BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 21-0300

HELEN ADKINS,

Plaintiff Below/Petitioner,

v.

CAROLYN CLARK, M.D.,

Defendant Below, Respondent

PETITIONER'S APPEAL BRIEF

Appeal from the Circuit Court of Cabell County, West Virginia

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I. Introduction

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

In medical negligence cases, the Medical Professional Liability Act (MPLA) requires that certain pre-suit procedures must be followed **BEFORE** any lawsuit can be filed against a health care provider and this Court has held that if these pre-suit procedures are not followed, the circuit court does not have jurisdiction in the case. Syllabus Point 2, *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 242 W.Va. 335, 835 S.E.2d 579 (2019). Another important aspect of the MPLA is that the health care provider has an absolute right to pre-suit mediation, which is referred to in the statute as "prelitigation mediation." W.Va.Code §55-7B-6(g).

This appeal addresses what happens when a plaintiff timely files the requisite notice of claim, but receives a response from the health care provider asking for a medical records release authorization so that once the records are obtained, the health care provider can make an informed decision on pre-suit mediation. Specifically, in the initial response to Petitioner Helen Adkins' notice of claim, counsel for Respondent Carolyn Clark, M.D., requested that Mrs. Adkins sign a medical records release authorization so that counsel could gather the relevant medical records and **"determine whether or not pre-suit mediation is advantageous."** (JA 0046).

When the Legislature enacted the MPLA, one of its main goals was to encourage the early resolution of potential medical negligence claims before any complaint was filed. Mrs. Adkins, who was fully prepared to file her complaint at any time, knew that compliance with the MPLA was jurisdictional and that Respondent was entitled to pre-suit mediation. Thus, based upon the MPLA and the decisions from this Court, Mrs. Adkins cooperated and accommodated this request from Respondent. Mrs. Adkins anticipated that once Respondent informed her in writing of her decision either to seek or decline pre-suit mediation, Mrs. Adkins then would have thirty days from that written notice to file her complaint.

On **August 31, 2020**, Respondent provided Mrs. Adkins with a flash drive containing the medical records obtained pursuant to the authorization she had provided and further represented that "Additional records will be provided upon receipt." (JA 0048). The legitimate effort by Mrs. Adkins to comply with the MPLA and cooperate with Respondent's request to obtain medical records so that Respondent could exercise her mandatory right to pre-suit mediation ended up being

used against her to dismiss her case. Under the theory accepted by the Honorable Judge Christopher D. Chiles, the statute of limitations in this case expired **PRIOR** to the date Respondent sent the flash drive of Mrs. Adkins' medical records to her counsel.

The Court's ruling in this case will have a major impact on how plaintiffs in medical negligence cases handle the various pre-suit requests made by health care providers. Affirming the trial court's ruling would be contrary to the Legislature's clearly stated intent to encourage pre-suit resolution of these disputes and will send the message that no future plaintiff should ever cooperate with a health care provider making a pre-suit request for medical records. Mrs. Adkins respectfully submits the denial of her day in court based upon these pre-suit procedural machinations that have nothing to do with the actual merits of her claim is contrary to the MPLA and decisions by this Court and, therefore, she asks the Court to reverse the final ruling dismissing her case.

II. Assignment of error

Whether under the MPLA, a complaint is filed within the applicable statute of limitations where:

1. **The plaintiff timely filed a notice of claim without a screening certificate of merit, pursuant to W.Va.Code §55-7B-6(d);**

2. **The plaintiff filed a revised notice of claim with a screening certificate of merit within the time frame outlined in W.Va.Code §55-7B-6(d), and as extended by this Court in the COVID-19 Administrative Orders;**

3. **The health care provider, which has an absolute right to pre-suit mediation under W.Va.Code §55-7B-6(g), filed a response to the original notice of claim requesting a medical records release authorization from the plaintiff and stating the records are needed to determine whether or not pre-suit mediation would be advantageous;**

4. **The plaintiff courteously complies with this records authorization request because the plaintiff knows the health care provider has an absolute right to pre-suit**

mediation and also knows that the failure to comply with the MPLA's pre-suit procedures is jurisdictional;

5. **The health care provider sends two additional responses to the plaintiff; and**

6. **The plaintiff files her complaint within a week after the health care provider finally advises her that no pre-suit mediation is requested?**

III. Statement of the case

On or about **March 22, 2018**, Mrs. Adkins discovered that the surgery performed by Respondent, specifically a total abdominal hysterectomy with bilateral salpingo-oophorectomy and lysis of adhesions, caused Mrs. Adkins to suffer a left ureteral injury. Respondent failed to identify the ureteral injury during the course of the original procedure. (JA 0015). On **March 28, 2018**, Mrs. Adkins was forced to endure another surgery with another physician to repair the ureteral injury. (JA 0009).

On **February 27, 2020**, in accordance with W.Va.Code §55-7B-6(d), Mrs. Adkins forwarded a Notice of Medical Professional Liability Claim to Respondent, which was subsequently received and signed for by Respondent. (JA 0002, 0009, 0013). A revised notice of claim with a screening certificate of merit was sent to Respondent on **May 18, 2020**, and signed for by Tammy Skaggs on behalf of Respondent.[1] (JA 0002-0003, 0015, 0044).

