IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HELEN ADKINS,

Plaintiff Below/Petitioner

vs. **Docket No.: 21-0300**

CAROLYN CLARK, M.D.,

Defendant Below/Respondent

BRIEF OF RESPONDENT, CAROLYN CLARK, M.D., IN RESPONSE TO PETITION FOR APPEAL OF HELEN ADKINS

Appeal from the Circuit Court of Cabell County, West Virginia

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Respectfully Submitted,

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II. STATEMENT OF THE CASE

A. Factual Background

The Petitioner filed her Complaint in this matter on November 23, 2020, alleging that Respondent, Dr. Clark, was negligent in the performance of a surgical procedure described as a total abdominal hysterectomy with bilateral salpingo-oophorectomy and lysis of adhesions. The surgery was necessary due to complaints of heavy vaginal bleeding which were not controlled by conservative treatment.[1] The Complaint does not specify the date of the surgery. [JA 0001 - 0007]. The surgery was performed by Dr. Clark at Cabell Huntington Hospital on March 22, 2018. [JA 0077]. Petitioner claims she suffered an injury to her left ureter during the hysterectomy. [JA 0079-0092]. According to the Complaint, Dr. Clark referred Petitioner to urologist, Charles Woolums, M.D., on March 28, 2020, for repair of the injury to the ureter. [JA 0004]. The date of the referral to Dr. Woolums is also referenced in the Notice of Claim [JA 0010] and Revised Notice of Claim as March 28, 2020 [JA 0016]. This date is incorrect by two years. Dr. Clark's and Dr. Woolums' medical records show that Dr. Clark recognized a possible injury to the ureter during a follow-up office visit with Petitioner at her office on March 28, 2018, and referred Petitioner to Dr. Woolums on that date. Dr. Woolums initially saw Petitioner on March 30, 2018, and, a few days later, he placed a stent in the left

[1] Hysterectomy is one of the most frequently performed surgical procedures in the United States. Approximately 600,000 are performed per year. Hysterectomies are most commonly performed for symptomatic uterine leiomyomas, excessive vaginal bleeding, endometriosis and prolapse. Hysterectomies may be performed vaginally, abdominally, or with laparoscopic/robotic assistance. ACOG Committee Opinion 444, CHOOSING THE ROUTE OF HYSTERECTOMY FOR BENIGN DISEASE, November, 2009. (Reaffirmed 2011).

ureter in a cystoscopic outpatient procedure on April 2, 2018. The stent was removed in a planned procedure on April 24, 2018. After the removal of the initial stent, Petitioner's bladder leak resumed, so a second stent was placed by Dr. Woolums in her left ureter on May 10, 2018. The second stent was removed in a planned procedure on May 25, 2018, and Petitioner has had no further issues with bladder leakage since that time and has had no further medical treatment for this injury.[2]

Dr. Clark was initially served with a Notice of Medical Professional Liability Claim by Plaintiff's counsel by letter dated February 27, 2020. [JA 0008 - 0011]. The Notice of Claim was not accompanied by a Screening Certificate of Merit, but stated that Plaintiff discovered the medical negligence about which she complained on March 22, 2018, and that she needed sixty additional days in which to obtain a Screening Certificate of Merit as required by the West Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-6(b) ("MPLA"). *Id.* Dr. Clark was served with a Revised Notice of Medical Professional Liability Claim and Screening Certificate of Merit dated May 18, 2020. [JA 0014 - 0042]. The Revised Notice of Claim and Screening Certificate of Merit was received in her office on May 26, 2020. [JA 0093]. The Screening Certificate of Merit was not received within 60 days of the original Notice of Claim as required by the MPLA which would have been on or before April 27, 2020. However, due to the COVID-19 pandemic and resulting declarations of judicial emergency by the Supreme Court of Appeals of West

[2] This information comes from Dr. Clark's office records as well as Dr. Woolums's records obtained by Dr. Clark's counsel pursuant to a medical records release authorization signed by Petitioner.

Virginia, all statutes of limitations and statutes of repose that would have otherwise expired between March 23, 2020 and May 15, 2020, expired on May 18, 2020. [JA 0094 - 0096].

