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' REPLY BRIEF

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B. SUMMARY OF REPLY

In their respective Reply Briefs, Respondents Jason Giffi, D.O. and Charles Town General Hospital ignore the phrase "whichever last occurs" in W. Va. Code § 55-7b-6 and advocate for an interpretation of the statute that simply is not written in the text. Instead, they suggest a reading that attempts to match different scenarios with different deadlines. The text, though, does not support their interpretation. Respondents – without saying the same – argue for an interpretation of the statute that would replace "whichever ***last*** occurs" with "whichever ***first*** occurs." This, of course, is not the plain language of the statute.

The statute provides a time *before which* a plaintiff may not file suit. It is a statute of prohibition. The tolling provision as written gives a plaintiff options as to when that prohibition has been lifted, while setting an outside limit on how long it lasts. But the statute is crystal clear: a plaintiff may file suit 30 days from when a response to a notice is received; 30 days from when a response should have been received; ***or*** thirty days after a failed mediation – ***whichever last occurs.*** Those words cannot be read out of the statute.

The issue before the Court is when does the tolling period end. Contrary to the reading offered by Respondents, the statute provides claimants the option of when to file suit, hence the use of the phrase "whichever last occurs." Respondents incorrectly advocate for an interpretation of the statute that simply is not contained in the plain words.

Even if the Respondents were correct – which they are not – the trial court assumed the limitations period would expire two years from the date of negligence. But that is not the law. A limitations period does not begin to run until a claimant knew or should have known of her claim. Here, the trial court simply assumed the limitations period would expire on the two-year anniversary of Petitioner's stroke. Again, this is not the law. Contrary to the argument of

Respondents, this Court most certainly can consider this argument that dismissal by the trial court was error, as this is plain error.

West Virginia has a long history of seeking to have cases resolved on the merits, not on technicalities. Because the interpretation offered by Respondents is wrong, this Court should reverse the trial court and remand this matter to proceed to discovery.

C. REPLY ARGUMENT

I. RESPONDENTS IGNORE THE PLAIN MEANING OF THE PHRASE "WHICHEVER LAST OCCURS," WHICH PROVIDES PLAINTIFFS OPTIONS AS TO WHEN TO FILE SUIT.

There is little offered in Respondents' respective briefs that supports their tortured reading of the statute. West Virginia Code § 55-7B6(i)(1) provides three (3) deadlines that end the tolling period:

- 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***.

Respondents contend 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 and Respondents do not offer any support for the position proffered in their brief. Had the West Virginia legislature intended the reading offered by Respondents, it simply could have written the statute to say "if a response to a notice of claim is provided, the time to file is tolled until thirty days after the response is received." But the statute does not say that. Instead, it says that the tolling period ends at the time "whichever last occurs."

Respondents advocate for a reading that would make sense if the statute said "whichever ***first*** occurs." Had the legislature mandated that a plaintiff file her suit within thirty days of the first

action, then, in this case, Respondents would be correct. But statutory interpretation does not permit one to read a statute in the opposite way of how it is written.

In fact, the statute is clearly to the contrary. The words "whichever last occurs" cannot be ignored or read out of the statute. – or read to mean the exact opposite of what they say. 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 is silent as to 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.

Again, to adopt the interpretation of the trial court and Respondents would be to read it as if it said "whichever first occurs." It does not say that.

II. THE CASES CITED DO NOT SUPPORT RESPONDENTS' POSITION.

Adkins v. Clark, 875 S.E.2d 266 (W.V. 2022) does not support Respondents' position. As noted in Petitioners' Opening Brief, *Adkins* deals exclusively with the one provision of the statute that is absolutely not at issue in this case, i.e. the provision that deals with mediation. The *Adkins* opinion is silent as to the issue of whether the tolling provision ends thirty days after receipt of a generic response to a notice of claim. That the *Adkins* opinion somehow dictates that the words "whichever last occurs" can be read out of the statute is a complete fallacy. The issue is not addressed anywhere in the opinion, which instead holds that the MPLA's tolling provision simply is not open ended. That point is not in dispute.

