

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33006

LARRY D. ELMORE, individually  
and as Administrator of the Estate  
of Dorothy Mae Elmore, Deceased,

Plaintiff/Appellant,

vs.

TRIAD HOSPITALS, INC., a Delaware  
corporation, d/b/a Greenbrier Valley  
Medical Center; JOHN M. JOHNSON,  
D.O.; and BJSM MED, INC., a West  
Virginia corporation,

Defendants/Appellees.

BRIEF OF APPELLANT, LARRY D. ELMORE

Respectfully submitted,

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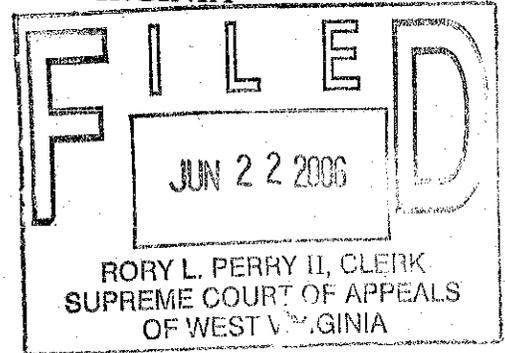


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KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

This instant appeal arises from an Order out of the Circuit Court of Greenbrier County. This appeal raises important issues of law relating to the notice of claim requirement set forth in West Virginia Code §55-7B-6 of the Medical Professional Liability Act. This Court is asked to resolve the ambiguity, if any, on when the thirty (30) day time period begins to run before a plaintiff may file a medical malpractice liability claim. Appellant, Mr. Larry D. Elmore, Individually and as Administrator of the Estate of Dorothy Mae Elmore, seeks relief from an Order entered on June 16, 2005, by the Circuit Court of Greenbrier County granting Defendant's, John M. Johnson, D.O., motion to dismiss in a medical malpractice action. Dr. John M. Johnson cared for the decedent while she was in the emergency room at Greenbrier Valley Medical Center (hereafter referred to as "GVMC").

Appellant, plaintiff below, Larry D. Elmore, instituted a medical professional liability action against the appellee, defendant below, John M. Johnson, D.O., in the Circuit Court of Greenbrier County, West Virginia, on June 30, 2003, one day before significant 2003 amendments to the Medical Professional Liability Act (hereinafter referred to as "MPLA") were to take effect. *See* W. Va. Code §55-7B-1, *et seq.* (2003). The 2003 amendments to the Medical Professional Liability Act became applicable to all medical malpractice actions filed on or after July 1, 2003. Under the amended version at W.Va. Code §55-7B-8 (2003), there is currently a cap on compensatory damages for noneconomic loss of \$250,000, except in certain prescribed circumstances when the cap

is \$500,000<sup>1</sup>.

The Complaint, filed by Appellant, Larry D. Elmore, alleged that John M. Johnson, D.O. breached the applicable medical standards of care for an emergency room physician by failing to properly investigate, diagnose, and treat Appellant's wife, Dorothy Mae Elmore, who was suffering from sepsis (an infection in the blood stream). The complaint further alleged that Ms. Elmore died as a proximate result of Dr. Johnson's deviation from the acceptable medical standards of care. In consideration of the facts and circumstances of this case, Appellant's potential damages could possibly exceed the statutory maximums for damages under the 2003 amendments to the MPLA.

Prior to filing his medical malpractice action, Appellant served the Notice of Claim and Screening Certificate of Merit by certified mail, return receipt requested, pursuant to W. Va. Code §55-7B-6(b) (2001). The Notice of Claim and Screening Certificate of Merit was addressed to John M. Johnson, D.O., Greenbrier Valley Medical Center, 202 Maplewood Avenue, Ronceverte, West Virginia, 24970. According to Appellant's knowledge, the hospital emergency room was Dr. Johnson's place of employment, as well as, the place where Dr. Johnson treated Mr. Elmore's late wife. The notice of claim and screening certificate of merit was mailed to Appellee on May 30, 2003. Appellee, Dr. Johnson, never responded, in any manner, to the Notice of Claim or

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<sup>1</sup>According to W.Va. Code §55-7B-8 (2003), the cap on noneconomic damages is \$500,000 where damages for noneconomic losses suffered by the plaintiff were for: (1) wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities." f.n. 2, Miller v. Stone, 216 W.Va. 379, 607 S.E.2d 485 (2004).

to the Screening Certificate of Merit nor did he request mediation<sup>2</sup>. On June 30, 2003, thirty - one (31) days after Appellant mailed the notice of claim and screening certificate of merit to the Appellee, Appellant filed his complaint<sup>3</sup>. After the filing of the Complaint, Appellee filed an Answer.

