IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0940

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

Petitioner,

v.

THE HONORABLE 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.

FROM THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA,
CIVIL ACTION NO. 20-C-134

RESPONDENT KIMBERLY DEGLER'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF PROHIBITION

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SUMMARY OF ARGUMENT

The case at hand is a wrongful death case wherein the Petitioner, Morgantown Health and Rehabilitation Center, negligently caused the death of Jacqulin Lee Cowell on June 25, 2018. Ms. Cowell was admitted to Morgantown Health and Rehabilitation Center on April 24, 2018 with no decubitus ulcer. (A.R. 0041). On June 17, 2018 she had to be transported from the Petitioner/Defendant's facility to Ruby Memorial Hospital due to an unstageable decubitus ulcer. (A.R. 0041). She died on June 25, 2018, a mere 8 days after arriving at Ruby Memorial Hospital. (A.R. 0041). Ms. Cowell's death certificate identifies her cause of death as Sepsis and Osteomyelitis. (A.R. 0041).

As directed by the West Virginia Wrongful Death Statute, W. Va. Code § 55-7-6 (1992), Plaintiff, Kimberly Degler, the daughter of Ms. Cowell, became the duly appointed Administratrix of the Estate of Jacqulin Lee Cowell for purposes of pursuing this wrongful death action. On January 29, 2020, Plaintiff sent a Notice of Claim and Screening Certificate of Merit to Morgantown Health and Rehabilitation Center setting forth the claim that Jacqulin Lee Cowell's death was caused by the Petitioner. (A.R. 0037). The notice was sent via certified mail and received by the Petitioner on February 5, 2020. (A.R. 0019). No response was received. On May 15, 2020, the Plaintiff filed her lawsuit in this matter alleging that Morgantown Health and Rehabilitation caused Jacqulin Lee Cowell's death. (A.R. 0002).

Despite the fact that this is a wrongful death case which was filed within the two-year statute of limitations for wrongful death claims, the Petitioner now seeks to have this claim dismissed, arguing – without support – that the one-year statute of limitations for nursing home *injuries* found within the West Virginia Medical Professional Liability Act ("MPLA"), W. Va. Code § 55-7B-4(b) (2017), applies instead of the long-standing two-year filing period for all

wrongful death cases in the State of West Virginia. W. Va. Code § 55-7-6 ("Wrongful Death Act"). First, this Court has already decided this issue in *Miller v. Romero,* 186 W. Va. 523,527 413 S.E.2d 178, 182 (1991), *overruled on other grounds by Bradshaw v. Soulsby*, 210 W. Va. 682, 558 S.E.2d 681 (2001) when it very clearly held that the Medical Professional Liability Act "does not supplant the two-year filing period for wrongful death found in W. Va. Code § 55-7-6."[1] Second, the plain, statutory language of the MPLA does not support Petitioner's argument as the one-year filing period relating to nursing homes is expressly limited to cases alleging ***injury*** so as not to conflict with West Virginia's longstanding Wrongful Death Act in cases involving death.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents believe that this Court should not entertain the Petitioners Writ and the relief sought by the Petitioner should be denied without oral argument. The issues before this Court involve well-settled issues of law concerning the statute of limitations for a wrongful death case upon which this Court has already ruled and as such, do not meet the requirements of Rule 19 and Rule 20 requiring oral argument.

[1] After deciding that the two-year statute of limitations for a wrongful death claim applied to death claims alleging medical negligence, the *Miller* Court held that the statute of limitations was not extended by the discovery rule. 413 S.E.2d at 183. Later, in *Bradshaw v. Soulsby*, 210 W. Va. 682, 558 S.E.2d 681 (2001), the Court found that the discovery rule did apply to wrongful death actions – including wrongful death actions alleging medical negligence – and held that the statute of limitations began to run when the widow first discovered that her husband's death may have been caused by a wrongful act, rather than the date he died. Importantly, the distinction between a medical malpractice claim and a wrongful death claim was once again at issue, and the only grounds on which *Miller* was reversed was the issue of whether the discovery rule applied to a wrongful death claim. Not only did *Bradshaw* not overrule the *Miller* Court's holding that the Wrongful Death Act's statute of limitation applied in death cases alleging medical negligence, it implicitly affirmed that ruling by applying the wrongful death statute of limitations to a medical negligence death case.

ARGUMENT

A. THIS COURT SHOULD NOT ENTERTAIN PETITIONER'S WRIT OF PROHIBITION BECAUSE THIS IS A SETTLED AREA OF LAW UPON WHICH THIS COURT HAS ALREADY RULED

This Court should not entertain this writ because the issues presented have been previously ruled upon by this Court and the Trial Court's decision is consistent with the plain language of the applicable statutes and rulings by this Court.

