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.

PETITIONER'S REPLY BRIEF

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

MIZE LAW FIRM, PLLC

John J. Mize (WV State Bar ID # 10091)
Counsel for the Petitioner
106 South Heber Street
Beckley, West Virginia 25801
Telephone: (304) 255-6493
Facsimile: (304) 255-0606
E-mail:johnmize@mizelawfirm.com

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STATUTES AND CONSTITUTIONAL PROVISIONS

A. The statute of limitations set forth in the Tort Claims Act at §29-12A-6(b) exlusively controls the time line for the filing of Petitioner's negligence claims against the Respondents.

Despite the Respondents' best attempts to muddy the waters in regards to which statute sets forth the appropriate statute of limitations for Petitioner's claims, the Circuit Court correctly determined the appropriate statute to be §29-12A-6(b), although the Circuit Court then misapplied the statute. In an effort to turn this Court's attention away from the clear and controlling language set forth in §29-12A-6(b), the Respondents spend the majority of their responsive brief trying to convince the Court to consider alternate statutes and/or foreign authority, and that §29-12A-6(b) has been struck down as unconstitutional.

Respondents attempt to turn this Court's attention away from the clear language contained in §29-12A-6(b) by disingenuously asserting the statute has been rendered unconstitutional. Respondents are, in fact, so scared of the clear and unambiguous language of §29-12A-6(b) that Respondents do not provide a single citation to the language of the statute at any point in their brief. In addition to arguing that §29-12A-6(b) is unconstitutional, Respondents invite this Court to analyze Petitioner's claims under additional statutes in the hopes that this Court might find a means to support the Circuit Court's incorrect determination on separate grounds. Finally, Respondents use foreign authority in an attempt to support the Circuit Court's improper interpretation of §29-12A-6(b).

a. Section 29-12A-6(b) of the Tort Claims Act is not unconstitutional under Whitlow v. Board of Education as it pertains to Petitioner's claims.

Respondents' brief flatly misstates that §29-12A-6(b) has been completely struck down as unconstitutional by this Court in Whitlow v. Board of Educ. of Kanawha County, 438 S.E.2d 15, 190 W.Va. 223 (1993). Respondents intentionally mischaracterize the holding of Whitlow in an effort to convince this Court that §29-12A-6(b) is completely unconstitutional because none of

Respondents' remaining arguments apply if the Court recognizes that §29-12A-6(b) is not unconstitutional as it applies to Petitioner's claims.

Respondents go to great lengths to convince this Court that its prior holding in Whitlow renders §29-12A-6(b) completely unconstitutional. Despite Respondents' best efforts, because baby Jasper died, Petitioner's claims against Respondents do not meet the specific criteria the Whitlow Court announced would render §29-12A-6(b) unconstitutional. A careful reading and complete understanding of the decision in Whitlow clearly demonstrates that applying §29-12A-6(b) to Petitioner's claims does not violate the Equal Protection Clause found in Section X of Article III of the West Virginia Constitution in relation to Petitioner's claims.

The first great distinction between the facts in Whitlow and Petitioner's claims is that the child in Whitlow survived its injury. Because the minor child in Whitlow survived, the general savings clause contained in §55-2-15 applied to toll the statute of limitations from beginning to run until that child reached the age of majority. The result being that the child in Whitlow would have until essentially age twenty to file his or her claims under §55-2-15 (age eighteen plus two years). Because the language of §29-12A-6(b) only provides a statute of limitations until the child's twelfth birthday, the Whitlow Court determined that §29-12A-6(b) would operate to reduce a surviving child's time period for filing from their twentieth birthday to their twelfth birthday. The Whitlow Court determined that, to the extent that §29-12A-6(b) **reduced** the statute of limitations period for filing it would violate the Equal Protection Clause of the West Virginia Constitution.

