) states, in part, "if a claimant...or...counsel has **insufficient time** to obtain a screening certificate of merit **prior to the expiration of the applicable statute of limitations**, the claimant shall comply with the provisions of subsection (b)..." [emphasis supplied].

The MPLA does not provide an exception to or suspend the pre-suit requirements for a statute of limitations deadline; however, it does provide a statutory remedy for it. Failing to follow the pre-suit mandates in an attempt "to

preserve the statute of limitations" is not based on any legal logic or statutory authority. The Circuit Court cannot create its own law, it cannot disregard statutory law, and it cannot disregard this Court's long-standing application of the pre-suit notice requirements. Yet, this is exactly what the Circuit Court did. Respondents must be held to the same standard of law as all medical malpractice litigants, and, therefore, the Circuit Court's Order must be reversed because it simply does not have subject matter jurisdiction over this matter.

### 2. The Circuit Court Erred in Concluding the Purported Certificate of Merit, Sent Post-Suit, Meets the Statutory Requirements Enumerated in West Virginia Code § 55-7B-6.

Not only did Respondents fail to serve a Screening Certificate of Merit **prior** to filing their Complaint, but the attempted Screening Certificates of Merit that were in fact sent by Respondents failed to meet the requirements of West Virginia law. W. Va. Code §55-7B-6(b). Thus, the Circuit Court erroneously concluded that it had subject matter jurisdiction, a Writ should issue, and Respondents' Complaint must be dismissed.

This Court recently addressed the screening certificate of merit requirement in *State ex rel. Faircloth*, 835 S.E.2d 579 (W. Va. 2019), and clearly stated that the "duty to serve a Notice of Claim exists in addition to the duty to serve a Certificate of Merit." If a proper screening certificate of merit is not served upon a defendant prior to a complaint being filed, then, simply put, a circuit court lacks subject matter jurisdiction over those claims. *Id.*, at Syl. Pt. 2. In this matter, as demonstrated from the timeline above, Respondents utterly failed in their duty to serve a Screening

Certificate of Merit prior to filing their Complaint. In fact, not only did Respondents fail to serve Screening Certificates of Merit before filing suit, **but some Petitioners only became aware of the existence of the purported Screening Certificates of Merit when one of them was attached to the dispositive motions and/or responses filed in response to Petitioners' motions to dismiss.** As such, a Writ must issue, and the Complaint must be dismissed.

Moreover, the Screening Certificates of Merit sent by Respondents **after** their Complaint was filed do not even come close to complying with the substantive requirements of W.Va. Code § 55-7B-6(b). For a certificate of merit to be valid, the following requirements must be met:

> The screening certificate of merit shall **state with particularity**, and include: (A) The basis for the expert's familiarity with the applicable standard of care at issue; (B) the expert's qualifications; (C) the expert's opinion as to how the applicable standard of care was breached; (D) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death; and (E) a list of all medical records and other information reviewed by the expert executing the certificate of merit. **A separate screening certificate of merit must be provided for each health care provider against whom a claim is asserted.** The health care provider signing the screening certificate of merit **shall have no financial interest** in the underlying claim...

W. Va. Code § 55-7B-6(b), in part, [emphasis supplied]. This Court explained in *Hinchman* the process by which a prospective defendant preserves a challenge to a certificate of merit: "...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." Syl. Pt. 5, 217 W.Va.

378, 618 S.E.2d 387 [emphasis supplied]. More recently, this Court elaborated on the prerequisite of a certificate of merit prior to a response by stating: "While syllabus point 5 of *Hinchman* provides, in relevant part, that all objections to the notice or certificates' legal sufficiency not specifically set forth in the request are waived, **that finding assumes that there is a certificate of merit to which a party may respond**." *Clay,* 2020 W.Va. LEXIS 51 at 15 [emphasis supplied]. In other words, a prospective defendant's duty to respond to a notice of claim is not even triggered until a screening certificate of merit is served. Though these are well-settled principles in West Virginia law, the Circuit Court ignored them, and a Writ must issue.

In Paragraph 22 of the Order Denying Defendants' Motion to Dismiss, the Circuit Court concluded the following: "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 hereby **DENIED**." **(App. 0011) (emphasis supplied by the Court).** The Circuit Court's conclusion is in direct contradiction to the law cited above, as well as W.Va. Code § 55-7B-6(b)(3), stating that a challenge may not be raised "prior to receipt of the Notice of Claim and the executed Screening Certificate of Merit." Petitioners were not afforded an opportunity to respond to any pre-suit deficiencies **because the Complaint was filed prior to the mailing of the Screening Certificates of Merit**, contrary to the plain statutory language of W.Va. Code § 55-7B-6(b). This thereby forced the Petitioners to file a Motion to Dismiss rather than a

pre-suit response. Moreover, by the time some of the Petitioners were made aware of the Screening Certificates of Merit, Motions to Dismiss had already been filed.

