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

**BARBARA STINE TRIVETT, ADMINISTRATRIX OF THE ESTATE OF JASPER TRIVETT,**

**Plaintiff Below and Petitioner,**



**v.**

**Case No. 22-0202**
**(Circuit Court Case No. CC-45-2021-C-27)**

**SUMMERS COUNTY COMMISSION d/b/a SUMMERS COUNTY OFFICE OF EMERGENCY MANAGEMENT and CARMEN CALES,**

**Defendants Below and Respondents.**

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# BRIEF OF THE PETITIONER

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**BARBARA STINE TRIVETT, ADMINISTRATRIX OF THE ESTATE OF JASPER TRIVETT**
**By Counsel**

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3. **The Circuit Court committed clear legal error and abused its discretion when it determined that the statute of limitations was not tolled by the discovery rule pursuant to Dunn v. Rockwell, 225 W.Va. 43, 689 S.E.2d 255 (2009).**

## STATEMENT OF CASE

This matter is before the Court pursuant to the appeal of the Plaintiff Below and Petitioner herein, Barbara Trivett, who is prosecuting this action in her capacity as the Administratrix of the Estate of her infant son, Jasper Trivett. In this matter, Mrs. Trivett appeals the Order Granting Motion to Dismiss of Defendants Summers County Commission D/B/A Summers County Office of Emergency Management and Carmen Cales entered by the Circuit Court of Summers County in which the the Circuit Court dismissed various wrongful death claims that Mrs. Trivett brought on behalf of baby Jasper against the Summers County Commission, doing business as the Summers County Office of Emergency Services ("Summers County 911") and its employee, Carmen Cales. Because this matter is before the Court on an appeal from an Order granting a Motion to Dismiss, the factual allegations that must be considered by the Court are those contained in Mrs. Trivett's underlying Complaint. (See App., pp. 147-77.)

In the early morning hours of September 15, 2019, Mrs. Trivett, awoke to feed her infant son, Jasper Trivett, and discovered that baby Jasper was unresponsive. (See App.,

p. 150.) In a panic and not knowing what to do, Mrs. Trivett phoned Summers County 911 to seek medical assistance and ambulance transport for baby Jasper. (See App., pp. 151-52.) Mrs. Trivett's phone call to Summers County 911 was answered by its dispatcher, Carmen Cales, at approximately 4:18 a.m. (See id.) After nearly a minute, Ms. Cales attempted to contact the Defendant below, Summers County EMS, Inc. ("Summers County EMS").1 (See id.) After the first attempt to reach Summers County EMS was unsuccessful, Ms. Cales attempted to call Summers County EMS a second time. (See id.) The second attempt to reach Summers County EMS was likewise unsuccessful. (See id.)

Based upon Ms. Cales inability to reach Summers County EMS, Mrs. Trivett asked Ms. Cales to provide her with instructions for the proper administration of cardiopulmonary resuscitation ("CPR") on baby Jasper. (See App., pp. 151-53.) Ms. Cales advised Mrs. Trivett that Summers County 911 did not give directions on how to perform CPR. (See id.) Mrs. Trivett then inquired as to whether she should transport baby Jasper to the hospital herself and Ms. Cales told Mrs. Trivett that she should. (See id.) Before Mrs. Trivett hung up, Ms. Cales assured Mrs. Trivett that she would continue to try and reach Summers County EMS. (See id.) Mrs. Trivett's telephone call to Summers County 911 lasted for two minutes and twenty-one seconds. (See id.)

Relying on Ms. Cales's assurance that she would continue to try to reach Summers County EMS, Mrs. Trivett did not attempt to call Summers County EMS directly and did not try to contact anyone else to seek medical assistance for baby Jasper. (See

1 Although Summers County EMS and its employee, Jacob Woodrum, have jointly moved the Circuit Court to dismiss Mrs. Trivett's claims against them, the Circuit Court had not decided their Motion to Dismiss at the time of the filing of this appeal. The Circuit Court has stayed all further proceedings until this Court has resolved the instant appeal.

App., pp. 152-53.) Instead, she left her home and drove with baby Jasper to the emergency room at Summers County Appalachian Regional Hospital emergency room ("SCARH"). (See id.) During her drive to SCARH, Mrs. Trivett looked for, and expected to see, an ambulance that could provide life-saving medical care to baby Jasper during the trip to SCARH. (See id.)

Unbeknownst to the Plaintiff, Ms. Cales reached Summers County EMS immediately after hanging up with Mrs. Trivett. (See App., pp. 150-53.) Inexplicably, during that call, Ms. Cales instructed Summers County EMS that there was no reason for an ambulance to be sent to baby Jasper's residence and refused to give Summers County EMS Mrs. Trivett's address, even though Summers County EMS asked for the address twice. (See id.) Based upon the instructions given by Ms. Cales to Summers County EMS, no ambulance was dispatched to provide care for baby Jasper. (See id.)

By the time Mrs. Trivett arrived at SCARH, baby Jasper had been deprived of oxygen for in excess of nine minutes. (See App., 150-53, 163.) Of those nine minutes, more than two minutes was spent on the phone with Summers County 911 during the failed attempts to reach Summers County EMS. (See id.) Although he was initially revived at SCARH and flown to Ruby Memorial Hospital for additional medical treatment, baby Jasper suffered fatal brain damage as a result of the deprivation of oxygen during his transport to SCARH. (See id.) Baby Jasper died on September 17, 2019, two days after Mrs. Trivett's initial telephone call to Summers County 911. (See id.)

After baby Jasper's death, Mrs. Trivett obtained a copy of the 911 audio traffic related to her call to Summers County EMS on September 15, 2019. (See App, pp. 63-73.) Mrs. Trivett did not obtain the 911 audio traffic recordings until October 12, 2019.

(See App, pp. 102) While listening to the telephone conversations between Ms. Cales and Summers County EMS, Mrs. Trivett learned, for the first time, that Ms. Cales had instructed Summers County EMS not to send an ambulance to Mrs. Trivett's home to assist baby Jasper. (See id.) Based upon this new information, and prior to filing the underlying action, Mrs. Trivett retained a medical expert to examine the events surrounding her telephone call to Summers County 911 on September 15, 2019. (See App., pp. 37-48.) According to Mrs. Trivett's expert, both Summers County 911 and Summers County EMS deviated from the accepted standard of care that each entity owed to baby Jasper in providing emergency medical care. (See id.) Mrs. Trivett's expert further opined that these deviations from the accepted standard of care were the proximate cause of baby Jasper's death or, in the alternative, that these deviations deprived baby Jasper of a chance of survival that was greater than twenty-five (25) percent. (See id.)

On September 10, 2021, Mrs. Trivett, through counsel, served a Notice of Claim upon Summers County 911 and Carmen Cales in accordance with the West Virginia Medical Professional Liability Act ("MPLA"). Mrs. Trivett included, with her Screening Certificate of Merit, the following documents:

- A Screening Certificate of Merit Affidavit signed by Mrs. Trivett's expert;
- A copy of the baby Jasper's medical records from SCARH;
- A copy of the baby Jasper's medical records from Ruby Memorial Hospital;
- The West Virginia State Medical Examiner's investigation and autopsy report for baby Jasper;
- The preliminary and final death certificates for baby Jasper;
- Audio copies of all 911 audio traffic related to Mrs. Trivett's call to Summers County 911 on September 15, 2019;
- An affidavit signed by Mrs. Trivett setting forth the relevant facts; and
- A draft copy of the Complaint that Mrs. Trivett intended to file if the underlying Defendants chose not to mediate the her claims.

(See App. 1-48.) After none of the underlying Defendants provided Mrs. Trivett notice that they intended to exercise their right to pre-suit mediation under the MPLA, Mrs. Trivett filed her underlying Complaint on October 12, 2021. (See id.)

In her Complaint, Mrs. Trivett asserted four causes of actions against the underlying Defendants. (See App., pp. 147-77.) In the first two counts of her Complaint, Mrs. Trivett asserted that Summers County 911 and Summers County EMS negligently caused baby Jasper's death in the manner in which they responded to Mrs. Trivett's 911 call on September 15, 2019. (See id.) Counts III and IV of the Complaint alleged that Summers County 911 and Summers County EMS were vicariously liable for the negligent actions of Carmen Cales and Jacob Woodrum, respectively. (See id.)

