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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0940

STATE ex rel. MORGANTOWN OPERATING COMPANY LLC d/b/a MORGANTOWN HEALTH AND REHABILITATION CENTER,
Petitioner

v.

HON. PHILLIP D. GAUJOT, JUDGE OF THE CIRCUIT COURT OF MONONGALIA COUNTY, and KIMBERLY DEGLER, as the duly Appointed Administratrix for the Estate of Jacqulin Lee Cowell, Deceased,
Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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I. QUESTION PRESENTED

Whether the Circuit Court erred as a matter of law by ruling that wrongful death actions against nursing homes alleging medical negligence are not subject to the one-year statute of limitations under the Medical Professional Liability Act contrary to this Court's holding in *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326 (2005)[1] that the MPLA is the remedy for "liability for damages resulting from **the death** or injury of a person for ***any* tort** based upon health care services rendered or which should have been rendered."

II. STATEMENT OF THE CASE

On May 15, 2020, the Respondent, Kimberly Degler, as the duly Appointed Administratrix for the Estate of Jacqulin Lee Cowell, Deceased ["Plaintiff"], filed a complaint against the Petitioner, Morgantown Operating Company LLC d/b/a Morgantown Health and Rehabilitation Center ["Defendant"], alleging that the decedent, Jacqulin Lee Cowell ["Decedent"] died as a result of the Defendant's medical negligence.[2] The complaint asserts claims for statutory violations, negligence, wrongful death, vicarious liability, and punitive damages.[3]

On August 10, 2020, the Defendant filed a motion to dismiss noting that the complaint was not filed within the one-year statute of limitations under the Medical Professional Liability Act ("MPLA").[4] Specifically, the undisputed history of this matter is as follows:

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[1] Syl. pt. 4, *Gray*, supra ("[T]he West Virginia Legislature's definition of medical professional liability, found in West Virginia Code § 55-7B-2(i) (2003) (Supp.2005), includes liability for damages resulting from the death or injury of a person for *any* tort based upon health care services rendered or which should have been rendered. ...") (emphasis supplied).

[2] App. at 0003.

[3] App. at 0002-0010.

[4] App. at 0018.

> Ms. Cowell was admitted to Morgantown Health and Rehabilitation on April 24, 2018. Compl. at ¶¶ 5, 9. Plaintiff alleges that during her admission, Ms. Cowell suffered "from a pattern of poor care, neglect and abuse at the hands of Morgantown Health and Rehabilitation Center" resulting in the "development of an unstageable pressure ulcer." Id. at ¶ 11. On June 17, 2018, Plaintiff claims Ms. Cowell was transferred from Defendant's facility to the Emergency Department at Ruby Memorial Hospital where the decubitus ulcer was documented. Id. at ¶ 14. Ms. Cowell died one week later on June 25, 2018, according to Plaintiff. Id.
>
> Recognizing that her claims were subject to the West Virginia Medical Professional Liability Act ("MPLA"), Plaintiff sent her "Notice of Claim and Screening Certificate of Merit" on January 29, 2020 – 1 year, 7 months, and 4 days after Ms. Cowell's death. Exhibit A. Morgantown Health and Rehabilitation received the Notice of Claim and Certificate of Merit on February 5, 2020. Id. Plaintiff then filed her Complaint on May 15, 2020 – 1 year, 10 months, and 28 days after Ms. Cowell's discharge from Defendant's facility, and 1 year, 10 months, and 20 days after her death.
>
> Plaintiff did not serve her Notice of Claim and Certificate of Merit within the one-year statute of limitations set out in the MPLA, nor did she commence her suit within the one-year statute of limitations. Further, no tolling provision applies to Plaintiff's claims. As a result, they must be dismissed.[5]

In her four-page response to the motion to dismiss, the Plaintiff did not contest that her suit was filed more than one year after the Decedent's death. Instead, she argued that this Court held in *Miller v. Romero*[6] that "the statute of limitations for a wrongful death claim is, and always has been, two years, and is not supplanted by the MPLA's one-year statute of limitations for 'injury' claims against nursing homes."[7] In reply, the Defendant noted as follows:

> Plaintiff points to the *Miller* Court's statement that, "Nothing in W.Va. Code § 55–7B–4, which sets forth the limitations for actions brought for 'Health care injuries,' provides for circumstances involving death cases, although both "injury" and "death" are discussed throughout the rest of the Act..." Id. While that was the case in 1991, it is no longer the case today. In 2003, the Legislature added a new

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[5] App. 0019.

[6] *Miller v. Romero*, 186 W. Va. 523, 413 S.E.2d 178 (1991), *overruled by Bradshaw v. Soulsby*, 210 W. Va. 682, 558 S.E.2d 681 (2001)

[7] App. 0057.

definition of "medical injury" to the MPLA. See 2003 West Virginia Laws Ch. 147 (H.B. 2122) ... Since that time, "medical injury" has been defined as "**injury or death** to a patient arising or resulting from the rendering or failure to render health care." Therefore, the limited discussion set forth in *Miller* regarding the MPLA is inapplicable, not instructive, and provides no precedential value to this matter.

Furthermore, in the decades that have passed since the *Miller* decision, the Legislature has continued to amend the MPLA on several occasions to provide specific nursing home litigation reform, and the Supreme Court of Appeals of West Virginia has continually recognized that the MPLA is the exclusive remedy for cases arising out medical negligence. See *Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005)(holding the MPLA is the exclusive remedy for "liability for damages resulting from the death or injury of a person for any tort based upon health care services rendered or which should have been rendered."). The applicable statute of limitations for medical negligence claims against nursing homes was one such amendment:

> A cause of action for injury to a person alleging medical professional liability against a nursing home, assisted living facility, their related entities or employees or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees arises as of the date of injury, except as provided in subsection (c) of this section, and must be commenced within one year of the date of such injury, or within one year of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs: Provided, That in no event shall any such action be commenced more than ten years after the date of injury.

W. Va. Code § 55-7B-4 (2017).[8]

In other words, it is undisputed that the MLPA was amended after *Miller* to expand the definition of "medical injury" to include both "injury or death" and to provide a single one-year statute of limitations for suits against nursing homes alleging that medical negligence caused either injury or death, or both.

[8] App. 0070-0071.

Following a hearing on the Defendant's motion to dismiss, the Plaintiff submitted a proposed order that abandoned her argument that the issue is controlled by *Miller v. Romero*.[9] Instead, the Plaintiff made two different arguments.

First, the Plaintiff cited *Miller v. Romero*,[10] *Bradshaw v. Soulsby*,[11] and *Mack-Evans v. Hilltop Healthcare Center, Inc.*,[12] for the proposition that, "the West Virginia Supreme Court of Appeals [has] recognized the distinction between a personal injury case involving alleged medical malpractice, and a wrongful death claim involving alleged medical malpractice as it relates to the statute of limitations."[13] Based on this "distinction," the Plaintiff argued that "the MPLA and the West Virginia Wrongful Death Statute work in concert with each other and that when a medical negligence claim sounds in wrongful death, the MPLA will control pre-suit notification requirements, such as a notice of claim and screening certificate of merit, but the Wrongful Death Statute will control the statute of limitations."[14]

Second, the Plaintiff made the following statutory construction argument:

> If in fact the legislature intended to supplant the two-year statute of limitations for a wrongful death action, this Court believes the legislature would have inserted the word death into this statute. They did not. Therefore, the rules of statutory construction dictate that this Court must not read into the statute that which it does not say. Again, the West Virginia Supreme Court of Appeals has consistently found that "[w]here the language of a statue is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 165 S.E.2d 108 (W. Va. 1968).