This Court's decision in *Miller v. Romero* has been black letter law for thirty years on whether the West Virginia MPLA or the West Virginia Wrongful Death Statute controls on the issue of the statute of limitations in death cases alleging medical negligence. 413 S.E.2d 178. Despite the Legislature making amendments to the MPLA and this Court interpreting the statute over the past thirty years, this Court's analysis in *Miller* still holds true;

> [W]hile we concede that the [MPLA] addresses both malpractice and actions involving death, **it does not supplant the two-year filing period for wrongful death found in W. Va. Code § 55-7-6**. 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 . . . [T]he omission of the word "death" from W. Va. Code § 55-7B-4 must mean that the section applies only to injury cases and the Legislature intended W. Va. Code § 55-7-6 to remain the applicable provision for limitations of actions involving wrongful death.

Id. at 182. In fact, if one were to research the current version of the West Virginia MPLA as it relates to statutes of limitations in § 55-7B-4, the Westlaw annotations regarding construction and application clearly cite *Miller* and state "Medical Professional Liability Act does not supplant two-year filing period for wrongful death." W. Va. Code §55-7B-4 (statutory annotations).

In determining whether to entertain a writ of prohibition where it is claimed that a lower court exceeded its legitimate powers, this Court will examine five factors: (1) 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. Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 15, 483 S.E.2d 12, 15 (1996). While these factors are guidelines to consider, the third factor – whether there is clear error as a matter of law – should be given substantial weight. *Id.* How could there be clear error when the Trial Court precisely followed this Court's finding in *Miller v. Romero*, which is also consistent with the plain language of the MPLA and West Virginia Wrongful Death Act?

Because *Miller v. Romero* continues to be good law with respect to the fact that the MPLA does not replace the two-year statute of limitations contained in the Wrongful Death Act and the Trial Court's decision is consistent with *Miller v. Romero*, as well as the MPLA and Wrongful Death Act, this Court should not entertain Petitioner's Writ as it fails to meet several of the *Berger* factors; namely factors 3, 4 and 5. To the contrary, the Trial Court had a clear statutory and common law mandate to deny Petitioner's Motion to Dismiss consistent with *Miller v. Romero* and the plain language of the MPLA.

B. THE STATUTE OF LIMITATIONS APPLICABLE TO THIS WRONGFUL DEATH CASE IS FOUND IN THE WEST VIRGINIA WRONGFUL DEATH ACT, W. VA. CODE § 55-7-6

A claim for wrongful death is a creation of statute. Without the Wrongful Death Statute, there can be no claim for the wrongful death of another. This Court has noted on multiple

occasions that the nature of a wrongful death case is purely statutory. *McDavid v. U.S.*, 213 W. Va. 592, 596-97, 584 S.E.2d 226, 230-231 (2003). More recently, this Court affirmed that:

> [a]s no right of action for death by a wrongful act existed at common law, the right or cause of action for wrongful death, if maintainable, exists under and by virtue of the provision of the wrongful death statute of this State, Sections 5 and 6, Article 7, Chapter 55, Code, 1931, as amended.

Michael v. Consolidation Coal Co., 241 W. Va. 749, 828 S.E.2d 811 (2019)(citing *Baldwin v. Butcher*, 155 W. Va. 431, 433, 184 S.E.2d 428, 429 (1971)). The Wrongful Death Statute applies to *every* wrongful death action, including wrongful death from alleged medical negligence. With this clearly being the law, how can the Petitioner in good faith argue that the West Virginia Wrongful Death Act does not apply to a wrongful death case involving medical negligence? The truth is, the MPLA and the Wrongful Death Act work in concert with each other in cases alleging death by medical negligence. In those sections of the MPLA which expressly apply to death, including pre-suit notification and caps on damages, *inter alia*, the MPLA applies to wrongful death cases. However, in those sections that are expressly limited to causes of action for injury, such as the nursing home statute of limitations, the Wrongful Death Act controls.

In light of the foregoing, we now turn to the statute of limitations set forth in the West Virginia Wrongful Death Act, § 55-7-6(d), and which states:

> Every such [wrongful death] action shall be commenced within two years after the death of such deceased person, subject to the provisions of section 18, article 2, chapter 55.

This statute is clear and unambiguous in that the statute of limitations for *every* wrongful death case is two years. This applies to wrongful death as a result of medical negligence, car accident, product liability, work-place incident – every case.