Rather than answer Mrs. Trivett's Complaint, Summers County 911 and Ms. Cales moved the Circuit Court to dismiss the Complaint under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failing to state a claim upon which relief can be granted. (See App., pp. 181-201.) In their Motion, the Respondents argued that the Complaint should be dismissed for three reasons. (See id.) First, the Respondents claimed that Mrs. Trivett's claims were barred by the public duty doctrine. (See id.) Second, the Respondents were immune from suit under the Tort Claims Act. Finally, the Respondents argued that Mrs. Trivett's claims were barred by the applicable statute of limitations. (See id.)

After receiving a responsive brief from Mrs. Trivett and hearing oral argument on the Respondents' Motion to Dismiss, the Circuit Court entered its Order Granting Motion to Dismiss of Defendants Summers County Commission D/B/A Summers County Office of Emergency Management and Carmen Cales on February 17, 2022. (See App., pp.

309-318.) In its Order, the Circuit Court found that Mrs. Trivett's claims against the Respondents were governed by the Tort Claims Act and that those claims were filed outside of the applicable statute of limitations found within the Tort Claims Act. (See id.) Further, the Circuit Court found that the provisions of the MPLA did not apply to the Respondents because the Respondents were not "health care providers" or a "health care facility" within the meaning of the MPLA. (See id.) The Circuit Court reasoned that, because the MPLA did not apply to Mrs. Trivett's claims against the Respondents, the tolling provisions for the filing of claims contained within the MPLA did not apply to Mrs. Trivett's claims against the Respondents. (See id.) Finally, the Circuit Court determined that the statute of limitations for filing Mrs. Trivett's claims could not be tolled by operation of the discovery rule. It is from the Circuit Court's Order that Mrs. Trivett now appeals.

**SUMMARY OF ARGUMENT**

Mrs. Trivett is now before this Court asking that it reverse the Circuit Court's Order Granting Motion to Dismiss of Defendants Summers County Commission D/B/A Summers County Office of Emergency Management and Carmen Cales and remand this matter to the Circuit Court for the conduct of discovery and a Circuit on the merits of Mrs. Trivett's claims against the Respondents. In support of her appeal, Mrs. Trivett asserts three assignments of error to justify the reversal of the Circuit Court's Order. First, Mrs. Trivett asserts that the Circuit Court committed clear legal error and abused its discretion when it determined that her underlying Complaint was filed outside of the applicable statute of limitations set forth in the West Virginia Governmental Tort Claims and Insurance Reform Act. West Virginia Code § 29-12A-6(b) provides the appropriate period of limitation for the claims at issue in this case and explicitly provides that "[a]n action against a political subdivision to recover damages for ... death ... to a minor,

brought ... on behalf of a minor who was under the age of ten years at the time of such injury, shall be commenced within two years after the cause of action arose or after the ... death ... was discovered or reasonably should have been discovered, whichever last occurs, or prior to the minor's twelfth birthday, whichever provides the longer period."

Under the plain language of this statutory provision, Mrs. Trivett has until the time that baby Jasper would have reached the age of twelve years to file his claims against the Respondents. Because she filed her Complaint long before that date, Mrs. Trivett's claims are timely and should not have been dismissed by the Circuit Court. To justify its dismissal of Mrs. Trivett's Complaint, the Circuit Court added its own requirement, one not found within the meaning of the statute, to the plain language of West Virginia Code §29-12A-6(b) to require that baby Jasper live to the age of twelve years in order to derive the benefit of the statutory language. This Court has repeatedly held that such statutory interpretation is impermissible where the language of a statute is clear and unambiguous.

Further, even if the Court were to conclude that Mrs. Trivett's claims against the Respondents were filed outside the applicable time periods contained in the Tort Claims Act, those claims are likewise governed by the MPLA and were timely filed under that statute. Mrs. Trivett's claims against the Respondents are subject to the requirements of the MPLA because those claims fall within the definitions of health care and/or health care provider as well as within the definition of medical professional responsibility under the MPLA. Mrs. Trivett's claims raise issues of fact under the MPLA that must be resolved by the Circuit Court only after an appropriate period of discovery has been conducted.

Finally, the Circuit Court committed clear legal error and abused its discretion when it held that the applicable statute of limitations governing Mrs. Trivett's claims

against the Respondents was not tolled by the discovery rule announced by this Court in Dunn v. Rockwell. Mrs. Trivett did not discover the existence of her claims against the Respondent until she obtained a copy of the 911 audio recording from Summers County 911 and determined that the Respondents had negligently responded to her call to 911 on September 15, 2019. Mrs. Trivett filed her Complaint within two years of this discovery, making her claim timely under any applicable period of limitations to be applied by the Circuit Court. For all of these reasons, the Circuit Court's Order Granting Motion to Dismiss of Defendants Summers County Commission D/B/A Summers County Office of Emergency Management and Carmen Cales must be reversed by this Court and this matter remanded to the Circuit Court for the conduct of discovery and a Circuit on the merits of the underlying claims.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

After consideration of Rule 18(a) of the West Virginia Rules of Appellate Procedure, Mrs. Trivett does not believe that any of the factors set forth within that Rule are present to render oral argument unnecessary in this case. Mrs. Trivett believes that oral argument should be conducted in this matter in accordance with Rule 19 of the West Virginia Rules of Appellate Procedure based upon the fact that this case (1) presents assignments of error in the application of settled law; (2) presents claims of an unsustainable exercise of discretion by the Circuit Court where the law governing that discretion is settled; and (3) involves a narrow issue of law.

## ARGUMENT

### I. Standard of Review.

This matter is before the Court pursuant to Mrs. Trivett's appeal of the Circuit Court's Order Granting Motion to Dismiss of Defendants Summers County Commission

D/B/A Summers County Office of Emergency Management and Carmen Cales. The Circuit Court dismissed Mrs. Trivett's claims against Summers County 911 and Ms. Cales under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failure to state a claim upon which relief can be granted. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syl. pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). In Runyan, Justice Cleckley expounded further on the manner in which this Court must consider appeals where the underlying case was dismissed pursuant to a motion to dismiss:

> "Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure. The circuit court, viewing all the facts in a light most favorable to the nonmoving party, may grant the motion only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his[, her, or its] claim which would entitle him[, her, or it] to relief.' Indeed, Rule 8 of the Rules of Civil Procedure requires clarity but not detail. Specifically, Rule 8(a)(2) requires 'a short and plain statement of the claim showing that the pleader is entitled to relief[.]' In addition, Rule 8(e)(1) states, in part, that '[e]ach averment of a pleading shall be simple, concise, and direct.' The primary purpose of these provisions is rooted in fair notice. Under Rule 8, a complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is.
>
> Although entitlement to relief must be shown, a plaintiff is not required to set out facts upon which the claim is based. Nevertheless, despite the allowance in Rule 8(a) that the plaintiff's statement of the claim be 'short and plain,' a plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint[,]', or where the claim is not authorized by the laws of West Virginia. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits."

Id., 194 W.Va. at 776, 461 S.E.2d at 522 (citations omitted).

In the instant case, although the parties do not necessarily agree on the facts underlying Mrs. Trivett's claims, any such factual disputes are irrelevant because the Circuit Court, and this Court, are required to treat the Complaint's factual assertions as

true when considering the Respondents' Motion to Dismiss. See John W. Lodge Co., Inc. v. Texaco, Inc., 161 W.Va. 603, 605, 245 S.E.2d 157, 159 (1978). Because this Court's inquiry is strictly a matter of the application of legal principles to those factual allegations, this Court's power of interpretive scrutiny over the Circuit Court's Order is plenary. See Mildred L.M. v. John O.F., 192 W.Va. 345, 350, 452 S.E.2d 436, 441 (1994). Considering that this Court's review is de novo, "the findings of the [Circuit Court], although relevant, are not binding on this Court." Runyan, supra.