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[9] App. 0075.

[10] *Miller*, supra.

[11] *Bradshaw v. Soulsby*, 210 W. Va. 682, 558 S.E.2d 681 (2001).

[12] *Mack-Evans v. Hilltop Healthcare Ctr., Inc.*, 226 W. Va. 257, 700 S.E.2d 317 (2010).

[13] App. 0077.

[14] Id.

> The Court finds that inasmuch as the legislature has had opportunities in the past to amend the statute of limitations contained in W.Va. Code § 55-7B-4(b) to include wrongful death actions, and inasmuch as the legislature has never included the word death in this specific section of the code, this Court believes that the legislature must have intended for the statute of limitations in all wrongful death actions, including wrongful death actions involving claims of medical negligence, to be a two-year statute of limitations, pursuant to W. Va. Code § 55-7-6.[15]

Regarding the Plaintiff's first argument, the Defendant filed an objection to the Plaintiff's proposed order stating as follows:

> The section of the MLPA governing the time within which suit must be filed is entitled "**LIMITATION OF ACTIONS**" in the plural. W. Va. Code § 55-7B-4.
>
> Relative to the period of limitations which apply to any claim for medical negligence resulting in either personal injury or death, the MPLA provides:
>
> > **A cause of action for injury to a person alleging medical professional liability against a nursing home, assisted living facility, their related entities or employees or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees arises as of the date of injury,** except as provided in subsection (c) of this section, and **must be commenced within one year of the date of such injury**, or within one year of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs: Provided, That in no event shall any such action be commenced more than ten years after the date of injury.
>
> W. Va. Code § 55-7B-4(b) (emphasis supplied).
>
> Relative to such causes of action, the Legislature has provided:
>
> > "Medical professional liability" means any liability for damages resulting from **the death or injury** of a person for any tort or breach of contract 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 breach of contract or otherwise provided, all in the context of rendering health care services.

[15] App. 0078.

W. Va. Code § 55-7B-2(i) (emphasis supplied).

To avoid the plain language of the statute providing for one form of action for "medical professional liability" resulting in injury or death, the proposed Order states:

> For instance, in *Mack-Evans v. Hilltop Healthcare Center, Inc.*, 700 S.E.2d 317 (W. Va. 2010), the West Virginia Supreme Court of Appeals analyzed the statute of limitations on a medical malpractice claim and a wrongful death claim. In *Mack-Evans*, which was a medical malpractice and wrongful death case, the Supreme Court found "the statute of limitations began to run on the wrongful death claim on the date of Ms. Mack's death . . ." Id. at 324. Here, like *Mack-Evans*, **the Plaintiff alleges Ms. Cowell's wrongful death was caused by medical negligence**.

Order at ¶ 11.

First, as noted, the Legislature has provided that all claims alleging medical negligence, whether for personal injury or death, are covered by the MPLA. See also *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326 (2005)(holding the MPLA is the exclusive remedy for "liability for damages resulting from the death or injury of a person for any tort based upon health care services rendered or which should have been rendered").

Second, the only holding in *Mack-Evans* has nothing to do with the period of limitations for wrongful death actions under the MPLA, but was set forth in Syllabus Point 5 as follows:

> The statute of limitations for a personal injury claim brought under the authority of W. Va. Code § 55-7-8a(c) (1959) (Repl.Vol.2008) is tolled during the period of a mental disability as defined by W. Va. Code § 55-2-15 (1923) (Repl.Vol.2008). In the event the injured person dies before the mental disability ends, the statute of limitations begins to run on the date of the injured person's death.

Indeed, the Court expressly stated, "The circuit court found, and the parties do not dispute, that a two-year statute of limitations applied to both causes of action." *Mack-Evans*, supra at 261, 700 S.E.2d at 321 (footnote omitted).

Accordingly, the proposed Order misrepresents the holding in *Mack-Evans,* where the applicable statute of limitations was the same under both the MPLA and wrongful death statute.[16]

Regarding the Plaintiff's statutory argument, the Defendant noted:

> The proposed Order states, "This Court believes that the MPLA and the West Virginia Wrongful Death Statute work in concert with each other and that when a medical negligence claim sounds in wrongful death, the MPLA will control pre-suit notification requirements, such as a notice of claim and screening certificate of merit, but the Wrongful Death Statute will control the statute of limitations," Order at ¶ 10, but the Legislature's definition of "medical professional liability" includes explicitly "liability for damages resulting from **the death or injury** of a person for any tort or breach of contract 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) (emphasis added), and there is absolutely nothing in the MLPA indicating that the Legislature intended to exclude wrongful death actions, which seek "damages resulting from the death ... of a person for any tort ... based on health care services rendered, or which should have been rendered," from the period of limitations period provided in the MLPA. ...
>
> The proposed Order states, "If in fact the legislature intended to supplant the two-year statute of limitations for a wrongful death action, this Court believes the legislature would have inserted the word death into this statute. They did not," Order at ¶ 14, but as noted herein the Legislature repeatedly inserted the term "wrongful death" throughout the MPLA.[17]

Lastly, the Defendant noted that the proposed order is contrary to this Court's recent decision in *Dean v. Gordinho*:

> Finally, and most importantly, the Plaintiff's proposed Order conflicts with the Court's decision in *Dean v. Gordinho*, No. 18-0642, 2019 WL 5289914 (W. Va. Oct. 18, 2019) (memorandum).
>
> In *Dean*, as in this case, the patient died, and the administratrix of her estate brought actions for personal injury and negligence. The suit was filed within two years of the decedent's death, but not within two years of the patient's last injury. Affirming the award of summary judgment to the defendant health care providers, the Court turned its decision on the MLPA's use of the term "injury" relative to the period of limitations:

[16] App. 0083.

[17] App. 0081 and 0084.

> West Virginia Code § 55-7B-4 requires a plaintiff to file a medical negligence action within two years **of the date of injury**, unless an exception applies. Petitioner filed this action on June 28, 2016, thirty months after Dr. Gordinho last treated decedent, and thirty-four months after the nurse practitioner at AMS treated her. Clearly, both time periods are outside the two-year statute of limitations found in the MPLA. Further, petitioner never argued that any exception to West Virginia Code § 55-7B-4 applies. Accordingly, the circuit court did not err in finding that the MPLA's two-year statute of limitations barred petitioner's claims against respondents.
>
> **As for petitioner's wrongful death claim, she now claims that the "injury" in this case was decedent's death**. However, in petitioner's complaint, she clearly alleged that Dr. Gordinho negligently injured decedent beginning at his first appointment with decedent on August 15, 2013, and ending with the last appointment on December 11, 2013. Importantly, the complaint also alleged that Dr. Aksoy was negligent on September 11, 2014, when he prescribed decedent hydrocodone shortly before decedent's death.

Dean, supra at *3-4 (emphasis supplied).

This using the term "injury" in the MPLA to reference wrongful death actions relative to its period of limitations provisions eviscerates the following paragraph in the Plaintiff's proposed Order:

> The Court has also reviewed W.Va. Code § 55-7B-4(b) as it relates to nursing home injury cases, and as relied upon by the Defendant in its Motion to Dismiss, and would note that the legislature repeatedly uses the term "injury" throughout this paragraph, and notably, never includes the word death.