The Certificate of Merit served on Dr. Clark with the Revised Notice of Claim makes reference to medical negligence which was discovered or occurred on March 9, 2017.[3] [JA 0038]. No surgery was performed by Dr. Clark on Plaintiff on March 9, 2017, and Dr. Clark performed no surgeries on Plaintiff prior to the hysterectomy performed at Cabell Huntington Hospital on March 22, 2018. However, to the extent that this error in the Screening Certificate of Merit may be deemed to be a deficiency in compliance with the notice requirements of the MPLA, Dr. Clark waived the deficiency and, for the purposes of her motion to dismiss filed below, agreed that the MPLA pre-suit notice requirements were met by Plaintiff. [JA 0057].

Before receipt of the Revised Notice of Claim and Screening Certificate of Merit, Dr. Clark's counsel responded to the original Notice of Claim on May 13, 2020, requesting a signed authorization to collect Plaintiff's medical records and a Screening Certificate of Merit. [JA 0097]. On August 31, 2020, Ms. Browning's

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[3] The Certificate of Merit authored by Karen Wang, M.D., claims that Dr. Clark should have arranged to have a cystoscopy performed by a urologist intraoperatively at the end of the hysterectomy procedure to rule out a possible injury to the ureters before closing the patient. [JA 00444]. Urologic injury during hysterectomies is a known complication of the procedure and occurs in up to 2.6% of surgeries. While cystoscopies at the end of the hysterectomy procedure lowers the number of injuries detected postoperatively, it is an expensive procedure involving an additional physician to be involved in the procedure which adds to the overall cost of medical care. Therefore, the American College of Obstetricians and Gynecologists recommends that cystoscopy only be performed in procedures with a high risk of urologic injury, such as those for pelvic organ prolapse or incontinence, conditions which Petitioner did not have. Chi, A., *Universal Cystoscopy After Benign Hysterectomy*, OBSTETRICS AND GYNECOLOGY, Vol. 127, No. 2, Feb. 2016.

paralegal, Kimberly Kearns, provided Mr. Kuenzel with copies of medical records received from Cabell Huntington Hospital. [JA 0098]. No other response was made on Dr. Clark's behalf to the Revised Notice of Claim and Screening Certificate of Merit. Mr. Kuenzel sent a letter to Ms. Browning on November 13, 2020, asking if Dr. Clark wished to engage in pre-suit mediation. [JA 0099]. Dr. Clark's counsel responded to Mr. Kuenzel's letter on November 17, 2020, and advised him that the statute of limitations had expired on Plaintiff's claims against Dr. Clark. [JA 0100-0101].

This is not a serious and meritorious medical malpractice claim that Dr. Clark or her counsel would consider settling pre-suit, or at any time, for that matter. Inadvertent injury to the urinary tract is a known complication of a hysterectomy procedure. The injury was timely diagnosed by Dr. Clark and Petitioner was immediately referred to a qualified urologist who successfully treated the injury with a non-surgical placement of a stent which was subsequently removed. Petitioner suffered no permanent injury and her damages are limited to a few days of urinary incontinence, a condition some people live with for a lifetime. Once Dr. Woolums's medical records had been secured and examined by Dr. Clark's counsel and a determination was made that Petitioner suffered from a known complication of a hysterectomy procedure and did not sustain serious or permanent injuries as a result, no serious consideration was given to demanding pre-suit mediation.

B. Procedural History

On November 23, 2020, the Petitioner's counsel filed a Complaint in the Circuit Court of Cabell County, West Virginia, alleging that the Respondent deviated from the standard of care in the performance of a "total abdominal hysterectomy with bilateral salpingo-oophorectomy and lysis of adhesions." [JA 0004]. The Complaint further alleged that the Respondent injured her left ureter during the surgery. *Id.* As a result of the alleged deviation in the standard of care, Petitioner claimed that she had to undergo another procedure to treat the injured ureter, incurred medical costs and expenses, lost wages, and suffered pain and suffering, annoyance and inconvenience, and emotional injuries. [JA 0006 – 0007].

