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

**Docket No. 22-0158**



**William Sager,**
**Plaintiff Below, Petitioner**

**vs.**

**Dr. Joseph Duvert, Tygart Valley Total Care Clinic, and Grafton City Hospital, Inc.,**
**Defendants Below, Respondents**

**Appeal from a final order of the Circuit Court of Taylor County (No. 20-C-35)**

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# RESPONDENTS' BRIEF

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**Respondents Dr. Joseph Duvert, Tygart Valley Total Care Clinic, and Grafton City Hospital, Inc., By Counsel:**

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## I. STATEMENT OF THE CASE

### A. Jurisdiction

This Honorable Court has appellate jurisdiction over this case pursuant to Article 8, Section 3 of the Constitution of West Virginia and § 51-1-3 of the West Virginia Code. Rule 5 of the West Virginia Rules of Appellate Procedure governs this appeal from the Circuit Court's order granting summary judgment and dismissing Petitioner's complaint with prejudice.

### B. Procedural History

Petitioner filed this lawsuit on October 13, 2020. (App. 1). His complaint alleges that Respondents deviated from the applicable standard of care when treating Petitioner "with excessive opiate medication" and that, as a result, Petitioner "became addicted to controlled substances." (App. 12-13). All parties agree that the West Virginia Medical Professional Liability Act ("MPLA"), W.Va. Code § 55-7B-1, *et seq.*, applies. (App. 437).

On December 8, 2020, Tygart Valley Total Care Clinic and Grafton City Hospital, Inc., filed a motion to dismiss (App. 1), and on December 28, 2020, Joseph Duvert, M.D., filed a motion to dismiss. (App. 1). Both motions were based on the fact that Petitioner failed to comply with the deadlines and requirements established by W.Va. Code § 55-7B-6 as to service of the certificates of merit and filing of the complaint. (App. 14, 39). Further, because the complaint was filed after the statute of limitation set forth in W.Va. Code § 55-7B-4 had run, the complaint failed to state a claim upon which relief could be granted. (App. 14, 39).

On August 26, 2021, Petitioner filed a response to the motions to dismiss (App. 1), contending that he had "filed his Complaint within the applicable statute of limitations period, complied with the provisions of the MPLA, and timely served the Certificates of Merit[.]" (App. 66). Petitioner relied upon the unsupported assertion that Respondents "acted in such a manner as

to misrepresent and conceal their malpractice thus raising an issue for the tolling of the statute of limitations." (App. 71). He also referenced the pandemic as a factor affecting the timing of his certificates of merit and revised notice of claim. (App. 83).

On August 30, 2021, Respondents filed a reply (App. 1) explaining that the discovery rule did not spare Petitioner's case from the running of the statute of limitation because Petitioner's assertion that he had no reason to know he was addicted to pain medications before August 2018 was patently false, given that he was in treatment for substance abuse no later than February 2, 2018. (App. 106). Respondents also pointed out that Petitioner had provided no support for his allegations of "fraud and concealment" as a basis for applying the discovery rule. (App. 108).

On September 2, 2021, the Circuit Court conducted a hearing on the motions to dismiss. (App. 414). Petitioner's counsel stated that Petitioner could not have discovered his possible cause of action until the date on which he signed a fee agreement several months after completing his drug rehabilitation program in August of 2018. (App. 439). However, the Circuit Court noted that Petitioner had in fact completed the drug rehabilitation program no later than May 7, 2018. (App. 439, 440). Respondents' counsel pointed out that Petitioner was clearly aware of his cause of action no later than May 11, 2018, the date on which his counsel sent a request for records to Respondents. (App. 439). Petitioner's counsel requested an opportunity to provide additional documentation to support his position with respect to when Petitioner discovered, or with reasonable diligence should have discovered, his injury. (App. 436). The Circuit Court took the motions under advisement and provided an opportunity for all parties to supplement their responses. (App. 436).

On September 16, 2021, Petitioner filed a supplemental response (App. 1) in which he argued that there was "no evidence that the Plaintiff knew or had reason to know as of January 31,

2018, that the Defendants had not provided appropriate medical care nor that their treatment of Plaintiff was negligent nor was the proximate cause of Plaintiff's injuries." (App. 159). On that same day, Respondents filed a supplemental brief (App. 1) explaining that Petitioner had completed his drug rehabilitation program and was no longer consuming the medications to which he was addicted by May 7, 2018, at the latest. (App. 140). Respondents also pointed out that Petitioner could not "deny…he was already moving forward with exploration and investigation of his possible cause of action through his attorney…by May 11, 2018 at the very latest." (App. 141).

