IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0763

STATE OF WEST VIRGINIA, ex rel. JOHN CHERIAN, M.D. and WEIRTON MEDICAL CENTER,	*
Petitioners and Defendants below,	*
v.	*
THE HONORABLE RONALD E. WILSON, Judge of the Circuit Court of Ohio (sic) County, and KEVIN and MARGARET CRAFT,	*
Respondents.	*

From the Circuit Court of Ohio (sic) County, West Virginia
Civil Action No. 19-C-31

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

KEVIN and MARGARET CRAFT,
By Counsel:

GEOFFREY C. BROWN, ESQ. (WVSB #9045)
gbrown@bordaslaw.com
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: (304) 242-8410
Facsimile: (304) 242-3936

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I. QUESTION PRESENTED

Did the Honorable Ronald Wilson, Judge of the Circuit Court of Brooke County, West Virginia, clearly err, as a matter of law, in a way not correctable on appeal, when he exercised his discretion to allow the Respondents/Plaintiffs to supplement their expert witness disclosure?

The Respondents/Plaintiffs, Kevin and Margaret Craft (hereinafter "the Crafts"), respectfully submit that Judge Wilson correctly and appropriately allowed them to supplement their expert disclosure and respectfully ask this Honorable Court to decline to issue a rule to show cause under W. Va. R. App. P. 16(i).

II. STATEMENT OF THE CASE

There is no dispute that the Crafts complied with every requirement of W. Va. Code §55-7B-6 and meticulously followed the provisions of the West Virginia Medical Professional Liability Act ("MPLA") before commencing this malpractice case. The Crafts served *Notices of Claim* and a *Screening Certificate of Merit* on the Petitioners, who never objected in any way to the Crafts' adherence to that process. The Crafts then waited more than 30 days and commenced this case well within the statute of limitations.

After the case was filed, Crafts came to believe that they would need to supplement their expert witness disclosure. As soon as they believed that to be the case, they supplemented immediately in conformance with the West Virginia Rules of Civil Procedure. The Crafts' actions were proper and appropriate, as Judge Wilson found through his Order of August 17, 2021.

The Petitioners now ask this Honorable Court to conclude that Judge Wilson committed a substantial and clear-cut legal error because he failed to apply the MPLA's *pre-suit* process to events that occurred *after* the case was already filed. The Petitioners' argument is that claimants like the Crafts can never supplement an expert witness disclosure and are, instead, always and forever bound

by the exact language of their pre-suit, pre-discovery *Certificates of Merit*. However, such an argument finds zero support in the MPLA. It finds zero support in the West Virginia Rules of Civil Procedure, and it finds zero support in the decisions of this Honorable Court.

When circumstances arise in civil litigation that might require a plaintiff to supplement an expert witness disclosure, what rules apply? The West Virginia Rules of Civil Procedure that address these scenarios directly or the MPLA statute that is expressly limited to pre-suit events? The answer is clear. Further, and to the extent it is an issue properly advanced by the Petitioners at all, it is equally clear that the Crafts complied with the requirements of the rules of civil procedure in supplementing their expert witness disclosure.

As a matter of background, this case arises out of a cardiac catheterization procedure performed by John Cherian, M.D., on Kevin Craft at Weirton Medical Center on July 4, 2017. On that date, Mr. Craft reported to Weirton Medical Center with complaints of chest pain, back pain, nausea and sweating. Dr. Cherian was WMC's on-call cardiologist and he decided to take Mr. Craft immediately to the WMC catheterization lab. During that procedure, Dr. Cherian placed two stents in the vascular structures around Mr. Craft's heart – one in his left anterior descending artery and one in his right coronary artery. As the Petitioners acknowledge, "Mr. Craft initially tolerated the procedure well." *See Petition for Writ of Prohibition* ("*Petition*") at 2. Indeed, at the conclusion of the procedure, Mr. Craft was awake and was talking about going fishing. However, shortly after the procedure "ended," but while Mr. Craft was still in the WMC cath lab, he collapsed into cardiac arrest. Dr. Cherian attempted to re-intervene and discovered that both of the stents he placed were clotted. The Petitioners acknowledge that "Mr. Craft suffered acute stent thrombosis." *Petition* at 3. As a result of this acute stent thrombosis, Mr. Craft suffered a catastrophic hypoxic brain injury. The primary liability question is why those two stents clotted at the same time right after the procedure.

The Crafts have set forth detailed expert information about exactly what happened to Kevin Craft during that procedure. Specifically, the Crafts have disclosed Martin Zenni, M.D., a specialist in interventional cardiology, to testify that two factors combined to cause those stent clots: (1) Dr. Cherian's inappropriate use of anticoagulants in connection with the procedure and (2) Dr. Cherian's inappropriate deployment of the stents themselves. *See Letter of Martin Zenni, M.D.* ("*Zenni Letter*") (Supp. Appx. at 008-010).[1]

Dr. Cherian and Weirton Medical Center ("WMC") do not take issue with the first subject area of expert testimony. They take issue with the second subject area of expert witness testimony, but strangely argue that Dr. Zenni's testimony should be restricted pursuant to the MPLA statute of limitations. The Crafts respectfully reject that position.

On March 5, 2019, well within the two-year statute of limitations set forth in W. Va. Code §55-7B-4(a), the Crafts provided Dr. Cherian and Weirton Medical Center with separate *Notices of Claim* under W. Va. Code §55-7B-6. The *Notice of Claim* that the Crafts provided to Dr. Cherian is attached in the Supp. Appx. at 11.[2] The *Notice of Claim* that the Crafts provided to Weirton Medical Center is attached in the Supp. Appx. at 0024.[3] As the law requires, along with these *Notices of Claim*, the Crafts provided a *Screening Certificate of Merit* executed by Dr. John Pirris, a Board-Certified

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[1] Dr. Zenni's letter was attached as **Exhibit 1** to *Plaintiffs' Memorandum in Support of Re-Filed Opposition to Defendants' Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Witness Testimony*. The Petitioners failed to include this document as part of their Appendix. The Crafts have attached that entire document at Supp. Appx. 001-011.

[2] Dr. Cherian and WMC failed to include this document in their Appendix. While they did provide the *Certificate of Merit*, they omitted the *Notice of Claim* to which it was attached preventing a full review of the document in its entirety.

[3] Dr. Cherian and WMC failed to include this document in their Petition.

Cardiovascular Surgeon who was serving as the Chief of the Division of Cardiothoracic Surgery at the University of Florida, Jacksonville. *See Expert's Certificate of Merit* (Appendix 007-008).

As set forth in the *Notice of Claim*, the Crafts' theory of liability against Dr. Cherian arose out of his medical professional liability pursuant to the elements set forth in W. Va. Code §55-7B-3. As set forth in the *Notice of Claim* pertaining to Dr. Cherian:

> I am writing to you on behalf of Kevin Craft. On July 4, 2017, you acted as Kevin Craft's doctor at Weirton Medical Center. **Due to your failure to meet the standard of care, Kevin Craft suffered severe and significant injuries**.
>
> . . .
>
> **These claims will be based on the West Virginia Medical Professional Liability Act, and will include all claims which arise from your professional negligence**, all as more fully detailed in the attached document, and will seek damages for all of the harms, losses, injuries and damages occasioned by your misconduct.

