IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

SPYRIDOULA L. MOSCHONAS and GERASIMOS MOSCHONAS,

Plaintiffs Below, Petitioners,

v. **No. 24-ICA-79**

THE CHARLES TOWN GENERAL HOSPITAL D/B/A JEFFERSON MEDICAL CENTER AND JASON GIFFI, D.O.,

Defendants Below, Respondents.

BRIEF OF RESPONDENT THE CHARLES TOWN GENERAL HOSPITAL D/B/A JEFFERSON MEDICAL CENTER

Counsel for Respondent, The Charles Town General Hospital d/b/a Jefferson Medical Center:

Melissa K. Oliverio, Esq. (WVSB # 6695)
Ryan T. Loos, Esq. (WVSB # 13648)
WEST VIRGINIA UNIVERSITY HEALTH SYSTEM
1238 Suncrest Towne Centre Drive
Morgantown, West Virginia 26505
Telephone: 304/598-4070
Facsimile: 304/598-9888
melissa.oliverio@wvumedicine.org
ryan.loos@wvumedicine.org

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I. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Respondent The Charles Town General Hospital d/b/a Jefferson Medical Center (hereinafter "JMC") provides the following addendum to Petitioners' statement of the case to supplement the omissions contained therein.

A. Notices of Claim/Certificates of Merit and Response Letters

1. Jason Giffi, D.O.

By letter dated December 21, 2022, and pursuant to W. Va. Code § 55-7B-6, Petitioners served upon Dr. Jason Giffi (hereinafter "Dr. Giffi") a Notice of Claim and Certificate of Merit, which were received by Dr. Giffi on or about January 3, 2023. JA 001–002, 134. By letter dated January 24, 2023, Dr. Giffi responded to Petitioners' Notice of Claim and Certificate of Merit by both regular mail and electronic mail. JA 007–010. Counsel's letter advised that it served as Dr. Giffi's "formal response pursuant to W. Va. Code § 55-7B-6(f) to your letter dated December 21, 2022, which contained your Notice of Claim and the Certified of Merit of Dr. Michael Falgami dated December 12, 2022." JA 007. The letter further served as notification of deficiencies in the Certificate of Merit pursuant to *Hinchman v. Gillette*, 217 W. Va. 378, 618 S.E.2d 387 (2005). JA 007. The letter was received by Petitioners' counsel the same day, January 24, 2023, and did not demand or decline pre-suit mediation. JA 007–010. On February 9, 2023, Petitioners' counsel sent a letter to counsel for Dr. Giffi in response to the *Hinchman* letter. JA 011.

2. JMC

By letter dated December 27, 2022, Petitioners served upon JMC a Notice of Claim and Certificate of Merit, which were received by JMC on December 31, 2022. JA 003–004, 136. By letter dated January 20, 2023 and sent via electronic mail, counsel for JMC responded to the

Notice of Claim and Certificate of Merit. JA 005–006. Counsel's letter acknowledged that counsel was "in receipt of the Notice of Claim and Screening Certificate of Merit that you served upon my client, Jefferson Medical Center (JMC)." JA 005. The response letter also advised that Dr. Giffi, along with other physicians named in the Notice of Claim, were not employed by JMC. JA 005. The letter further served as notification of deficiencies in the Certificate of Merit pursuant to *Hinchman v. Gillette*, 217 W. Va. 378, 618 S.E.2d 387 (2005). JA 005–006. The response letter was received by Petitioners' counsel the same day, January 20, 2023, and did not demand or decline pre-suit mediation. JA 005–006. JMC's counsel received no further correspondence from Petitioners' counsel.

B. Procedural History

On February 28, 2023, thirty-nine (39) days after Petitioners' counsel's receipt of JMC's response to the Notice of Claim and Certificate of Merit and thirty-five (35) days after Petitioners' counsel's receipt of Dr. Giffi's response to the Notice of Claim and Certificate of Merit, Petitioners filed a Complaint in the Circuit Court of Jefferson County naming JMC and Dr. Giffi as defendants. JA 240.