Additionally, West Virginia Code § 55-7B-6 specifically requires a "separate screening certificate of merit" for "each health care provider against whom a claim is asserted." In order to fulfill W. Va. Code § 55-7B-6's purpose of preventing frivolous medical malpractice claims and promoting pre-suit resolution of non-frivolous claims, the Certificate of Merit must include specific allegations against the defendant so the defendant may properly evaluate the claim. *See Hinchman v. Gillette*, 217 W. Va. 378, 386 (2005) (holding that the principal consideration in reviewing a claim that a certificate of merit is insufficient is whether the party challenging or defending the certificate has demonstrated a good faith and reasonable effort to further the statutory purposes). A comparison of the Certificate of Merit that was sent to Westside Pharmacy and Devonna Miller-West with the one that was supplied to Walgreens demonstrates that Respondents made no attempt whatsoever to state with any particularity how each of these Petitioners supposedly breached the standard of care and how that claimed breach purportedly caused Mr. Shrewsbury's alleged injuries. **(App, 0147-0152, 0354-0359.)** Rather, the Certificates of Merit are nothing more than fill-in-the blank forms with the blanks being reserved for the name of the pharmacy/pharmacist to whom the document was directed. **(App. 0147-0152, 0354-0359.)** No specifics are provided regarding the nature of these Petitioners' involvement with Mr. Shrewsbury. **(App. 0147-0152, 0354-0359.)** Mr. Breve simply states that Westside Pharmacy filled prescriptions for Mr. Shrewsbury. **(App. 0147-**

**0152.)** Even less information is provided with respect to Walgreens as there is no indication in the Certificate of Merit that it ever supplied any medication to Mr. Shrewsbury. **(App, 0354-0359.)** Rather than targeting each health care provider, the Certificates of Merit repeatedly mention "pharmacies and pharmacists" without any statement of particularity to the individually named Petitioners. **(App, 0147-0152, 0354-0359.)** This is in direct contradiction to the MPLA's mandate requiring a screening certificate of merit for each health care provider. Therefore, the Screening Certificates of Merit are clearly insufficient and fail to meet the requirements of West Virginia law.

Lastly, both Screening Certificates of Merit are deficient for lack of specific, statutorily-required content, insofar as neither contains a disclaimer of financial interest in the underlying claim as mandated by W.Va. Code § 55-7B-6(b) **(App. 0147-0152, 0354-0359.).** Furthermore, neither Screening Certificate of Merit is targeted to an individual health care provider against whom claims are asserted. As such, there are no claims of "particularity" as to the breach of the standard care and alleged resulting injury for **each** healthcare provider, as required under the law. Respondents continually attempt to create their own law and blatantly disregard the MPLA, and regrettably the Circuit Court's Order further enabled this. It is imperative for this Court to intervene and enforce the law **as written**. Therefore, in accordance with the W.Va. Code §§ 55-7B-6(b) and (d)[16], this Court should issue a Writ and require dismissal of this case.

[16] W.Va. Code §§ 55-7B-6(b) and (d) provide, in pertinent part, that "a claimant shall serve...a Screening Certificate of Merit' along with a Notice of Claim or "a statement of intent to

### C. The Circuit Court Committed Clear Legal Error in Finding that Respondents Filed Suit Within the Applicable Statute of Limitations.

In their respective Motions to Dismiss, Petitioners Rite Aid, Dr. Mehta, Dr. Blume, and Hope Clinic all argued that Respondents' October 2018 Complaint was barred by the two-year statute of limitations imposed by W. Va. Code §55-7B-4(a) for the following reasons.[17] Respondents claim that Rite Aid "filled the prescriptions for controlled substances for Greg Shrewsbury during the period of approximately 2011 to 2013"—**more than five years prior to the filing of the Complaint. (App. 0048.)** Respondents also claim that Mr. Shrewsbury "began treating at the Hope Clinic and with Dr. Mehta after the closure of Beckley Pain Clinic," which ceased operations in January of 2015. **(App. 0049.)** Hope Clinic (and Dr. Mehta's practice) likewise ceased operations in June of 2015—**some three-and-a-half years before Respondents filed their Complaint**. ***(Id.)***

In denying Petitioners' Motions to Dismiss, the Circuit Court found, as a matter of law, that (1) the "discovery rule" applied to stay the statute of limitations because Mr. Shrewsbury did not "become aware of the Defendants' negligent actions [until] he kicked his addiction on August of 2018 and discovered the Defendants' malpractice was the cause of his injuries" **(App. 0017-0024.)**; and (2) "[t]he pre-suit requirements of the MPLA stay the statute of limitations until such time as those

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provide a Screening Certificate of Merit within 60 days of the date the health care provider receives the Notice of Claim."

[17] This argument was made in the alternative to Petitioners' argument that the Circuit Court lacked subject matter jurisdiction. **(App. 0057-0133; 0170-0179.)**

requirements have been met." ***(Id.)*** Both of these findings are erroneous and require that a Writ be issued.

### 1. The Circuit Court acted Prematurely in Concluding that the "Discovery Rule" applied because the Pleadings have not Closed and Discovery has not been Completed.

West Virginia courts apply "a five-step analysis . . . to determine whether a cause of action is time-barred." *Dunn v. Rockwell,* 689 S.E.2d 255, 265, (W. Va. 2009). First, the court should identify the applicable statute of limitation for each cause of action. *Id.* In this case, per W. Va. Code §55-7B-4(a), the applicable statute of limitation is two years from the date of the alleged injury.

