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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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WILLIAM SAGER,

Petitioner,

v.

No. 22-0158
(Lower Case No. 20-C-35)

DR. JOSEPH DUVERT,
TYGART VALLEY TOTAL CARE CLINIC, and
GRAFTON CITY HOSPITAL, INC.,
a West Virginia corporation,

Respondents.

PETITIONER'S BRIEF

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I. The lower Court erred by dismissing Petitioners' claims on the Defendants' Rule 12(b) motion to dismiss/motions for summary judgment by determining that Petitioner filed his Complaint after the applicable statute of limitations date.

II. The lower Court erred by dismissing Petitioner's claims by finding that the discovery rule did not apply to extend the statute of limitations date.

III. The lower Court erred by dismissing Petitioner's claims by finding that the Petitioner failed to comply with the provisions of the Medical Professional Liability Act.

II. STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURT BELOW

Petitioner filed this medical malpractice case in the Circuit Court of Taylor County, alleging that Respondent physician and medical facilities breached the applicable standard of care in the treatment of the Plaintiff by the over prescribing of controlled substances and the filling of controlled substances prescription, which were known to have addictive qualities to the Petitioner, the failure to properly treat Plaintiff's medical conditions, the failure to properly diagnose Plaintiff's medical conditions, and the failure to refer Plaintiff to other physicians or specialists who could properly treat Plaintiff in an appropriate manner. (0003-0013). Thereafter, Respondents filed their Motions to Dismiss/Motions for Summary Judgment to which the Appellant responded and to which the Respondents replies. (0039-0413). A hearing was held

and the Court granted Petitioner's request to supplement the record, although the Court indicated it would rule in Respondents' favor. After entry of the Dismissal Order, Petitioner filed a Rule 59(e) Motion to Alter or Amend Judgment, to which the Respondents responded and to which the Petitioner replied. Petitioner now appeals the Circuit Court's Order granting summary judgment in favor of the Respondents. Petitioner timely filed his Notice of Appeal on February 28, 2022.

B. SUMMARY OF CLAIMS

On December 2003, Petitioner was involved in a motor vehicle accident in which he sustained injuries and sought medical treatment from the Respondents. Instead of providing legitimate medical care to address the Petitioner's injuries and pain, the Respondents, for approximately fourteen years, merely prescribed increasing amounts of controlled substances.

The Respondents held themselves out to be health care providers who were providing legitimate care to the Petitioner. Petitioner relied upon the Respondents to provide appropriate medical care for the injuries sustained in the motor vehicle accident and the attendant pain. Respondents misrepresented and concealed the fact that their medical treatment of the Petitioner was the actual cause of his pain (hyperalgesia); Respondents misrepresented and concealed the fact that Mr. Sager did not have any physical injuries that required the prescribing of controlled substances; Respondents misrepresented and concealed the fact that they had prescribed controlled substances not for a legitimate medical purpose, and that their overprescribing had addicted him to the medications they had prescribed. Due to the excessive overprescribing of pain medications by the Respondents, Petitioner became dependent upon and addicted to the medications, lived with daily pain caused by the excessive prescribing of opioids

otherwise known as hyperalgesia, suffered from depression, and anxiety, and lived in a drug-induced stupor for 14 years (0218).

Petitioner filed his Complaint when the Respondents' negligence and malpractice, that Respondents engaged in conduct that breached their duty of care, was discovered and was filed within the applicable statute of limitations period. Further, prior to the filing of the Complaint, Petitioner complied with the provisions of the MPLA, timely served the Certificates of Merit upon the Respondents and filed his Complaint within the applicable statute of limitations period.

The lower Court's finding that the statute of limitations began to run when the Petitioner entered into a drug rehabilitation program in May, 2018, is a mistaken understanding of the disease of addiction, the rehabilitation process, and fails to consider the applicability of the discovery rule and its elements. Petitioner has repeatedly argued that in August 2018, he discovered that Respondents breached their duty and failed to exercise proper care in the treatment they provided in August 2018 at such time as he learned that the controlled substances prescribed by the Respondents for approximately fourteen years were not medically necessary and were not written for a legitimate medical purpose. Petitioner learned that the controlled substances were not written for a legitimate medical purpose when the pain he had been experiencing for 14 years ceased, which occurred in August 2018. The cessation of ingesting controlled substances does not immediately return a person's mind or body to its "normal" status.

Neither the prescribing of controlled substances nor addiction to the controlled substances is necessarily malpractice or negligence. The Respondents herein are licensed healthcare providers who treated Mr. Sager for approximately 14 years for the pain associated

with injuries and/or medical conditions, which, according to their records included scoliosis, chronic hip pain, and low back pain (0089), (0190-0291), (0312-0335). However, none of those medical conditions were causing Petitioner to experience pain. The Respondents' plan of care for Mr. Sager was the prescribing of ever-increasing amounts of controlled substances, despite the lack of testing, or the use of other medical treatments.

Mr. Sager, as a lay person, relied upon the medical expertise of the Respondents to provide the appropriate treatment to address his medical needs, specifically the pain he was experiencing. During the 14 years of treatment provided by the Respondents, Mr. Sager was in constant pain on a daily basis. Petitioner's injuries and pain was the reason he initially sought medical treatment from the Respondents. That pain continued for 14 years. Respondents attributed that pain to "actual" medical conditions as reflected upon the medical records. Respondents' plan of care for pain Mr. Sager was experiencing was the prescribing of opioids and other controlled substances.

According to Centers for Disease Control and Prevention,

> "Prescription opioids are often used to treat chronic and acute pain and, when used appropriately, can be an important component of treatment."