On April 21, 2023, Dr. Giffi filed a motion to dismiss Petitioners' Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure on the grounds that Petitioners filed their Complaint five days after the expiration of the statute of limitations even after considering the applicable tolling provision set forth in West Virginia Code § 55-7B-6(i)(1) of the West Virginia Medical Professional Liability Act ("MPLA"). JA 022, 024–025. On May 8, 2023, Petitioners responded to Dr. Giffi's motion to dismiss, and Dr. Giffi filed a reply on May 18, 2023. JA 240–241.

On May 12, 2023, JMC filed a motion to dismiss Petitioners' Complaint that was nearly identical to Dr. Giffi's motion to dismiss.[1] JA 240. JMC similarly argued that Petitioners filed their Complaint seven days after the expiration of the statute of limitations even considering the applicable tolling provision in the MPLA.[2] JA 087. Petitioners did not respond to JMC's motion to dismiss.

On August 9, 2023, the Court entered an Order granting Dr. Giffi's motion to dismiss Petitioners' Complaint with prejudice. JA 241. In the Order, the Court determined that, based on the allegations in the Complaint, Petitioners' cause of action accrued no later than January 2, 2021. JA 114–115. Therefore, the two-year statute of limitation on Petitioners' claim began to run no later than January 2, 2021, and was set to expire on January 2, 2023, in the absence of further action by or on behalf of Petitioners to toll the statute of limitations. JA 114–115. On December 21, 2022, when Petitioners' counsel sent a Notice of Claim and Certificate of Merit to Dr. Giffi, via certified mail, the statute of limitations was tolled pursuant to W. Va. Code § 55-7B-6(i)(1) from the date of mailing "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." JA 115. The Court then concluded that when Petitioners' Complaint was filed 35 days after Petitioners received Dr. Giffi's January 24, 2023, response to the Notice of Claim and Certificate of Merit, Petitioners'

[1] The motions filed by Dr. Giffi and JMC were based on the same legal issues and only differed factually with regard to the dates of service of the Notices of Claim and Certificates of Merit and the responses of counsel for each respective defendant.

[2] Thirty days following Petitioners' counsel's receipt of JMC's response to the Notice of Claim and Certificate of Merit fell on Sunday, February 19, 2023, and Monday, February 20, 2023 was President's Day. Given that the expiration of the statute of limitations fell on a weekend and the next day was a legal holiday, Petitioners likely would have had until Tuesday, February 21, 2023 to file their Complaint. *See* W. Va. R. Civ. P. 6(a).

Complaint was time barred because it was filed more than 30 days from the date Dr. Giffi responded to the Notice of Claim and Certificate of Merit pursuant to W. Va. Code § 55-7B-6(i)(1) and *Adkins v. Clark*, 247 W. Va. 128, 132, 875 S.E.2d 266, 270 (2022). JA 116–118. As a result, the Court dismissed Petitioners' Complaint with prejudice. JA 118.

On August 18, 2023, the Court also entered an Order granting JMC's unopposed motion to dismiss with prejudice. JA 241. In its Order, the Court acknowledged that "[t]he identical legal issue was already decided by this Court in its Order Granting Motion to Dismiss Defendant Jason Giffi, D.O. with Prejudice entered August 9, 2023" and "[t]hat ruling upon the legal issue presented is incorporated by reference *in toto* here." JA 121. Although the dates in the two motions were slightly different, the Court stated that "the outcome is unchanged by these facts: Plaintiffs filed suit on February 28, 2023 – after the expiration of the two-year statute of limitations plus statutory tolling." JA 121–122.

On August 21, 2023, Petitioners filed their Motion to Alter, Amend, or Otherwise Relieve Plaintiffs from Judgment pursuant to Rules 59 and 60 of the West Virginia Rules of Civil Procedure. JA 241. On August 25, 2023, JMC filed a response to Petitioners' motion, and Dr. Giffi filed a response on September 5, 2023. JA 241. A hearing was held on Petitioners' motion on November 16, 2023. JA 242.