On December 5, 2003, Appellee filed a Motion to Dismiss. Appellee argued that the Circuit Court lacked subject matter jurisdiction because the Complaint was filed only twenty-six (26) days from the time he received and read the Notice of Claim out of his internal hospital mailbox. Therefore, he claimed the twenty-six (26) days did not satisfy his thirty (30) day time period to allow him to decide whether to elect to mediate. Once again, Appellee, Dr. Johnson, never responded to the notice and never requested mediation. In addition, Appellee alleged service was improper because the mail clerk at the hospital signed for the certified mail, although through the course of discovery, it was revealed that it was the mail clerk's duty and responsibility to sign for all certified mail at GVMC at that time and the practice is still present at GVMC today. See Affidavit of Theresa Shinn attached as an Exhibit to Plaintiff's Motion for Reconsideration of December 22, 2003 ruling Dismissing John M. Johnson, D.O.

Appellee argued he did not read the mail until June 4, 2003, claiming the earliest Appellant could have filed his complaint was thirty days from that date. Appellee asserted that the Notice of Claim and Complaint did not comply with the thirty (30) day

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<sup>2</sup> Once the instant case was dismissed without prejudice, Appellant filed the case again to protect his interests in the lawsuit prior to the expiration of the statute of limitations. However, the second case is governed by the 2003 amendments to the MPLA, thereby subjected to limitations on the Appellant's potential damages. Once again, the Appellee never responded to the notice of claim or screening certificate of merit nor did he request mediation prior to the filing of the second case.

<sup>3</sup> There is no dispute as to the date the notice of claim and screening certificate was mailed.

pre-litigation and service requirements of the MPLA, and should therefore be dismissed pursuant to Rule 12(b)(1), West Virginia Rules of Civil Procedure, for lack of subject matter jurisdiction.

A hearing was conducting on December 22, 2003, wherein the lower court granted Dr. Johnson's motion to dismiss pursuant to it's ruling that the Appellant failed to comply with statutory pre-filing requirements of the MPLA, by filing the complaint less than thirty days from the date the Appellee read the notice and certificate. Prior to the entry of that order, Appellant filed a motion for reconsideration and request for an evidentiary hearing to elicit fact testimony and also a motion for reconsideration of the December 22, 2003 ruling dismissing John M. Johnson, D.O. alleging that Appellant met the service requirement set out by the statute, by serving the notice and screening certificate at least thirty (30) days prior to filing the suit, and that the mail clerk at GVMC duties and responsibilities consisted of signing for and accepting all certified mail, including those sent to physicians at the hospital address and that at no time previously or thereafter had Dr. Johnson objected to such procedure. The lower court denied Appellant's motions. This is an appeal from the trial court's order dismissing the appellee, John M. Johnson, D.O. and thereby dismissing the case without prejudice. (See attached Order).

### ASSIGNMENT OF ERROR

1. THE COURT ERRED IN IT'S RULING THAT SERVICE OF A NOTICE OF CLAIM UPON THE HEALTH CARE PROVIDER IS PERFECTED UPON ACTUAL DATE OF RECEIPT OF THE SAME BY THE HEALTH CARE PROVIDER OR HIS AUTHORIZED AGENT FOR SERVICE OF PROCESS AND NOT THE DATE OF MAILING; THEREFORE IT HELD SERVICE OF THE NOTICE WAS PERFECTED WHEN DEFENDANT RECEIVED HIS LETTER OUT OF HIS MAILBOX FIVE DAYS AFTER MAILING.
2. THE COURT ERRED IN ITS RULING THAT SERVICE WAS NOT PERFECTED WHEN CLAIMANT MAILED THE NOTICE OF CLAIM, CERTIFIED, RETURN RECEIPT REQUESTED, TO DEFENDANT'S PLACE OF BUSINESS, SINCE IT WAS SIGNED FOR BY THE MAIL CLERK AND PLACED IN DEFENDANT'S INTERNAL MAILBOX.