Mr. Sager relied upon the medical expertise of the Respondents and trusted the Respondents to provide appropriate treatment for his pain. Importantly and unknown to Mr. Sager, the pain he had been experiencing for 14 years was actually caused by the opioids prescribed the Respondents. This medical condition is otherwise known as hyperalgesia, often medically diagnosed as opioid-induced hyperalgesia. "Opioid-induced hyperalgesia (OIH) is defined as a state of nociceptive sensitization caused by exposure to opioids. The condition is

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

Contrary to the information contained on Mr. Sager's medical records, Respondents did not perform medical examinations of Mr. Sager. During Mr. Sager and Dr. Duvert's conversations regarding current events and politics, Dr. Duvert would inquire whether Mr. Sager was still experiencing pain, which he was still experiencing. Thereafter, Dr. Duvert prescribed opioids and other controlled substances which continued the rebound effect of hyperalgesia.

Petitioner alleged in his Complaint that the Respondents "were in a joint venture and/or civil conspiracy to promote the distribution of highly addictive and potentially lethal drugs into the state of West Virginia, including but not limited to Taylor County for profit and by turning a blind eye." In further of their civil conspiracy, the actions, misrepresentations, and concealment of facts of the Respondents were instrumental in preventing Mr. Sager from learning of the negligence of the Respondents and tolls the statute of limitations.

In *Syl.Pt.4, Gaither v. City Hospital, Inc.,* 199 W.Va. 706, 487 S.E.2d 901 (1997), the West Virginia Supreme Court stated that:

> "under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury."

While addiction is an "undesirable result" after medical treatment, Petitioner did not know until August 2018 that the controlled substances prescribed by these Defendants were not medically necessary, that prescribing of controlled substances for 14 years was contrary to medical protocol, nor did the Plaintiff know that the actions of the Defendants was malpractice until he was no longer experiencing pain.

As the West Virginia Supreme Court opined in *Gaither v. City Hospital*, :487 S.E.2d 901 (1997):

> "In our holding today, we find on the one hand that knowledge sufficient to trigger the limitation period requires something more than a **mere apprehension** that something may be wrong. *See Hill v. Clarke*, 161 W.Va. at 262, 241 S.E.2d at 574 ("[P]ain, suffering and manifestation of the harmful effects of medical malpractice do not, by themselves, commence running of the statute of limitation"). Even if a patient is aware that an undesirable result has been reached after medical treatment, a claim will not be barred by the statute of limitations so long as it is reasonable for the patient not to recognize that the condition might be related to the treatment. On the other hand, we do not go so far as to require recognition by the plaintiff of *negligent* conduct. In medical malpractice actions, such a standard is usually beyond the comprehension of a lay person and actually assumes a conclusion that must properly await a legal determination by a jury. Such a requirement would also result in a situation "where the statute of limitations would almost never accrue until after the suit was filed." *Hickman*, 178 W.Va. at 253, 358 S.E.2d at 814. We simply hold that once a patient is aware, or should reasonably have become aware, that medical treatment by a particular party has caused a personal injury, the statute begins".

C. FACTUAL STATEMENT OF CASE

On December 2003, Plaintiff was involved in a motor vehicle accident in which he sustained injuries and sought treatment from these Respondents. At the time Petitioner sought treatment, he was experiencing pain due to the injuries sustained the accident. Instead of providing legitimate medical care to treat the physical injuries that were causing Mr. Sager pain,

the Respondents, for approximately fourteen years, merely prescribed controlled substances without conducting any medical examination of Petitioner. In February 2018, due to the Respondents' negligent prescribing of prescriptions month after month for more than a decade, Petitioner who had become dependent upon the medications written by the Respondents, Petitioner sought medical detoxification for the medical withdrawal from the medications at United Hospital Center Rehabilitation located in Bridgeport, West Virginia. At that same time, Mr. Sager received concurrent treatment at the John D. Good Center and Cranberry Medical Clinic. Plaintiff completed the rehabilitation program and treatment in August 2018. Treatment at the John D. Good Center and Cranberry Medical Clinic consisted of treatment for opioid abuse with other opioid-induced disorder, withdrawal, insomnia, acute stress reaction, including the prescribing of medications to address a recently diagnosed bipolar disorder. (0090-0091)

Throughout the 14 years of being treated by these Defendants, Plaintiff had experienced tremendous pain on a daily basis, which these Respondents attributed to the injuries sustained in the 2003 accident. During those 14 years of treatment, month-after-month, Respondents fabricated medical records in an attempt to legitimize their overprescribing of controlled substances. As outlined in Petitioner's medical records (0087-0089), (0190-0261), (0312-0335). Respondents advised Petitioner that it was medically necessary to prescribe controlled substances month-after-month for more than ten years in ever increasing dosages of his pain medication. This increase in the dosage of the pain medication was done without any medical examinations or testing to determine the extent of his injuries, to determine the true cause of Plaintiff's pain, or whether the injuries Petitioner sustained in the 2003 motor vehicle accident still existed.

The Respondents held themselves out to be health care providers who were providing legitimate care to the Petitioner. Respondents misrepresented and concealed the fact that their medical treatment of the Petitioner was contrary to medical protocol, that the prescribing of the controlled substances was not medically necessary nor was the prescribing for a legitimate medical purpose. Respondents misrepresented and concealed the fact that their medical treatment was the actual cause of his pain and that they had purposely addicted him to the medications they had prescribed. Due to the excessive overprescribing of pain medications by these Respondents, Plaintiff became dependent upon the medications and lived in a drug-induced stupor for 14 years. After Petitioner completed the drug treatment program in August 2018, he discovered the negligence and malpractice of these Respondents, that the controlled substances prescribed by the Respondents were not medically necessary, and the fact that these Respondents had actually caused the injuries he had been suffering from, including the intense pain he experienced month-after-month for approximately 14 years. Petitioner has not experienced any pain since August 2018.

