IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 24-ICA-79

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Spyridoula L. Moschonas and
Gerasimos Moschonas,
Plaintiffs Below, Petitioners,

vs.

The Charles Town General Hospital d/b/a Jefferson Medical Center and Jason Giffi, D.O.,
Defendants Below, Respondents.

Appeal from a final order of the Circuit Court of Jefferson County (CC-19-2023-C-32)

RESPONDENT'S BRIEF ON BEHALF OF JASON GIFFI, D.O.

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I. STATEMENT OF THE CASE

A. Jurisdiction

This Court has jurisdiction over Petitioners' appeal because this Court has appellate jurisdiction over the final judgments and orders of the Circuit Courts in all civil cases. W.Va. Code § 51-11-4(a)(1); W.Va. R. App. P. 1(b).

B. Statement of Facts and Procedural History

On January 1, 2021, Spyridoula L. Moschonas presented to the emergency department at Jefferson Medical Center ("JMC") because she was having trouble breathing. (JA 017). After evaluating the patient and ordering diagnostic testing, Emergency Medicine physician Jason Giffi, D.O., consulted with another physician, and a decision was made to admit the patient to JMC as an inpatient, to determine the cause of her presenting complaints. (JA 025). Following the departure of Mrs. Moschonas from the JMC ED and her admission to JMC as an inpatient, a CT scan of the brain was ordered and performed approximately 24 hours after the patient was admitted to JMC, and a stroke was diagnosed based upon that CT scan. (JA 025).

Healthcare providers at JMC determined that it was medically necessary to transfer the patient to INOVA Fairfax Hospital on the same day that the stroke was diagnosed. (JA 025). It is clearly documented in a Patient Transfer Form contained within the medical record that the necessity and reason for the transfer was the stroke that had been diagnosed by the CT scan; this information was, at a minimum, explained to the patient's husband, Gerasimos Moschonas. (JA 025). In addition, this communication was confirmed by a Consent to Transfer form, which Gerasimos Moschonas signed at 3:15 p.m. on January 2, 2021. (JA 025). The patient was transferred from JMC to INOVA two hours after the Consent to Transfer form was executed, at 5:15 p.m. (JA 025).

On December 21, 2022, counsel for Petitioners Spyridoula L. Moschonas and Gerasimos Moschonas sent a letter to Dr. Giffi via Certified Mail, and that letter was self-described as a "Notice of Claim pursuant to West Virginia Code § 55-7B-6" ("NOC"). (JA 001-002). Enclosed with the NOC was a Screening Certificate of Merit ("COM") from Michael Falgami, M.D. in support of the claim against Dr. Giffi. (JA 038-039).

On January 24, 2023, Dr. Giffi's counsel sent a letter to Petitioners' counsel by both email and regular mail that (1) served as a clearly defined "formal response" to the NOC/COM of December 21, 2022, that is contemplated by West Virginia Code § 55-7B-6(f); and (2) served as notification of deficiencies in Dr. Falgami's COM pursuant to *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387 (2005). Dr. Giffi's January 24, 2023, formal response letter did <u>not</u> request pre-suit mediation. (JA 007-010, 056).

On February 9, 2023, Petitioners' counsel sent a letter reacting and responding to the *Hinchman* letter to challenge the assertion of deficiencies in the COM. (JA 011).

On February 28, 2023, Petitioners e-filed a Complaint in the Circuit Court of Jefferson County against Dr. Giffi and JMC seeking recovery for injuries and damages allegedly sustained by Spyridoula L. Moschonas while she was a patient in the emergency department at JMC on January 1, 2021. (JA 015-020). Based on the absence of any question or request for clarification in the letter dated February 9, 2023, about Dr. Giffi's desire for pre-suit mediation, and the filing of the Complaint on February 28, 2023, it is clear that the Petitioners understood and were operating under the assumption that Dr. Giffi's January 24, 2023 letter was indeed the formal "response" contemplated by West Virginia Code § 55-7B-6(f) and that Dr. Giffi did not unequivocally request pre-suit mediation in his formal response.