On December 3, 2020, Respondent filed a motion dismiss the Complaint asserting that it was filed beyond the two year statute of limitations. [JA 0055 – 0066]. The Petitioner filed a response in opposition to the Respondent's motion. [JA 0111 – 0119]. Respondent filed a reply to Respondent's response. [JA 0120 - 0127]. On February 4, 2021, a hearing was held regarding the parties' respective positions, and the Circuit Court took the matter under advisement. [JA 0152 – 0171]. On March 16, 2021, the Circuit Court entered an order granting the Respondent's motion to dismiss. [JA 0128 – 0134].

III. SUMMARY OF ARGUMENT

This Court should deny the Petitioner's Petition for Appeal because the Circuit Court did not err in granting Dr. Clark's motion to dismiss. The MPLA sets out precisely when the statute of limitations is tolled in a medical professional

liability case, and the Circuit Court correctly interpreted the statute and applied its provisions regarding tolling of the statute of limitations by granting the motion to dismiss Petitioner's Complaint.

There are four tolling provisions contained in the MPLA. The first is contained in W. Va. Code § 55-7B-6(d) which tolls the statute of limitations for sixty (60) days to allow a claimant to obtain and serve a screening certificate of merit after serving a notice of claim on a healthcare provider. Once the screening certificate of merit is served, W. Va. Code § 55-7B-6(i)(1) contains three additional tolling provisions -- (1) from the date of mail of a notice of claim to thirty (30) days following a receipt of a response to the notice of claim; (2) thirty (30) days from the date a response to the notice of claim would be due, and (3) thirty (30) days from the receipt by the claimant of written notice from a mediator that mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs. Since Dr. Clark did not demand pre-suit mediation, only the first two are applicable to this case. A response was made by Dr. Clark to the initial Notice of Claim on May 13, 2020, by letter to Plaintiff's counsel advising that Dr. Clark had retained counsel and requesting authorizations to collect Plaintiff's medical records. However, Plaintiff's counsel had not yet served Dr. Clark with a screening certificate of merit at that time, so the statute of limitations was still tolled pursuant to W. Va. Code § 55-7B-6(d).

Once the Revised Notice of Claim and Certificate of Merit were received by Dr. Clark on May 26, 2020, the statute of limitations was tolled until sixty (60) days

from that date[4], or until July 26, 2020 pursuant to W. Va. Code § 55-7B-6(i)(1). The Complaint was filed three months and twenty-one days after that date. Petitioner takes the position in her Petition that the statute of limitations was somehow equitably tolled until her counsel was advised that Dr. Clark did not wish to engage in pre-suit mediation pursuant to W. Va. Code § 55-7B-6(g), based on the letter sent to him on May 13, 2020, in which it was stated: "[a]t this time, I would ask that you have your client sign an authorization so we may collect her medical records and determine whether or not pre-suit mediation is advantageous." There is absolutely no support for this legal argument. The MPLA does not toll the statute of limitations until a defendant has made a decision about pre-suit mediation one way or the other. In fact, pursuant to W. Va. Code § 55-7B-6(f), healthcare providers are given thirty (30) days from receipt of the notice of claim and screening certificate of merit to respond to the claim if they desire to do so. A response is not required. Therefore, once that time period passed, which was on June 26, 2020, Petitioner's counsel was on notice that pre-suit mediation had been waived by Dr. Clark. He only had 30 more days during which the statute of limitations was tolled in order to timely file the Complaint.

Petitioner argues in her brief that the MPLA does not contain a specific deadline or timeframe in which a demand for pre-suit mediation must take place. That is simply not true. W. Va. Code § 55-7B-6(f) makes it clear that the healthcare provider must respond to the claim, if the healthcare provider wishes to do so,

[4] Thirty (30) days for Dr. Clark to respond, if she chose to do so, plus thirty (30) days beyond that date.

within thirty (30) days after receipt of the certificate of merit.[5] That response could be a demand for pre-suit mediation if the healthcare provider so desires. However, if no demand for pre-suit mediation comes within that time frame or if the healthcare provider specifically declines pre-suit mediation, the claimant has an additional thirty (30) days beyond that date to file suit during which the statute of limitations is tolled pursuant to the provisions of W. Va. Code § 55-7B-6(i)(1). Nothing in the MPLA prevents litigants to specifically agree to toll the statute of limitations for an additional period of time to allow a healthcare provider to collect medical records before deciding whether to demand pre-suit mediation, but such an agreement cannot be based on a unilateral assumption by Plaintiffs' counsel. The tolling agreement must be specific, unambiguous, and preferably confirmed in writing.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent does not believe oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure will assist the Court in deciding this issue. This is simply a case of an attorney who failed to read and understand the clear and unambiguous tolling provisions of the MPLA, thus allowing the statute of limitations on his client's claim to expire, and is now trying to find an equity argument to excuse his own lack of due diligence. [6]