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[1]Under ordinary circumstances, the screening certificate of merit, pursuant to W.Va.Code §55-7B-6(d), should have been filed by **April 27, 2020**. However, as the Court knows, the year 2020 was not an ordinary year and as a result of the COVID-19 crisis, the Court entered a series of Administrative Orders directly addressing the impact this pandemic had on legal schedules and deadlines. In the May 6, 2020 order, the Court held that any deadlines "set forth in...statutes...that expired between March 23, 2020, and May 15, 2020, are hereby extended to June 12, 2020." (JA 0023). Thus, this screening certificate of merit was filed timely.

On **May 13, 2020**, an initial response to the original notice of claim was sent to Mrs. Adkins' counsel noting that Respondent had retained her own counsel. (JA 0003, 0046). In this letter, Respondent's counsel requested that Plaintiff sign an enclosed authorization so that Respondent could **"collect [Plaintiff's] medical records and determine whether or not pre-suit mediation is advantageous."** (JA 0046).

By this time, Mrs. Adkins knew she had to maneuver through all of these MPLA pre-suit procedures so that when she filed her complaint, the circuit court would have jurisdiction. Furthermore, Mrs. Adkins knew that Respondent had an absolute right to pre-suit mediation. As a result of these concerns, Mrs. Adkins felt compelled to comply with the medical records request so that Respondent could make a decision about whether or not to seek pre-suit mediation.

It is important to view the critical dates in chronological order. In particular, according to the dismissal order entered by the trial court, Mrs. Adkins should have filed her complaint no later than **July 26, 2020**. (JA 0132). At that time, Mrs. Adkins was still waiting for Respondent to make a decision on whether or not pre-suit mediation would be advantageous. Clearly, the Legislature included this absolute right to pre-suit mediation because some health care providers would prefer to see if a medical negligence dispute could be resolved before any public complaint is filed. This type of mediation provides advantages for the plaintiff as well as the health care provider. Consequently, in an effort to comply with the MPLA and as a courtesy to Respondent, Mrs. Adkins continued to hold off on filing her complaint.

On **August 31, 2020**, about one month **AFTER the trial court held the statute of limitations had expired,** Respondent provided counsel for Mrs. Adkins a flash drive with copies of the medical records obtained and stated, "Additional records will be provided upon receipt." (JA

0048). The failure of Respondent in this letter to address pre-suit mediation specifically is understandable given the letter's clear indication that Respondent's review of Mrs. Adkins' records was not complete. So the statute of limitations has expired, as least according to the trial court, and yet Respondent is still sending medical records to Mrs. Adkins' counsel and suggesting that more records may be forthcoming. By receiving these records and learning that there may be additional records provided, Mrs. Adkins quite correctly continued to believe that she needed to accommodate Respondent's request to review the records to decide whether or not she wanted to exercise her right to pre-suit mediation.

After providing Respondent some additional time to review the medical records, and having received no further word from her, Mrs. Adkins' counsel sent a letter dated **November 13, 2020**, to Respondent's counsel asking whether or not Respondent had decided that "pre-suit mediation is advantageous or whether pre-suit mediation is being denied." (JA 0051). Clearly, Mrs. Adkins had not received either a request for or a declination of pre-suit mediation by the time this letter was sent and the goal was to have Respondent make a final decision. In a letter dated **November 17, 2020**, Respondent's counsel finally informed Mrs. Adkins for the first time since the **May 13, 2020** letter indicated that Respondent needed to review the medical records to decide whether she wanted to request pre-suit mediation that "Dr. Clark chose not [to] request pre-suit mediation under the MPLA....and the statute of limitations has now expired." (JA 0053).

On **November 23, 2020**, six days after first being informed that Respondent was not exercising her mandatory right to pre-suit mediation, a complaint was filed on behalf of Mrs. Adkins and against Respondent in the Circuit Court of Cabell County, West Virginia. (JA 0001 and 0177).

On **February 4, 2021**, a hearing was held on Respondent's motion to dismiss and on **March 16, 2021**, the trial court entered a final order dismissing the complaint based upon the expiration of the statute of limitations. (JA 0152, 0128). Mrs. Adkins timely appealed this final ruling to this Court. (JA 0135).

IV. Summary of argument

The MPLA's pre-suit procedures are designed to help eliminate the filing of frivolous cases and to encourage the early resolution of such disputes. When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute. The Legislature is presumed to have known and understood the laws they had earlier enacted and courts must presume that a legislature says in a statute what it means and means in a statute what it says there. Every word used by the Legislature in a statute, including the articles "a" and "the," must be given its plain meaning and should be read in the context of the Legislature's stated intent.

