IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 25-ICA-72

ADRIAN OSBORNE,

Plaintiff below, Petitioner,

v.

WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS, KEVIN MACE, M.D., MONTANA BOYCE, R.N., AND UNITED HOSPITAL CENTER, INC.,

Defendants Below, Respondents

RESPONDENTS' JOINT RESPONSE IN OPPOSITION TO PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR APPEAL

Chelsea V. Brown (WVSB No. 11447)
JACKSON KELLY PLLC
3000 Swiss Pine Way, Ste. 200
Morgantown, WV 26501
Telephone: (304)-284-4129
Fax: (304)-284-4142
chelsea.brown@jacksonkelly.com

Blair E. Wessels (WVSB No. 13707)
JACKSON KELLY PLLC
P.O. Box 553
Charleston, WV 25322
Telephone: (304) 340-1000
Fax: (304) 340-1050
blair.wessels@jacksonkelly.com

Counsel for Respondents West Virginia University Board of Governors, and Kevin Mace, M.D.

Lauren T. Krupica (WVSB No. 11719)
Joshua K. Boggs (WVSB No. 10096)
West Virginia United Health System, Inc.
1238 Suncrest Towne Centre Drive
Morgantown, WV 26505
Telephone: (304)-598-6076
Fax: (304)-598-9888
lauren.twiggkrupica@wvumedicine.org
joshua.boggs@wvumedicine.org

Counsel for Respondents Montana Boyce, R.N., and United Hospital Center, Inc.

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INTRODUCTION

Respondents West Virginia University Board of Governors, Kevin Mace, M.D., Montana Boyce, R.N., and United Hospital Center, Inc. ("Respondents") urge the Court to deny Petitioner Adrian Osborne's ("Petitioner") appeal. The appeal before this Court is straightforward—Petitioner missed the clear statute of limitations applicable to his medical malpractice claim, and accordingly, the circuit court properly dismissed Petitioner's Complaint. In an effort to revive his claim, Petitioner now seeks to declare unconstitutional a statutory provision that has been in place for almost 40 years. There is no question that the statute of limitations stated in W. Va. Code § 55-7B-4(a) applies to Petitioner's claim, and Petitioner's appeal fails to demonstrate that this statute is unconstitutional under the Equal Protection Clause of the West Virginia Constitution. Therefore, the Court should affirm the circuit court's January 31, 2025, Order Granting Defendants' Motions to Dismiss, as the ruling was not in error.

I. STATEMENT OF THE CASE

On August 31, 2021, Petitioner Adrian Osborne injured his lower right leg during a high school soccer game and was subsequently transferred to Respondent United Hospital Center ("UHC") for treatment.[1] At the time of his injury, Petitioner was sixteen years old.[2] When Petitioner arrived at UHC's Emergency Department, he was treated by Respondent Kevin Mace, M.D. ("Dr. Mace"), who evaluated Petitioner's leg and determined that Petitioner had fractures in his tibia and fibula.[3] After consulting with an orthopedic surgeon, Dr. Mace ordered splinting of Petitioner's right lower extremity.[4] Accordingly, Respondent Montana Boyce, R.N. ("Nurse

[1] PetAppx 000121.

[2] *Id.*

[3] *Id.*

[4] *Id.*

Boyce") applied an ortho-glass splint to Petitioner's right lower extremity.[5]

Three days later, on September 2, 2021, Petitioner presented to a follow-up appointment, which revealed findings that were concerning for compartment syndrome.[6] That same day, Petitioner underwent an emergency four-compartment fasciotomy of his lower right extremity, with the completion of the initial surgery occurring the next day on September 3, 2021.[7] Three weeks later, on September 24, 2021, Petitioner required skin grafting surgery, and ultimately had the right tibia fracture repaired on October 1, 2021.[8]

Petitioner turned eighteen years old on September 2, 2023.[9] Nearly ten months later, on June 20, 2024, Petitioner served upon Respondents Notices of Claim and Certificates of Merit.[10] In response, on July 19, 2024, Respondents sent *Hinchman* letters identifying defects and insufficiencies in Petitioner's Notices of Claim and Certificates of Merit.[11] Petitioner served Amended Certificates of Merit on September 6, 2024, and subsequently filed his Complaint on September 12, 2024.[12]

In his Complaint, Petitioner brought claims of medical negligence pursuant to West Virginia's Medical Professional Liability Act ("MPLA"), W. Va. Code § 55-7B-1, *et seq*., against all Respondents for the treatment he received on August 31, 2021.[13] On October 10, 2024,

[5] PetAppx 000121–122.

[6] PetAppx 000122.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

Respondents West Virginia University Board of Governors and Dr. Mace, and Respondents UHC and Nurse Boyce filed their respective Motions to Dismiss.[14] Petitioner responded to both Motions on November 14, 2024,[15] and Respondents filed a Joint Reply in support of their Motions to Dismiss on December 13, 2024.[16] On January 7, 2025, the circuit court held a hearing on the Motions to Dismiss, where the court took the parties' positions under advisement.[17]

On January 31, 2025, the circuit court granted Respondents' Motions to Dismiss.[18] In the Order, the circuit court held that (1) Petitioner's action is barred by the applicable statute of limitations found in W. Va. Code §§ 55-7B-4(a) and (c),[19] and (2) Petitioner did not meet his burden to prove that the applicable statute of limitations is unconstitutional.[20] Petitioner subsequently filed his Notice of Appeal on February 26, 2025, and perfected his appeal on April 30, 2025.

II. SUMMARY OF ARGUMENT

The issue before the Court is significant. Petitioner asked the circuit court below, and now again on appeal, to strike down a meaningful, constitutional act of the West Virginia Legislature in order to save his untimely Complaint. The circuit court correctly determined that Petitioner's Complaint against Respondents was time-barred. Petitioner argues that the Complaint "was timely filed within two years of Petitioner reaching the age of eighteen (18) as provided for in W. Va.

[14] PetAppx 000017, 000034.

[15] PetAppx 000050, 000062.

[16] PetAppx 000074.

[17] PetAppx 000137.

[18] PetAppx 000120.

[19] PetAppx 000124.

[20] PetAppx 000128.

Code § 55-2-15."[21] But as the circuit court rightly determined, W. Va. Code § 55-7B-4(a) is the statute of limitations applicable to Petitioner's medical malpractice claim. As such, Petitioner had until August 31, 2023, or at the latest September 2, 2023, to file his Complaint. Petitioner did not file his Complaint until September 12, 2024—over one year after the statute of limitations lapsed.

Petitioner seeks to escape dismissal by arguing that the provisions in W. Va. Code § 55-7B-4 are unconstitutional under the Equal Protection Clause of the West Virginia Constitution. However, Petitioner's Brief does not satisfy the rational basis test—the standard Petitioner must meet to successfully challenge the constitutionality of a statute. As argued herein, the statute of limitations at W. Va. Code §§ 55-7B-4(a) and (c) bear a reasonable relationship to a proper governmental purpose, as codified extensively at W. Va. Code § 55-7B-1. Petitioner has not presented any evidence or argument invalidating these legitimate governmental purposes, which are presumed to be valid under rational basis review.

Further, Petitioner's reliance on dicta within *Whitlow v. Board of Education of Kanawha County*, 190 W. Va. 223, 438 S.E.2d 15 (1993) to question the constitutionality of W. Va. Code § 55-7B-4 is misplaced. *Whitlow* does not conclude that W. Va. Code § 55-7B-4 violates equal protection; rather, Petitioner's citation to this portion of the *Whitlow* decision merely references dicta, which is not controlling here. *Whitlow* is also factually distinguishable due to the difference in deference granted to the Legislature in creating legislation relating to medical malpractice claims, specifically, as opposed to governmental immunities, more generally. Moreover, the *Whitlow* decision on this specific point is counteracted by the trend in upholding minors' statutes of limitation against equal protection challenges that have followed that decision.

The Supreme Court of Appeals of West Virginia and the West Virginia Legislature have

[21] Pet'r's Br. in Supp. of Pet. for Appeal, at p. 5.

had ample opportunity to consider, reject, and/or reform W. Va. Code § 55-7B-4 in the 31 years since *Whitlow* has been decided, but they have never chosen to do so. This Court must resist Petitioner's suggestion that it sit in the position as a super-legislature to do what the West Virginia Legislature and the Supreme Court of Appeals have elected not to do.

Accordingly, this Court should reject Petitioner's appeal and affirm the circuit court's decision in granting Respondents' Motions to Dismiss.

