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.

# PETITIONER'S REPLY BRIEF

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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### STATUTES

## STATEMENT OF THE CASE

Petitioner's brief has already set forth Petitioner's statement of the case and a summary of the claims, and Petitioner's counsel now submits this Reply Brief to respond to several of Respondent's arguments. Respondent's brief misses the mark and demonstrates a lack of understanding of the basis of the suit filed by the Petitioner and a lack of understanding of the discovery rule. The issue is not when Petitioner discovered he had an addiction. The issue is when Petitioner discovered the Defendants' negligence and malpractice.

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.

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".

## 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

### 1. Respondents' arguments that Petitioner has not made the requisite showing that there exists genuine issue of material fact misrepresents the Petitioner's position

Respondents argue in their brief that Respondent has not made the requisite showing that there exists genuine issue of material fact regarding Petitioner's knowledge of his addiction. That argument is a misrepresentation of the facts of the case. Both in the lower court below and herein, Respondents continue to argue that the deciding factor is when Petitioner knew of or discovered that he had an addiction to the controlled substances which is incorrect. 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 Defendants 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 Defendants.

At the time of Petitioner's participation in the in-house drug rehabilitation program and treatment with health care providers at the Cranberry Medical Center, Plaintiff did not know of the causal connection between his drug addiction and the **malpractice** of the Defendants. At that time, Plaintiff did not know that the controlled substances that had been prescribed by these Defendants **were not medically necessary** and the prolonged prescribing of the controlled substances was actually **malpractice**.

Petitioner has made the requisite showing that there does exist genuine issues of material fact with respect to when he knew or in the exercise of reasonable diligence had reason to know

that the Respondents' overprescribed and improperly prescribed vast amounts of controlled substances to him that were not medically necessary.

> "...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".**
> *Gaither v. City Hospital*, :487 S.E.2d 901 (1997) (Emphasis supplied.)

> "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."

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).

Petitioner has sufficiently pled and has substantiated his arguments to the extent to demonstrate that a genuine issue for trial exists and that the lower court erred in granting the Respondents' Motions for Summary Judgment and dismissing his complaint.

**A. Respondents' continue to incorrectly argue that Petitioner filed his Complaint after the expiration of the statute of limitations and that the Discovery Rule does not apply**

**Discovery Rule**

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 Respondents' 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.

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. It is of importance that Petitioner's counsel also requested records from Dr. Duvert on July 12, 2018 and did received records from Grafton 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.

Additionally, 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.**

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)

Respondents' reliance upon *Yuric v. Purdue Pharma, L.P.* and *Uhiren v. Bristol-Myers Squibb Co.*, is misplaced. Both of these cases were brought against the manufactures of the opioid medication and not against the physician who prescribed the medication. Again, Respondents continue incorrectly base their arguments solely on the addiction suffered by the Plaintiff. As stated above, even when prescribed properly, a patient may become addicted to opioid medication. However, and what the Respondents continue to ignore, is that the Respondents' negligently and improperly prescribed controlled substances to the Petitioner that were not medically necessary. The key component is the negligent and improper prescribing of controlled substances.

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) Petitioner Complied with the mandates and requirements of W.Va. Code §55-7B-6, et seq.**

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, *Hinchman 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).

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).

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 Repondents' 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.E2d at 223.

In *Adkins v. Clark*, this Court's analysis of the provisions of the MPLA which tolls the statute of limitations, and the time the thirty day clock for a Plaintiff to file his/her complaint begins, supports the fact that Plaintiff timely filed his Complaint consistent with the tolling provisions of West Virginia Code 55-7B-6(i)(1).

> "...most important for our purposes is subsection (i)(1), which addresses the tolling of the statute of limitations. and provides in relevant part:
>
> except as otherwise provided in this subsection, any statute of limitations applicable to a cause of action against a health care provider upon whom notice was served for alleged medical professional liability shall be tolled from the date of mail of a notice of claim to 30 days following receipt of a response to the notice of claim..."

A review of the timeline of the submissions of notices and responses, unequivocally establishes that Plaintiff timely filed his Complaint against these Defendants.

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

The Court further held that:

> "...the Plaintiff **must have been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies."**
> Syl. Pt. 3 *Hinchman* (emphasis added)
>
> "Any objections not specifically set forth in response are waived."
> Syl.Pt 5 *Hinchman.*

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."

## CONCLUSION

For the foregoing reasons. Petitioner respectfully requests that the Honorable Court grant his appeal, that the decision from the Circuit Court Taylor County's *Order Granting Defendants' Motions to Dismiss/Motions for Summary Judgment* be set aside, and that this matter be remanded the case to the Circuit court for trial.

**WILLIAM SAGER,**

By Counsel

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

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 Reply Brief** in the above-styled case has been made upon the following:

Brent P. Copenhaver, Esq.
Margaret L. Miner, Esq.
Linkous Law, PLLC
10 Cheat Landing, Suite 200
Morgantown, WV 26508

on this the 31st day of August, 2022, via first-class mail, postage prepaid.

*/s/ Joseph H. Spano, Jr.*

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