In Petitioner's case, sadly baby Jasper did not survive his injuries. Because baby Jasper did not survive, the general savings clause contained in §55-2-15 does not apply to extend the time period for filing claims on baby Jasper's behalf. Accordingly, the statute of limitations

created by §29-12A-6(b) **does not reduce** the time period for filing baby Jasper's claims, rather, it enlarges the time period for filing claims on baby Jasper's behalf. Thus, as it relates to Petitioner's claims, §29-12A-6(b) does not violate the Equal Protection Clause of the Constitution.

It is helpful here to note that §29-12A-6(b) and §55-2-15 operate in very different manners. The operative mechanism for each statute explains why §55-2-15 no longer applies after a minor's death but §29-12A-6(b) still applies. The general savings clause contained in §55-2-15 only operates to extend or toll the general statute of limitations set forth in another section of the code. The tolling mechanism of §55-2-15 is premised upon the idea that a child who has not yet attained the age of majority is suffering from an infirmity that would prevent that child from filing claims on its own behalf. Once the child reaches the age of majority, the infirmity is then lifted and the applicable statute of limitations would begin to run. Likewise, if the child dies, the claims then belong to the adult representative of the child who would not suffer the same infirmity and the statute of limitations would begin to run upon the child's death.

In contrast, §29-12A-6(b) is not designed to toll or extend any other statute of limitations. Rather, §29-12A-6(b) establishes that the statute of limitations for claims to be filed on a minor's behalf under the Tort Claims Act is any time prior to the twelfth birth date of the minor. Section 29-12A-6(b) does not attempt to toll any statute of limitations until a point in time that a minor has reached the age of majority and can bring claims on his or her own behalf. This is evidence that §29-12A-6(b) is NOT a minority tolling statute. Section 29-12A-6(b) is not premised upon any infirmity that would prevent a minor from filing claims on their own behalf. Whereas the requisite infirmity for operation of §55-2-15 is lifted upon a child's death, §29-12A-6(b) is not

premised on any infirmity and thus the child's death is of no consequence to its operation. The twelfth birthday has no significance in terms of a child's ability to file claims on their own behalf.

This Court need not embark on a fruitless Constitutional analysis under Whitlow in this case when §55-2-15 cannot operate to extend Petitioner's statute of limitations. Whitlow inarguably held that §29-12A-6(b) is **only** unconstitutional to the extent that it operates to reduce the time period of filing from eighteen years plus two in §55-2-15 to twelve years in §29-12A-6(b). Here, because baby Jasper died, §55-2-15 cannot extend Petitioner's time frame for filing and therefore §29-12A-6(b) does not operate to reduce Petitioner's time frame, but rather enlarges the time period for filing which does not violate the Equal Protection Clause of the West Virginia Constitution. The Court in Whitlow clearly announced its preference for providing the longest possible time frame for the filing of a minor's claims. This exact same sentiment is echoed by the Legislature in the language of §29-12A-6(b) that provides "whichever provides the longer period."

b. The Tort Claims Act creates its own statute of limitations, independent and exclusive of the statute of limitations set forth in the Wrongful Death Act.

Respondents improperly assert that all wrongful death claims are subject to a strict two year statute of limitations set forth in West Virginia Code §55-7-6(d) of the Wrongful Death Act. While Respondents are correct that the Wrongful Death Act created a recognized cause of action for tortious behavior resulting in death, Respondents fail to recognize that the Wrongful Death Act works in conjunction with several other statutes, including but not limited to the Tort Claims Act and the Medical Professional Liability Act ("MPLA"). The bold assertion that ALL wrongful death cases are subject to a strict two year statute of limitations contained in §55-7-6(d) ignores both the voice of the Legislature and the voice of this Court. The Legislature has, on

multiple occasions, provided for wrongful death periods of limitation that are independent of the two year statute of limitation contained in §55-7-6(d).