Under the MPLA, the Legislature envisioned a process where a medical negligence action may be resolved in pre-suit mediation. Resolving these disputes before a public complaint is filed benefits the health care provider, who avoids the public embarrassment of being accused of committing malpractice and benefits the plaintiff through a quick resolution. Pre-suit mediation may also result in the parties getting together and concluding there was no actionable medical negligence.

West Virginia Code §55-7B-6(g), provides that "the health care provider is entitled to prelitigation mediation before a qualified mediator upon written demand to the claimant." This statute mandates that health care providers are entitled and have an absolute right to pre-suit

mediation and also does not state when the health care provider is required to make a written demand on the claimant for pre-suit mediation. The lack of any timing requirement established by the Legislature is significant in light of the other parts of the MPLA where the Legislature is very explicit about when certain actions must be taken.

Upon receipt of a notice of claim, the health care provider "may respond, in writing, to the claimant or his or her counsel within 30 days of receipt of the claim or within 30 days of receipt of the screening certificate of merit if the claimant is proceeding pursuant to the provisions of subsection (d) or (e) of this section. The response may state that the health care provider has a bona fide defense and the name of the health care provider's counsel, if any." W.Va.Code §55-7B-6(f).

Under subsection (f), the health care provider is not required to file any response. Although this provision does identify two different thirty-day time periods for filing responses, the statute is completely silent with respect to what happens in the event the health care provider chooses to file a written response beyond the time periods identified. This statute also does not limit the number of responses a health care provider may choose to make to the original notice of claim. Finally, while this statute provides that the written response can assert a bona fide defense and identify counsel, the Legislature otherwise has not restricted what the health care provider may include in any written response to the claim.

Pursuant to subsection (f), Respondent's May 13, 2020 letter was "a response" to the original notice of claim, Respondent's August 31, 2020 letter with the flash drive also was "a response" to the original notice of claim, and finally, Respondent's November 17, 2020 letter was "a response" to the original notice of claim. As explained below, these responses tolled the statute of limitations while Respondent was making her decision on whether or not to pursue pre-suit mediation. Once

Respondent informed Mrs. Adkins in writing that pre-suit mediation would not be pursued, Mrs. Adkins then had thirty days to file her complaint, which deadline she did meet.

West Virginia Code §55-7B-6(i)(1), tolls the statute of limitations "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, or 30 days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs.

Neither this Court nor a circuit court the authority to suspend the MPLA's pre-suit notice requirements and allow a claimant to serve notice after the claimant has filed suit. To do so would amount to a judicial repeal of W.Va.Code § 55-7B-6.

The Legislature never intended to create a situation where a health care provider, under the guise of needing to review medical records before making a decision on pre-suit mediation, to use the time needed to obtain medical records, which sometimes can take several months, as a way for the statute of limitations in the meanwhile to expire before the records are produced and before the plaintiff is informed in writing that the health care provider has decided not to ask for pre-suit mediation.

The basic purpose of any statute of limitations is to encourage promptness in instituting actions; to suppress stale demands or fraudulent claims; and to avoid inconvenience which may result from delay in asserting rights or claims when it is practicable to assert them. Statutes of limitations are not absolute, however, with the Legislature enacting statutory tolling provisions, such as W.Va.Code §55-7B-6(i)(1).

The Court has recognized equitable modifications regarding the statute of limitations: (1) equitable tolling, which often focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant and (2) equitable estoppel, which usually focuses on the actions of the defendant. The latter of these principles applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact. Accordingly, a party seeking to apply estoppel and maintain an action against a statute of limitations defense must show that he was induced to refrain from bringing his action within the statutory period by some affirmative act or conduct of the defendant or his agent and that he relied upon such act or conduct to his detriment.

Another type of equitable estoppel is referred to as quasi-estoppel. Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken. Quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit. To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another. A party does not need to show reliance for quasi-estoppel to apply.

In applying these equitable and quasi-estoppel theories, the Court will need to decide if the actions of Respondent caused her to gain an advantage over Mrs. Adkins. Once Respondent explained she wanted to obtain and review the medical records so she could make an informed decision on pre-suit mediation, Respondent was required to inform Mrs.

Adkins in writing whether or not she wanted to pursue this pre-suit procedure and her failure to inform Mrs. Adkins of her position on this issue equitably tolls the statute of limitations. Stated differently, the Court needs to decide, under these facts, whether it is unconscionable for the complaint to be dismissed based upon the expiration of the statute of limitations where Respondent's actions caused Mrs. Adkins to hold off on filing her complaint until Respondent informed her in writing about pre-suit mediation.

V. Statement regarding oral argument and decision

In light of the jurisdictional nature of the pre-suit procedures under the MPLA combined with the health care provider's mandatory right to pre-suit mediation, the question as to whether or not Mrs. Adkins filed her complaint against Respondent within the statute of limitations is an important issue for the medical malpractice bar that has never been decided by this Court. Mrs. Adkins respectfully submits oral argument under Rule 19 or 20 would be appropriate and the final decision ought to be authored by a Justice of this Court so that all lawyers involved in this type of litigation will understand the Court's interpretation and application of the MPLA under these or similar facts.