See Notice of Claim to Dr. Cherian (Supp. Appx. at 011) (emphasis supplied).

The Crafts, without objection or complaint, set forth the following regarding their theory of liability against Weirton Medical Center:

> According to W. Va. Code §55-7B-6, Kevin Craft is not required to provide Weirton Medical Center with a separate Screening Certificate of Merit because the claims against it are based on a well-established legal theory of liability, vicarious liability, that does not require separate expert testimony.

See Notice of Claim to WMC (Supp. Appx. at 0024). *See also*, W. Va. Code §55-7B-6(c) ("if a claimant or his or her counsel believes that no screening certificate of merit is necessary because the cause of action is based on a well-established legal theory of liability which does not require expert testimony supporting a breach of the applicable standard of care, the claimant or his or her counsel shall file a statement specifically setting forth the basis of the alleged liability of the healthcare provider in lieu of s screening certificate of merit").

Thus, the Crafts' theory of liability against Dr. Cherian was his medical malpractice arising out of his service as Mr. Craft's doctor at Weirton Medical Center on July 4, 2017. His theory of liability against Weirton Medical Center was its vicarious liability for Dr. Cherian's malpractice. Those theories of liability were appropriately set forth in the *Notices of Claim.*

A screening certificate of merit serves a different purpose under the rules. Unlike the general standards applicable to a notice of claim, a certificate of merit must contain a significant amount of detail, including "the expert's opinion as to **how** the applicable standard of care was breached." W. Va. Code §55-7B-6(b). Accordingly, the Crafts' *Certificate of Merit* from Dr. Pirris set forth his opinion regarding how Dr. Cherian deviated from the standard of care. Specifically, it was Dr. Pirris' opinion that Dr. Cherian mismanaged Mr. Craft's anticoagulation medications throughout the peri-operative period. *See* Appendix 007-008. The Crafts still maintain that position today. That is, the Crafts still contend and intend to prove that Dr. Cherian fell below the standard of care by and through the way in which he handled Mr. Craft's anticoagulation management.

On April 17, 2019, well within the two-year statute of limitations, the Crafts commenced this civil action against Dr. Cherian and WMC in the Circuit Court of Brooke County, West Virginia. *See Complaint* (Appendix 001-006).[4] It is true that the *Complaint* focuses on Dr. Cherian's anticoagulation decisions. The Crafts fully support those same allegations today. Nothing about that has changed. However, it is undisputed that the *Complaint* also contained allegations of medical negligence generally. As set forth in the *Complaint*:

> 15. The Defendant, John Cherian, M.D., owed all of the following duties to Kevin Craft:
>
> A. The duty to exercise the degree of care, skill and learning required or expected of a reasonable, prudent health care

[4] Dr. Cherian and WMC incorrectly captioned its Petition before this Honorable Court as having arisen from Ohio County. *See Respondents' Motion to Amend the Caption* of this proceeding.

provider in the profession or class to which he belonged acting in the same or similar circumstances.

...

16. The Defendant, John Cherian, M.D., was negligent, breached the standard of care, and breached his duties to Kevin Craft in each of the following ways:

A. Failing to exercise that degree of care, skill and learning required or expected of a reasonable, prudent, health care provider acting in the profession or class to which he belonged acting in the same or similar circumstances.

Complaint ¶¶ 15A & 16A (Appendix at 004-005).

In accordance with Judge Wilson's Scheduling Order, and on July 29, 2020, the Crafts submitted their *Expert Witness Disclosure*. Through that disclosure, the Crafts disclosed Dr. Pirris to testify in a way that was generally consistent with his previously submitted *Screening Certificate of Merit*. *See* Appendix 010-016. Although Dr. Cherian and WMC fail to bring this fact to the attention of this Honorable Court, the Defendants submitted their own *Expert Witness Disclosure* on August 31, 2020. *See* Supp. Appx. at 0028-0034.[5] Through that filing, Dr. Cherian and WMC disclosed Ian C. Gilchrist, M.D., as an "expert in the field of interventional cardiology." *Id.* at 0028. While Dr. Gilchrist's disclosure does address the anticoagulation issue, he is also addresses the Crafts' claims of malpractice overall: "**Without limitations**, it is anticipated that Dr. Gilchrist will testify that Dr. John Cherian and all employees of Weirton Medical Center **acted at all times within the standard of care** in caring for a treating Kevin Craft and that in particular, Mr. Craft was properly and adequately anticoagulated in connection with his July 4, 2017 procedure." *Id.* (emphasis supplied).

[5] Dr. Cherian and WMC failed to include this document in their Appendix.

On October 23, 2020, the same day as the Pretrial Conference, Dr. Cherian and WMC submitted their *Pretrial Memorandum*. *See* Supp. Appx. at 0035-0040.[6] Through that document, and for the first time, Dr. Cherian and WMC stated that they anticipated objecting to the expertise of the Crafts' expert. *Id.* at p. 3 (Supp. Appx. at 0037). At the pretrial conference that same day, Judge Wilson established a discovery deadline of May 31, 2021 and a trial date of September 13, 2021.

Once the Crafts realized the apparent position of Dr. Cherian and WMC regarding the qualifications of Dr. Pirris, the Crafts immediately got in touch with Dr. Martin Zenni, an interventional cardiologist. At the time, the primary question for Dr. Zenni was whether he agreed with Dr. Pirris' opinions regarding the anticoagulation issue. He emphatically did. Accordingly, and because the Crafts, through counsel, believed in good faith that Dr. Zenni's opinions about the anticoagulation issue predominated, they moved for substitution on November 23, 2020. See *Motion for Leave to File a Supplemental Expert Witness Disclosure*. *See* Appendix 021-043.

On December 18, 2021, Dr. Cherian and WMC wrote to counsel regarding the motion for substitution stating as follows: "We are in receipt of the attached [the motion for leave to file a supplemental disclosure]. **Because discovery has been extended and we have a later trial date**, we are not going to oppose your Motion. We are requesting Dr. Zenni's deposition." *See Plaintiffs' Filing of Additional Exhibits in Support of Re-Filed Memorandum in Opposition to Defendants' Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Witness Testimony* (emphasis supplied) (Supp. Appx. at 0015).[7]

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[6] Dr. Cherian and WMC failed to include this document in their Appendix.

[7] Dr. Cherian and WMC failed to attach this document as part of their Appendix.