Second, "the court (or, if material questions of fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action[.]" *Id.; see also Legg v. Rashid,* 663 S.E.2d 623, 628, (W. Va. 2008), and *Gaither v. City Hospital, Inc.,* 487 S.E.2d 901 (W. Va. 1997). "In most cases, the typical plaintiff will 'discover' the existence of a cause of action, and the statute of limitation will begin to run, at the same time that the actionable conduct occurs." *Dunn,* 689 S.E.2d 264-265. "Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the 'discovery rule' applies only when there is a strong showing by the plaintiff that some action by the defendant

written discovery has been exchanged.[18] No depositions have been taken. No fact witnesses or experts have been disclosed. Without the benefit of any meaningful discovery, the procedural posture of the case is completely devoid of any facts which would support the Circuit Court's ruling that the discovery rule applied to toll the statute of limitations such that Respondents filed their claims against Petitioners in a timely manner.

Pursuant to *Dunn*, "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. 3, *Dunn v. Rockwell*, 689 S.E.2d 255. At this juncture of the litigation, the procedural posture fails to set forth sufficient factual evidence regarding each and every Petitioner such that the Circuit Court could make a blanket determination regarding the applicability of the discovery rule to the claims Respondents have made against each Petitioner. Bald, blanket assertions made by Respondents in their Omnibus Response to avoid dismissal are not evidence upon which the Circuit Court may conclude "no genuine issue of material fact" exists regarding the application of the discovery rule. Furthermore, the Circuit Court's decision may impair Petitioners' ability to raise a statute of limitation defense in a dispositive motion or as an

[18] Initial written discovery was exchanged between Respondents and some Petitioners. **(App.** 0349-0350.)

prevented the plaintiff from knowing of the wrong at the time of the injury." Syl. Pt. 3, *Cart v. Marcum,* 423 S.E.2d 644 (W. Va. 1992).

Fourth, if the discovery rule is not applicable, then it must be determined whether the defendant fraudulently concealed facts that prevented the plaintiffs from discovering or pursuing their cause of action. *Dunn,* at 689 S.E.2d 265. Fifth and finally, "the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine." *Id.*

In their Omnibus Response, Respondents vaguely allege that they were "unable to know of the existence of injury or its cause" until the federal indictments of Drs. Mehta and Blume in February of 2018 **(App. 0300-0301.)**, and also after Mr. Shrewsbury kicked his addiction in August of 2018 **(App. 0023; 0303.)**. The Circuit Court, found in its Order that "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." **(App. 0021-0023.)** These findings of fact have no evidentiary basis and are founded on nothing more than unsupported assertions that Respondents made in their response to the Motions to Dismiss.

The analysis of the other four elements set forth in *Dunn* "is naturally dependent upon the procedural posture and facts of the case under review." *Dunn,* at 265. In the case at bar, there has been little to no discovery conducted. Very little

affirmative defense at trial even if the evidence developed during discovery or trial discloses that Respondents' claims are, in fact, time-barred.

For all of the reasons set forth above, the Circuit Court's ruling that the discovery rule applies is clearly erroneous, and a Writ must issue.

### 2. For Certain Petitioners, Plaintiffs' Allegations, Taken as True, Establish that Respondents' Complaint was Filed Outside the Applicable Statute of Limitations.

Petitioners Rite Aid, Dr. Mehta, Dr. Blume, and Hope Clinic argued in their respective Motions to Dismiss that Respondents' claims are barred by the statute of limitations according to the allegations set forth in Respondents' own Complaint. By concluding the discovery rule applied in such a manner so as to render Respondents' claims timely, the Circuit Court disregarded the averments in the Complaint in favor of subsequent assertions that were made in Respondents' Omnibus Response. In doing so, the Circuit Court ignored the basic precept in motions to dismiss that allegations in a complaint are treated as true and arguments made by counsel are not evidence. The Court also acted improperly in deciding which version of the "facts" Respondents had put forward was to be believed.

Moreover, the discovery rule is inapplicable in this matter with respect to these Petitioners. While addiction may certainly constitute a disability, the assertion that Mr. Shrewsbury could not appreciate his own addiction while in its midst truly strains credulity. Individuals addicted to prescription medication are still held to the same criminal standards as non-addicted individuals, and many people who battle with drug and alcohol addiction still drive, vote, enter into contracts, make financial

decisions, and otherwise function sufficiently to manage their own affairs.

Furthermore, this Court has interpreted the discovery rule as inapplicable to an injury or wrong of such a character that a plaintiff cannot reasonably claim ignorance of the existence of a cause of action. *Gaither v. City Hosp.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). In these circumstances, this Court has held that:

> Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the "discovery rule" applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury.

*Id.* at 712 and 907. This rule was crafted because in some circumstances causal relationships are so well established that we cannot excuse a plaintiff who pleads ignorance. *Gaither,* at *Id.* It cannot be seriously argued that the dangers of opioids were not known in 2013. As such, the dangers of opioid addictions are that type of injury or wrong of such a character where ignorance cannot be reasonably claimed.