**II. The Circuit Court committed clear legal error and abused its discretion when it determined that the Petitioner's underlying Complaint was filed outside of the applicable statute of limitations set forth in the West Virginia Governmental Tort Claims and Insurance Reform Act.**

The Petitioner's underlying Complaint alleges, among other things, that her son, Jasper, suffered fatal injuries on September 15, 2019 as a result of the negligence of Summers County 911 and Carmen Cales. These claims are governed by the West Virginia Governmental Tort Claims and Insurance Reform Act ("Tort Claims Act"). The Circuit court abused its discretion and committed clear legal error when it ruled that Petitioner's negligence claims against Summers County 911 and Carmen Cales were filed outside of the applicable statute of limitations set forth in the Tort Claims Act. Although it is undisputed in the record that Petitioner's decedent (baby Jasper) was a minor child under the age of ten years at the time of his loss, the Circuit court erroneously determined that Petitioner's claims under the Tort Claims Act had to be brought within two years of Jasper's death and that the tolling provision set forth in §29-12A-6(b) of the Tort Reform Act does not apply to Petitioner's claims.

The West Virginia Tort Claims Act establishes the time period within which a party must file their claim when they have suffered an injury, loss or death due to the negligence

of a governmental agency or its employee. The Tort Claims Act establishes different time periods for filing when the injured person is an adult versus when the injured individual is a minor child. West Virginia Code §29-12A-6(a) creates a two year time period for an injured adult to file a claim against a governmental tortfeasor. If, however, the injured party is a minor child under the age of ten years, the period of limitation for filing is governed by West Virginia Code §29-12A-6(b) which provides the following:

> (b) An action against a political subdivision to recover damages for injury, death, or loss to a minor, brought by or on behalf of a minor who was under the age of ten years at the time of such injury, shall be commenced within two years after the cause of action arose or after the injury, death of loss was discovered or reasonably should have been discovered, whichever last occurs, or prior to the minor's twelfth birthday, whichever provides the longer period.

In the instant action, the decedent, Jasper Trivett, was a minor child under the age of ten years at the time he suffered fatal injuries that caused his death on September 15, 2019. Baby Jasper was born on August 9, 2019 and was less than two months of age at the time that he died on September 17, 2019. According to the underlying Complaint, Petitioner, who is baby Jasper's mother, awoke in the early morning hours of September 15, 2019 to find baby Jasper unresponsive. Petitioner phoned Summers County 911 and spoke to dispatcher Carmen Cales. Ms. Cales twice attempted during the phone call with Petitioner, without success, to contact Summers County EMS to arrange an ambulance transport and emergency medical assistance for baby Jasper.

After Ms. Cales was unable to reach Summers County EMS, Petitioner asked Ms. Cales for instructions on how to perform cardiopulmonary resuscitation (CPR) on baby Jasper. Ms. Cales informed Petitioner that Summers County 911 could not provide CPR instructions and agreed that Petitioner should transport baby Jasper to the hospital

herself while Ms. Cales continued to try to contact Summers County EMS on Petitioner's behalf. After ending the telephone call with Petitioner, Carmen Cales continued to attempt to contact Summers County EMS on Petitioner's behalf. As Petitioner was transporting baby Jasper to the hospital, Ms. Cales was able to immediately connect with Summers County EMS, but, inexplicably, instructed Summers County EMS that an ambulance was no longer necessary to assist baby Jasper. Baby Jasper was revived while at Summers County Appalachian Regional Hospital ("SCARH") and flown to Ruby Memorial Hospital where he died from his injuries two days later on September 17, 2019.

Petitioner, acting in her capacity as the Administratrix of baby Jasper's Estate, brought suit against Summers County 911 and Carmen Cales, individually, on October 12, 2021.2 In her Complaint, Petitioner alleges that Summers County 911 was liable for the negligent and tortious acts of its employee, Ms. Cales, in failing to provide CPR instructions and in failing to cause an ambulance to be dispatched to render medical aid to baby Jasper. In response to the Complaint, Summers County 911 and Carmen Cales moved the Circuit court to dismiss Petitioner's Complaint, asserting, among other arguments, that the Complaint was filed outside of the applicable statute of limitations.

On February 17, 2022, the Circuit court entered an Order granting the Motion to Dismiss filed by Summers County 911 and Carmen Cales. In its Order, the Circuit court agreed with the Respondents that Petitioner's Complaint was filed after the applicable statute of limitations. To support its conclusion, the Circuit court held as follows:

> 24. Claims filed within the framework of the GTCIRA are generally subject to a two year statute of limitations. W.Va. Code § 29-12A-6.

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2 Petitioner also named Summers County EMS and its employee, Jacob Woodrum, as Defendants in her Complaint.

25. Jasper's tragic death occurred on September 17, 2019. Thus, the Plaintiff had until September 17, 2021 to file a complaint alleging any claims against SCC or Ms. Cales. The Plaintiff's Complaint was filed on October 12, 2021, roughly twenty-five days after the close of the applicable filing window.

26. In her response, the Plaintiff asserts that the two-year statute of limitations should be extended, either due to the savings provision or the tolling provision of the GTCIRA statute of limitations.

*The savings provision of the GTCIRA statute of limitations does not apply.*

27. The Plaintiff first asserts that the savings provision, permitting the filing of GTCIRA actions on behalf of a minor so long as they are filed prior to the minor's twelfth birthday, stretches the statute of limitations in this case to August 9, 2031, what would have been the date of Jasper's twelfth birthday.

28. The savings provision reads in full:

> [a]n action against a political subdivision to recover damages for injury, death, or loss to a minor, brought by or on behalf of a minor who was under the age of ten years at the time of such injury, shall be commenced within two years after the cause of action arose or after the injury, death or loss was discovered or reasonably should have been discovered, whichever last occurs, or prior to the minor's twelfth birthday, whichever provides the longer period.
>
> W.Va. Code § 29-12A-6(b) (emphasis added).

29. Based upon a plain reading of the statute, the Court cannot conclude that the savings provision applies here, as Jasper regrettably will not have a twelfth birthday. Because Jasper passed before his twelfth birthday, no such birthday exists in the future to maintain the saving provision's applicability.

30. Courts that have likewise considered the application of savings provisions in such cases have generally concluded that they do not apply because children cease to have birthdays after they die. See

Gretchen R. Fuhr, Civil Procedure/Tort Law-Better Off Dead?: Minority Tolling Provision Cannot Save Deceased Child's Claim, 31 W. New Eng. L. Rev. 491, 533 n. 8 (2009) (citing *Randolph v. Methodist Hosps., Inc.*, 793 N.E.2d 231 (Ind. Ct. App. 2003); *Bailey v. Martz*, 488 N.E.2d 716 (Ind. Ct. App. 1986), superseded by statute, Ind. Code § 34-23-2-1 (2008), as recognized in *Ellenwine v. Fairley*, 846 N.E.2d 657 (Ind. 2006); *Joslyn v. Chang*, 837 N.E.2d 1107 (Mass. 2005); *Baker v. Binder*, 609 N.E.2d 1240 (Mass. App. Ct. 1993); *Regents of Univ. of N.M. v. Armijo*, 704 P.2d 428 (N.M. 1985); *Holt v. Lenko*, 791 A.2d 1212 (Pa. Super. Ct. 2002); *Campos v. Ysleta Gen. Hosp., Inc.*, 879 S.W.2d 67 (Tex. App. 1994)).

31. The savings provision inapplicable, the Plaintiff's claims against Defendants SCC and Cales must therefore have been filed within the two-year statute of limitations unless tolled by the discovery rule.

*The statute of limitations cannot be tolled here*

The Circuit court abused its discretion and committed clear legal error in its ruling in two distinct manners. First, the Circuit court failed to apply the clear and unambiguous language of West Virginia Code §29-12A-6(b), and instead attempted to interpret the meaning of the statute. Second, the Circuit court failed to recognize this Court's longstanding preference of affording the longest available period of time for filing the claims of minors.

**i. The Circuit Court abused its discretion and committed clear legal error when it construed the language of West Virginia Code §29-12A-6(b) rather than applying the clear and unambiguous language contained in the statute.**

Pursuant to the separation of powers doctrine, it is the province of the West Virginia Legislature to create law through the passage of statutes. It is the duty of the courts to apply these statutes, as written, to factual scenarios that are placed before the courts for determination. Courts are not permitted to change or alter the intent of the Legislature when making legal rulings. This Court has long acknowledged the

requirement that courts must defer rule-making authority to the Legislature. "Pursuant to our rules of statutory construction, '[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.'" State v. Ward, 858 S.E.2d 207 (W.Va. 2021) quoting Syl. pt. 2, Crockett v. Andrews, 153 W. Va. 714, 172 S.E.2d 384 (1970).