In reality, the Petitioner is attempting to do two things that neither the Legislature nor this Court has done: (1) improperly insert words into the MPLA that do not actually appear within the

statute, and (2) strike medical negligence cases entirely from the purview of the Wrongful Death Act.

i. The Petitioner is improperly attempting to insert words into the MPLA that do not appear within the statute.

The Petitioner improperly attempts to alter the statute of limitations in wrongful death actions by inserting words into the MPLA that do not actually appear within the statute. Importantly, the code section at issue in this matter, W. Va. Code § 55-7B-4(b), which governs the statute of limitations for **"injury"** actions against nursing homes does not use the term **death** or the term **"medical injury."** W. Va. Code § 55-7B-4(b) states as follows:

> A cause of action for ***injury*** to a person alleging medical professional liability against a nursing home . . . 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***, whichever last occurs. *Provided,* That in no event shall any such action be commenced more than ten years after the date of ***injury***.

(emphasis added). Importantly, when the Legislature states "a cause of action for ***injury to a person alleging medical professional liability*** against a nursing home," the Legislature is carving out the "injury" portion of "medical professional liability" as opposed to using the phrase " a cause of action for medical injury" which would include death, or, as opposed to calling it a "medical professional liability action" which also would include death. Or, as opposed to simply stating, "A cause of action for injury *or death*" which would plainly include death cases.

In W. Va. Code § 55-7B-2(h) (2017), "medical injury" is defined as follows:

> (h) "Medical injury" means injury or death to a patient arising or resulting from the rendering of or failure to render healthcare.

Moreover, in W. Va. Code § 55-7B-2(i) "medical professional liability" is defined as follows:

> (i) "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.

It is important to note that throughout the MPLA, the Legislature does use the term "medical injury" in numerous sections, and further, it uses the term "a medical professional liability action" in other sections. **However, neither of these phrases is used in the section which governs the statute of limitations, W. Va. Code § 55-7B-4(b).**

Had the Legislature intended to supplant the longstanding two-year filing period for wrongful death cases, it very easily could have done so by adding the terms death, medical injury, or medical professional liability action; instead, the Legislature chose to limit the section to "a cause of action for injury." To illustrate this point, three subsections below the relevant subsection, the Legislature made it mandatory that all *medical professional liability actions* filed against nursing homes must be brought in the circuit court of the county in which the nursing home is located:

> "any ***medical professional liability action*** against a nursing home ... shall be brought in the circuit court of the county in which the nursing home . . . at which the alleged act of medical professional liability occurred is located . . .."

W. Va. Code § 55-7B-4(e). The term "medical professional liability action" could have easily been used in subsection (b) if in fact the Legislature intended to supplant the two-year filing period for wrongful death claims; yet, it chose to use the word "injury" so as to specifically not conflict with the Wrongful Death Act.

Further, the term "medical injury" is used throughout the MPLA in the following sections: W. Va. Code § 55-7B-6 (2017); W. Va. Code § 55-7B-7 (2017); W. Va. Code § 55-7B-8 (2017); W. Va. Code § 55-7B-9 (2017); W. Va. Code § 55-7B-9a, but interestingly, is not used in § 55-7B-4(b), which specifically deals with the statute of limitations. The only reasonable interpretation would be that the Legislature purposefully intended for § 55-7B-4(b) to only apply to "**injury**

claims alleging medical professional liability." This is precisely what this Court found in *Miller v. Romero* when it held, "[n]othing 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 . . .". 413 S.E.2d at 182. Had the Legislature sought to reverse this Court's holding in *Miller* to make the statute of limitations apply to both injury and death cases, all it had to do was insert the term "injury or death", or "medical injury," or "medical professional liability action." It did none of the above – instead, it specifically limited the one-year filing period provision to "cause[s] of action for **injury**."

The Petitioner's brief proves the point that the Trial Court correctly applied the plain meaning of the MPLA and the Wrongful Death Act when analyzing which statute of limitations applies to this wrongful death action. In Petitioner's Brief regarding the applicable rules of statutory construction, which can be found at page 15, Petitioner cites the following:

- "where the language of a statute is clear and without ambiguity, the plain meaning is to be accepted." Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).
- "It is not for this Court arbitrarily to read into a statute that which it does not say." Syl. Pt. 11, *Brooke B. v. Ray*, 230 W. Va. 355, 738 S.E.2d 21 (2013).
- "Just as courts are not to eliminate through judicial interpretation words that were purposefully included, we are obligated not to add to statutes something the Legislature purposefully omitted." *Id.*