In their motion, Petitioners made the same arguments that they previously asserted in response to Dr. Giffi's motion to dismiss. However, for the very first time, Petitioners also asserted that the "discovery rule" should apply to Petitioners' claims because 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." JA 131. In denying Petitioners' motion, the Court determined that Petitioners' arguments were "nothing more than Plaintiffs' attempt to simply reiterate and reargue the identical arguments that this Court

previously considered and rejected before determining that the statute of limitations clearly expired before Plaintiffs filed their Complaint on February 28, 2023, based on the applicable statute of limitations and tolling provisions of the MPLA and the *Adkins* decision." JA 180–181. The Court further determined that Petitioners' discovery rule argument had been waived because Petitioners failed to raise it, without justification, prior to the entry of the Court's August 9, 2023 and August 18, 2023 Orders dismissing the claims asserted against Dr. Giffi and JMC with prejudice. JA 182. The Court's August 9, 2023 and August 18, 2023 Orders granting Dr. Giffi's and JMC's motions to dismiss are the subject of Petitioners' appeal.[3] Pet'rs' Br. at 15.

II. SUMMARY OF ARGUMENT

Under the MPLA, a claimant seeking to bring a lawsuit against a health care provider for medical professional liability is required to serve, by certified mail, the health care provider with a notice of claim and certificate of merit at least 30 days prior to filing a complaint. *See* W. Va. Code § 55-7B-6(b). Upon receipt, a health care provider may respond to the notice of claim and certificate of merit within 30 days. *Id.* § 55-7B-6(f). The response may state that the health care provider has a bona fide defense and the name of the health care provider's counsel. *Id.* The health care provider also has the right to demand pre-suit mediation in response to the notice of claim and certificate of merit. *Id.* § 55-7B-6(g).

When a claimant serves a notice of claim and certificate of merit on the health care provider, the MPLA tolls a claimant's statute of limitations from the date of mail to (1) 30 days following receipt of a response to the notice of claim; (2) 30 days from the date a response to the notice of claim would be due; or (3) 30 days from the receipt by the claimant of written notice

[3] Notably, Petitioners did not identify the Circuit Court's denial of their Motion to Alter, Amend, or Otherwise Relieve Plaintiffs from Judgment as an assignment of error for purposes of this appeal. Pet'rs' Br. at 1.

from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs. *Id.* § 55-7B-6(i)(1).

When JMC responded to Petitioners' Notice of Claim and Certificate of Merit, which did not demand or decline pre-suit mediation, before the 30-day deadline to respond, Petitioners' receipt of JMC's response triggered Scenario 1 and Petitioners' 30-day deadline to file their complaint before the expiration of the statute of limitations. This reading is consistent with the plain language of W. Va. Code § 55-7B-6(i)(1) and the Supreme Court of Appeals of West Virginia's recent decision in *Adkins v. Clark*, 247 W. Va. 128, 875 S.E.2d 266 (2022). When Petitioners filed their Complaint more than 30 days after their receipt of JMC's response to the Notice of Claim and Certificate of Merit, Petitioners' Complaint was filed after the two-year statute of limitations on their claims had expired. The Circuit Court agreed and dismissed Petitioners' Complaint with prejudice.

Petitioners argue that this Court should read W. Va. Code § 55-7B-6(i)(1) in a way that would permit a claimant to choose between Scenarios 1 and 2 and file the complaint within 30 days of when a response is received *or* when a response would be due, *regardless* of whether the health care provider actually responds to the notice of claim. Petitioners' interpretation would effectively read Scenario 1 out of the statute because it would never be implicated. This result is inconsistent with the plain language of the statute and could not have been intended by the West Virginia Legislature.

Further, Petitioners have waived any arguments concerning the date when Petitioners' cause of action accrued and whether the discovery rule should apply because Petitioners failed to raise these arguments at the motion to dismiss stage, and the Circuit Court concluded that it was improper for Petitioners to raise these new arguments for the first time in their Motion to Alter,

Amend, or Otherwise Relieve Plaintiffs from Judgment pursuant to Rules 59 and 60 of the West Virginia Rules of Civil Procedure.