On April 21, 2023, a *Motion to Dismiss Plaintiff's Complaint Against Defendant Jason Giffi, D.O.* was filed seeking dismissal based upon Petitioners' failure to comply with the deadlines and requirements established by West Virginia Code § 55-7B-6(i)(1). (JA 022-023). More specifically, the motion to dismiss explained that when the Complaint was e-filed on February 28, 2023, the statute of limitations had already expired five days earlier. (JA 024-025).

On May 8, 2023, Petitioners' *Response and Opposition to Defendant Jason Giffi, M.D.'s Motion to Dismiss* was filed. (JA 061). Petitioners contended that the Complaint was timely filed, as it did not have to be filed until March 4, 2023, based upon the "whichever last occurs" language of West Virginia Code § 55-7B-6(i)(1). (JA 061-065). The response did not assert that the discovery rule operated to further toll the applicable statute of limitations in this case.

On May 18, 2023, the *Reply Brief of Defendant Jason Giffi, D.O. to Plaintiffs' Response and Opposition to Defendant Giffi's Motion to Dismiss Plaintiffs' Complaint* was filed. (JA 99). Dr. Giffi argued that once the formal response to the NOC and COM was delivered to Petitioners' counsel, a response was no longer "due," such that the words "whichever last occurs" at the end of West Virginia Code § 55-7B-6(i)(1) became moot, inapplicable, and irrelevant. (JA 102).

On August 9, 2023, the Circuit Court entered an *Order Granting Motion to Dismiss Defendant Jason Giffi, D.O. with Prejudice*, concluding "as a matter of law that the statute of limitations for the claim against Dr. Giffi had clearly expired before . . . Plaintiffs filed suit. Consequently, the claim against Defendant Jason Giffi, D.O. in Plaintiffs' Complaint is time barred[.]" (JA 110-118).

On August 21, 2023, *Plaintiffs' Motion to Alter, Amend, or Otherwise Relieve Plaintiff from Judgment* was filed pursuant to Rule 59 or, alternatively, Rule 60 of the West Virginia

Rules of Civil Procedure. (JA 124). Petitioners reiterated the arguments presented in their response to Dr. Giffi's motion to dismiss. (JA 129). Petitioners contended for the first time that the Circuit Court "fail[ed] 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 . . ." (JA 131).

On September 5, 2023, the *Response of Defendant Jason Giffi, D.O. in Opposition to Plaintiffs' Motion to Alter, Amend, or Otherwise Relieve Plaintiffs from Judgment* was filed. (JA 163). Dr. Giffi's response explained, *inter alia*, that Petitioners had "included a new and untimely argument not previously raised in opposition to the motions to dismiss" and that they "claimed for the first time that there may be a reason for extension of the statute of limitations based on operation of the 'discovery rule.'" (JA 167).

On November 16, 2023, the Circuit Court conducted a hearing on *Plaintiffs' Motion to Alter, Amend or Otherwise Relieve Plaintiff From Judgment*. (JA 173, 197). Petitioners' counsel argued that the Circuit Court had not given effect to the "whichever last occurs" language in West Virginia Code § 55-7B-6(i)(1). (JA 201). Dr. Giffi's counsel countered that the statutory interpretation offered by Petitioners' counsel was improperly disregarding the following language in § 55-7B-6(i)(1): "any statute of limitations . . . 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..." (JA 211). Dr. Giffi's counsel also argued that Petitioners had waived the discovery rule argument because it was not raised in response to the motion to dismiss, and counsel further argued that Petitioners had failed to provide an affidavit or any other evidentiary support for their discovery rule argument. (JA 213-218).

On February 1, 2024, the Circuit Court entered an *Order Denying Plaintiffs' Motion to Alter, Amend, or Otherwise Relieve Plaintiffs from Judgment*. (JA 186). That Order provided

that Plaintiffs' arguments in the Rule 59(e) motion 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 . . . based on the applicable statute of limitations and tolling provisions of the MPLA and the *Adkins* decision." (JA 192). In regard to the Rule 60(b) motion, the Order stated, "Plaintiffs' new argument that was first asserted in the instant motion that the discovery rule should apply and extend Plaintiffs' statute of limitations has been waived because Plaintiffs failed to raise it, without justification, prior to the entry of the Court's . . . Order dismissing Dr. Giffi . . . with prejudice." (JA 194).