III. STATEMENT REGARDING ORAL ARGUMENT

Because this case presents issues of fundamental public importance, including whether a statute that was lawfully enacted by the West Virginia Legislature to address a problem within the Legislature's purview should be struck down as unconstitutional, Respondents request oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure.[22]

IV. ARGUMENT

The circuit court appropriately dismissed Petitioner's Complaint. The Supreme Court of Appeals of West Virginia has held that when reviewing an order granting or denying a motion to dismiss, the standard of review is *de novo*.[23] Specifically, "[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.[24] Further, "a motion to dismiss should be granted only where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."[25] Applying this standard, Petitioner has failed to satisfy his burden of showing that

[22] W. Va. R. App. P. 20.

[23] Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995) ("Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.").

[24] Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 140, 459 S.E.2d 415, 417 (1995).

[25] *Westmoreland v. Vaidya*, 222 W. Va. 205, 209, 664 S.E.2d 90, 94 (2008) (quotation and citation omitted).

the circuit court erred in granting Respondents' Motions to Dismiss.

A. The circuit court did not err by dismissing Petitioner's Complaint.

1. Because Petitioner brought an action for medical negligence, the statute of limitations found in the MPLA, W. Va. Code § 55-7B-4(a), applies.

Petitioner brought a medical malpractice action arising under West Virginia's MPLA, W. Va. Code § 55-7B-1, *et seq*. In his Complaint, Petitioner alleged failure to meet the standard of care by Dr. Mace, Nurse Montana Boyce, and UHC after Petitioner developed findings concerning for compartment syndrome,[26] requiring surgical intervention to address that condition, the first of which took place on September 2, 2021.[27] Petitioner alleged that the cause of the compartment syndrome was Dr. Mace's failure to order immobilization of Petitioner's fractures,[28] failure to recheck Petitioner after the splint was applied,[29] and improper application of a splint to then sixteen-year-old Petitioner's broken tibia and fibula by Nurse Montana Boyce at UHC's emergency department on August 31, 2021.[30] It is undisputed that these allegations fall squarely under the definitions of alleged "medical injury" as defined in the MPLA.[31]

Because this action for medical negligence is governed by the MPLA, Petitioner, who was sixteen years old at the time of the alleged injury, was required to commence his cause of action "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

[26] PetAppx 000006–07.

[27] PetAppx 000006–08.

[28] PetAppx 000009.

[29] *Id.*

[30] PetAppx 000010.

[31] Under W. Va. Code § 55-7B-2(h), "'Injury' or 'Medical injury' means injury or death to a patient arising or resulting from the rendering of or failure to render health care."

medical injury, whichever last occurs. . . .”[32] Although Petitioner was a minor when injured, the statute of limitations found in W. Va. Code § 55-7B-4(a), which requires the injured party to bring the cause of action within two years from the date of the injury or discovery of the injury, applies to him. The MPLA includes a different statute of limitations that applies to minors who were under the age of ten at the time of their injury: “A cause of action for an injury to a minor, brought by or on behalf of a minor who was under the age of 10 years at the time of such injury, shall be commenced within two years of the date of such injury, or prior to the minor’s 12th birthday, whichever provides the longer period.”[33] There is no question that the statute of limitations defined in W. Va. Code § 55-7B-4(c) for minors who suffered injury while under the age of ten does not apply to Petitioner. Accordingly, Petitioner should have filed his Complaint alleging medical negligence on or before August 31, 2023, or arguably at the very latest, September 2, 2023. However, nineteen-year-old Petitioner filed his Complaint alleging medical negligence on September 12, 2024, one year and twelve days after the two-year statute of limitations expired, per W. Va. Code § 55-7B-4(a).

The Supreme Court of Appeals has held that “statutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. It has been widely held that such exceptions are strictly construed and are not enlarged by the courts upon considerations of apparent hardship.”[34] Here, there is neither an exception nor any tolling provision that can operate to make Petitioner’s Complaint timely filed under the MPLA.

[32] W. Va. Code § 55-7B-4(a).

[33] W. Va. Code § 55-7B-4(c).

[34] *Adkins v. Clark*, 247 W. Va. 128, 133, 875 S.E.2d 266, 271 (2022) (citations omitted) (cleaned up).

First, the parties agree that the MPLA's tolling provisions[35] do not apply to this action. Petitioner sent the required pre-suit Notice of Claim and Certificate of Merit too late—on June 20, 2024,[36] two years, nine months, and 20 days after the alleged medical injury occurred. The filing of these pre-suit notice documents occurred after the closure of the statute of limitations.[37] Accordingly, the statute of limitations was never tolled by W. Va. Code § 55-7B-6(i)(1). Second, Petitioner does not dispute that he was not under the age of ten when the injury occurred, so the statutorily elongated period for minors does not apply to him. Finally, Petitioner does not argue that there is any other legal or equitable reason the MPLA's statute of limitation should be tolled to elongate the period within which he should have filed his Complaint. The circuit court found this when it determined, in accordance with the analysis in *Sager v. Duvert*,[38] that the discovery rule does not apply to this action, as Petitioner's pre-suit filings indicated knowledge of an alleged medical injury as early as August 31, 2021, or at the latest September 2, 2021, and that Petitioner made no allegation of fraudulent concealment by Respondents, such that Petitioner could argue that he was kept from the knowledge that he may have suffered medical injury.[39]

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[35] " . . . 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).

[36] *See* PetAppx 000122.

[37] In *Sager v. Duvert*, 249 W. Va. 221, 229, 895 S.E.2d 76, 84 (2023), this Court discussed the timeline for filing pre-suit notice documents: "Petitioner had sufficient knowledge of the relevant facts related to his claim by May 11, 2018, the statute of limitations began to run on that date. Accordingly, Petitioner had until May 11, 2020, to serve the notice of claim to toll his statute of limitations under West Virginia Code § 55-7B-6(i) . . . ."

[38] *Id.* at 227, 895 S.E.2d at 82 (citing Syl. Pt. 5, in part, *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009)).

[39] PetAppx 000127.

Importantly, Petitioner admitted to the circuit court and to this Court that if the MPLA's statute of limitations applies, "his Complaint was not timely filed."[40] This is accurate, and precisely what the circuit court found after extensive legal analysis. Because W. Va. Code § 55-7B-4(a) applies to Petitioner's action, and because neither the MPLA's tolling provisions nor any other legal or equitable exceptions apply, Petitioner should have filed this action on or before August 31, 2023, or at the very latest, September 2, 2023. The circuit court's dismissal of Petitioner's action was not erroneous as Petitioner contends but is instead the only result supported by the facts and applicable law. Accordingly, this Court should affirm the circuit court's dismissal of Petitioner's Complaint for failure to file the action within the applicable statute of limitations.

2. Contrary to Petitioner's arguments, the special and general savings statute found in W. Va. Code § 55-2-15 does not apply to Petitioner's claims.

Without legal support, Petitioner asserts that the circuit court applied the wrong statute of limitations to his claims. Rather than apply W. Va. Code § 55-7B-4, Petitioner argues that the circuit court should have applied W. Va. Code § 55-2-15, which is West Virginia's special and general savings statute.[41] Had the circuit court applied W. Va. Code § 55-2-15, Petitioner argues that his Complaint will have been timely filed.[42] The special and general savings statute provides:

> If any person to whom the right accrues to bring any personal action other than an action described in subsection (a) of this section, suit, or scire facias, or any bill to repeal a grant, shall be, at the time the same accrues, an infant or insane, the same may be brought within the like number of years after his or her becoming of full age or sane that is allowed to a person having no such impediment to bring the same after the right accrues, or after such acknowledgment as is

[40] *See* PetAppx 000055; *see also* Pet'r's Br. in Supp. of Pet. for Appeal, at p. 7.

[41] *See* H.B. 2605, 2016 Leg., 82nd Sess., 2nd Reg. Sess., (W. Va. 2016): The 2016 amendment added the word "special" to the title and subsection (a) relating to personal actions for damages resulting from sexual abuse or assault suffered by an infant. The general savings language was moved to subsection (b).

[42] Pet'r's Br. in Supp. of Appeal, at p. 7.