### POINTS OF AUTHORITY

1. "Notwithstanding any other provisions of this code, no person may file a medical professional liability action against any health care provider without complying with the provisions of this section." West Virginia Code §55-7B-6(a) (2001).
2. "At least thirty days prior to the filing of a medical professional liability action against a health-care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim. The notice of claim shall include a statement of theories of liability upon which a cause of action may be based, together with a screening certificate of merit." West Virginia Code §55-7B-6(b) (2001).
3. "Under West Virginia Code §55-7B-6 (2003), the purposes of requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims. The requirement of a

pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizens' access to the courts." Syllabus Point 2, Hinchman v. Gillette, 217 W.Va. 378, 618 S.E. 2d 387 (2005); Syllabus Point 3, Roy v. D'Amato, D.O., 629 S.E.2d 751 (W. Va. 2006).

### STATEMENT OF FACTS

On May 30, 2003, Appellant served the requisite notice of claim and screening certificate of merit, by certified mail, return receipt requested, on the health care provider, John M. Johnson, D.O. The certified mail was accepted on May 31, 2003. Like the defendants in Hinchman and Roy, Appellee, John M. Johnson, D.O., never responded to the notice of claim or screening certificate of merit nor did he request mediation. Subsequently, thirty-one (31) days later on June 30, 2003, Appellant properly filed his complaint<sup>4</sup> alleging medical negligence against the health care provider concerning the care his wife received as a patient at GVMC Emergency Room on February 16, 2002. The Summons and Complaint was served by hand delivery on the defendant-Appellee by the sheriff of Greenbrier County on September 8, 2003.

The complaint alleged medical professional liability against the Appellee for his negligence in failure to admit Ms. Elmore for further investigation of her unexplainable symptoms, among other things. In the case at hand, Ms. Elmore began experiencing flu-like symptoms on or about February 14, 2002. Ms. Elmore had a significant past medical history, which included a diagnosis of insulin dependent diabetes. On

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<sup>4</sup> The original Complaint also included Triad Hospitals, Inc. d/b/a Greenbrier Valley Medical Center, and BJSM Med, Inc. Both defendants were dismissed. The defendant who remained was John M. Johnson, D.O., an emergency room physician, who treated and released Ms. Elmore from Greenbrier Valley Medical Center.

February 16, 2002, Ms. Elmore's symptoms worsened. She went to GVMC Emergency Room expecting to receive appropriate treatment for her flu-like symptoms and edema and redness of her leg. Ms. Elmore exhibited symptoms of a severe infection within her blood stream. She had abnormal laboratory values which under the acceptable medical standards of care would have required her to be admitted for further follow-up care, including intravenous antibiotics and further testing. Dr. Johnson discharged her to home with a prescription for a urinary tract infection. Ms. Elmore's condition continued to worsen. The next day, her daughter phoned Ms. Elmore's primary physician who instructed her to take Ms. Elmore to an emergency room. The family took Ms. Elmore to Allegheny Regional Medical Center Emergency Room where she was admitted to the intensive care unit for acute anemia, acute sepsis, and acute hypokalemia. Ms. Elmore's condition deteriorated to the point where she was unable to breath for herself. Ms. Elmore was placed on a ventilator due to her respiratory failure. She also suffered from renal failure due to the infection. Her condition continued to decline until her unfortunate death on February 19, 2002.

On September 26, 2003, after the Complaint was filed, the appellee filed and served an Answer. Thereafter, in December 2003, Dr. Johnson filed a Motion to Dismiss pursuant to Rule 12(b)(1), asserting that the Circuit Court lacked jurisdiction over the subject matter of the action. A hearing on Appellee's motion to dismiss was conducted on December 22, 2003 and a hearing on the Appellant's motion to reconsider the ruling occurred on April 25, 2005. After briefing and argument, the lower court denied Appellant's motion to reconsider it's previous ruling by Order dated June 17, 2005.

This is an appeal requesting the reversal of the trial court's order dismissing Appellee, John M. Johnson, D.O.