II. SUMMARY OF ARGUMENT

Petitioners failed to comply with the deadlines and requirements of West Virginia Code § 55-7B-6(i)(1), which establishes the statute of limitations for medical malpractice cases and provides clear limitations on tolling the statute of limitations. Because the statute of limitations set forth in West Virginia Code § 55-7B-4 expired before the Complaint was filed, even after factoring in the tolling provision in § 55-7B-6(i)(1), and because Petitioners waived the argument that the discovery rule tolled the statute of limitations applicable to their claims against Dr. Giffi, the Circuit Court properly dismissed the Complaint against Dr. Giffi, with prejudice.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Respondent respectfully submits that oral argument is unnecessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure because the dispositive issues have been authoritatively decided; 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.

IV. ARGUMENT

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

The sole issue presented for consideration by Petitioners' appeal is whether the Circuit Court properly dismissed the Complaint as untimely. The Supreme Court of Appeals of West Virginia ("SCAWV") has held that appellate review of an order dismissing a complaint as untimely is plenary and that "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." *See*, e.g., *Adkins v. Clark*, 247 W.Va. 128, 131, 875 S.E. 2d 266, 269 (2022).

B. The Circuit Court properly dismissed Petitioners' Complaint against Dr. Giffi because Petitioners failed to comply with the deadlines and requirements established by West Virginia Code § 55-7B-6(i)(1).

The West Virginia Medical Professional Liability Act ("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 which are governed by the MPLA are subject to a two-year statute of limitation. The applicable statute states, in relevant part, as follows:

> 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, arises as of the date of injury, except as provided in subsection (c) 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 the person discovers, or with reasonable diligence, should have discovered such injury, whichever last occurs…

W.Va. Code § 55-7B-4(a) (emphasis supplied).

The MPLA also sets forth specific pre-suit requirements that must be satisfied prior to the filing of 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 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). In the event that a claimant does not have time prior to the expiration of the statute of limitations to obtain and serve the required COM with the NOC, the MPLA affords the claimant an additional sixty (60) days to obtain and serve the COM:

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

W. Va. Code § 55-7B-6(d).

In order 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 NOC and a COM. The MPLA's tolling provisions provide as follows:

> (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 SCAWV has had the opportunity to discuss and apply these tolling provisions. In *Adkins v. Clark*, 247 W.Va. 128, 875 S.E.2d 266 (2022), the SCAWV wrote, "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." *Id*. at 270. "Importantly, the only 'response' that further tolls the statute of limitations under West Virginia Code § 55-7B-6(i)(1) is the invocation of the right to pre-litigation mediation." *Id*. The SCAWV also explained, "The provisions of the MPLA are clear that the statute of limitations is not indefinitely tolled until a healthcare provider unequivocally declines pre-suit mediation." *Id*.

The holding in *Adkins* is abundantly clear that if a healthcare provider does not affirmatively and clearly request pre-suit mediation in writing, then there is no tolling beyond the 30-day time limit in either of the first two circumstances (Scenario 1 or Scenario 2) as described by the Court. Syllabus Point 2 of *Adkins* states as follows:

> 2. 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, Syl. Pt. 2. The SCAWV reinforced this holding from *Adkins* last year, leaving no doubt regarding its analysis and application of the plain language of the statute. *See* Syl. Pt. 2, *Sager v. Duvert*, 895 S.E.2d 76 (2023).

In the case *sub judice*, it is undisputed that Petitioners' Complaint was governed by the MPLA and that Petitioners were required to comply with the statute of limitations and jurisdictional prerequisites of the MPLA prior to filing a medical professional liability action. W.Va. Code § 55-7B-6(a). Moreover, the following facts and conclusions cannot reasonably be disputed by Petitioners:

(1) Based upon Petitioners' allegations, their cause of action accrued no later than January 2, 2021, which is the date on which Mrs. Moschonas' stroke was first diagnosed while she was an inpatient at JMC. The stroke was diagnosed by a CT scan of the brain on the morning of January 2, 2021, and this was disclosed at a minimum to Mrs. Moschonas' husband, Petitioner Gerasimos Moschonas, prior to the transfer of Mrs. Moschonas to INOVA Fairfax Hospital on that date. Therefore, the two-year statute of limitation on this claim pursuant to W.Va. Code § 55-7B-4(a) began to run on 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.