> mentioned in § 55-2-8 of this this code, except that it shall in no case be brought after 20 years from the time when the right accrues.[43]

W. Va. Code § 55-2-15 is nearly as old as West Virginia's statehood,[44] pre-dating the 1986 advent of the MPLA by approximately a century. When tasked with addressing issues related to statutory interpretation, the Supreme Court of Appeals has explained that there is a presumption that "legislators who drafted and passed [a statute] were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common . . . ."[45]

Accordingly, the 1986 Legislature that drafted the MPLA is presumed to have known of the general savings statute applicable to minors when it drafted the MPLA's statute of limitations applicable to minors. If the 1986 Legislature intended the general savings statute, W. Va. Code § 55-2-15, to apply to medical malpractice actions, it would not have drafted a redundant code section. This is especially true since "[i]t is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning."[46]

When faced with similar issues, courts in other jurisdictions have upheld the more specific statute over a general statute relating to the same subject matter. For example, in *Ho-Rath v. Rhode Island Hosp.*, 115 A.3d 938 (R.I. 2015), the Rhode Island Supreme Court was asked the same

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[43] W. Va. Code § 55-2-15(b).

[44] *See* W. Va. Code Ann. § 55-2-15 (West). Acts 1882, c. 102, § 16; Acts 2016, c. 1, eff. June 10, 2016; Acts 2020, c. 2, eff. June 1, 2020. **Formerly** Code Va. 1849, c. 149, § 15; Code Va. 1860, c. 149, § 15; Code 1868, c. 104, § 16; Code 1923, c. 104, § 16. *See also* Robert W. Kerns, Jr. *The History of the West Virginia Code*, 120 W. Va. L. Rev. 165, 167 (2017) ("At the very beginning of its statehood, West Virginia simply adopted most of Virginia's laws.").

[45] *State ex rel. Dep't of Motor Vehicles v. Sanders*, 184 W. Va. 55, 58, 399 S.E.2d 455, 458 (1990).

[46] *Wingett v. Challa*, 249 W. Va. 252, 257, 895 S.E.2d 107, 112 (2023) (quotation and citation omitted).

question that is before this Court—whether Rhode Island's general savings statute applied instead of its medical malpractice statute, as it related to minors. The court held:

> if the Legislature had intended [the medical malpractice statute] to toll the statute of limitations on a minor's malpractice claim until he or she reached the age of majority, then this provision would be functionally identical to [the general savings statute] § 9-1-19, which already accomplishes the same result in a general manner for personal injury actions. When § 9-1-14.1 was enacted in 1976, the general tolling provision for the claims of minors set forth in § 9-1-19 was a longstanding, well-established law.[47]

Because the 1986 Legislature is presumed to have known of the existence of the general savings statute applicable to minors, and because each word in a statute must be presumed to have specific purpose and meaning, it must be assumed that the Legislature purposely included a statute of limitations applicable to minors who suffer health care injuries and intended for that statute of limitations to apply to minors who suffer health care injuries.

The circuit court correctly interpreted this Court's precedent in determining that the general savings statute does not apply to Petitioner's claim for medical negligence and, as a result, its decision should not be overturned.

3. The circuit court correctly held that a specific statute of limitations takes precedence over a general statute of limitations with respect to actions involving minors.

Utilizing the Supreme Court of Appeals' holding in *UMWA v. Kingdom*,[48] the circuit court held that "in accordance with West Virginia's longstanding rules of statutory construction, the statute of limitations applicable to this action is found in W. Va. Code § 55-7B-4(a)."[49] Petitioner

[47] *Ho-Rath v. Rhode Island Hosp.*, 115 A.3d 938, 947 (R.I. 2015).

[48] *See* Syl. Pt. 1, *UMWA v. Kingdon*, 174 W. Va. 330, 331, 325 S.E.2d 120 (1984) ("The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.").

[49] PetAppx 000125.

challenges this ruling by relying on *Whitlow v. Board of Education of Kanawha County*,[50] arguing that the circuit court should have relied on the Supreme Court of Appeals' holding in *Whitlow* to find that the general savings statute should apply to his claims.[51]

In *Whitlow*, the Supreme Court answered the question of which statute of limitation applies to a minor's tort claim for personal injury—the general savings statute located at W. Va. Code § 55-2-15, or the more specific statute of limitations located in the Governmental Tort Claims and Insurance Reform Act ("Tort Claims Act"), W. Va. Code § 29-12A-6. The *Whitlow* Court's[52] analysis leads to the unequivocal answer that the MPLA's statute of limitations, W. Va. Code § 55-7B-4(a), applies and bars Petitioner's action:

> There is nothing in the language of W. Va. Code, 29-12A-6, that repeals W. Va. Code 55-2-15. Thus, it is apparent that the legislature did not repeal W. Va. Code, 55-2-15, when it enacted W. Va. Code, 29-12A-6. Rather, W. Va. Code, 29-12A-6, enacted a separate tolling provision for minors who sue a political subdivision. Thus, we must contrast the general provision for the tolling of a statute of limitations by persons under a disability in W. Va. Code, 55-2-15, with W. Va. Code, 29-12A-6(b), which contains a more limited tolling provision relating only to suits filed on behalf of minors against political subdivisions.
>
> The parties neither suggest nor can we find a way to reconcile the general tolling statute with the special minor's tolling provision in W. Va. Code, 29-12A-6(b). Our traditional rule of statutory construction is set out in Syllabus Point 1 of *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984): "**The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.**" *See also Vance v. Ritchie*, 178 W.Va. 155, 358 S.E.2d 239 (1987); *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (1970).

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[50] *Whitlow v. Bd. of Educ. of Kanawha Cnty.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993).

[51] Pet'r's Br. in Supp. of Pet. for Appeal, p. 9.

[52] Petitioner's reliance on *Whitlow* for the proposition that the MPLA is unconstitutional as it applies to the statute of limitations applicable to Petitioner is misplaced and will be discussed in Part IV.B.4, *infra*.

> **Utilizing this rule, we conclude that the tolling provisions in the special statute of limitations as to minors in W. Va. Code, 29-12A-6(b), takes precedence over the tolling provisions in the general statute of limitations found in W. Va. Code, 55-2-15.**[53]

Based on the *Whitlow* Court's analysis, when comparing the competing statutes of limitation, the MPLA's statute of limitations clearly applies to Petitioner's claim.

Courts in other jurisdictions have reached similar conclusions. In 2020, the Court of Appeals of Mississippi heard an appeal with similar facts and legal issues as those presented by Petitioner. In *Span v. Nichols*,[54] a fifteen-year-old patient was allegedly injured as a result of the extraction of her wisdom teeth in June 2013. Her mother filed suit in July 2015 but failed to timely serve the complaint. The Court of Appeals considered whether the general "minor savings clause" tolled the statute of limitations such that plaintiff's claim was timely filed. The court analyzed the applicable Mississippi law, which is substantially similar to West Virginia's medical malpractice statutes of limitation.[55]

Employing an analysis similar to *Whitlow*, the Mississippi Court of Appeals determined that "[t]he minors savings provisions of the medical malpractice statute of limitations . . . deal specifically with the 'special and particular subject' of tolling the limitations period for minors' medical malpractice claims. In contrast, the general minors savings clause, Miss. Code Ann. § 15-1-59, deals 'generally' with the subject of tolling statutes of limitations for minors' claims.

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[53] *Whitlow*, 190 W. Va. at 226, 438 S.E.2d at 18 (emphasis added).

[54] *Span v. Nichols*, 306 So. 3d 781, 787 (Miss. Ct. App. 2020).

[55] *Id.* at 788–89. ("A medical malpractice claim must be 'filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.' This statute of limitations for medical malpractice claims has its own specific minors savings provisions. Under these specific provisions, the statute of limitations for a minor's medical malpractice claim is tolled until the minor's sixth birthday or—if the minor does not have a parent or legal guardian—until the minor is at least six years old and has a parent or legal guardian. These specific savings provisions did not toll the limitations period in this case because it is undisputed that Antheijah was already fifteen years old and had a parent and guardian (her mother) at the time of the alleged malpractice in June 2013.").

Therefore, it follows that in medical malpractice cases, the specific provisions of section 15-1-36 control over the general minors savings clause."[56]

Because the MPLA is the more specific statute, the rules of statutory construction dictate its application to Petitioner's medical negligence action. Because Petitioner had two years from the date of the alleged medical injury or discovery thereof [57] to file his Complaint, the statute of limitations closed August 31, 2023, at the latest on September 2, 2023. Petitioner's September 12, 2024, Complaint was delinquent by more than one year. Relying on mandatory authority, the circuit court correctly determined that the MPLA's statute of limitations, and not the general savings statute, applies to Petitioner's medical negligence claim.[58] The circuit court then correctly undertook the five-step legal analysis identified in *Sager v. Duvert* to determine whether Petitioner's Complaint was time-barred.[59] The circuit court's conclusion that Petitioner's Complaint was time-barred resulted from the correct application of the facts and the law, and there is no basis upon which such ruling should be overturned.