### ARGUMENT

**A. APPELLANT COMPLIED WITH THE PLAIN LANGUAGE OF THE MPLA BY SERVING THE NOTICE OF CLAIM, CERTIFIED MAIL, RETURN RECEIPT REQUESTED, AT LEAST 30 DAYS PRIOR TO THE FILING OF THE COMPLAINT.**

Appellant met all of the pre-litigation requirements of the MPLA. The Notice of Claim<sup>5</sup> was properly served by certified mail, return receipt requested, thirty-one (31) days prior to the filing of the medical malpractice complaint. This comports with the plain language of the W. Va. Code §55-7B-6(b), as well as Rule 5, West Virginia Rules of Civil Procedure. Under the Medical Professional Liability Act, service of a notice of claim is complete upon mailing. Thus, Appellant complied with the plain language of the MPLA. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus Point 5, State v. General Daniel Morgan Post No. 54, V.F.W., 144 W.Va. 137, 107 S.E.2d 353 (1959). Likewise, Rule 5 of the West Virginia Rules of Civil Procedure, titled "Service And Filing of Pleadings and Other Papers," states in the last sentence of paragraph (b), that "[s]ervice by mail is complete upon mailing." W.Va.R.Civ.P. 5(b). It is the stated scope and purpose of the Rules of Civil Procedure to:

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<sup>5</sup> There is no dispute that the notice of claim and the screening certificate of merit were mailed together in one envelope on May 30, 2003. Therefore, for sake of brevity, Appellant will use the term Notice of Claim solely in his argument to represent the required documents set forth in W.Va. Code §55-7B-6.

... govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity, with the qualifications and exceptions stated in Rule 81. They shall be construed and administered to secure the just, speeding, and inexpensive determination of every action.

W.Va.R.Civ.P. Rule 1.

Clearly, it is within the scope of these rules to control the pre-suit procedures set forth by the legislature in W. Va. Code §55-7B-6.

The lower court's ruling determined that the thirty days does not begin until Dr. Johnson read the Notice of Claim, therefore the Complaint was filed too early, cutting short the Appellee's time to request mediation. The Appellee never requested mediation at anytime nor did he respond in any manner to the Notice of Claim. There is no language in the MPLA to support the lower court's ruling.

Appellant also asserts that in the event this Court finds that the relevant statutory language and/or provisions are ambiguous, the canons of statutory construction apply and support the Appellant's contention that service is complete upon mailing. This statutory construction avoids the unconstitutional and absurd results, which would occur under the appellee's and lower court's interpretation. It also consistent with W.Va.R.Civ.P. Rule 5(b), cited above.

Under the appellee's interpretation, no civil action can proceed unless and until the health care provider receives delivery and reads the notice of claim. However, a notice of claim may be refused as it is served as certified mail. Therefore, a health care provider could bar the filing of a civil action simply by refusing the certified mail. In addition, under the well-established canons of statutory construction, the MPLA must

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Under the appellee's interpretation, no civil action can proceed unless and until the health care provider receives delivery and reads the notice of claim. However, a notice of claim may be refused as it is served as certified mail. Therefore, a health care provider could bar the filing of a civil action simply by refusing the certified mail. In addition, under the well-established canons of statutory construction, the MPLA must

be strictly construed, inasmuch as it is in derogation of the common law. For these and other reasons set forth below, the Circuit Court erred in determining that the filing of a complaint could not occur until thirty days after the health care provider has received the letter.

**B. W. VA. CODE §55-7B-6(b) SETS FORTH THE ONLY REQUIREMENT FOR A CLAIMANT TO FILE A COMPLAINT ALLEGING MEDICAL PROFESSIONAL LIABILITY IS TO WAIT 30 DAYS FROM SERVING A NOTICE OF CLAIM AND CERTIFICATE OF MERIT.**

Appellant met all of the pre-litigation requirements of the MPLA. The statutory language governing the time period of the filing of a medical negligence complaint is set forth in W. Va. Code §55-7B-6(b) (2001):

At least 30 days prior to the filing of a medical professional liability action against health provider, the claimant shall serve by certified mail, return receipt required, a notice of claim. The Notice of Claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, together with a screening certificate of merit. The certificate of merit shall be executed under oath by a health care provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) the expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death.

The Legislative Amendments to the Medical Professional Liability Act have been brought before this Court recently, however none of the opinions by this Court has directly addressed this particular issue on when service is accomplished. See Roy v. D'Amato, D.O., 629 S.E.2d 751 (W. Va. 2006); Grey v. Mena, 218 W.Va. 564, 625 S.E.2d 326 (2005); Hinchman v. Gillette, 217 W.Va. 378, 618 S.E.2d 387 (2005); Boggs v. Camden Clark Memorial Hospital Corporation, 216 W.Va. 656, 609 S.E.2d 917 (2004); Miller v.