The Respondent agrees wholeheartedly with the above arguments made by the Petitioner. In the statute at issue, W. Va. Code 55-7B-4(b), the Legislature specifically used the limiting term "**injury**" when addressing the statute of limitations. The word "**injury**" should be given its plain meaning, which is – "**injury**" – not death. The Petitioner asks this Court to insert additional words

into W. Va. Code 55-7B-4(b) when the West Virginia Legislature did not do so. The Petitioner knows that the two-year wrongful death statute of limitations applies to this case unless this Court agrees to insert words into the MPLA that the Legislature did not. Specifically, the Petitioner wants to ignore the plain meaning of the term, "injury" and add the term "medical injury" in its place. That is the job of the Legislature. If the Legislature wanted to make the statute of limitations one year for a wrongful death case involving nursing home malpractice, it could have easily done so. It did not.

ii. The Petitioner mistakenly asks this Court to strike medical negligence cases entirely from the purview of the Wrongful Death Act.

The Petitioner has argued repeatedly that the MPLA is the *exclusive remedy* for medical malpractice actions involving wrongful death. From a practical standpoint, that cannot be true. Without the Wrongful Death Act there can be no claim for wrongful death. *See Michael*, 828 S.E.2d at 816. Moreover, the wrongful death statute is the controlling statute that governs the following:

(a) who is the appropriate person to bring a wrongful death action and how that is to be accomplished;

(b) who are the proper legal beneficiaries to wrongful death proceeds and how the court shall distribute those proceeds;

(c) the elements of damage that a jury may consider when giving an award in a wrongful death action; and

(d) the statute of limitations for a wrongful death claim.

See W. Va. Code § 55-7-6, *et seq*. Without the wrongful death statute, there would be no practical way for one to bring a wrongful death claim. The MPLA simply does not address the issues above because it is understood that the wrongful death statute and the MPLA work together in instances where medical negligence leads to death. For instance, if the MPLA is the only relevant statute in

death cases alleging medical professional liability, in whose name would the action be brought? What damages would be available and to whom may they be awarded? While certain provisions of the MPLA may apply to wrongful death cases where specifically indicated by the Legislature, the Wrongful Death Act is routinely applied and followed in such cases. *See e.g., Miller*, 413 S.E. 2d 178; *Bradshaw*, 558 S.E.2d 681; and *Mack-Evans v. Hilltop Healthcare Ctr., Inc.*, 226 W. Va. 257, 700 S.E.2d 317 (2010)(cases applying the wrongful death two-year statute of limitations to death cases alleging medical negligence).

Petitioner claims it is inconsistent for the Plaintiff to argue that all other provisions of the MPLA apply to a wrongful death claim alleging medical negligence, but the statute of limitations in the MPLA does not. The truth is, this is not inconsistent at all. The MPLA and the wrongful death statute work together and both apply to this wrongful death case. The Wrongful Death Act controls the statute of limitations for *every* wrongful death claim. The Legislature understood this and purposefully drafted the MPLA statute of limitations to apply only to injury claims in order to maintain this balance. Interestingly, the Petitioner would require the Plaintiff to comply with all other portions of the Wrongful Death Act (as noted above) but now wants to eliminate the two-year statute of limitations applicable to *every* wrongful death case because it benefits them in this case. In summary, the plain language of the MPLA statute of limitations is specifically limited to "injury" cases and the Wrongful Death Act statute of limitations applies to "every" wrongful death action.

C. THE CIRCUIT COURT WAS CORRECT IN ITS RULING BECAUSE THE WEST VIRGINIA SUPREME COURT OF APPEALS HAS ALREADY DECIDED THIS ISSUE IN THE CASE OF *MILLER V. ROMERO*

The Supreme Court of Appeals of West Virginia has already decided the issue of whether the MPLA supplants the statute of limitations for wrongful death claims in the case of *Miller v.*

Romero, 413 S.E.2d 178. In *Miller*, this Court stated, "while we concede that the [MPLA] addresses both malpractice and actions involving death, it does not supplant the two-year filing period for wrongful death found in W. Va. Code § 55-7-6." *Id.* at 182. The *Miller* case is both controlling and dispositive on the issues raised by the Petitioner's Brief.

In *Miller*, the Court analyzed the interplay of the MPLA's "injury" statute of limitations and the longstanding two-year statute of limitations from the Wrongful Death Act, finding as follows:

> [W]hile we concede that the [MPLA] addresses both malpractice and actions involving death, **it does not supplant the two-year filing period for wrongful death found in W. Va. Code § 55-7-6**. 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. at 182 (emphasis added). The one-year statute of limitations for nursing home injuries, which the Petitioner urges this Court to apply in this wrongful death case, states as follows:

> (b) A cause of action for ***injury*** to a person alleging medical professional liability against a nursing home, ... arises as of the date of ***injury*** ... 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 added).