Petitioner's expert, Dr. Ranieri, opined that (0054-0058), to a reasonable degree of medical certainty, Respondents breached the applicable standard of care within the scope of the practice of pain management by allowing the prescribed medications to be used on a chronic basis, despite the patient not having any significant relief in pain. (0234) Dr. Ranieri also opined that Dr. Duvert breached the applicable standard of care by treating Mr. Sager with a combination of multiple opioids and benzodiazepines which facilitated the development of addictive tendencies.

Dr. Ranieri opined that Dr. Duvert, "failed to select appropriate drug therapy for chronic use, failed to adhere to treatment algorithms, failed to instruct about potential life-threatening effects, failed to properly monitor the patient, and failed to attempt tapering and transition to safer agents, among others.

The lower court erred in granting the Respondents' Motions for Summary Judgment and dismissing the Petitioner's Complaint.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner submits this case is appropriate for oral argument under Rules 18, 19, and 20 of the West Virginia Rules of Appellate Procedure because this case involves a complicated set/series of facts and the facts and legal arguments would be significantly aided by oral argument.

ARGUMENT

Introduction

Petitioner presents this brief following the lower court's granting of the Respondents' request to convert their Motions to Dismiss to Motions for Summary Judgment and finding, as a matter of law, that Petitioner filed his Complaint after the expiration of the statute of limitations. Petitioner takes exception and assert their right to appeal the final order of the circuit court. (0436-0448).

I. STANDARD OF REVIEW – SUMMARY JUDGMENT

This appeal arises from the conversion of Respondents' Motions to Dismiss to Motions for

Summary Judgment and the granting of the Motions for Summary Judgment in favor of the Respondents. Appellate review of the circuit court's order entering summary judgment is subject to this court's *de* novo review. E.G., Syl.Pt. 1, *Painter* . Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

This Court has ruled that,

> [s]ummary judgment is appropriate if, from the totality of evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as to where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 2, *Precision Coil, Inc.*, 194 W.Va. 52, 459 s.E.2d 329.

The West Virginia case law is clear that

> "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl.pt.3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). *Accord* Syl.pt. 2, *Jackson v. Putnam County Bd. of Educ.*, 221 W.Va. 170, 653 S.E.2d 632 (2007); Syl.pt. 1, *Mueller v. American Elec. Power Energy Servs., Inc.*, 214 W.Va. 390, 589 S.E.2d 532 (2003).

Thus, "[t]he circuit court's function at summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl.pt. 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Pursuant to the West Virginia Rule of Civil Procedure 56, to survive a motion for summary judgment, the party opposing the motion must present some evidence to indicate that the facts are in dispute. In this case, Petitioner presented sufficient evidence for a reasonable jury to find in favor of the Petitioner. The lower court erred in granting the Respondents' Motions for Summary Judgment and dismissing the Petitioner's Complaint.

I. MOTION TO DISMISS STANDARD OF REVIEW

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

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

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

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

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

5. "[o]nly matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b) R.C.P., and if matters outside the pleading are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment and disposed of under Rule 56 R.C.P. if there is no genuine issue as to any material fact in connection therewith.... Syl. pt. 4, *United States Fid. & Guar. Co. v. Eades*, 150 W.Va. 238, 144 S.E.2d 703 (1965), *overruled on other grounds by Sprouse v. Clay Communication, Inc.*, 158 W.Va. 427, 211 S.E.2d 674 (1975). *Accord* Syl. pt. 1, *Poling v. Belington Bank, Inc.*, 207 W.Va. 145, 529 S.E.2d 856 (1999). *See also* Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[3], at 354 (3d ed. 2008) ("Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b)(6). However, if matters outside the

pleading are presented to the court and are not excluded by it, the motion must be treated as one for summary judgment and disposed of under Rule 56.")."

6. "Under Rule 12(b)(6), the district court may properly consider only facts and documents that are part of or incorporated into the complaint; if matters outside the pleadings are considered, the motion must be decided under the more stringent standards applicable to a Rule 56 motion for summary judgment..." *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 758 (2008).

The Plaintiffs' Complaint provides "grounds of...'entitlement to relief' in more factual detail than mere 'labels and conclusions'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plaintiffs' complaint sets forth specific allegations relating to each Defendant and the negligence of each Defendant, including the following:

> The Defendant Physician, Clinic, and Hospital failed to follow the accepted standard of care and thereby exposing the Plaintiff to chronic opioid use but never properly treated the Plaintiff for his medical condition. Further the said excessive use of chronic opioids and other addictive drugs has caused the Plaintiff physiological dependency and placed the Plaintiff at risk for both drug addiction and prescription misuse. Each of these Defendants continued to negligently treat the Plaintiff which resulted in the creation and maintenance of exaggerated pain. Defendant Physician, Clinic, and Hospital failed to properly monitor and thus violated the standard of care. Plaintiff met infrequently, if at all, with the Defendant Physician and those meetings were of a *pro forma* nature only at which no meaningful examination occurred. The proper standard of care was thereby breached in that addictive medications were prescribed over an extensive period by time by Defendant Physician."