B. The MPLA's minor statute of limitations did not violate Petitioner's right to equal protection.

"Equal protection of the law is implicated when a classification treats **similarly situated**

[56] *Id.* at 789; *see also Raley v. Wagner*, 57 S.W.3d 683, 687 (Ark. 2001) (". . . in *Shelton* . . . we were asked to determine whether the general statute of limitations found in Ark. Code Ann. § 16-56-116, or the specific two-year statute of limitations found in the Arkansas Medical Malpractice Act, applied to a minor's medical malpractice claim. Noting that a general statute must yield when there is a specific statute involving the particular issue, we held that the statute of limitations applicable to a minor in a malpractice case was the specific two-year statute of limitations found in the Medical Malpractice Act and not the general savings statute for claims brought by minors found at Ark. Code. Ann. § 16-56-116.") (citations omitted).

[57] W. Va. Code § 55-7B-4(a).

[58] PetAppx 000125.

[59] *See* PetAppx 000125–128; *see also Sager,* 249 W. Va. at 277, 895 S.E.2d at 82.

persons in a disadvantageous manner."[60] As demonstrated below, medical professional liability plaintiffs who were minors at the time of injury are not similarly situated to all other minor plaintiffs. The differences between W. Va. Code § 55-7B-4(a) and W. Va. Code § 55-2-15(b) do not, therefore, implicate equal protection. Nevertheless, even if this were not so, Petitioner's arguments fall incredibly short of showing beyond a reasonable doubt that the MPLA's minor statute of limitations was an irrational abuse of the Legislature's plenary power to enact economic regulation.

1. The test to determine whether the MPLA's minor statute of limitations violates principles of equal protection is highly deferential.

The test for determining whether economic legislation—like W. Va. Code § 55-7B-4(a)—comports with equal protection is as follows:

> In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. [W. Va. Const. art. V, § 1.] **Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question.** Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, **the negation of legislative power must appear beyond reasonable doubt.**[61]

In light of the clear separation of powers amongst the three branches of government, "courts ordinarily presume that legislation is constitutional, and the negation of legislative power must be

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[60] Syl. Pt. 2, in part, *Israel by Israel v. W. Va. Secondary Sch. Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989) (emphasis added).

[61] Syl. Pt. 1, *Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991) (quotation and citation omitted) (emphasis added).

shown clearly[.]"[62] As the Court noted:

> . . . a facial challenge to the constitutionality of legislation is the most difficult challenge to mount successfully. The challenger must establish that **no set of circumstances exists under which the legislation would be valid**; the fact that the legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.[63]

Where, as here, Petitioner has challenged the constitutionality of a restriction of economic rights, the Court must undertake a review of the restricting legislation according to the rational basis test:

> Where economic rights are concerned, we look to see whether the classification is a **rational** one based on social, economic, historic or geographic factors, whether it bears a **reasonable relationship** to a **proper governmental purpose**, and whether all persons within the class are treated equally. **Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause**.[64]

Under rational basis review, considered to be "the least level of scrutiny,"[65] "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[66] Rational basis review is highly deferential—it is not "a license for courts to judge the wisdom, fairness, or logic of legislative choices. [. . .] Nor does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative

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[62] *Id.* at 726, 414 S.E.2d at 883.

[63] *Id.* (emphasis added) (citing *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (1991)).

[64] Syl. Pt. 4, *Gibson v. W. Va. Dep't of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991) (emphasis added) (cleaned up); *see also Clements v. Fashing*, 457 U.S. 957, 963 (1982) ("Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them.").

[65] *See Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (1991).

[66] *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985).

policy determinations[.]"[67] Indeed, a statute "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis" for the challenged classification.[68] And the Legislature "need not actually articulate at any time the purpose or rationale supporting its classification."[69] Furthermore, when a challenged legislation is subject to rational basis review, the government is not obligated "to produce evidence to sustain the rationality of a statutory classification."[70] Instead, the plaintiff "bears the heavy burden of negating every conceivable basis which might reasonably support the challenged classification."[71]

2. The MPLA's minor statute of limitations represents a rational legislative classification based on social, economic, and historical factors.

When the Legislature enacted the MPLA, it "set forth a detailed explanation of its findings and purpose of the Act in W. Va. Code § 55-7B-1 (1986)."[72] A reading of the Legislature's "findings and declaration of purpose" to the MPLA reveals not only the Legislature's rationale in enacting the MPLA, but also the considerable care the Legislature took to address the problems associated with the medical malpractice insurance crisis occurring at the time of enactment:[73]

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[67] *Heller v. Doe*, 509 U.S. 312, 319 (1993) (quotation and citation omitted); *see also Verba v. Ghaphery*, 210 W. Va. 30, 36, 552 S.E.2d 406, 412 (2001) ("It is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted. If the legislature finds that it does not, it is within its power to amend the legislation as it sees fit.").

[68] *Heller*, 509 U.S. at 320 (quotation and citation omitted).

[69] *Id.* (quotation and citation omitted).

[70] *Id.*

[71] *Van Der Linde Housing, Inc. v. Rivanna Solid Waste Authority*, 507 F.3d 290, 293 (4th Cir. 2007).

[72] *MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 719, 715 S.E.2d 405, 417 (2001).

[73] *See, e.g.*, Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 L. & Contemp. Probs. 5, 5–6 (1986) (Beginning in the mid-1970s, the health care industry saw large increases in medical malpractice insurance premiums and the departure of insurance carriers from malpractice underwriting. The crisis affected health care providers and insurance carriers differently. For health care providers, the crisis was twofold: "a sudden and substantial increase in malpractice insurance premium rates and, worse, the threat that liability coverage would become unavailable at any price as a consequence of

The Legislature finds and declares that:

The citizens of this state are entitled to the best medical care and facilities available and that health care providers offer an essential and basic service which requires **that the public policy of this state encourage and facilitate the provision of such service to our citizens**;

As in every human endeavor the possibility of injury or death from negligent conduct commands that protection of the public served by health care providers be recognized as an important state interest;

Our system of litigation is an essential component of this state's interest in providing adequate and reasonable compensation to those persons who suffer from injury or death as a result of professional negligence, and any limitation placed on this system must be balanced with and considerate of the need to fairly compensate patients who have been injured as a result of negligent and incompetent acts by health care providers;

Liability insurance is a key part of our system of litigation, affording compensation to the injured while fulfilling the need and fairness of spreading the cost of the risks of injury;

A further important component of these protections is the capacity and willingness of health care providers to monitor and effectively control their professional competency, so as to protect the public and ensure to the extent possible the highest quality of care;

It is the duty and responsibility of the Legislature to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers and health care facilities who can themselves obtain the protection of reasonably priced and extensive liability coverage;

In recent years, the cost of insurance coverage has risen dramatically while the nature and extent of coverage has diminished, leaving the health care providers, the health care facilities and the injured without the full benefit of professional liability insurance coverage;

Many of the factors and reasons contributing to the increased cost and diminished availability of professional liability insurance arise

carrier withdrawal from the field." For the insurance carriers, the crisis resulted from "an unanticipated number of claims filed for negligent injuries and the amounts recovered.").

from the historic inability of this state to effectively and fairly regulate the insurance industry so as to guarantee our citizens that rates are appropriate, that purchasers of insurance coverage are not treated arbitrarily and that rates reflect the competency and experience of the insured health care providers and health care facilities;

The unpredictable nature of traumatic injury health care services often results in a greater likelihood of unsatisfactory patient outcomes, a higher degree of patient and patient family dissatisfaction and frequent malpractice claims, **creating a financial strain on the trauma care system of our state, increasing costs for all users of the trauma care system and impacting the availability of these services, requires appropriate and balanced limitations on the rights of persons asserting claims against trauma care health care providers**, this balance must guarantee availability of trauma care services while mandating that these services meet all national standards of care, to assure that our health care resources are being directed towards providing the best trauma care available;

The cost of liability insurance coverage has continued to rise dramatically, resulting in the state's loss and threatened loss of physicians, which, together with other costs and taxation incurred by health care providers in this state, have created a competitive disadvantage in attracting and retaining qualified physicians and other health care providers;