"In other words, 'if the legislative intent is clearly expressed in the statute, this Court is not at liberty to construe the statutory provision.'" Id., quoting Dan's Carworld, LLC v. Serian, 223 W. Va. 478, 484, 677 S.E.2d 914, 920 (2009). "When the legislative intent of a statute's terms is clear, we will ... not construe ... its plain language." Id., quoting Henry v. Benyo, 203 W. Va. 172, 177, 506 S.E.2d 615, 620 (1998). "As we have explained, '[a] statute [...] may not, under the guise of 'interpretation', be modified, revised, amended or rewritten." Id., quoting Syl. Pt. 1, Consumer Advocate Div. of Pub. Serv. Com'n v. Pub. Serv. Com'n., 182 W. Va. 152, 386 S.E.2d 650 (1989). "Moreover, '[i]t is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.'" Id., quoting Syl. Pt. 11, Brooke B. v. Ray, 230 W. Va. 355, 738 S.E.2d 21 (2013).

In the case sub judice, it is undisputed that baby Jasper was younger than age ten at the time Petitioner alleges that he was harmed by Summers County 911 and their employee, Carmen Cales. Because the Petitioner alleges in her Complaint that baby Jasper's death was caused, in part, by a governmental entity, the appropriate statute of limitations is set forth in West Virginia Code §29-12A-6(b). The Circuit court's Order dismissing Petitioner's underlying Complaint against Summers County 911 and Carmen

Cales begins its analysis with the application of §29-12A-6(b). When analyzing §29-12A-6(b), and its applicability to the facts of Petitioner's underlying Complaint, the Circuit court failed to apply the plain language of §29-12A-6(b). Stripped of its language that would be extraneous to the Circuit court's analysis, §29-12A-6(b) reads as follows:

> (b) **An action against a political subdivision to recover damages for** [...] **death** [...] **to a minor** [...] **who was under the age of ten years at the time of such injury, shall be commenced within two years** [...] **after the** [....] **death** [...] **or prior to the minor's twelfth birthday, whichever provides the longer period.**

The plain language contained in §29-12A-6(b) establishes that the statute of limitations is extended for those bringing an action on behalf of a minor who suffered an injury, a minor who suffered a loss or a minor who has died. Under each of these scenarios, the claim may be brought at any point in time prior to the date on which the minor would turn twelve years of age. The statute, as written, clearly expresses the intent of the Legislature to provide an extended time period for the claims of minors in all three classes – those who have suffered injury, loss or death. This intent is further substantiated by the additional language contained in the statute, "whichever provides the longer period."

Despite the clear and unambiguous language contained in §29-12A-6(b), the Circuit court failed to apply the statute as written and instead attempted to interpret the statute by adding new meaning to the phrase "the minor's twelfth birthday." The Circuit court reasoned that §29-12A-6(b) cannot operate to extend the time period for filing on behalf of a minor child who has died. The Circuit court explained that a minor child who passes away "will not have a twelfth birthday." Accordingly, the Circuit court held that "[b]ecause [baby] Jasper passed before his twelfth birthday, no such birthday exists in the

future to maintain the saving provision's applicability." In so holding, the Circuit court read into §29-12A-6(b) the additional requirement that the minor child must "live to attain" the age of twelve years old before that child's claims will be entitled to the extended time period for filing. This interpretation simply does not meet with the clear intent and clear language of the statute and constitutes an impermissible interpretation of statute. This Court explained in State v. Ward, supra, that "[a] statute [...] may not, under the guise of 'interpretation', be modified, revised, amended or rewritten." quoting Syl. Pt. 1, Consumer Advocate Div. of Pub. Serv. Com'n v. Pub. Serv. Com'n., 182 W. Va. 152, 386 S.E.2d 650 (1989).

Baby Jasper was born on August 9, 2019. It is therefore easily determined that baby Jasper's "twelfth birthday" will fall on August 9, 2031.3 August 9 will always remain baby Jasper's birthday, even though he has passed. It is a common occurrence that birthdays continue to be celebrated long after an individual has passed, such as Abraham Lincoln on February 12 or Jesus Christ on December 25. The reference to a minors twelfth birthday in §29-12A-6(b) has nothing to do with the minor child advancing another year in age or the celebration of the child's birth date. Rather, §29-12A-6(b) intends to use the twelfth birthday as a monument that can be used as a measuring stick for the passage of time.

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3 Despite the Circuit court's assertion that, because Japer Trivett passed before his twelfth birthday and therefore no such birthday exists in the future that could be used to calculate the statute of limitations if tolled, the court, in what seems to be a contradiction, was able to calculate and reference the exact date in the future, August 9, 2031, that would mark Jasper Trivett's twelfth birthday. Despite using language that suggests that this date was derived from Petitioner's argument, Petitioner had not referenced August 9, 2031 in any argument prior to the Circuit court's ruling. Accordingly, the Circuit court, in paragraph 27 of its Order, was able to calculate and reference a date that it, two paragraphs later, said could not be calculated because it "does not exist".

While aging, and sometimes birth date celebrations, may cease upon one's death, the ability to use a persons date of birth as a monument to measure time survives. The modern definition of time itself, and its measurement, is premised upon the birth of an individual who has been deceased for nearly two thousand years. It is commonly accepted and referred to that this is the year 2022, which signifies the two thousand and twenty second year after the accepted birthday for Jesus Christ on December 25 in the year zero. As proven by our modern concept of time, Jesus Christ did not cease having a birth date simply because he passed away and neither does Jasper Trivett.

By crafting its ruling to require that baby Jasper survive until his twelfth birthday, the Circuit court impermissibly eliminated language that the Legislature chose to include in §29-12A-6(b), while adding language that the Legislature chose not to include. The Circuit court could only reach its conclusion by eliminating the word "death" from §29-12A-6(b). The Legislature chose to include the term "death" twice in §29-12A-6(b) when defining what types of claims would be tolled for a minor under age ten. Without removing the term "death", there is no possible way for the Circuit court to reach its stated conclusion under a plain reading and application of the statute that explicitly extends the time period for filing claims for injury, loss **or death**. After eliminating the term "death" from the statute, the Circuit court next added an additional requirement that a minor child must survive long enough to attain age twelve before becoming entitled to the tolling provision set forth in §29-12A-6(b).

This Court has repeatedly held that "[i]t is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes

something the Legislature purposely omitted." State v. Ward, supra, quoting Syl. Pt. 11, Brooke B. v. Ray, 230 W. Va. 355, 738 S.E.2d 21 (2013). If the Legislature had intended a requirement that a minor child must survive to attain age twelve for the tolling provision to apply, it would have expressly included such a requirement.4 Because the Legislature chose to omit the requirement that a child must survive to attain age twelve, the Circuit court committed clear legal error and abused its discretion when it modified, amended and rewrote §29-12A-6(b) to include such a requirement.

In support of its ruling, the Circuit court made reference to a New England Law Review article authored in 2009. Because the legislative intent of §29-12A-6(b) is clear and because the language is unambiguous, the Circuit court was not permitted to rely upon the persuasive authority offered by a law review article from a foreign jurisdiction in an attempt to interpret the statute. Rather, the Circuit court was required to apply the clear language of §29-12A-6(b) to the undisputed facts of Petitioner's claims. The Circuit court abused its discretion and committed clear legal error when it failed to apply the clear language of §29-12A-6(b) and instead attempted to construe the meaning of the statute.

**ii. The Circuit Court abused its discretion and committed clear legal error when it failed to follow this Court's prior holdings which mandate that circuit courts apply the longest possible period of limitation for filing claims on behalf of a minor child.**

This Court has long held that claim's filed on behalf of a minor child will be afforded the longest applicable time period available for filing. Even in the face of legislative amendment, this Court has always looked for and given effect to whichever statute

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4 "In the interpretation of statutory provisions, the familiar maxim expressio unius est exclusio alterius, the express mention of one thing implies the exclusion of another, applies." Syllabus Point 6, Phillips v. Larry's Drive-in Pharmacy, Inc., 647 S.E.2d 920, 220 W.Va. 484 (W. Va. 2007), quoting Syllabus Point 3, Manchin v. Dunfee, 174 W.Va. 532, 327 S.E.2d 710 (1984).

provides the longest time period for filing a minor's claims. In Whitlow v. Board of Educ. of Kanawha County, 438 S.E.2d 15, 190 W.Va. 223 (1993), this Court was faced with competing statutes that set forth the time period for filing claims on behalf of a minor child. In Whitlow, the Court was asked to reconcile the competing time periods of limitation contained in §55-2-15 and §29-12A-6(b) for a minor child who was injured. In reconciling the two, this Court determined that the shortened filing period established in "West Virginia Code §29-12A-6(b) violates the Equal Protection Clause found in Section X of Article III of the West Virginia Constitution to the extent that it denies minors the benefit of the [much longer] statute of limitations provided in the general tolling statute, West Virginia Code §55-2-15."