III. PETITIONERS HAVE NOT WAIVED THEIR ARGUMENT THAT THE STATUTE HAS OTHERWISE EXPIRED

Respondents also argue that Petitioners waived their ability to raise any issues with the lower court's interpretation of the limitations period for this matter since Petitioners did not raise these issues in their initial response to the motions to dismiss. However, there is no controlling case law which states that an argument must be raised in opposition to dismissal in the trial court to preserve the argument on appeal.

Respondents cited only two cases to make such an argument: (1) the *Ward* case, a criminal matter and (2) the *Mayhew* case, a divorce proceeding. In *Ward*, the petitioner was convicted of a firearm possession charge and later raised an equal protection argument for the first time in his appellate reply brief. *State v. Ward*, 245 W. Va. 157, 162 (2021). The Supreme Court of West Virginia found that although it generally does not consider non-jurisdictional questions raised for the first time on appeal, "[a] constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case." *Id.* (citing *Louk v. Cormier*, 218 W. Va. 81, 86

(2005)) (An error not properly preserved at the trial court level may be considered on appeal given that the failure to raise issues below is "not a jurisdictional prerequisite to an appeal but, rather, is a gatekeeper provision rooted in the concept of judicial economy, fairness, expediency, respect, and practical wisdom.") As such, the appellate court went on to review the equal protection issue despite the fact that the petitioner only raised it for the first time in his reply brief. *Ward*, 245 W. Va. at 162-63.

Whereas the petitioner in *Ward* first mentioned the equal protection issue in his appellate reply brief, here, Petitioners appropriately raised the limitations issue before the lower court in their Motion to Alter or Amend Judgement and then again in their initial brief before this Court. See *Argus Energy, LLC v. Marenko*, 248 W. Va. 98, 103 (2023) ("Limiting a party to asserting the issues and arguments in an appeal to those clearly set forth in a party's brief is important because raising an issue or argument in an appellate brief provides the necessary notice to both this Court and the opposing party as to what they confront so each can adequately prepare and discharge their respective responsibilities.") Under the circumstances presented, Petitioners have not deprived Respondents nor this Court of the appropriate notice regarding the issue of the applicable limitations period.

Additionally, even if Petitioners had not already raised the limitations issue in the lower court, in accordance with the ruling in *Ward*, this Court should still opt to review the limitations period since it is a controlling inquiry that directly relates to the notice statute at issue— W.V. Code § 55-7b-6. Thus, this Court should exercise its discretion to address the limitations issue given that it is indispensable for final resolution, even if this Court believes the matter should have been raised in Petitioners' first opposition to Respondents' Motions to Dismiss.

In the second case that Respondents rely on, *Mayhew*, the appellate court declined to review the issue of rehabilitative alimony since it was not raised by either party in the circuit court. *Mayhew v. Mayhew*, 205 W. Va. 490, 506 (1999). Again, that is not the case in this matter given that Petitioners appropriately raised the limitations issue before the lower court in its Motion to Alter/Amend.

Furthermore, the appellate rule regarding assignments of error makes clear that it is permissible for a petitioner to raise an issue on appeal even if it was not presented to the lower court, so long as it is presented in a clear assertion to the appellate court:

> Assignments of Error: The brief opens with a list of the assignments of error that are presented for review, expressed in terms and circumstances of the case but without unnecessary detail. The assignments of error need not be identical to those contained in the notice of appeal. The statement of the assignments of error will be deemed to include every subsidiary question fairly comprised therein. ***If the issue was not presented to the lower tribunal, the assignment of error must be phrased in such a fashion as to alert the Intermediate Court or the Supreme Court to the fact that plain error is asserted.***

W. Va. R. App. P. 10(c)(3) (emphasis added).

Thus, taken all together, Petitioners have in no way waived their right to raise issue with the limitations period in this matter. It was discussed in the circuit court by both parties and clearly assigned as error in Petitioner's initial brief. Furthermore, even if this Court were not convinced that those two instances were sufficient notice, this Court still has discretion to review the issue since preservation is not a requirement but more of a procedural courtesy. The issue of limitations is more than worth the exercise of such discretion given that it is a legal inquiry which had no bearing on the Court or Respondents fact-finding ability to date and because it is vital to final resolution of the matter.

D. CONCLUSION

It is clear from the above arguments that Petitioners were entitled to file their Complaint thirty days after Respondents' request for 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 6th day of August, 2024, I served the foregoing PETITIONERS' REPLY BRIEF via electronic filing on:

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