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[5] If the notice of claim and screening certificate of merit are served at the same time, the healthcare provider has 30 days from that date. If the screening certificate of merit is not served until sometime after the notice of claim pursuant to W. Va. Code § 55-7B-6(d) or (e), the healthcare provider has 30 days from the date the certificate of merit is received to demand pre-suit mediation.

[6] Petitioner's appellate counsel is not the same attorney who drafted and served the Notice of Claim, the Revised Notice of Claim or the Complaint filed below.

V. ARGUMENT

A. Standard of Review

West Virginia Rule of Civil Procedure 12(b)(1) requires the dismissal of a case when the Court does not have jurisdiction over the subject matter. 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. *Lowe v. Richards*, 234 W. Va. 48, 52, 763 S.E.2d 64, 68 (2014). Furthermore, Rule 12(b)(6) of the West Virginia Rules of Civil Procedure states that "a circuit court must determine whether the Complaint has 'stated a claim upon which relief can be granted[.]'" *Albright v. White,* 202 W. Va. 292, 297, 503 S.E.2d 860, 865 (1998) (quoting W. Va. R. Civ. P. 12(b)(6)).

B. The Circuit Court Appropriately Granted Dr. Clark's Motion to Dismiss Because Petitioner Failed to Timely File Her Complaint

1. Petitioner's Claims Are Time-Barred by the Applicable Statute of Limitations and Tolling Provisions of the West Virginia Medical Professional Liability Act (MPLA)

Respondent does not contend that Petitioner failed to comply with the pre-suit notice provisions of the MPLA. Respondent agreed, for the purpose of her motion to dismiss, that Petitioner fully and completely complied with the notice of claim and screening certificate of merit provisions of the MPLA. Petitioner filed her original Notice of Claim pursuant to the provisions of W. Va. Code § 55-7B-6(b) on February 27, 2020, within two years of the date she admits she was aware of her cause of action. The initial Notice of Claim stated the Petitioner had insufficient time to obtain a screening certificate of merit prior to the expiration of the statute of

limitations and would serve it within sixty days. Petitioner did not serve a screening certificate of merit within sixty days, but due to the COVID-19 pandemic situation in West Virginia, her time to do so was extended by the Supreme Court of Appeals of West Virginia until May 18, 2020, and the screening certificate of merit was mailed to Respondent on that date. Therefore, the case of *Hinchman v. Gillette*, 217 W. Va. 378, 618 S.E.2d 387 (2005) – which held that before a defendant in a lawsuit can challenge the legal sufficiency of a plaintiff's pre-suit notice of claim or screening certificate of merit under W. Va. Code § 55-7B-6(b) the plaintiff must have been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies – has no application to the issues presented in this motion. The only legal issue presented in this appeal is application of the MPLA's tolling provisions regarding the statute of limitations.

Petitioner's claims are time-barred per the plain-language application of the MPLA. Petitioner confirms by the averments she makes in her Notice of Claim and Complaint that she discovered her alleged surgical injury on March 22, 2018. Unless the statute of limitations is tolled, her complaint must have been filed on or before March 23, 2020. The MPLA is unequivocal on this issue; "[a] cause of action for injury to a person alleging medical professional liability against a health care provider . . . arises as of the date of injury . . . and must be commenced within two years of the date of such injury, or within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs[.]" W. Va. Code § 55-7B-4(a). In order for the statute

of limitations to begin to run, West Virginia law only requires that that the patient recognizes that "something went wrong" or that they are aware of "adverse results of medical treatment;" it does not require that the patient know the exact nature, source, or reason for the injury. *McCoy v. Miller*, 213 W. Va. 161, 166, 578 S.E.2d. 355, 360 (2003). The statute of limitations in medical negligence cases begins to run on the date of the injury, not the date of subsequent treatments. *See Jones v. Aburahma*, 215 W.Va. 521, 600 S.E.2d 233 (2004). Therefore, absent any tolling provisions, Petitioner's cause of action was required to be commenced by March 23, 2020.