In showing a clear preference for the longer filing period, the Whitlow Court announced that it was "unwilling to find a rational basis for the legislative reduction of the tolling period for minors [...]. Their rights to file suit are entrusted to a parent or guardian, who may also be a minor, or who may be ignorant or unconcerned, and who, by inaction, could cause the minor to lose the right to file a claim. To require a child of tender years to seek out another adult to vindicate the claim would [...] 'ignore the realities of the family unit and the limitations of youth.'" Id. quoting Strahler v. St. Luke's Hospital, 706 S.W.2d 7 (Mo. 1986).

When considering whether Petitioner's underlying Complaint was filed within the applicable statute of limitations, the Circuit court was required to analyze three separate statutes. First the Circuit court would start with consideration of the general statute of limitations for filing a wrongful death claim. West Virginia Code §55-7-6(d) provides the

general rule that "every such action shall be commenced within two years after the death of such deceased person."

Next, in light of the fact that the Plaintiff's decedent was a minor child, the Circuit court must consider the more specific rule set forth in West Virginia Code §55-2-15(b). Section 55-2-15(b) sets forth the time period for filing a claim for a person who is under a disability. Specifically, §55-2-15(b) states, in pertinent part, that "if any person to whom the right accrues to bring **any personal action** [...] shall be, at the time the same accrues, an infant [...] the same may be brought within the like number of years after his or her becoming of full age [...] that is allowed to a person having no such impediment to bring the same after the right accrues [...] except that it shall in no case be brought after 20 years from the time when the right accrues." Emphasis added. Under §55-2-15(b) an injured minor has until two years after reaching the age of eighteen to file their claims.

Finally, the Circuit court must then consider the time period for filing established in West Virginia Code §29-12A-6(b). Section 29-12A-6(b) is even more specific than §55-7-6(d) or §55-2-15(b), in that it deals with the factual scenario whereby a minor child has suffered injury, loss or death as a result of negligence attributable to a governmental entity. Under §29-12A-6(b), claims filed on behalf of a minor child, under the age of ten, who suffers injury, loss or death due to governmental negligence "shall be commenced within two years after the cause of action arose [...] or prior to the minor's twelfth birthday, whichever provides the longer period."

When faced with three competing statutes with different time periods for filing that cannot be reconciled, the Circuit court must apply the statute with the most specific language applicable to the facts of the case. "The general rule of statutory construction

requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. Pt. 1, Whitlow, supra, quoting Syl. Pt. 1, UMWA by Trumka v. Kingdon, 174 W.Va. 330, 325 S.E.2d 120 (1984). In the matter before the Court, §29-12A-6(b) is the statute that is most specific in relation to the facts alleged in Petitioner's underlying Complaint.

While §55-2-15(b) appears to provide a longer time period for the filing of claims on behalf of a minor child who is injured, it is unclear on the face of that statute whether the Legislature intended §55-2-15(b) to supercede the general wrongful death statute of limitations found in §55-7-6(d). While an argument can be made that the tolling provision contained in §55-2-15(b) applies to wrongful death claims of minors because the language of §55-2-15(b) explicitly states that it applies to "any personal action" on behalf of a minor, that statute does not specifically reference death claims. The specific language contained in §29-12A-6(b) eliminates this confusion when a governmental entity is alleged to be at fault. By expressly including the term death in §29-12A-6(b), the Legislature eliminated any ambiguity that might exist in the language of §55-2-15(b). Whereas this Court found in Whitlow that §29-12-6(b) cannot operate to shorten the statute of limitations embodied in §55-2-15(b) for injury claims, here §29-12A-6(b) operates to extend the general statute of limitations for death claims set forth in §55-7-6(d). This extension of the statute of limitations is precisely what the Court in Whitlow wanted to achieve.

Here, the Circuit court correctly settled upon §29-12A-6(b) as the controlling statute to establish the time period under which the Petitioner must file her claims against Summers County 911. Despite identifying the correct statute to apply, the Circuit court

then erroneously interpreted the clear language contained within the statute to restrict the time period to two years from the date of baby Jasper's death. In so interpreting §29-12A-6(b), the Circuit court improperly omitted specific language that the legislature intended to be part of the statute. In addition, the Circuit court added an additional requisite that was omitted by the legislature, that the minor child must live to attain age twelve. Finally, the Circuit court ignored this Court's long-standing precedent that a minor child be afforded the longest available time period for filing their claims. This Court in Whitlow, supra, made clear that it is the policy of this Court to favor the longer time period for filing a minor's claims when faced with competing time periods. This sentiment is echoed by the Legislature in the language "whichever provides the longer period" contained in §29-12A-6(b).

Petitioner's claims made on behalf of her infant son, baby Jasper, could have been filed at any point prior to August 9, 2031, the date of Jasper Trivett's twelfth birthday. If §29-12A-6(b) is found to not apply, Petitioner would have until two years after the date that baby Jasper would have reached the age of majority. Under an application of either statute, the Circuit court committed clear legal error and abused its discretion when it dismissed Petitioner's claims as being untimely filed.

**III. The Circuit Court committed clear legal error and abused its discretion when it determined that the Petitioner's underlying Complaint was filed outside of the applicable statute of limitations set forth in the West Virginia Medical Professional Liability Act.**

In addition to her claims under the Tort Claims Act, the Petitioner's underlying Complaint also includes claims against Summers County 911 and Carmen Cales under the West Virginia Medical Professional Liability Act (MPLA). To comply with the mandates of West Virginia Code §55-7B-6, the Petitioner obtained a screening certificate

of merit and served a Notice of Claim upon Summers County 911 and Carmen Cales on September 10, 2021, well before the two year anniversary of Petitioner's decedent's death. The Notice of Claim provided 30 days for the Respondents to assert their right to pre-suit mediation pursuant to West Virginia Code §55-7B-6. When Respondents failed to reply to the Notice of Claim within the allotted time, Petitioner filed her Complaint on October 12, 2021.

Because Petitioner's claims fall under the MPLA, the statute of limitations period for Petitioner to file her claims against the Respondents was tolled by operation of §55-7B-6(i)(1) for an additional sixty days after her Notice of Claim was served on September 10, 2021. This means that Petitioner had at least until approximately November 10, 2021 to file her civil Complaint within the statute of limitations applicable to claims under the MPLA. Petitioner filed her Complaint on October 12, 2021, well within the appropriate time frame under the MPLA §55-7B-6(i)(1).

In its Order granting the Motion to Dismiss filed by Summers County 911 and Carmen Cales, the Circuit court erroneously determined that Petitioner's claims were not subject to the MPLA and that the tolling provision contained in West Virginia Code § 55-7B-6(i)(1) was, therefore, not applicable to the Petitioner's Complaint. In reaching its conclusion, the Circuit court held that neither Summers County 911 nor Carmen Cales fall within the definition of a "Health Care Facility" or "Health Care Provider" as defined by the MPLA. While the Petitioner concedes that Respondents may not fall within the definition of a "Health Care Facility", the Circuit court failed to properly apply the definitions of "Health Care" found in §55-7B-2(e), "Health Care Provider" contained in §55-7B-2(g), and "Medical Professional Liability" set forth in §55-7B-2(i).

West Virginia Code §55-7B-2(e)(2) defines, in pertinent part, "Health Care" in the following manner:

> "Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider [...] for, to or on behalf of a patient during the patient's medical care [or] treatment [...], including, but not limited to [...] medical transport."

Unquestionably, the definition of "Health Care" includes both medical treatment and medical transports that were either provided or that should have been provided by a "Health Care Provider." The question then becomes, do Respondents meet the definition of "Health Care Provider" as related to medical treatment and/or medical transports.