VI. Argument

Under the MPLA, a complaint is filed within the applicable statute of limitations where:

1. **The plaintiff timely filed a notice of claim without a screening certificate of merit, pursuant to W.Va.Code §55-7B-6(d);**

2. **The plaintiff filed a revised notice of claim with a screening certificate of merit within the time frame outlined in W.Va.Code §55-7B-6(d), and as extended by this Court in the COVID-19 Administrative Orders;**

3. **The health care provider, which has an absolute right to pre-suit mediation under W.Va.Code §55-7B-6(g), filed a response to the original notice of claim requesting a medical records release authorization from the plaintiff and stating the records are needed to determine whether or not pre-suit mediation is advantageous;**

4. **The plaintiff courteously complies with this records authorization request because the plaintiff knows the health care provider has an absolute right to pre-suit mediation and also knows that the failure to comply with the MPLA's pre-suit procedures is jurisdictional;**

5. **The health care provider sends two additional responses to the plaintiff; and**

6. **The plaintiff files her complaint within a week after the health care provider finally advises her that no pre-suit mediation is requested.**

A. Trial court's ruling

The most critical fact found by the trial court was Finding of Fact No. 12, where the trial court held:

> Dr. Clark had thirty days from the date of receipt of the Revised Notice of Claim and Screening Certificate of Merit, or until June 26, 2020, to respond to the Revised Notice of Claim and Screening Certificate of Merit if she wanted to do so, but the MPLA places no requirement on her to respond in any manner. During this thirty day period, the statute of limitations was tolled by the MPLA's tolling provisions. Because Dr. Clark did not respond to the Revised Notice of Claim, the statute of limitations was then tolled an additional thirty days beyond her deadline for responding, if she chose to do so, or until July 26, 2020. (JA 0130).

The trial court reads W.Va.Code §55-7B-6(f), as **requiring** the health care provider to respond to the notice of claim within thirty days. As Mrs. Adkins explains below, subsection (f) **does not require** the health care provider to file any particular response to the notice of claim and

this provision is silent with respect to what happens when the health care provider files a response to the notice of claim more than thirty days after its receipt and files more than one response, which is what occurred in this case.

Nevertheless, based upon the trial court's misunderstanding of the MPLA as reflected in Finding of Fact No. 12, it adopted Conclusion of Law No. 8 holding that:

> Since no pre-suit mediation was requested by Dr. Clark pursuant to the provisions of W. Va. Code §56-7B-6(h), in accordance with W. Va. Code §56-7B-6(I), the statute of limitations expired as to any claim against her on July 26, 2020. The Plaintiff's Complaint was not filed with the Circuit Clerk until November 23, 2020, three months and twenty-one days after the tolling provisions of the MPLA had expired. Accordingly, the Plaintiff's Complaint is barred by the statute of limitations and must be dismissed, with prejudice. (JA 0132).

Mrs. Adkins respectfully submits the statutory analysis adopted by the trial court is incorrect and inconsistent with the Legislature's intent and the facts of this case.

B. MPLA designed to discourage filing of frivolous cases and to encourage pre-suit mediation

The MPLA's pre-suit procedures are designed to help eliminate the filing of frivolous cases and to encourage the early resolution of such disputes as explained by the Court in Syllabus Point 2 of *Hinchman v. Gilette*, 217 W.Va. 378, 618 S.E.2d 387 (2005):

> Under W.Va.Code, 55–7B–6 [2003] the purposes of requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) **to promote the pre-suit resolution of non-frivolous medical malpractice claims.** 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. (Emphasis added).

In Syllabus Point 2 of *State ex rel. Miller v. Stone*, 216 W.Va. 379, 607 S.E.2d 485 (2004), the Court concluded W.Va.Code §55-7B-6, was clear and unambiguous, the legislative intent is plain, and therefore applied the following rule of statutory construction:

> "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus Point 5, *State v. General Daniel Morgan Post No. 548, V.F. W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959)

Because the legislative intent in the MPLA so clearly encourages early resolution of disputes, the clear and unambiguous provisions of the MPLA applied in this case must be read as carrying out this intent.

When the Court reviews the relevant provisions of the MPLA at issue in this case, there are two other presumptions the Court must make, as explained in *Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 585-86, 466 S.E.2d 424, 436-37 (1995):

> First, the Legislature is presumed to have known and understood the laws they had earlier enacted. *State ex rel. Smith v. Maynard*, 193 W.Va. 1, 8-9, 454 S.E.2d 46, 53-54 (1994). Second, " `courts must presume that a legislature says in a statute what it means and means in a statute what it says there.' " *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995), quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391, 397 (1992).

Thus, every word used by the Legislature in a statute, including the articles "a" and "the," must be given its plain meaning and should be read in the context of the Legislature's stated intent. With these general guidelines, Mrs. Adkins now will go through the MPLA to explain where the trial court erred.