The MPLA prohibits any person from filing a medical professional liability action against any health care provider without complying with its provisions. W. Va. Code § 55-7B-6(a). W. Va. Code § 55-7B-6(b) requires "[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." This notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, along with a screening certificate of merit. *Id.* The screening certificate of merit shall be executed under oath by a health care provider qualified as an expert under the Rules of Evidence and shall state with particularity: (1) the expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; (3) the

expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death. W. Va. Code § 55-7B-6(b). If a claimant has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable statute of limitations, the claimant must provide the provider with a statement of intent to provide a screening certificate of merit within 60 days of the date the provider receives the notice of claim. *Id.* at § 55-7B-6(d).

Once a certificate of merit is properly served on a healthcare provider, there are three applicable tolling provisions contained in the MPLA, W. Va. Code § 55-7B-6(i)(1) – 1) from the date of mail of a notice of claim to thirty days following a receipt of a response to the notice of claim; 2) thirty days from the date a response to the notice of claim would be due, or 3) thirty days from the receipt by the claimant of written notice from a mediator that mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs. Since Respondent did not demand pre-suit mediation, only the first two are applicable to this case.

The first tolling provision set forth in W. Va. Code § 55-7B-6(i)(1) tolls the statute from the date of mail of a notice of claim to thirty days following receipt of a response to the notice of claim. The original notice of claim in this case, which was dated February 27, 2020, did not include a screening certificate of merit and stated that a screening certificate of merit would be provided within 60 days, or on or before April 27, 2020. The Screening Certificate of Merit was not served on Dr.

Clark on or before that date, but due to courthouse closures during the COVID-19 pandemic, the Supreme Court of Appeals of West Virginia, by Administrative Order, suspended all statutes of limitations that would otherwise expire between March 23, 2020, and May 15, 2020, and extended them until May 18, 2020. Petitioner filed her Revised Notice of Claim and Screening Certificate of Merit on that date and it was received in Respondent's office on May 26, 2020.

Pursuant to W. Va. Code § 55-7B-6(f), Respondent 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 wished 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 Respondent 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, pursuant to the second tolling provision contained in § 55-7B-6(i)(1). Petitioner did not file her Complaint with the Circuit Clerk of Cabell County on or before that date and did not file it until November 23, 2020, three months and twenty-one days after the tolling provisions of the MPLA had expired. Accordingly, the Petitioner's Complaint was barred by the statute of limitations and was appropriately dismissed by the Circuit Court.

Respondent's counsel did contact Petitioner's counsel by letter dated May 13, 2020, advising that Respondent had retained counsel and requesting authorizations

to collect Petitioner's medical records.[7] If this is deemed to be a response for the purpose of the tolling provisions of the MPLA, thirty days from that date would have made the Complaint due by June 13, 2020. It was not filed until more than five months later. Even if the letter from Respondent's counsel dated August 31, 2020 to Petitioner's counsel with the disk containing copies of medical records which had been collected pursuant to the authorization is deemed a response to the Revised Notice of Claim and Screening Certificate of Merit, Petitioner had 30 days from that date, or until October 1, 2020, to file her Complaint, and she missed that deadline by nearly two months.

2. The Failure of Petitioner's Counsel to Timely File Her Complaint Cannot Be Cured by Equitable Doctrines

The Supreme Court of Appeals of West Virginia has made it clear that the pre-suit notice screening requirements of the MPLA are jurisdictional, and the failure to comply with its requirements deprives a Circuit Court of jurisdiction. *State of West Virginia Ex. Rel. Primecare Medical of West Virginia, Inc., v. The Honorable Laura Faircloth,* 242 W. Va. 335, 835 S.E.2d 579, (2019), *et al., supra.* The Court made it clear in the *Primecare* opinion that a Circuit Court has no authority to suspend the West Virginia Medical Professional Liability Act's pre-suit screening requirements. *Id.* at Syl. Pt. 5. The same applies to the MPLA's tolling provisions. 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

[7] It should be noted that the MPLA gives Petitioner an absolute right to have access to all medical records pertaining to the alleged act or acts of medical professional liability within thirty days of filing an answer. W. Va. Code § 55-7B-6a(a).

or expand the tolling provisions for equitable reasons or because it believes Plaintiff's counsel made an excusable mistake in interpreting the statute.