West Virginia Code §55-7B-2(g) defines, in pertinent part, "Health Care Provider" as follows:

> "Health care provider" means a person, partnership, corporation, professional limited liability company, health care facility, entity or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, [...] emergency medical service personnel, emergency medical services authority or agency, [...] any person taking actions or providing service or treatment pursuant to or in furtherance of a [...] medical diagnosis or treatment; or an officer, employee or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment." Emphasis added.

Whether Summers County 911 and Carmen Cales fall into the definition of "Health Care Provider" while acting as an "emergency medical services authority or agency" or as an agent of an "emergency medical services authority or agency" or an agent of "emergency medical service personnel" is a question of fact that cannot and should not be determined by a Circuit court upon a motion to dismiss without the benefit of further factual development through discovery. Likewise, whether Summers County 911 and Carmen

Cales fall into another related category envisioned by the "including, but not limited to" clause is a question of fact for jury determination as well.

Finally, West Virginia Code §55-7B-2(i) defines, in pertinent part, "Medical Professional Liability" in the following manner:

> "Medical professional liability" means **any liability** for damages resulting from the death or injury of a person **for any tort** [...] **based on health care services** rendered, or **which should have been rendered**, by a health care provider or health care facility to a patient. **It also means other claims that may be contemporaneous to or related to the alleged tort** [...] or otherwise provided, **all in the context of rendering health care services**." Emphasis added.

The broadened definition of "Medical Professional Liability" contained in §55-7B-2(i) eliminates any remaining question regarding whether Petitioner's claims against Respondents fall within the purview of the MPLA. Whether the Respondents' actions alone meet with the definitions of "Health Care" or "Health Care Provider" is a question of fact for jury determination. However, even if those actions are determined to fall short of the statutory definitions for "Health Care" or "Health Care Provider", Petitioner's claims still meet the definition of "Medical Professional Liability" as a matter of law because the claims are contemporaneous and related to an alleged tort within the context of rendering health care services.

**i. Petitioner's claims against the Respondent's are subject to the requirements of the Medical Professional Liability Act (MPLA) because those claims fall within the definitions of Health Care and/or Health Care Provider.**

In her civil Complaint below, Petitioner set forth two distinct allegations against the Respondents, Summers County 911 and Carmen Cales, under the West Virginia Medical Professional Liability Act. First, Petitioner alleges that Carmen Cales, acting within the

scope of her employment by Summers County 911, was asked by Petitioner for help and instructions for performing CPR on her son, baby Jasper. Carmen Cales refused to provide instructions and informed Petitioner that 911 does not give instructions for CPR. According to the screening certificate of merit authored by Petitioner's Expert, and echoed throughout Petitioner's underlying Complaint, Carmen Cales' refusal to provide CPR instructions amounted to a failure to render medical care "that should have been rendered". This refusal to provide medical care that should have been provided meets with the definitions of both "Health Care" and "Health Care Provider" under the MPLA.

Although West Virginia Code §24-6-5(e)(2) was not yet applicable to require Summers County 911 and Carmen Cales to be certified in providing telephonic CPR instructions, Petitioner's medical expert opined that there was an existing national standard of care that required 911 call takers to provide telephonic CPR instructions. The statutory embodiment of the national standard of care does not operate to relieve Summers County 911 or Carmen Cales from the standard that already existed, but was not yet codified. Petitioner's claims allege that Carmen Cales and Summers County 911 breached the applicable standard of care that required them to provide CPR instructions to Petitioner on September 15, 2019. At best, the legislative embodiment of the national standard and the timing of the legislative mandate as it applies to Respondents would create a question of fact that cannot be determined as a matter of law upon a motion to dismiss.

Petitioner next alleged that Respondents violated the MPLA and applicable standards of care when Carmen Cales, acting within the scope of her employment with Summers County 911, failed to cause an ambulance to be dispatched by Summers

County EMS. Petitioner's expert opined that Carmen Cales' failure to dispatch an ambulance to assist Petitioner and her dying son was a denial of emergency medical services that constitutes a medical diagnosis. When Carmen Cales was asked by Summers County EMS for the address so that an ambulance could be dispatched, Carmen Cales responded that Petitioner's son no longer needed an ambulance to assist him because Petitioner was transporting him on her own. Whether she possessed the requisite training to do so, Carmen Cales, in that moment, medically diagnosed the needs of Petitioner's son and that diagnosis prevented Petitioner's son from obtaining earlier medical intervention and care that could have saved his life. According to Petitioner's expert, this denial of emergency medical services and diagnosis meets the definition of "Health Care" and "Health Care Provider" as set forth in the MPLA.

The Circuit court committed clear legal error and abused its discretion when it determined, as a matter of law, that the MPLA does not apply to Petitioner's claims against Respondents.

**ii. Even if the trier of fact should determine that Petitioner's claims against Respondents below do not fall within the definitions of Health Care and/or Health Care Provider, Petitioner's claims still fall within the definition of Medical Professional Responsibility under the MPLA.**

In 2015, the West Virginia Legislature amended the MPLA and its definitions in an attempt to broaden the scope and application of medical professional liability. These amendments were, in part, the legislative response to this Court's holding in Manor Care Inc. v. Douglas, 234 W.Va. 57, 763 S.E.2d 73 (2014). This Court expressly recognized the Legislature's intent of the 2015 amendments and the impact those amendments have in broadening the scope of the MPLA in State v. Scott, 866 S.E.2d 350 (W.Va. 2021). In Scott, this Court stated that:

"[t]he 2015 amendments [...] expanded the definition of 'medical professional liability.' The prior definition of 'medical professional liability' was 'any liability for damages resulting from the death or injury of a person for any tort [...] based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient.' W. Va. Code § 55-7B-2(i) (eff. 2006). The 2015 amendment added the following sentence to the definition of 'medical professional liability': 'It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.' W. Va. Code § 55-7B-2(i) (eff. 2015) (emphasis added). This addition to 'medical professional liability' combined with the broadened definition of 'health care,' expanded what services, and therefore what claims, are included in the definition of 'medical professional liability.' All of these changes illustrate the Legislature's intent for the MPLA to broadly apply to services encompassing patient care—not just the care itself. [...] One would be remiss to ignore the legislative pathway of the MPLA. As stated above, 'medical professional liability' no longer encompasses only health care services rendered or that should have been rendered. It also includes 'other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.' W. Va. Code § 55-7B-2(i) (emphasis added)."

In noting the "changing landscape" of medical malpractice, the Scott Court observed that:

"Now, when a complaint contains a cause of action that meets the definition of 'health care' under West Virginia Code section 55-7B-2(e), claims that are either 'related to' or 'contemporaneous to' the medical injury being asserted, 'all in the context of rendering health care services,' meet the definition, and are encompassed in 'medical professional liability' as it is defined in West Virginia Code section 55-7B-2(i). The 'health care' claim is the 'anchor;' it gets you in the door of MPLA application to allow for inclusion of claims that are 'contemporaneous to or related to' that claim, but still must be in the overall context of rendering health care services. It is not a broad stroke application that because a claim is contemporaneous to or related to health care that it falls under the MPLA. To put a finer point on it, you must have the anchor claim (fitting the definition of 'health care') and then make the showing that the ancillary claims are (1) contemporaneous with or

related to that anchor claim; and (2) despite being ancillary, are still in the context of rendering health care."

It is undisputed that Petitioner's underlying Complaint asserts claims against Summers County EMS, and Jacob Woodrum that are properly asserted under the MPLA. These claims against Summers County EMS and Jacob Woodrum provide the "anchor" as explained by the Court in Scott. There can be no dispute that the Petitioner's claims against Summers County 911 and Carmen Cales are contemporaneous to Petitioner's claims against Summers County EMS and Jacob Woodrum inasmuch as all of Petitioner's claims center upon a series of five (5) telephone calls made between the Petitioner and Summers County 911 and between Summers County 911 and Summers County EMS all within the course of less than three (3) hours on the morning of September 15, 2019.

Likewise, there can be no dispute that Petitioner's claims against Summers County 911 and Carmen Cales are within the context of rendering or failure to render medical care to Petitioner's decedent. When Petitioner phoned Summers County 911 in the early morning hours of September 15, 2019, she was experiencing a medical emergency and made the phone call to Summers County 911 to obtain medical assistance. Summers County 911 was not called upon to render assistance for police or fire or any other emergency, it was called upon to render assistance for a medical emergency.