C. What the MPLA actually says and does not say

1. Health care provider has an absolute right to pre-suit mediation and the MPLA does not state when the request for such mediation must be made

As noted above, under the MPLA, the Legislature envisioned a process where a medical negligence action may be resolved in pre-suit mediation. Resolving these disputes before a public complaint is filed benefits the health care provider, who avoids the public embarrassment of being accused of committing malpractice and benefits the plaintiff through a quick resolution. Pre-suit mediation may also result in the parties getting together and concluding there was no actionable medical negligence. In an effort to achieve these positive goals, the Legislature sought to encourage pre-suit mediations in W.Va.Code §55-7B-6(g), which provides, " (g) Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant is proceeding pursuant to the provisions of subsection (d) or (e) of this section, **the health care provider is entitled to prelitigation mediation before a qualified mediator upon written demand to the claimant.**" (Emphasis added). If a written request for pre-suit mediation is made by the health care provider, then the mediation must be concluded within 45 days from the date of the written demand. W.Va.Code §55-7B-6(h).

Two points should be noted, based upon the clear and unambiguous language in subsection (g). First, this statute mandates that health care providers are entitled and have an absolute right to pre-suit mediation. Second, this statute **DOES NOT STATE WHEN** the health care provider is required to make a written demand on the claimant for pre-suit mediation. The lack of any timing requirement established by the Legislature is significant in light of the other parts of the MPLA where the Legislature is very explicit about when certain actions must be taken.

Since the Legislature is presumed to know what it is doing, the lack of any time period for making a demand for pre-suit mediation suggests that such a demand can be made at any time prior to the complaint being filed. Once the demand for pre-suit mediation is made, counsel for the plaintiff has no choice but to engage in such mediation before filing the complaint because the statute explicitly states the physician is "entitled" to pre-suit mediation upon making that demand.

The Legislature did not specifically address what should happen in a situation where the health care provider, upon receipt of a timely filed notice of claim and/or screening certificate of merit, files a response requesting medical records and an opportunity to review the same to decide whether or not to make a written request for pre-suit mediation. The MPLA does not provide any time period for how long the physician should have to review the records before either making the demand for pre-suit mediation or informing the plaintiff's counsel that mediation is not demanded.

If plaintiffs routinely refused these requests from a health care provider to authorize the release of medical records pre-suit so that an informed decision about early mediation can be made, then that would defeat one of the Legislature's most clearly stated purposes for adopting the MPLA in the first place. The Court can rest assured that if the trial court's order in this case is affirmed, no plaintiff's counsel will ever again advise their client to authorize at the pre-suit stage the release of medical records to the health care provider that is the subject of the screening certificate of merit. To avoid this result, which would be inconsistent with the Legislature's intent, Mrs. Adkins respectfully submits the clear and unambiguous language in the the MPLA tolls the statute of limitations under the facts of this case.

2. Health care providers options in responding to notice of claim and/or screening certificate of merit

Upon receipt of a notice of claim, the health care provider "**may respond**, in writing, to the claimant or his or her counsel within 30 days of receipt of the claim or within 30 days of receipt of the screening certificate of merit if the claimant is proceeding pursuant to the provisions of subsection (d) or (e) of this section. The response may state that the health care provider has a bona fide defense and the name of the health care provider's counsel, if any." (Emphasis added). W.Va.Code §55-7B-6(f).

Under subsection (f), the health care provider **is not required** to file any response. Although this provision does identify two different thirty-day time periods for filing responses, the statute is completely silent with respect to what happens in the event the health care provider chooses to file a written response beyond the time periods identified. This statute also does not limit the number of responses a health care provider may choose to make to the original notice of claim. Finally, while this statute provides that the written response can assert a bona fide defense and identify counsel, the Legislature otherwise has not restricted what the health care provider may include in any written response to the claim.

In this case, Respondent waited approximately seventy-six days[2] before making a written response to the original notice of claim filed by Mrs. Adkins. Subsection (f) does not explain what happens when a health care provider waits more than thirty days to file "a response." In this response, Respondent included the request for Mrs. Adkins to sign a medical records release authorization so that Respondent could decide whether or not pre-suit mediation would be advantageous. While subsection (f) does not state specifically that a health care provider can make

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[2]The original notice of claim was filed on February 27, 2020, and the initial response from Respondent was dated May 13, 2020.

such a request, by the same token, this provision does not specifically mandate what a health care provider can or cannot include in "a response." However, when this request is placed in the context of subsection (g), where the health care provider is entitled to pre-suit mediation, any plaintiff receiving such a request will feel duty bound to abide by this request.

What happens under the MPLA when a plaintiff files a complaint **BEFORE** the health care provider has an opportunity to seek pre-suit mediation? In *State ex rel. Miller v. Stone*, 216 W.Va. 379, 383, 607 S.E.2d 485, 490 (2004), after concluding that W.Va.Code §55-7B-6, was clear and unambiguous, the Court held "the Legislature's clear intent in enacting W.Va.Code § 55–7B–6 was to mandate that a plaintiff in a medical malpractice claim file his or her certificate of merit at least 30 days prior to filing his or her medical malpractice action so as to allow health care providers the opportunity to demand pre-litigation mediation." Because the complaint was filed in that case before the health care provider had decided whether or not to seek pre-suit mediation, the complaint was dismissed.