The Supreme Court of Appeals of West Virginia has uniformly recognized that "[t]he plaintiff or his attorney bears the responsibility to see that an action is properly and timely instituted." *See* Syl. pt. 4, *Stevens v. Saunders*, 159 W. Va. 179, 220 S.E.2d 887 (1975). The Court has rejected equitable arguments to toll or extend the statute of limitations by attorneys who have failed to file complaints within the applicable statute of limitations. An examination of cases concerning proposed equitable exceptions to statutes of limitations indicate that this Court has been unwilling to extend the applicable statutory period in order to cure filing defects that could have been avoided had the plaintiff's attorney been more diligent and conscientious in adhering to the statutory deadline.

In *Stevens*, plaintiffs' counsel filed a complaint two days before the statute of limitations ended, but failed to post a cost bond to serve a nonresident defendant motorist. The plaintiffs' counsel prepared the bond form and mailed it to the circuit clerk who received it after the statute of limitations expired. The Supreme Court upheld the dismissal of the complaint on statute of limitations grounds and rejected plaintiffs' attorneys' equitable arguments. Similarly, in *Huggins v. Hospital Bd. of Monongalia County*, 165 W. Va. 557, 270 S.E.2d 160 (1980), the plaintiff's attorney filed a complaint with the circuit court at approximately 4:30 p.m. on the last day of the statute of limitations, but he did not have additional copies of the complaint for the issuance of summonses for service. Additional copies of the complaint were

delivered to the clerk's office the following day and summonses were issued after the expiration of the statute of limitations. The Court declined to find the Complaint had been timely filed.

In order to create an "estoppel" to plead the statute of limitations, the party seeking to maintain the action 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. Syl. pt. 1., *Humble Oil & Ref. Co. v. Lane*, 152 W. Va. 578, 165 S.E.2d 379 (1969). The doctrine of estoppel should be applied cautiously and only when equity clearly requires it to be done. *Id.* at Syl. pt. 3. In *Humble Oil*, the plaintiff argued that the defendant's insurance company (Motorists Mutual) had induced it not to file suit within the two year statute of limitations following a collision between two motor vehicles through a series of letters and representations that the claim would be settled. Motorists had sent eight letters to Humble regarding the claim. It advised Humble that it was investigating the accident and as soon as its investigation was complete it would further advise Humble regarding the claim. Motorists did not admit liability, promise to pay any amount to settle the clam, or request Humble to refrain from suing. The Supreme Court ruled against Humble's equitable estoppel claim on the basis that it failed to find any statements or conduct by Motorists Mutual which would warrant the application of estoppel. The Court noted that "[r]eliance by the plaintiff does not, in itself, give rise to an estoppel. The words or conduct must be such that a reasonable man, relying thereon, would

believe that his debtor would not invoke the statute of limitations as a defense to his claim." *Humble Oil & Ref. Co.*, 152 W. Va. at 585, 165 S.E.2d at 384.

In *Johnson v. Nedeff*, 192 W. Va. 260, 452 S.E.2d 63 (1994), plaintiff's attorney attempted to file a complaint by mailing it to the clerk's office. The address for the clerk's office had changed at the beginning of the year. The attorney had filed another complaint in a separate matter earlier by mailing it to the same incorrect address and, although the address was incorrect, the complaint was received for timely filing. However, the second complaint was not received by the clerk prior to the expiration of the statute of limitations. The Court rejected the plaintiff's argument that the statute of limitations should have been equitably tolled. Finding that the plaintiff had failed to satisfy the requirements of any established exception to the statute of limitations, the Court stated that "[d]efendants have a right to rely on the certainty the statute [of limitations] provides, and adoption of the rule plaintiff urges would destroy that certainty." *Id.*, 192. W. Va. at 265, 452 S.E.2d at 68.