The Circuit Court reviewed the parties' supplemental responses, which included numerous additional exhibits and records. (App. 414). On September 16, 2021, it determined that the motions to dismiss were properly considered as motions for summary judgment due to the additional exhibits, and it granted summary judgment in favor of Respondents. (App. 414). The Circuit Court directed Respondents to submit a proposed order including findings of fact and conclusions of law reflecting its ruling. (App. 414).

Respondents submitted a proposed order, and on October 14, 2021, Petitioner submitted objections to that proposed order. (App. 1). Petitioner's objections were based upon unsupported allegations that the medical records were "fabricated by the Defendants to fraudulently conceal their malpractice" (App. 418) and that Petitioner "was not aware of his addiction and continuously denied throughout his in-house drug rehabilitation that he had a drug addiction problem." (App. 418).

On November 19, 2021, the Circuit Court entered an Order Granting Defendants' Motions to Dismiss/Motions for Summary Judgment. (App. 1). It found that the "assertions of Plaintiff's counsel…were not accurate and prove[d] that the Plaintiff was indeed aware of his substance abuse addiction…no later than May 7, 2018, the date that it was disclosed to this Court in the criminal

cases...that he had successfully completed the drug rehabilitation program to address the addiction that is the subject of this civil lawsuit." (App. 439). The Circuit Court also found that Petitioner had "discovered his injury (his addiction) upon completion of drug rehab prior to May 7, 2018, if not before when he entered drug rehab in February 2018." (App. 440). It referenced additional evidence that Petitioner was aware of his addiction by May 11, 2018 (App. 440) and noted that Respondents "did not take any action that would extend or toll the statute of limitations[.]" (App. 441).

The Circuit Court concluded that Petitioner "clearly failed to file the Certificate of Merit prior to the judicially extended deadline" and "clearly failed to file his Complaint prior to the running of the applicable statue of limitations, which expired at least two months before Plaintiff filed his Complaint[.]" (App. 446). It granted Respondents' request to convert their motions to dismiss to motions for summary judgment, granted summary judgment in favor of Respondents based upon Petitioner's filing of the Complaint after the expiration of the statute of limitations, and dismissed Petitioner's Complaint with prejudice. (App. 447).

On December 3, 2021, Petitioner submitted a motion to alter or amend judgment (App. 1), asserting that the Circuit Court's "decision was based upon mistaken interpretation of the facts of the case[.]" (App. 449). On December 13, 2021, Respondents filed a brief in opposition, in which they highlighted that an exhibit to Petitioner's motion, a letter dated May 1, 2018 to Petitioner's treating physician, "confirms that no later than the first week of May 2018, Plaintiff was aware of all three of the elements of the discovery rule[.]" (App. 705). Petitioner filed a response on December 27, 2021 (App. 1) in which he reiterated his previous arguments and asked the Circuit Court to "reconsider its ruling...based upon mistaken interpretation of the facts" and "predicated on a number of clear errors[.]" (App. 710). On January 27, 2022, the Circuit Court denied the

motion to alter or amend (App. 1) because it was "not persuaded by the Plaintiff's arguments" and was of the opinion that it had "appropriately granted the Defendants' Motions and dismissed the Complaint." (App. 734).

On February 28, 2022, Petitioner submitted a notice of appeal from the Circuit Court's January 27, 2022 order. On March 8, 2022, this Honorable Court entered a Scheduling Order establishing the deadline for Petitioner to perfect his appeal as May 27, 2022. On May 17, 2022, Petitioner filed a Motion to Suspend Scheduling Order and Motion for Entry of a New Scheduling Order. This Court granted that motion and entered an Amended Scheduling Order on June 1, 2022, extending the deadline for perfecting the appeal to July 1, 2022 and the deadline for Respondents' brief to August 15, 2022. Petitioner's Brief was filed on July 1, 2022, though copies were not mailed to Respondents until July 5, 2022. Respondents are now submitting this brief in accordance with this Court's Amended Scheduling Order, based upon the filing date of Petitioner's Brief.

### C. Statement of Facts

In December of 2003, Petitioner was involved in a motor vehicle accident and sustained injuries for which he sought treatment from Respondents. (App. 9-10). Petitioner continued to receive health care from Respondents through January of 2018. (App. 3).

On January 17, 2018, Petitioner was arraigned on an indictment for Wanton Endangerment Involving a Firearm and Domestic Assault (App. 635), which "set the wheels in motion for his treatment for substance abuse addiction in February 2018." (App. 438). On April 17, 2018, Petitioner was arraigned on another indictment for Wanton Endangerment Involving a Firearm (App. 642).

On May 1, 2018, his treating physician wrote a letter stating that Petitioner had reported that "his prior physician started him on these medications at a lower dose and gradually increased

the medications over time without making him aware of the potential problems that they could cause" (App. 558); and that Petitioner "appears to be very committed to remaining drug free" (App. 558). By May 7, 2018, Petitioner had successfully completed his drug rehabilitation program. (App. 439).