Plaintiff did not incorporate any exhibits into his Complaint, nor did he refer to documents in his complaint. Thus, any consideration of any documents outside of the four corners of the Complaint, converts Defendants' motion to a Motion for Summary Judgment.

D The Circuit Court erred in granting respondents' Motion for Summary Judgment by finding that Petitioner filed his Complaint after the expiration of the statute of limitations

a) The Circuit Court erred in granting respondents' Motion for Summary Judgment by finding that the discovery rule did not apply

Discovery Rule

This Court has previously stated:

"[t]he Medical Professional Liability Act, W.Va.Code, 55-7B-4(a) [1986] ... requires an injured plaintiff to file a [medical] malpractice claim against a health care provider within two years of the date of the 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 [.]' Syllabus Point 1, in part, *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 *628 (1997). Ordinarily, the applicable statute of limitation begins to run when the actionable conduct first occurs, or when an injury is discovered, or with reasonable diligence, should have been discovered. W.Va.Code § 55-7B-4. The discovery rule recognizes "the inherent unfairness of barring a claim when a party's cause of action could not have been recognized until after the ordinarily applicable period of limitation." *Harris v. Jones*, 209 W.Va. 557, 562, 550 S.E.2d 93, 98 (2001). "[U]nder the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim." Syllabus Point 2, in part, *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997).

This Court further stated:

"There are two common situations when the discovery rule may apply. The first occurs when "the plaintiff knows of the existence of an injury, but does not know the injury is the result of any party's conduct other than his own." *Gaither*, 199 W.Va. at 713, 487 S.E.2d at 908 (modifying *Hickman v. Grover*, 178 W.Va. 249, 358 S.E.2d 810 (1987)). In Gaither, this Court held that a question of fact existed as to when Mr. Gaither first "became aware" that the hospital's negligence, as opposed to his own negligence, might have resulted in the amputation of his leg. We explained that: "We find nothing in the record to indicate that the appellant had any reason to know before January 1993 that City Hospital may have breached its duty and failed to exercise proper care, or that City Hospital's conduct may have contributed to the loss of his leg." 199 W.Va. at 715, 487 S.E.2d at 910.

> The second situation may occur when an individual "does or should reasonably know of the existence of an injury *and* its cause." *Gaither*, 199 W.Va. at 713, 487 S.E.2d at 908. In footnote 6 of *Gaither*, this Court lists instances where "causal relationships are so well-established [between the injury and its cause] that we cannot excuse a plaintiff who pleads ignorance." These instances include a patient who, after having a sinus operation, lost sight in his left eye, and a patient who, after undergoing a simple surgery for the removal of a cyst, was paralyzed in both legs. *Gaither*, 199 W.Va. at 712, 487 S.E.2d at 907 (internal citations omitted). In such instances, when an individual knows or should reasonably know of the injury and its cause, the injured party must "make a strong showing of fraudulent concealment, inability to comprehend the injury, or other extreme hardship" for the discovery rule to apply. 199 W.Va. at 713, 487 S.E.2d at 908 (*quoting Cart v. Marcum*, 188 W.Va. 241, 245, 423 S.E.2d 644, 648 (1992))." (emphasis supplied.)

Under each Syllabus Point and under both situations outlined in *Gaither*, it is clear that the discovery rule applies to this matter in determining the applicable statute of limitations and that Petitioner timely filed his complaint.

Additionally, the facts set forth herein, are comparable to the fact set in *Gaither*. Plaintiff did not know that his injuries, including the opioid dependence and addiction, were a result of the Defendants negligent conduct until such time as he had completed his residential/inpatient drug rehabilitation from the John D. Good Center in conjunction with his required treatment at the Cranberry Medical Center in August 2018, when **Petitioner was no longer experiencing any pain**. The pain Mr. Sager had experienced from the injuries he sustained in the 2003 automobile accident was the reason why he had sought treatment from the Respondents in the first place.

The lower Court's decision has mistakenly found as a Finding of Fact that due to the Court's review of the documents submitted in Mr. Sager's criminal prove that "the Plaintiff was indeed aware of his substance abuse addiction (the basis of his Complaint) no later than May 7, 2018, the date that it was disclosed to this Court in the criminal cases against William Sager that

he had successfully completed the drug rehabilitation program to address the addiction that is the subject of this civil lawsuit." The Court's Order cites passages from the Plaintiff's various responses to Motions which contradict the Court's findings. The passages cited by the Court clearly state that:

> "Due to the excessive overprescribing of pain medications by these Defendants, Plaintiff became dependent upon the medications and lived in a drug-induced stupor for 14 years. **After Plaintiff completed the drug treatment program in August 2018, he discovered the negligence and malpractice of these Defendants and that the fact that these Defendants had actually caused the injuries he had been suffering from."**

The issue is not when Petitioner discovered he had an addiction. The issues is when Petitioner discovered the Defendants' negligence and malpractice, that the Respondents breached its duty and failed to exercise proper care. In August 2018, Petitioner discovered that the Respondents had improperly prescribed controlled substances to him for 14 years, that he did not have chronic pain as the Respondents had repeatedly diagnosed him with, and that the Respondents' overprescribing of the controlled substances was negligent and constituted malpractice.

The Court's Order inaccurately opines that Petitioner's arguments are based upon when he knew of or discovered that he had an addiction to the controlled substances. Petitioner has argued and continues to argue that the Discovery Rule applies to the time that he knew or became aware that the debilitating pain he had experienced for 14 years was caused by the improper and overprescribing of controlled substances by these Respondents and not from the injuries he had sustained in the car accident and that his addiction to the controlled substances was caused by the negligent improper and overprescribing of the controlled substances by these Respondents.