In *Perdue v. Hess*, 199 W. Va. 299, 484 S.E.2d 182 (1997), plaintiff sued defendant for injuries sustained in an automobile accident which occurred on May 16, 1991. The statute of limitations expired on May 17, 1993, but plaintiff's counsel did not file the complaint until May 18, 1993, relying on an incorrect date in the accident report regarding the date of the accident. On a certified question to the Supreme Court of Appeals, the circuit court asked "[w]hether the two year statute of limitations for personal injury actions . . . may be tolled under the theory of

'excusable neglect' of a plaintiff's counsel, such that the statute of limitations is without force and effect, where prior counsel for the plaintiff failed to file plaintiff's personal injury action within the two year limitations period[.]" *Perdue,* 199 W. Va. at 301, 484 S.E.2d at 184. The Court answered the certified question in the negative. In its opinion, the Court noted: "[i]n sum, our prior cases concerning proposed equitable exceptions to statutes of limitations indicate that this Court is unwilling to extend the applicable statutory period in order to cure filing defects that could have been avoided had the plaintiff's attorney been more conscientious in adhering to the statutory deadline. The ultimate purpose of statutes of limitations is to require the institution of a cause of action within a reasonable time." *Id.*, 199 W. Va. at 303, 484 S.E.2d at 186 (*citing* Syl. pt. 4, *Humble Oil & Ref. Co. v. Lane, supra.*).

The decisions cited above reflect the Court's long term commitment to ensuring that time limits for filing suits are strictly followed. This reluctance to create exceptions to statutes of limitations beyond those already provided by statute was expressed nearly 100 years ago in Syl. Pt. 3 of *Hoge v. Blair,* 105 W. Va. 29, 141 S.E. 444 (1928), "[e]xceptions in statutes of limitation are strictly construed and the enumeration by the Legislature of specific exceptions by implication excludes all others." As the Court noted in *Perdue*, "[b]y strictly applying statutes of limitations, we are better able to ensure that causes of action are promptly and timely filed. Accordingly, we are very reluctant to accept an attorney's mere lack of diligence as a reason for tolling a statutory filing period." 199 W. Va. at 303, 484 S.E.2d at 186.

These cases are also in accord with federal decisions regarding equitable tolling of statutes of limitations. To determine whether a plaintiff is entitled to equitable tolling of a statute of limitations, the U.S. Supreme Court has set a two-part test under which a plaintiff must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe v. United States*, 136 S. Ct. 750, 755, 577 U.S. 250 (2016) (internal quotation marks and citations omitted). Failure to prove either element precludes a plaintiff from being granted equitable tolling. *Id.*

Under federal law, equitable tolling is appropriate only "in those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Whiteside v. United States*, 775 F.3d 180, 184 (4th Cir. 2014) (en banc) (internal quotations omitted). Equitable tolling "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). The Fourth Circuit has explained that "[e]quitable exceptions to the statutory limitations period should be sparingly applied, however." *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987), *cert. denied,* 486 U.S. 1044 (1988) (citations omitted).

3. Adopting Petitioner's Equitable Argument Would Amount to a Re-Writing of the Legislative Tolling Provisions of the MPLA and Create Uncertainty as to When the Statute of Limitations Expires

If this Court were to adopt Petitioner's argument that the statute of limitations in MPLA cases is equitably tolled until thirty (30) days beyond such time as a defendant affirmatively advises plaintiffs' counsel that the defendant is not demanding pre-suit mediation, it would effectively re-write the tolling provisions of the statute and would create an illogical, unworkable, and uncertain situation regarding the running of the statute of limitations. The tolling provisions of the MPLA are clear. A healthcare provider has thirty (30) days from the receipt of a certificate of merit to demand pre-suit mediation. If the healthcare provider does not demand pre-suit mediation within that period, the statute of limitations is tolled for another thirty (30) days and a complaint must be filed within that time period or the statute of limitations has expired. To undermine the clear directive of the MPLA regarding these tolling provisions would be contrary to the ultimate public purpose of statutes of limitations, which is to require the institution of a cause of action within a reasonable time.