The MPLA establishes its own statute of limitations for the filing of wrongful death caused by medical negligence. The MPLA effectively modifies the two year statute of limitations contained in §55-7-6(d). Section 55-7B-4(a) of the MPLA sets forth a two year statute of limitations for wrongful death caused by medical negligence from the time that the tortious behavior was known or should have been known. In addition to adopting a discovery rule not present in §55-7-6(d), the MPLA also provides a tolling provision in §55-7B-6(i)(1) to provide an extended time frame to allow for pre-suit requirements to be met. Contrary to Respondents' position, the MPLA creates a statutory mechanism whereby the general wrongful death statute of limitations is extended.

Respondents point the Court's attention to the holding in State ex rel. Morgantown Operating Co., LLC v. Gaujot, 245 W.Va. 415, 859 S.E.2d 358 (2021), whereby this Court determined that §55-7B-4(b) of the MPLA did not apply to wrongful death claims. Section 55-7B-4(b) of the MPLA operates to reduce the statute of limitations for the filing of injury claims against a nursing home. The Court in Gaujot determined that §55-7B-4(b) cannot operate to reduce the statute of limitations for filing a wrongful death claim against a nursing home because the statute only references injury claims against nursing homes and does not address wrongful death claims against a nursing home. Accordingly, the Gaujot Court reasoned that a wrongful death claim against a nursing home would be controlled by §55-7-6(d). Notably, the Court in Gaujot settled upon the statute of limitations that provided for the longer period of time for filing. When faced with the possible one year statute of limitations contained in §55-7B-4(b), the Court determined that the two year statute of limitations contained in §55-7-6(d) applied.

Unlike §55-7B-4(b) of the MPLA, §29-12A-6(b) of the Tort Claims Act clearly expresses, in unambiguous terms, that the statute of limitations contained in §29-12A-6(b) applies to both injury and death claims. Because the Legislature chose to expressly include death claims within the language of §29-12A-6(b), the holding of Gaujot does not apply. Judicial acknowledgement of the Legislature's intent for §29-12A-6(b) to modify, change or supersede §55-7-6(d) is no different than the longstanding judicial acknowledgement of the Legislature's modification of §55-7-6(d) under the MPLA in §55-7B-4(a) and §55-7B-6(i)(1).

To be clear, as discussed more fully hereinbelow, §29-12A-6(b) of the Tort Claims Act is not a minority tolling statute as repeatedly referenced by Respondents. Rather than tolling some other statute of limitations (presumably §55-7-6(d)), §29-12A-6(b) establishes its own statute of limitations that is specifically tailored to facts that fall within the scope of the Tort Claims Act. To this end, §55-7-6(d) has no bearing upon the Petitioner's claims against Respondents that were filed under the provisions of the Tort Claims Act.

Finally, this Court, too, has recognized factual scenarios wherein the two year wrongful death statute of limitations must be extended. In Dunn v. Rockwell, 225 W.Va. 43, 689 S.E.2d 255 (2009), this Court adopted the common law discovery rule that operates to toll any statute of limitations until the person knew or should have known all of the factual elements of their claim. This Court's adoption of the discovery rule is further evidence that the Respondents' claim that all wrongful death claims are subject to the two year statute of limitations contained in §55-7-6(d) is untenable. Accordingly, Respondents lengthy discussion of §55-7-6(d) is nothing more than a red herring.

Next, the Respondents embark on a lengthy discussion of the general savings statute contained in §55-2-15. This argument, too, is quickly disposed of as a red herring that is

installed purely in an attempt to muddy the waters and support the Respondents' disingenuous argument that §29-12A-6(b) is unconstitutional. Known as the general savings statute, §55-2-15 is designed to toll an infant's claims until the disability of infancy has been lifted, either by reaching the age of majority or by death. If applied to Petitioner's claims in this case, there would be no "savings" as baby Jasper sadly died as a result of Respondents' negligent conduct. Because there would be no extension, modification or tolling of the general wrongful death statute of limitations contained in §55-7-6(d), the savings statute contained in §55-2-15 does not apply to Petitioner's claims. Having disposed of §55-2-15, the Court is left to consider §55-7-6(d) and §29-12A-6(b).

c. This Court must resolve the conflict between §55-7-6(d) and §29-12A-6(b) in favor of §29-12A-6(b) because it contains the most specific language relative to Petitioner's claims.