Order at ¶ 13.[18]

In response to the Defendant's objections to the Plaintiff's proposed order, she addressed both the precedential and statutory construction issues.

[18] App. 0084-0085.

Regarding the fact that the precedents relied upon by the Plaintiff conflict with *Gray v. Mena*, the Plaintiff did not mention it, but stated:

> [T]he Defendant apparently misunderstands the Plaintiff's purpose for pointing out cases such as *Mack-Evans v. Hilltop Healthcare*, 700 S.E.2d 317 (W. Va. 2010), *Miller v. Romero*, 413 S.E.2d 178 (W. Va. 1991), and *Bradshaw v. Soulsby*, 558 S.E.2d 681 (W. Va. 2001). These cases are all instances where the West Virginia Supreme Court of Appeals was analyzing both the statute of limitations for a medical professional liability claim *and* for a wrongful death claim. That is, these cases plainly illustrate that there are separate and distinct statutes of limitations for injury claims falling under the MPLA, and death claims falling under the wrongful death act.[19]

Of course, this is incorrect as (1) the MLPA was amended after *Miller* to expand the definition of "medical injury" to include both "injury or death" and to provide a single one-year statute of limitations for suits against nursing homes alleging that medical negligence caused either injury or death, or both; (2) the only holding in *Mack-Evans* had nothing to do with the period of limitations for wrongful death actions under the MPLA, but involved the tolling of statutes of limitation due to mental disability; and (3) not only did this Court's opinion in *Bradshaw* never reference the MPLA or decide which period of limitations applies to wrongful death suits arising from alleged medical negligence, but it overruled *Miller* as follows:

> After a careful reading of *Miller v. Romero,* it is clear the case is internally contradictory and fundamentally flawed in its reasoning. On the one hand, the case holds that "the right to sue for a wrongful death is created purely by statute" and therefore, the wrongful death statutes cannot be interpreted under the common law to include any equitable tolling provision. But on the other hand, the case holds that it would be "contrary to both the remedial purpose of this statute and the public policy of this State" to allow a tortfeasor to avoid a wrongful death action through fraud, misrepresentation or concealment and therefore interprets the wrongful death statutes to include an equitable, common law tolling provision. These opposing positions are inconsistent either the statute of limitation in wrongful death actions can, or it cannot, be construed to include an equitable, common law tolling provision. *Miller v. Romero* takes both positions.

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[19] App. 0084.

We must therefore examine the statute of limitation for a wrongful death action contained within *W. Va. Code,* 55-7-6(d) in light of the standard rules of statutory interpretation....

Examining our wrongful death statutes, we find no clear statutory prohibition to the application of the discovery rule to W. Va. Code, 55-7-6(d). We therefore conclude that the discovery rule, as set forth in *Gaither v. City Hospital*, supra, applies to actions arising under the wrongful death act. To the extent that *Miller v. Romero*, supra, conflicts with this holding, it is overruled.[20]

Regarding the issue of statutory construction, the Plaintiff argued:

Further, the term "medical injury" is used throughout the act in the following sections: §§ 55-7B-6; 55-7B-7; 55-7B-8; 55-7B-9; 55-7B-9a, (See Exhibit C) but interestingly, is not used in § 55-7B-2 [sic][21], which specifically deals with the statute of limitations, thus suggesting that the legislature purposefully intended for § 55-7B-2 [sic] to only apply to "injury claims alleging medical professional liability." If the legislature intended this subsection to apply to both injury and death, all it had to do was use the term "medical injury," or the term "medical professional liability action."[22] It did neither. ...

The West Virginia Wrongful Death Statute is very specific and very clear on the issue of what statute of limitations applies in a wrongful death case. W. Va. Code § 55-7-6(d) states:

> Every such action shall be commenced within two years after the death of such deceased person, subject to the provisions of section eighteen, article two, chapter fifty-five.

The West Virginia Wrongful Death Statute clearly states *every* such action shall be commenced within two years. Not some actions, but every wrongful death action. The case before the Court is undisputedly a wrongful death action and therefore, the two-year statute of limitations applies.[23]

Of course, this ignores the rules of statutory construction that related statutes must be read *in pari materia* and that they be interpreted to effectuate legislative intent, and it is clear that the

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[20] *Bradshaw*, supra at ____, 558 S.E.2d at ____.

[21] This is the wrong statute. W. Va. Code § 55-7B-4 is the correct statute.

[22] There is no such term under the MPLA.

[23] App. 0095.

Legislature intended all provisions of the MPLA to apply to both injury and death claims arising from medical negligence, which is why this Court held in *Gray v. Mena* that the MPLA is the exclusive remedy for "liability for damages resulting from the death or injury of a person for any tort based upon health care services rendered or which should have been rendered."

Finally, regarding *Dean v. Gordinho*, the Plaintiff argued:

> As can bee [sic] seen from a reading of the *Dean* case, the facts of the case at hand are in stark contrast. In the present case, Jacqulin Cowell was admitted to Defendant's facility on April 24, 2018 with no decubitus ulcer. By June 17, 2018, she had to be transported to Ruby Memorial Hospital due to an unstageable decubitus ulcer. A mere eight days after her admission to Ruby Memorial Hospital, Jacqulin Lee Cowell passed away on June 25, 2018. Ms. Cowell's cause of death was sepsis and osteomyelitis. In this case, there are no intervening causes which would prevent the Plaintiff from bringing a wrongful death action against the Defendant.[24]

Of course, this is completely beside the point. The Defendant did not cite *Dean* for the proposition that there was some intervening cause that prevented the Plaintiff from bringing her wrongful death claim within the applicable period of limitations under the MPLA. Rather, in *Dean*, this Court applied the term "injury" under the MLPA to include "medical injury" which eviscerates the Plaintiff's argument that the Legislature intended the term "injury" in the MLPA to be something different that "medical injury" in the same MPLA.

And, that perhaps is the greatest absurdity in the Plaintiff's argument, i.e., that the Legislature did not intend its use of term "injury" under the MPLA to include "medical injury," but meant the term "injury," which it did not define in the MLPA, to mean something different.

Despite this, the Circuit Court entered the Plaintiff's proposed order on October 29, 2020, denying the Defendant's motion to dismiss.[25] Because the refusal to dismiss the Plaintiff's suit for

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[24] App. 0097.

[25] App. 0125.

medical negligence is clearly wrong as a matter of law, the Defendant requests this Court to issue a rule in prohibition overturning the Circuit Court's ruling and holding that wrongful death actions against nursing homes alleging medical negligence are subject to the one-year statute of limitations set forth in the Medical Professional Liability Act.

III. SUMMARY OF ARGUMENT

As the MPLA states, "A cause of action for injury to a person alleging medical professional liability against a nursing home ... must be commenced within one year of the date of such injury, or within one year of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs;" defines "medical injury" as "injury **or death** to a patient arising or resulting from the rendering or failure to render health care;" and defines "medical professional liability" as "any liability for damages resulting from **the death** or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient," and as this Court held in *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326 (2005) that the MPLA is the exclusive remedy for "liability for damages resulting from the death or injury of a person for any tort based upon health care services rendered or which should have been rendered," the Circuit erred, as a matter of law, in applying the two-year period of limitations under the wrongful death statute instead of the one-year period of limitations under the MLPA.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As the narrow issue in this case is one of first impression and its resolution is of fundamental importance, oral argument under R. App. P. 20 is appropriate.