On May 11, 2018, Petitioner's counsel sent a letter on his behalf to Respondent Grafton City Hospital, Inc. requesting Petitioner's medical records. (App. 725). On July 12, 2018, Petitioner's counsel sent another records request to Respondent Dr. Duvert. (App. 730). A records release form enclosed with both letters clearly stated that the requested disclosures were "for the purpose of litigation or potential litigation." (App. 728, 731).

On January 22, 2020, pursuant to W.Va. Code § 55-7B-6, Petitioner served a notice of claim on numerous individuals and entities. In that notice, he averred that a screening certificate of merit would be provided within 60 days. (App. 25-26).

On March 22, 2020, this Court declared a judicial emergency in light of the pandemic (App. 34-35) and extended deadlines, statutes of limitation, and statutes of repose set to expire between March 23, 2020 and April 10, 2020 until April 11, 2020. (App. 34). On April 3, 2020, this Court further extended those deadlines, and on April 22, 2020, it extended them for a third time (App. 36). A fourth Administrative Order dated May 6, 2020 set an endpoint for the extensions:

> . . .Statutes of limitations and statutes of repose that would otherwise expire during the period of judicial emergency between March 23, 2020, and May 15, 2020, shall expire on May 18, 2020. . .
>
> . . . Deadlines set forth in court rules, statutes (excluding statutes of limitation and repose), ordinances, administrative rules, scheduling orders, or otherwise that expired between March 23, 2020, and April 17, 2020, are hereby extended to May 29, 2020, unless otherwise ordered by the presiding judicial office. . .
> . . . Deadlines, statutes of limitations, and statutes of repose that do not expire during the period of judicial emergency between March 23, 2020, and May 15, 2020, are not extended or tolled by this or prior orders.

(App. 36-37).

Petitioner did not provide a certificate of merit until approximately July 3, 2020, when his attorney mailed a second notice of claim with a certificate of merit dated June 29, 2020. (App. 27-28). Respondents did not respond to either of the notices of claim, nor did they request pre-litigation mediation under the MPLA. (App. 405).

## II. SUMMARY OF ARGUMENT

The Circuit Court properly granted summary judgment and dismissed the complaint with prejudice where Petitioner did not provide a certificate of merit until more than a month after the deadline for doing so had passed and where he did not file his complaint until more than three months after a certificate of merit was served and at least two months after the statute of limitation had expired.

## III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents respectfully submit that oral argument is unnecessary under Rules 18, 19, and 20 of the West Virginia Rules of Appellate Procedure. All dispositive issues have been authoritatively decided; the facts and legal arguments are thoroughly presented in the briefs and the record; and the decisional process would not be significantly aided by oral argument. Further, this case does not present any issue of first impression, does not involve an assignment of error in the application of settled law, and does not claim an unsustainable exercise of discretion or a result unsupported by the evidence. Instead, Petitioner's Brief asserts that the Circuit Court made a mistake in its interpretation of the facts relating to when Petitioner knew of his claimed injury.

## IV. ARGUMENT

### A. The standard of review is *de novo*.

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994); Syl. pt. 1, *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 524 S.E.2d 688 (1999). In exercising plenary review, this Court bears in mind that "summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963); *West Virginia Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 111, 543 S.E.2d 664, 668 (2000)(per curiam).

"A genuine issue does not arise unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict for that party. *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995). In determining whether there is a genuine issue of material fact, the court should view the evidence in the light most favorable to the nonmoving party. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). Mere allegations are insufficient—the nonmoving party must offer "some concrete evidence from which a reasonable finder of fact could return a verdict in its favor or other significant probative evidence tending to support the complaint." *Miller v. City Hospital, Inc.*, 197 W.Va. 403, 407, 475 S.E.2d 495, 499 (W.Va. 1996)(citations omitted).

The U.S. Supreme Court has also provided valuable insights regarding what counts as a genuine issue of material fact. First, in order to avoid summary judgment, the non-moving party "must do more than simply show...some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). In addition,

"[f]actual disputes that are irrelevant or unnecessary will not be counted," *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986), and "[t]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient[.]" *Id.* at 252. Further, the moving party may discharge its burden by pointing out to the court that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Petitioner argues that the question of when he knew or had reason to know of medical malpractice is a jury question. However, he has not made the requisite showing that there exists a genuine issue of material fact with respect to when he knew or in the exercise of reasonable diligence had reason to know of his addiction. Absent such a showing, it was entirely appropriate for the Circuit Court to grant summary judgment, as evidenced by this Court's decision affirming the entry of summary judgment in *Mack-Evans v. Hilltop Healthcare Ctr.*, 226 W. Va. 257, 264, 700 S.E.2d 317, 324 (2010)("we agree with the circuit court that the discovery rule did not toll the statute of limitations...the trial court was correct in granting summary judgment...").