Petitioner had experienced pain for 14 years. For 14 years the Respondents had advised the Petitioner that the pain he was experiencing was due to injuries, chronic pain, and/or scoliosis. Petitioner believed the diagnosis of the Respondents because he had been injured in a car accident, he had begun experiencing pain after the car accident, he had had pain every day, month-after-month, year-after-year, until August 2018, and he knew he had scoliosis and had known that fact since he was a child.

However, as of August 2018, once Plaintiff's body and mind was free from the impact of the opioids prescribed by these Defendants, Plaintiff knew:

a. that he did not have injuries to his body and thus the pain he had been experiencing for over a decade was not due to physical injuries and/or scoliosis;
b. Plaintiff knew that he did not have chronic pain;
c. Plaintiff knew that his scoliosis was not causing him pain; and
d. Plaintiff knew that his drug addiction and dependence had been caused by the Defendants' overprescribing of opioids for 14 years.

Plaintiff knew of the Defendants' malpractice and negligence in August 2018.

Plaintiff had consumed high levels of opioids, as prescribed by the Defendants, every day for 14 years, which he believed to be medically necessary, since the medications were prescribed by a medical physician. The Plaintiff experienced opioid intoxication every day for 14 years. Opioid intoxication is a condition in which a person is not only high from using the drug, but also has body-wide symptoms that can make an individual ill and impaired. Opioid intoxication impacts a persons' ability to think clearly, to reason, and to comprehend, comparable to alcohol intoxication. Once Plaintiff's mind and body were opioid free, he

discovered the Defendants' negligence and malpractice, including opioid dependence and addiction, which occurred on August 27, 2018. Also, at the time, Plaintiff was pain free and he knew that the medications prescribed by these Defendants were the cause of his injuries, including the pain he had been experiencing for 14 years.

The lower court based its ruling granting summary judgment that the Petitioner filed his complaint after the statute of limitations date, upon the date Respondents' counsel requested records from Respondent medical entities, May 11, 2018. However, the lower court failed to consider the fact that Petitioner's counsel also requested records from Dr. Duvert on July 12, 2018 since the records previously received appeared to be incomplete (0308). The lower court also failed to consider the fact that Petitioner's counsel received records from Grafton City Hospital on July 19, 2018 (0306). Using the lower court's logic to establish the date the statute of limitations began to run based upon the dates requests for medical records were made, the statute of limitations began to run on July 12, 2018, at the earliest and at the latest, July 19, 2018.

The lower court also erroneously based its decision granting summary judgment upon the date of February 2, 2018, the date Petitioner entered into an in-house drug rehabilitation program at the John D. Good Center and the date Petitioner was released from the in-house drug rehabilitation program, May 7, 2018. However, the lower court failed to consider that Petitioner's drug rehabilitation program also included concurrent treatment from the Cranberry Medical Center and Dr. Roger Lewis who practices at the Cranberry Medical Center. Dr. Lewis medically treated the Plaintiff for his addiction/dependence and attendant anxiety, insomnia, racing thoughts and bipolar disorder and prescribed medications to treat Petitioner's medical conditions. It was during that treatment during the summer of 2018, specifically August 2018,

that Petitioner realized he was pain free and the medical conditions diagnosed by the Respondents did not cause him pain and did not warrant the taking controlled substances. Dr. Lewis continues to treat Petitioner to date to ensure he remains drug free.

According to the Cleveland Clinic, "Drug addiction, or substance use disorder, is a brain disease. The drugs affect your brain, make it difficult to stop taking the drugs, even if you want to....Addictions are not problems of willpower or morality. Addiction is a powerful and complex disease... The drugs change the brain in a way that makes quitting physically and mentally difficult. Treating addiction often requires lifelong care and therapy"

Until August, 2018, Petitioner was unaware that the medical treatment he received from these Respondents was below the standard of care and that their continued prescribing of controlled substances for 14 years was malpractice and was the actual cause of the pain he had been experiencing daily for 14 years. The Respondents, on a monthly basis, advised the Petitioner that the pain he was experiencing was caused by the injuries he had received in the 2003 car accident, chronic hip and back pain due to those injuries, and/or scoliosis. Petitioner discovered the Defendants' negligence and malpractice after his treatment at the John D. Good Center in cooperation with the Cranberry Medical Clinic when he became pain free. After completion of his treatment at the John D. Goode Center and treatment with Dr. Lewis at the Cranberry Medical Clinic through August 2018, Plaintiff discovered that he did not have any pain nor any injuries to his back and hip. For 14 years Petitioner had experienced extreme pain in his back and hips, which the Defendants attributed to the 2003 automobile accident, chronic pain associated with the accident, and/or scoliosis. None of that is true.

During the detoxification process and the rehabilitation process, including his

treatment with Dr. Lewis, Petitioner continued to be in in tremendous pain.

Respondents fabricated medical records, which medical records misrepresented and concealed the material facts of their malpractice. Each month, from 2003 through 2018, while in the care and treatment of Dr. Duvert, Tygart Valley Total Care Clinic, and Grafton City Hospital, Inc., Mr. Sager's "treatment" consisted of being weighed by office personnel who also took Mr. Sager's blood pressure. During Mr. Sager's interactions with Dr. Duvert, the two of them discussed current events and politics. Other than maybe two occasions, no discussions were had regarding Mr. Sager's medical condition nor did Dr. Duvert perform any medical examinations of Mr. Sager. At the conclusion of the discussions regarding politics and current events, Mr. Sager was given the prescriptions for the controlled substances.