V. ARGUMENT

A. THE AWARD OF A WRIT OF PROHIBITION IS APPROPRIATE UNDER THE STANDARDS ESTABLISHED BY THIS COURT.

1. The Standard for a Writ of Prohibition

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers."[26] In this case, the Circuit Court has erred, as a matter of law, by refusing to apply the one-year period of limitations under the MPLA, and as the Plaintiff's claims are time-barred, the Circuit Court lacks subject matter jurisdiction.

This Court has held that prohibition is appropriate to correct "substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance,"[27] and the Circuit Court's ruling involves a contravention of a clear statutory mandate which may be resolved independently of any disputed facts where there is a high probability that the trial will be completely reversed if the error in applying the wrong period of limitations is not corrected in advance. Moreover, in Syllabus Point 4 of *State ex rel. Hoover v. Berger*,[28] this Court held:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1)

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[26] W. Va. Code § 53-1-1; see also syl. pt. 1, in part, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) (purpose of writ of prohibition is "to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers").

[27] Syl. pt. 1, in part, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), superseded on other grounds as stated in *State ex rel. Thornhill Grp., Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014)

[28] *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

> whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Here, where the Defendant has no other means, such as a direct appeal, to obtain the requested relief; the Defendant will be damaged in a way by the time and expense in defending a time-barred case that is not correctable on appeal; the Circuit Court's order is clearly erroneous as a matter of law; the Defendant is unaware of any other court that has refused to apply the MPLA's period of limitations in a wrongful death case arising from a claim of medical negligence; and the narrow question of which period of limitations applies to a wrongful death action under the MPLA, a writ of prohibition is appropriate.

2. This Court's Application of the Prohibition Standards in Similar Cases

This Court has not infrequently issued writs of prohibition in cases where trial courts have failed to dismiss cases barred by applicable statutes of limitation.[29] Likewise, in this case, a writ of prohibition is appropriate where all the Plaintiff's claims are time-barred.

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[29] See *State ex rel. Gallagher Bassett Servs., Inc. v. Webster*, 242 W. Va. 88, 829 S.E.2d 290 (2019) (granting writ of prohibition as claims barred by applicable statute of limitations); *Lewis v. Municipality of Masontown*, 241 W. Va. 166, 820 S.E.2d 612 (2018) (reversing circuit court denial of petition for writ of prohibition arising from proceeding determined to be time-barred); *State ex rel. Monongahela Power Co. v. Fox*, 227 W. Va. 531, 711 S.E.2d 601 (2011) (granting writ of prohibition as claims barred by applicable statute of limitations); *Preiser v. MacQueen*, 177 W. Va. 273, 352 S.E.2d 22 (1985) (granting writ of prohibition as claims were time-barred); see also *State ex rel. Camden-Clark Mem'l Hosp. v. Hill*, 205 W. Va. 236, 517 S.E.2d 469 (1999) (granting writ of prohibition where complaint barred by failure to serve within applicable period under the rules); *State ex rel. Johnson v. Zakaib*, 184 W. Va. 346, 400 S.E.2d 590 (1990) (granting writ of prohibition for prosecution barred by speedy trial rule); *Arlan's Dep't Store of Huntington, Inc. v. Conaty*, 162

B. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY RULING THAT WRONGFUL DEATH ACTIONS AGAINST NURSING HOMES ALLEGING MEDICAL NEGLIGENCE ARE NOT SUBJECT TO THE ONE-YEAR STATUTE OF LIMITATIONS UNDER THE MEDICAL PROFESSIONAL LIABILITY ACT CONTRARY TO THIS COURT'S HOLDING IN *GRAY V. MENA*, 218 W.VA. 564, 625 S.E.2D 326 (2005) THAT THE MPLA IS THE REMEDY FOR "LIABILITY FOR DAMAGES RESULTING FROM THE DEATH OR INJURY OF A PERSON FOR *ANY* TORT BASED UPON HEALTH CARE SERVICES RENDERED OR WHICH SHOULD HAVE BEEN RENDERED."

1. The Applicable Rules of Statutory Construction

The core of the Circuit Court's legal error in this case was to disregard the rules for statutory construction.

"The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature."[30] "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation."[31] "A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute."[32] "It 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."[33] To the extent that it is argued that statutory language is ambiguous, "Absent explicatory legislative history... this Court is obligated to consider the ... overarching design of the

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W. Va. 893, 253 S.E.2d 522 (1979) (granting writ of prohibition where party failed to comply with time limitations governing reinstatement motion).

[30] Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

[31] Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968); see also Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.").

[32] Syl. pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999).

[33] Syl. pt. 11, *Brooke B. v. Ray*, 230 W. Va. 355, 738 S.E.2d 21 (2013).

statute."[34] Moreover, "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments."[35] "A statute is enacted as a whole with a general purpose and intent, and each part should be considered in connection with every other part to produce a harmonious whole. Words and clauses should be given a meaning which harmonizes with the subject matter and the general purpose of the statute. The general intention is the key to the whole and the interpretation of the whole controls the interpretation of its parts."[36] Accordingly, "A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith."[37]

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[34] *State v. Fuller*, 239 W. Va. 203, 208, 800 S.E.2d 241, 246 (2017) (quoting *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995)).

[35] Syl. pt. 3, *Smith v. State Workmen's Comp. Comm'r*, supra; see also Syl. pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage* Co., 159 W. Va. 14, 217 S.E.2d 907 (1975) ("Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in Pari materia to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly."); Syl. Pt. 3, *State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958) ("Statutes in pari materia must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect.").

[36] Syl. pt. 1, *State ex rel. Holbert v. Robinson*, 134 W. Va. 524, 59 S.E.2d 884 (1950); see also Syl. pt. 2, *Smith v. State Workmen's Comp. Com'r*, supra ("In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.").

[37] Syl. pt. 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908).

Where two statutes "govern a particular scenario, one being specific and one being general, the specific provision prevails."[38] Relatedly, where there is any alleged conflict between two statutes, this Court "resolve[s] such tension in favor of the more recent and specific statute."[39] That is because this Court generally follows the black-letter principle that "effect should always be given to the latest ... expression of the legislative will ...."[40]

Here, considering the language of the MLPA, its stated legislative purpose, the definitions of its terms, and reading its provisions *in pari materia*, the Legislature intended the one-year statute of limitations to apply to both death and injury claims. Moreover, the limitation of actions provisions of the MLPA are more specific than the general provisions of the wrongful death statute and were more recently enacted.

2. The Legislature Intended the One-Year Period of Limitations in the MPLA to Apply to Both Injury and Wrongful Death Suits Against Nursing Homes.

The Legislature set forth its declaration of purpose for the enactment of the Medical Professional Liability Act as follows:

> The Legislature finds and declares that:
>
> The citizens of this state are entitled to the best medical care and facilities available and that health care providers offer an essential and basic service which requires that the public policy of this state encourage and facilitate the provision of such service to our citizens;
>
> As in every human endeavor the possibility of injury **or death** from negligent conduct commands that protection of the public served by health care providers be recognized as an important state interest;

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[38] *Bowers v. Wurzburg*, 205 W. Va. 450, 462, 519 S.E.2d 148, 160 (1999).

[39] *Riffle v. Ranson*, 195 W.Va. 121, 125 n. 4, 464 S.E.2d 763, 767 n. 4 (1995).