Medical liability issues have reached critical proportions for the state's long-term health care facilities, as: (1) Medical liability insurance premiums for nursing homes in West Virginia continue to increase and the number of claims per bed has increased significantly; (2) the cost to the state Medicaid program as a result of such higher premiums has grown considerably in this period; (3) current medical liability premium costs for some nursing homes constitute a significant percentage of the amount of coverage; (4) these high costs are leading some facilities to consider dropping medical liability insurance coverage altogether; and (5) the medical liability insurance crisis for nursing homes may soon result in a reduction of the number of beds available to citizens in need of long-term care; and

The modernization and structure of the health care delivery system necessitate an update of provisions of this article in order to facilitate and continue the objectives of this article which are to control the

> increase in the cost of liability insurance and to maintain access to affordable health care services for our citizens.
>
> Therefore, the purpose of this article is to provide a comprehensive resolution of the matters and factors which the Legislature finds must be addressed to accomplish the goals set forth in this section. In so doing, **the Legislature has determined that reforms in the common law and statutory rights of our citizens must be enacted together as necessary and mutual ingredients of the appropriate legislative response** relating to:
>
> > (1) Compensation for injury and death;
> > (2) The regulation of rate making and other practices by the liability insurance industry, including the formation of a physicians' mutual insurance company and establishment of a fund to assure adequate compensation to victims of malpractice; and
> > (3) The authority of medical licensing boards to effectively regulate and discipline the health care providers under such board."[74]

West Virginia Code § 55-7B-1 represents the Legislature's thoughtful and express acknowledgement that ensuring compensation to parties injured during medical care is inexorably tied to increases in medical professional liability costs. The Legislature considered the social factors (access to healthcare), economic factors (the dramatic rise of the cost of insurance coverage in combination with diminished coverage), as well as the historical factors (the trend in rising costs and diminishing healthcare access leading to a shortage of providers) underlying healthcare access in West Virginia. In enacting the statutory scheme constituting the framework of the MPLA, the Legislature sought to carefully balance the competing rights of litigants with the need to regulate the cost of insurance premiums threatening doctors' ability to practice in West Virginia. These are precisely the types of social, economic, and historical factors which the Legislature alone must balance in crafting legislation.

[74] W. Va. Code § 55-7B-1 (emphasis added).

To strike this balance, the Legislature established the elements of proof of a claim that a health care provider failed to follow the acceptable standard of care;[75] set out certain pre-suit requirements for medical malpractice complaints;[76] required plaintiffs to provide their medical records to the accused health care providers automatically;[77] instituted certain limits on liability for noneconomic loss;[78] provided a modified collateral source rule;[79] set out limits on claims for treatment of emergency conditions by certain health care providers;[80] limited past medical expenses to actual expenses;[81] and, importantly here, regulated the time that a medical negligence plaintiff has to bring their claims.[82]

As demonstrated above, "the entire MPLA is an act designed to be in derogation of the common law."[83] Here, the derogation of common law was necessary to achieve specific objectives related to the provision of health care services in West Virginia and not, as Petitioner has suggested, to achieve some discriminatory effect on minor plaintiffs asserting medical negligence claims. And as explained, the Legislature's findings are presumed to be valid,[84] and courts should refrain from re-examining the factual basis for these findings.[85]

3. W. Va. Code § 55-7B-4 bears a reasonable relationship to a proper government purpose: ensuring access to health care to West Virginia's citizens and preventing the litigation of stale claims.

[75] W. Va. Code § 55-7B-3.

[76] W. Va. Code § 55-7B-6.

[77] W. Va. Code § 55-7B-6a.

[78] W. Va. Code § 55-7B-8.

[79] W. Va. Code § 55-7B-9a.

[80] W. Va. Code § 55-7B-9c.

[81] W. Va. Code § 55-7B-9d.

[82] W. Va. Code § 55-7B-4.

[83] *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 491, 647 S.E.2d 920, 927 (2007).

[84] *City of Cleburne*, 473 U.S. at 439.

[85] *Robinson*, 186 W. Va. at 730, 414 S.E.2d at 887.

In his Brief, Petitioner seemingly challenges the rationality in enacting the minor statute of limitations by asserting that "the legislative findings and declarations of purpose set forth in W. Va. Code § 55-7B-1, et. seq., fail to identify how minors between the ages of ten (10) and seventeen (17) have affected the litigation of medical malpractice claims."[86] But as explained in Part IV.B.ii, the minor statute of limitations was one part of the Legislature's comprehensive effort undertaken over several years to stabilize and maintain West Virginia's health care system.[87] When combined with the Legislature's other reforms, the minor statute of limitations plays an important role because it allows health care providers and their insurance carriers to better predict and account for liability exposure.

The minor statute of limitations also prevents the litigation of stale claims. The general purpose behind statutes of limitations is to encourage the presentation of claims within a reasonable time.[88] Indeed, the Supreme Court of Appeals has held that "[t]he basic purpose of statutes of limitations is to encourage promptness in instituting actions; to suppress stale demands or fraudulent claims; and to avoid inconvenience which may result from delay in asserting rights

[86] Pet'r's Br. in Supp. Pet. for Appeal, at p. 12. Petitioner goes on to assert additional challenges to the minor statute of limitations, including that the MPLA fails "to identify how minors between the ages of ten (10) and seventeen (17) have caused liability insurance premiums to rise; created a climate that has impacted impacted compensation to injured plaintiff; caused liability insurance costs to increase; impacted the State's inability to control or regulate insurance; caused medical providers to leave the state; or, the failure of the medical profession to regulate the competency of health care providers."

[87] *See* State of West Virginia Medical Malpractice Report (2009), at p. 2, accessible at https://www.wvinsurance.gov/Portals/0/pdf/reports/insurers_over_5_percent_market_2009.pdf?ver=2010-01-04-143605-703 ("The medical malpractice insurance market has gone through three crisis periods or 'hard' markets during the past thirty years. The first medical malpractice crisis occurred in the mid-to–late 1970s. The second medical malpractice crisis occurred in the mid-1980s. The most recent medical malpractice crisis began in early 2001."); *see also supra* note 73.

[88] *Donley v. Bracken*, 192 W. Va. 383, 387, 452 S.E.2d 699, 703 (1994); *see also id.* at 391, 452 S.E.2d at 707 (holding a statute of limitation is a "legislative judgment that enough is enough" and that "[a]t some point the interest of defendants in protecting individuals from having to defend against stale law suits—when memory, documents, facts, and witnesses have drifted away—takes over").

or claims when it is practicable to assert them."[89] Prior to the enactment of W. Va. Code § 55-7B-4, minors' medical malpractice claims were governed by the general tolling provision in W. Va. Code § 55-2-12, which allows minors to reach the age of majority before filing a tort claim. So, for example, if a medical injury occurred at birth, the minor could wait until the age of majority plus an additional two years to file a claim before being barred by the statute of limitations.

But medical professional liability claims are different than typical person injury claims. These claims involve complex concepts regarding the medicine underlying the diagnosis or treatment at issue, the standard of care required of the health care provider taking action on behalf of the patient, and how the action or inaction of the provider proximately caused the injury alleged by the claimant.[90] Further, from a practical standpoint, the more removed the filing of a claim is from the date of injury, the more likely that evidence or witnesses will have been lost. Statutes of limitations are particularly important in the medical malpractice context because advances in medical technology and knowledge often change the appliable standard of care.[91]

Thus, the timely litigation of these cases—while the evidence underlying the care can be preserved and the standard of care upon which the care is judged may be determined—is a critical interest underlying the institution of statutes of limitation. For minors such as Petitioner, the Legislature made the reasoned judgment that a two-year limitation on the commencement of claims is a reasonable period within which these claims can be justly adjudicated. Despite bemoaning the Legislature's findings and declarations in the MPLA, Petitioner's Brief provides

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[89] *Morgan v. Grace Hosp., Inc.*, 149 W. Va. 783, 791, 144 S.E.2d 156, 161 (1965) (citations omitted).

[90] *See, e.g.*, W. Va. Code § 55-7B-3.

[91] *See e.g., James G. v. Caserta*, 175 W. Va. 406, 413, 332 S.E.2d 872, 879 (1985) ("This area of the tort law has evolved as a result of the increased ability of medical science to determine the possibility of genetic defects which can cause substantial birth defects in children. With the increased knowledge in this field of genetic counseling, there is the concomitant recognition that the ordinary standard of care may require appropriate tests and counseling with parents who are more likely to bear children with birth defects.").

no evidence to undercut the Legislature's judgment affixing the statute of limitations for minors over the age of ten to other patients claiming medical malpractice. When viewed under the appropriate level of scrutiny, the Legislature's economic regulation of medical professional liability claims is perfectly rational.

