IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

SPYRIDOULA L. MOSCHONAS and GERASIMOS MOSCHONAS, *Plaintiffs Below, Petitioners,* *v.* THE CHARLES TOWN GENERAL HOSPITAL D/B/A JEFFERSON MEDICAL CENTER and JASON GIFFI, D.O. *Defendants Below, Respondents.*	No. 24-ICA-79

PETITIONERS' BRIEF

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1. **THE CIRCUIT COURT ERRED IN GRANTING RESPONDENTS' MOTIONS TO DISMISS BY MISREADING W.VA. CODE § 55-7B-6 AND APPLYING AN INCORRECT FILING DEADLINE TO PETITIONERS.**

2. **THE CIRCUIT COURT ERRED BECAUSE IT FAILED TO RECOGNIZE THAT A LIMITIONS PERIOD DOES NOT BEGIN TO RUN UNTIL A PLAINTIFF KNEW OR SHOULD HAVE KNOWN OF EACH ELEMENT OF HER CLAIM.**

STATEMENT OF THE CASE

This is a complex medical malpractice action in which Petitioners allege that Respondents were negligent in their care and treatment of Petitioner Spyridoula L. Moschonas at Jefferson Medical Center. On January 1, 2021, at approximately 5:29 a.m, Mrs. Moschonas presented to the Emergency Department of Jefferson Medical Center with a primary complaint of shortness of breath. (JA 012-020, Complaint ¶9). While in the Emergency Department, she developed agitation, confusion, and slurred speech. (JA 012-020, Complaint ¶10). At 11:00 a.m., she was noted to have an altered mental status; however, she was not reassessed at that time. (JA 012-020, Complaint ¶11). An addendum note entered by Rebecca Thompson, D.O. at 2:21 p.m. noted that Mrs. Moschonas was unarousable, and a drug scan was ordered. (JA 012-020, Complaint ¶12). At 6:42 pm and 9:18 pm, the nursing evaluations noted her to be confused and disoriented despite not having had any additional sedatives that may have contributed to her presentation. (JA 012-020, Complaint ¶13). On January 2, 2021, Dr. Thompson entered a note at 12:47 p.m. indicating that she was unable to understand the patient and attempted to contact her husband and daughters. (JA 012-020,Complaint ¶ 14). Dr. Thompson then ordered respiratory therapy to place the patient on a high frequency nasal cannula and finally consulted with a Greek interpreter. (JA 012-020, Complaint ¶15). After utilizing the interpreter, Dr. Thompson formulated a presumed diagnosis of Broca's aphasia and ordered a STAT brain CT with and without radiology study. (JA 012-020, Complaint ¶16). The CT study revealed an acute left-sided infarct as well as an aneurysm. (JA 012-020, Complaint ¶17). After consultation with neurology, a CT angiogram

of the head and neck was performed, which demonstrated an occlusion of the left internal carotid artery and other abnormalities leading to a diagnosis of a left ischemic stroke with severe stenosis of right proximal internal carotid, anterior cerebral aneurysm, and left posterior frontal, parietal, and occipital lobe infarct. (JA 012-020, Complaint ¶18). Mrs. Moschonas was then transferred to INOVA Fairfax Hospital. (JA 012-020, Complaint ¶19). Upon admission to INOVA Fairfax, Mrs. Moschonas underwent a left carotid endarterectomy to open up her carotid artery and remained in inpatient acute rehabilitation until discharge on January 26, 2021. (JA 012-020, Complaint ¶20). To date, Mrs. Moschonas has permanent deficits as a result of the alleged negligence and has and will continue to suffer both economic and non-economic damages. (JA 012-020, Complaint ¶21).

The first issue presented is whether Petitioners were timely in filing their complaint against the Respondents within thirty (30) days after the expiration of Respondents' right to request prelitigation mediation, rather than within thirty (30) days from Respondents' respective replies to Petitioners' Notice of Claim, where both time periods are prescribed by West Virginia Code § 55-7B-6(i)(1).

The second issue presented is whether the Circuit Court erred by assuming the limitations period began to run the first day of negligent care, rather than at the time when Petitioners knew or should have known of their claim.