Respondents, in their brief, assert that there is no conflict between §55-7-6(d) and §29-12A-6(b), and that somehow the Court can apply both statutes to determine the applicable statute of limitations to govern Petitioner's claims against Respondents. This, of course, is an impossibility when you apply each statute individually. If the Court were to apply §55-7-6(d), Petitioner would have two years from the date baby Jasper's death to file her claims, without exception. Conversely, §29-12A-6(b) sets the statute of limitations for Petitioner's claims anytime before baby Jasper's twelfth birthday. Because the two statutes result in a different period of limitations under which Petitioner's claims must be filed, the statutes are clearly in conflict with each other.

When faced with conflicting statutes, the Court must attempt to give meaning and effect to each statute whenever possible. Here, this can be achieved by allowing §29-12A-6(b) to work in conjunction with the remainder of the Wrongful Death Statute, only replacing the statute of

limitations contained in §55-7-6(d). This is precisely how the Court has routinely reconciled the varying statutes of limitations contained in the MPLA and the Wrongful Death Act. By allowing a second statute to modify only the statute of limitations contained in the Wrongful Death Act, the remainder of the Wrongful Death Act remains in effect.

To the extent that two conflicting statutes cannot both be given effect, it is well settled by this Court's longstanding jurisprudence that conflicts between statutes are to be resolved by applying the statute with the most specific language. "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).

Without question, §29-12A-6(b) is the most specific of the two statutes as they relate to Petitioner's claims. Section 55-7-6(d) simply provides a generic statute of limitations of two years for wrongful death cases. Section 29-12A-6(b) is more specific in that it relates to instances wherein a minor child sustains injury or death due to the negligent and tortious behavior of a governmental entity or its agent.

Considering that §29-12A-6(b) operates independently to provide the clear and unambiguous time period for Petitioner to file her claims, this Court need not consider §55-7-6(d). Even the Circuit Court centered its ruling on an incorrect interpretation of §29-12A-6(b), without regard to either §55-7-6(d). If, however, this Court were to accept Respondents' invitation to examine both statutes, this Court's conflict of laws analysis still mandates that §29-12A-6(b) is the operative statute to determine Petitioner's statute of limitations.

d. The clear and unambiguous language contained in §29-12A-6(b) must be applied by the Court as written and is not subject to interpretation by the Court.

In its last ditch effort to disparage §29-12A-6(b), the Respondents cite caselaw from foreign jurisdictions to argue the meaning and application of §29-12A-6(b). This Court is under no obligation, of course, to provide any weight to foreign authority. This Court should be particularly reticent to consider foreign authority that is based upon statutes with completely different language, completely different meaning and completely different legislative intent.

The West Virginia Constitution establishes the separation of powers between the three branches of government. Under the Constitution, it is the strict province of the legislative branch to enact laws. The judicial branch must then apply those laws as written to honor the intent of the Legislature. The judiciary is not permitted to legislate from the bench or read into laws that which is not there. Additionally, the judiciary is not permitted to omit specific language that the Legislature chose to include in a statute. Under the separation of powers doctrine, the judiciary is only permitted to interpret the meaning of a statute if and when some ambiguity exists.

"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).

If the Circuit Court had strictly applied the clear and unambiguous language of §29-12A-6(b) to Petitioner's claims, it would have recognized that Petitioner had until the twelfth birth date of baby Jasper to file her claims against the Respondents. Rather than apply §29-12A-6(b) as written, the Circuit Court looked to persuasive authority contained in foreign jurisdictions to interpret the meaning of §29-12A-6(b). Respondents now invite this Court to follow along the same impermissible path in considering foreign caselaw. The first problem with the Circuit Court's ruling and Respondents' argument is that the Circuit Court had no authority to interpret §29-12A-6(b). Neither the Circuit Court nor the Respondents have attempted to articulate for this Court's review the exact portion of §29-12A-6(b) that is purportedly ambiguous.