In *Miller*, the Court further addressed the issue of statutory construction concerning the language between the MPLA and the wrongful death statute, reasoning as follows:

> It is a well established rule of statutory construction that where the language of a statute is clear and unambiguous, the plain meaning should be accepted without resorting to rules of interpretation. *State ex rel. Underwood v. Silverstein*, 167 W.Va. 121, 278 S.E.2d 886 (1981). The Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning. *State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979). ***Conversely, the omission of the word "death" from W. Va. Code § 55-7B-4 must***

> ***mean that the section applies only to injury cases and the Legislature intended W. Va. Code § 55-7-6 to remain the applicable provision for limitations of actions involving wrongful death.***

Id. at 182 (emphasis added). As pointed out by the Petitioner, the Legislature amended W. Va. Code § 55-7B-4 in 2017 long after *Miller* was decided. Importantly, the Legislature did not add the word "death" to subsection (b) which deals with the statute of limitations for "injury" claims against nursing homes. Had the Legislature intended to replace the two-year statute of limitations for a wrongful death action, it could have easily inserted the word "death" into this statute – or "medical injury," or "medical professional liability action." It did not.

Despite the clear and controlling language in *Miller*, the Petitioner fails to discuss the Court's holding. Instead, they dismiss *Miller* altogether and mislead this Court by claiming the entirety of *Miller* was overruled. This is patently false. The only grounds on which *Miller* was reversed was the issue of whether the discovery rule applied to a wrongful death claim. Not only did *Bradshaw* not overrule the *Miller* Court's holding that the Wrongful Death Act's statute of limitation applies in death cases alleging medical negligence, it implicitly affirmed that finding by applying the wrongful death statute of limitations to the medical negligence death in that case. *Bradshaw v. Soulsby*, 558 S.E.2d 681 (2001). **The Petitioner must answer one question: which statute of limitations did the Supreme Court of Appeals apply to the medical negligence death in *Miller, Bradshaw,* and *Mack-Evans*?**

As is stated above, this Court in *Miller v. Romero* held that "the omission of the word 'death' from W. Va. Code § 55-7B-4 must mean that the section applies only to injury cases and the Legislature intended W. Va. Code § 55-7-6 to remain the applicable provision for limitations of actions involving wrongful death." *Miller,* 413 S.E.2d at 182. The Petitioner would have this Court believe that, in light of this Court's holding in *Miller*, the Legislature intended W. Va. Code

§ 55-7B-4 to replace the two-year filing period for wrongful death cases but simply forgot to add the word "death." It could not be more clear – the Legislature limited Section 4(b) to "cause[s] of action for injury" to specifically avoid a conflict with the longstanding, two-year wrongful death statute of limitations.

The simple point is, the West Virginia Legislature used this specific language: "a cause of action for ***injury*** to a person alleging medical professional liability against a nursing home . . ." to limit the section to "cause[s] of action for injury." This language carves out the "injury" portion of a "medical professional liability" action and separates injury claims from death claims. This is consistent with the Wrongful Death Act and allows the Wrongful Death Act to work in concert with the MPLA. The Legislature understood that the wrongful death statute of limitations would be controlling in circumstances where wrongful death is alleged to have occurred as the result of medical negligence, which explains why the Legislature did not add the term "death," or use the term "medical injury," or the term "medical professional liability action" in the section dealing with the statute of limitations. Therefore, not only is the plain language of the MPLA statute of limitations clear, but this Court has already ruled that the MPLA does not supplant the longstanding two-year statute of limitations applicable to *every* wrongful death case. *Miller*, 413 S.E.2d at 182. Had the Legislature intended to overrule this Court's holding in *Miller*, it could have done so easily but clearly chose not to.

D. THE PETITIONER MISINTERPRETS THE WEST VIRGINIA SUPREME COURT'S HOLDINGS IN *GRAY V. MENA* AND *DEAN V. GORDINHO*

The Petitioner distorts the holding in *Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005), and *Dean v. Gordinho,* No. 18-0642, 2019 WL 5289914 (W. Va. Oct. 18, 2019), in an effort to fit its narrative. The issue at hand in *Gray* had nothing to do with statutes of limitation. In *Gray*, the Plaintiff/Petitioner filed a lawsuit against a physician and other medical providers

alleging assault and battery. *Gray*, 625 S.E.2d at 329. The Plaintiff/Petitioner did not send a Screening Certificate of Merit or Notice of Claim to the Defendants, because she believed assault and battery claims did not fall under the MPLA. *Id.* It was in this context that the Court analyzed whether the MPLA applied. This Court found that claims of intentional conduct against a healthcare provider may fall within the MPLA, however, this is a fact-driven inquiry, and the case was sent back to the trial court to make that determination. *Id.* at 332-33. The point is the statute of limitations was not an issue this Court addressed in *Gray* – the *Gray* Court addressed whether allegations of assault and battery committed during the provision of healthcare are within the scope of the MPLA.