At the point that Summers County 911 employee Carmen Cales finally spoke with Summers County EMS, a determination was made regarding what medical assistance would, or would not, be provided to Petitioner's decedent. Petitioner's claim that Summers County 911 and Carmen Cales owed a duty to cause an ambulance to be dispatched is within the context of Petitioner's claims against Summers County EMS for

its failure to provide medical assistance. The two claims are inextricably intertwined and fall within the scope of the amended definition of "Medical Professional Liability."

Because Petitioner's underlying Complaint properly asserts a claim against the Respondent's under the MPLA, and because Petitioner complied with the pre-suit mandates of §55-7B-6, the statute of limitations for Petitioner to file her claims was tolled under §55-7B-6(i). Having served the Respondent's with a proper Notice of Claim and screening certificate of merit on September 10, 2021, Petitioner had at least until November 10, 2021 to file her civil Complaint within the tolling provision contained in §55-7B-6(i). Petitioner's underlying Complaint was filed on October 12, 2021 and was, therefore, filed within the appropriate time period and the Circuit court's dismissal is an abuse of its discretion and constitutes clear legal error.5

## IV. The Circuit Court committed clear legal error and abused its discretion when it determined that the statute of limitations was not tolled by the discovery rule pursuant to Dunn v. Rockwell.

Syllabus Point 5 of Dunn v. Rockwell, 225 W.Va. 43, 689 S.E.2d 255 (2009) provides a framework for the determination of whether an action is time-barred. The framework can be summarized in the following steps:

1. Determination of the applicable statute of limitations;
2. Identification of when the requisite elements of the cause of action occurred;
3. Application of the discovery rule;

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5 Perhaps there is no stronger proof that the holding of this Court in Scott mandates that Petitioner's claims constitute "professional medical liability' and must therefore be filed under the pre-suit requirements of the MPLA, than the fact that, if Petitioner had not obtained a screening certificate of merit and served Summers County 911 and Carmen Cales with a Notice of Claim, these same Respondents would have cited this Court's holding in Scott to seek dismissal of Petitioner's Complaint for failure to meet the requirements of the MPLA.

4. If the discovery rule is not applicable, determination of whether the defendant engaged in fraudulent concealment; and,
5. If there is no fraudulent concealment, determination of whether some other tolling doctrine applies.

"Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact." Id.

The Circuit court completed step one when it properly determined that §29-12A-6(b) sets forth the statute of limitations applicable to Petitioner's underlying Complaint. The Circuit court next determined that no material facts existed regarding when the requisite elements of Petitioner's underlying Complaint occurred. Next, the Circuit court erroneously rejected application of the discovery rule despite the existence of a factual dispute regarding when the Petitioner knew or should have known about the elements of her claim. The Circuit court next found that no material dispute exists that would suggest that Summers County 911 fraudulently concealed any fact from Plaintiff. Finally, as stated more fully hereinabove, the Circuit court erroneously determined that the tolling provision contained in §29-12A-6(b) does not apply.

The Circuit court committed clear legal error and abused its discretion when it improperly invaded the province of the trier of fact by making factual determinations in relation to the application of the discovery rule. The Circuit court made factual determinations regarding material facts that are in dispute in regards to the discovery rule as well as factual determinations regarding questions of fact that have not yet been developed through discovery. Any determination made by the Circuit court based on

facts that have not been fully developed through discovery is precipitous and premature. See Dailey v. Ayers Land Dev., LLC, 825 S.E.2d 351 (W. Va. 2019), Powderidge Unit Owners Ass'n v. Highland Props.,Ltd., 196 W.Va. 692, 701, 474 S.E.2d 872, 881 (1996); Williams v. Precision Coil , Inc., 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995).

In her reply to Respondent's underlying Motion to Dismiss, Petitioner pointed out facts that suggest the statute of limitations was tolled for filing her claims pursuant to the discovery rule. Under this Court's holding in Dunn, the Circuit court must look to "determin[e] when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action." If, during this analysis, the Circuit court determines that there are factual disputes that are material to the determination of when the Petitioner knew or should have known of the elements of her claim, that question should be left for determination by the trier of fact.

The facts as alleged in Petitioner's underlying Complaint that are relative to the discovery rule analysis are largely undisputed. The Petitioner discovered her son, baby Jasper, unresponsive in the early morning hours of September 15, 2019. The Petitioner immediately phoned 911 for help. Once the Petitioner connected with Summers County 911, dispatcher Carmen Cales attempted to call Summers County EMS to have an ambulance dispatched to the Petitioner's location. With Petitioner still on the phone, Carmen Cales twice attempted to reach Summers County EMS without success. The Petitioner asked Carmen Cales if she should transport baby Jasper to the hospital herself and Cales instructed the Petitioner to transport baby Jasper to the hospital while Cales continued to try and reach Summers County EMS on the Petitioner's behalf.

Unbeknownst to the Petitioner, Carmen Cales was able to reach Summers County EMS immediately after hanging up with the Petitioner. Inexplicably, Carmen Cales did not ask that an ambulance be dispatched to assist the Petitioner and baby Jasper. By the time the Petitioner arrived at the hospital, baby Jasper had suffered irreparable brain damage from a lack of oxygen. Baby Jasper died two days later, on September 17, 2019. Because Petitioner was not a party to this communication, she was unaware that Ms. Cales was able to reach Summers County EMS, and the fact that Ms. Cales instructed Summers County EMS to stand down.

On the morning of September 15, 2019, while at the hospital, the Petitioner spoke with Summers County EMS employee Jacob Woodrum, who told the Petitioner that he had been praying every since he found out about her son. Days later, the Petitioner reflected upon the statement made to her by Jacob Woodrum and became confused. The Petitioner had assumed that, since no ambulance intercepted her on the way to the hospital on September 15, Summers County 911 and Carmen Cales were unable to reach anyone at Summers County EMS after the conversation with the Petitioner.

The Petitioner contacted Jacob Woodrum on September 25, 2019 to inquire exactly when he first found out about the circumstances surrounding baby Jasper's death, explaining that she thought that Summers County 911 had not been able to reach Summers County EMS on September 15. Jacob Woodrum replied that he was not comfortable having a conversation on the topic. Up to this moment, Petitioner had no reason to know that Carmen Cales had ever established contact with Summers County EMS on the morning of September 15, 2019. In fact, because no ambulance ever responded to intercept the Petitioner during her drive to the hospital, she understandably

assumed that Ms. Cales was unsuccessful in her continued efforts to reach Summers County EMS, just as she had been during her earlier attempts.

Unsatisfied with the lack of cooperation by Jacob Woodrum, Petitioner hired counsel who sent a Freedom Of Information Act (FOIA) request, which sought disclosure and production of the 911 audio recordings. The Petitioner, by and through her counsel, received the 911 audio recordings on October 14, 2019. For the first time, following the receipt of the 911 audio recordings on October 14, 2019, the Petitioner discovered that Summers County 911 and Carmen Cales had negligently declined to send an ambulance to assist baby Jasper.

The basis for Petitioner's claims against Summers County 911 and Carmen Cales rests upon the decision of Carmen Cales to not send an ambulance to aid Petitioner and her dying son. Petitioner did not know, and could not know, the factual basis for her claims prior to October 14, 2021. Accordingly, pursuant to the discovery rule annunciated in Dunn, Petitioner's statute of limitations would be extended at least until the two year anniversary of the date that she discovered all of the essential elements of her claims against Respondents. This means that Petitioner would have had at least until October 14, 2021 to file her claims within the applicable time period. Petitioner filed her claims on October 12, 2021.

Despite the fact that the Petitioner could not have known that she had a viable claim against the Respondents until the discovery of the 911 audio on October 14, 2021, the Circuit court erroneously determined that Petitioner was not entitled to application of the discovery rule. In its ruling, the Circuit court stated the following:

35. The Plaintiff argues that the statute of limitations began to run, not when she became aware of Jasper's passing, but from the moment she discovered the

conversations between Ms. Cales and Mr. Woodrum. While the contents of that conversation may have provided the Plaintiff with a legal basis for this action, she nevertheless became aware of the factual basis on September 17, 2019. That moment triggered the statute of limitations.