### B. The lower court properly granted summary judgment where Petitioner failed to provide a timely screening certificate of merit as required by the MPLA.

It **is u**seful to begin with Petitioner's third Assignment of Error, which relates to the MPLA's pre-suit notice requirements. The MPLA establishes specific pre-suit requirements that must be satisfied prior to the filing of any complaint alleging medical negligence:

> ***At least 30 days prior to the filing of a medical professional liability action*** against a health care provider, ***the claimant shall serve*** by certified mail, return receipt requested, ***a notice of claim on each health care provider the claimant will join in litigation.*** For the purposes of this section, where the medical professional liability claim against a health care facility is premised upon the act or failure to act of agents, servants, employees, or officers of the health care facility, such agents, servants, employees, or officers shall be identified by area of professional practice or role in the health care at issue. The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit.

W. Va. Code § 55-7B-6(b)(emphasis supplied).

In the event that a plaintiff does not have time before expiration of the statute of limitation to obtain and serve the required certificate of merit along with the notice of claim, the MPLA affords the plaintiff an additional sixty (60) days to obtain and serve the certificate of merit:

> Except for medical professional liability actions against a nursing home, assisted living facility, their related entities or employees, or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees, ***if a claimant or his or her counsel has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable statute of limitations***, the claimant shall comply with the provisions of subsection (b) of this section except that ***the claimant or his or her counsel shall furnish the health care provider with a statement of intent to provide a screening certificate of merit within 60 days of the date the health care provider receives the notice of claim.*** The screening certificate of merit shall be accompanied by a list of the medical records otherwise required to be provided pursuant to subsection (b) of this section.

W. Va. Code § 55-7B-6(d)(emphasis supplied).

All parties to this lawsuit agree that Petitioner's claims are governed by the MPLA. Petitioner was clearly required to comply with the prerequisites set forth in the MPLA before filing his medical malpractice action. W.Va. Code § 55-7B-6(a). Petitioner timely filed and served his first notice of claim dated January 22, 2020 upon Respondents, and he properly included in that notice a statement of his intent to provide a certificate of merit within 60 days. (App. 26).

The 60th day from the date of that notice of claim and statement of intent was March 22, 2022. On that very day, this Court issued the first of four administrative orders regarding the COVID-19 judicial emergency. Because of extensions provided by those orders, Petitioner was obligated to serve a certificate of merit no later than May 29, 2020, but he did not do so until July 2, 2020. In other words, the statutory deadline passed more than a month before Petitioner provided a certificate of merit in support of his notice of claim.

After considering the various submissions and arguments from both sides, the Circuit Court entered an order containing the following findings of fact:

> William Sager did not provide a Certificate of Merit within 60 days of January 22, 2020, as required by § 55-7B-6 and as promised in his Notice of Claim dated January 22, 2020. In fact, William Sager did not provide a Certificate of Merit until July 2, 2020, when his attorney Joseph H. Spano, Jr. mailed a second Notice of Claim which contained a Certificate of Merit signed by Joseph N. Ranieri, D.O. dated June 29, 2020.

(App. 441). The Conclusions of Law stated, "Therefore, the Certificate of Merit was filed [by] William Sager more than one month after the deadline for providing the Certificate of Merit had expired." (App. 445).

The Circuit Court's order entering summary judgment in favor of Respondents on the basis that Petitioner failed to comply with the pre-suit requirements of the MPLA was proper and, indeed, was required by the law. Accordingly, Respondents ask this Court to affirm the Circuit Court's decision.

### C. The lower court properly granted summary judgment where Petitioner filed his complaint after the applicable statute of limitation expired and where the statute of limitation was not extended or tolled by the discovery rule, any actions taken by Respondents, or any other tolling doctrine.

Even if, for the sake of argument, Petitioner had timely served his certificate of merit, dismissal of his claims would nevertheless have been proper because he did not file his complaint until more than three months after a certificate of merit was served and two months or more after the statute of limitation had expired. The Circuit Court granted summary judgment on the basis that the statute of limitation had run on Petitioner's claims, and Petitioner's brief appealing from that decision contains two assignments of error related to whether his causes of action were time-barred.

Petitioner's brief notes that in *Dunn v. Rockwell*, this Court identified a five-part test to determine whether a cause of action is time-barred. This Court provided additional clarity regarding that five-step analysis in the subsequent case of *Mack-Evans v. Hilltop Healthcare Ctr.*:

> First, the court should identify the applicable statute of limitation...Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action...Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action...And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.

*Mack-Evans,* 226 W. Va. at 263, 700 S.E.2d at 322 (2010)(citations omitted). It is of course proper for the trial court to grant summary judgment where there is no genuine issue of material fact concerning these steps. The five steps enumerated by this Court will be discussed in order below.