Importantly, the Respondent has never claimed that the MPLA does not apply to death claims where the Legislature has so expressly indicated. For instance, W. Va. Code § 55-7B-6, which sets forth the MPLA's pre-suit notice requirements, states as follows: (a) " . . . no person may file a ***medical professional liability action*** against any healthcare provider without complying with the provisions of this section." As noted above, the term "medical professional liability action" encompasses both injury and death claims, and as such, the pre-suit requirements found in W. Va. Code 55-7B-6 apply to both injury and wrongful death claims. There has never been any question that the Respondent provided pre-suit notice to the Defendant/Petitioner. In fact, the Trial Court correctly recognized in the instant case that both the MPLA and the Wrongful Death Statute applied to this wrongful death case, stating as follows:

> 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. (A.R. 0127)

Concerning *Dean v. Gordinho*, Petitioner clearly misunderstands and has then misapplied the ruling in *Dean.* In *Dean,* the Plaintiff, who was the Administratrix of the estate of M.M., attempted to bring a wrongful death claim against Dr. Gordinho, alleging that Dr. Gordinho caused or substantially contributed to M.M.'s death when M.M. died from an overdose on October 2, 2014. *Dean v. Gordinho*, No. 18-0642, 2019 WL 5289914, at *1-2 (W. Va. Oct. 18, 2019). The problem with Plaintiff's argument was that Dr. Gordinho had no contact with M.M. for eight months prior to her death. *Id.* at *5. Further, M.M. had seen at least 3 other physicians in that eight-month timeframe between being discharged from Dr. Gordinho's care and when she died. *Id.* Moreover, M.M. died from taking drugs she did not get from a physician's prescription. *Id.* The Circuit Court held, and the Supreme Court affirmed, that the specific facts of that case precluded the Plaintiff from bringing a wrongful death claim against Dr. Gordinho because the care was distant from the death. *Id.* at *3. In other words, the Trial Court and this Court found that Plaintiff could – under that specific factual scenario – only bring a personal *injury* claim and not a wrongful death claim. This was because there were numerous intervening causes which prevented the Plaintiff from bringing a wrongful death claim in that specific case. In response to Plaintiff's claim that the trial court erred in finding that she brought a medical negligence claim and not a wrongful death claim, this Court stated as follows:

> Petitioner's first assignment of error is based on a misunderstanding of the circuit court's order. *The circuit court did not exclusively rule that petitioner's case was barred by the two-year statute of limitations found in the MPLA*. Instead, it ruled (1) with regard to petitioner's wrongful death action, numerous intervening causes precluded petitioner from pursuing such an action against respondents; (2) petitioner's claim against respondents stood alone as a medical negligence claim; and, therefore (3) the MPLA's statute of limitations barred the medical negligence claim against respondents.

Id. (emphasis added).

The Petitioner herein does not argue that numerous intervening causes preclude the Respondent from alleging a wrongful death claim. Rather, the Petitioner argues that the MPLA's statute of limitations applies to Respondent's wrongful death cause of action, as opposed to the wrongful death statute of limitations. The *Dean* case does not support such an argument. As can be 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 from the Defendant/Petitioner's facility to Ruby Memorial Hospital due to an unstageable decubitus ulcer. Just eight days after her admission to Ruby Memorial Hospital, Jacqulin Lee Cowell died 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/Respondent from bringing a wrongful death action against the Defendant/Petitioner. Neither *Gray*, nor *Dean* support the Petitioner's argument.

E. THE CASES CITED BY THE PETITIONER REGARDING OTHER STATES' MALPRACTICE REFORM STATUTES ARE IRRELEVANT TO AN INTERPRETATION OF WEST VIRGINIA'S MPLA AS THEY ARE ALL DIFFERENT

In its brief, Petitioner asks this Court to rely on decisions from other jurisdiction to interpret the West Virginia MPLA. First, how other states have handled medical malpractice reform legislatively has no relevance or bearing on the plain language of West Virginia's MPLA and Wrongful Death Act. Our Court has consistently found that "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." *Elder*, 165 S.E.2d at Syl. Pt. 2. Even if this Court were to resort to the rules of interpretation, it would be inappropriate and without legal precedent to interpret a specific provision of West Virginia's MPLA by looking at other states' statutes.