Stone, 216 W.Va. 379, 607 S.E.2d 485 (2004). Nonetheless, this Court, in its *per curiam* opinion in Miller applied the plain statutory terms and found, in that case, that the circuit court properly ruled that Petitioner's claim could not be commenced until, at the earliest, 30 days after she filed her certificate of merit on June 20, 2003, which would be July 20, 2003. Id. at 490, 384

The Appellant, plaintiff below, served a Notice of Claim and a Screening Certificate of Merit to defendant, John M. Johnson, D.O., by certified mail, return receipt requested on May 30, 2003. Subsequently, on June 30, 2003, thirty-one (31) days later, Appellant instituted the instant medical professional liability action by filing a Complaint in the Circuit Court of Greenbrier County, West Virginia. Accordingly, Appellant complied with the clear mandate of W. Va. Code §55-7B-6(b) (2001).

The lower court's ruling relied upon an interpretation of the statutory language, which is inconsistent with the actual language of the statute. The appellee argued that W. Va. Code §55-7B-6(e) provides that a medical professional liability action shall not be filed until thirty (30) days following the *receipt* of the Notice of Claim and Screening Certificate of Merit. However, that is not the language of the statute. Rather, W. Va. §55-7B-6(e) states:

Any health care provider who receives a Notice of Claim pursuant to the provisions of this section must respond, in writing, to the claimant within 30 days of receipt of the claim or within 30 days of receipt of the Certificate of Merit if the claimant is proceeding pursuant to the provisions of subsection (d) of this section.

Id. (2001). Clearly, this subsection of the MPLA does not speak to when a claimant may file a complaint. As such, with the facts at issue, nothing precluded the Appellant from

filing his medical professional liability complaint after more than 30 days had elapsed from the service of the Notice of Claim and Screening Certificate of Merit.

The lower court's ruling violates the clear and unambiguous language of the MPLA. The legislature is presumed to employ statutory language that expresses its intent. "Where to language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968); Syllabus Point 3, Peyton v. City Council of Lewisburg, 182 W.Va. 297, 387 S.E.2d 532 (1989). In the MPLA, the legislature specifically stated how service was to be accomplished. The claimant is to send the Notice of Claim "by certified mail, return receipt requested." There is no other requirement stated in the statute. If the legislature would have intended a different result, then it would have made the requirement clear in the language of the statute by expressly stating that the time period to file a complaint begins to run from the time the Notice of Claim is received by the health care provider. As stated previously, the MPLA contains language specific to the time period for filing a complaint and, accordingly, it is presumed that the Legislature did not intend the result argued by the appellee.

Thus, the timing and sequence of the filing of the civil action complied with the mandates of the MPLA. The Complaint was not filed until thirty-one (31) days had elapsed from the serving the Notice of Claim by certified mail, return receipt requested. There is no expressed requirement that 30 days elapsed from the health care provider's receipt of the Notice of Claim, as the lower court found. Although, even if that was a

requirement, the facts in this case still support Appellant's position for appeal, as the complaint was not filed until thirty (30) days had elapsed from the receipt of the certified mail. Therefore, under the plain meaning of the statute, the lower court incorrectly granted Dr. Johnson's Motion to Dismiss and therefore the ruling should be reversed and the case reinstated.

**C. UNDER RULE 5(b) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE, SERVICE IS COMPLETE UPON MAILING AND THEREFORE THE THIRTY (30) DAY PERIOD FOR FILING THE COMPLAINT BEGAN ON MAY 30, 2003.**

Rule 5(b) of the West Virginia Rules of Civil Procedure controls the date upon which the thirty (30) day period contained in W. Va. Code §55-7B-6(b) begins to run. It provides that "[s]ervice is complete upon mailing." W.Va.R.C.P. Rule 5(b). "The critical factor in service by mail is that it is 'mailing' not the 'receipt' of mailing that is controlling. Service is complete the moment the document, with proper postage is placed in the custody of the United States Mail.<sup>6</sup> It has been held that nonreceipt or refusal to accept mailed service does not effect the validity of the service." D. Cleckley, R. Davis, L. Palmer, Jr. Litigation Handbook on West Virginia Rules of Civil Procedure, 136 (2002). The notice of claim and screening certificate of merit provisions are procedural rules and necessary prerequisites to a medical professional liability action. Hence, it is not only reasonable but also necessary to apply West Virginia Rules of Civil