For the reasons in the arguments that follow, this Court should affirm the Circuit Court's dismissal of Petitioners' Complaint with prejudice.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with West Virginia Rule of Appellate Procedure 18(a)(3)–(4), oral argument is not necessary on this appeal. The dispositive issue or issues have been authoritatively decided, and oral argument would not significantly aid the decisional process. Should the Court desire to hear oral argument, this Respondent submits that oral argument would be appropriate pursuant to Rule 19(a)(1) of the West Virginia Rules of Appellate Procedure.

IV. ARGUMENT

A. Standard of Review

The standard of review for a circuit court's order granting a motion to dismiss a complaint is *de novo*. *See* Syl. Pt. 1, *Gable v. Gable*, 245 W. Va. 213, 858 S.E.2d 838 (2021). Also, as is the case here, "[w]here the issue on appeal from the circuit court is clearly a question of law . . . involving an interpretation of a statute," this Court applies a *de novo* standard of review. Syl. Pt. 1, in part, *Crystal R.M. v. Charles A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995); Syl. Pt. 2, *Thomas v. Morris*, 224 W. Va. 661, 687 S.E.2d 760 (2009).

B. The Circuit Court Did Not Err When it Granted Respondent's Motion to Dismiss Because Petitioners Filed Their Complaint After the Expiration of the Statute of Limitations Even Considering the Applicable Tolling Provision in W. Va. Code § 55-7B-6(i)(1).

1. The Plain Language of W. Va. Code § 55-7B-6(i)(1) Makes Clear that a Health Care Provider's Response to a Notice of Claim and Certificate of Merit Triggers a Plaintiff's 30-Day Window to File a Complaint Before the Expiration of the Statute of Limitations.

The MPLA defines "medical professional liability" as "any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient." W. Va. Code § 55-7B-2(i). Civil actions governed by the MPLA are subject to a two-year statute of limitation:

> A cause of action for medical injury to a person alleging medical professional liability against a health care provider, except 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, arises as of the date of medical injury, except as provided in subsection (c)[4] of this section, and **must be commenced within two years of the date of such injury or death**, or within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such medical injury, whichever last occurs[.]

W. Va. Code § 55-7B-4(a) (emphasis added). The MPLA also has specific pre-suit requirements that must be satisfied prior to filing any Complaint:

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

W. Va. Code § 55-7B-6(b) (emphasis added). Upon receipt of a Notice of Claim and Certificate of Merit, a health care provider has 30 days from receipt to respond:

> 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 of receipt of the claim . . . The response may state that the health care

[4] Subsection (c) deals with the statute of limitations for a claim made by or on behalf of a minor and is inapplicable to this case.

> 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). To permit compliance with the pre-suit notice requirements, the MPLA briefly tolls the applicable statute of limitations against a health care provider who is served with a Notice of Claim and Certificate of Merit:

> Except for medical professional liability actions against a nursing home, assisted living facility, their related entities or employees, or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees, 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). It is undisputed that this action is governed by the MPLA and Petitioners were required to comply with the statute of limitations and jurisdictional prerequisites of the MPLA before filing the instant medical malpractice action. W. Va. Code § 55-7B-6(a).

"When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 5, *Liberty Mutual Ins. Co. v. Morrisey*, 236 W. Va. 615, 760 S.E.2d 863 (2014) (quoting Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548*, *V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959)).

Petitioners argue that "[t]here is nothing in the statute to support [the] view" that Petitioners must adhere to the first scenario of the MPLA's tolling provision "simply because Respondents responded to Petitioners' notice of claim." Pet'rs' Br. at 9. To the contrary, that is exactly what a plain reading of the statute requires. As noted above, the relevant MPLA tolling provision states

that the statute of limitations shall be tolled for a period of 30 days starting with the date of mail of a notice of claim and terminating based on one of three mutually exclusive scenarios: (1) 30 days following receipt of a response to the notice of claim; (2) 30 days from the date a response to the notice of claim would be due; or (3) 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. *See* W. Va. Code § 55-7B-6(i)(1).

