No. 22-0202

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BARBARA STINE TRIVETT,
ADMINSTRATRIX OF THE ESTATE OF JASPER TRIVETT
Plaintiff, Petitioner,

v.

SUMMERS COUNTY COMMISSION d/b/a SUMMERS COUNTY OFFICE OF EMERGENCY MANAGEMENT and CARMEN CALES.
Defendants, Respondents.

BRIEF OF RESPONDENTS

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I. SUMMARY OF THE ARGUMENT

The Circuit Court correctly determined that the Petitioner's Complaint against the Respondents was time-barred. Petitioner's argument that the Complaint was timely filed under the *West Virginia Tort Claims and Insurance Reform Act*, West Virginia Code § 29-12A-1, *et seq.*, relies upon the minority tolling provision, West Virginia Code § 29-12A-6(b), which has been invalidated because it violates the Equal Protection Clause of the West Virginia Constitution.

Moreover, while the Circuit Court also relied upon that same provision in determining that the Complaint was filed outside of the applicable statute of limitations, the Circuit Court's reasoning is still proper even when considered under the proper statutes. The proper statute of limitations is either West Virginia Code § 55-2-15 (general tolling statute) or West Virginia Code § 55-7-6 (Wrongful Death Act).

Under the Wrongful Death Act, the applicable limitations period begins to run from the date of the decedent's death, which was September 17, 2019. The Wrongful Death Act's statute of repose applies because of the nature of Petitioner's cause of action, which is that the Respondents allegedly committed a negligent act or omission that proximately resulted in Jasper's death. The cause of action was ripe upon Jasper's death on September 17, 2019, and thus, the limitations period expired on September 17, 2021. Petitioner's Complaint, which was filed on October 12, 2021, was untimely by nearly a month.

Even under the general tolling statute, any limitations period is tolled while a person is under a legal disability, but once that disability is removed, either through attaining the age of majority, obtaining mental competency, or death, such tolling ends

and that limitations period begins to run. Jasper tragically passed away on September 17, 2019, which removed the legal disability of being a minor. Thus, even under the more forgiving general tolling statute, the Complaint needed to have been filed within two years of the removal of Jasper's legal disability, which would have been September 17, 2021.

Thus, under either the Wrongful Death Act or the general tolling statute, the limitations period began to run on the same date—September 17, 2019—when Jasper passed away.

Additionally, the Circuit Court correctly rejected Petitioner's tolling argument when it determined that because Jasper passed away, he would not continue to age. In other words, Jasper would never purge himself of his legal disability. Moreover, any tolling provisions would only be triggered if Jasper had not passed away. Petitioner herself is not a minor for whom the tolling provisions would apply; rather, she is an adult and brought suit as the personal representative of Jasper's estate.

While the Court need not delve into Petitioner's argument concerning the Circuit Court's alleged misinterpretation of the Tort Claims Act's minority tolling provision, its interpretation of such provision was correct because the Circuit Court implicitly found that such a tolling provision is only available to living minors. Jasper, however, passed away and would never reach either his twelfth birthday (under the Tort Claims Act) or the age of majority (under the general tolling provision).

Nor did the Circuit Court err in applying the proper limitations period. Petitioner claims that the longest available limitations period must apply. Yet, the longest possible limitations period is two years, which began running from Jasper's death, under any of

the available statutes. Nor do the various statutes necessarily conflict. The only realistic conflict is between West Virginia Code § 29-12A-6(b) and West Virginia Code § 55-2-15. West Virginia Code § 29-12A-6(b) has previously been ruled unconstitutional, but even if it applies, it works in conjunction with the Wrongful Death Act, as does West Virginia Code § 55-2-15, because it is the Wrongful Death Act that authorizes a cause of action for the death of a person.

The Circuit Court also correctly determined that Petitioner could not rely upon the Medical Professional Liability Act ("MPLA"), its statute of limitations, or its tolling provisions for her claims against the Respondent. The Respondents are not entities covered by the MPLA; nor are they entities whose conduct is governed by the MPLA. The Respondents do not fall within the class of "Health Care Facilities" or "Health Care Providers" and do not provide "Health Care." If the Legislature had intended entities such as county 911 centers to be governed by the MPLA, it would have so provided; yet, it has not done so. That is likely because the function of a 911 center and its employees is to dispatch appropriate services if warranted by the situation, not the provision of medical services. No amount of discovery will change the fact that entities such as the Respondents are not "Health Care Providers."

Nor can Petitioner rely upon the fact that she has also named covered MPLA entities (who are not a party to this appeal) as a basis for applying either the MPLA or its statutory tolling provisions to the Respondents. The MPLA only applies to claims against entities engaged in the provision of health care and claims against such entities that are contemporaneous or related to such provision of health care. That extension, however, does not mean that claims against non-covered entities are also subject to the MPLA.

Moreover, while the statute of limitations is tolled as to entities covered by the MPLA, that tolling does not apply to non-covered entities such as the Respondents.

Finally, the Circuit Court properly rejected Petitioner's invocation of the discovery rule when it found that all elements of the cause of action were known to the Petitioner by the date of Jasper's death. The Circuit Court correctly found that Petitioner knew of the factual basis for her claim, which is premised upon negligent dispatching of EMS services, on September 15, 2019, when Petitioner made the 911 call and transported Jasper to the hospital. Petitioner knew on September 15, 2019 that she did not encounter EMS, either at her home or on the way to the hospital. That is, she knew that EMS was either not dispatched or was not dispatched timely. The Circuit Court's determination that Petitioner's review of the 911 recordings may have provided a potential legal theory of recovery, as opposed to a factual basis, was correct and should be affirmed.

Accordingly, the Circuit Court's ruling on the Respondent's motion to dismiss was correct and should be affirmed.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents assert that oral argument is unnecessary, pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, as the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. However, if the Court believes oral argument is warranted, the Respondents submit that any such argument would be appropriate, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, as this case involves the application of settled law.

III. ARGUMENT

Plaintiff's claims against the Respondents were properly dismissed because they were filed outside of the applicable two-year statute of limitations.

> Statutes of limitation are statutes of repose and the legislative purpose is to compel the exercise of a right of action within a reasonable time; such statutes represent a statement of public policy with regard to the privilege to litigate and are a valid and constitutional exercise of the legislative power.

Syl. Pt. 1, Stevens v. Saunders, 159 W.Va. 179, 220 S.E.2d 887 (1975). In West Virginia, courts employ a five-step test to determine whether a claim is time-barred:

> First, the court should identify the applicable statute of limitation for each cause of action. 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[.]

Syl. Pt. 5, in part, Dunn v. Rockwell, 225 W.Va. 43, 689 S.E.2d 255 (2009).

A. The Wrongful Death Statute of Repose Dictates the Appropriate Limitations Period Under Either the General Tolling Statute or Tort Claims Act Minority Tolling Provision

Petitioner argues that the Circuit Court erred by not applying the minority tolling provision of the Tort Claims Act. Pet. Br. at p. 10-19. Petitioner asserts that West Virginia Code § 29-12A-6(b) applies to any claim brought by or on behalf of a minor child against a political subdivision for any injury, loss, or death sustained by a minor under the age of ten.