**1. The applicable statute of limitation for Plaintiff's cause of action is the two-year statute of limitation contained within the MPLA.**

The first step in the five-step analysis used to determine whether a claim is time-barred is to identify the applicable statute of limitation. As noted above, all parties agree that the MPLA applies to Petitioner's medical malpractice claims. A medical negligence cause of action "arises as of the date of injury...and must be commenced within two years of the date of such injury, or within two years of the date the person discovers, or with reasonable diligence, should have discovered such injury." W.Va. Code §55-7B-4. To permit an opportunity for compliance with its pre-suit notice requirements, the MPLA briefly tolls the statute of limitations against a health care provider served with a notice of claim and certificate of merit:

> ...any statute of limitations applicable to a cause of action against a health care provider upon whom notice was served for alleged medical professional liability shall be tolled from the date of mail of a notice of claim to 30 days following receipt of a response to the notice of claim, 30 days from the date a response to the notice of claim would be due, or 30 days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs.

W. Va. Code §55-7B-6(i)(1).

Petitioner provided the certificate of merit on July 2, 2020. Assuming, for the sake of argument only, that Petitioner's certificate of merit had been timely, it would have effectively served to toll the statute of limitation for 30 days. Thirty days from July 2, 2020 would have been August 1, 2020. Thus, Petitioner had an obligation under the MPLA to file his complaint by August 1, 2020 at the very latest. However, Petitioner did not file his complaint until October 13, 2020, at least two months after the statute of limitation had expired, if it is assumed that Petitioner had timely sent the certificate of merit on July 2, 2020 (which Respondent disputes).

The Circuit Court correctly determined that Petitioner filed his Complaint after the applicable statute of limitation expired and properly granted summary judgment in favor of Respondents. Because Petitioner argues that the statute of limitation was tolled or extended, it is necessary to proceed with the other four steps of the five-step analysis.

**2. The requisite elements of Petitioner's cause of action occurred when he became addicted to pain medications—by the end of January 2018 at the very latest.**

The second step in the analysis is to determine when the requisite elements of the cause of action occurred. Under the MPLA, there are two necessary elements of proof in every medical negligence case: "(1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and

(2) Such failure was a proximate cause of the injury[.]" W.Va. Code § 55-7B-3(a). The MPLA also expressly provides that "[a] cause of action for injury to a person alleging medical professional liability against a health care provider...arises as of the date of injury." W.Va. Code § 55-7B-4(a).

Here, any alleged breach in the standard of care obviously must have occurred before the end of January 2018, based upon Petitioner's allegation that Respondents provided him with health care through the end of that month. The injury alleged is an addiction to controlled substances. (App. 13). If, for the sake of argument, Petitioner's addiction resulted from health care provided by Respondents, then that addiction necessarily would have existed no later than the last date on which Respondents provided health care to Petitioner. In other words, all of the requisite elements of Petitioner's cause of action would have occurred by the end of January 2018.

Petitioner presented a variety of arguments to the Circuit Court, and, after carefully considering them, the Circuit Court determined that Petitioner had failed to create a genuine issue of material fact and noted that Petitioner's addiction was the injury that formed the basis of his complaint. Absent any sort of tolling of the statute of limitation based upon the discovery rule or some other tolling doctrine, Petitioner's cause of action accrued when the injury allegedly caused by medical negligence, i.e., his addiction, first began—on or before the end of January 2018.

### 3. The discovery rule does not apply to extend or toll the running of the statute of limitation because Plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action on or before May 11, 2018.

The third step in the analysis is to apply the discovery rule to determine when the statute of limitation began to run by determining when Petitioner knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action. This step of the timeliness analysis addresses Petitioner's second Assignment of Error.

Petitioner contends that he "did not know until August 2018 that the controlled substances prescribed by these Defendants were not medically necessary, that prescribing of controlled substances for 14 years was contrary to medical protocol, nor did the Plaintiff know that the actions of the Defendants was malpractice until he was no longer experiencing pain." Petitioner's Brief argues, "The lower Court's finding that the statute of limitations began to run when the Petitioner entered into a drug rehabilitation program in May, 2018 is a mistaken understanding of the disease of addiction, the rehabilitation process, and fails to consider the applicability of the discovery rule and its elements."

The MPLA plainly requires an injured plaintiff to file a medical malpractice claim against a health care provider within two years of the injury, or within two years of the date when such person discovered, **or in the exercise of reasonable diligence should have discovered**, such injury. W.Va. Code § 55-7B-4(a); Syl. Pt. 2, *Jones v. Aburahma*, 215 W.Va. 521, 600 S.E.2d 233 (2004); Syl. Pt. 1, *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Further, even prior to the MPLA, with respect to the general rules concerning when a plaintiff "should have discovered" an injury, this Court recognized that mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitation, and the discovery rule applies only when there is a strong showing by the plaintiff that the defendants prevented him from knowing of the wrong at the time of the injury. Syl. Pt. 2, *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996); Syl. Pt 3, *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992); Syl. Pt. 2, *Donley v. Bracken*, 192 W. Va. 383, 452 S.E.2d 699 (1994).