Based upon the plain language of the MPLA, it is clear that the only scenario applicable to the circumstances in this case and the analysis of the end point of the tolling of the statute of limitations is scenario (1)—30 days following receipt of a response to the notice of claim—because JMC *actually responded* to the Notice of Claim and Certificate of Merit by letter dated January 20, 2023 via electronic mail. When JMC responded to the Notice of Claim and Certificate of Merit, the statute of limitations was tolled for a period of 30 days from the date Petitioners received JMC's response on January 20, 2023. Therefore, the last day Petitioners could file their Complaint prior to the expiration of the statute of limitations was February 21, 2023. Petitioners did not file their Complaint until February 28, 2023.

2. *Adkins v. Clark* Directly Supports Respondent's Reading of W. Va. Code § 55-7B-6(i)(1) and Does Not Require a Health Care Provider to Unequivocally Demand or Decline Pre-Suit Mediation.

In 2022, the Supreme Court of Appeals of West Virginia affirmatively differentiated the application of the three scenarios set forth in W. Va. Code § 55-7B-6(i)(1): "[t]his subsection (i)(1) provides three circumstances that begin the thirty-day clock to file the complaint if the statute of limitations has expired: (1) receipt of a response from the health care provider; (2) no response from the health care provider after 30 days; and (3) notification from a mediator that settlement was unsuccessful." *Adkins v. Clark*, 247 W. Va. 128, 132, 875 S.E.2d 266, 270 (2022) (emphasis added). Despite the *Adkins* Court's clear delineation of when each of the three scenarios

applies, Petitioners argue that *Adkins* is "silent" about JMC's assertion that Scenario 2 only applies when the health care provider has not responded to the Notice of Claim. Pet'rs' Br. at 11. However, *Adkins* could not be more clear that Scenario 1 is implicated when a health care provider responds to the Notice of Claim and Scenario 2 only applies when there is *no response* at all from the health care provider after 30 days. The *Adkins* opinion is consistent with a plain reading of the statute.

Nevertheless, Petitioners attempt to distinguish *Adkins* and argue that it "simply does not support Respondents' position." *Id.* A review of the facts and the Supreme Court of Appeals of West Virginia's analysis indicate otherwise. In *Adkins*, following a surgical procedure on March 22, 2018, the plaintiff sent a notice of claim dated February 27, 2020 to the physician who performed the surgery, which indicated that plaintiff needed an additional sixty days to obtain a screening certificate of merit pursuant to W. Va. Code § 55-7B-6(d) (2019).[5] *Adkins*, 247 W. Va. at 130, 875 S.E.2d at 268. In light of the COVID-19 pandemic and the Supreme Court's administrative order extending certain deadlines, the plaintiff's deadline to obtain a screening certificate of merit was extended to May 18, 2020. *Id.* On May 18, 2020, the plaintiff sent the physician a revised notice of claim with a screening certificate of merit. *Id.* However, before receiving the revised notice of claim and screening certificate of merit, the physician's counsel sent a letter dated May 13, 2020, to the plaintiff's counsel requesting an authorization to collect medical records to "determine whether or not pre-suit mediation is advantageous." *Id.*

On August 31, 2020, more than three months later, the physician's counsel sent plaintiff's counsel the medical records it obtained via the authorization and noted additional records would

[5] While this subsection of the MPLA was not invoked in the instant case, it provides that a claimant is permitted to provide a screening certificate of merit to the health care provider within 60 days of the date the health care provider receives the notice of claim if the claimant has insufficient time to obtain a screening certificate of merit prior to the expiration of the statute of limitations.

be provided upon receipt. *Id.* On November 13, 2020, plaintiff's counsel inquired whether the physician was requesting pre-suit mediation. *Id.* On November 17, 2020, the physician's counsel responded that the physician had chosen not to request pre-suit mediation under the MPLA and had not responded to the revised notice of claim and screening certificate of merit within 30 days. *Id.* The physician's counsel indicated that the statute of limitations had expired because the complaint had not been filed 30 days after the physician's failure to respond to the revised notice of claim and screening certificate of merit. *Id.*