Further, Respondents did not plead the discovery rule in their Complaint. There is no allegation in the Complaint that Rite Aid, Dr. Mehta, Dr. Blume, or Hope Clinic hid the nature of their actions or otherwise prevented Respondents from discovering the nature of the conduct. Rather, within the four corners of the Complaint, Respondents describe the full nature and extent of their interactions with Rite Aid, Dr. Mehta, and Hope Clinic.[19] Again, the Circuit Court's reliance on unverified arguments of counsel made in a responsive pleading was improper. The Complaint, on its face, pled dates certain which fall outside of the statute of

[19] Respondents make no actual allegations against Dr. Blume in their Complaint.

limitations, and contains no averment that the discovery rule applies. As such, the Court's denial of these Respondents' Motions to Dismiss based upon the discovery rule is clear error of law which demands reversal.

### 3. The Circuit Court Erred in Finding that the Statute of Limitations is Stayed Until the Pre-suit Requirements of the MPLA are Met.

For actions brought under the MPLA, the statute of limitations can only be tolled by the filing of a statement of intent. *Cooper v. Appalachian Regional Healthcare, Inc.*, 2006 WL 538925, at *9 (Unpublished); *see also,* W. Va. Code §55-7B-6(h). This tolling period is not indefinite, and its extent varies depending on when and if a defendant responds. *Id.* Specifically, the MPLA's statute of limitations can only be tolled "for the latter of (1) thirty days from the day the defendant responds to the screening certificate, (2) thirty days from the date a response to the screening certificate would be due, or (3) thirty days from the date a claimant receives notice from the mediator that mediation has concluded without a settlement." *Id.* For the purposes of tolling, a complaint is only timely filed if filed **before** the expiration of the applicable tolling period. *Id.* at *8.

In the instant case, the Circuit Court found that "the pre-suit requirements of the *MPLA* stay the statute of limitations until such time as those requirements have been met." **(App. 0017.)** [Emphasis in original]. This finding essentially declares that the statute of limitation can be tolled indefinitely, and is inapposite with the plain language of §55-7B-6(h) and this Court's interpretations of its application. According to the *Cooper* analysis of how to apply §55-7B-6(h), the statute of limitations in this case was in fact **never tolled**, because Respondents filed their

Complaint **before** filling a Statement of Intent, Notice of Claim, or Screening Certificate of Merit. **(*See, e.g.*, App. 0098-0100.)** Therefore, the Circuit Court's finding that the statute of limitations was stayed by the tolling provisions set forth in §55-7B-6(h) was clearly in error, and a Writ must issue.

**4. With Respect to Defendants Rite Aid, Dr. Mehta, Dr. Blume, and Hope Clinic, Plaintiffs' Complaint Sets Forth Dates Certain and the Circuit Court Committed Clear Legal Error in Finding that Plaintiffs Filed Suit Within the Applicable Statute of Limitations.**

In Paragraph 38 of their Complaint, Respondents assert that between 2011 to 2013, the conduct of Rite Aid was instrumental in the continuation of Plaintiff-husband's addiction. **(App. 0048.)** There are no allegations regarding the conduct of Rite Aid for any time period after 2013. **(*See* App. 0040-0056.)** Likewise, Respondents assert the negligence of Hope Clinic and Dr. Sanjay R. Mehta was instrumental in the continuation of Greg Shrewsbury's addiction. **(App. 0049.)** The allegations in Paragraph 42 of the Complaint state Mr. Shrewsbury began treating with Ace Medical and Dr. Morgan on April 28, 2015, after the closure of Hope Clinic.[20] **(*Id.*)** As such, according to Paragraph 42 of the Complaint, Greg Shrewsbury did not treat with Dr. Mehta or, any physician at Hope Clinic, after April 28, 2015.

Pursuant to § 55-7B-4 of the MPLA, causes of action for medical negligence arise as of the date of the injury, and actions must be commenced within two years. Paragraphs 38 and 42 of the Complaint serve as party admissions that Respondents were aware of Mr. Shrewsbury's addiction and did nothing to assert and/or

[20] Hope Clinic closed in June of 2015.

investigate their potential claims until approximately five years after Rite Aid last dispensed controlled substances to him, and nearly three and half years after Mr. Shrewsbury received treatment from Dr. Mehta and Hope Clinic.

The present matter is remarkably similar to *Dean v. Gordinho*, Supreme Court of Appeals of West Virginia, No. 18-0642, October 18, 2019, where this Court determined that the statute of limitations had expired stemming from a drug overdose death on October 2, 2014 that was purportedly contributed to by defendant Dr. Gordinho's, prescription of opioids on December 11, 2013. In *Dean*, plaintiff Barbara Dean filed suit on behalf of the Estate of M.M. on June 28, 2016 arising from M.M.'s death on October 2, 2014. Ms. Dean asserted that a number of medical professionals, including Dr. Gordinho had contributed to M.M.'s drug addiction and subsequent overdose death. This Court held that the statute of limitations began to run from the last date of treatment, not from the date of the death of M.M. Implicit in the Court's reasoning was the recognition that West Virginia does not have a continuing tort theory of recovery in this context. Rather, each interaction with the medical professional was a separate event subject to its own statute of limitations.