Nothing within the Court records nor in the medical records prove that Petitioner knew of Defendants' negligence and malpractice prior to August 2018 or at the earliest mid to late July 2018. "...knowledge sufficient to trigger the limitation period requires something more than a mere apprehension that something may be wrong." *Gaither* citing *Hill v. Clarke*, 161 W.Va. at 262, 241 S.E.2d at 574."

In *Syl.Pt.4, Gaither v. City Hospital, Inc.,* 199 W.Va. 706, 487 S.E.2d 901 (1997), the West Virginia Supreme Court stated that:

> "under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury."

The Plaintiff had no obligation to file a medical malpractice action until the

Plaintiff knew that his injuries were caused by these Defendants' negligent and wrongful acts. Again, "...knowledge sufficient to trigger the limitation period requires something more than a mere apprehension that something may be wrong." *Gaither* citing *Hill v. Clarke*, 161 W.Va. at 262, 241 S.E.2d at 574."

Additionally, "Even if a patient is aware that an undesirable result has been reached after medical treatment, a claim will not be barred by the statute of limitations so long as it is reasonable for the patient not to recognize that the condition might be related to the treatment." *Gaither*. The court in *Gaither* concluded, based on reasons of judicial economy, and considerations of fairness, that "[T]he law does not and should not require a patient to assume that his medical provider has committed malpractice, or worse, has engaged in a conspiracy to conceal some misconduct every time medical treatment has less than perfect results.

Because Petitioner relied upon the expertise of the Respondents to properly treat his medical conditions, it is reasonable that Petitioner did not know that the medications prescribed by these Respondents were the cause of injuries, including the extreme pain he experienced throughout his body, including in the areas that were injured in the car accident for which he initially sought medical treatment. Further, the Respondents' negligence and malpractice caused Mr. Sager to become dependent and addicted to controlled substances and **it is reasonable that Petitioner did not know that his addiction and dependence was caused by the Respondents' inappropriate over-prescribing of controlled substances until August 2018, or at the earliest mid to late July, 2018, when Petitioner's medical records were received and reviewed.**

Additionally, the discovery rule originated from circumstances that often times an

injured party is unable to know of the existence of injury or its cause. These Respondents did act and they continue to assert in their pleadings as to pretend that they were acting in the capacity of legitimate medical practitioners who provided proper medical care. Each of these Respondents have held themselves out to be legitimate medical providers providing legitimate medical services.

As stated by this Court in *Gaither:*

> "The 'discovery rule' is generally applicable to all torts, unless there is a clear statutory prohibition of its application." Syllabus Point 2, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992)
>
> In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1)that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.
>
> **The question of when plaintiff knows or in the exercise of reasonable diligence has reason to know of medical malpractice is for the jury."** Syllabus Point 4, *Hill v. Clarke*, 161 W.Va. 258, 241 S.E.2d 572 (1978)." (emphasis supplied)

The West Virginia Supreme Court determined in *Martin v. Charleston Area Medical Center, Inc.*, 2013 WL 2157698 (W.Va. May 17, 2013) that "[f]or most general causes of action, those under a disability have up to twenty years to file suit pursuant to West Virginia Code §55-2-15." 2013 WL 2157698 at *2. The Court determined in *Martin* that individuals bringing a medical malpractice case under the MPLA have a two-year statute of limitations **except in cases where discovery is at issue.** Mr. Sager discovered the negligence of each of these Respondents at such time that he was no longer addicted to opioids, at such time as the true nature of these Respondents' negligent acts and malpractice were unearthed, and he knew that the pain he had

been experiencing for 14 years was actually due to the excessive overprescribing of opioid medications.

Mr. Sager, as a patient of these Respondents, followed their medical orders as he believed, due to the Respondents' pretense of legitimately practicing medicine, that his pain was caused by the injuries he sustained in his car accident, chronic pain and/or scoliosis. Mr. Sager, as a non-medical person, could in no way be aware that his pain was caused by the failure of each of the Defendants to properly treat his underlying medical condition, could in no way be aware that the long-term use of opioid medications was inappropriate, and could not know that the long-term use of opioid medications actually causes dependence and addiction and increased pain. This condition is otherwise known as hyperalgesia, often medically diagnosed as opioid-induced hyperalgesia. "Opioid-induced hyperalgesia (OIH) is defined as a state of nociceptive sensitization caused by exposure to opioids. The condition is characterized by a paradoxical response whereby a patient receiving opioids for the treatment of pain could actually become more sensitive to certain painful stimuli. The type of pain experienced might be the same as the underlying pain or might be different from the original and underlying pain. OIH appears to be a distinct, definable, and characteristic phenomenon that could explain loss of opioid efficacy in some patients." A comprehensive review of opioid-induced hyperalgesia, Pain Physician. 2011 Mar-Apr;14(2):145-61. The experts in this case have opined that Mr. Sager suffered from Opioid-induced hyperalgesia. (0133-0137).

There is no clear statutory prohibition to the application of the discovery rule in this case and the Petitioner had no obligation to file a medical malpractice action until he knew that his injuries were caused by these Respondents' negligent and wrongful acts.

> "Our conclusion today is based on reasons of judicial economy, as well as obvious considerations of fairness. the law does not and should not require a patient to assume that his medical provider has committed malpractice, or worse, has engaged in a conspiracy to conceal some misconduct every time medical treatment has less than perfect results. "To hold otherwise would require that whenever any medical treatment fails to promptly return the patient to full health, the patient would necessarily hire attorneys and experts to investigate the possibility of malpractice, lest the statute run. Such wasteful over-abundance of caution is not the goal of our statute of limitations."
> *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Citing *Szpynda v. Pyles*, 433 Pa.Super.1, 639 A.2d 1181, 1184-85 (1994).