In making this argument, however, the Petitioner fails to mention three important issues: (1) that the minority tolling provision has been invalidated as violating the equal protection clause;[1] (2) that because this is an action for wrongful death, the wrongful death act's two-year statute of repose applies and was triggered upon Jasper's Death on September 17, 2019; and (3) that even if the general tolling statute applied, that tolling ended upon Jasper's Death.

1. The Minority Tolling Provision of Tort Claims Act has been held to be Unconstitutional

The first problem with Petitioner's argument concerning the minority tolling provision of the Tort Claims Act is that that provision has been judicially abrogated after it was found to violate the Equal Protection Clause of the West Virginia Constitution. In Whitlow v. Board of Education, 190 W.Va. 223, 438 S.E.2d 15 (1993), this Court determined that West Virginia Code § 29-12A-6(b) "violates the Equal Protection Clause ... to the extent that it denies to minors the benefit of the statute of limitations provided in the general tolling statute, W.Va. Code, [§] 55-2-15." Syl. Pt. 3, in part, Whitlow, 190 W.Va. 223, 438 S.E.2d 15. The Court noted that under West Virginia Code § 29-12A-6(b) "minors have been selected for disparate and more severe treatment than others who are within the same class under W.Va., [§] 55-2-15, i.e., the insane." Id. at 231, 438 S.E.2d at 23.

Thus, the net result of Whitlow is that with respect to claims brought by or on behalf of minors in general, it is the general tolling statute, West Virginia Code § 55-2-15,[2] not

[1] To be sure, Petitioner acknowledges that the minority tolling provision has been invalidated in another argument section. Pet. Br. at p. 20. However, Petitioner's argument there is that the Court should have used the longest possible statute of limitations to the estate's claims.

[2] West Virginia Code § 55-2-15(b) provides in pertinent part, "[i]f any person to whom the right accrues to bring any personal action ..., suit, or scire facias, or any bill to repeal a grant, shall be, at the time the same

the Tort Claims Act's minority tolling statute, which applies regardless of whether the defendant is a political subdivision.

At first blush, that statute may seem to allow a plaintiff to bring a claim on behalf of a minor child for up to two years after the minor reaches the age of majority. Sadly however, because Jasper passed away before reaching the age of majority and passed away from injuries that caused his death, the Wrongful Death Act's statute of repose, which applies from the date of his death on September 17, 2019, is applicable.

In its ruling, the Circuit Court determined that the minority tolling provision of the *West Virginia Government Tort Claims and Insurance Reform Act* ("Tort Claims Act"), West Virginia Code § 29-12A-6(b), did not extend the statute of limitations on the wrongful death claim to Jasper's twelfth birthday. JA0314-JA0315.

While the Circuit Court limited its analysis solely to the Tort Claims Act's minority tolling provision, this Court should still affirm because the Circuit Court's analysis was correct under the Tort Claims Act or the general savings statute, as both work in conjunction with the wrongful death statute in determining the appropriate limitations period for claims involving death. The Circuit Court's ruling reflects that it is the date of a person's death that begins the limitations period when it found that Petitioner's wrongful death claim expired on September 17, 2021, which was two years from the date Jasper passed away. JA0314-JA0315.

This Court has long held that "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground

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accrues, an infant ..., the same may be brought within the like number of years after his or her becoming of full age ... that is allowed to a person having no such impediment to bring the same after the right accrues..."

disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 2, Adkins v. Gatson, 218 W. Va. 332, 624 S.E.2d 769 (2005) (citation omitted); *see also*, Murphy v. Smallridge, 196 W. Va. 35, 36-37, 468 S.E.2d 167, 168-169 (1996) ("An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support."); Longwell v. Hodge, 171 W.Va. 45, 47, 297 S.E.2d 820, 822 (1982) ("We agree with the Circuit Court, and affirm its decision, although for different reasons than those expressed by the lower court.").

While the Circuit Court's analysis was limited to the minority tolling provision of the Tort Claims Act, this Court should still affirm because the Circuit Court's analysis was correct under either the Tort Claims Act or the general savings statute.

2. The Wrongful Death Statute of Repose Applies to all Claims Involving Death

The second problem with Petitioner's argument is that the minority tolling provision of the Tort Claims Act simply does not apply because the injury complained of is the death of Jasper, not personal injuries that did not result in death.

As noted by this Court, "[a]ctions [or injuries] resulting in death are covered by our wrongful death statute, West Virginia Code, [§] 55-7-5." Courtney v. Courtney, 190 W. Va. 126, 128 n.5, 437 S.E.2d 436, 438 n.5 (1993). If a plaintiff "die[s] of injuries received ... [the] action must proceed under the Wrongful Death provision. If his death ... was for reasons other than the injuries suffered ..., this action is permissible under [West Virginia Code §] 55-7-8a." Conrad v. Wertz, 278 F.Supp. 428, 432 (N.D.W.Va. 1968); *see also*, State ex rel. Morgantown Operating Co., LLC v. Gaujot, 245 W. Va. 415, 419-420, 859 S.E.2d 358, 362-363 (2021) (noting differences between (1) personal injury claims that

are (a) initiated by a plaintiff in his own right and prosecuted to completion, and (b) initiated by a plaintiff but revived upon the plaintiff's death under the Wrongful Death Act; and (2) a decedent's personal injury claims (a) that did not cause the decedent's death, which survive under the Wrongful Death Act, and (b) that result in the death of the decedent, which arise under West Virginia Code § 55-7-5.

Thus, "there is a patent distinction between personal injury claims and wrongful death claims." Gaujot, 245 W. Va. at 420, 859 S.E.2d at 363. "[I]n order to maintain an action for wrongful death there must be the death of a person and the death must be caused by such wrongful act, neglect or default as would, if death had not ensued, have entitled the party injured to maintain such action to recover damages for such wrongful death." Michael v. Consolidation Coal Co., 241 W. Va. 749, 756, 828 S.E.2d 811, 818 (2019) (citation omitted).

Here, Petitioner's wrongful death claim arises solely out of the incident asserted in the Complaint—the alleged failure to timely dispatch emergency services to either arrive at her residence or intercept her on the drive to the hospital. JA0148-JA0177. That is, Plaintiff alleges the fourth type of claim addressed in Gaujot – a claim that the negligent conduct directly caused or contributed to the death.

A straight wrongful death claim must be filed within two years of the decedent's death, subject to "certain, narrowly defined circumstances." Michael, 241 W.Va. at 757, 828 S.E.2d at 819. However, "the two year limitation upon the bringing of an action for wrongful death is an integral part of the statute itself and creates a condition precedent to the bringing of an action which bears no relationship to statutes of limitation[.]" Id. (citation omitted). Thus,

> [i]n a wrongful death action, under the discovery rule, the statute of limitation contained in W. Va. Code, 55-7-6(d) [1992] begins to run when the decedent's representative knows or by the exercise of reasonable diligence should know (1) that the decedent has died; (2) that the death was the result of a wrongful act, neglect, or default; (3) the identity of the person or entity who owed the decedent a duty to act with due care and who may have engaged in conduct that breached that duty; and (4) that the wrongful act, neglect or default of that person or entity has a causal relation to the decedent's death.