In both *Dean* and the present matter, the plaintiffs supposedly became addicted to opioids after motor vehicle accidents. **(App. 0048.)** Thereafter, both plaintiffs went to a number of medical professionals in drug seeking behavior to further their respective addictions. **(App. 0048-0050.)** And as was the case with Dr. Gordinho in *Dean*, neither Rite Aid, nor Dr. Mehta and Hope Clinic were the original prescription writers/fillers; nor were they the last entity in the line of treatment. ***(Id.)***

As such, consistent with *Dean*, **and based on the Respondents' own Complaint,** the statute of limitations for Respondents' claims against Rite Aid began to run on December 31, 2013, and expired at the end of 2015 at the latest. Similarly, the statute of limitations began to run with respect to Dr. Mehta, Hope Clinic, and Dr. Blume on April 28, 2015—June 2015 at the latest—and expired by June 2017. Accordingly, the instant Complaint was filed too late pursuant to § 55-7B-4. As such, the Circuit Court's denial of Rite Aid, Dr. Mehta, Dr. Blume, and Hope Clinic's Motion to Dismiss on statute of limitations grounds was clearly legal error, and a Writ must issue.

### D. The Circuit Court Committed Clear Legal Error in Denying DMS and Dr. Deschner's Motion to Dismiss pursuant to Rule 12(b)(2).

"It is a fundamental principle of law that a court must possess... *in personam* jurisdiction... in order to exercise authority in a case." *Burnett v. Burnett,* 542 S.E.2d 911, 916 (W. Va. 2000); *accord State ex rel. CSR Ltd. v. MacQueen,* 441 S.E.2d 658, 661 (W. Va. 1994) ("Obviously, jurisdiction cannot be asserted over a defendant with which a state has no contacts, no ties and no relations."). Indeed, "[a] court which has jurisdiction of the subject matter in litigation exceeds its legitimate powers when it undertakes to hear and determine a proceeding without jurisdiction of the parties." *State ex rel. Smith v. Bosworth,* Syl. Pt. 4, 117 S.E.2d 610 (W. Va. 1960).

In determining whether personal jurisdiction exists over a non-resident defendant, a court must use a two-step approach. *Lane v. Boston Scientific Corp.,* Syl. Pt. 1, 481 S.E.2d 753 (W. Va. 1996); *accord State ex rel. Ford Motor Co. v. McGraw,* Syl. Pt. 3, 788 S.E.2d. 319 (W. Va. 2016) [hereinafter "*McGraw*"]. First, it must determine whether the non-resident defendant's actions meet the

requirements of West Virginia's long-arm statutes - W. Va. Code § 56-3-33 and W. Va. Code § 31D-15-1501. *Id.* Second, the court must determine whether the non-resident's contacts with West Virginia satisfy the United States Constitution's due process requirements. *Id.* Importantly, when a nonresident makes a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), "the plaintiff bears the burden of establishing sufficient facts upon which the court may exercise jurisdiction over the defendant." *Lane,* 481 S.E.2d at 757.

### 1. Personal Jurisdiction is Not Proper Under West Virginia's Long-arm Statutes.

West Virginia has "two statutes that outline when *in personam* jurisdiction can be obtained" — West Virginia Code § 56-3-33 and West Virginia Code § 31D-15-1501, the latter "defines when a corporation is doing business in this state so that *in personam* jurisdiction may be obtained over the corporation," and is 'merely an elaboration on the transacting business provision of W. Va. Code 56-3-33(a)." *Abbott v. Owens-Corning Fiberglas Corp.,* 444 S.E.2d 285 (W.Va. 1994) (overruled on other grounds); *see also Lane,* 481 S.E.2d at FN 6. Pursuant to West Virginia Code § 56-3-33:

> (a) The engaging by a non-resident or by his or her duly authorized agent, any or more of acts specified in subdivision (1) through (7) of this subsection shall be deemed equivalent to an appointment by such non-resident of the Secretary of State...upon whom may be served all lawful process in any action or proceeding against him or her, in any circuit court in the State, including an action or proceeding brought by a non-resident plaintiff or plaintiff, for a cause of action growing out of such act or acts...
>
> (1) Transacting business in this state;
>
> (2) Contracting to supply services or things in this state;

(3) Causing tortuous injury anywhere by an act or omission in this state;

(4) Causing tortuous injury in this state by an act or omission outside this state if he or she 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;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected such person to use, consume or be affected by the goods in this state: Provided, that he or she also 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;

(6) Having an interest in, using or possessing real property in this state; or

(7) Contracting to insure any person, property or risk located within this state at the time of contracting;

(b) When jurisdiction over a non-resident is based solely upon the provisions of this section, only a cause of action arising from or growing out of one or more of the acts specified in subdivisions (1) through (7), subsection (a) of this section may be asserted against him or her.

W. Va. Code §§ 56-3-33(a) and (b) (2017). Likewise, West Virginia Code § 31D-15-1501 provides, in pertinent part:

(d) A foreign corporation is deemed to be transacting business in this state if:

(1) The corporation makes a contract to be performed, in whole or in part, by any party thereto in this state;

(2) The corporation commits a tort, in whole or in part, in this state...