Under subsection (f), Respondent's May 13, 2020 letter was "a response" to the original notice of claim, Respondent's August 31, 2020 letter with the flash drive also was "a response" to the original notice of claim, and finally, Respondent's November 17, 2020 letter was "a response" to the original notice of claim. As explained below, these responses tolled the statute of limitations while Respondent was making her decision on whether or not to pursue pre-suit mediation. Once Respondent informed Mrs. Adkins in writing that pre-suit mediation would not be pursued, Mrs. Adkins then had thirty days to file her complaint, which deadline she did meet.

3. The MPLA's tolling provisions extended the statute of limitations under these facts

In the MPLA, the Legislature anticipated that requiring all of these pre-suit procedures before filing any complaint may cause the statute of limitations to expire, particularly where the plaintiff sees a lawyer near the expiration of the statute of limitations. For example, W.Va.Code §55-7B-6(d), permits a notice of claim to be filed, followed up by a screening certificate of merit sixty days later. Thus, if a plaintiff sees a lawyer near the expiration of the statute of limitations, this statute provides a way for the claim to be timely filed where the lawyer may not have enough time to first obtain a screening certificate of merit. Without these tolling provisions, the MPLA would be unconstitutional and in violation of Equal Protection and Due Process principles. *See, e.g., O'Neil v. The City of Parkersburg*, 160 W.Va. 694, 237 S.E.2d 504 (1977)(This Court unanimously held a statute requiring pre-suit notice before suing a municipality was unconstitutional because it shortened the statute of limitations by thirty days and provided no tolling provisions).

West Virginia Code §55-7B-6(i)(1), sets out what actions toll the statute of limitations under the MPLA:

> (i)(1) 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, and except as otherwise provided in this subsection, 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, or 30 days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, **whichever last occurs.** (Emphasis added).

Instead of stating the tolling provision is triggered thirty days following receipt of "**the** response" to the notice of claim, the Legislature instead deliberately states that the statute of limitations is tolled "from the date of mail of a notice of claim to 30 days following receipt of **a response** to the notice of claim." (Emphasis added). The fundamental error made by the trial court was that somehow the tolling provisions only applied to **the** initial response filed by Respondent to the original notice of claim. The trial court also failed to account for the fact that Respondent in this case actually filed multiple responses to the original notice of claim.

What happens, as occurred in the present case, when the health care provider submits multiple responses–May 17, 2020, August 31, 2020, and November 17, 2020–to the original notice of claim? By the clear and unambiguous language used in subsection (i)(1), the statute of limitations is tolled throughout so that once Respondent finally informed Mrs. Adkins that Respondent had decided not to exercise her mandatory right to pre-suit mediation, the statute of limitations was tolled for an additional thirty days from the date of that letter. Thus, when Mrs. Adkins filed her complaint on November 23, 2020, it was filed timely and prior to the expiration of the statute of limitations.

To reach this conclusion, all the Court has to do is apply the actual language of the MPLA to these facts. In Syllabus Point 5 of *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 242 W.Va. 335, 835 S.E.2d 579 (2019), the Court made a very strong point that courts must abide by the pre-suit requirements established by the Legislature in the MPLA and the failure to do so would amount to judicial repeal of this law:

> A circuit court has no authority to suspend the West Virginia Medical Professional Liability Act's pre-suit notice requirements and allow a claimant to serve notice after the claimant has filed suit. To do so would amount to a judicial repeal of W. Va. Code § 55-7B-6 [2003].

The ruling by the trial court in the present case does amount to judicial repeal of W.Va.Code §55-7B-6. Plaintiffs in medical negligence cases have to rely upon the actual language used by the Legislature, particularly when these plaintiffs are required to jump through all of these pre-suit hoops BEFORE being permitted to file the complaint. The actions Mrs. Adkins took in this case were consistent with the MPLA and the Legislature's intent to encourage pre-suit mediation.

Did the Legislature intend to create a situation where a health care provider, under the guise of needing to review medical records before making a decision on pre-suit mediation, to use the time needed to obtain medical records, which sometimes can take several months, as a way for the statute of limitations in the meanwhile to expire before the records are produced and before the plaintiff is informed in writing that the health care provider has decided not to ask for pre-suit mediation? Mrs. Adkins respectfully submits the Legislature never intended such a result and the language in the statutes analyzed clearly does not support such a holding.

For all of these reasons, Mrs. Adkins respectfully asks this Court to hold that the statute of limitations in this case was tolled based upon the various responses filed by Respondent, and, therefore, consistent with the actual language of the MPLA and to carry out the Legislature's plainly stated intent, Mrs. Adkins filed her complaint before the statute of limitations had expired.