(2) On Wednesday, December 21, 2022, Petitioners' counsel sent by Certified Mail a NOC and COM to Dr. Giffi that tolled the statute of limitations from the date of mailing of the NOC "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).

(3) On Tuesday, January 24, 2023, counsel for Dr. Giffi sent his response to the NOC and COM. That response pointed out deficiencies in the COM, pursuant to W.Va. Code § 55-7B-6(b)(3) and *Hinchman*, *supra*. The response did not demand or request pre-suit mediation. The

response was sent by email and U.S. Mail and was addressed to and received in the email inbox of Petitioners' counsel on January 24, 2023.

(4) Counsel for Petitioners sent a letter to counsel for Dr. Giffi dated February 9, 2023 challenging the assertion in the January 24, 2023 letter that the COM was deficient and did not comply with the minimum requirements of the MPLA.

(5) The Complaint was filed on February 28, 2023, thirty-five (35) days after Dr. Giffi's January 24, 2023 response to the NOC and COM was received by Petitioners' counsel.

As noted above, the relevant tolling provision in West Virginia Code § 55-7B-6(i)(1) states that the statute of limitations shall be tolled for a period of 30 days starting with the date of mail of a NOC and terminating based upon one of the three mutually exclusive scenarios:

Scenario 1: 30 days following receipt of a response to the NOC.

Scenario 2: 30 days from the date a response to the NOC would be due.

Scenario 3: 30 days from receipt by the claimant of written notice from the mediator that mediation has not resulted in settlement of the alleged claim and mediation is concluded.

Dr. Giffi's January 24, 2023 response to the NOC/COM neither requested nor declined pre-suit mediation. The response did not in any way invoke the right to pre-suit mediation, and the lack of a specific waiver of pre-suit mediation in that letter cannot be relied upon by Petitioners as conduct that tolled the statute of limitations beyond the 30 days set forth in Scenario 1. Based upon the February 9, 2023 letter from Petitioners' counsel in reply to Dr. Giffi's January 24, 2023 formal response, it is clear that Petitioners did not interpret the formal response as a request for mediation, as the February 9, 2023 reply did not make any reference to pre-suit mediation, did not suggest possible names of mediators, and did not request clarification as to whether mediation was being requested by Dr. Giffi (it was not).

Based upon the plain language of West Virginia Code § 55-7B-6(i)(1) and the SCAWV's application of that statutory provision in *Adkins* and *Sager*, it is clear that the *only* scenario applicable to the circumstances in this case and the analysis of the endpoint of the tolling of the statute of limitations is Scenario 1 ("30 days following receipt of a response to the notice of claim"). This inescapable conclusion is based on Dr. Giffi's formal response to the NOC/COM, which did not request pre-suit mediation. *Adkins* makes clear that Scenario 2 ("30 days from the date a response to the notice of claim would be due") applies only when the health care provider has failed to send any response to the NOC/COM. *Adkins* also makes clear that Scenario 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") applies only when the health care provider has made a clear and unequivocal request for pre-suit mediation.

Neither of those circumstances existed in the case *sub judice*. Based on the wording of the statute, it is logical that any scenario that has been eliminated cannot occur, is irrelevant, and must be excluded from the determination of "whichever last occurs." As a result, the formal response by Dr. Giffi dated January 24, 2023, effectively eliminated Scenario 2 and 3, and from that point forward, the *only* scenario that could "occur" (and therefore the "last" scenario to "occur") was Scenario 1 ("30 days following receipt of a response to the notice of claim"). This is not a conclusion that changes the language of the statute from "whichever last occurs" to "whichever *first* occurs" (as argued by the Petitioners at the motion hearing held on November 16, 2023), but, rather, is a simple recognition that the statute should be interpreted logically and reasonably. "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." Syl. Pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938).