On March 17, 2021, Dr. Cherian and WMC noticed Dr. Zenni for deposition scheduled to take place just six days later, *i.e.*, March 23, 2021. *See Plaintiffs' Filing of Additional Exhibits in Support of Re-Filed Memorandum in Opposition to Defendants' Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Witness Testimony* (Supp. Appx at 0018-0019)[8]. In preparing Dr. Zenni for deposition in the week leading up to his testimony, it became clear to the Crafts that Dr. Zenni's opinion regarding the placement of the stents was more important to his opinions than they originally believed. As Dr. Zenni explains:

> It was my understanding that a colleague, Dr. Jack Pirris a cardiothoracic surgeon, had reviewed this matter and was very concerned that Mr. Craft had undergone a high risk multivessel angioplasty stent procedure (PCI) with inadequate antithrombotic therapy after suffering an acute inferior myocardial infarction (STEMI) complicated by a cardiac arrest in the emergency room where he was resuscitated.
>
> ...
>
> Based on these materials, I understood that Dr. Pirris' criticisms centered on Dr. Cherian's insufficient use of antithrombotic (AT) medications during the July 4, 2017 PCI procedure. I completed my own independent review of the materials with careful attention to the AT treatment as well as to the PCI procedure to reach my own conclusion having practiced interventional cardiology since 1993. **Based on my analysis, I concur with Dr. Pirris' opinion that Dr. Cherian fell below the standard of care with respect to insufficient use of antithrombotic medication used during the PCI. Only a single AT medication (Angiomax) was used during a high risk, complex, multivessel PCI procedure during a STEMI. My review strongly supports that Angiomax was discontinued prematurely and (long) before any potent anti-platelet and appropriate AT was ever given**.
>
> ...
>
> Eventually, I was scheduled for deposition. **In an effort to be fully prepared for the deposition, I discussed with Mr. Brown that this case was far more involved beyond the AC treatment given**

[8] Dr. Cherian and WMC failed to attach this document as part of their Appendix.

> **during the procedure**. A careful frame by frame detailed analysis of the PCI procedure (difficult using a DICOM viewer playback from a CD-Rom) confirms that more could have been done and should have been done in the cath lab to prevent the predictable failure of the initial stent procedures.
>
> ...
>
> **When I communicated these opinions to Mr. Brown initially, my primary focus was on the AT treatment and not so much on Dr. Cherian's performance of the PCI procedure. Upon prepping for deposition on or about March 17, 2021 planned for March 23, 2021, I emphasized the procedural issues to Mr. Brown along with the AT issues that were much better communicated to him after my initial review**.

See Zenni Letter (attached as **Exhibit 1** to *Plaintiffs' Memorandum in Support of Re-Filed Opposition to Defendants' Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Witness Testimony*) (Supp. Appx. at 008-010) (emphasis supplied).

Once the Crafts understood how important the stent placement issue was to Dr. Zenni, they supplemented their *Expert Witness Disclosure* and made sure to do so in advance of Dr. Zenni's deposition. Indeed, the supplementation occurred on March 19, 2021, four days before he was scheduled to be deposed and just two days after he was noticed for deposition. *See* March 19, 2021 email (Appendix 050-051). Instead of rescheduling Dr. Zenni's deposition, Dr. Cherian and WMC filed the motion that eventually led to this Petition.[9]

On May 27, 2021, the Crafts opposed the Defendants' motion. See *Plaintiffs' Memorandum in Support of Re-Filed Opposition to Defendants' Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Witness Testimony*) (Supp. Appx. at 001-011). On August 17, 2021, the trial court DENIED the Petitioners' motion concluding that "[t]he Plaintiffs will be permitted to call their expert witness, Dr. Zenni, at trial and will be

[9] Strangely, the Petitioners did not include their own motion in their Appendix.

permitted to pursue a negligence claim in this matter, while Defendants will be permitted to have their own expert testify in response. However, with this ruling coming within less than a month prior to trial, the Court recognizes that this ruling could create issues with the trial date. Therefore, if Plaintiffs still wish for their expert to testify on the issue of negligence, the trial will be continued to a later date in order for the parties to make the proper preparations." *See* Appendix 052. After the Plaintiffs acknowledged their intent to call Dr. Zenni, the Court gave counsel for Dr. Cherian and WMC the option to have the trial continued, which the Defendants took. *See* email correspondence (Supp. Appx. at 0041).[10] On August 23, 2021, the trial court continued the trial. *See Order* (Supp. Appx. at 0043).[11] No new trial date has been established.[12]

III. SUMMARY OF THE ARGUMENT

The first reason this Petition fails is because it applies the wrong legal standard to Judge Wilson's August 17, 2021 Order. The Petitioners themselves characterize their entire argument as follows: "The August 17, 2021 Order of Court entered by the Honorable Ronald E. Wilson, of the Circuit Court of Ohio County (sic), West Virginia . . . is clearly erroneous as a matter of law because it is in violation of the procedural requirements of the Medical Professional Liability Act ("MPLA"), W. Va. Code §§55-7B-1, et seq." *Petition* at 7. The Crafts respectfully submit that this argument fails on its face.

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[10] Dr. Cherian and WMC failed to include this email exchange in their Appendix.

[11] Dr. Cherian and WMC failed to include this Order in their Appendix.

[12] The Petitioners represent that the trial was continued to August of 2022. *See Petition* at 6. That is not exactly correct. At the September 7, 2021 status conference, the trial court did state that it was prepared to set a trial date in August of 2022, but upon learning of the Petitioners' intention to file this writ, the trial court did not set a new trial date. Regardless, the analysis set forth herein is the same one way or the other.

The MPLA's "procedural requirements" are found in W. Va. Code §55-7B-6. Those requirements are explicitly limited to events that occur before a case is filed. *See, e.g.*, W. Va. Code §55-7-B-6(b) ("At least 30 days **prior** to the filing of a medical professional liability action...) (emphasis supplied). Further, that same statute contemplates that things might change after the filing of malpractice case and specifically and explicitly defers to the West Virginia Rules of Civil Procedure on those issues. *Id.* ("Nothing in this subsection limits the application of Rule 15 of the Rules of Civil Procedure.").

Judge Wilson's Order regarding the scope of an expert's testimony is not evaluated under the MPLA. It is, instead, properly evaluated under the West Virginia Rules of Civil Procedure. That poses an insurmountable problem for the Petitioners, however, because under the rules of civil procedure, Judge Wilson's decision about the scope of the Crafts' claims and the timeliness of their expert supplementation are purely discretionary decisions not subject to interlocutory review. That is, they cannot amount to the type of substantial, clear-cut, error of law that would allow a writ. *See State ex rel. Shelton v. Burnside*, 212 W. Va. 514, 575 S.E.2d 124 (2002)("[i]n the absence of jurisdictional defect, the administration of justice is not well served by challenges to discretionary rulings of an interlocutory nature. These matters are **best saved for appeal** and, as a general rule, do not present a proper case for issuance of the writ.") (emphasis supplied).

The fact that the Petitioners base their entire argument on an inapplicable statute should end the analysis. That is not, however, the only fatal defect in this *Petition.*

The Crafts respectfully contend that Judge Wilson's August 17, 2021 Order was correct. The Crafts' *Complaint* is clearly broad enough to encompass the full scope of Dr. Zenni's proffered testimony and the Crafts' supplementation of Dr. Zenni's disclosure comports with the letter and the spirit of the West Virginia Rules of Civil Procedure. After the legitimate retention of a new

expert, the Crafts believed that a supplementation of their expert witness disclosure was necessary under W. Va. R. Civ. 26(e). As soon as they believed such supplementation was necessary, they communicated that supplement to the Petitioners. The Petitioners have plenty of time to depose the expert and address the full scope of his testimony. Indeed, they have their own expert capable of addressing anything the Crafts' expert says. There is not bad-faith and there is zero prejudice.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION:

The Petitioners contend that oral argument is necessary because "[t]his matter involves assignments of error in the application of settled law." *Petition* at 8. The Crafts disagree. The trial court correctly exercised its discretion in permitting the Crafts' expert to fully testify and the Petitioners can point to no statute or syllabus point that prohibits Judge Wilson's order. Should this Honorable Court desire oral argument, the Crafts will gladly participate.