In *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009), this Court established the following five-step analysis to determine whether a cause of action is time-barred.

> "First, the court should identify the applicable statute of limitations for each cause of action. Second the court (or, if material questions of fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitations began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc., supra.* Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine.

Dunn, 225 W.Va. at 53, 689 S.E.2d 265.

Under the five-step analysis in *Dunn*, Petitioner has established that the applicable

statute of limitations date is August 2018, and in no way could the statute of limitations date be any earlier than July 12, 2021 per the discovery rule. Petitioner has also established that the that the Respondents concealed facts which prevented the Petitioner from discovering or pursing the potential cause of action in that their medical records report that these Respondents had diagnosed the Petitioner with medical conditions, that if were true, would require the use of pain medication, among other testing and interventions. Respondents even concealed the fact that Plaintiff was dependent upon and addicted to the medications. (0237)

These Respondents fabricated medical records month-after-month for more than a decade to legitimize their continuous prescribing of controlled substances to the Plaintiff.

The Respondents' medical records evidence that Respondents concealed their negligence and malpractice in the treatment provided to Plaintiff by the Defendants and entitles the Petitioner to the benefit of the discovery rule.

The Defendants fail to satisfy the requirements set forth in *Dunn* that Plaintiff's Complaint is time barred and the lower court erred in granting Respondents' Motions for Summary Judgment. Further, "**The question of when plaintiff knows or in the exercise of reasonable diligence has reason to know of medical malpractice is for the jury."** Syllabus Point 4, *Hill v. Clarke*, 161 W.Va. 258, 241 S.E.2d 572 (1978)." (emphasis supplied)

When reviewing a motion for summary judgment, Circuit Courts are guided by Rule 56 of the West Virginia Rules of Civil Procedure which states that the granting of a motion for summary judgment is proper where the record demonstrates "that there is no genuine issue as to

Because the allegations set forth in the Petitioner's Complaint clearly states genuine issues of material fact for trial and easily meets the Plaintiff's pleading burden under Rule 56 and under Rule 12, the lower court erred in granting Respondents' Motions for Summary Judgment.

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

The lower Court dismissed Petitioner's Complaint by concluding that Petitioner failed to file his Complaint prior to the running of the applicable statute of limitations.

Petitioner complied with the requirements of the *Medical Professional Liability Act* (MPLA) – *West Virginia Code §55-7B-6* and thereafter timely filed his Complaint in accordance with the provisions of the *Medical Professional Liability Act* (MPLA) – *West Virginia Code §55-7B-6.*

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

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

In, H*inchman v. Gillette*, 217 W.Va. 278, 618 S.E.2d 387 and at Syl.Pt. 2, this Court stated that according to *West Virginia Code §55-7B-6*, the rationale "for requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making and filing of frivolous medical and malpractice claims and lawsuits: and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims." Further, '[t]he requirement of pre-suit notice of claim and screening certificate of merit is **not** [emphasis added] intended to restrict or deny citizens' access to the courts." Syl. Pt. 4 *Elmore v. Triad Hospitals, Inc.*, 220 W.Va. 154, 640 S.E.2d 217 (2006).

In a 2019 decision, the West Virginia Supreme Court emphasized the necessity to Comply with the pre-suit requirements of the MPLA as opined in *State ex rel. PrimeCare Med. of W. Va., Inc. v. Faircloth*, 835 S.E.2d 579, 584 n.4 (W. Va. 2019). The Court stated that:

a. The pre-suit notice requirements contained in the West Virginia Medical Professional Liability Act are jurisdictional, and failure to provide such notice deprives a circuit court of subject matter jurisdiction. [1]

b. "Where . . . alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of 'health care' as defined by W. Va.Code § 55–7B–2(e) (2006) (Supp.2007), the Act applies regardless of how the claims have been pled." Syl. Pt. 4, in part, *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007).

c. Pursuant to W. Va. Code § 55-7B-6(a) and (b) [2003], **no person** may file a medical professional liability action against any health care provider unless, at least thirty days prior to the filing of the action, he or she has served, by certified mail, return receipt requested, a notice of claim on

1. [1] The Court in *State ex rel. PrimeCare Med. of W. Va., Inc. v. Faircloth,* affirmed "the jurisdictional nature of MPLA pre-suit notice in *Keith v Lawrence*, No. 15-0223, 2015 WL 7628691 (W.Va. Nov. 20, 2015) (memorandum decision). The Court's decision and dismissal of the Plaintiff's Complaint was based upon whether the lower Court had subject matter jurisdiction and was not based upon the facts of the Plaintiff's Complaint.

> each health care provider the claimant will join in the litigation. (emphasis added)

Additionally, the Court in *Primecare* emphasized that "[t]he requirement of a pre-Suit Notice of claim and screening certificate of merit is not intended to restrict or deny citizens' access to the court." Syl.Pt.2, in part, *Hinchman*, 217 W.Va. 378, 618 S.E.2d 387."