(e) A foreign corporation's making of a contract, the committing of a manufacture or sale, offer of sale or supply of defective product as described in subsection (d) of this section is deemed to be the agreement of

> that foreign corporation that any notice or process served upon, or accepted by, the Secretary of State in a proceeding against that foreign corporation arising from, or growing out of, contract, tort or manufacture or sale, offer of sale or supply of the defective product has the same legal force and validity as process duly served on that corporation in this state.

W. Va. Code § 31 D-15-1501.

These statutes expressly provide that only a cause of action **arising from or growing out of** one of the enumerated acts contained within the statutes will confer jurisdiction over the non-resident individual and/or corporation. This Court further solidified this interpretation in *Lane v. Boston Scientific Corporation*, 481 S.E.2d 753 (W. Va. 1996). *See Lane,* 481 S.E.2d 753 (affirming Circuit Court's dismissal of non-resident defendants for lack of jurisdiction based on requirement of West Virginia long arm statutes that the non-resident defendant corporation's business affairs in West Virginia must directly relate to plaintiff's cause of action to establish personal jurisdiction.).

Personal jurisdiction over DMS and Dr. Deschner does not comport with West Virginia's long-arm statute(s). DMS did not at any time relevant herein, engage in any of the activities enumerated by West Virginia Code § 56-3-33 or West Virginia Code § 31D-15-1501. Likewise, Dr. Deschner did not engage in the practice of medicine or engage in any of the activities enumerated by West Virginia Code § 56-3-33 in West Virginia with regard to the treatment of Mr. Shrewsbury or otherwise. Therefore, it was clearly erroneous to allow the claims against DMS and Dr. Deschner to proceed.

### 2. Personal Jurisdiction is Not Proper Under the Federal Due Process Analysis.

Similarly, Respondents cannot establish the second step of the personal jurisdiction inquiry. The Constitution of the United States requires "that before a non-resident individual or corporation can be hauled 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 into that forum state." *Grove* v. *Maheswaran,* 498 S.E.2d 485, 488 (W. Va. 1997). That is, "[t]here...must be a sufficient connection or minimum contacts between the defendant and the forum state so that it will be fair and just to require a defense to be mounted in the forum state." *Pries v. Watt,* Syl. Pt. 2. 410 S.E.2d 285 (W. Va. 1991). "Such personal jurisdiction may be either general or specific." *McGraw,* 788 S.E.2d. at 329. "General jurisdiction, also known as all-purpose jurisdiction, applies to those situations where the cause of action is distinct from and is not related to a non-resident defendant's contacts with a forum." *Id.* "Specific jurisdiction, also known as case-linked jurisdiction, refers to jurisdiction which arises out of or relates to the defendant's contacts with a forum." *Id.*; *accord Bristol-Myers Squibb Co. v. Superior Court,* 2017 U.S. LEXIS 3873, * 11 (U.S. June 19, 2017) ("In order for a state court to exercise specific jurisdiction, the **suit** must arise out of or relate to the defendant's contacts with the **forum**." *Id.* (internal quotations omitted)(emphasis in original)).

Cases from other jurisdictions involving hospitals and physicians are instructive. In *Gelineau v. New York University Hospital*, 375 F. Supp. 661, 667 (D.N.J. 1974), the district court reasoned:

> Unlike a case involving involuntary interstate or international economic activity . . . the residence of a recipient of personal services rendered elsewhere is irrelevant and totally incidental to the benefits provided by the defendant at his own location. It is clear that when a patient travels to receive professional services without having been solicited . . . then the client, who originally traveled to seek services apparently not available at home, ought to expect that he will have to travel again if he thereafter complains that the services sought by him in the foreign jurisdiction were there rendered improperly.

The reasoning of *Gelineau* is in instructive in that the state's interest in insuring that its citizens do not have to leave the state to file suit must be balanced against the burden to those providing the medical services of having to defend themselves in a foreign forum. Such a burden might ultimately have the counter-productive result of reducing the availability of medical services to residents of the forum state. *See also Wright v. Yackley*, 459 F.2d 287 (9th Cir. 1972).

Here, the conduct of DMS and Dr. Deschner did not show an intent on their part to purposefully avail themselves of the privilege of providing medical services to West Virginia residents on a systematic basis. Moreover, Respondents' claims against DMS and Dr. Deschner do not arise out of or relate to any alleged contacts of DMS and Dr. Deschner with the State of West Virginia. Indeed, neither DMS nor Dr. Deschner have ties or connections to West Virginia which would demonstrate a purposeful interjection into the State. Thus, it was clearly erroneous for the Circuit Court to conclude that it had specific jurisdiction over DMS and Dr. Deschner.

## VI.

## CONCLUSION

For the reasons stated herein, Petitioners respectfully move this Honorable Court to grant their Verified Petition for Writ of Prohibition, and issue a Writ ordering the Circuit Court of Wyoming County to dismiss all claims brought against Petitioners in that court.