The plaintiff proceeded to file her complaint on November 23, 2020, which the circuit court dismissed, with prejudice, because the statute of limitations had expired. *Id.* at 130–31, 875 S.E.2d at 268–69. On appeal, the issue before the Supreme Court of Appeals of West Virginia was "the effect on the tolling provisions of the MPLA of [the physician's] letter asking for authorization to obtain medical records so that counsel could determine whether pre-suit mediation would be beneficial." *Id.* at 131, 875 S.E.2d at 269. The Court first explained that, at the time of the physician's May 13, 2020 letter, the screening certificate of merit had not yet been provided, so the plaintiff could not have filed her complaint 30 days from receipt of that response because the MPLA's pre-suit notice requirements had not yet been met. *Id.* at 132, 875 S.E.2d at 270. Instead, the relevant 30-day time period would have begun from the date the plaintiff provided the amended notice of claim and screening certificate of merit, which was received by the physician's counsel on May 26, 2020. *Id.*

After outlining the three scenarios that begin the 30-day clock to file the complaint if the statute of limitations has expired, the Court explained that the physician's non-response triggered Scenario 2 of W. Va. Code § 55-7B-6(i)(1): that the tolling ceases 30 days from the date a response would have been due. *Id.* The Court further explained that, because the statute of limitations

expired in July 2020 and the plaintiff did not file her complaint until November 2020, her complaint was untimely. *Id.*

Critically, the Court then went on to state that, "**[e]ven if we assume that the May 13, 2020 letter constituted a 'response' for purposes of these provisions, the statute of limitations would have run on June 13, 2020.**" *Id.* In another alternative scenario, the Court stated that even "**if we assume that the August 31, 2020 letter forwarding medical records to [the plaintiff's] counsel . . . did further toll the statute of limitations as a timely 'response' (even one that still did not invoke any right to pre-suit mediation), the statute of limitations would have run thirty days later, on October 1, 2020[.]**" *Id.* Ultimately, the Court affirmed the circuit court's dismissal with prejudice for the plaintiff's failure to file her complaint prior to the expiration of the statute of limitations and held that "the failure of a healthcare provider to unequivocally decline pre-suit mediation in 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)." *Id.* at 133–35, 875 S.E.2d at 271–73.

Despite Petitioners' argument that "*Adkins* does not hold anywhere that a plaintiff cannot utilize Scenario 2 even when presuit mediation has been declined," the *Adkins* Court certainly maintained that *a timely response* to a notice of claim, even one that does not decline pre-suit mediation, triggers Scenario 1, requiring a plaintiff to file a complaint within 30 days following receipt of a response to the notice of claim. Such a conclusion is consistent with how simplistic and non-substantive a "response" may be under the MPLA: "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). Therefore, absent a health care provider's timely demand for pre-suit mediation, *any* response to the Notice of Claim invokes application of Scenario 1, and *Adkins* reaffirms this.

3. The "Whichever Last Occurs" Language Does Not Allow Petitioners to Choose Which Tolling Scenario Applies as Such Interpretation Would be Inconsistent with a Plain Reading of the Statute.

Petitioners contend that the "whichever last occurs" language at the end of the tolling provision permits a plaintiff to choose from Scenarios 1 and 2 and file the complaint within 30 days of when a response is received *or* when a response would be due, *regardless* of whether the healthcare provider actually responds to the Notice of Claim. Pet'rs' Br. at 9. Petitioners argue that JMC's and the Circuit Court's reading of the statute reads the "whichever last occurs" language out of the statute. *Id.* at 3.