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

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

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

The Court further held that:

> "...the Plaintiff must have been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies."
> Syl. Pt. 3 *Hinchman*

> "Any objections not specifically set forth in response are waived."
> Syl.Pt 5 *Hinchman.*

On January 22, 2020 and pursuant to W.Va. Code §55-7B-6, Plaintiff served a

Notice of Claim upon numerous medical professionals and medical entities. In Plaintiff's Notice of Claim, Plaintiff advised the professionals and entities that a Screening Certificate of Merit would be provided within 60 days. (0025-0026)

On March 23, 2020, Plaintiff served a Notice of Claim upon the medical professional medical entities advising that, due to the COVID-19 pandemic, their medical expert, Dr. Ranieri, who was involved in medical care during the pandemic, was unable to provide the Certificates of Merit at that time, and that the Screening Certificates of Merit would be provided at such time as the COVID-19 pandemic had abated. (0339-0400).

d. Actions Taken by the Defendant that Extended and Tolled the Statute of Limitations

Contrary to the lower Court's findings that "The Defendants did not respond to either of the Notices of Claim from William Sager dated January 22, 2020 and July 2, 2020," Respondents did respond to William Sager's notices of claim and Certificates of Merit and those actions extended and tolled the statute of limitations.

Upon receipt of the Certificates of Merit, Plaintiff served the Defendants with a revised Notice of Claim and the Certificates of Merit on July 2, 2020. (0027-0033). Thereafter, the parties began engaging in the expanded interplay during the pre-suit period of the MPLA regarding the sufficiency of the Certificates of Merit and requests for more definite statements.

In accordance with W.Va. Code §55-7B-6(i)(1), any applicable statute of limitation is tolled in order to permit compliance with the pre-suit notice requirements. On July 13, 2020, Defendants requested that Plaintiff provide them with copies of Plaintiff's medical records for their evaluation in furtherance of the pre-suit requirements of the MPLA. (0097-0099) and requested the Petitioner sign the attached Authorization allowing the Respondents to

obtain Petitioners' medical records stating that "without the benefit of reviewing all of Mr. Sager's records, it is not feasible to make a fully informed decision as to whether pre-litigation mediation would be desired and productive in this matter." Plaintiff responded to the Defendants' request on August 10, 2020, (0100) submitting medical records for Respondents' assessment, and supplemented its response on September 10, 2020, (0101).

Due to the Columbus holiday, Plaintiff's Complaint was timely filed in the Taylor County Circuit Court on October 13, 2020.

Petitioner timely served the Notice of Intent and Certificates of Merit and filed his Complaint within the statute of limitations period and in accordance with the provisions of the MPLA.

Per the requirements set forth in *Hinchman*, the Plaintiff is required to serve a Notice of Claim and a screening Certificate of Merit that **shall** be executed under oath by a **health care provider**.

Further, according to the West Virginia Supreme Court's ruling in *Primecare*, "...the statute could not be clearer: *'[N]o person may file* a medical professional liability action against a health care provider *without complying with the provisions of this section.* [i.e., W.Va. Code §55-7B-6]' (emphasis added)." The Court further stated "As we held in *Davis v. Mound View Health Care, Inc.,* 220 W.Va. 28, 32, 640 S.E.2d 91, 95 (2006), '[t]he provisions of W.Va. Code §55-7B-6(a) and (b), that no person may file a medical professional liability action against any health care provider unless, at least thirty days prior to the filing of the action, he or she has served, by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in the action.'"

According to *Hinchman* and *Primecare*, Plaintiff was prohibited from filing his claim until such time as the requisite Certificates of Merit were served upon the Defendants. Due to the COVID-19 pandemic, Plaintiff served the Certificates of Merit upon the Defendants when the Certificates were received by the health care professional.

"When a statute is clear and unambiguous and the legislative intent in 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." *State ex rel. Miller v. Stone*, 216 W.Va. 379, 383, 607 S.e.2d 485, 489, (2004) (citing Syl. Pt. 5, *State v. General Daniel Morgan Post No. 5, 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

Petitioner's Complaint is governed by the MPLA, and Petitioner is required to comply with the prerequisites of the MPLA before filing his Complaint.

The Petitioner acted in good faith to comply with the mandates and requirements of §55-7B-6. In *Elmore v. Triad Hospitals, Inc.*, 640 S.E.2d 217 (2006), the West Virginia Supreme Court concluded that there was "no reason to penalize [the Plaintiffs' with dismissal of [their] suit when the records fails to show that [they were] not acting in good faith or otherwise[were] neglecting to put forth a reasonable effort to further the statutory purposes." 640 s.E.2d at 223.

This Court expanded the interplay between parties during the pre-suit period, permitting a health care provider who believes the notice and/or certificate of merit to be defective to make "a written request to the claimant for a more definite statement of the notice of claim and screening certificate of merit."

Finally, the actions of the Respondents creates equitable estoppel and extends the statute of limitations. Regarding equitable estoppel, this Court has held:

> "[i]n 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"

Bradley v. Williams, 195 W.Va. 180, 465 S.E.2d 180, 184 (1995).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Honorable Court reverse the Circuit Court Taylor County's *Order Granting Defendants' Motions to Dismiss/Motions for Summary Judgment* and remand the case to the Circuit court for trial.

WILLIAM SAGER,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM SAGER,

Petitioner,

v.

No. 22-0158
(Lower Case No. 20-C-35)

DR. JOSEPH DUVERT,
TYGART VALLEY TOTAL CARE CLINIC, and
GRAFTON CITY HOSPITAL, INC.,
a West Virginia corporation,

Respondents.

CERTIFICATE OF SERVICE

I, Joseph H. Spano, Jr., counsel for Plaintiff, do hereby certify that service of the foregoing **Petitioner's Brief** in the above-styled case has been made upon the following:

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on this the 1st day of July, 2022, via first-class mail, postage prepaid.

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