Assume the situation in a non-MPLA case in which a defendant's attorney, after receiving notice that a client may be sued for a cause of action with a two year statute of limitations and the statute of limitations will expire in thirty (30) days, calls plaintiff's counsel and says, "[s]end me some information about your client's damages. We may want to discuss an early settlement of this claim." Does that contact alone equitably extend the tolling of the statute of limitations for any period

of time? Of course not. Any reasonable attorney in the position of counsel for the plaintiff would respond by saying, "[l]et's enter into a formal agreement tolling the statute of limitations so we will have time to discuss settlement." If the other side does not execute a tolling agreement or simply does not respond, plaintiff's attorney, exercising due diligence, would go ahead and file suit prior to the running of the statute of limitations or would contact counsel for the other side prior to the running of the statute of limitations and directly address a tolling agreement. He or she could not reasonably assume that the statute of limitations had somehow been tolled due to a discussion of possible settlement negotiations or a request for copies of medical records. Any responsible attorney in the position of Petitioner's counsel in this case would have simply picked up the phone and called Respondent's counsel prior to the earliest date the statute of limitations could possibly run and inquired if the defendant healthcare provider wished to demand pre-suit mediation. Reasonable, responsible, and diligent plaintiff's counsel would not simply wait for weeks or months wondering if the healthcare provider was going to demand pre-suit mediation.

This is simply a case of an attorney who either misinterpreted the tolling provisions of the MPLA, or simply didn't consult the MPLA during the course of his representation of his client. In addition to misinterpreting the tolling provisions of the MPLA, there are several examples of lack of due diligence on the part of Petitioner's counsel in the representation of his client. The date for the surgery about which his client complained in the Screening Certificate of Merit

accompanying the Revised Notice of Claim was incorrect. The surgery was identified as occurring on March 9, 2017, when Petitioner's hysterectomy was performed by Dr. Clark on March 22, 2018.[8] A second example of lack of due diligence on the part of Plaintiff's counsel below is his reference twice to a referral of Petitioner to an urologist, Dr. Woolums, on March 28, 2020. The referral by Dr. Clark was made on March 28, 2018, six (6) days after the hysterectomy when Petitioner came for her post-surgery office appointment, not two years and six days after the surgery.[9]

VI. CONCLUSION

Petitioner makes an equitable argument that the statute of limitations for cases subject to the MPLA is tolled until a defendant has made a decision about pre-suit mediation one way or the other. There is absolutely no legal support for this argument. Pursuant to W. Va. Code § 55-7B-6(f), a defendant only has 30 days from receipt of a screening certificate of merit to demand pre-suit mediation. Therefore, once that time period passed, which was on June 26, 2020, Petitioner's counsel was on notice that pre-suit mediation had been waived by Dr. Clark due to the passage of time for her to demand mediation under the provisions of the MPLA, and he only had thirty more days during which the statute of limitations was tolled in order to timely file the Complaint. Petitioner did not file her Complaint until three months

[8] If the correct date of the hysterectomy was March 9, 2017, as stated in the Screening Certificate of Merit, the statute of limitations had already expired nearly a year before the date of the original Notice of Claim.

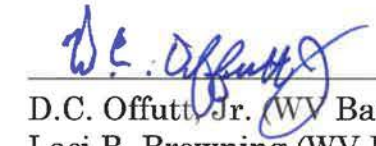
[9] Petitioner's original counsel's reference to a referral date to Dr. Woolums of March 28, 2020, in the original Notice of Claim dated February 27, 2020, should have been obvious to counsel since March 28, 2020, was still more than a month in the future from the date of the Notice of Claim.

and twenty-one days after the tolling period for the statute of limitation had expired, and the Cabell County Circuit Court correctly dismissed her claim.

WHEREFORE, for the reasons set forth above, the Respondent, Carolyn Clark, M.D., respectfully requests that this Honorable Court affirm the rulings of the Circuit Court in granting the Respondent's Motion to Dismiss.

CAROLYN CLARK, M.D.,
RESPONDENT

BY COUNSEL,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HELEN ADKINS,

Plaintiff Below/Petitioner

vs. **Docket No.: 21-0300**

CAROLYN CLARK, M.D.,

Defendant Below/Respondent,

CERTIFICATE OF SERVICE

I, D.C. Offutt, Jr., counsel for Carolyn Clark, M.D., do hereby certify that I served a true and correct copy of the foregoing ***"Brief of Respondent, Carolyn Clark, M.D.., In Response to Petition for Appeal of Helen Adkins, Petitioner,"*** upon the following by U.S. Mail, postage pre-paid this 24th day of August, 2021:

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