## VII.

## MOTION FOR STAY OF PROCEEDINGS

In addition to the relief sought in the separate Joint Motion to Stay Proceedings which is being filed contemporaneously with the instant Petition, Petitioners also move the Court pursuant to Rule 28 of the West Virginia Rules of Appellate Procedure to stay proceedings in the Circuit Court of Wyoming County, West Virginia pending the resolution of the Verified Petition for Writ of Prohibition. If this Court grants this Petition, the case will be dismissed as to Petitioners. Thus, granting a stay will promote judicial economy and prevent the Circuit Court from unnecessarily deciding issues that should be decided by another court.

Respectfully submitted,

Timothy R. Linkous by TRMS #9104

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Jenny L. Hayhurst (WVSB #11752)
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Ollie M. Harton, Esq. (WVSB #5217)
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COUNSEL FOR PETITIONERS,
RHONDA ROSE, R. PH., EVAN D. BRUSH,
R. PH., AND RHONDA 'S PHARMACY, LLC

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

HOPE CLINIC, PLLC,
JAMES H. BLUME, JR. D.O.,
SANJAY R. METHA, D.O.,
DESCHNER MEDICAL SERVICES, PLLC,
d/b/a DEBOSS NEUROLOGY
AND 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.

**Upon Original Jurisdiction**
**In Prohibition No. _____**
(Circuit Court of Wyoming Co.,
Civ. Ac. No. 18-C-100)

---

**VERIFICATION**

---

I, Robert M. Sellards, counsel for Petitioners, Hope Clinic, PLLC and James H. Blume, Jr., D.O. in accordance with W. Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Verified Petition and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Verified Petition, based upon information and belief.

Robert M. Sellards, Esq. (WVSB #9104)
John H. Zickefoose, Esq. (WVSB #12584)
BAILES CRAIG YON & SELLARDS, PLLC
401 10TH Street, Suite 500
Huntington, WV 25701
Tel. (304) 697-4700
Fax. (304) 697-4714
rms@bcyon.com
jhz@bcyon.com

Sworn to and subscribed before me this 11th day of June, 2020.

Notary Public

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
LACY EDMONDS
BAILES, CRAIG, YON & SELLARDS, PLLC
401 TENTH STREET, SUITE 500
HUNTINGTON, WV 25701
My Commission Expires APRIL 12, 2021

## VERIFICATION

I, Timothy R. Linkous and Jenny L. Hayhurst, counsel for Petitioner, Sanjay R. Mehta, D.O., in accordance with W. Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Verified Petition and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Verified Petition, based upon information and belief.

**Petitioner Sanjay R. Mehta, D.O.**
By Counsel,

Timothy R. Linkous (WV Bar #8572)
Jenny L. Hayhurst (WV Bar #11752)
**Linkous Law, PLLC**
179 Hanalei Drive, Suite 100
Morgantown, WV 26508
Phone: 304-554-2400; Fax: 304-554-2401

Sworn to and subscribed before me
this 2nd day of June, 2020.

Notary Public

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Beverly A. Goodwin
90 Melvin Fields Rd.
Morgantown, WV 26508
My Commission Expires June 16, 2024

I, Jeanette H. Ho, of Thomas, Thomas & Hafer LLP, counsel for Petitioner, Walgreen, Co., in accordance with W. Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Verified Petition and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Verified Petition, based upon information and belief.

Jeanette H. Ho, Esquire
WVSB No. 9920
525 William Penn Place
37th Floor, Suite 3750
Pittsburgh, PA 15219
(412) 697-7403

Sworn to and subscribed before me
this 3rd day of June, 2020.

Notary Public

Commonwealth of Pennsylvania - Notary Seal
Antoinette M. Bucci, Notary Public
Allegheny County
My commission expires April 27, 2022
Commission number 1223688
Member, Pennsylvania Association of Notaries

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

HOPE CLINIC, PLLC,
JAMES H. BLUME, JR. D.O.,
SANJAY R. METHA, D.O.,
DESCHNER MEDICAL SERVICES, PLLC,
d/b/a DEBOSS NEUROLOGY
AND 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.

**Upon Original Jurisdiction**
**In Prohibition No. _____**
(Circuit Court of Wyoming Co.,
Civ. Ac. No. 18-C-100)

---

**VERIFICATION**

---

I, Trevor K. Taylor of Taylor Law Office, counsel for Bypass Pharmacy, Inc., in accordance with W. Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Verified Petition and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Verified Petition, based upon information and belief.

Trevor Taylor, Esquire (WVSB #8862)
TAYLOR LAW OFFICE
ttaylor@taylorlawofficewv.com
330 Scott Avenue, Suite 3
Morgantown, WV 26508
(304) 225-8529

Sworn to and subscribed before me this 22 day of June, 2020.

Carrie S. Rose
Notary Public

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

HOPE CLINIC, PLLC,
JAMES H. BLUME, JR. D.O.,
SANJAY R. METHA, D.O.,
DESCHNER MEDICAL SERVICES, PLLC,
d/b/a DEBOSS NEUROLOGY
AND 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.