However, it is clear from the language of W. Va. Code § 55-7B-6(i)(1) and *Adkins* that Scenario 1 (30 days following receipt of a response to a notice of claim) and Scenario 2 (30 days from the date a response to the notice of claim would be due) are mutually exclusive, and Scenario 2 only applies when a health care provider has not responded in any way to the Notice of Claim. When JMC's counsel responded to the Notice of Claim on January 20, 2023, twenty days after receipt of the Notice of Claim on December 31, 2022, JMC's counsel made it clear that she was "in receipt of the Notice of Claim and Screening Certificate you served upon my client[.]" Once JMC's response was delivered to Petitioners' counsel, a response was no longer "due" and Scenario 2 became moot, irrelevant, and inapplicable based on a plain reading of W. Va. Code § 55-7B-6(i)(1).

Under Petitioners' interpretation, the statute would be read in such a way where the 30-day period to file the complaint would begin from the date a response to the Notice of Claim would be due *even if* a health care provider responded early. This is inconsistent with the way the statute is written and is clearly not what the West Virginia Legislature intended. *See* Syl Pt. 4, *State ex rel. Morrisey v. Diocese of Wheeling-Charleston*, 244 W. Va. 92, 851 S.E.2d 755 (2020) ("The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature."

(quoting Syl. Pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975))). If the Legislature had truly intended for the final 30-day tolling period to start exactly 30 days after receipt of the Notice of Claim *regardless* of whether the health care provider sends the response early, the Legislature's differentiation of Scenario 1 and Scenario 2 of the statute was a distinction without a difference as Scenario 1 would never apply. *See* Syl. Pt. 9, *id.* ("Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." (quoting Syl. Pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938))).

Instead, the "whichever last occurs" language could only have been intended to modify the relationship between Scenario 1 (30 days following receipt of a response to a notice of claim) and Scenario 3 (30 days from notice from a mediator that mediation was unsuccessful) and the relationship between Scenario 2 (30 days from the date a response to the notice of claim would be due) and Scenario 3. When a health care provider responds to a Notice of Claim, either before a response is due or when the response is due, that triggers a claimant's 30-day period to file a complaint before the expiration of the statute of limitations. However, if the health care provider demands pre-suit mediation in response to the Notice of Claim, Scenario 3 is triggered, extending the claimant's deadline to file a complaint to 30 days from receipt of written notice from a mediator that the mediation has been unsuccessful. Certainly, 30 days from receipt of notice from the mediator that mediation was unsuccessful will always occur later than the date the health care provider responds to the Notice of Claim (Scenario 1) or the date a response would be due (Scenario 2).

Therefore, because the "whichever last occurs" language modifies the relationship between Scenario 1 and 3 and Scenario 2 and 3, JMC's reading of the statute is consistent with this language and does not "read out" or "ignore" it. Instead, unlike Petitioners' interpretation that would

eliminate the application of Scenario 1, JMC's reading of the statute aligns with the "cardinal rule of statutory construction that significance and effect shall, if possible, be accorded every word." Pet'rs' Br. at 9 (citing *Bullman v. D & R Lumber Co.*, 195 W. Va. 129, 133, 464 S.E.2d 771, 775 (1995)).

C. Petitioners Waived Any Arguments Concerning the Date When the Statute of Limitations Began to Run and Application of the Discovery Rule Because Petitioners Failed to Raise Them Before the Circuit Court at the Motion to Dismiss Stage.

Petitioners' second assignment of error is that "the circuit court erred because it failed to recognize that a limitations period does not begin to run until a plaintiff knew or should have known of each element of her claim." *Id.* at 1. In JMC's and Dr. Giffi's motions to dismiss, both asserted that Petitioners' cause of action accrued no later than January 2, 2021, the date that Mrs. Moschonas's stroke was first diagnosed when Mrs. Moschonas was an inpatient at JMC. JA 030, 085. Therefore, JMC and Dr. Giffi contended that the two-year statute of limitation pursuant to W. Va. Code § 55-7B-4(a) began to run no later than January 2, 2021, and was set to expire on January 2, 2023, in the absence of further action by Petitioners to toll the statute of limitations. JA 030, 085. Petitioners never challenged the date when the statute of limitations began to run or was set to expire in response to the motions to dismiss, waiving the ability to assert this argument on appeal. *See State v. Ward*, 245 W. Va. 157, 162, 858 S.E.2d 207, 212 (2021) ("Our general rule is that nonjurisdictional questions raised for the first time on appeal will not be considered."); *Mayhew v. Mayhew*, 205 W. Va. 490, 506, 519 S.E.2d 188, 204 (1999) ("Our law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal.").