[40] *Joseph Speidel Grocery Co. v. Warder*, 56 W.Va. 602, 608, 49 S.E. 534, 536 (1904).

> Our system of litigation is an essential component of this state's interest in providing adequate and reasonable compensation to those persons who suffer from injury **or death** as a result of professional negligence, and any limitation placed on this system must be balanced with and considerate of the need to fairly compensate patients who have been injured as a result of negligent and incompetent acts by health care providers ...
>
> Medical liability issues have reached critical proportions for the state's long-term health care facilities, as: (1) Medical liability insurance premiums for nursing homes in West Virginia continue to increase and the number of claims per bed has increased significantly; (2) the cost to the state Medicaid program as a result of such higher premiums has grown considerably in this period; (3) current medical liability premium costs for some nursing homes constitute a significant percentage of the amount of coverage; (4) these high costs are leading some facilities to consider dropping medical liability insurance coverage altogether; and (5) the medical liability insurance crisis for nursing homes may soon result in a reduction of the number of beds available to citizens in need of long-term care; and
>
> The modernization and structure of the health care delivery system necessitate an update of provisions of this article in order to facilitate and continue the objectives of this article which are to control the increase in the cost of liability insurance and to maintain access to affordable health care services for our citizens.
>
> Therefore, the purpose of this article is to provide **a comprehensive resolution** of the matters and factors which the Legislature finds must be addressed to accomplish the goals set forth in this section. In so doing, the Legislature has determined that reforms in the common law **and statutory rights** of our citizens must be enacted together as necessary and mutual ingredients of the appropriate legislative response relating to:
>
> (1) Compensation for injury **and death** ...[41]

Accordingly, the Legislature expressly stated on no fewer than **three times** in its statement of purpose that it intended its reforms to extend to **causes of action for death** arising from medical negligence. Moreover, it made clear that it was not only reforming the common law, but "statutory rights," which would include both the exclusively statutory cause of action for wrongful death, as well as statutes of limitation.

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[41] W. Va. Code § 55-7B-1 (emphasis supplied).

In its definitions, the Legislature defined the term "medical injury" to include "injury **or death** to a patient arising or resulting from the rendering of or failure to render health care."[42] It defined "medical professional liability" as "any liability for damages resulting from **the death** or injury of a person for any tort or breach of contract 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 breach of contract or otherwise provided, all in the context of rendering health care services."[43]

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[42] W. Va. Code § 55-7B-2(h) (emphasis supplied).

[43] W. Va. Code § 55-7B-2(i) (emphasis supplied); see also *Hull v. Nasher-Alneam*, No. 18-1028, 2020 WL 882087 (W. Va. Feb. 24, 2020) (memorandum) (wrongful death action under MPLA; *Saleh v. Damron*, 242 W. Va. 568, 836 S.E.2d 716 (2019) (wrongful death action under MPLA); *State ex rel. PrimeCare Med. of W. Virginia, Inc. v. Faircloth*, 242 W. Va. 335, 835 S.E.2d 579 (2019) (wrongful death action under MPLA); *Dean v. Gordinho*, supra (wrongful death action under MPLA); *Smith v. Clark*, 241 W. Va. 838, 828 S.E.2d 900 (2019) (wrongful death action under MPLA); *Admiral Ins. Co. v. Fisher*, No. 17-0671, 2018 WL 2688182 (W. Va. June 5, 2018) (memorandum) (insurance dispute arising from wrongful death action under MPLA); *Minnich v. MedExpress Urgent Care, Inc.-W. Virginia*, 238 W. Va. 533, 796 S.E.2d 642 (2017) (wrongful death action under MPLA); *Earle v. City of Huntington*, No. CV 3:14-29536, 2016 WL 3198396 (S.D.W. Va. June 8, 2016) (wrongful death action under MPLA); *Williams v. CMO Mgmt., LLC*, 239 W. Va. 530, 803 S.E.2d 500 (2016) (wrongful death action under MPLA); *Moore v. Ferguson*, No. 2:15-CV-04531, 2015 WL 3999596 (S.D.W. Va. July 1, 2015) (wrongful death action under MPLA); *State ex rel. HCR Manorcare, LLC v. Stucky*, 235 W. Va. 677, 776 S.E.2d 271 (2015) (wrongful death action under MPLA); *Sine v. Sheren*, No. 1:14CV143, 2015 WL 1880354 (N.D.W. Va. Apr. 24, 2015) (wrongful death action under MPLA); *Flaugher v. Cabell Huntington Hosp., Inc.*, No. CIV.A. 3:13-28460, 2014 WL 6979450 (S.D.W. Va. Dec. 9, 2014) (wrongful death action under MPLA); *McComas v. Miller*, No. CIV.A. 3:13-14953, 2014 WL 5823138 (S.D.W. Va. Nov. 7, 2014) (wrongful death action under MPLA); *Manor Care, Inc. v. Douglas*, 234 W. Va. 57, 763 S.E.2d 73 (2014) (wrongful death action under MPLA); *Dawson v. United States*, 11 F. Supp. 3d 647 (N.D.W. Va. 2014) (wrongful death action under MPLA); *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), cert. granted, judgment vacated sub nom. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) (wrongful death action under MPLA); *Karpacs-Brown v. Murthy*, 224 W. Va. 516, 686 S.E.2d 746 (2009) (wrongful death action under MPLA); *Camden-Clark Mem'l Hosp. Ass'n v. St. Paul Fire & Marine Ins. Co.*, 224 W. Va. 228, 682 S.E.2d 566 (2009) (insurance dispute arising from wrongful death action under MPLA); *Macek v. Jones*, 222 W. Va. 702, 671 S.E.2d 707 (2008) (wrongful death action under MPLA); *Laboke v. Grafton City Hosp.*, No. CIV.A. 1:07CV31, 2007 WL 1871113 (N.D.W. Va. June 26, 2007) (wrongful death action under MPLA); *Kominar v. Health Mgmt. Assocs. of W. Virginia, Inc.*, 220 W. Va. 542, 648 S.E.2d 48 (2007) (wrongful death action under MPLA); *Taylor v. Nursing Care Mgmt. of Am., Inc.*, No. CV 2:05-1165, 2007 WL 9718397 (S.D.W. Va. Apr. 10, 2007) (wrongful death action under MPLA); *Cooper v. Appalachian Reg'l Healthcare, Inc.*, No. CIV.A. 5:04-1317, 2006 WL 538925 (S.D.W. Va. Mar. 3, 2006) (wrongful death action under MPLA); *Calhoun v. Traylor*, 218 W. Va. 154, 624 S.E.2d 501 (2005) (wrongful

Regarding the elements of proof, the Legislature has provided, "The following are necessary elements of proof that an injury **or death** resulted from the failure of a health care provider to follow the accepted standard of care: (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and (2) Such failure was a proximate cause of the injury **or death**."[44]

The Legislature has provided that "In any medical professional liability action against a health care provider," which would include wrongful death actions as "medical professional liability" is defined to include such actions, "no specific dollar amount or figure may be included in the complaint."[45] The Legislature has further provided, "Notwithstanding any other provision of this code, no person may file a medical professional liability action against any health care