Petitioners' interpretation of 55-7B-6(i)(1) is contradicted by the rules of statutory construction and interpretation. First, if the West Virginia Legislature had intended for the final thirty-day tolling period to start exactly 30 days after receipt of the NOC *regardless* of the date on which the health care provider sends the response described in West Virginia Code § 55-7B-6(f), then the Legislature's differentiation of Scenario 1 and Scenario 2 in the statute would have been a distinction without a difference and a meaningless exercise. Second, if the West Virginia Legislature had intended for the final thirty-day tolling period to *only* start running exactly 30 days from the date the health care provider received the NOC – including a situation in which the health care provider responded early and before the passage of 30 days – then the Legislature would have had no reason to include the distinction between Scenario 1 and Scenario 2 in West Virginia Code § 55-7B-6(i)(1).

Accordingly, the statute of limitations for this claim was tolled only for a period of 30 days from January 24, 2023, the date on which Petitioners' counsel received the email containing Dr. Giffi's response to the NOC/COM. Therefore, the last day on which Petitioners could have filed their Complaint before the expiration of the statute of limitations was Friday, February 23, 2023. When the Complaint was filed on Tuesday, February 28, 2023, the statute of limitations for filing suit against Dr. Giffi had expired. Consequently, the claim against Dr. Giffi in the Complaint was time-barred, and Dr. Giffi was entitled to dismissal.

As to *Plaintiffs' Motion to Alter, Amend, Or Otherwise Relieve Plaintiff From Judgment*, Petitioners failed to establish a basis for granting the motion based upon Rule 59(e) of the West Virginia Rules of Civil Procedure, under any of the four grounds for relief set forth under Syllabus Point 2 of *Mey v. Pep Boys – Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011), which reads:

2. A motion under Rule 59(e) of the *West Virginia Rules of Civil Procedure* should be granted where:

> (1) there is an intervening change in controlling law;
> (2) new evidence not previously available comes to light;
> (3) it becomes necessary to remedy a clear error of law or
> (4) to prevent obvious injustice.

The Circuit Court properly ruled that Petitioners failed to satisfy any of the four grounds for granting their motion as to Rule 59(e). As to Petitioners' request for relief under Rule 60(b) of the *West Virginia Rules of Civil Procedure*, the Circuit Court properly ruled that Petitioners failed to satisfy any of the six grounds in Rule 60(b) for the relief they sought, noting that the rule "does not afford relief from a final judgment of the circuit court dismissing a personal injury action with prejudice for failure to comply with the statutory limitations for instituting suit." Syl. Pt. 4, *Johnson v. Nedeff*, 192 W.Va. 260, 452 S.E.2d 63 (1994).

C. The Circuit Court correctly determined that Petitioners waived the argument that the discovery rule tolled the statute of limitations applicable to their claims against Dr. Giffi.

Petitioners' second assignment of error states, "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." In reality, the Circuit Court acknowledged Petitioners' discovery rule arguments and generously provided counsel with the opportunity to present arguments regarding the discovery rule even though the discovery rule issue was not timely raised. Petitioners did not present any evidence, by affidavit or otherwise, to support the assertion or argument that the discovery rule tolled the statute of limitations applicable to their claims against Dr. Giffi. Nor did they present any explanation for their failure to present their discovery rule argument prior to dismissal of the Complaint, with prejudice.

After reviewing the parties' written submissions and hearing oral arguments from Petitioners' counsel, the Circuit Court properly concluded that Petitioners had waived any

argument related to the discovery rule. The fact that waiver was the basis for the Circuit Court's decision on the discovery rule argument is clear from the Circuit Court's February 1, 2024 *Order Denying Plaintiffs' Motion to Alter, Amend, or Otherwise Relieve Plaintiffs from Judgment*, which states as follows: "***Plaintiffs' new argument . . . that the discovery rule should apply . . . has been waived because Plaintiffs failed to raise it, without justification, prior to the entry of the Court's...Orders dismissing Dr. Giffi...with prejudice***." (JA 182) (emphasis added).