Although the Respondents do not point this Court to any ambiguous language contained in §29-12A-6(b), it would appear that the Circuit Court and Respondents reach their conclusions based on an interpretation of the term "birthday". Under the Circuit Court's analysis, the term "birthday" has differing meanings depending on whether or not the minor child survived their injuries. The Circuit Court reasoned, and Respondents urge, that a "birthday" only applies to a child that survives. This, however, is refuted by a reading of the statute as a whole. The clear language of §29-12A-6(b) applies to minors who were injured, as well as minors who died. Section 29-12A-6(b) does not toll a statute of limitations until a minor child reaches the ages of twelve, it creates a statute of limitations that expires on the minor child's twelfth birth date.

Because §29-12A-6(b) applies in equal force to both injury and death claims, and because it is not a tolling statute, whether the child lived to reach the age of twelve is inconsequential.

B. The Petitioner's claims against the Respondents were timely filed pursuant to the West Virginia Medical Professional Liability Act, §55-7B-6(i)(1).

The MPLA provides a brief tolling period to allow a claimant time to meet the pre-suit requirements contained in §55-7B-6. The two year statute of limitations created by §55-7B-4(a) is tolled for essentially 60 days, by operation of §55-7B-6(i)(1), to allow a claimant time to provide their Notice of Claim and Screening Certificate of Merit and allow for a response to the same. Here, Petitioner filed her Complaint well within the tolling window provided by §55-7B-6(i)(1). Respondents concede that Petitioner filed her Complaint within this window, but argue that the MPLA and its tolling provision contained in §55-7B-6(i)(1) do not apply to Petitioner's claims. While it certainly is not the norm for a Plaintiff to fight for an opportunity to have their claims controlled by the restrictive mandates of the MPLA, Petitioner acknowledged at the outset that her claims were controlled by the MPLA and took the appropriate measures prior to filing suit. In fact, Petitioner's efforts to meet the pre-suit requirements of the MPLA are the sole reason for any perceived delay in filing Petitioner's Complaint.

As discussed at length in Petitioner's appellate brief, the Respondents' conduct throughout the morning of September 15, 2019 places Respondents squarely within the definitions contained in the MPLA. Respondents meet the definitions of a "Health Care Provider" that rendered or failed to render "Health Care". Despite the fact that §24-6-5(e)(2) did not require 911 operators to become certified in providing telephonic CPR instructions until seven months after baby Jasper died, Petitioner's expert opined that a such provision of telephonic CPR instructions was a longstanding national standard of care at the time baby Jasper died. Statutes are just one possible source to establish the appropriate standard of care in a

medical malpractice case. The fact that the national standard of care required Respondents to be certified in the provision of telephonic CPR establishes that Respondents are, in fact, "Health Care Providers" when taking calls wherein telephonic CPR instructions may be necessary. Respondents' failure to provide telephonic CPR instructions, when asked by Petitioner, constitutes a failure to provide "Health Care". Likewise, Respondents' decision to not dispatch an ambulance equates to medical diagnosis resulting in the denial of "Health Care".

Respondents assert, in their brief, that a 911 center does not fall within the definition of "Health Care Provider" inasmuch as §55-7B-2(g) does not specifically mention 911 centers. This reasoning is flawed in that it fails to recognize the qualifying language contained in §55-7B-2(g), "including, but not limited to", that precedes the enumerated list of health care providers.