V. ARGUMENT:

A. Standard of Review – The Trial Court Committed No Substantial, Clear-Cut, Legal Error:

The Petitioners concede that the trial court was acting within its jurisdiction when it issued its order of August 17, 2021. *See Petition* at 9. Thus, the Petitioners also concede, as they must, that they are asking for an "extraordinary remedy" and that "this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of 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." *Id.* at 9-10, *citing* Syl. Pt. 2, *State ex rel. Tucker Cty. Solid Waste Auth. v. West Virginia Div. of Labor*, 222 W. Va, 588, 668 S.E.2d 217 (2008) and W. Va. Code §53-1-1.

As this Honorable Court recently held in *State ex rel. Morgantown Operating Co. v. Gaujot*, 859 S.E.2d 358, 362 (2021):

> We have discussed that prohibition is an extraordinary remedy, "reserved for 'really extraordinary causes.' " Extraordinary writs do not issue to prevent a simple abuse of discretion. Rather, discretionary writs of prohibition serve the limited purpose of rectifying "substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate." Even then, those issues may only be appropriate for prohibition when they "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."

Quoting State ex rel. Vanderra Resources, LLC v. Hummel, 242 W. Va. 35, 40, 829 S.E.2d 35, 40 (2019) (*quoting Am. Elec. Power Co. v. Nibert*, 237 W. Va. 14, 19, 784 S.E.2d 713, 718 (2016), Syl. Pt. 2, in part, *Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977), Syl. Pt. 1, in part, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), *superseded by statute on other grounds as stated in State ex rel. Thornhill Grp., Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014).

Morgantown Operating Co. also reaffirmed the familiar analysis contained in *Hoover v. Berger* when assessing whether a trial court has exceeded its legitimate powers. *Id.*, 859 S.E.2d at 362-63. According to Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996):

> 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) 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.

Dr. Cherian and WMC make no effort whatsoever to even address factors (1), (2), (4), and (5), above. There is good reason for that. The Petitioners cannot come close to satisfying any of those factors. Nonetheless, the Crafts will address them briefly in Part V.E., below.

Instead, Dr. Cherian and WMC focus on the third factor, but remarkably they cite no statute that they contend Judge Wilson clearly violated. They can cite to no syllabus point law from this Honorable Court that they contend Judge Wilson violated. The reason for that is simple, there is no such authority.

To be sure, this Honorable Court has decided cases that go one way or the other on discretionary procedural issues (whether a plaintiff can amend a complaint) or evidentiary issues (whether a party can supplement an expert witness disclosure). *See* Syl. Pt. 1, *California State Teachers' Retirement Sys. v. Blankenship*, 240 W. Va. 623, 814 S.E.2d 549 (2018) ("'A trial court is vested with sound discretion in granting or refusing leave to amend pleadings in civil actions,'"), *quoting* Syl. Pt. 6, *Perdue v. S. J. Groves and Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250 (1968); Syl. Pt. 2, *Kiser v. Caudill*, 210 W. Va. 191, 557 S.E.2d 245 (2001) (abuse of discretion standard applies to expert witness decisions). However, those cases are all decided on their own facts and left to the sound discretion of the trial court. Were this Honorable Court to intervene in the present matter, it would then become the arbiter of every discretionary procedural and evidentiary issue decided by every trial court throughout the state. After all, every case is tried against the background procedural and evidentiary decision of the trial court.

The analysis here is further confounded by the odd mismatch between the relief requested by Dr. Cherian and WMC and the purported basis for that relief. That is, the Petitioners complain about a trial court order that pertains to the permissible scope of expert witness testimony. However, they do not address that order directly under Rules 16, 26, or 37 of the West Virginia Rules of Civil Procedure. Instead, they claim that the Crafts' expert should be limited by operation of the statute of limitations, which is an affirmative defense ordinarily directed at claims (not witnesses) and pursued through a motion under W. Va. R. Civ. P. 12(b)(6), 12(c) or 56. *See* Syl. Pt 2, *Coffield v. Robinson*, 245 W. Va. 55, 857 S.E.2d 395 (2021) (statute of limitations is an affirmative defense), *quoting* Syl. Pt. 2, *Nellas v. Loucas*, 156 W. Va. 77, 191 S.E.2d 160 (1972).

The permissible scope of expert witness testimony is evaluated as a discretionary evidentiary issue and a statute of limitations defense is usually evaluated as an assessment of the timeliness of a complaint under totally different rules. Neither the Crafts, nor the trial court, nor this Honorable Court should be compelled to try to make sense of the Petitioners' attempt to graft one set of rules onto a mismatched request for relief

This analysis dovetails with the third Hoover factor, "whether the lower tribunal's order is clearly erroneous as a matter of law." The Crafts respectfully submit that Judge Wilson committed no such legal error.

B. The Trial Court's Decision to Allow the Plaintiffs' Expert to Fully Testify has Nothing to do with the MPLA's Pre-Suit Requirements:

As stated above, the Petitioners cannot force this Honorable Court to attempt to find some legitimate request for relief somewhere in their *Petition.* It is also notable in light of the "substantial, clear-cut, legal error standard" that the Petitioners' argument about the MPLA's pre-

suit requirements spans nearly seven pages without reference to a single case or statute that has anything whatsoever to do with the present controversy.

The Petitioners apparently take the position that W. Va. Code §55-7B-6, which sets forth the pre-suit requirements applicable to MPLA actions, somehow applies to the present situation, which relates to a supplemental expert witness disclosure submitted after the case is already filed. §55-7B-6 simply does not and cannot apply.

There is no dispute that the Crafts complied with the pre-suit requirements of W. Va. Code §55-7B-6. They served an entirely appropriate *Notice of Claim* and *Screening Certificate of Merit*. They waited more than 30 days and then filed suit. Neither Dr. Cherian nor WMC objected to the Crafts' MPLA compliance, nor did they raise any objection to the Crafts' *Complaint*. *See* Syl. Pts. 3-5, *Hinchman v. Gillette*, 217 W. Va. 378, 618 S.E.2d 387 (2005). This case was properly commenced, and it was properly commenced within the statute of limitations.

Pursuant to its own terms, W. Va. Code §55-7B-6(b) applies only to events that happen **before** the case is filed. It simply does not apply to things that happen **after the case is filed**. After the case is filed, the West Virginia Rules of Civil Procedure take over, as acknowledged by the MPLA itself.

As set forth below, the Crafts respectfully submit that there was no need or reason for the Crafts to file a motion for leave to file an amended complaint under W. Va. R. Civ. P. 15. Additionally, if a Rule 15 motion was required (it was not), then the issues encompassed by Dr. Zenni's opinions regarding the placement of these stents are clearly covered by the relation-back provisions of the rule. *See* Part V.C., below.