The Circuit Court also noted that Petitioners' Rule 59(e) motion "purported to argue that the discovery rule should apply . . . 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 179). Petitioners could have raised any discovery rule issue in their response to Dr. Giffi's motion to dismiss, and a factual record could have been established at that point via affidavits or other competent evidence, or at the very least some specific factual assertions, to support their position. It is well established that "a Rule 60(b) motion does not present a forum for the consideration of evidence which was available but not offered at the original [proceeding]." *Jividen v. Jividen*, 212 W.Va. 478, 481, 575 S.E.2d 88, 91(2002) (citing *Powderidge Unit Owners Association v. Highland Properties*, 196 W.Va. 692, 706, 474 S.E.2d 872, 886)(1996). However, Petitioners failed to even argue applicability of the discovery rule at the motion to dismiss stage. Therefore, the discovery rule contention first raised in *Plaintiffs' Motion to Alter, Amend, or Otherwise Relieve Plaintiff From Judgment* was waived by Petitioners and was unsupported by any evidence, and the Circuit Court properly ruled against Petitioners on this point in the *Order Denying Plaintiffs' Motion to Alter, Amend, or Otherwise Relieve Plaintiffs From Judgment.*

Even after the issue was untimely raised, the Circuit Court generously provided Plaintiff's counsel with an opportunity to address the discovery rule argument, but no support for the argument was provided. When asked to respond regarding the lack of any competent evidence to support the discovery rule argument, Petitioners' counsel indicated that he "never thought to submit an affidavit on this issue" before shifting back to his primary argument regarding the MPLA's tolling provisions and providing no further information or analysis related to the discovery rule. (JA 230). Petitioners seem to acknowledge that they failed to present any evidence or an adequate argument related to their untimely discovery rule issue, as *Petitioners' Brief* states, "There has been absolutely no discovery or consideration in this case as to when the limitations period would have run" and "it was impossible for the Circuit Court to rule determine [*sic*] Petitioners' states of mind as to when they knew or should have known of the essential elements of a possible cause of action." (*Petitioners' Brief* at p. 14). Petitioners were clearly operating under the assumption that the two-year limitations period began on January 1, 2022, based on their procurement of Dr. Falgami's COM which was signed and notarized by him on December 12, 2022. Petitioners failed to timely raise the claim of applicability of the discovery rule and failed to provide the Circuit Court with any evidence upon which it could rely to make a finding of potential applicability. Therefore, Petitioners' untimely and unsupported discovery rule claim should be rejected.

The MPLA plainly requires an injured plaintiff to file a medical malpractice claim against a health care provider within two years of the injury, or within two years of the date when such person discovered, or in the exercise of reasonable diligence should have discovered, such injury. W.Va. Code § 55-7B-4(a); Syl. Pt. 2, *Jones v. Aburahma*, 215 W.Va. 521, 600 S.E.2d 233 (2004). Even prior to the MPLA, with respect to the general rules concerning when a plaintiff "should

have discovered" an injury, the SCAWV recognized that mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitation, and the discovery rule applies only when there is a strong showing by the plaintiff that the defendants prevented him from knowing of the wrong at the time of the injury. Syl. Pt. 2, *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996); Syl. Pt. 2, *Donley v. Bracken*, 192 W. Va. 383, 452 S.E.2d 699 (1994).

Despite the well-established legal authority on the statute of limitation and tolling provisions applicable to MPLA claims, Petitioners did not timely file their complaint and did not timely present any information or any credible argument on the discovery rule. Even after raising their untimely discovery rule argument, Petitioners failed to provide evidentiary support or a persuasive argument to support their assertion that the discovery rule might apply. Accordingly, the Circuit Court properly concluded that Petitioners waived any discovery rule argument and properly dismissed their Complaint against Dr. Giffi as time-barred.

V. CONCLUSION

The Circuit Court of Jefferson County properly entered the *Order Granting Motion to Dismiss Defendant Jason Giffi, D.O. with Prejudice* (entered August 9, 2023), as well as the *Order Denying Plaintiffs' Motion to Alter, Amend, or Otherwise Relieve Plaintiffs from Judgment* (entered February 1, 2024). For the foregoing reasons, Respondent Jason Giffi, D.O. respectfully requests that this Honorable Court affirm the Circuit Court's August 9, 2023 *Order Granting Motion to Dismiss Defendant Jason Giffi, D.O. with Prejudice* and the Circuit Court's February 1, 2024 *Order Denying Plaintiffs' Motion to Alter, Amend, or Otherwise Relieve Plaintiffs from Judgment*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July 2024, I timely served a true and accurate copy of the foregoing *Respondent's Brief on Behalf of Jason Giffi, D.O.* via electronic filing (via File & Serve Express) on the following counsel of record:

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