Syl. Pt. 8, Bradshaw v. Soulsby, 210 W. Va. 682, 558 S.E.2d 681 (2001). The focus of the wrongful death statute of repose is upon the knowledge of the personal representative of the decedent, not the status of the decedent at the time of his or her death.

Petitioner, however, maintains that because Jasper was a minor, the wrongful death claim should be tolled under the Tort Claims Act. That would be a proper argument if the Petitioner herself was under the disability of either being a minor or otherwise incompetent, or if the cause of action was for personal injuries that did not result in death.[3] Yet, the Petitioner's claim is not Jasper's death was unrelated to alleged negligent conduct; rather, the claim is that the negligent conduct directly caused or contributed to Jasper's death. Therefore, the minority tolling provisions simply do not apply to the wrongful death claim.

Jasper passed away on September 17, 2019. JA0148; JA0311. Under the Wrongful Death Act, the Complaint needed to be filed on or before September 17, 2021. Petitioner did not file her Complaint until October 12, 2021—25 days after the limitations period expired. JA0148-JA0177.

[3] Of course, if the Petitioner was a minor, she would be ineligible to serve as the personal representative. *See e.g.*, State ex rel. Linger v. Cty. Court, 150 W. Va. 207, 219, 144 S.E.2d 689, 698 (1965); Tomblin v. Peck, 73 W. Va. 336, 339, 80 S.E. 450, 451 (1913).

Plaintiff's discovery tolling argument holds no weight. Petitioner first noticed that Jasper was unresponsive on September 15, 2019, at which time she contacted 911, and then drove Jasper to a local hospital. JA0055-JA0056; JA0150-JA0152; JA0310-JA0311.Tragically, Jasper passed away on September 17, 2019. JA0148; JA0311.

The Circuit Court rejected Petitioner's assertion that she was not aware of the necessary facts of her causes of action until her counsel's receipt of the 911 audio records. JA0315-JA0316. Indeed, the Court noted that while those recordings may have provided a legal basis for certain causes of action, it did not change the fact that Petitioner was aware of all the necessary facts of her claim by Jasper's death on September 17, 2019. JA0316.

Petitioner knew on the night of the 911 call—September 15, 2019—that no emergency services were dispatched to her residence because at that time, the Respondents had been unable to connect with the EMS provider while on the phone with Plaintiff. JA0056-JA0057; JA0150-JA0152. Petitioner further knew on the night of the 911 call that no emergency services intercepted her as such services would have necessarily encountered Petitioner's vehicle on her trip from the residence to the hospital. Id. In fact, Petitioner signed an affidavit noting that EMS did not arrive at the hospital until 20 minutes after her own arrival. JA0054-JA0057.

Therefore, because the Petitioner's claim is a wrongful death claim, the applicable limitations period is two years under the Wrongful Death Act. As the Complaint was filed outside of the applicable two-year limitations period, the Circuit Court's decision should be affirmed.[4]

[4] As noted in Section A, this Court is empowered to affirm on any other grounds disclosed by the record.

3. The General Savings Statute Applies

While the Circuit Court may have limited its analysis solely to the Tort Claims Act's minority tolling provision, this Court should still affirm because the Circuit Court's analysis was correct under the general savings statute, West Virginia Code § 55-2-15.

The general tolling statute "allow[s] an infant, upon reaching majority, to still have the benefit of the applicable statute of limitations period." Whitlow, 190 W.Va. at 231, 438 S.E.2d at 23. However, application of the general tolling statute still does not render Petitioner's complaint timely. As noted by the Circuit Court, Jasper will not ever reach the age of twelve, JA0315, much less the age of majority. Stated another way, because Jasper died before turning eighteen, he cannot purge himself of his legal disability.

Because Jasper will never "becom[e] ... full age" under the general tolling statute, that means that some other statutory limitations period must apply. Here, that statute is the two-year wrongful death statute of repose, West Virginia Code § 55-7-6, which begins running from the date of death.

In Williams v. CMO Mgmt., LLC, 239 W.Va. 530, 803 S.E.2d 500 (2016), this Court addressed an analogous case of an adult who passed away while under a mental disability. In Williams, this Court noted that "the statutory authority for a personal representative to bring an action following the death of an individual is examined with specific reference to the tolling provisions provided under the savings statute." Id. at 537, 803 S.E.2d at 507 (*citing* Mack-Evans v. Hilltop Healthcare Ctr., 226 W.Va. 257, 266, 700 S.E.2d 317, 326 (2010)). This Court further noted that "[l]ogic impels the conclusion that an incompetent individual's death is a natural moratorium for the tolling of the statute of limitations that was invoked due to a disability." Id. (*citing* Roberson v. Teel, 20 Ariz. App.

439, 513 P.2d 977, 988 (Ariz. App. 1973) (stating that "where a statute of limitation is tolled because of incompetency, the tolling of the statute ends upon the death of the incompetent")). Thus, because "the applicable tolling provisions terminate upon the death of an incompetent individual, the two-year statute of limitations begins to run on the date of the injured person's death." Id. at 538, 803 S.E.2d at 508 (citing Hilltop Healthcare, 226 W. Va. at 259, 700 S.E.2d at 319). That is because the two-year limitations period of the wrongful death statute is an "integral part of a wrongful death claim," because a "cause of action [for wrongful death] did not exist at common law, but is created by statute." Michael, 241 W.Va. at 757, 828 S.E.2d at 819 (citation omitted).

Here, had the incident not resulted in Jasper's death, he would have had until the age of twenty to bring a claim on his own behalf under the general tolling provision. However, the incident is alleged to have resulted in his death, meaning that it is the Wrongful Death Act's statute of repose that governs. Even if the general tolling provision is applied, it terminated upon Jasper's death on September 17, 2019. Williams, 239 W.Va. at 538, 803 S.E.2d at 508.

The net result is that both the statute of limitations period in the general tolling statute and the Wrongful Death Act's statute of repose applies from the date of Jasper's death. Under either the general tolling statute or the Wrongful Death Act, the Complaint needed to be filed on or before September 17, 2021. However, Petitioner did not file her Complaint until October 12, 2021—25 days after the limitations period expired. JA0148-JA0177.

While the Circuit Court rejected Petitioner's minority tolling argument under the Tort Claims Act, the same analysis would apply even under the more forgiving general

tolling statute, West Virginia Code § 55-2-15. The Circuit Court properly noted that the Tort Claims Act's savings provision does not apply because Jasper would never reach twelve years of age. JA0315. Logically, if Jasper cannot ever reach age twelve, he will never reach age eighteen.

To the extent that the Court determines that Jasper's status as a minor could toll the running of any statute of limitations until he reached the age of majority, the tolling of the statute of limitations ended on the date of Jasper's death at which time the limitations period imposed by the wrongful death act began to run. Petitioner did not file her Complaint until nearly a month after the limitations period expired.