Moreover, Petitioner has failed to make any demonstration as to how W. Va. Code § 55-7B-4(a) has been discriminatorily applied to restrict the rights of minors in Petitioner's class to seek timely compensation under the MPLA.[92] Minors such as Petitioner—who was almost seventeen at the time of his treatment—are treated similarly to other adult litigants, including the insane, who would assert a claim under the MPLA. In other words, sixteen-year-old Adrian Osborne has the same statutory limits within which to assert a MPLA claim as an eighteen-year-old patient or a mentally incapacitated patient asserting claims under the MPLA. Each of these hypothetical plaintiffs has the same two years from the date of injury to assert their claim.[93] Rather than being treated more harshly than other plaintiffs under the MPLA, Petitioner has been given the same statutory period within which to assert his claim. The fact that the MPLA is a derogation of common law belies the reality that MPLA claims are different and must be treated differently to achieve the rational governmental purpose of ensuring access to healthcare and keeping malpractice premiums manageable.

Petitioner would have this Court override the Legislature's assessment of the insurance and health care crises in West Virginia. But as the Supreme Court of Appeals has made clear, that is not the Court's role in the legislative process. In an MPLA case challenging the constitutionality of the noneconomic damages cap, the Court held:

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[92] *See* Syl. Pt. 2, in part, *Israel*, 182 W. Va. at 454, 388 S.E.2d at 480.

[93] *Compare* W. Va. Code § 55-7B-4(c) *with* W. Va. Code § 55-7B-4(a).

> Upon review, we find that the Legislature could have reasonably conceived to be true the facts on which the amendments to the Act, including the cap on noneconomic damages in W. Va. Code § 55-7B-8, were based. The Legislature could have rationally believed that decreasing the cap on noneconomic damages would reduce rising medical malpractice premiums and, in turn, prevent physicians from leaving the state thereby increasing the quality of, and access to, healthcare for West Virginia residents. While one or more members of the majority may differ with the legislative reasoning, **it is not our prerogative to substitute our judgment for that of the Legislature, so long as the classification is rational and bears a reasonable relationship to a proper governmental purpose**. Further, even though the cap now contained in W. Va. Code § 55-7B-8 is significantly less than the original $ 1,000,000 amount, we cannot say that it is on its face arbitrary or capricious.[94]

Here, under the rational basis test, and as the party contesting the constitutionality of the statute, Petitioner has failed to meet his burden to establish that the MPLA and the statutory limitations set forth therein have no reasonable relationship to a proper governmental purpose—ensuring access to affordable healthcare for the citizens of West Virginia and preventing the litigation of stale claims.[95] This Court should resist Petitioner's request to do what the Supreme Court of Appeals has been unwilling to do—sit in judgment on the Legislature's analysis of the competing social, economic, historical interests underlying the enactment of the MPLA.

4. *Whitlow* provides no support for Petitioner's position.

Petitioner's appeal is largely based on one argument: extend *Whitlow v. Board of Education*

[94] *MacDonald*, 227 W. Va. at 720, 725 S.E.2d at 418 (emphasis added).

[95] There is evidence that these reforms are working. According to the West Virginia Board of Medicine's biennial reports, the number of physicians practicing in West Virginia has remained consistent over the last decade, indicating that the Legislature's reforms are doing as intended: attracting and retaining physicians to West Virginia. *Compare* W. Va. Board of Medicine, Annual Report to the Legislature July 1, 2014 through June 30, 2016, at p. 5 (2016) (In 2015, the number of actively licensed physicians (M.D.) practicing in West Virginia was 4,177.), *with* W. Va. Board of Medicine, Annual Report to the Legislature July 1, 2021 through June 30, 2023, at p. 6 (2023) (In 2023, the number of actively licensed physicians (M.D.) practicing in West Virginia was 4,472.).

of Kanawha County[96] to the MPLA. But there are critical factual and legal differences between the Tort Claims Act and the MPLA. In addressing Petitioner's equal protection argument below, the circuit court was "not persuaded that the opinion of the Supreme Court of Appeals in *Whitlow* compels the conclusion that W. Va. Code § 55-7B-4 is unconstitutional."[97] Specifically, the circuit court noted that "the dicta in footnote 16 of the *Whitlow* decision, regarding various other Courts' holding unconstitutional statutes of limitations applicable to minors in medical malpractice actions, is now approximately thirty-two years old."[98] The Court should reach the same conclusion here.

a. There are dispositive factual and legal differences between the legislative contexts of the Tort Claims Act and the MPLA.

Unlike the detailed findings of the MPLA, the Tort Claims Act's legislative findings are brief:

> The Legislature finds and declares that the political subdivisions of this state are unable to procure adequate liability insurance coverage at a reasonable cost due to: The high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services.[99]

The Tort Claims Act was enacted the same year as the MPLA, and its minor statute of limitations is identical in language to the one in the MPLA.[100] This is where the similarities end. Although both statutes seek to make liability insurance more affordable for various entities, the context and impact of each statute is different.

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[96] 190 W.Va. 223, 438 S.E. 2d 15 (1993).

[97] PetAppx 000135.

[98] PetAppx 000136.

[99] W. Va. Code § 29-12A-2.

[100] W. Va. Code § 29-12A-6(b).

The Tort Claims Act, in part, codifies the State's waiver of sovereign immunity in certain situations.[101] Because it consented to be sued in some capacity, the State wanted to ensure that governmental entities could acquire affordable liability insurance which, in turn, eased the burden on taxpayers.[102] The Tort Claims Act, however, only lists **five** specific instances where a political subdivision can be held liable for damages.[103] Although political subdivisions do need liability insurance, they only need liability insurance for those situations. For any other situation, sovereign immunity bars suit.

When the plaintiff in *Whitlow* challenged the minor statute of limitations in the Tort Claims Act under a theory that the statute violated the Equal Protection Clause, the Court held that it could not find a rational basis for the disparate treatment of minors: "Carving suits by infants against political subdivisions out of the general statutory tolling provisions can hardly be thought to substantially diminish the number of suits filed."[104] However, compared to the MPLA, the Tort Claims Act's legislative findings and purpose provide no real explanation for how its reforms will impact the cost and availability of liability insurance in the few situations where political subdivisions can be sued for damages. Without this requisite analysis, *Whitlow*, while perhaps correct in the context of the Tort Claims Act, cannot be applied to the MPLA.

Unlike the Tort Claims Act, which is limited in scope and application, the MPLA is far more reaching. The MPLA's minor statute of limitations is one part of a comprehensive effort by the Legislature to stabilize the entirety of West Virginia's health care system. Although Petitioner may argue that there is no rational basis for treating minors differently under the MPLA, the

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[101] W. Va. Code § 29-12A-4(c)(1)–(5).

[102] W. Va. Code § 29-12A-2; *see also Whitlow*, 190 W. Va. at 228, 438 S.E.2d at 20.

[103] W. Va. Code § 29-12A-4(c)(1)–(5).

[104] *Whitlow*, 190 W. Va. at 231, 438 S.E.2d at 23.

Legislature could have rationally believed that controlling the number of claims filed by minors "would reduce rising medical malpractice premiums and, in turn, prevent physicians from leaving the state thereby increasing the quality of, and access to, healthcare for West Virginia residents."[105]

b. The West Virginia Legislature has had numerous opportunities to amend MPLA's minor statute of limitations since *Whitlow* and has chosen not to do so.

In the 31 years since *Whitlow* was decided, the West Virginia Legislature has had numerous opportunities to revise the MPLA statute of limitations pertaining to minors to be consistent with the holding in *Whitlow* but has not seen fit to do so.[106] In 1997, House Bill 2489 proposed the following amendment to W. Va. Code § 55-7B-4:[107]

> (b) A cause of action for injury to a minor, brought by or on behalf of a minor who was under the age of ten years at the time of such injury, shall be commenced within two years of the date of such injury, or prior to the minor's twelfth birthday, whichever provides the longer period comes first.[108]

This proposed amendment to the MPLA was not adopted by the Legislature.

In 2015, Senate Bill 580 proposed another amended to the MPLA's minor statute of limitations:

> (b) A cause of action for injury to a minor, brought by or on behalf of a minor who was under the age of ten years at the time of such injury,

[105] *MacDonald*, 227 W. Va. at 720, 715 S.E.2d at 418.

[106] "A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syl. Pt. 6, *Mace v. Mylan Pharm., Inc.*, 227 W. Va. 666,714 S.E. 2d 223 (2011) (quotation and citation omitted). The West Virginia Legislature is presumed to know exactly what was discussed by the Court in *Whitlow,* including the reservation of this issue in footnote 16 of its decision. Consequently, everything that the Legislature did (or did not do) thereafter is presumed to be intentional, including its rejection of the revisions to this statute of limitations.