Although W. Va. R. Civ. P. 15 does not apply, it is notable that W. Va. Code §55-7B-6(b) specifically states: "Nothing in this subsection limits the application of Rule 15 of the Rules of

Civil Procedure." *See* Syl. Pts. 1 & 2, *Boggs v. Camden-Clark Mem. Hospital Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004) (Rule 15 applies in MPLA actions), *modified on other grounds*, Syl. Pt. 4, *Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005). Thus, before a MPLA case is commenced, W. Va. Code §55-7B-6(b) applies. After a MPLA case is filed, the West Virginia Rules of Civil Procedure apply just like they would in any other case.

That is exactly how it should be and how it needs to be. By its very operation, a notice of claim and screening certificate of merit come into existence before the opportunity for discovery. When those documents are generated, neither the claimant, nor the claimant's certificate of merit expert, nor claimant's counsel will have had the opportunity to take discovery under the West Virginia Rules of Civil Procedure. Forcing a claimant to be glued to the exact contents of a certificate of merit no matter what happens during the case is not only fundamentally unfair, it is also in contravention to the statute itself, and would have to be accompanied by a ruling that would allow a Plaintiff to re-open the notice of claim process after the fact, which is contrary to the statute and this Honorable Court's decisions on the issue.

The civil rules contemplate and allow expansive discovery and address the permissible scope of expert witness testimony. They also address what is expected of a party when the supplementation of expert witness testimony becomes necessary. *See* W. Va. R. Civ. P. 26(e)(1)(B). If, as sometimes happens, a party needs to update by supplementation "the subject matter on which the expert is expected to testify [or] the substance of the expert's testimony," that supplementation should be addressed under the ordinary operation of the Rules of Civil Procedure. It makes no sense to attempt to re-start the pre-suit mechanisms set forth in MPLA. In fact, by its own terms, such action is impossible because the suit has already been filed. Nothing in the MPLA indicates that it is meant to replace the Rules of Civil Procedure once a case is underway.

Dr. Cherian and WMC were in control of their motion in the trial court, and they are in control of their *Petition* before this Honorable Court. The only stated basis for the relief they seek allegedly lies within the MPLA's pre-suit requirements (Petition 10-18) and the MPLA's statute of limitations (Petition 18-20). However, those provisions have nothing to do with the present controversy. For that reason alone, the Petitioners are not entitled to any relief.

C. The Crafts' Complaint is Broad Enough to Encompass the Full Scope of Dr. Zenni's Opinions:

Dr. Cherian and WMC have never moved under Rule 12(b)(6), Rule 12(c), Rule 56, or any other provision of the West Virginia Rules of Civil Procedure on any claim, so again, the Crafts respectfully submit that this Honorable Court can and should deny this writ without the necessity of having to address issues pertaining to the scope of the Crafts' *Complaint*. That is, the Crafts respectfully submit that this Honorable Court does not need to issue an advisory opinion on a motion the Petitioners have never filed. Nonetheless, the Crafts address this issue only out of an abundance of caution.

As set forth above, it is true that the *Complaint* addresses the anticoagulation issues. It also contains allegations of medical negligence generally. *Complaint* ¶¶ 15A & 16A (Appendix at 004-005). Through its Order of August 17, 2021, the trial court determined that "[t]he Plaintiffs will be permitted to call their expert witness, Dr. Zenni, at trial and **will be permitted to pursue a negligence claim in this matter**, while Defendants will be permitted to have their own expert to testify in response." Appendix at 052 (emphasis supplied). Judge Wilson was exactly correct in determining that the Crafts' claim against the Petitioners sounds in negligence. It does. That claim of negligence is certainly broad enough to include the stent issue.

A plaintiff's complaint does not need to contain detailed factual allegations that forever bind the plaintiff to those exact words. Instead, all that is required is "(1) a short and plain statement of the

claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." W. Va. R. Civ. P. 8(a). As with all rules applicable to the pleadings, the allegations in a plaintiff's complaint "shall be construed as to do substantial justice." W. Va. R. Civ. P. 8(f).

The West Virginia Supreme Court of Appeals recently addressed the liberality of West Virginia's pleading rules in *Mountaineer Fire & Rescue Equipment, LLC, v. City National Bank of West Virginia*, 854 S.E.2d 870 (2020). The Court in *Mountaineer Fire* wrote: "[T]he West Virginia Rules of Civil Procedure establish the principle that a plaintiff pleading a claim for relief need only give **general notice as to the nature of his or her claim**." *Id.* at 883 (emphasis supplied). Said another way, "In light of the purpose behind the Rules of Civil Procedure, this Court has steadfastly held that, to survive a motion under Rule 12(b)(6), a pleading need only **outline the alleged occurrence** which (if later proven to be a recognized legal or equitable claim), would justify some form of relief." *Id. See also*, Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977); *State v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995) ("Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure.").

In light of these legal standards, the *Plaintiffs' Complaint* is clearly broad enough to encompass everything set forth in the Crafts' supplemental disclosure. The Crafts' claim against Dr. Cherian is one for medical negligence under W. Va. Code §55-7B-3. Although the *Complaint* does discuss Dr. Cherian's decisions regarding the administration of anticoagulants, it also contains general allegations of medical negligence and the Crafts are not, in any case, limited by their more specific allegations. *See* W. Va. R. Civ. P. 8(e)(2) ("A party may also state as many separate claims or defenses as the party has regardless of consistency.").

Simply put, the Crafts have not advanced a new claim against Dr. Cherian under the West

Virginia Rules of Civil Procedure. *See Wallace v. Shaffer*, 155 W. Va. 132, 137-138, 181 S.E.2d 677, 680 (1971) (even where acts occurred on different dates, there was no "new cause of action" where the claims "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."), *quoting* W. Va. R. Civ. P. 15; *Lindsay v. Attorneys Liability Protection Society, Inc.*, No. 11-1651, 2013 WL 1776465 at *4, n. 12 (W. Va. Supreme Court, April 25, 2013) (memorandum decision) (no "new claim" existed where amended complaint was "founded on the same set of operational facts.").

While the Crafts respectfully reject the contention that the present issue is governed by W. Va. R. Civ. P. 15, the Crafts take the position that if Rule 15 did apply, any "new claims" asserted by the through their supplemental disclosure would relate back to the filing of their original *Complaint*. Here, it is important to emphasize again that the Crafts have always taken the position that Dr. Cherian failed to properly anticoagulate Mr. Craft. Nothing about that has changed. At the same time Dr. Cherian was making his anticoagulation decisions, he was also making his stenting decisions. That is, the anticoagulation decisions and the stenting decisions were undertaken at the same time by the same actor. They are also very closely related issues. It is Dr. Zenni's opinion that Dr. Cherian's failures with regard to anti-thrombotic treatment are so important because of his underlying failures with respect to the placement of the stents themselves:

> Upon review, I am convinced that Dr. Cherian's poor performance of both stent procedures contributed to the acute stent thrombosis that occurred in both the LAD and RCA stents exacerbated in the setting of grossly exacerbated in the setting of grossly inadequate AT [medical treatment].
>
> ...
>
> It remains my opinion that Dr. Cherian's inadequate AT therapy was a proximate contributor to Mr. Craft's acute stent thrombosis (in both RCA and LAD stents). At the same time, it is also my opinion that Dr. Cherian's poor performance of the PCI procedure was an

> equally important contributing factor to the failed initial procedure that resulted in a devastating second cardiac arrest that has had a dramatic consequences for the patient and his family.