SUMMARY OF ARGUMENT

West Virginia Code § 55-7b-1 *et seq.* is the West Virginia Medical Professional Liability Act. Among other presuit requirements, it mandates that plaintiffs provide a notice letter and screening certificate of merit to defendant health care providers before a lawsuit can be commenced. The statute includes a tolling provision, which indicates that so long as the notice letter is mailed before the expiration of the limitations period, any applicable statutes of limitations shall be tolled. The statute provides three available options for determining the expiration of the tolling provision:

- 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) (emphasis added). Critical to this appeal and an accurate reading of the statute are the words "whichever last occurs."

In this case, the Circuit Court ignored the plain language "whichever last occurs" and dismissed the Petitioners' Complaint on the basis that it was filed outside of the tolling period. There is no dispute that the Complaint was timely had the "whichever last occurs" provision been applied. The Circuit Court erred by ignoring the plain language of the statute and dismissing the Complaint.

Additionally, the Circuit Court did not evaluate when the limitations period began to run. In West Virginia, a statutory limitations period does not begin to run until a plaintiff knew or should have known that each element of a claim has been satisfied. The Circuit Court did not perform any analysis of this issue, instead applying a limitations period that began running the first date of treatment, not a date when the Petitioner knew or should have known of her claim.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate under Rule 18(a) when: (1) the parties have not all waived oral argument; (2) the appeal is most certainly not frivolous; (3) the issues have not been authoritatively decided; and (4) the decision process will be assisted by oral argument.

A Rule 20 Oral Argument should be set because this matter presents an issue of first impression, i.e. how to properly interpret the tolling provision of W. Va. Code § 55-7b-6(i)(1).

ARGUMENT

I. STANDARD OF REVIEW

The standard of review when considering interpretation of a statute is *de novo*. The Intermediate Court of Appeals of West Virginia has held:

> Our review of this matter is guided by the Supreme Court of Appeals of West Virginia's ("SCAWV") recognition, in syllabus point one of *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995), that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Likewise, in syllabus point one of *Appalachian Power Co. v. State Tax Department of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995), the SCAWV held "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review."

Cummings v. Paine, 899 S.E.2d 646, 649, 2024 W. Va. App. LEXIS 54, *5.

Moreover, the West Virginia Supreme Court of Appeals has held that

> [w]hen we examine a circuit court's order dismissing a pleading under Rule 12(b)(6), we are required to accept the pleading's allegations as true. As we have often said, ***"Since the preference is to decide cases on their merits,*** courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." *Sedlock v. Moyle*, 222 W. Va. 547, 550, 668 S.E.2d 176, 179 (2008) (citing *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 605, [**878] [*516] 245 S.E.2d 157, 158 (1978)).

Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va., 244 W. Va. 508, 515-16, 854 S.E.2d 870, 877-78 (2020) (emphasis added).

II. THE STATUTE OF LIMITATIONS AND THE MPLA.

West Virginia's Medical Professional Liability Act ("MPLA") is codified at W. Va. Code § 55-7b-1 *et seq*. The two (2) year statute of limitations applicable to medical negligence cases is set forth in W. Va. Code § 55-7B-4. As noted above, the MPLA also states that a claimant must provide notice of claim to each health care provider at least 30 days prior to filing. Code § 55-7B-6(b).

The legislative intent behind enacting the § 55-7B-6 mandate — that a plaintiff in a medical malpractice claim file his or her certificate of merit at least 30 days prior to filing his or her medical malpractice action — is to allow health care providers the opportunity to demand prelitigation

mediation. *State ex rel. Miller v. Stone*, 216 W. Va. 379 (2004) (holding that Petitioner's filing of her medical malpractice claim was premature and improper where she filed the claim prior to 30 days after filing her certificate of merit, thus not allowing the health care provider 30 days to demand prelitigation mediation).

Upon receipt of the notice of claim and the screening certificate of merit, the health care provider is entitled to prelitigation mediation before a qualified mediator upon written demand to the claimant. W. Va. Code § 55-7B-6 (g).

"[A]ny 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**." § 55-7B6(i)(1).