In *Gaither v. City Hosp.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), Justice Starcher discussed this Court's holding related to a patient's discovery of medical negligence:

> In our holding today, we find on the one hand that knowledge sufficient to trigger the limitation period requires something more than a mere apprehension that

> something may be wrong...Even if a patient is aware that an undesirable result has been reached after medical treatment, a claim will not be barred by the statute of limitations so long as it is reasonable for the patient not to recognize that the condition might be related to the treatment. On the other hand, ***we do not go so far as to require recognition by the plaintiff of negligent conduct....We simply hold that once a patient is aware, or should reasonably have become aware, that medical treatment by a particular party has caused a personal injury, the statute begins.***

*Id.* at 909 (emphasis supplied).

Although it does not appear that this Court has made a specific pronouncement as to the specific question of when the discovery rule extends or tolls the statute of limitations applicable to claims involving alleged injuries related to addiction to pain medication, at least two other jurisdictions have squarely addressed this precise issue, and both of those decisions accord with this Court's reasoning in *Gaither*, as well as with the specific language set forth in the MPLA's express provisions pertaining to the applicable limitation period.

In *Yurcic v. Purdue Pharma, L.P.*, the U.S. District Court for the Middle District of Pennsylvania noted that the plaintiff had "enrolled in an in-patient detoxification program...on December 27, 1999." 343 F. Supp. 2d 386, 389 (M.D. Pa. 2004). Based upon this fact, that court found that the plaintiff "knew of his injury by December 27, 1999, and knew of the immediate cause of his injury—addiction to OxyContin. At that point, it was up to him to research whether he had a claim[.]" *Id.* at 393.

Similarly, in *Uhiren v. Bristol-Myers Squibb Co.,* the U.S. Court of Appeals for the Eighth Circuit concluded in a products liability case where addiction was the claimed injury that "[a] cause of action accrues when the plaintiff first becomes aware of her condition, including both the fact of the injury and the probable causal connection between the injury and the product's use, or when the plaintiff by the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered." 346 F.3d 824, 828 (8th Cir.

2003)(citations omitted). "For her cause of action to accrue, therefore, [the plaintiff] need only to have been aware of her excessive dependency on [the drug] and on notice of injury." *Id.*

In that case, the record contained evidence to support the conclusion that the plaintiff "was on notice of drug abuse and of a causal relationship between this drug abuse and her injuries," including, among other things, evidence that she had been confronted about her addiction, that rehabilitation had been recommended, and that she was facing administrative investigations related to her drug use. *Id.* at 828-829. The court of appeals noted that although there had been testimony that raised a "metaphysical doubt as to the material facts," this was not sufficient to support a jury verdict in the plaintiff's favor regarding when she was aware or reasonably should have been aware of her drug-related harm. *Id.* at 829. As a result, she failed to satisfy her burden of producing evidence of the existence of a genuine issue of material fact, and the district court's order granting summary judgment in favor of the defendant was affirmed.

In the instant case, Petitioner was arraigned on an indictment for Wanton Endangerment Involving a Firearm and Domestic Assault on January 17, 2018 (App. 635), and this experience "set the wheels in motion for his treatment for substance abuse addiction in February 2018." (App. 438). On April 17, 2018, Petitioner was arraigned on another indictment for Wanton Endangerment Involving a Firearm (App. 642), and on May 1, 2018, his treating physician wrote a letter stating that Petitioner had reported that "his prior physician started him on these medications at a lower dose and gradually increased the medications over time without making him aware of the potential problems that they could cause" (App. 558); and that Petitioner "appears to be very committed to remaining drug free" (App. 558). The record further reveals that by May 7, 2018, Petitioner had successfully completed his drug rehabilitation program. (App. 439).

On May 11, 2018, Petitioner's counsel sent a letter on his behalf to Respondent Grafton City Hospital, Inc. requesting Petitioner's medical records. (App. 725). On July 12, 2018, Petitioner's counsel sent another records request to Respondent Dr. Duvert. (App. 730). A records release form enclosed with both letters clearly stated that the requested disclosures were "for the purpose of litigation or potential litigation." (App. 728, 731).