Finally, even if this Court finds that Respondents do not meet the definitions of "Health Care Provider" and "Health Care", Respondents' conduct on September 15, 2019 still falls within the scope of the MPLA. Respondents' conduct on September 15, 2019 places them within the expanded definition of "Medical Professional Liability" contained in §55-7B-2(i), particularly after the 2015 amendments and this Court's holding in State ex rel. W.Va. Univ. Hosps., Inc. v. Scott, 866 S.E.2d 350 (2021).

After this Court's holding in Manor Care, Inc. v. Douglas, 234 W.Va. 57, 763 S.E.2d 73 (2014), the Legislature set out to broaden the scope of the MPLA by enacting several amendments. Of these amendments, the most notable, and most relevant to Petitioner's claims, is the final clause added to §55-7B-2(i). Specifically, the Legislature added that "Medical Professional Liability" "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." In analyzing these amendments, this Court in Scott held that the "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."

In Scott, the Court was asked to determine if the MPLA applies to corporate decisions that do not qualify as health care, but effect the way that health care would be provided at a later date and time. Specifically, the corporate defendant in Scott was alleged to have acted negligently when it failed to purchase certain filters for pediatric intravenous devices. No argument could be made that the purchase or failure to purchase filters was health care being rendered by a health care provider. Nonetheless, this Court found that the failure of the corporate defendant to purchase the filters fell within the new definition of "medical professional responsibility" because such an act was within the context of rendering health care services. Although the decision regarding the purchase of medical filters was not health care in and of itself, and although it was not the act of a health care provider, it was deemed to be within the context of rendering health care services because it directly effected the manner in which health care was provided by others at a later point in time.

Similarly, even if Respondents are not considered health care providers, the decision to not dispatch Summers County EMS was made within the context of rendering health care services. Petitioner's Complaint includes claims against Summers County EMS for its failure to respond to Petitioner's emergency and render life saving health care to baby Jasper. Summers County EMS explained that its failure to respond by ambulance to provide health care to baby Jasper was based on the fact that Respondents told it not to respond. Respondents' decision to not send an ambulance is no different than a corporate defendant's decision to not purchase

intravenous filters. Both decisions have a direct impact on the nature, amount, quality and level of health care services that will be provided at a later point in time.

Respondents argue that actions undertaken by a 911 center cannot be considered to be within the context of rendering health care because the function and role of a 911 center is to gather information and dispatch an appropriate emergency response. Respondents may be correct when an emergency call requires the dispatch of emergency police or fire services. However, when the same 911 dispatcher receives a call regarding an individual suffering from cardiac arrest, that dispatcher's conduct determines if, when and how the victim receives health care services. Because the 911 dispatcher, in this situation, holds the keys to receiving health care services, such conduct is undertaken within the context of rendering health care services. Here, Respondents received a call from Petitioner that her son was not breathing and needed emergency health care. Respondents refused to provide telephonic CPR instructions and later refused to dispatch an ambulance to aid Petitioner's son. Respondents conduct denied Petitioner's son life saving health care services.

Respondents final attempt to evade application of the MPLA to Petitioner's claims is grounded in the argument that the 2015 amendments to the definition of "medical professional liability" and this Court's resulting holding in Scott are still limited to health care providers. Respondents reading of the 2015 statute and of Scott would operate to nullify the intention of the Legislature in expanding what qualifies as "medical professional liability". If, as the Respondents argue, the legislative amendment and Scott only apply to health care providers, the amendments would have no practical effect. The MPLA has ALWAYS applied to health care providers. Clearly, the intention of the Legislature, as recognized by this Court in Scott, was to broaden the scope and coverage of the MPLA to encompass actors who may not be health care

providers but who's actions are so intertwined as to effect the rendering of health care. This is precisely the scenario that exists between the Respondents and the failure of Summers County EMS to render life saving health care to baby Jasper on September 15, 2019. The Court need look no further than the Notice of Non-Party Fault of Summers County EMS asserting Respondents' fault that was filed immediately once Respondents were dismissed from the case.

a. Petitioner's efforts in filing her claim were frustrated by the COVID-19 Pandemic.