Therefore, because the Complaint was filed after the expiration of the two-year statute of repose, the Circuit Court correctly determined that the Complaint was untimely and properly dismissed the same. While the Circuit Court may have relied upon the incorrect statute, it did not commit reversible error and its decision should be affirmed.

4. The Circuit Court did not Engage in Improper Statutory Interpretation

To the extent the Court wishes to address the Circuit Court's interpretation of the statute of limitations in the Tort Claims Act (or the general tolling statute), the Circuit Court did not improperly interpret the same.

Petitioner claims that that the Circuit Court should have applied the Tort Claims Act's minority tolling provision as written and without resort to interpretation. Pet. Br. at p. 14-20. Petitioner asserts that the Circuit Court erred by improperly interpreting the statute by finding that a minor must live to the age of twelve before his or her claim is statutorily barred. Id. at p. 17-19. Plaintiff contends that the Circuit Court reached its decision by

"eliminating the word 'death'" while also including an additional requirement that the minor child must live long enough to attain [the] age [of] twelve..." Id. at p. 18.

To the extent that the Tort Claims Act's minority tolling provision could be applied to Petitioner (it cannot), the Circuit Court's analysis of the statute was sound. The Circuit Court determined that "[b]ecause Jasper passed before his twelfth birthday, no such birthday exists in the future to maintain the saving provision's applicability." JA0315.

West Virginia Code § 29-12A-6(b) says "birthday," it does not define what that term means. Does it mean, as Petitioner asserts, the anniversary or "monument" of the date of a person's birth?[5] Pet. Br. at p. 18. Or does it mean, as the Circuit Court found, a specific birthday that a minor must reach? JA0315.

Several courts have determined that minority savings provisions are only available to children who are living. Awve v. Physicians Ins. Co. of Wis., Inc., 512 N.W.2d 216, 218 (Wis. Ct. App. 1994) (holding that a minority tolling provision "unambiguously applies only to a living minor" and that if the legislature intended to include deceased children it would have used phrases such as "by the time the minor reaches or would have reached" or "ten years after that person's birth[.]"); Holt v. Lenko, 791 A.2d 1212, 1214 (Pa. Super. Ct. 2002) (rejecting argument that minority tolling statute extended time until decedent's eighteenth birthday because the statute "contemplates a minor plaintiff who is alive, but whose parent or guardian fails, for some reason, to bring suit on the minor's behalf prior to the minor's eighteenth birthday" because "nothing in the statutory language...would

[5] Petitioner's argument that the minority tolling provision should extend the statute of limitations period until the anniversary of Jasper's twelfth birthday ignores this Court's holding in Whitlow, 190 W.Va. 223, 438 S.E.2d 15, which found that that provision violates the equal protection clause of the West Virginia Constitution; and ignores the fact that the Petitioner herself is not a minor and cannot invoke the protections of the minority tolling provision.

indicate that the legislature intended that the minority tolling statute would be available to a deceased minor plaintiff."); Estate of Ayala-Gomez v. Sohn, 823 N.W.2d 418 (Iowa Ct. App. 2012) (minority tolling provision "only tolls the statute of limitations as to living minors."); Hammen v. Iles, 834 N.W.2d 872 (Iowa Ct. App. 2013) (same); Randolph v. Methodist Hosps., Inc., 793 N.E.2d 231, 235 (Ind. Ct. App. 2003) (minority tolling provision "applies only to living children"); Regents of Univ. of N.M. v. Armijo, 704 P.2d 428, 429-30 (N.Mex. 1985) (minority tolling provision "gives a minor under age seven 'until his ninth birthday in which to file' presupposes that the child is living at the time his cause of action accrues and is potentially able to reach his ninth birthday."); Monk v. Kennedy Univ. Hosp., Inc., 2022 N.J. Super. LEXIS 101 (N.J.Super.Ct.App. 2022) (rejecting application of minority tolling for deceased minor because "[t]he purpose of minority tolling is to preserve claims until the minor achieves sufficient maturity to be held accountable for the assertion of legal rights, a circumstance that ceases to exist once a minor dies.").

Like other states, West Virginia defines the terms "infant" and "minor" as being "persons under the age of eighteen years[.]" West Virginia Code § 2-2-10(aa). As noted in Sohn and Hammen, "[i]mplicit in this definition is a presumption that a minor is a person who is living." Sohn, 823 N.W.2d 418; Hammen, 834 N.W.2d 872; *see also*, Estate of Shinholster v. Annapolis Hosp., 685 N.W.2d 275, 291 n.21 (Mich. 2004) ("At death, a deceased no longer continues to age, and by that same token..., at death, a deceased does not surrender her age or become without an age, but rather..., retains her age."). That is precisely what the Circuit Court noted in its Order. The Circuit Court's Order

implied that because Jasper died, logically he would not continue to age and thus could never have a twelfth birthday. JA0315.

The Circuit Court's determination was based on the proper reading of the statute—that Jasper's age at the time of his death would remain static, that he would not continue to age, and therefore, could never have a twelfth birthday. That "[l]ogic impel[ed] the conclusion that an incompetent individual's death is a natural moratorium for the tolling of the statute of limitations that was invoked due to a disability." Williams, 239 W.Va. at 537, 803 S.E.2d at 507 (citation omitted).

That same logic commands the same result under West Virginia Code § 55-2-15. Under the general tolling provision, Jasper was under a legal disability that would have allowed him to wait until reaching the age of majority to bring a claim in his own right had he survived. Tragically, however, he passed away at 39 days old. His death ended the legal disability and likewise ended tolling of the statute of limitation. Williams, 239 W.Va. at 538, 803 S.E.2d at 508 ("the applicable tolling provisions terminate upon the death of an incompetent individual, the two-year statute of limitations begins to run on the date of the injured person's death." (citation omitted)).

The Circuit Court's application of the minority tolling provision was correct, logical, and within the intent of the Legislature. Likewise, under the general tolling provision, the Circuit Court's decision correctly deduced that the disability ended upon Jasper's death and that he would never reach an age for which he could bring a cause of action. The Circuit Court's finding that the statute of limitations was not tolled should be affirmed.

5. The Various Statutes are not Truly in Conflict

Petitioner also argues that the Circuit Court erred in not applying the longest possible statute of limitation because she claims the various statutes of limitations are in conflict. Pet. Br. at p. 19-23. The truth of the matter is that there is no conflict in application of the various statutes of limitations (or repose) and such statutes can easily be reconciled.

"[W]here two statutes are in apparent conflict, the Court must, if reasonably possible, construe such statutes so as to give effect to each." Syl. Pt. 5, in part, Gaujot, 245 W. Va. 415, 859 S.E.2d 358 (citations omitted). Further, "[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. Pt. 6, in part, Gaujot, 245 W. Va. 415, 859 S.E.2d 358 (citations omitted).