Second, every state is different. Every state has differing language in their respective wrongful death statute as well as in any applicable medical malpractice statute. There may be some similarities, but all of the statutes and cases cited by the Petitioner have important differences to the West Virginia Wrongful Death Act as well as the West Virginia MPLA. For example, and as set forth below, some states' medical professional liability statutes expressly include the term "death" in the statute of limitations, and some, like West Virginia, do not. It is important to note that when other states are examining the issue of which statute of limitations would apply to a wrongful death claim alleging medical malpractice, this decision is overwhelmingly decided based upon the language of the specific state statutes at play. It also involves an interpretation of that particular state's case law concerning prior decisions interpreting the statutes generally and statute of limitations, specifically.

For example, this Court has already ruled in *Miller v. Romero* that:

> [W]hile we concede that the [MPLA] addresses both malpractice and actions involving death, **it does not supplant the two-year filing period for wrongful death found in W. Va. Code § 55-7-6**. . . . The omission of the word "death" from W. Va. Code § 55-7B-4 must mean that the section applies only to injury cases and the Legislature intended W. Va. Code § 55-7-6 to remain the applicable provision for limitations of actions involving wrongful death.

413 S.E.2d at 182. The *Miller* court based its decision on the language of the West Virginia MPLA. Because the West Virginia MPLA does not specifically use the term "wrongful death" or "death" in the portion of the statute involving the statute of limitations, this Court correctly determined that the West Virginia Wrongful Death Statute of Limitations applies to all death cases – including death cases alleging medical negligence. It would be inappropriate to use the reasoning by the West Virginia Supreme Court in *Miller* to determine how a court in any other state should rule on this issue because each state's statute and previous case law interpreting that statute will be different. You do not figure out if its raining in West Virginia by checking the weather in Arizona.

In other words, it is not a fair comparison to look at the decisions of other states and then conclude that the decision from that state should automatically apply to West Virginia. The language of each state's respective wrongful death statute and any applicable medical malpractice act will typically control the ruling of the courts. Notably, none of the cases from other states which are cited by the Petitioner contain the precise language found in West Virginia's Medical Professional Liability Act regarding statutes of limitation. As such, it is improper to apply the holdings from other states to the situation at hand because the language of each state's applicable statutes are different.

However, to the extent this Court wishes to look to other states for guidance, it is important to note that West Virginia is one of many states in which the wrongful death statute of limitations controls in wrongful death claims alleging medical negligence. For instance, in *McMickens v. Waldrop*, 406 So.2d 867 (Ala. 1981), The Supreme Court of Alabama found as follows:

> . . . we must decide this case by construing the intent of the Alabama Legislature in passing the Alabama Medical Liability Act, and the effect of that Act, if any, upon the right of a personal representative to bring an action for wrongful death within two years of the death of his "testator" or "intestate." The law of Alabama for many years has been that the two-year period provided for in the Wrongful Death Statute is a part of the substantive cause of action and is not to be treated as a statute of limitations. After two years, the remedy expires. *Downtown Nursing Home v. Pool*, 375 So.2d 465 (Ala. 1979). In view of the above, we conclude that the medical malpractice statute of limitations does not apply; . . .

Id. at 869.

In *Weedin v. United States*, 509 F.Supp. 1052 (D.Colo. 1981), The United States District Court for the District of Colorado held as follows:

> First, there has been some uncertainty throughout the briefing and argument of this motion whether the wrongful death statute of limitations section 13-21-204, C.R.S. 1973, as amended or the medical malpractice statute of limitations section 13-80-105, C.R.S. 1973, as amended applies to this case. It is quite apparent, however, from both a logical analysis of the statutes and from Colorado case law that the wrongful death statute of limitations controls this case. . . . Since Colorado law

> does not recognize the existence of a wrongful death action other than that created and defined by statute, necessarily the special statute of limitations made part of the wrongful death act applies to wrongful death actions arising from alleged medical malpractice, absent a specific, valid exception provided by the Legislature.

Id. at 1053-1054.

In *Dawson v. Kuehn*, 47 Conn.Supp. 241, 785 A.2d 1226 (Conn. Super. Ct. 2001), the Superior Court of Connecticut examined this issue and held that the wrongful death statute of limitations would apply rather than the medical malpractice statute of limitations. The Court stated "since its enactment our wrongful death statute has been regarded as the exclusive means by which damages resulting from death are recoverable." *Id.* at 1229. Additionally, in footnote 3 of the *Dawson* opinion, the Court further reasoned:

> This court believes that a statute providing for a limitation of two years from the date of death is more logical than a limitation of two years from the date the actionable harm is discovered or should have been discovered. This is because often the cause of death is not known until after the death, and there are such things as the opening of an estate, the appointment of an executor, executrix, administrator or administratrix, which are necessary before the estate can investigate and take action.