See Zenni Letter (Supp. Appx. 008-010). The issue of the stent placement and the issue of the medications are very closely related. One helps explain the other.

Again, the Crafts respectfully submit that no motion for leave to amend is required, but if such a motion were made, the Crafts respectfully submit that it would and should be granted. In evaluating a motion for leave to amend, courts are guided by the principle that "leave shall be freely given when justice so requires." W. Va. R. Civ. P. 15(a). As the West Virginia Supreme Court of Appeals has held:

> The purpose of the words 'and leave (to amend) shall be freely given when justice so requires' in Rule 15(a) W.Va. R.Civ.P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, **motions to amend should always be granted** under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet he issue.

Syl. Pt. 3, *Muto v. Scott*, 224 W. Va. 350, 686 S.E.2d 1 (2008), *quoting* Syl. Pt. 3, *Rosier v. Garron, Inc.*, 156 W. Va. 861, 199 S.E.2d 50 (1973) (emphasis supplied). *See also*, *Adkins Barber v. Slater*, 171 W. Va. 203, 207, 298 S.E.2d 236, 241 (1982) (amendment should have been allowed where plaintiffs made their new theory "known to the court and to the appellees at least one month before trial."); *Coleman v. Coleman*, 175 W. Va. 569, 571, 336 S.E.2d 217, 219 (1985) (amendment should have been permitted because "the West Virginia Rules of Civil Procedure should be liberally construed in favor of allowing pleadings to be amended.").

As to any subsequent issues that would relate to the timeliness of any new allegations contained in an amended complaint, the rules state that an amendment of a pleading relates back

to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." W. Va. R. Civ. P. 15(c)(2). Here, it is clear that even if this rule applied, the Crafts satisfy its requirements.

Even construed as narrowly as the Defendants suggest, the Crafts' *Complaint* addresses Dr. Cherian's decisions on July 4, 2017. Further, as Dr. Zenni is prepared to testify, Mr. Craft's clots were caused by Dr. Cherian's decisions regarding the anticoagulants and Dr. Cherian's decisions regarding the stenting. These issues all arise out of the same "conduct, transaction, or occurrences" set forth in the Plaintiffs' *Complaint*. That is, there is no "exact same facts" requirement under the rule. It is not true that a litigant must file an amended complaint every time an expert wishes to add something to his or her testimony, particularly when the expert wishes to address the same set of facts that has always been at issue in the case. Such is the case here.

Bennett v. Owens, 180 W. Va. 641, 378 S.E.2d 850 (1989) is a case that arose out of an assault at a high school graduation party. The plaintiff originally alleged that the defendant, Dennis Owens, Sr., was the one who hit him. After it became apparent that the defendant did not, himself, strike the plaintiff, the plaintiff sought leave to amend his complaint to alleged that the defendant failed to appropriately supervise the party more generally. *Id.* at 642. The trial court denied the plaintiff's motion for leave to amend, but this Honorable Court reversed holding as follows:

> This Court has recognized that under certain circumstances a trial court should allow amendment of a complaint, even where the amendment changes the legal theory of the case and the new legal theory, if advanced independently, would be barred by the statute of limitations at the time of the amendment. The real question is whether the legal theory raised by the amendment grows out of the same conduct, transaction, or occurrence which gave rise to the initial transaction. If it does, it will be allowed, provided that injustice will not result from the allowance of relation back and provided the adverse party has received adequate notice of the new

> claim and has an adequate opportunity to prepare a defense to it. *Roberts v. Wagner Chevrolet–Olds, Inc.*, 163 W.Va. 559, 258 S.E.2d 901 (1979).
>
> In the case presently before the Court, the appellant sought to amend his complaint against Dennis Owens, Sr. by alleging that, instead of striking the appellant directly at the time of the incident giving rise to the proceeding, Dennis Owens, Sr. was negligent in supervising the incident and by failing to take precautionary measures to neutralize the argument between the appellant and the other guests and by encouraging other guests to engage in aggressive behavior toward him.
>
> The theory advanced by the appellant's amendment arose out of the same **factual context** as the appellant's original theory. The original complaint placed Dennis Owens, Sr. on notice of the injury which the appellant suffered, **the general circumstances** which resulted in that injury, and of the fact that recovery was being sought against him **because of his participation in the incident**. The appellant moved to amend his complaint after the deposition of Dennis Owens, Sr. was taken, but before trial of the case.
>
> This Court believes that at the time of the appellant's motion, amendment would have permitted the preservation of the merits of the action, and Dennis Owens, Sr. would have had an adequate opportunity to prepare a defense to meet the issues raised. The Court cannot say that the motion to amend was made at such a time and in such a manner as to result in sudden prejudice against Dennis Owens, Sr.
>
> Under the circumstances, and in view of the policy favoring liberal amendment, this Court believes that the circuit court erred in refusing to allow the appellant to amend his complaint.

Id. at 642-43 (emphasis supplied).

The Petitioners cite *Southern Environmental, Inc. v. Bell*, 854 S.E.2d 285 (2020), in support of their position, but that case is not remotely like this one. In *Southern Environmental*, the plaintiff sued multiple defendants after he was injured at work. At the time, the plaintiff was employed by Nicholson Construction Company. In his original complaint, the *plaintiff's only allegation of liability against Nicholson was for spoliation.* The plaintiff appeared to have made a conscious decision not

to assert a deliberate intent case against his employer, but later tried to do just that through the filing of an amended complaint. *Id.* at 288-290.

This Honorable Court did not permit the relation back of the amendment on the grounds that "when alleging who was at fault for the accident [in the original complaint], the Bell Plaintiffs did not even mention Nicholson." Instead, the plaintiff claimed that Nicholson was responsible for acts of spoliation such that "[t]he claims against Nicholson in the original complaint occurred *after* the workplace incident" and "occurred at a different time and are based on an entirely different set of facts that the allegations against Nicholson in the original complaint." *Id.* at 292. That is a far cry from what happened here where Dr. Cherian is the lone actor and all of his decisions occurred at the same time and place and are intimately related with one another.

Further, *Southern Environmental* relies on the case of *Dzinglski v. Weirton Steel Corp.*, 191 W. Va. 278, 287, 445 S.E.2d 219, 228 (1994). In that case, this Honorable Court determined that leave to amend was properly granted even though a new claim was asserted two weeks before trial and six and one-half years after the action was begun because the claims "arose from the same set of facts as those in the original complaint" and defendant never moved for a continuance. *See also*, *State v. Barker*, 169 W. Va. 620, 623, 289 S.E.2d 207, 209-210 (1982) (failure to move for continuance waived right to claim prejudicial surprise).

As stated above, the Crafts respectfully submit that Rule 15 and its relation-back analysis simply do not apply to the present issue. However, if Rule 15 or its concepts do apply, the requirements of relation-back under the rule are clearly present.