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<sup>6</sup> See Conner v. Conner, 175 W. Va. 512, 334 S.E.2d 650 (1985). ("Service is usually made on the opposing attorney and service by mail is sufficient under Rule 5(b)"); Boggs v. Settle, 150 W. Va. 330, 145 S.E.2d 446 (1965) ("It is quite true that, under R. C. P. 5(b), service by mail is complete upon mailing"); Adkins v. State Compensation Director, 149 W. Va. 540, 142 S.E.2d 466 (1965) ("mailing rather than receipt controls service") (citations omitted).

Procedure Rule 5(b) to the requirements of W. Va. Code §55-7b-6(b), and conclude that service is complete upon mailing.

**D. ASSUMING THAT THE PROVISIONS OF W.VA. CODE §55-7B-6 ARE AMBIGUOUS REGARDING THE TIME WHEN A CIVIL ACTION MAY BE FILED, THE RULES OF STATUTORY CONSTRUCTION DEMAND THAT THE PROVISIONS BE CONSTRUED IN FAVOR OF THE APPELLANT.**

Any ambiguity that may arise in the application of W. Va. Code §55-7B-6 to this case can only result in a reversal of the trial courts ruling of the time period of when a complaint may be filed under the MPLA. To the extent this Court finds ambiguity in the application of the provisions of subsections (b) and (e), the canons of statutory construction apply. These canons are well established through case law and provide that

"[i]n the interpretation of a statute, the legislative intention is the controlling factor and the intention of the legislature is ascertained from the provision of the statute by the application of sound and well established canons of construction." State v. General Daniel Morgan Post No. 548, V.F.W., 144 W. Va. 137, 144, 107 S.E.2d 353, 358(1959) (citation omitted). In parsing the language of a statute for its meaning, new are mindful that "a cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Id. at 359 (citations omitted). Also, [g]enerally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." Syllabus Point 4, Id.; See also McComas v. Bd. Of Educ. Of Fayette County, 197 W. Va. 188, 205, 475 S.E.2d 280, 297 (1996) ("When interpreting statutes we give credence to the normal usage of the word[.]") Finally, we are "informed when necessary by the policy that the statute was designed to serve." West Virginia Human Rights Com'n v. Garretson, 196 W.Va. 118, 123, 468 S.E.2d 733, 738 (1996) (footnote and citation omitted). . . . Accordingly, "we must construe the statute liberally so as to furnish and accomplish all the purposes intended." State ex rel McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995) (citation omitted).

Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 214-15, 530 S.E.2d 676, 687-88 (1999).

Further, “[i]t is the duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust, or unreasonable results.” Charter Communications VI, PLLC v. Community Antenna Service, Inc., 211 W.Va. 71, 77, 561 S.E.2d 793, 799 (2002). (citations omitted).

Finally, and most importantly, it is a well-established rule of statutory construction that statutes that limit or are in derogation of the common law, such as the MPLA, are to be given a narrow construction. See Rhodes v. J.B.B. Coal Co., 79 W.Va. 71, 90 S.E.2d 796, 797-98 (citations omitted). Application of these rules demonstrates unequivocally that service of the notice of claim is complete upon mailing.

**1. The Court’s Error In Its Interpretation Of The MPLA Violates West Virginia And Federal Constitutions Regarding Due Process And The Right To Trial.**

The lower court’s finding that a period of thirty (30) days must elapse from the receipt of a Notice of Claim and Screening Certificate of Merit before a claimant may institute an action is in error. This interpretation places the sole discretion as to whether a lawsuit may be filed, or a trial conducted on the merits in the hands of the health care provider. Under the applicable regulations promulgated by the United States Postal Service, a person may refuse to accept a letter, which is sent certified mail, return receipt requested. As a result, if the lower court’s interpretation is upheld, a health care provider would be allowed to refuse to accept “receipt” of a claim, and thereby preclude the filing of a civil action for medical negligence.