As noted above, West Virginia Code § 29-12A-6(b) simply does not apply because it was held to violate the Equal Protection Clause of the West Virginia Constitution. *See*, Syl. Pt. 3, in part, Whitlow, 190 W.Va. 223, 438 S.E.2d 15. Petitioner argues that the Court's decision in Whitlow means that West Virginia Code § 29-12A-6(b) can be used to extend the time to file wrongful death claims when the decedent is a minor. Pet. Br. at p. 22. Petitioner's argument finds no support in Whitlow, as the basis of the Whitlow opinion was to ensure that minors would be able to prosecute claims upon reaching the age of majority. Whitlow, 190 W.Va. at 231, 438 S.E.2d 23. That rationale does not support Petitioner's argument as, tragically, Jasper will never reach an age to bring a claim. Moreover, because of the unconstitutionality of West Virginia Code § 29-12A-6(b), West Virginia Code § 55-2-15 applies to all claims involving a minor. Whitlow, 190 W.Va.

at 231, 438 S.E.2d at 23 (West Virginia Code § 55-2-15 "allow[s] an infant, upon reaching majority, to still have the benefit of the applicable statute of limitations period.").[6]

The question thus becomes whether West Virginia Code § 55-2-15 and West Virginia Code § 55-7-6 conflict, and if so, whether that conflict can be reconciled. The statutes are not in apparent conflict and even if they are, such conflict can be easily reconciled by construing general tolling provision's statute of limitations to apply to a minor's personal injury actions that do not result in death and the Wrongful Death Act's statute of repose to apply to death actions involving minors.

Such a holding would be analogous to what this Court did in Gaujot. There the Court determined that the MPLA's statute of limitations applied to personal injury actions whereas the Wrongful Death Act's statute of repose applied to death actions. 245 W. Va. at 429, 859 S.E.2d at 372. Such reconciliation would also flow from the fact that the legal disability of being a minor—like the legal disability of being mentally incompetent—terminates upon the death of the person under the disability. Williams, 239 W.Va. at 537, 803 S.E.2d at 507 (citation omitted).

Finally, even if the Court accepts Petitioner's argument that West Virginia Code § 29-12A-6(b) could apply to the claims (it should not), that statute and the Wrongful Death Statute would not be in conflict and any conflict could likewise be easily resolved. Again, Gaujot is instructive. There the Court held that the MPLA and the Wrongful Death Act worked in concert because a medical negligence claim resulting in death "is not legally actionable or practically triable without" the Wrongful Death Act because

[6] For West Virginia Code § 29-12A-6(b) to have any applicability, this Court would need to overturn the decision in Whitlow. However, even if the Court decides to overturn Whitlow, the result would be the same as the Wrongful Death Act would work in conjunction with the Tort Claims Act to supply the appropriate limitations period.

> [n]o provision of the MPLA provides for the appointment of a representative to file and litigate a wrongful death claim; no provision of the MPLA outlines the appropriate beneficiaries for wrongful death proceeds or the distribution thereof; and no provision of the MPLA contemplates the elements of damage that might be considered in a wrongful death action that would not arise in any other context.

Gaujot, 245 W. Va. at 421-22, 859 S.E.2d at 364-365 (footnotes omitted). The Court held that "actions for death that fall under the purview of the Medical Professional Liability Act, West Virginia Code §§ 55-7B-1, *et seq.*, necessarily also fall under the purview of the Wrongful Death Act, West Virginia Code §§ 55-7-5, *et seq.*" Id. at 422, 859 S.E.2d at 365.

The Tort Claims Act and the Wrongful Death Act must also work in conjunction. Like the MPLA, the Tort Claims Act does not provide a mechanism for the appointment of a personal representative to litigate a wrongful death claim. West Virginia Code § 29-12A-1, *et seq.* Nor does it outline potential beneficiaries for the proceeds from such a claim. Id. And it does not contemplate any elements of damage that might be considered in a wrongful death claim. Id. Thus, like the MPLA, a claim for death under the Tort Claims Act "is not legally actionable or practically triable without" the Wrongful Death Act. Gaujot, 245 W. Va. at 421, 859 S.E.2d at 364.

Because the Wrongful Death Act mandates that all claims for the wrongful death of a decedent must be filed within two years of the decedent's death, the date of death should likewise serve as a "natural moratorium for the tolling of the statute of limitations" for the legal disability of minority status even under the Tort Claims Act. Williams, 239 W.Va. at 537, 803 S.E.2d at 507 (citation omitted).

The result of whether the Court applies the Tort Claims Act or the general tolling provision is the same, the statute of limitations begins to run from the day Jasper died. To have been timely, the Complaint needed to have been filed within two years from that

date. The Petitioner waited until October 14, 2021, to file her Complaint, nearly a full month after the limitations period expired. JA0148-JA0177.

Whether the Circuit Court applied the correct statute or not is immaterial as the result is necessarily the same—the Complaint was untimely due to the expiration of the statute of limitation. The Circuit Court's decision should be affirmed.

B. The Circuit Court Correctly Determined that the MPLA and its Statute of Limitations Did Not Apply to the Respondents

Petitioner seeks to utilize the MPLA's statutory tolling provisions in an effort to save her time-barred claims. Despite Petitioner's assertions to the contrary, the West Virginia Medical Professional Liability Act ("MPLA"), its statute of limitations, and its tolling provisions simply do not apply to the Respondents. Accordingly, the Circuit Court did not err in refusing to apply the MPLA's statute of limitations or its tolling provisions.

As the Circuit Court correctly found, and as the Petitioner concedes, the Respondents do not fall within the MPLA's definition of a "Health Care Facility."[7] JA0313-JA0134; Pet. Br. at p. 24. Instead, the Petitioner contends that the Circuit Court failed to find that the Respondents fell within the definitions of "Health Care," "Health Care Provider," and "Medical Professional Liability." Pet. Br. at p. 24. Petitioner is incorrect on all accounts.

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[7] The MPLA defines a "Health Care Facility" as "any clinic, hospital, pharmacy, nursing home, assisted living facility, residential care community, end-stage renal disease facility, home health agency, child welfare agency, group residential facility, behavioral health care facility or comprehensive community mental health center, intellectual/developmental disability center or program, or other ambulatory health care facility, in and licensed, regulated or certified by the State of West Virginia under state or federal law and any state-operated institution or clinic providing health care and any related entity to the health care facility." West Virginia Code § 55-7B-2(f).
Instead, as defined by the 911 Emergency Telephone Act, a 911 center is a "county answering point" or a "public service answering point," which is "a facility to which 911 calls are initially routed for response and where county personnel respond to specific requests for emergency service by directly dispatching the appropriate emergency service provider, relaying a message to the appropriate provider or transferring the call to the appropriate provider." West Virginia Code § 24-6-2.

1. Respondents do not provide "Health Care"

Petitioner argues that the Respondents' omissions fall within the definition of "Health Care" by focusing on the inclusion of the phrase "medical transport." Id. at p. 25. Plaintiff further argues that refusing to provide over-the-phone CPR instructions is health care that should have been provided. Id. at p. 27.

The first glaring issue not addressed by Petitioner is the fact that a 911 center does not provide medical transports—that function is performed by ambulance services, hospitals, or medical providers—or medical treatment at all. A 911 center receives calls for assistance and either dispatches the appropriate units, if needed, to respond to such calls, relays messages to the appropriate responders, or transfers calls directly to such providers. West Virginia Code § 24-6-2. That is, a 911 center does not provide any emergency medical services; rather, it provides dispatch services for law enforcement, fire protection, and emergency medical services. Employees of a 911 center do not respond to the scene of car crashes, go fight fires, arrest suspects, or provide transportation for persons injured; instead, they make a decision, based upon the information provided, as to whether a response in necessary, and, if so, what units are the most appropriate to respond.