The Circuit Court considered various written submissions, exhibits, and oral arguments before finding that the "assertions of Plaintiff's counsel...were not accurate and prove[d] that the Plaintiff was indeed aware of his substance abuse addiction...no later than May 7, 2018, the date that it was disclosed to this Court in the criminal cases...that he had successfully completed the drug rehabilitation program to address the addiction that is the subject of this civil lawsuit." (App. 439)(emphasis supplied). The Circuit Court also found that Petitioner "discovered his injury (his addiction) upon completion of drug rehab prior to May 7, 2018, if not before when he entered drug rehab in February 2018." Further, the Circuit Court cited additional evidence that Petitioner was aware of his addiction on or before May 11, 2018, since by then he had retained his attorney to investigate this potential cause of action. (App. 440)

Based on these findings of fact, the Circuit Court converted Respondents' motions to dismiss to motions for summary judgment, found that no genuine issue of material fact existed as to when Petitioner had discovered his injury, and found that even with application of the discovery rule as urged by Petitioner, the statute of limitations had clearly expired by the time the complaint was filed on October 13, 2018.

The Circuit Court expressed no doubts about its findings and conclusions, not even the sort of "metaphysical doubt as to the material facts" discussed by the Eighth Circuit when examining a very similar issue. Indeed, Petitioner failed to point to any facts sufficient to support a jury

verdict in his favor regarding when he was aware or reasonably should have been aware of his drug-related harm. As a result, Petitioner failed to satisfy his burden of producing evidence of the existence of a genuine issue of material fact, and the Circuit Court's order granting summary judgment in favor of Respondents was proper.

**4. Respondents did not engage in a civil conspiracy, did not fraudulently conceal any facts from Petitioner, and did not otherwise prevent Petitioner from discovering or pursuing any cause of action.**

Having established that Petitioner is not entitled to the benefit of the discovery rule, the fourth step in the analysis is to determine whether Respondents fraudulently concealed facts that prevented Petitioner from discovering or pursuing his cause of action. Just as this Court's rulings have made clear that a defendant's fraud or concealment can serve to toll the statute of limitation, the MPLA provides for tolling where a health care provider has engaged in fraud or collusion: "The periods of limitation set forth in this section shall be tolled for any period during which the health care provider or its representative has committed fraud or collusion by concealing or misrepresenting material facts about the injury." W.Va. Code § 55-7B-4.

Petitioner's brief asserts that Respondents misrepresented and concealed facts from him, stating as follows:

> Respondents misrepresented and concealed the fact that their medical treatment of the Petitioner was the actual cause of his pain (hyperalgesia); Respondents misrepresented and concealed the fact that Mr. Sager did not have any physical injuries that required the prescribing of controlled substances; Respondents misrepresented and concealed the fact that they had prescribed controlled substances not for a legitimate medical purpose, and that their overprescribing had addicted him to the medications they had prescribed.

(*Petitioner's Brief* at 12). Petitioner further argues that Respondents were engaged in a "civil conspiracy to promote the distribution of highly addictive and potentially lethal drugs into the state of West Virginia" and that "[i]n further of their civil conspiracy, the actions, misrepresentations,

and concealment of facts of the Respondents were instrumental in preventing Mr. Sager from learning of the negligence of the Respondents and tolls the statute of limitations." (*Petitioner's Brief* at 9).

These assertions are wholly unsupported by the record. Petitioner presented these arguments before the Circuit Court, contending that "Defendants acted in such a manner as to misrepresent and conceal their malpractice thus raising an issue for the tolling of the statute of limitations." (App. 71). Respondents pointed out that Petitioner had provided no support whatsoever for his allegations of "fraud and concealment" as a basis for application of the discovery rule. (App. 108). After considering the parties submissions and arguments, the Circuit Court concluded that Respondents "did not take any action that would extend or toll the statute of limitations[.]" (App. 441). In short, Respondents did not engage in fraud or concealment; there are no genuine issues of material fact with respect to whether Respondents engaged in fraud or concealment; and the Circuit Court's entry of summary judgment on this issue was appropriate.

**5. The statute of limitation period applicable to Petitioner's claims was not arrested by any other tolling doctrine.**

The final step in the five-step analysis of timeliness is to determine whether the limitation period was arrested by some other tolling doctrine. Petitioner has argued that correspondence from Respondents' counsel tolled the statute of limitation because it stated that "without the benefit of reviewing all of Mr. Sager's records, it is not feasible to make a fully informed decision as to whether pre-litigation mediation would be desired and productive in this matter." The Circuit Court considered this argument, as well as the correspondence, and found that Respondents "did not respond to either of the Notices of Claim...dated January 22, 2020 and July 2, 2020...did not request pre-litigation mediation under the MPLA and did not take any action that would extend or toll the statute of limitations[.]" (App. 441). Even though the correspondence from Respondents'

counsel explicitly stated that it was not a response, Petitioner seeks to use this correspondence as a means of circumventing the statute of limitation on the theory that the correspondence did not unequivocally decline mediation.