In its brief, Respondents question why Petitioner did not simply file her Complaint prior to the expiration of the two year anniversary of baby Jasper's death on September 17, 2021. It is important to note that neither Petitioner, nor her counsel were dilatory in prosecuting her claims. Petitioner began gathering medical records soon after her son's death. Due to the reduced personnel related to the COVID-19 pandemic, records requests from all hospitals were severely delayed. After Petitioner obtained and reviewed the records, it appeared that those records were incomplete and a new request was made. Once Petitioner was satisfied that she had complete records, she set upon obtaining a Screening Certificate of Merit affidavit that would be necessary to file her claims. Petitioner began working with her expert several months prior to September 2021. Because Petitioner's expert is a front line physician in an emergency room setting, continuous outbreaks of COVID-19 delayed Petitioner's expert's ability to communicate with Petitioner and finalize his report and Screening Certificate of Merit affidavit.

Despite continuous delays in obtaining the requisite Screening Certificates of Merit to file her claim, Petitioner was able to send her Notice of Claim and Screening Certificates prior to September 17, 2021. Moreover, Petitioner included with her Notice of Claim a rare wealth of information. Petitioner included the Notice of Claim, Screening Certificate of Merit, an affidavit statement from Petitioner, medical records from Summers County ARH, medical records from

Ruby Memorial Hospital, audio of all 911 communications, West Virginia Medical Examiner's autopsy report, County Coroner's Investigative Report, Preliminary and Final Death Certificates, and a draft copy of the Complaint that would be filed if pre-suit mediation were declined. Considering the wealth of information included with the Notice of Claim, it is impossible for Respondents' to claim that they were not aware of Petitioner's claims prior to September 17, 2019.

The policy behind any statute that limits the time frame for filing a claim is based on two simple criteria: First, to place an individual on notice of the claims against them within a reasonable amount of time and, second, to prevent evidence from going stale through the operation of time. Here, there is no question that Respondents were apprised of Petitioner's claims against them prior to the two year anniversary of baby Jasper's death. If the Notice of Claim and Screening Certificate of Merit were not sufficient to apprise the Respondents of the precise nature of Petitioner's claims against them, surely the medical records and draft Complaint were. In regards to allowing evidence to grow stale, any delay in Petitioner's filing her Complaint while she met the pre-suit requirements of the MPLA pales in comparison to the delay caused by the motion practice of Respondents and the ensuing appeal.

C. Respondents, like the Circuit Court, fail to properly understand and apply the discovery rule under this Court's prior holding in Dunn v. Blackwell.

Respondents, in their brief, fail to grasp the holding in Dunn, supra, and repeatedly confuse the definitions of "legal theory" and "factual theory" as set forth in Dunn. Under this Court's holding in Dunn, the trial 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." The heart of Petitioner's claims against Respondents assert negligence. The bare bones elements of a negligence claim are: 1) Duty, 2) Breach, 3) Causation and 4) Damages. So the

question, according to Dunn, becomes when did the Petitioner know, or by the exercise of reasonable diligence should she have known about the 1) Duty owed by Respondents, 2) Breach of Duty committed by Respondents, 3) that Respondents' Breach of Duty Caused the death of baby Jasper and 4) that baby Jasper died.

On September 15, 2019 Petitioner knew that Respondents owed to her a duty to dispatch an ambulance to provide emergency medical care to her son. Petitioner did not and could not know the remaining elements of her claims against Respondents until she discovered that Respondents breached the duty it owed by instructing Summers County EMS that an ambulance should not be dispatched to assist Petitioner and her son.

Respondents argue in their brief that Petitioner knew or should have known of Respondents' breach on September 15, 2019 when no ambulance ever appeared to assist Petitioner. Respondents fails to recognize or acknowledge that there are many reasons that an ambulance would not appear to assist Plaintiff, even if Respondents had not breached their duty owed to Petitioner. The only information available to Petitioner on September 15, 2019 regarding the conduct of the Respondents was that Respondents attempted to contact Summers County EMS on two occasions while on the phone with Petitioner and was unable to connect. From that point, Respondents informed Petitioner that, if Petitioner would begin to transport her son, Respondents would continue to call Summers County EMS on Petitioner's behalf.