Nor does a 911 center offer "medical care, treatment, or confinement" to patients, or work "under the direction of a health care provider or licensed professional" to provide the same. Instead, it offers dispatching services when necessary. Clearly, the services provided by a 911 center and its employees, such as the Respondents, do not fall within the meaning of "Health Care" as defined by the MPLA.

Petitioner's second argument is that the failure to provide over-the-phone CPR instructions meets the definition of "Health Care" as it is medical care that should have been provided. Pet. Br. at p. 27. Petitioner acknowledges that the code provision requiring certification for telephonic CPR instruction "was not yet applicable." Id. In fact, that addition to the 911 Emergency Telephone Act set a specific deadline for telecommunicators to become certified with such training. West Virginia Code § 24-6-5(e)(2).[8] By setting a specific future date for the statute's effective date, the Legislature did not impose a duty upon 911 centers or telecommunicators to immediately begin offering over-the-phone CPR when they had yet to receive appropriate certification. *See*, State ex rel. Bd. of Educ. v. Melton, 157 W. Va. 154, 163, 198 S.E.2d 130, 135 (1973) ("A statute with a definite future day fixed for its commencement has effect only from that time." (citation omitted)). Moreover, it was not until 2020 that the Legislature even provided a definition for "emergency telecommunicators" and tasked such persons with gathering medical information. *See*, HB 4123 (2020).[9] Petitioner cannot premise an MPLA claim upon a duty that did not yet exist in the law.

Petitioner further argues that the Respondents' failure to dispatch an ambulance was a "denial of emergency medical services" and that the Respondents "medically diagnosed" Jasper's needs. Pet. Br. at p. 28. Petitioner's argument strains credulity. As noted above, in 2020 the Legislature provided a definition for "emergency telecommunicators" and mandated that they ***gather*** medical information but explicitly rejected tasking such persons with providing medical advice. The gathering of medical

[8] West Virginia Code § 24-6-5(e)(2) was enacted in April 2019 and mandated that 911 operators become certified in providing telephonic CPR training or before July 1, 2020.

[9] In fact, in passing HB 4123, the Legislature explicitly rejected imposing a duty upon emergency telecommunication to provide medical advice. *Compare*, HB 4123 (introduced) and HB 4123 (enrolled).

information, which was not a duty imposed until 2020, does not even fit within the definition of "Health Care."

Finally, only "Health Care Providers" as that term is defined by the MPLA, provide "Health Care." As noted below, a 911 center has been explicitly omitted from the definition of a "Health Care Provider" and they do not fall within the definition of either "emergency medical services authorities or agency" or "emergency medical service personnel."

As such, the Circuit Court correctly determined that the Respondents were not governed by the MPLA and its rejection of the MPLA, its statute of limitations, and its tolling provisions should be affirmed.

2. Respondents are not "Health Care Providers"

While the definition of "Health Care Provider" contains a myriad of medical professions, neither a 911 center nor a 911 telecommunicator are among them. Under the MPLA, "Health Care Provider" is defined as

> a person, partnership, corporation, professional limited liability company, health care facility, entity or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment; or an officer, employee or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment.

West Virginia Code § 55-7B-2(g). Nowhere within the definition of "Health Care Provider" is there any mention of an agency or individual performing any semblance of the function

of a 911 center or a telecommunicator. The Circuit Court correctly found that the Respondents were not governed by the MPLA because they were not "Health Care Facilities" or "Health Care Providers." JA0313-JA0314.

Had the Legislature intended to include 911 centers or its employees under the definition of "Health Care Provider" it would have done so expressly. In Phillips v. Larry's Drive-In Pharm., Inc., 220 W.Va. 484, 647 S.E.2d 920 (2007), this Court analyzed whether pharmacies were health care providers under the then-existing version of the MPLA. The Court reasoned that the Legislature did not intend for pharmacies to be covered by the MPLA because the term was not included in the list of professionals or businesses intended to be covered by the MPLA. Id. at 492, 647 S.E.2d at 928. The Court also reasoned that because the MPLA was designed to be in derogation of the common law, it must be construed narrowly, and because of this, the Court could not read into the statute what the Legislature purposefully omitted. Id. at 490-492, 647 S.E.2d at 926-928. The Court concluded that "because certain medical professionals are specifically included under the MPLA, but pharmacies are not included, means that the Legislature intended to exclude pharmacies." Id. at 493, 647 S.E.2d at 929. "[T]here is no better definition of what constitutes the medical care community, and therefore what groups and individuals are included as "health care provider[s]" under the MPLA, than the unambiguous and exclusive list of defined providers in *W.Va. Code*, 55-7B-2(c)." Id.

The Circuit Court agreed and held that Respondents were "not a 'Health Care Facility' or 'Health Care Provider' as defined by the MPLA." JA0313-JA0314. The Circuit Court's determination was correct and complied with both the letter and spirit of the MPLA.

Nevertheless, the Petitioner asks this Court to read into the definition of "Health Care Provider" that which the Legislature has not included. Petitioner argues that the Circuit Court erred in finding, as a matter of law, that the Respondents were not "Health Care Providers" because whether the Respondents could be classified as "emergency medical services authorities or agency" or "emergency medical service personnel" is a question of fact. Pet. Br. at p. 25. Plaintiff likewise asserts that whether the Respondents "fall into another related category envisioned by the 'including but not limited to' clause is a question of fact. Id. at p. 25-26.

While not defined by the MPLA, such terms are defined by the Emergency Medical Services Act ("EMS Act").[10] West Virginia Code § 16-4C-1, *et seq.* The EMS Act defines "emergency medical services agency" as any agency licensed under section six-a of this article to provide emergency medical services." West Virginia Code § 16-4C-3(f). The EMS Act also provides a definition of "emergency medical service personnel" as being "any person certified by the commissioner to provide emergency medical services as set forth by legislative rule." West Virginia Code § 16-4C-3(g). Likewise, the EMS Act defines "emergency medical service provider" as "any authority, person, corporation, partnership or other entity, public or private, which owns or operates a licensed emergency medical services agency providing emergency medical service in this state." West Virginia Code § 16-4C-3(h).

[10] Under the EMS Act, an emergency medical services agency must be licensed by the Office of Emergency Medical Services under the Bureau of Public Health, and its personnel must be certified by the Office of Emergency Services to provide emergency services. West Virginia Code § 16-4C-1, *et seq.* On the other hand, a county answering point is regulated by the Public Service Commission under the 911 Emergency Telephone Act. West Virginia Code § 24-6-1, *et seq.*

Under the EMS Act, an emergency medical services agency must be licensed by the Office of Emergency Medical Services under the Bureau of Public Health, and its personnel must be certified by the Office of Emergency Medical Services to provide emergency services. West Virginia Code § 16-4C-1, *et seq*. On the other hand, a county answering point and telecommunicators are subject to regulation by the Public Service Commission—a completely different agency—under the 911 Emergency Telephone Act. West Virginia Code § 24-6-1, *et seq*. They are not licensed or certified by the OEMS. As such, they do not qualify as "emergency medical services authorities or agency" or "emergency medical service personnel."