D. The Plaintiffs' Supplemental Disclosure was Proper and Appropriate:

As Justice Workman wrote in *Tallman v. Tucker*, 234 W. Va. 713, 721, 769 S.E.2d 502, 510 (2015) (Workman, J., concurring):

> Expert testimony is a dynamic creature. While our discovery rules are designed to avoid unfair surprise and allow each party to adequately prepare and prosecute or defend their case, the vagaries and expediencies of trial necessarily preclude dogged adherence to written disclosures. . . . [P]arties must each be permitted to place their full case before the jury and not be hamstrung by an unyielding requirement of absolute prescience by attorneys and experts.

Understanding the dynamic nature of expert witness testimony, West Virginia law allows and, indeed, encourages the supplementation of expert disclosures pursuant to W. Va. R. Civ. P. 26(e)(1)(B) and the Crafts respectfully submit that a litigant should not be punished for complying with its duty under that rule. See *Kiser v. Caudill*, 210 W. Va. 191, 198, 557 S.E.2d 245, 252 (2001)

In *Kiser*, the plaintiff sued the defendant, a neurosurgeon, for medical malpractice. During discovery and prior to the expiration of the expert disclosure deadline, the plaintiff disclosed a neurologist, Dr. Brill, as her expert witness. Sometime after the expert disclosure deadline, and after plaintiff determined that the defendant intended to challenge Dr. Brill's qualifications to offer standard of care opinions against a neurosurgeon, plaintiff filed a supplemental expert disclosure identifying a neurosurgeon, Dr. Barnes, as a standard of care expert witness. *Kiser*, 210 W. Va. 197, 557 S.E.2d 251. The defendant objected to the admissibility of Dr. Barnes' testimony on the basis Dr. Barnes was not disclosed until after the expert witness disclosure deadline. The trial court agreed with the defendant and excluded Dr. Barnes as an expert. Later, at trial, the court also determined that Dr. Brill was not qualified to offer an expert standard of care opinion, resulting in judgment in favor of the defendant. On appeal to this Honorable Court, the Court determined while the plaintiff failed to file a motion with the trial court to have Dr. Barnes recognized as an expert witness as soon as she believed that his testimony would be necessary, the trial court nonetheless abused its discretion in striking Dr. Barnes as an expert witness since there was no prejudice to the defendant. Specifically, in reversing the decision of the trial court, this Honorable Court determined that the defendant had

ample time to depose Dr. Barnes and determine his opinions well before trial, even though a pretrial order had already been entered. *Id.* at 198. *See also*, *Tallman v. Tucker*, 234 W. Va. 713, 717-719, 769 S.E.2d 502, 506-508 (2015) (it was clearly erroneous for circuit court to preclude expert witness from rendering opinions set out in supplemental discovery disclosure); *Martin v. Smith*, 190 W. Va. 286, 291, 438 S.E.2d 318, 323 (1993) (late disclosed expert permitted to testify where there was no evidence of bad faith and prejudiced party "could have easily moved for a continuance in order to secure a comparable expert witness.").

This is what makes the present case so different than *McCoy v. CAMC*, 210 W. Va. 324, 557 S.E.2d 378 (2001), a case cited by the Petitioners. That case is unlike this one in virtually every single respect. Here, the Crafts complied with every single Order of the trial court. The Crafts never refused to participate in discovery. In stark contrast, the party in *McCoy* engaged in all of the following conduct: (1) they failed to respond to interrogatories requiring a motion to compel, (2) they failed to attend a status conference, (3) they reluctantly provided the names of two experts but failed to provide any substantive information, (4) they claimed that they could not find any contact information about their disclosed expert, even though his contact information was easily located on the Internet, (5) when one of the defendants contacted the plaintiffs' disclosed expert he "stated that he had no recollection of being retained in this case, had no file relating thereto, and no longer acted as an expert in this type of case." *Id.*, 201 W. Va. at 327-29. That is a far cry from what happened here. *McCoy* also dealt with a totally different type of claim. The *McCoy* plaintiffs initially asserted that the Plaintiff was inappropriately transported during surgery. When that claim fell apart, they abandoned that position and claimed that the surgery never should have commenced to begin with. *Id.* That is very unlike what happened here where the Crafts continue to maintain their anticoagulation allegations while also pursuing the closely related and interlocking issue of the stent placement.

Under *Tallman*, "Factors that may assist a court in deciding whether to permit late supplemental expert witness disclosure include: "(1) the explanation for making the supplemental disclosure at the time it was made; (2) the importance of the supplemental information to the proposed testimony of the expert, and the expert's importance to the litigation; (3) potential prejudice to an opposing party; and (4) the availability of a continuance to mitigate any prejudice." Syl. Pt. 2, *Tallman*, 234 W.Va. 713, 769 S.E.2d 506.

As set forth above, there is a very good reason for the supplement. Dr. Zenni was relatively new to the case and was preparing for his deposition. The Crafts also respectfully submit that there is no prejudice here and that parties should be encouraged to supplement expert disclosures, not punished for doing so, based on all of the following factors:

1. The Petitioners already have an expert, who is disclosed to testify that Dr. Cherian met the standard of care "at all times." Given that the Petitioners' expert has already presumably reviewed all of the relevant materials, the Petitioners' expert should already be prepared to address the issues identified in the Crafts' supplement.
2. There is no prejudice from the timing of the Crafts' supplement. The Petitioners acknowledge that there is no prejudice from the substitution of Dr. Zenni into this case in the place of Dr. Pirris. Indeed, they consented to that substitution. Thus, the Petitioners can only complain regarding the additional issue identified in the supplement. However, that is a extremely narrow issue that (a) occurred at the same time and place as the events that have always been at issue in the case and (b) is closely related to those issues. This is not a supplement raising issues involving different and unrelated times, actions, and actors. The only alleged prejudice the Petitioners even try to discuss deals with the Crafts' depositions of Dr. Cherian and certain staff members at Weirton Medical Center. The Petitioners ignore the fact that those witnesses

are controlled by the Defendants who have access to those witnesses anytime they want. The Crafts did not need to take these depositions at all and were certainly not required to ask any particular questions. If the Petitioners want to know how Dr. Cherian feels about his stent placements, they can ask him anytime they want.

3. This was not an 11th hour disclosure. When the Crafts submitted their supplement, trial was still six months away and their expert was and is available for deposition. As many of the cases above state, where a continuance is available, there is no prejudice in these situations. Here, a continuance was eventually granted and there is no prejudice. As Justice Workman acknowledged in her concurring opinion in *Tallman*, "any genuinely 'new' and/or prejudicial information should be fairly apparent; splitting hairs over the nuances of the previously disclosed opinions and 'new' information does little to further the purpose of our disclosure and supplementation rules. More importantly, such new information should ordinarily be addressed by providing an opportunity to cure the prejudice rather than exclusion." *State ex rel. Tallman*, 234 W. Va. 713, 769 S.E.2d at 510 (Workman, J. concurring).

4. As soon as the Crafts recognized that a supplement was even possibly required, they provided one immediately. The Crafts immediately provided a supplemental disclosure, even where they may not have even been required to do it. Although the stenting was always intimately related to the anticoagulation efforts, as soon as it became clear that the Crafts' expert placed more emphasis on the stenting than originally believed, the Crafts immediately supplemented and made sure to do so before their expert was deposed. If the Crafts were engaged in some type of bad-faith effort to get away with something, why would they ever supplement at all? At most, the Crafts' counsel, who was understandably focused on the on the anticoagulation

issue, didn't fully appreciate the scope of Dr. Zenni's testimony until he emphasized it in later discussions. That is not bad faith. It's not even close. If litigants risk their entire expert merely by filing a supplement, no litigant will ever file a supplement of any kind. New opinions (even known new opinions) will simply emerge on the witness stand and trial courts and parties will be left with the aftermath.