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death action under MPLA); *Hinchman v. Gillette*, 217 W. Va. 378, 618 S.E.2d 387 (2005) (wrongful death action under MPLA); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004), holding modified by *Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005) (wrongful death action under MPLA); *State ex rel. Miller v. Stone*, 216 W. Va. 379, 607 S.E.2d 485 (2004) (wrongful death action under MPLA); *State ex rel. Weirton Med. Ctr. v. Mazzone*, 213 W. Va. 750, 584 S.E.2d 606 (2003) (wrongful death action under MPLA); *State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003) (insurance dispute arising from wrongful death action under MPLA); *Hicks v. Ghaphery*, 212 W. Va. 327, 571 S.E.2d 317 (2002) (wrongful death action under MPLA); *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001) (wrongful death action under MPLA); *Rubin v. United States*, 88 F. Supp. 2d 581 (S.D.W. Va. 1999) (wrongful death action under MPLA); *Moats v. Preston Cty. Comm'n*, 206 W. Va. 8, 521 S.E.2d 180 (1999) (wrongful death action under MPLA); *Andrews v. Reynolds Mem'l Hosp., Inc.*, 201 W. Va. 624, 499 S.E.2d 846 (1997) (wrongful death action under MPLA); *Pennington v. Bear*, 200 W. Va. 154, 488 S.E.2d 429 (1997) (wrongful death action under MPLA); *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996) (wrongful death action under MPLA); *Gooch v. W. Virginia Dep't of Pub. Safety*, 195 W. Va. 357, 465 S.E.2d 628 (1995) (wrongful death action under MPLA); *Michael on Behalf of Estate of Michael v. Sabado*, 192 W. Va. 585, 453 S.E.2d 419 (1994) (wrongful death action under MPLA); *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) (wrongful death action under MPLA); *Mackey v. Irisari*, 191 W. Va. 355, 445 S.E.2d 742 (1994) (wrongful death action under MPLA); *Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991) (wrongful death action under MPLA).

[44] W. Va. Code § 55-7B-3(a) (emphasis supplied).

[45] W. Va. Code § 55-7B-5(a).

provider," which would again include wrongful death actions, "without complying with the provisions of this section."[46]

Regarding the requirement of notices of claim, the Legislature has provided, "If a claimant has sent a notice of claim **relating to any** injury or **death** to more than one health care provider, any one of whom has demanded mediation, **then the statute of limitations shall be tolled** with respect to, and only with respect to, those health care providers to whom the claimant sent a notice of claim to 30 days from the receipt of the claimant of written notice from the mediator that the

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[46] W. Va. Code § 55-7B-6(a); see also W. Va. Code § 55-7B-6a(a) ("Within thirty days of the filing of an answer by a defendant in **a medical professional liability action** or, if there are multiple defendants, within thirty days following the filing of the last answer, the plaintiff shall provide each defendant and each defendant shall provide the plaintiff with access, as if a request had been made for production of documents pursuant to rule 34 of the rules of civil procedure, to all medical records pertaining to the alleged act or acts of medical professional liability which: (1) Are reasonably related to the plaintiff's claim; and (2) are in the party's control.") (emphasis supplied); W. Va. Code § 55-7B-6b(a) ("In each **professional liability action** filed against a health care provider, the court shall convene a mandatory status conference within sixty days after the appearance of the defendant.") (emphasis supplied); W. Va. Code § 55-7B-7(a) ("The applicable standard of care and a defendant's failure to meet the standard of care, if at issue, shall be established in **medical professional liability cases** by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court...") (emphasis supplied); W. Va. Code § 55-7B-8(a) ("In any **professional liability action** brought against a health care provider pursuant to this article, the maximum amount recoverable as compensatory damages for noneconomic loss may not exceed $250,000 for each occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, except as provided in subsection (b) of this section."); W. Va. Code § 55-7B-9(a) ("In the trial of a **medical professional liability action** under this article involving multiple defendants, the trier of fact shall report its findings on a form provided by the court which contains each of the possible verdicts as determined by the court....") (emphasis supplied); W. Va. Code § 55-7B-9b ("Nothing in this section shall be construed to prevent the personal representative of a deceased patient from maintaining **a wrongful death action** on behalf of such patient pursuant to article seven of this chapter or to prevent a derivative claim for loss of consortium arising from injury or death to the patient arising from the negligence of a health care provider within the meaning of this article.") (emphasis supplied); W. Va. Code § 55-7B-9c(a) ("In any action brought under this article for injury to **or death of a patient** as a result of health care services or assistance rendered in good faith and necessitated by an emergency condition for which the patient enters a health care facility designated by the Office of Emergency Medical Services as a trauma center, including health care services or assistance rendered in good faith by a licensed emergency medical services authority or agency, certified emergency medical service personnel or an employee of a licensed emergency medical services authority or agency, the total amount of civil damages recoverable may not exceed $500,000, for each occurrence, exclusive of interest computed from the date of judgment, and regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributes.") (emphasis supplied).

mediation has not resulted in a settlement of the alleged claim and that mediation is concluded."[47] So, it is clear that the Legislature was modifying statutes of limitation applicable to all medical professional liability actions, which it defined to include "**death** or injury of a person for any tort or breach of contract based on health care services rendered."[48]

The nature of the general wrongful death statute having been supplanted relative to medical professional liability under the MPLA, including relative to the statute of limitations and its exceptions, is reflected in Syllabus Point 4 of *Williams v. CMO Mgmt., LLC*,[49] in which this Court held:

> The authority of a personal representative to bring a personal injury action on behalf of a deceased individual **pursuant to West Virginia Code § 55-7-8a(c) (2008)** includes the authority to bring a medical malpractice action under the Medical Professional Liability Act, West Virginia Code §§ 55-7B-1 to-12 (2008 & Supp.2015), for injuries sustained prior to death that did not result in death. **Because West Virginia Code § 55-7-8a(c) incorporates the general disability savings statute, West Virginia Code § 55-2-15 (2008)**, the tolling provisions of the general disability savings statute apply to a medical malpractice cause of action brought by a personal representative under authority of West Virginia Code § 55-7-8a.[50]

Regarding the period of limitations for suits for medical professional liability, the Legislature has provided:

> (a) A cause of action for injury to a person alleging medical professional liability against a health care provider, **except a nursing home**, assisted living facility, their related entities or employees or a distinct part of an acute care hospital providing

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[47] W. Va. Code § 55-7B-6(h)(3) (emphasis supplied).

[48] W. Va. Code § 55-7B-2(i) (emphasis supplied).

[49] 239 W. Va. 530, 803 S.E.2d 500 (2016) (emphasis supplied).

[50] Indeed, this Court referred to it as "the two-year MPLA statute." Id. at 535, 803 S.E.2d at 505; see also *Martin v. Charleston Area Med. Ctr., Inc.*, No. 12-0710, 2013 WL 2157698, at *2 (W. Va. May 17, 2013) (memorandum), abrogated by *Williams v. CMO Mgmt., LLC*, 239 W. Va. 530, 803 S.E.2d 500 (2016) ("adults alleging a medical professional liability action under [the] MPLA have a two-year statute of limitations").