With regard to the statute of limitations, it is also worth noting that "the statute of limitations begins to run when a tort occurs; however, under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim." *Gaither v. City Hosp.*, 199 W. Va. 706, 711, 487 S.E.2d 901, 906 (1997). The West Virginia Supreme Court:

> stated in Syllabus Point 2 of *Hill v. Clarke*, 161 W. Va. 258, 241 S.E.2d 572 (1978) that "the statute of limitations for malpractice begins to run when plaintiff knows or has reason to know of the alleged malpractice." In later cases, we demonstrated the application of the discovery rule. We subsequently emphasized that the focus is on the plaintiff's state of mind, "on whether the injured plaintiff was aware of the malpractice or, by the exercise of reasonable care, should have discovered it." *Harrison v. Seltzer*, 165 W. Va. 366, 371, 268 S.E.2d 312, 314 (1980)

Id. at 712. The West Virginia Supreme Court stated the discovery rule clearly in *Gaither*:

> Accordingly, we hold that in tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a

> duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury. This rule tolls the statute of limitations until a plaintiff, acting as a reasonable, diligent person, discovers the essential elements of a possible cause of action, that is, discovers duty, breach, causation and injury.

Id. at 714.

III. THE RELEVANT DATES IN THIS MATTER.

The issue presented is whether Petitioners were timely in filing their Complaint against Jefferson Medical Center and Jason Giffi, D.O. within thirty (30) days after the expiration of Respondent's right to request prelitigation mediation, rather than within thirty (30) days from Respondents' respective replies to Petitioners' Notice of Claim, where both time periods are prescribed by West Viriginia Code § 55-7B-6(i)(1) and the statute directs that the complaint deadline is based on which deadline "last occurs."

Petitioners mailed their Notice of Claim and Screening Certificate of Merit (hereafter "Notice of Claim") to Respondent Jason Giffi, M.D. on ***December 21, 2022*** (JA 001-002). Respondent Giffi received the Notice of Claim on ***January 3, 2023***.

Petitioners also mailed their Notice of Claim to Respondent Jefferson Medical Center on ***December 27, 2022*** (JA 003-004). Respondent Jefferson Medical Center received said notice on ***December 31, 2022.***

The Notices of Intent were both mailed in advance of the two year anniversary of Petitioner's presentation to Jefferson Medical Center. This is not disputed.

Pursuant to W.Va. Code § 55-7b-6:

> (f) Any health care provider who receives a notice of claim pursuant to the provisions of this section may respond, in writing, to the claimant or his or her counsel ***within 30 days <u>of receipt</u> of the claim or within 30 days <u>of receipt</u> of the screening certificate of merit if the claimant is proceeding pursuant to the provisions of subsection (d) or (e) of this section.*** The response may state that the health care provider has a bona fide defense and the name of the health care provider's counsel, if any.

W. Va. Code § 55-7B-6(f) (emphasis added). Accordingly, based on the dates of receipt listed above, the first response was due from Petitioner Jefferson Medical Center no later than ***January 30, 2023.*** Following that, Petitioner Giffi's response was due no later than ***February 2, 2023.***

Pursuant to West Virginia Code §55-7b-6:

> (1) 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, and except as otherwise provided in this subsection, ***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) (emphasis added).

The tolling provision provides that Petitioners were entitled to file their Complaint up to thirty (30) days ***after the date Defendants' response(s) would be due.*** Because Respondent Jefferson Medical Center's response was due to Petitioners by January 30, 2023, Petitioners had an additional thirty (30) days —until ***March 1, 2023*** — to file their Complaint against Jefferson Medical Center.

Similarly, because Respondent Giffi's response was due to Petitioners by February 2, 2023, Petitioners had until ***March 4, 2023,*** to file their Complaint against Dr. Giffi. The Complaint in this case was filed ***February 28, 2023***. Therefore, the Complaint was timely.

The following chart is included for simplicity:

Health Care Provider	Notice Mailed	Notice Received	Date to Respond	Date to File
Jason Giffi, M.D.	12/21/2022	1/3/2023	2/2/2023	3/4/2023
Jefferson Medical Center	12/27/2022	12/31/2022	1/30/2023	3/1/2023

IV. THE HEALTH CARE PROVIDERS' RESPONSES TO THE NOTICE OF CLAIM NEITHER ELECTED NOR DECLINED MEDIATION.

On January 20, 2023, Respondent Jefferson Medical Center replied to Petitioners notice of claim (JA 005-006). Jefferson Medical Center's response primarily pointed out alleged deficiencies in the Screening Certificate of Merit.[1] Jefferson Medical Center did not address their position regarding its right to prelitigation mediation. Importantly Jefferson Medical Center failed to unequivocally invoke or deny their right to prelitigation mediation.