Instead, Petitioners asserted their argument that the discovery rule should apply for the very first time in Plaintiffs' Motion to Alter, Amend, or Otherwise Relieve Plaintiffs from Judgment pursuant to Rules 59 and 60 of the West Virginia Rules of Civil Procedure. However,

the Circuit Court properly concluded that Petitioners had waived making any such argument, without justification, by not making it prior to the entry of the dismissal orders and were precluded from making any new arguments in their Rule 59(e) motion. JA 182; *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 56, 717 S.E.2d 235, 243 (2011) ("A motion under Rule 59(e) is not appropriate for presenting new legal arguments, factual contentions, or claims that could have been previously argued.").

Consequently, an argument raised for the first time in a Rule 59(e) motion does not preserve that argument for appeal. *See Peck v. Scolapio*, No. 19-0165, 2020 WL 2735437, at *5 (W. Va. May 26, 2020) (memorandum decision) (finding that the "circuit court did not err in denying petitioner's Rule 59(e) motion" when petitioner "could have raised his purported mental impairment and incarceration as grounds for the tolling of the applicable statute of limitations in earlier proceedings" but instead "untimely raised them for the first time in his Rule 59(e) motion to alter or amend"); *City of Fairmont v. W. Va. Municipal League, Inc.*, No. 18-0873, 2020 WL 201188, at *6 (W. Va. Jan. 13, 2020) (memorandum decision) (declining to address the petitioner's argument that was "first raised in its Rule 59(e) motion" and was therefore "not properly preserved in the circuit court"). Therefore, because Petitioners failed to properly preserve any argument concerning the date when the statute of limitations began to run, it has been waived and Petitioners cannot assert it before this Court for the first time on appeal.

V. CONCLUSION

For the foregoing reasons, Respondent JMC respectfully requests that this Honorable Court affirm the Circuit Court's grant of JMC's Motion to Dismiss Petitioners' Complaint with prejudice.

/s/ Melissa K. Oliverio
Melissa K. Oliverio, Esq. (WVSB # 6695)
Ryan T. Loos, Esq. (WVSB # 13648)
WEST VIRGINIA UNIVERSITY HEALTH SYSTEM
1238 Suncrest Towne Centre Drive
Morgantown, West Virginia 26505
Telephone: 304/598-4070
Facsimile: 304/598-9888
melissa.oliverio@wvumedicine.org
ryan.loos@wvumedicine.org
Counsel for Respondent The Charles Town General Hospital d/b/a Jefferson Medical Center

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

SPYRIDOULA L. MOSCHONAS and GERASIMOS MOSCHONAS,

Plaintiffs Below, Petitioners,

v. **No. 24-ICA-79**

THE CHARLES TOWN GENERAL HOSPITAL D/B/A JEFFERSON MEDICAL CENTER AND JASON GIFFI, D.O.,

Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I, Melissa K. Oliverio, do hereby certify that I have caused to be served this 18th day of July, 2024, the foregoing, **"BRIEF OF RESPONDENT THE CHARLES TOWN GENERAL HOSPITAL D/B/A JEFFERSON MEDICAL CENTER,"** upon the following counsel of record via the File & ServeXpress system:

Christopher T. Nace, Esq.
Paulson & Nace, PLLC
1025 Thomas Jefferson St., NW
Suite 810
Washington, DC 20007
ctnace@paulsonandnace.com
Counsel for Petitioners

Brent P. Copenhaver, Esq.
Dana Hantel, Esq.
Linkous Law, PLLC
10 Cheat Landing, Suite 200
Morgantown, WV 26508
brent@linkouslawpllc.com
dana@linkouslawpllc.com
Counsel for Respondent Jason Giffi, D.O.

Melissa K. Oliverio
Melissa K. Oliverio, Esq. (WVSB # 6695)