> intermediate care or skilled nursing care or its employees, arises as of the date of injury, except as provided in subsection (c) of this section, and **must be commenced within two years of the date of such injury**, or within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs: Provided, That in no event shall any such action be commenced more than ten years after the date of injury.
>
> (b) **A cause of action for injury to a person alleging medical professional liability against a nursing home**, assisted living facility, their related entities or employees or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees arises as of the date of injury, except as provided in subsection (c) of this section, and **must be commenced within one year of the date of such injury**, or within one year of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs: Provided, That in no event shall any such action be commenced more than ten years after the date of injury.[51]

Accordingly, the Legislature plainly intended that all medical professional liability suits against nursing homes, **both for injury and death**, are subject to a one-year stature of limitations. In this regard, it has been noted relative to the 2017 amendments, "Section 4 of the MPLA was amended to reduce the statute of limitations for **causes of action** alleging medical professional liability against a nursing home, assisted living facility, and/or any of their related entities or employees from two (2) years to one (1) year from the date of the injury or from the date when the person, with the exercise of reasonable diligence, should have discovered such injury."[52] Indeed,

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[51] W. Va. Code §§ 55-7B-4(a) and (b) (emphasis supplied).

[52] Thomas J. Hurney, Jr., et al., *West Virginia Medical Professional Liability & Health Care Litigation Review* 2017-19 (2019) (emphasis supplied); see also Office of the West Virginia Insurance Commissioner, *West Virginia Informational Letter No. 199* (June 2017) ("This legislation amended state law concerning a medical professional liability lawsuit against a nursing home, assisted living facility, or a distinct part of an acute care hospital providing intermediate care or skilled nursing care that arises or accrues on or after July 1, 2017. Pursuant to the legislative amendments, such an action must be commenced within one year of the date of injury or within one year of the date when the person discovers, or with the exercise of reasonable diligence should have discovered, the injury."); Geoff Brown, *The West Virginia Legislature Should Allow an Expanded Statute of Limitations in Nursing Home Cases* (April 27, 2020), https://bordaslaw.com/blog/west-virginia-legislature-should-allow-expanded-statute-limitations-nursing-home-cases ("Until very recently, West Virginia applied a two-year statute of limitations to cases brought against nursing homes and other

those opposing Senate Bill No. 338 noted that its passage would "cut ... in half" the time "to file a claim for nursing home abuse."[53]

3. Courts in Multiple States with Similar Medical Malpractice Statutes Have Held that Those More Recently Enacted and More Specific Statutes and Not the General Wrongful Death Statutes Govern the Period of Limitations for Wrongful Death Actions Predicated on Medical Professional Negligence.

Other courts have held in multiple states with medical malpractice statutes similar to West Virginia's applying to both injury and wrongful death claims that more specific and more recently enacted medical professional liability statutes govern the period of limitations for wrongful death actions where the predicate claims are those for medical professional negligence.

In *Davis v. Parham*, 362 Ark. 352, 361-362, 208 S.W.3d 162, 168 (2005), for example, the court stated:

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long-term care facilities. However, the Legislature amended the relevant statute so now nursing home cases must be 'commenced within one year of the date of such injury, or within one year of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs.'"); Jenkins Fenstermaker PLLC, *West Virginia Medical Professional Liability Act Amendments* (Dec. 18, 2017), https://www.jenkinsfenstermaker.com/blog/west-virginia-medical-professional-liability-act ("The West Virginia Medical Professional Liability Act also establishes a one-year statute of limitations period (as opposed to the prior two-year period in the MPLA) for medical professional liability claims for the liability of a WV nursing home, assisted living facility, and other related entities."); Burke, Schultz, Harman & Jenkinson, *Deadlines and Damage Caps for West Virginia Medical Malpractice Cases* (May, 31, 2018), https://www.burkeandschultz.com/deadlines-and-damage-caps-for-west-virginia-medical-malpractice-cases ("The deadline is one year for cases against nursing homes or assisted living facilities.").

[53] Jeff D. Stewart, *Deadline Looms For Preserving Nursing Home Residents' Rights* (June 23, 2017), https://www.belllaw.com/deadline-looms-for-preserving-nursing-home-residents-rights/ ("One thing that will change is that people will have less time to take legal action to protect their rights. Generally, the current law allows up to two years to file a claim for nursing home abuse. Senate Bill 338 will cut that time in half. Also, the new law will limit the number of courthouses where legal action may be filed."); see also Chris Dickerson, *Bill to change medical professional liabilities law passes state Senate*, The West Virginia Record (March 17, 2017), https://wvrecord.com/stories/511093731-bill-to-change-medical-professional-liabilities-law-passes-state-senate ("Kelly also said the bill would change the statute of limitations to one year, for long-term care providers.").

At the outset, we note that our case law is replete with the holding that the Medical Malpractice Act's two-year limitations period conflicts with the three-year limitations period provided under the Wrongful Death Act, and is therefore controlling where death ensues from medical injuries. ...

Furthermore, we stated in *Scarlett*, supra:

> We recognized in Ruffins that the Medical Malpractice Act was enacted long after the wrongful death statute was enacted, and that it expressly states that it applies to all causes of action for medical injury and that it supersedes any inconsistent provision of law. We have consistently applied this reasoning in the cases following Ruffins. We adhere to this position, and decline to overrule these cases.

Scarlett, 328 Ark. at 675, 944 S.W.2d at 547.

As a threshold matter, based upon this precedent, we hold that the trial court correctly ruled that appellant's cause of action is controlled by the two-year medical malpractice statute of limitations set forth in Ark. Code Ann. § 16–114–203. Here, appellant alleges in his complaint that his "cause of action did not accrue until February 25, 2003." However, based upon the foregoing precedent, the medical-malpractice statute of limitations applies. Under Ark. Code Ann. § 16–114–203(a), "all actions for medical injury shall be commenced within two (2) years after the cause of action accrues." Id. Under Ark. Code Ann. § 16–114–203(b), "[t]he date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time." Id.

Similarly, in *Alegent Health Bergan Mercy Med. Ctr. v. Haworth,* 260 Neb. 63, 72-73, 615 N.W.2d 460, 467-468 (2000), the court held:

> Applying these principles of statutory construction, we conclude that while § 30–810 includes a general statute of limitations applicable to wrongful death actions, § 44–2828 is a subsequently enacted special statute of limitations applicable to all personal injury and wrongful death actions against health care providers who have taken the necessary steps to qualify under the NHMLA. To construe § 44–2828 as applicable to only personal injury claims and not to wrongful death claims against qualified health care providers, as urged by the special administrator, would be inconsistent with both the language of the component statutory provisions of the NHMLA read *in pari materia* and the articulated intent of the Legislature, as set forth in § 44–2801, to provide an "alternative method for determining malpractice claims." Accordingly, the district court did not err in determining that § 44–2828, and not § 30–810, was the applicable statute of limitations.

In *Moon v. Rhode*, 2016 IL 119572 at *16, 67 N.E.3d 220, 228 (emphasis supplied, and footnote omitted), the court likewise stated:

> We are now tasked with determining whether under section 13–212(a) of the Code the term "death" in the phrase "injury or death" should receive a different construction than our interpretation of "injury" in the same sentence. We agree with plaintiff that no cognizable reason exists for us to interpret "death" in a different manner than we have already interpreted "injury" in that sentence. We therefore conclude, consistent with our statutory interpretation in *Witherell*, that the statute of limitations in a wrongful death action alleging medical malpractice begins to run when a plaintiff knows or reasonably should know of the death and also knows or reasonably should know that it was wrongfully caused. ...
>
> Although not a basis for the appellate court's decision, defendants also rely upon the limitations period contained in section 2(c) of the Act (740 ILCS 180/2(c) (West 2012)). This section of the Act provides, in pertinent part, that "[e]very such action shall be commenced within 2 years after the death of such person." 740 ILCS 180/2(c) (West 2012). We do not find, however, that this provision controls the statute of limitations issue here. **Plaintiff's wrongful death case was predicated upon medical malpractice, and as such, we find the more specific statute of limitations relating to medical malpractice must control**. See *Abruzzo v. City of Park Ridge*, 231 Ill.2d 324, 346, 325 Ill. Dec. 584, 898 N.E.2d 631 (2008) ("[w]hen a general statutory provision and a more specific one relate to the same subject, we will presume that the legislature intended the more specific statute to govern").