That an ambulance never appeared does not, by itself, inform Petitioner that Respondents breached their duty by instructing Summers County EMS not to respond to Petitioner. As far as Petitioner knew on September 15, 2019, Respondents were never able to speak with anyone at Summers County EMS and that is why an ambulance never appeared. Moreover, as far as Petitioner knew on September 15, 2019, it could be that Respondents did dispatch an ambulance

from Summers County EMS and that ambulance got lost, wrecked, broke down, had a flat tire, took a wrong turn, was driving too slowly, chose not to respond. There are a myriad of possible reasons why Petitioner would not have encountered an ambulance on September 15, 2019 that have nothing to do with any breach of duty by the Respondents.

It was not until October 14, 2019 that Petitioner obtained the 911 audio recordings and learned for the first time that Respondents breached the duty they owed to her by refusing to dispatch an ambulance from Summers County EMS. Even though Petitioner sadly knew her damages on September 17, 2019 when baby Jasper tragically died, Petitioner would not be able to determine the full causation of baby Jasper's death until October 14, 2019 when she discovered the Respondents' breached their duty by failing to dispatch an ambulance.

Contrary to the holding of the Circuit Court and the argument of Respondents, discovery of the Respondents breach provides the "factual basis" for Petitioner's claims. In 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), emphasis added.

> "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.**"

Dunn 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.'" Id., emphasis added. 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 Respondents breached the duty owed to dispatch an ambulance to aid Petitioner and her son. Petitioner did not and could not discover that Respondents breached the duty owed to Petitioner until receipt of the 911 audio on October 14, 2019.

The Circuit Court, in its ruling, found that the "factual basis" for Petitioner's claims was the moment that her son, baby Jasper died. The Circuit Court erroneously held, and Respondents argue, that the Petitioner's discovery of the conversations between Respondents 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 and Respondents erroneously reverse 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.

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 Respondents 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 trial 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

This Court must overrule the Order of the Circuit Court Dismissing Petitioner's claims against the Respondents and remand the case back to the Circuit Court to allow Petitioner to prosecute her claims against the Respondents. The Circuit Court abused its discretion and committed clear legal error when it determined that Petitioner's claims were time barred. Petitioner's claims were, in fact, timely filed under application of the Tort Claims Act at §29-12A-6(b) as well as the Medical Professional Liability Act at §§55-7B-4(a) and 55-7B-6(i)(1) and through application of the discovery rule as espoused by this Court in Dunn v. Blackwell.

RESPECTFULLY SUBMITTED
BARBARA TRIVETT, as Administratrix
of the Estate of Jasper Trivett
BY COUNSEL

John J. Mize (WVSB ID # 10091)
Mize Law Firm, PLLC
106 South Heber Street
Beckley, West Virginia 25801
Telephone: (304) 255-6493
Facsimile: (304) 255-0606
E-mail: johnmize@mizelawfirm.com

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.

CERTIFICATE OF SERVICE

I, John J. Mize, counsel for the Petitioner, Barbara Trivett as Administratrix of the Estate of Jasper Trivett, hereby certify that a true and correct copy of the foregoing Petitioner's Reply Brief was served upon counsel for the Respondents on this the 11th day of August, 2021, via United States Mail, First Class, Postage Pre-paid to the following address.

Drannon Adkins
Pullin Fowler Flanagan Brown & Poe
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301

John J. Mize (WVSB ID #10091)
Counsel for the Petitioner
106 South Heber Street
Beckley, West Virginia 25801
Telephone:(304) 255-6493
Facsimile: (304) 255-0606
E-mail: johnmize@mizelawfirm.com