[107] The underlined language indicates the proposed new language to amend the statute.

[108] H.B. 2498, 1997 Leg., 73rd Sess., 1st Reg. Sess., (W. Va. 1997).

> shall be commenced within two years of the date of such injury, or prior to the minor's twelfth birthday, whichever provides the longer period in accordance with section fifteen, article two of this chapter.[109]

The proposed amendment included a note that the "purpose of this bill is to revise the statute of limitations on actions by minors under the Medical Professional Liability Act to make the current statute consistent with other provisions of the code governing statute of limitations on claims by minors." This proposed amendment to the MPLA was not adopted by the Legislature.

In fact, in the most recent legislative session, the Legislature considered another bill to amend W. Va. Code § 55-7B-4(c). House Bill 2809 proposed to change the following language:

> (c) A cause of action for injury to a minor, brought by or on behalf of a minor who was under the age of 18 years at the time of such injury, shall be commenced within five years after the minor turns 18 years old.[110]

Once again, this amendment was not adopted by the Legislature. As this legislative history demonstrates, the Legislature is paying attention to the MPLA. The Legislature had an opportunity to amend the MPLA's minor statute of limitations just three months ago and purposefully chose not to do so.

To be clear, the Legislature has not hesitated to amend the MPLA in the past when necessary. In 2017, an amendment was made to the MPLA statute of limitation provisions with respect to causes of actions against nursing homes; however, the statute of limitation provisions for minors was left unchanged. Similarly, the Legislature has repeatedly revisited, revised, and amended other sections of the MPLA since the *Whitlow* decision without changing the statute of limitations for minors. In 2001, the Legislature addressed the MPLA provisions related to health care actions

[109] S.B. 580, 2015 Leg., 82nd Sess., 1st Reg. Sess., (W. Va. 2015).

[110] H.B. 2809, 2025 Leg., 87th Sess., 1st Reg. Sess., (W. Va. 2025).

and prerequisites for filing an action.[111] In 2003, the Legislature revised the Legislative findings and declaration of purpose, definitions, elements of proof, prerequisites for filing an action, testimony of expert on standard of care, limit on liability for noneconomic loss, joint and several liability, collateral sources, and limitations on third-party claims.[112] In 2006, the Legislature revised the declaration of purpose and the definitions section.[113] In 2015, the Legislature revised or added six sections, including limiting the use of certain information, adjusting the caps, limiting liability severally, and adjusting provisions for collateral sources and medical expenses.[114] Yet again, in 2016, the Legislature clarified the definitions section and revised the Prerequisites to suit to preclude causes of action relative to the Uniform Controlled Substances Act ("UCSA").[115] A review of the MPLA demonstrates the ongoing attention the Act has received from lawmakers with respect to keeping the MPLA current with other legislation (UCSA) and evolving public policy (legislative findings and declaration of purpose), while maintaining the currency of the Act in light of decisions from the Supreme Court of Appeals.

In 2005, the Supreme Court of Appeals decided *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005), addressing a challenge to the constitutionality of the twelve-person jury, which had been added to the MPLA by Acts 2001, 6th Ex. Sess., c. 19, effective December 1, 2001. The Court declared that

> [t]he provisions contained in W. Va. Code § 55-7B-6d (2001) (Supp. 2004) were enacted in violation of the Separation of Powers Clause, Article V, § I of the West Virginia Constitution, insofar as the statute addresses procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of

[111] Acts 2001, 6th Ex. Sess., c. 19, eff. Dec. 1, 2001; Acts 2001, 6th Ex. Sess., c. 19, eff. Dec. 19, 2001.

[112] Acts 2003, c. 147, eff. March 8, 2003.

[113] Acts 2006, c. 123, eff. 90 days after March 11, 2006.

[114] Acts 2015, c. 168, eff. March 10, 2015.

[115] Acts 2016, c. 156, eff. June 5, 2016; Acts 2016, c. 3, eff. May 24, 2016; Acts 2016, c. 155, eff. July 1, 2016.

> the West Virginia Constitution. Consequently, W. Va. Code § 55-7B-6d, in its entirety, is unconstitutional and unenforceable.[116]

In response to the Court's ruling, the Legislature repealed W. Va. Code § 55-7B-6d.[117] This legislative response to jurisprudence is but one example of the Legislature's vigilance and attention to the MPLA.[118] It is not inadvertence or inattention that has left the statute of limitations for minors in its present form; it is a conscious decision of West Virginia's lawmakers, a decision made on behalf of all citizens and relative to no one individual as to where to draw the line on timely filed claims.

c. Courts in other jurisdictions have found that statutes of limitations on minors' medical malpractice claims are constitutional.

The tide has shifted with respect to minors' statute of limitations since *Whitlow* was decided. Courts across multiple states have found that such statutes satisfy rational basis scrutiny and are, therefore, constitutional. Although these decisions are obviously not binding on this Court, the number of cases that align with the circuit court's ruling is persuasive. *See, e.g.*, *Morris v. Rodeberg*, 877 S.E.2d 328, 335 (N.C. Ct. App. 2022) (applying rational basis to uphold a statute of limitations that impacted minors differently based on age—stating that "plaintiff offers no

[116] Syl. Pt. 3, *Louk*, 218 W. Va. at 81, 622 S.E.2d at 788.

[117] Acts 2014, c. 99, eff. June 6, 2014.

[118] Further, since *Whitlow* was decided, the Supreme Court of Appeals has addressed the MPLA's minor statute of limitations in dicta without reservations as to the statute's constitutionality. *See, e.g.*, *Williams v. CMO Mgmt., LLC*, 239 W.Va. 530, 537, 803 S.E. 2d 500, 507 (2016) ("The fact that the Legislature chose to address how the two-year MPLA limitations period impacts a certain class of minors does not establish an intent to nullify the effect of the savings statute on medical injuries suffered by incompetent persons. By failing to carve out any treatment different than that already existing with regard to the limitations periods applicable to causes of action brought on behalf of incompetent persons, it arguably does the opposite."); *Cartwright v. McComas*, 223 W.Va. 161, 166, 672 S.E. 2d 297, 302 (2008) ("The enlarged filing period the Legislature has provided for minors under the age of ten at the time of injury is unquestionably applicable to Tiffany since she was only four years old when the alleged acts of malpractice occurred in 1999. Thus, under the terms of the statute, the limitations for filing suit did not expire until Tiffany's twelfth birthday in 2007.").

argument and cites no authority to demonstrate that [the statute] does not pass rational-basis review."); *Gomersall v. St. Luke's Reg'l Med. Ctr.*, 483 P.3d 365, 377 (Idaho 2021) (The court applied rational basis to uphold a statute of limitations that created different time limits for minors to bring medical malpractice claims, and found the legislature's "purpose for adopting the six-year tolling period was to reduce the 'tail of the risk' faced by insurance companies," which was "intended to reduce the cost of medical malpractice insurance." The court refused to apply strict scrutiny because it found that there is no fundamental right in a minor having access to courts to pursue a medical malpractice claim.); *Willis v. Mullett*, 561 S.E.2d 705, 710 (Va. 2002) (finding the "rational basis" for the minor's statute of limitations in the legislative history: "Recognizing (i) the particular and severe insurance availability problems facing physicians, (ii) the need of insurers for predictability of risk exposure and (iii) the effect of the provisions tolling the two-year statute of limitations during minority on the ability of insurers to adequately assess their risk of loss, the joint subcommittee recommends that the statute of limitations, as it applies to minors in medical malpractice actions, be modified."); *Raley v. Wagner*, 242 57 S.W.3d 683, 688 (Ark. 2001) (holding that two year statute of limitations applied to minors with medical malpractice claims as opposed to minors with other tort claims subject to the general savings statute and did not violate equal protection); *Ledbetter v. Hunter*, 842 N.E.2d 810 (Ind. 2006) (holding that statute of limitations allowing minors injured in the first six years of life to file medical malpractice claim until age eight does not violate equal protection); *Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund*, 613 N.W.2d 849, 854 (Wis. 2000)[119] (holding five year medical malpractice statute of limitation, and

[119] Focusing on the statute of repose, and applying a rational basis test, the Wisconsin Supreme Court rejected the equal protection challenge, noting the legislative history:

> We are able to locate a rationale and purpose underlying the enactment of both Wis. Stat. §§ 893.55(1)(b) and 893.56 in the legislative history of the provisions. Materials generated in support of the medical malpractice legislation reveal that the drafters of the statute balanced both the continuing

ten year statute of limitation for minors, is economic legislation presumed to be constitutional); *Partin v. St. Francis Hosp.*, 694 N.E.2d 574, 579 (Ill. App. Ct. 1998) (The court applied rational basis to uphold a statute that imposed a different statute of limitation on minors bringing medical malpractice claims: "a rational basis exists on which to distinguish between medical malpractice victims disabled by age only, and those disabled by both age and mental incompetence."); *Estate of McCarthy v. Montana Second Judicial District Court*, 994 P.2d 1090,

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> liability of health care providers and the rising costs of malpractice premiums. Staff Paper # 10, Analysis of Statistical Data and Recent Wisconsin Cases on Statutes of Limitation, Malpractice Committee, Legislative Council Staff, Sept. 21, 1976. Whether the perception of a malpractice crisis was inflated or illusory makes little difference because the perceived crisis led the legislature to make a policy determination about the costs of health care. Moreover, the enactment of Wis. Stat. § 893.55(1)(b), which created a discovery rule for medical malpractice, was in response to this court's pointed recommendation that a three-year rule based on injury alone was too short to cover many claims. *Claypool*, 209 Wis. 2d at 292-93. Wisconsin Stat. § 893.55(2) and (3) also created new discovery rules for specific claims.

613 N.W.2d at 868–69. The court also found,

> [t]he allocation here is reasonable. The legislature could have concluded that by the age of 10, most children will have been in school for at least four years. Children, at age 10, will have been observed by teachers, counselors, parents, and other adults outside their own families. They will have been in contact with the types of children prone to notice distinguishing characteristics. Children at this age likely will have had other contacts with the health care system. By the age of 10 years, they probably will have developed an ability to communicate their concerns, an ability that will have advanced markedly from their early childhood.

Id. at 869–70. And concluded,

> Taming the costs of medical malpractice and ensuring access to affordable health care are legitimate legislative objectives. We therefore hold that the statutes of repose for minor medical malpractice actions satisfy the rational basis test because they evince a rational relationship between the classification scheme and a legitimate governmental objective. Accordingly, we hold that Wis. Stat. §§ 893.55(1)(b) and 893.56 do not violate the equal protection provisions of the Wisconsin and United States Constitutions.

Id. at at 871–72.

1095 (Mont. 1999)[120] (holding that the two year statute of limitations that began to run when a minor injured by medical malpractice under age four reached eighth birthday or died did not violate right of access to courts or equal protection under state constitution); *Bonin v. Vannaman*, 929 P.2d 754, 768 (Kan. 1996) (holding eight year medical malpractice statute of repose for persons under legal disability does not violate equal protection as it affects minors and has a rational basis to goals of reducing rising costs of medical malpractice insurance); *Smith v. Cobb Cnty.-Kennestone Hosp. Auth.*, 423 S.E.2d 235 (Ga. 1992)[121] (upholding a statute which treated minors with medical malpractice claims differently from minors with other tort claims by applying rational basis); *Thompson v. Franciscan Sisters Health Care Corp.*, 578 N.E.2d 289 (Ill. Ct. App. 1991)[122] (applying rational basis to uphold a statute of limitations that impacted minors differently based on age); *Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242, 1249 (7th Cir. 1989) (sitting in diversity) (upholding a statute of limitations classification based on age because "the limits imposed by the malpractice statute of limitations are certainly rationally related to the stated goals of preventing stale claims and controlling the cost of medical care."); *Hart v. Children's Hosp.*

[120] In this case, the Montana Supreme Court applied rational basis and analyzed the legislature's stated objectives of "reducing health care costs and malpractice insurance premiums." The court upheld the statute, stating that the plaintiff had failed to present persuasive arguments or authority to support that the statute was not rationally related to a legitimate government and, therefore, plaintiff failed to meet his burden to establish that the statute was unconstitutional. *Estate of McCarthy*, 994 P.2d at 1096.

[121] The Supreme Court of Georgia concluded: "We have no difficulty concluding that the separate classification of minors for purposes of medical malpractice actions could accomplish the stated legislative objectives. [. . .] The reduction of the period within which minors could bring suit certainly would tend to achieve the stated legislative objectives, as, e.g., it would tend to prevent stale medical malpractice claims, and would also tend to lower insurance and medical costs by decreasing the period in which health care providers and their insurers would be exposed to suit." *Smith*, 423 S.E.2d at 570–71.

[122] The Appellate Court of Illinois noted that "the legislature perceived a problem within the area of medical malpractice, and in addressing that problem chose to treat plaintiffs alleging medical malpractice (both adults and minors) differently from plaintiffs alleging other forms of negligence." *Thompson*, 578 N.E.2d at 292. The court also stated that "the legislature's solution in the form of a shortened statute of limitations was not unreasonable in light of what it was trying to accomplish." *Id.* The court then held that the statute did not violate plaintiff's federal or state equal protection rights. *Id.*

Med. Ctr., No. C-850725, 1986 Ohio App. LEXIS 6967, 1986 WL 6203, at *5 (Ohio Ct. App. June 4, 1986)[123] (applying rational basis to find that statute which gave a different limitations period for minors based on medical malpractice cases did not violate equal protection); *Rohrabaugh v. Wagoner*, 413 N.E.2d 891 (Ind. 1980)[124] (applying rational basis to find that the legislature's decision to enact a statute of limitations that treated children under the age of six differently than children over the age of six, did not violate equal protection).

The overwhelming weight of authority across the country is in support of the constitutionality of minor statutes of limitations. The actions of the Legislature with respect to W. Va. Code § 55-7B-4 and its continued prominence within the MPLA framework evinces its critical role in achieving the purposes set forth in the legislative preamble to the Act. Because *Whitlow* does not compel the conclusion that the statute is unconstitutional, and because Petitioner has not met his heavy burden under the rational review test, his arguments must fail in favor of applying the statute to dismiss his claims.

V. CONCLUSION

Petitioner's appeal lacks merit. As demonstrated, the statute of limitations within W. Va. Code § 55-7B-4 applies to Petitioner's claims, which means that his Complaint was properly time-barred and dismissed by the circuit court. Respondents, therefore, respectfully urge this Court to

[123] The Court of Appeals of Ohio held that the statute of limitations was rationally related to the purpose of the medical malpractice statutes, which was "to insure [*sic*] a continuance of health care delivery . . . alleviate the medical malpractice crisis . . . [and address concerns with] the problems of delayed proof, as . . . it becomes increasingly difficult to investigate stale medical malpractice claims." *Hart*, 1986 Ohio App. LEXIS 6967, 1986 WL 6203, at *5.

[124] The Supreme Court of Indiana noted that the state malpractice act was a "legislative response to the reduction of health care services available to the public in the state." *Rohrabaugh*, 413 N.E.2d at 894. "The legislative judgment was that these decisions were being made because of actual and threatened loss to the health care industry of malpractice insurance at a reasonable cost." *Id.* The court found that there was a reasonable basis for the legislature's decision to treat children over the age of six and adults as "similarly circumstanced." *Id.* at 895.

reject Petitioner's appeal, decline to extend *Whitlow* to the MPLA's minor statute of limitations, and affirm the circuit court's order granting Respondents' Motions to Dismiss.

Respectfully submitted,

/s/ Blair E. Wessels
Chelsea V. Brown (WVSB No. 11447)
JACKSON KELLY PLLC
3000 Swiss Pine Way, Ste. 200
Morgantown, WV 26501
Telephone: (304)-284-4129
Fax: (304)-284-4142
chelsea.brown@jacksonkelly.com

Blair E. Wessels (WVSB No. 13707)
JACKSON KELLY PLLC
P.O. Box 553
Charleston, WV 25322
Telephone: (304) 340-1000
Fax: (304) 340-1050
blair.wessels@jacksonkelly.com

Counsel for Respondents West Virginia University Board of Governors, and Kevin Mace, M.D.

/s/ Lauren T. Krupica
Lauren T. Krupica (WVSB No. 11719)
Joshua K. Boggs (WVSB No. 10096)
West Virginia United Health System, Inc.
1238 Suncrest Towne Centre Drive
Morgantown, WV 26505
Telephone: (304)-598-6076
Fax: (304)-598-9888
lauren.twiggkrupica@wvumedicine.org
joshua.boggs@wvumedicine.org

Counsel for Respondents Montana Boyce, R.N., and United Hospital Center, Inc.