Dr. Giffi replied to the notice of claim by letter dated January 24, 2023 (JA 007-010). Like Jefferson Medical Center, Dr. Giffi did not indicate one way or the other whether he was electing or declining mediation, stating:

> Without the benefit of reviewing all of Mrs. Moschonas' records, it is not possible to make a fully informed decision as to whether pre-litigation mediation would be desired and productive in this matter. A sufficiently informed decision in this regard cannot be made until I have had a chance to at least receive and review all of these records with my client.

(JA 008). It is important to note that at no time did either health care provider decline presuit mediation.

V. THE MPLA PROVIDES THREE OPTIONS TO CALCULATE THE EXPIRATION OF THE TOLLING PERIOD.

West Virginia Code § 55-7B6(i)(1) provides three (3) tolling deadlines:

- 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***.

[1] The validity or adequacy of Petitioners' Screening Certificate of Merit is not at issue in this appeal.

Respondents argued and the Circuit Court concluded that Petitioners ***must*** adhere to the first timeline simply because Respondents responded to Petitioners' notice of claim. There is nothing in the statute to support this view.

In fact, the statute is clearly to the contrary. The words "whichever last occurs" cannot be ignored or read out of the statute. By including these words, Petitioners contend that it was proper to avail themselves of the tolling time period prescribed under Scenario 2 in § 55-7B6(i)(1), i.e. thirty days from the date a response to the notice of claim would have been due.

The Supreme Court of Appeals of West Virginia has held that,

> In construing [a] statute, we commence with the rule that courts are not at liberty to construe any statute so as to deny effect to any part of its language. Indeed, it is a cardinal rule of statutory construction that significance and effect ***shall, if possible, be accorded to every word.*** See *Kokoszka v. Belford*, 417 U.S. 642, 650, 94 S. Ct. 2431, 2436, 41 L. Ed. 2d 374, 381 (1974) ("when 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature[.]'" (Citation omitted)).

Bullman v. D & R Lumber Co., 195 W. Va. 129, 133, 464 S.E.2d 771, 775 (1995) (emphasis added).

There is nothing in the statute that indicates that if a health care provider sends a response – particularly one that does not decline mediation – that a plaintiff ***must*** file suit within thirty days of that letter. In fact, the statute says just the opposite: it says that a plaintiff can file her complaint at the later time of when a response is received ***or*** when it was due to be received. The words "whichever last occurs" make this clear and cannot simply be ignored. It would be contrary to well-established rules of statutory construction to exclude these words from consideration.

Moreover, Petitioners present a reasonable interpretation when one considers that under W. Va. Code § 55-7B-6(g), upon receipt of Petitioners' notice of claim on December 31, 2022, Jefferson Medical Center's right to prelitigation mediation remained viable up until the point in time that its response was due. Only after the expiration of thirty days from receipt of the notice of claim does a

health care providers statutory right to presuit mediation expire. This is the same for Dr. Giffi. Consider: if Jefferson Medical Center or Dr. Giffi mailed ***second*** letters before the expiration of their thirty day window to request presuit mediation and these second letters sought mediation the day after they mailed their first letters, would plaintiffs' complaint be premature? Had such second letters been mailed, it is unequivocal that Petitioners would have been prohibited from filing suit until mediation was concluded. This scenario is suggestive as to ***why*** the words "whichever occurs last" are included in the statute.

In accordance with § 55-7B-6(f) and based on the date of receipt of Petitioners' notice of claim, Jefferson Medical Center's response was due no later than January 30th, 2023 – thirty days after its receipt of Petitioners' notice of claim. Based on Scenario 2 in § 55-7B6(i)(1), Petitioners had an additional thirty days from January 30th (the due date of Jefferson Medical Center's response)—until March 1, 2023 — to file their Complaint against Jefferson Medical Center.