D. Respondent is estopped by her actions from asserting the statute of limitations

In the event the Court decides judicially to repeal the MPLA and hold that a health care provider should be encouraged to seek medical records from the plaintiff before the complaint is filed purportedly in an effort to decide whether or not to seek pre-suit mediation so that the statute of limitations expires while the plaintiff is assisting in this effort, Mrs. Adkins offers another theory

to reverse the dismissal of her complaint: estoppel. The trial court rejected the application of any estoppel theory to these facts by holding, "The MPLA sets out precisely when the statute of limitations is tolled in a medical professional liability case and a Circuit Court has no authority to enlarge or expand this time period for equitable reasons because Plaintiff's counsel made a mistake by assuming the defendant was going to engage in pre-suit mediation and delayed filing the Complaint until after the statute of limitations had run on Plaintiff's claim." (JA 0134).

The "basic purpose" of any statute of limitations is "to encourage promptness in instituting actions; to suppress stale demands or fraudulent claims; and to avoid inconvenience which may result from delay in asserting rights or claims when it is practicable to assert them." *Morgan v. Grace Hosp., Inc.*, 149 W.Va. 783, 791, 144 S.E.2d 156, 161 (1965); *Perdue v. Hess*, 199 W.Va. 299, 303, 484 S.E.2d 182, 186 (1997) (ultimate purpose of statutes of limitations is simply to require the institution of a cause of action within a reasonable time). Statutes of limitations are not absolute, however, with the Legislature enacting statutory tolling provisions, such as W.Va.Code §55-7B-6(i)(1).

In addition to statutory tolling, the Court has recognized equitable modifications regarding the statute of limitations: "(1) equitable tolling, which often focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant and (2) equitable estoppel, which usually focuses on the actions of the defendant." *Bradley v. Williams*, 195 W.Va. 180, 184, 465 S.E.2d 180, 184 (1995) (quoting *Indep. Fire Co. No. 1 v. W. Virginia Human Rights Comm'n*, 180 W.Va. 406, 408, 376 S.E.2d 612, 614 (1988)). The latter of these principles "applies when a party is induced to act or to refrain

from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact." *Id.* (*quoting* Syllabus Point 2, in part, *Ara v. Erie Ins. Co.*, 182 W.Va. 266, 267, 387 S.E.2d 320, 321 (1989)). Accordingly, a party seeking to apply estoppel and maintain an action against a statute of limitations defense "must show that he was induced to refrain from bringing his action within the statutory period by some affirmative act or conduct of the defendant or his agent and that he relied upon such act or conduct to his detriment." 195 W.Va. at 185, 465 S.E.2d at 185 (*quoting* Syllabus Point 1, *Humble Oil & Ref. Co. v. Lane*, 152 W.Va. 578, 578, 165 S.E.2d 379, 380 (1969)); *see also Indep. Fire Co. No. 1*, 180 W. Va. at 409, 376 S.E.2d at 615 (*quoting Mull v. ARCO Durethene Plastics, Inc.*, 784 F.2d 284, 292 (7th Cir. 1986)) ("Among other factors, the granting of equitable estoppel should be premised upon (1) 'a showing of the plaintiff's actual and reasonable reliance on the defendant's conduct or representations' and (2) 'evidence of improper purpose on the part of the defendant or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct.'").

For example, in *Shell Western E&P, Inc. v. Board of County Commissioners*, 923 P.3d 251, 253-54 (Col.Ct.App. 1996), the Colorado Court of Appeals applied equitable estoppel to toll the statute of limitations where the defendant failed to disclose information to the plaintiff, which the plaintiff needed before going forward with the case:

> Equity will toll the running of the statute of limitations if the party asserting a statutory bar has failed to disclose information he or she is legally required to reveal and such failure results in prejudice to the other party. *See Garrett v.*

> *Arrowhead Improvement Ass'n*, 826 P.2d 850 (Colo.1992) (petitioner in workers' compensation proceeding may raise equitable estoppel to toll statute of limitations when company failed to provide him with necessary documents); *Strader v. Beneficial Finance Co.*, 191 Colo. 206, 551 P.2d 720 (1976) (party whose failure to perform its statutory duty contributes to the running of the statute of limitations is estopped from raising it as a defense).

Additionally, another species of estoppel is referred to as quasi-estoppel. Quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him." *In re the Petition of Shiflett*, 200 W.Va. 813, 490 S.E.2d 902, n. 26 (1997)(quoting, 31 C.J.S. *Estoppel and Waiver* §120 at 543). While the Court has not had occasion to engage in any extended discussion of quasi-estoppel, this doctrine is well accepted. For example, in *In re Rural/Metro Corp. Stockholders Litigation*, 102 A.3d 205, 247 (Del.Chanc.Ct. 2014), the Delaware Chancery Court explained:

> The doctrine of quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken. Quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Pers. Decisions, Inc. v. Bus. Planning Sys.*, 2008 WL 1932404, at *6 (Del.Ch. May 5, 2008) (internal quotation marks omitted). "To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another." Id. "A party does not need to show reliance for quasi-estoppel to apply." *Barton v. Club Ventures Invs. LLC*, 2013 WL 6072249, at *6 (Del.Ch. Nov. 19, 2013).