In Short v. Appalachian OH-9, Inc., 203 W.Va. 246, 507 S.E.2d 124 (1998), the Court examined an allegation that EMTs had negligently treated an infant who had stopped breathing was subject to the MPLA. The Court concluded that even though the then-existing MPLA definitions did not include EMTs, "the definition of 'health care provider' is subject to the inclusion of emergency medical service personnel" because EMTs provide hands-on and direct emergency medical services to patients. Id. at 250, 507 S.E.2d at 128.

Like the pharmacies in Phillips, and unlike EMTs in Short, 911 centers and 911 telecommunicators, do not "provide hands-on emergency medical services to patients." Phillips, 220 W.Va. at 492, 647 S.E.2d at 928. That is, EMTs provide medical care directly to patients. However, 911 Centers and its employees typically never even see the caller, and never provide them with direct medical services.

Thus, because the Respondents are not explicitly listed as "Health Care Providers" under the MPLA, and because they do not provide direct medical care, they are not

subject to the MPLA's definition of "Health Care Providers." Accordingly, the Circuit Court did not err in finding that the Respondents were not Health Care Providers under the MPLA and did not err in refusing to apply the MPLA to Petitioner's claims.

3. Allegations of Negligent Dispatching Does Not Equate to Medical Professional Liability

As a final effort to bring the Respondents under the ambit of the MPLA, Petitioner asserts that the 2015 amendments to the MPLA were intended to broaden the scope of claims covered by the MPLA. Pet. Br. at p. 28. Petitioner claims that this expansion of the definition of medical professional liability means that even claims that are not explicitly medical claims still fall within the purview of the MPLA. Id. at p. 28-30.

While it is true that the Legislature's 2015 amendments have been construed as expanding the scope of the MPLA, that broadening does not extend as far as Petitioner contends. In State ex rel. W.Va. Univ. Hosps., Inc. v. Scott, ___ W.Va. ___, 866 S.E.2d 350 (2021), this Court noted that the 2015 amendments were the result of the Court's decision in Manor Care.[11] Id. at 358. The 2015 amendments expanded the definition of "medical professional liability" to include "claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided." Id. (*citing* West Virginia Code § 55-7B-2(i)). However, "to be governed by the MPLA, contemporaneous or related claims must still be grounded 'in the context of rendering health care services." Id. at 361. Hence, the 2015 amendments were designed to foreclose corporate negligence claims against a health care provider, which the Manor Care Court determined fell outside the ambit of the MPLA. Id. at 359.

[11] Manor Care, Inc. v. Douglas, 234 W. Va. 57, 763 S.E.2d 73 (2014).

As noted above, the Respondents do not provide health care services to patients. Instead, they provide dispatch services for law enforcement, fire protection, and emergency medical services. West Virginia Code § 24-6-5. Answering a call from the public does not fall within the "context of rendering health care." Nor does it transform a 911 center into a "Health Care Provider." Any claim against the Respondents necessary falls outside the "context of rendering health care services" and is not encompassed in the expansion of the definition of medical professional liability.

Petitioner further argues that because she has asserted MPLA claims against other defendants (who are not a party to this appeal), those claims serve as the "anchor" authorizing application of the MPLA to the Respondents. Pet. Br. at p. 30.

Plaintiff stretches the anchoring mechanism beyond its limits. As noted in Scott, the anchoring theory "is not a broad stroke application that because a claim is contemporaneous to or related to health care that it falls under the MPLA." 866 S.E.2d at 360. Rather, an anchoring claim "gets you in the door of MPLA application to allow for inclusion of claims that are 'contemporaneous to or related to' that claim, but still must be in the overall context of rendering health care services." Id. Thus, even the ancillary claim must "still be in the context of rendering health care." Id. In other words, the anchoring theory means that corporate negligence claims by a health care provider are still governed by the MPLA if they are "contemporaneous to or related to" the provision of health care by that provider. It does not work to apply the MPLA to claims against entities that are not health care providers.

Simply because the MPLA may have tolled the statute of limitations to other defendants does not mean that the statute of limitations is tolled as to non-governed

entities. In Magee v. Racing Corp. of W.Va., 2017 W.Va. LEXIS 856 (2017 memorandum decision), this Court considered whether a statutory tolling provision applicable to claims against state agencies "operate[d] to toll the statute of limitations to all named defendants or only the defendant(s) requiring pre-suit notice under the statute." Id. at *5-6. The Court found that the tolling provisions only applied to state agencies and not to all named defendants and thus affirmed the dismissal of the claims against non-covered entities as being time-barred. Id. at *11; *see also*, Patton v. City of Berkeley, 242 W.Va. 315, 835 S.E.2d 559 (2019) (rejecting application of statutory tolling provision to non-covered entities).

As noted by the Court,

> [S]tatutes 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 considerations of apparent hardship." Finding that the plaintiff had failed to satisfy the requirements of any established exceptions to the statute of limitations, we further stated that "[d]efendants have a right to rely on the certainty the statute [of limitations] provides, and adoption of the rule plaintiff urges would destroy that certainty." Lastly, we concluded that "[b]y strictly enforcing statutes of limitations, we are both recognizing and adhering to the legislative intent underlying such provisions."

Perdue v. Hess, 199 W. Va. 299, 303, 484 S.E.2d 182, 186 (1997) (citations and internal quotations omitted).

Here, as in Magee and Patton, the Respondents are not governed by the MPLA and therefore, its statute of limitations and tolling provisions simply do not apply. "The plaintiff or his attorney bears the responsibility to see that an action is properly and timely instituted." Syl. Pt. 1, Stevens, 159 W.Va. 179, 220 S.E.2d 887.

Determining the proper limitations period for claims among multiple defendants is no different that determining whether various causes of action, which may or may not have differing statutes of limitations. Petitioner could have set out to serve the required MPLA pre-suit documents to the other defendants well in advance of the running of the statute of limitations against the Respondents, which would have provided sufficient time to file a single complaint against all defendants.

For whatever reason, Petitioner waited until just before the statute of limitations expired against the Respondents to serve the pre-suit documents on both the Respondents and the other defendants and waiting until the expiration of the MPLA's tolling provision to file her complaint. JA0001-JA0058; JA0148-JA0177. By doing so, Petitioners ran the risk that if her claims were not covered by the MPLA, they would be untimely. That proposition came to pass when the Circuit Court correctly determined that the MPLA did not apply to the Respondents. JA0313-JA0134. Thus, because the MPLA's tolling requirements cannot be applied against non-covered entities, the Circuit Court properly found that the Petitioner's Complaint was untimely. JA0310-JA0317

The Circuit Court correctly determined that the Respondents were not governed by the MPLA and its rejection of the MPLA, its statute of limitations, and its tolling provisions should be affirmed.