However, the Court recently had an opportunity to consider this very issue in *Adkins v. Clark*, No. 21-0300 (W.Va. Supreme Court, June 14, 2022). In *Adkins*, the original notice of claim was filed within and tolled the applicable statute of limitation, and the certificate of merit was timely filed within the 60 days permitted by W.Va. Code § 55-7B-6(d) because the original due date for that certificate of merit fell within the time period addressed in this Court's administrative order postponing deadlines until May 18, 2020. The issue was "the effect on the tolling provisions of the MPLA of [a health care provider's] letter asking for authorization to obtain medical records so that counsel could determine whether pre-suit mediation would be beneficial." This Court held, "The failure of a healthcare provider to unequivocally decline pre-suit mediation in a response to a notice of claim does not serve to toll the statute of limitations beyond the statutorily prescribed time periods set forth in the provisions of West Virginia Code § 55-7B-6(i)." Syl. pt. 2, *Adkins*.

Here, absent a response or request by any of the Respondents for pre-litigation mediation within 30 days of receipt of a timely filed certificate of merit, Petitioner had only an additional 30 days from May 29, 2020 to file suit, counting from the date on which the response was due. In other words, if the certificate of merit had been sent on May 29, 2020, then Respondents would have had 30 days to respond if they had wished to do so—by July 1, 2020, at the latest. Assuming no response from Respondents, the statute of limitation for filing Petitioner's complaint would have been tolled for only 30 more days, until July 31, 2020, pursuant to §55-7B-6(i)(1).

The Circuit Court correctly concluded that Petitioner clearly failed to file his complaint prior to the running of the applicable statute of limitation, which had expired more than two months before Petitioner filed his complaint on October 13, 2020.

Near the end of Petitioner's brief, he argues that "the actions of the Respondents creates equitable estoppel and extends the statute of limitations." With respect to the doctrines of equitable tolling and equitable estoppel, *Adkins* is again instructive. In that case, this Court "differentiated equitable tolling from equitable estoppel," noting that "equitable tolling...often focuses on the plaintiff's excusable ignorance of the limitations period and lack of prejudice to the defendant" whereas "equitable estoppel...usually focuses on the actions of the defendant." *Id.* at 11-12. With respect to equitable tolling, the Court reiterated that "[t]he provisions of the MPLA are clear that the statute of limitations is not indefinitely tolled until a healthcare provider unequivocally declines pre-suit mediation" such that equitable tolling did not apply under the facts of that case. *Id.* at 12. With respect to equitable estoppel, the Court explained that "the party seeking to maintain the action must show that he was induced to refrain from bringing his action within the statutory period by some affirmative act or conduct of the defendant or his agent and that he relied upon such act or conduct to his detriment." *Id.* at 12.

The *Adkins* decision also provides an excellent discussion of the importance of strict enforcement of statutes of limitations:

> ***We have repeatedly found that statutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. It has been widely held that such exceptions are strictly construed and are not enlarged by the courts upon consideration of apparent hardship.*** And by strictly enforcing statutes of limitations, we are both recognizing and adhering to the legislative intent underlying such provisions. With respect to equitable tolling and facts such as these, we have discussed that our prior cases concerning proposed equitable tolling exceptions to statutes of limitations indicate that this Court is unwilling to extend the applicable statutory period in order to cure filing defects that could have been avoided had the plaintiff's attorney been more

> conscientious in adhering to the statutory deadline. The ultimate purpose of statutes of limitations is to require the institution of a cause of action within a reasonable time.

*Adkins* at 10-11 (emphasis supplied).

In this case, the record establishes that Petitioner was aware of his addiction no later than May of 2018. The record is devoid of any evidence suggesting that Respondent engaged in any efforts to conceal any alleged malpractice from Petitioner or otherwise engaged in any affirmative conduct that would have induced Petitioner to refrain from bringing his action within the statutory period. The relevant statutory provisions are clear, and this Court's administrative orders relating to the judicial emergency are also clear, such that ignorance of the applicable statute of limitation would not be excusable. Nevertheless, Petitioner failed to provide a certificate of merit until more than a month after the deadline for doing so had passed. He did not file his complaint until more than three months after his certificate of merit was served and two months or more after the statute of limitations had expired. Neither equitable tolling nor equitable estoppel applies in this case. Under these circumstances, the Circuit Court properly granted summary judgment and dismissed Petitioner's complaint with prejudice.

## V. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court affirm the Circuit Court's November 19, 2021 *Order Granting Defendants' Motions to Dismiss/Motions for Summary Judgment*, which dismissed Petitioner's complaint against Respondents with prejudice.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August 2022, I timely served a true and accurate copy of the foregoing *Respondents' Brief* by depositing the same in the United States mail, postage pre-paid, addressed as follows:

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