Likewise, Dr. Giffi's response was due no later than February 2, 2023 – thirty days after his receipt of Petitioners' Notice of Claim. Based on Scenario 2 in § 55-7B6(i)(1), Petitioners had an additional thirty days from February 2, 2023 (the due date of Dr. Giffi's response) – until March 4, 2023 – to file their Complaint against Dr. Giffi.

Petitioners thus timely filed their Complaint on February 28, 2023.

VI. *ADKINS V. CLARK* DOES NOT SUPPORT RESPONDENTS' POSITION THAT A HEALTH CARE PROVIDERS RESPONSE TO A NOTICE LETTER TRIGGERS A THIRTY DAY WINDOW TO FILE SUIT, CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE.

Respondents relied in the Circuit Court on *Adkins v. Clark*, 875 S.E.2d 266 (W.V. 2022), for the proposition that Petitioners cannot calculate thirty days from the date a response to the Notice of Claim would be due, i.e. January 30, 2023 (for Jefferson Medical Center) and February 2, 2023 (for Def. Giffi).

The issue in *Adkins* was whether a letter sent by defense counsel requesting records but silent on the issue of mediation could somehow be relied upon to ***indefinitely*** toll the limitations period. In *Adkins*, the plaintiff contended that she was under the impression mediation was still a possibility given the request for records. The Court held otherwise, stating: "Accordingly, we hold that 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). *Adkins v. Clark*, 875 S.E.2d 266, 271 (W. Va. 2022).

Referring to the three different scenarios outlined by W.V. Code § 55-7b-6(i)(1), Respondents argued in the Circuit Court that "*Adkins* makes clear that Scenario 2 only applies when the health care provider has not responded to the Notice of Claim/Certificate of Merit." (JA 021-059; Motion to Dismiss at 12). That is not true. Such a holding can be found nowhere in the *Adkins* opinion. In fact, *Adkins* is silent on this issue.

The Court in *Adkins* did not hold that if presuit mediation is declined, Scenario 2 must be applied, nor is that required under a proper interpretation of the statute. In fact, such an interpretation would read out the words "whichever occurs last." The statute prohibits a plaintiff from filing suit for thirty days after a Notice of Claim is received. But, if a defendant affirmatively states it will not seek presuit mediation, then a plaintiff can file suit. However, the statute does not say that a plaintiff ***must*** follow scenario 2; in fact, the statute plainly gives plaintiffs a choice by including the "whichever occurs last" language. Absent that language, Respondents' argument might be valid; but the words "whichever occurs last" cannot be ignored or read out of the statute. *Adkins* does not address this language; does not hold anywhere that a plaintiff cannot utilize Scenario 2 even when presuit mediation has been declined; and simply does not support Respondents' position.

A. RESPONDENTS' LETTERS DID NOT DECLINE PRESUIT MEDIATION.

As noted above, Respondents' letters to Petitioners on January 20, 2023 and January 24, 2023, did not decline presuit mediation. (JA 001-004). As noted above, Counsel for Dr. Giffi specifically wrote that he was not capable of deciding as to mediation without certain additional information. (JA 008). In theory, Petitioners *could have* filed suit on January 25, 2023. But Dr. Giffi had thirty days from the day he received the Notice of Claim – January 3, 2023 – and could have requested presuit mediation up until February 2, 2023. This exact scenario is emblematic of why the MPLA includes the "whichever occurs last" language.

Respondents may argue that *Adkins* requires an affirmative request for presuit mediation and that the letters such as those sent squarely fall within the *Adkins* holding that it cannot be read to seek mediation. But that does not matter in this case. In *Adkins*, the plaintiff *did not file suit in time under any of the three scenarios*. The *Adkins,* the plaintiff argued that a letter that was silent as to mediation could be relied upon to toll the limitations period ***indefinitely***, but the Court rejected that argument. Here, Petitioners' Complaint was timely filed under Scenario 2, *i.e.*, thirty days following when a response would have been due. Unlike in *Adkins*, Petitioners did not wait some indefinite period time, filing well within the time prescribed by statute.

The MPLA does not state anywhere that if correspondence is received in response to a notice of claim that a plaintiff ***must*** file suit within thirty days from such a response. A plaintiff may file suit thirty days after a response would have been due and the "whichever occurs last" language confirms that.