E. The Remaining *Hoover* factors Weigh Strongly Against Granting this Writ:

Although unaddressed by the Petitioners, the Crafts will briefly discuss the remaining *Hoover* factors. The first two *Hoover* factors ask "(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; [and] (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal." Importantly, this Court's Rules of Appellate Procedure Rule 16(d)(7) specifically requires that the Petition must "explain why the original jurisdiction relief sought is not available in any other court or cannot be had through any other process." Petitioners have failed to provide any such explanation, nor could they. *See State ex rel. Shelton v. Burnside*, 212 W. Va. 514, 575 S.E.2d 124 (2002)("[i]n the absence of jurisdictional defect, the administration of justice is not well served by challenges to discretionary rulings of an interlocutory nature. These matters are **best saved for appeal** and, as a general rule, do not present a proper case for issuance of the writ.")(emphasis supplied).

Petitioners also fail to address the fourth *Hoover* factor, that this issue "is at risk of becoming an oft repeated error" (which it is not). There is a perfectly obvious reason; this issue, which is not in error, will not likely be repeated as it is highly fact-intensive, involving substituting one expert for another, which was approved by both Petitioners and the lower court, who adopted the prior expert's opinions and properly and seasonably supplemented them to add one additional

fact related to the same negligence. While extremely rare, if similar issues may present themselves in the future, they, too, will likely be fact-specific to that case, and this Court would set bad precedent for litigants to seize the opportunity to abuse the Writ and open the floodgates for every litigant to second-guess every interlocutory, discovery-related ruling a lower court makes.

Petitioners similarly fail to address another important *Hoover* factor, the fifth factor, that the instant Petition presents legal issues of first impression. It is not an issue of first impression. Petitioners' brief proves this very point. Petitioners do not address this factor because the instant Petition confirms that this issue has been decided. In fact, Petitioners go so far as to provide an established four-factor test addressing supplementation. *See* Petition at p. 14. Specifically, Petitioners cite to *State ex rel. Tallman v. Tucker*, 234 W. Va. 713, 769 S.E.2d 506 (2015), in which this very Court laid out the above test the trial court may consider in deciding whether to permit late supplemental expert disclosures. Petition at p. 14. None of these factors, however, remotely encompass consideration of such matters as affirmative defenses, including statute of limitations defenses, which Petitioners improperly insert into this Petition. Such matters have no place here, as Petitioners have never presented a proper motion-such as a motion to dismiss-in the trial court.

F. The Petitioners' Failure to Facilitate an Appropriate Review:

For all of the reasons set forth above, this Honorable Court should refuse this Petition outright. Nonetheless, the Crafts concede that the Petitioners have made this job difficult for all involved in several ways.

First, Judge Wilson's August 17, 2021 Order does not contain specific findings of fact and conclusions of law. That fault lies squarely on the Petitioners, and emphatically not on the trial court:

> A party seeking to petition this Court for an extraordinary writ based upon a non-appealable interlocutory decision of a trial court, **must** request the trial court set out in an order findings of fact and conclusions of law that support and form the basis of its decision. In making the request to the trial court, counsel **must** inform the trial court specifically that the request is being made because counsel intends to seek an extraordinary writ to challenge the court's ruling. When such a request is made, trial courts are obligated to enter an order containing findings of fact and conclusions of law. Absent a request by the complaining party, a trial court is under no duty to set out findings of fact and conclusions of law in non-appealable interlocutory orders.

Syl. Pt 6, *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998) (emphasis supplied). The Petitioners' failure in this regard is reason enough for this Honorable Court to deny this writ.

Along these same lines, it is notable that the Petitioners failed to include their *own motion* that led to this *Petition* in their Appendix before this Honorable Court. The Petitioners also failed to include the Crafts' response to that motion before the trial court. That is, Judge Wilson's August 17, 2021 Order denied the "Defendants' Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Testimony." August 17, 2021 Order (Appendix 052). Despite that obvious fact, and for reasons that defy explanation, the Petitioners did not include their *own motion* in their Appendix before this Honorable Court. *See* W. Va. RAP 16(d)(7) ("The argument must contain appropriate and specific citations to the appendix, including citations that pinpoint when and how the issues were presented to the lower tribunal. The Court may disregard questions presented that are not adequately supported by specific references to the appendix.").[13]

As is the case with the Petitioners odd attempt to merge evidentiary rulings with a (totally inapplicable) statute of limitations argument, it should not be up to the Crafts, or the trial court, or

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[13] The Petitioners' Appendix is missing other key documents as well. *See Respondents' Motion to Supplement the Appendix*, filed contemporaneously herewith.

this Honorable Court to sort all of this out for the Petitioners. Dr. Cherian and WMC improperly asked the trial court to impose a sanction (striking or limiting an expert witness) without ever having made a proper motion under W. Va. R. Civ. P. 37 and without ever having requested a proper order in that regard. They now ask this Honorable Court to fix that for them through an extraordinary writ, but without any further support.

VI. CONCLUSION

For all of the reasons above, the Respondents/Plaintiffs respectfully ask this Honorable Court to DENY the Petition for Writ of Prohibition, and affirm the lower court's decision to deny Petitioners/Defendants' Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Testimony.

KEVIN and MARGARET CRAFT,

Respondents/Plaintiffs,

By: _____

GEOFFREY C. BROWN, ESQ. (WV Bar #9045)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: (304) 242-8410
Counsel for Respondents-Plaintiffs

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0763

STATE OF WEST VIRGINIA, ex rel. JOHN CHERIAN, M.D. and **WEIRTON MEDICAL CENTER,**	*
Petitioners and Defendants below,	*
v.	*
THE HONORABLE RONALD E. WILSON, Judge of the Circuit Court of Ohio[14] County, and **KEVIN** and **MARGARET CRAFT,**	*
Respondents.	*

From the Circuit Court of Ohio (sic) County, West Virginia
Civil Action No. 19-C-31

CERTIFICATE OF SERVICE

Service of the foregoing ***Response to Petition for Writ of Prohibition*** was had upon all interested parties by U.S. mail this 3rd day of November, 2021.

Edmund L. Olszewski, Jr., Esq.
Fallon C. Stephenson, Esq.
GORDON REES SCULLY MANSUKHANI, LLP
707 Grant Street, Suite 3800
Pittsburgh, PA 15219
Counsel for Petitioners/Defendants

The Honorable Ronald E. Wilson, Judge
Brooke County Courthouse
P.O. Box 474
632 Main Street
Wellsburg, WV 26070

[14] This case actually arises out of Brooke County. *See Respondents' Motion to Amend the Caption.*

KEVIN and MARGARET CRAFT,

Respondents-Plaintiffs,

By: _____

GEOFFREY C. BROWN, ESQ. (WV Bar #9045)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: (304) 242-8410
Counsel for Respondents-Plaintiffs