In *Ellenwine v. Fairley*, 846 N.E.2d 657, 664 (Ind. 2006), the issue presented was whether a medical malpractice statute or a general wrongful death statute of limitations applied, and the court resolved the issue in favor of the more specific medical malpractice statute as follows:

> One of the principal legislative purposes behind the MMA in general and the two-year occurrence-based statute of limitations in particular was to foster prompt litigation of medical malpractice claims. Because a patient who has been the victim of medical negligence could well live many more than two years beyond the occurrence of the malpractice only to ultimately die as a result of it, applying the two-years-after-death limitations period of the wrongful death statute where a patient dies from the malpractice seems to us totally inconsistent with this legislative goal. Furthermore, just as a fair reading of the MMA indicates that the medical review panel requirements of the MMA must be complied with in order to bring a wrongful death claim based on medical malpractice, so too for the limitations provision.

Likewise, in the present case, it is inconsistent for the Plaintiff to argue that although all other provisions of the MLPA apply to a wrongful death claim based in professional medical negligence, such as the pre-suit requirements and damages limitations and caps, but the one-year statute of limitations applicable to wrongful death claims against nursing homes does not.

In *James v. Phoenix Gen. Hosp., Inc.*, 154 Ariz. 594, 744 P.2d 695 (1987), the court held that by use of the phrase "an action for injury or death" to define medical malpractice, as with the West Virginia statute, the legislature clearly intended a wrongful death action based on medical malpractice to be treated as a cause of action for medical malpractice for limitations purpose.

In *Ex parte Hodge*, 153 So. 3d 734 (Ala. 2014), the court held that because the patient did not have viable medical malpractice claim at time of her death because the period of repose had run, a wrongful-death claim was also barred, even though brought within the otherwise-applicable two-year limitations period.

In *Brown v. Dep't of Health & Human Res.*, 498 So. 2d 785 (La. Ct. App. 1986), writ denied, 500 So. 2d 430 (La. 1987), and writ denied, 500 So. 2d 430 (La. 1987), the court held that medical malpractice actions, which had once been governed by a general prescription statute, were now governed by the recently enacted medical malpractice prescription statute, including those for wrongful death.

In *Castle v. Lockwood-MacDonald Hosp.*, 40 Mich. App. 597, 199 N.W.2d 252 (1972), the court held that all allegations that go to malpractice claims, including those for wrongful death, are controlled by the malpractice statute of limitations.

In *Markham v. Fajatin*, 325 S.W.3d 455 (Mo. Ct. App. 2010), the court held the two-year statute of limitations applicable to medical malpractice claims, not the three-year statute of

limitations applicable to wrongful death actions, applied to a lost chance of survival action that the surviving daughter of a patient, who died during emergency surgery following an alleged misdiagnosis, brought against the patient's treating doctors.

In *Reyes v. Kent Gen. Hosp., Inc.*, 487 A.2d 1142 (Del. 1984), the court held that a claim for wrongful death arising out of an alleged act of medical malpractice is governed by the medical malpractice statute of limitations.[54]

The analysis of these courts applies in equal measure to the question of whether the Legislature intended its adoption of a one-year period of limitations to professional medical negligence wrongful death cases against nursing homes.

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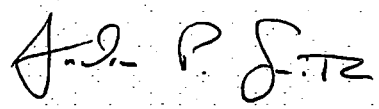
[54] See also *Farley v. Advanced Cardiovascular Health Specialists PC*, 266 Mich. App. 566, 703 N.W.2d 115 (2005) (widow's filing of notice of intent to bring medical malpractice action did not toll the two-year period she had to file suit under the wrongful death savings provision, and thus, medical malpractice wrongful death suit was untimely, where it was filed after the two-year statute of limitations period for malpractice actions and after the two-year savings provision for wrongful death); *Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954 (D. Minn. 2000) (under Minnesota law, wrongful death action predicated on alleged medical malpractice begins to run not on date of death, but when limitation period for underlying claim of medical malpractice by decedent began to run); *Peterson, ex rel. Peterson v. Burns*, 2001 S.D. 126, 635 N.W.2d 556 (three-year wrongful death statute of limitations did not extend or supplant two-year medical malpractice statute of limitations in cause of action arising from medical malpractice resulting in death); *Burgard v. Benedictine Living Communities*, 2004 S.D. 58, 680 N.W.2d 296 (even if Supreme Court's holding in *Peterson v. Burns* that wrongful death actions arising from medical malpractice were governed by two-year medical malpractice statute of limitations, rather than three-year limitations period for wrongful death actions, had prospective effect only, such prospective application did not save wrongful death suit filed by personal representative of patient's estate against rehabilitative facility one day prior to expiration of three-year wrongful death period but eight months after *Peterson* was handed down); *Brown v. Shwarts*, 968 S.W.2d 331 (Tex. 1998) (medical malpractice statute of limitations, rather than separate statute of limitations otherwise applicable to wrongful death actions, governs wrongful death claims premised on negligent health or medical care); *Estate of Genrich v. OHIC Ins. Co.*, 2009 WI 67, 318 Wis. 2d 553, 769 N.W.2d 481 (patient's surviving spouse's derivative claim for damages due to wrongful death arising from medical malpractice was controlled by the specific statute of limitations for medical malpractice, not the general statute of limitations for wrongful death actions).

VI. CONCLUSION

WHEREFORE, the Petitioner, Morgantown Operating Company LLC d/b/a Morgantown Health and Rehabilitation Center, respectfully requests that this Court issue a rule for the Respondent, Kimberly Degler, as the duly Appointed Administratrix for the Estate of Jacqulin Lee Cowell, Deceased, to show cause why a writ of prohibition should not be issued setting aside the ruling of the Circuit Court of Monongalia County that the wrongful death statute and not the MPLA governs the period of limitations for suits against nursing homes for medical professional negligence.

MORGANTOWN OPERATING COMPANY LLC D/B/A MORGANTOWN HEALTH AND REHABILITATION CENTER

By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November 2020, I served the foregoing "VERIFIED PETITION FOR WRIT OF PROHIBITION" by email and by mailing a true copy thereof, postage prepaid, in the United States mail as follows:

Hon. Phillip D. Gaujot, Judge
Monongalia County Justice Center
75 High Street, Suite 31
Morgantown, WV 26505

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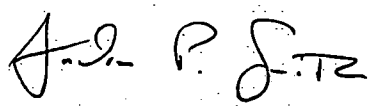

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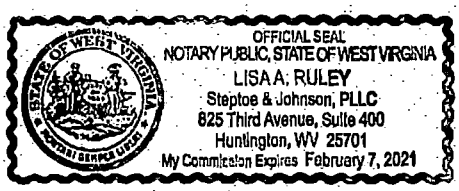
VERIFICATION

I, Andrew P. Smith, being first duly sworn, state that I have read the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

Andrew P. Smith

Taken, subscribed, and sworn to before me this 25th day of November 2020.

My Commission expires: February 7, 2021.



Notary Public