Id. at n.3.[2]

The Missouri Court of Appeals examined this issue in *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180 (Mo.App.1982), and stated:

> The [Missouri] Supreme Court has unequivocally held that an action by statutory beneficiaries for death by reason of malpractice is an action for wrongful death and not an action for malpractice. . . . This case is an action for wrongful death and not an action for malpractice. It necessarily follows that this case should be governed by the limitation provided in the wrongful death statute § 537.100."

Id. at 185, citing *Baysinger v. Hanser*, 355 Mo. 1042, 199 S.W.2d 644 (1947).

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[2] Like Colorado, Connecticut, and the other states cited herein, West Virginia's wrongful death statute is the exclusive means by which damages resulting from death are recoverable. *See Michael*, 828 S.E.2d at 816. Without the Wrongful Death Statute, a decedent's estate would have no means by which to pursue a claim under the MPLA – the two statutes exist in concert.

Likewise, the United State District Court for the District of Minnesota examined this issue in *Hachmann v. Mayo Clinic*, 150 F.Supp. 468 (D. Minn. 1957) and found that the wrongful death statute of limitations applied rather than the medical malpractice statute of limitations, holding as follows:

> The wrongful death statute is not a survival act, but is a new and distinct right of action accruing only to the personal representative of the deceased. *Keiper v. Anderson*, 138 Minn. 392, 398, 165 N.W. 237, 238, L.R.A. 1918C, 299. The case at bar is an action for death by wrongful act. It can be nothing else.

Id. at 470.

The Supreme Court of Ohio examined this issue in *Klema v. St. Elizabeth's Hospital*, 170 Ohio St. 519, 166 N.E.2d 765 (1960), where it examined whether Ohio's one-year malpractice statute of limitations would apply or the two-year wrongful death statute of limitations. The Court reasoned as follows:

> Had plaintiff's decedent survived the postoperative period and brought suit himself against the negligent doctor, no serious contention could be made that any other than the one-year statute of limitations would have applied. Such is not the case here, however. This is a wrongful death action brought under and by virtue of the provisions of [the wrongful death statute].

Id. at 767-68. This issue was again examined by the Supreme Court of Ohio in *Koler v. St. Joseph Hosp.*, 69 Ohio St.2d 477, 432 N.E.2d 821 (1982), where it was reiterated that although malpractice actions would be governed by the one-year medical malpractice statute of limitations, wrongful death actions would be governed by the two-year wrongful death statute of limitations.

Finally, in *Baxter v. Zeller*, 42 Or.App. 873, 601 P.2d 902 (Or.App.1979) the Court of Appeals of Oregon was asked to determine whether the Oregon medical malpractice statute of limitations or the Oregon wrongful death statute of limitations applied in a malpractice action involving wrongful death. The Court found as follows:

> We note first that [the medical malpractice act] speaks of "(a)n action to recover damages for Injuries to the person." (Emphasis added.) By contrast, [the wrongful death act] applies "(w)hen the Death of a person is caused by (a) wrongful act." (Emphasis added.) This is a Death case, but the applicability of [the wrongful death act] derives from more than a label. . . . The enactment of the wrongful death statute, however, created a new and separate cause of action which could arise if death was caused by Any wrongful act. Its three-year statutory period was a part of that right. [citations omitted]. Full vindication of the right dictates that the limitation found in [the wrongful death act] be applied in this case.

Id. at 904.

The problem with this entire analysis is that the language of every other state's applicable statute is different than the language of West Virginia's MPLA. That is critically important. The problem continues because the decisions by the other states involve entirely different sets of underlying facts which affect the way each court has ruled. Lastly, the Petitioner's analysis is faulty because each state must take into consideration that respective state's prior holdings on this issue. The point is, to decide this issue this Court need look no further than its own precedent in *Miller v. Romero*, as well as the plain language of the West Virginia Wrongful Death Act, and the West Virginia MPLA.

CONCLUSION

Wherefore, for the reasons set forth above, the Respondent, Kimberly Degler, hereby respectfully requests that this Honorable Court affirm the decision of the Trial Court which denied Petitioner's Motion to Dismiss.

Respectfully submitted,

KIMBERLY DEGLER,
Administratrix for the Estate of Jacqulin Lee Cowell,
Respondent,

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CERTIFICATE OF SERVICE

I, Dino S. Colombo, counsel for Respondent, do hereby certify that I served the foregoing **Respondent Kimberly Degler's Response to Petitioner's Petition for Writ of Prohibition** on this 8th day of January, 2021, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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