C. The Circuit Court Correctly Applied the Discovery Rule and Correctly Found that the Discovery Rule did not Extend the Statute of Limitations.

In her final assignment of error, Petitioner contends that the Circuit Court failed to appropriately apply the discovery rule. However, the Circuit Court correctly determined that the discovery rule did not apply to extend the statute of limitations to counsel's receipt of documents pursuant to a Freedom of Information Request. JA0315-JA0136. The

Circuit Court properly found that the factual basis of Petitioner's claims was known to her by the date of Jasper's death, which was on September 17, 2019. Id.

As noted above, Syl. Pt. 5 of Dunn, 225 W.Va. 43, 689 S.E.2d 255, requires a court to examine five factors in determining whether a cause of action is time-barred.[12] The first factor concerns what limitations period applies. As noted throughout the Respondents' brief, the proper statute of limitations is two years under either the Tort Claims Act or the general tolling statute because this case involves allegedly negligent conduct directly caused or contributed to the death of Jasper.

The next inquiry under the Dunn analysis is determining when the requisite elements of the cause of action occurred. Id. The elements of a wrongful death cause of action are: "(1) that the decedent has died; (2) that the death was the result of a wrongful act, neglect, or default; (3) the identity of the person or entity who owed the decedent a duty to act with due care and who may have engaged in conduct that breached that duty; and (4) that the wrongful act, neglect or default of that person or entity has a causal relation to the decedent's death." Syl. Pt. 8, Bradshaw, 210 W. Va. 682, 558 S.E.2d 681.

Petitioner noticed that Jasper was unresponsive on September 15, 2019. JA0055-JA0056; JA0150-JA0152; JA0310-JA0311. Upon discovering that he was unresponsive, Petitioner contacted 911 to request medical attention. Id. The Respondents answered Petitioner's 911 call but were unable to reach EMS despite two separate attempts. Upon being informed that EMS could not be reached, Petitioner inquired as to whether she should transport Jasper to the hospital herself and was advised to do so. Id. Petitioner

[12] As to the final Dunn factors—fraudulent concealment and any other tolling doctrine—Petitioner did not allege below, and does not argue here, that the Respondents fraudulently concealed any material facts or that any other tolling mechanism applies. Rather, Petitioner relies solely upon the discovery rule.

did not encounter any EMS providers on her way to the hospital. Id. These facts establish elements (2), (3), and (4) of a wrongful death claim. Syl. Pt. 8, Bradshaw, 210 W. Va. 682, 558 S.E.2d 681. The remaining element—the death of Jasper—occurred on September 17, 2019. JA0148; JA0311. Thus, the wrongful death cause of action was ripe as of September 17, 2019.

The third Dunn factor involves determining whether the discovery rule applies. Syl. Pt. 5, Dunn, 225 W.Va. 43, 689 S.E.2d 255. Moreover

> [u]nder the discovery rule ... whether a plaintiff "knows of" or "discovered" a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action.

Syl. Pt. 4, in part, Dunn, 225 W.Va. 43, 689 S.E.2d 255.

Petitioner contends that the discovery rule should apply to extend the statute of limitations to when her counsel received copies of the 911 audio on October 14, 2019. Pet. Br. at p. 32-35. Petitioner's argument concerning the 911 recordings is nothing more than a belated attempt to justify the untimely filing of her Complaint. In any event, Petitioner's claim that she was unaware that the Respondents actually made contact with EMS that night is not a factual basis for her claim; instead, it is a legal basis for a possible theory under her wrongful death cause of action. The factual basis was that an ambulance was not sent to the residence or to intercept them on the road.

Indeed, the Circuit Court correctly deciphered that while the contents of the 911 recordings "may have provided the [Petitioner] with the legal basis" for her claims, "she nevertheless became aware of the factual basis on September 17, 2019." JA0316. That

is, the 911 recordings may have provided information that could trigger the legal theory under which she may pursue a cause of action.

Receipt of the 911 recordings does not change the fact that Petitioner knew on September 15, 2019 when she contacted the Respondents (1) that the Respondents were unable to reach EMS because she was on the phone at the time the attempts were made; and (2) that EMS was either not dispatched or dispatched untimely because she was not intercepted on the way from her residence to the hospital. Indeed, Petitioner signed an affidavit noting that EMS did not arrive at the hospital until 20 minutes after she did. JA0054-JA0057.

Petitioner knew of the factual basis of the claim—that an ambulance was either not dispatched or dispatched too late—on September 15, 2019. However, not all elements of a wrongful death claim were completed on September 15, 2019, as the final element occurred on September 17, 2019, when Jasper passed away. Upon Jasper's death, each element of the cause of action was completed, and the limitations period began to run.

Petitioner's argument would necessarily require this Court to abandon the discovery rule's objective approach in favor of her subjective belief as to when she knew of the elements of her cause of action. The "objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action." Syl. Pt. 4, in part, Dunn, 225 W.Va. 43, 689 S.E.2d 255.

Objectively, it makes no difference whether EMS was dispatched untimely or not at all; that is simply a legal basis for potential causes of action, not a factual one. This is precisely what the Circuit Court held. JA0316.The fact remains that Petitioner knew that

she did not encounter EMS on the trip from her residence to the hospital, and that she did not see EMS until twenty minutes after arriving at the hospital. JA0057. That leads to a conclusion that EMS was either not dispatched at all, was dispatched untimely, or were dispatched and did not go to the residence. Either of those conclusions would have been reached by an a reasonably prudent person on September 15, 2019.

Following Jasper's death on September 17, 2019, Petitioner was aware of every necessary element of the wrongful death claim. Thus, the limitations period began to run on September 17, 2019, and expired on September 17, 2021, which is 25 days after the limitations period expired.

The Circuit Court correctly determined that Petitioner's Complaint was filed outside the applicable limitations period and properly dismissed all claims against the Respondents. Accordingly, the Circuit Court's decision should be affirmed.

IV. CONCLUSION

The Circuit Court properly granted the Respondents' *Motion to Dismiss* and correctly found that Petitioner's Complaint was filed outside of the applicable statute of limitations. Further, the Circuit Court correctly determined the MPLA did not apply to the Respondents. Finally, the Circuit Court properly applied the discovery rule and correctly found that it did not apply to the facts of this case. For all the reasons set forth above, this Honorable Court should affirm the ruling of the Circuit Court below.

Respectfully submitted,

SUMMERS COUNTY COMMISSION d/b/a SUMMERS COUNTY OFFICE OF EMERGENCY MANAGEMENT, and CARMEN CALES

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No. 22-0202

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BARBARA STINE TRIVETT,
ADMINSTRATRIX OF THE ESTATE OF JASPER TRIVETT
Petitioner, Petitioner,

v.

SUMMERS COUNTY COMMISSION d/b/a SUMMERS COUNTY OFFICE OF EMERGENCY MANAGEMENT and CARMEN CALES.
Defendants, Respondents.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondents, does hereby certify on this **20th** day of **July 2021**, that a true copy of the foregoing **"BRIEF OF RESPONDENTS"** was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

John J. Mize, Esquire
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