See also Lopez v. Munoz, Hockem & Reed, LLC, 22 S.W.3d 857 (2000); *Atwood v. Smith*, 143 Idaho 110, 138 P.3d 310 (2006); *Wohnoutka v. Kelley*, 330 P.3d 762 (UtahCt.App. 2014); *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 872-73 (Del. 2015).

In the present case, Petitioner provided Respondent with the statutorily mandated notice of claim well before the limitations period. Thus, by February 27, 2020, Respondent had notice of this claim and began investigating the facts to determine whether pre-suit mediation would be advantageous. The original notice was followed up by the timely filing of a revised notice of claim and a screening certificate of merit, as permitted by W.Va.Code § 55-7B-6(d). These notices were received by Respondent, who acknowledged receipt and requested medical record authorization for the stated purpose of determining the need for, and desirability of, pre-suit mediation.

From that point, Mrs. Adkins was lead by Respondent to believe that Respondent wanted these medical records so that she could make a decision on pre-suit mediation. The fact that both parties were working toward the possibility of pre-suit mediation is consistent with one of the main purposes for enacting the MPLA recognized by the Court in *Hinchman*. Pursuant to both the letter and spirit of the MPLA, the Plaintiff facilitated pre-suit resolution by providing medical record authorization and remained hopeful of a resolution given Defendant's assurance that records were being reviewed and that Plaintiff would be informed when additional requested records had been provided. Even as Mrs. Adkins hoped for a pre-suit resolution, she continued diligently to pursue her rights, requesting an update from Respondent on the progress of the record review and the prospect of pre-suit mediation. This letter prompted Respondent's counsel finally to answer that "Dr. Clark chose not [to] request pre-suit mediation under the MPLA," but further explained under Respondent's

theory that the statute of limitation already had expired while Mrs. Adkins was waiting for Respondent to inform her in writing on whether or not she wanted pre-suit mediation.

As the Court noted in *Hinchman*, 217 W.Va. at 385, 618 S.E.2d at 394, "[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." Despite this admonition, that is exactly what occurred in this case. Respondent effectively used her various responses to Mrs. Adkins' notice of claim to "restrict or deny [Plaintiff's] access to the courts" under the theory that while Mrs. Adkins cooperated with Respondent and held back on filing her complaint to permit Respondent to review the medical records and make a decision on pre-suit mediation, the statute of limitations expired.[3]

In applying these equitable or quasi-estoppel theories, the Court will need to decide if the actions of Respondent caused her to gain an advantage over Mrs. Adkins. Using the analysis applied in *Shell Western*, once Respondent explained she wanted to obtain and review the medical records so she could make an informed decision on pre-suit mediation, Respondent was required to inform Mrs. Adkins in writing whether or not she wanted to pursue this pre-suit procedure and her failure to inform Mrs. Adkins of her position on this

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[3]Mrs. Adkins does not attribute any ill will or foul motive on the part of Respondent's counsel in asking for the medical records and representing that Respondent needed to review these records to decide whether pre-suit mediation would be advantageous. In fact, counsel for Mrs. Adkins has the highest respect for Respondent's counsel. However, the sequence of events in this case did result in Mrs. Adkins holding off on filing her complaint while Respondent pondered the possibility of seeking pre-suit mediation and, ultimately, the trial court accepted Respondent's theory that the statute of limitations actually expired about a month BEFORE Respondent provided the medical records to Mrs. Adkins.

issue equitably tolls the statute of limitations. Stated differently, the Court needs to decide, under these facts, whether it is unconscionable for the complaint to be dismissed based upon the expiration of the statute of limitations where Respondent's actions caused Mrs. Adkins to hold off on filing her complaint until Respondent informed her in writing about pre-suit mediation.

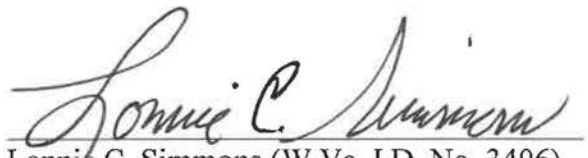
Mrs. Adkins respectfully submits the facts in this case support the application of these various equitable estoppel doctrines. Therefore, Mrs. Adkins asks the Court to reverse the final order of the trial court.

VII. Conclusion

For the foregoing reasons, Petitioner Helen Adkins respectfully asks the Court to grant oral argument so that any questions the Court may have can be answered and, following any argument, Mrs. Adkins seeks the reversal of the final order dismissing her complaint with prejudice and remanding this case to the trial court so that the merits of the claim asserted can be resolved on the facts.

HELEN ADKINS, Plaintiff Below/Petitioner,

–By Counsel–



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 21-0300

HELEN ADKINS,

Plaintiff Below/Petitioner,

v.

CAROLYN CLARK,

Defendant Below, Respondent

PETITIONER'S APPEAL BRIEF

Appeal from the Circuit Court of Cabell County, West Virginia

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CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **PETITIONER'S APPEAL BRIEF** was served on counsel of record on the 16th day of July, 2021, by email and through the United States Postal Service, to the following:

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