**Upon Original Jurisdiction**
**In Prohibition No. _____**
(Circuit Court of Wyoming Co.,
Civ. Ac. No. 18-C-100)

---

**VERIFICATION**

---

I, Tim J. Yianne, counsel for Petitioners, in accordance with W. Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Verified Petition and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Verified Petition, based upon information and belief.

Tim J. Yianne (WVSB 8623)
Lewis Brisbois Bisgaard & Smith LLP
707 Virginia Street, E., Suite 1400
Charleston, WV 25301
(304)553-0161
Tim.yianne@lewisbrisbois.com

Sworn to and subscribed before me this 2nd day of June, 2020.

Notary Public

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Jan E. Winnell
5273 Frame Road
Elkview, WV 25071
My Commission Expires March 07, 2023

I, Michael P. Markins, of Cipriani & Werner, P.C., counsel for Petitioner, Rite Aid of West Virginia, Inc., in accordance with W. Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Verified Petition and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Verified Petition, based upon information and belief.

Michael P. Markins (WVSB#8825)
CIPRIANI & WERNER, P.C.
500 Lee Street, East, Suite 900
Charleston, WV 25301
(304) 341-0500

Sworn to and subscribed before me this 3rd day of June, 2020.

Notary Public

OFFICIAL SEAL
Notary Public, State of West Virginia
LOUISE STACY
234 Snow Hill Drive
Charleston, WV 25311
My commission expires April 13, 2021

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

HOPE CLINIC, PLLC, JAMES H. BLUME, JR. D.O., SANJAY R. METHA, D.O., DESCHNER MEDICAL SERVICES, PLLC, d/b/a DEBOSS NEUROLOGY AND 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.

**Upon Original Jurisdiction**
**In Prohibition No. _____**
(Circuit Court of Wyoming Co., Civ. Ac. No. 18-C-100)

---

**VERIFICATION**

---

I, Robert L. McKinney, II, with Hawkins Parnell & Young, LLP, counsel for Devonna Miller-West, R.Ph. and Westside Pharmacy, Inc. in accordance with W. Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Verified Petition and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Verified Petition, based upon information and belief.

Robert L. McKinney, II (WVSB No.: 6932)
Ollie M. Harton (WVSB No.: 5217)
Hawkins Parnell & Young, LLP
Chase Tower
707 Virginia Street, East, Suite 1601
Charleston, WV 25301
Office: 304.345.8545
Facsimile: 1.877.788.2861

Sworn to and subscribed before me this 2nd day of June, 2020.

Notary Public

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Brooke M. Hughes
123 Hastings Drive, Belle, WV 25015
My Commission Expires May 12, 2025

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HOPE CLINIC, PLLC,
JAMES H. BLUME, JR., D.O.,
SANJAY R. METHA, D.O.,
DESCHNER MEDICAL SERVICES, PLLC,
d/b/a DEBOSS NEUROLOGY AND 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. CASE NO: _____
(Circuit Court of Wyoming Co., Civ. Ac. 18-C-100)

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

Respondent,

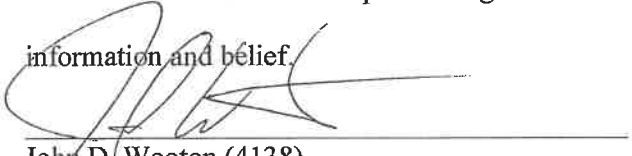
v.

GREG A. SHREWSBURY and PHYLLIS A. SHREWSBURY,

Respondents.

VERIFICATION

I, John D. Wooton, of Wooton, Davis, Hussell & Johnson, counsel for Rhonda's Pharmacy, LLC, Rhonda Rose, R. Ph., and Evan D. Brush, R. Ph., in accordance with W. Va. Code § 53-1-3 and Rule 16 (d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Verified Petition and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Verified Petition, based upon information and belief.



John D. Wooton (4138)
Wooton Davis Hussell & Johnson
P.O. Box 2600
Beckley, WV 25802-2600

**STATE OF** WV,

**COUNTY OF** Raleigh, **SS:**

I, Lori M Hughes, a Notary Public in and for the state and county aforesaid, do hereby certify that John D Wooton whose name is signed to the foregoing writing bearing date of the 5th day of June, 2020, have this day acknowledged the same before me in my said county.

Given under my hand this 5th day of June, 2020.

My commission expires: Dec. 7, 2021

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
LORI M. HUGHES
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My Commission Expires December 07, 2021

Lori M Hughes
NOTARY PUBLIC

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

HOPE CLINIC, PLLC,
JAMES H. BLUME, JR. D.O.,
SANJAY R. METHA, D.O.,
DESCHNER MEDICAL SERVICES, PLLC,
d/b/a DEBOSS NEUROLOGY
AND 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.,
and 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.

**Upon Original Jurisdiction**
**In Prohibition No. _____**
(Circuit Court of Wyoming Co.,
Civ. Ac. No. 18-C-100)

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**CERTIFICATE OF SERVICE**

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I, Robert M. Sellards, hereby certify that service of the foregoing "**Verified Petition for Writ of Prohibition**" has been made by mailing a true and correct copy of the same in the regular course of the United States Mail, postage prepaid, on this 11th day of June, 2020, addressed as follows:

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