VII. THE STATUTE CLEARLY PROVIDES THAT A PLAINTIFF HAS THE OPTION TO FILE A COMPLAINT THIRTY DAYS AFTER A RESPONSE TO A NOTICE WOULD BE DUE.

In its August 9, 2023 (JA 109-119) and August 18, 2023 (JA 120-122) Orders, the Court does not consider the plain language of the statute that states "***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) (emphasis added). As noted above, Jefferson Medical Center's response would have been due no later than January 30, 2023, and Dr. Giffi's response would have been due no later than February 2, 2023. The statute provides that Petitioners were entitled to file their Complaint up to 30 days ***after the date a response would be due***. Thus, thirty days from Jefferson Medical Center's response deadline (January 30, 2023) was March 1, 2023, and thirty days from Dr. Giffi's response deadline (February 2, 2023) was ***March 4, 2023***. The Complaint in this case was filed ***February 28, 2023***, prior to the earlier of the two deadlines. The Complaint was timely.

The Circuit Court did not address this in its Orders from August 9, 2023, and August 18, 2023. The statute plainly says that the limitations period ***shall be tolled*** to the latest date. This plain language was ignored. There is nothing in the statute that indicates if a letter is sent from a defendant to a plaintiff – a letter that, mind you, does not reject mediation and simply asks for medical records – that a plaintiff must then calculate a complaint date from thirty days of the date of such a letter. Just the opposite: the statute very clearly says the limitations are tolled until the latest date.

A. DEFENDANTS DID NOT REJECT MEDIATION.

Once again, the letters from Respondents did not reject mediation. Had Respondents rejected presuit mediation, perhaps – and only perhaps – the statute could be interpreted as triggering a thirty-day window from that date. But that did not happen here. Arguably, had Petitioners filed suit the day after Respondents' letters had been received, Respondents could have requested mediation and

claimed that suit was filed prematurely. This is exactly why in this case the "whichever occurs last" language is so critical to a clear interpretation of the statute.

VIII. IT IS UNCLEAR THAT THE LIMITATIONS PERIOD WOULD HAVE EXPIRED ON JANUARY 2, 2023 AS THERE WAS NO ANALYSIS OF WHEN PETITIONERS KNEW OR SHOULD HAVE KNOWN A CLAIM EXISTED.

Underpinning Defendants' Motions and the Court's August 9, 2023 (JA 109-119), and August 18, 2023 (JA 120-122) Orders is the assumption that the limitations period would have expired on January 2, 2023, two years after Ms. Moschonas' discharge from Jefferson Medical Center. This is not a certainty. This fails to recognize that a limitations period does not begin to run until the time that a plaintiff knew or should have known of a viable claim. In this case, after her stroke, Ms. Moschonas was transferred to INOVA where she remained until being discharged from inpatient rehabilitation on January 26, 2023. There is no factual record in this case at this time that Ms. Moschonas knew or should have known any earlier than February 28, 2023, that she had a viable claim for medical negligence.

As noted *supra*,

> in tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury. This rule tolls the statute of limitations until a plaintiff, acting as a reasonable, diligent person, discovers the essential elements of a possible cause of action, that is, discovers duty, breach, causation and injury.

Gaither v. City Hosp., 199 W. Va. 706, 711, 487 S.E.2d 901, 906 (1997). There has been absolutely no discovery or consideration in this case as to when the limitations period would have run. Absent some discovery, it was impossible for the Circuit Court to rule determine Petitioners' states of mind as to when they knew or should have known of the essential elements of a possible cause of action.

CONCLUSION

It is clear from the above arguments that Petitioners were entitled to file their Complaint thirty days after Respondents' opportunity to request mediation would have been due, i.e. the event that occurred last. Moreover, the Circuit Court failed to undertake any analysis of when the limitations period began running, and thus ignored when Petitioners knew or should have known of their possible claim. Courts do not prefer to dismiss actions, instead opting to have them decided on the merits. In light of this and the well-reasoned arguments above, Petitioners request relief from the Circuit Court's August 9, 2023, and August 18, 2023, Orders dismissing their action and ask this Honorable Court to remand the case to proceed to discovery.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2024, I served the foregoing PETITIONERS' BRIEF via electronic filing on:

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