36. Accordingly, the Court CONCLUDES that the Plaintiff's claims against Defendants SCC and Cales were filed outside the GTCIRA statute of limitations and are therefore untimely. They must be DISMISSED, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

The Circuit court's ruling erroneously misinterprets this Court's holding in Dunn and, more specifically, misinterprets the meanings of "factual basis" and "legal basis" as announced in Dunn.

In Syllabus Points 3 and 4 of Dunn, this Court clarified the definition of the discovery rule to be applied in all cases moving forward in the following manner:

> "In tort actions, [...] 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."

Id. at Syllabus Point 3, quoting, Syllabus Point 4, Gaither v. City Hosp., Inc., 199 W.Va. 706, 487 S.E.2d 901 (1997).

> "Under the discovery rule set forth in Syllabus Point 4 of Gaither v. City Hosp., Inc., [...] whether a plaintiff "knows of" or "discovered" a cause of action is an objective test. **The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action.**" Id. at Syllabus Point 4. Emphasis added.

Dunn further extrapolated on what it meant by discovering "the elements" of the possible cause of action. "This articulation of the discovery rule 'tolls the statute of

limitations until a plaintiff, acting as a reasonable, diligent person, discovers the essential elements of a possible cause of action, that is, discovers duty, breach, causation and injury.'" Based upon the definition stated in Dunn, the "factual basis" for a potential claim includes the discovery of all of the essential elements of the claim. This means that the "factual basis" used to determine the Petitioner's statute of limitations in the underlying case includes when the Petitioner knew or should have known that Carmen Cales, acting on behalf of 911, breached the duty she owed to dispatch an ambulance to aid Petitioner and her son. Petitioner did not and could not discover that Carmen Cales breached the duty she owed to Petitioner until receipt of the 911 audio on October 14, 2019.

The Circuit court, in its ruling, at paragraph 35 found that the "factual basis" for Petitioner's claims was the moment that her son, baby Jasper died. The Circuit court erroneously held that the Petitioner's discovery of the conversations between Carmen Cales and Summers County EMS constituted the "legal basis" for Petitioner's claims and was therefore not relevant to the discovery rule analysis. When applying the definitions of "legal basis" and "factual basis" that are set forth in Dunn, it appears that the Circuit court erroneously reversed the two definitions. Because the conversations between Carmen Cales and Summers County EMS establish the breach of the duty owed to Petitioner, those conversations are part of the essential elements of Petitioner's claims and form the "factual basis" for Petitioner's claims. Baby Jasper's death merely constitutes the "legal basis" for Petitioner's claims.

Because the discovery rule applies to the moment an individual first discovers the "factual basis" for their potential claims, the discovery rule applies here to the moment that Petitioner discovered the conversations between Carmen Cales and Summers

County EMS. Petitioner discovered these facts on October 14, 2019, thereby extending her statute of limitations to at least October 14, 2021 through operation of the discovery rule. Because Petitioner filed her claims on October 12, 2021, her claims were timely filed. The Circuit court abused its discretion and committed clear legal error when it determined that the discovery rule does not apply to extend Petitioner's statute of limitations.

## CONCLUSION

The Circuit court abused its discretion and committed clear legal error when it dismissed Petitioner's claims against Respondents after determining Petitioner's claims were filed outside of the applicable statute of limitations. In arriving upon its conclusion that Petitioner's claims were time barred, the Circuit court erroneously rejected three distinct authorities that establish that Petitioner's claims were filed within the appropriate statute of limitations.

First, the Circuit court erroneously concluded that the tolling provision contained in §29-12A-6(b) of the Tort Claims Act does not apply to claims filed on behalf of a minor child who has died. Despite the clear and unambiguous language contained in §29-12A-6(b), the Circuit court impermissibly attempted to construe the meaning of that statute and settled upon an interpretation that violates the clear intention of the Legislature to extend the time period to file claims on behalf of minor children who have suffered injury, loss, or death. Under an application of the clear and unambiguous terms of §29-12A-6(b), Petitioner had until August 9, 2031 to file her claims against Respondents. Because Petitioner filed her claims against Respondents on October 12, 2021, Petitioner's claims were timely filed.

Second, the Circuit court erroneously concluded that Petitioner's claims against the Respondents are not entitled to the tolling provision contained in §55-7B-6(i)(1) of the Medical Professional Liability Act. The Circuit court erroneously determined that Petitioner's claims against the Respondents do not fall within the definitions of "Health Care" or "Health Care Provider" as set forth in §55-7B-2(e)(2) and §55-7B-2(g), respectively. Moreover, the Circuit court erroneously failed to consider the definition of "Medical Professional Responsibility" as set forth in §55-7B-2(i).

Whether Petitioner's claims against Respondents fall into the definitions of "Health Care" or "Health Care Provider" is a question of fact that cannot be determined by the Circuit court upon a motion to dsmiss. Petitioner's claims against Respondents included a screening certificate of merit authored by Petitioner's medical expert that opined that Summers County 911 employee Carmen Cales' refusal to provide CPR instructions and failure to dispatch an ambulance constituted a denial of medical care and rendering a medical diagnosis. This screening certificate of merit creates a question of fact as to whether Carmen Cales and Summers County 911 fall into the definition of "Health Care Provider" who provided, or failed to provide, necessary "Health Care".

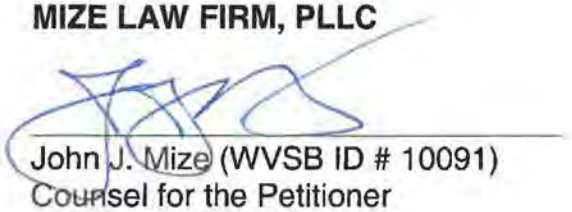
Finally, this Court's holding in Scott, supra, clearly establishes that the definition of "Medical Professional Responsibility" includes claims that are contemporaneous or related to medical malpractice claims, all within the context of providing medical care. Because Petitioner's claims against Respondents are included in the definitions of "Health Care", "Health Care Provider" and "Medical Professional Responsibility" and because Petitioner complied with the pre-suit requirements contained in §55-7B-6, Petitioner's claims could be filed at any point prior to sixty days after service of Petitioner's

Notice of Claim on Respondents under §55-7B-6(i)(1). Petitioner served her Notice of Claim on Respondents on September 10, 2021. This means that Petitioner had until approximately November 10, 2021 to file her claims against Respondents under the tolling provision included in §55-7B-6(i)(1). Because Petitioner filed her claims against Respondents on October 12, 2021, Petitioner's claims were timely filed.

Third, the Circuit court erroneously concluded that the time period for filing Petitioner's claims against the Respondents was not tolled by operation of the discovery rule. In Dunn, supra, this Court held that the statute of limitations for filing claims does not begin to run until the point in time that a claimant knows or should have known the factual basis for their claim. The factual basis of the claim includes the discovery of each of the essential elements of the potential claim.

Here, Petitioner was not aware that Carmen Cales, acting on behalf of Summers County 911, spoke with Summers County EMS on September 15, 2019 and instructed Summers County EMS that an ambulance was not necessary to assist Petitioner's son. Carmen Cales failure to dispatch an ambulance to assist baby Jasper is an essential element forming the factual basis of Petitioner's claims against Respondents. Petitioner did not discover that Carmen Cales spoke with Summers County EMS and refused to dispatch an ambulance on September 15, 2019 until Petitioner obtained the 911 audio recordings on October 14, 2019. Pursuant to the discovery rule as set forth in Dunn, Petitioner's statute of limitations to file her claims against Respondents did not start to run until October 14, 2019. This means that, at minimum, Petitioner would have until October 14, 2021 to file her claims against Respondents. Because Petitioner filed her claims against Respondents on October 12, 2021, Petitioner's claims were timely filed.

**MIZE LAW FIRM, PLLC**



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## CERTIFICATE OF SERVICE

I, John J. Mize, counsel for the Petitioner, Barbara Trivett as the Administratrix of the Estate of Jasper Trivett, do hereby certify that I have served the attached **Appendix Record** and **Brief of the Petitioner** by placing a true and correct copy of the same in the United States mail, first-class, postage prepaid, to counsel of record for all named Defendants below and Respondents herein, on this the 7th day of June, 2022.

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