The regulations adopted by the United States Postal Service clearly require that a recipient, or a person in a position to accept mail for such location, sign for certified mail. The rules governing delivery of certified mail are set forth in the Domestic Mail Manual ("DMM") promulgated by the United States Postal Service ("USPS"). See Bailey v. Kentucky Nat'l Ins. Co., 210 W. Va. 220, 222, 496 S.E.2d 170, 172 n. 4 (1997) (citing Domestic Mail Manual as authoritative); and Haynes v. Helchler, 182 W. Va. 806, 808, 392 S.E.2d 697, 699 (1990) (same); See also 39 C.F.R. §111.1 (incorporating the Domestic Mail Manual into the Federal Register and the U.S. Postal Service's as "the Mailing Standards of the United States Postal Service").

Specifically, the DMM provides that "[t]he addressee may refuse to accept the mail piece when it is offered for delivery." DMM § 508.1.1, p. 931 (4-14-05) (Refusal of Delivery). With regard to who may accept delivery of certified mail and mail sent with a return receipt, the DMM provides as follows:

#### **1.1.7 Express Mail and Accountable Mail**

The following specific conditions also apply to the delivery of Express Mail and accountable mail (registered, certified, ..., as well as mail for which a return receipt ... is requested ...):

- a. The recipient (addressee or addressee's representative) may obtain the sender's name and address and may look at the mail piece while held by the USPS employee before accepting delivery and endorsing the delivery receipt.
- b. The mail piece may not be opened or given to the recipient before the recipient signs and legibly prints his or her name on the delivery receipt (and return receipt, if applicable) and returns the receipt(s) to the USPS employee.

- c. Suitable identification can be required of the recipient (if not known to the USPS employee) before delivery of the mail piece.
- d. When delivery is not restricted at the sender's request, mail addressed to a person at a hotel, apartment house, etc., may be delivered to any person in a position to whom mail for that location is usually delivered.
- e. USPS responsibility ends when the mail piece is delivered to the recipient (or another party, subject to 1.1.7d and 1.0).
- f. A notice is left for a mail piece that cannot be delivered. If the piece is not called for or redelivery is not requested, the piece is returned to the sender after 15 days (5 days for Express Mail, 30 days for COD) unless the sender specifies fewer days on the piece.

DMM § 508.1.1.7, p. 932.

Clearly, the lower court's interpretation of the statute will lead to absurd outcomes, as the Notice of Claim does not have to be accepted upon delivery by the USPS. Legally, the healthcare provider would be able to avoid the institution of a medical liability claim simply by refusing to accept delivery of the certified mail and thereby invoking immunity from such claims. As a consequence, if receipt of the Notice of Claim is the rule, health care providers could frustrate the claimant's right to trial, as embodied under Article III, Section 13 of the West Virginia Constitution and U.S. Const. Amend. VII. Obviously, this was not the legislature's intent when construing the MPLA amendments.

The MPLA does not provide for the refusal of service. In addition, it does not provide any alternative means of service should service by mail fail. In the alternative,

the problem of service is recognized in the Rules of Civil Procedure. Under Rule 4(d)(1)(D), the clerk is authorized to serve a summons and complaint by certified mail, return receipt requested, and delivery restricted to addressee. Also, it specifically addresses the problem of a defendant refusing delivery. If that occurs, the rule states that the attempted service provides an adequate basis for later entering a default judgment should the defendant fail to answer or otherwise defend. Rule 4(d) W. Va. R. C. P. Rule 4 also provides for alternative means of service. However, the MPLA has no alternative for the claimant should the health care provider refuse to accept the certified mail.

Once again, rules of statutory construction dictate that such a result be avoided. First, the legislature's intention is paramount in interpreting their laws. Obviously, the legislature did not intend to create such a loophole providing health care providers immunity from civil actions. The canons of statutory construction state that the courts shun from construing statutes in a manner that leads to absurd and unconstitutional results. This Court further addressed this issue in McDavid by stating:

[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 the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended that 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.

McDavid v. United States, 213 W. Va. 592, 595-596, 584 S.E.2d ~~225, 229~~-230 (2003).

In view of the above argument, the lower court erred by violating the canon of statutory construction and therefore should be reversed.

**2. The Lower Court's Interpretation Of Service Being Complete Upon Receipt Is Inconsistent With The MPLA's Provisions Tolling The Statute Of Limitations Upon Mailing.**

The MPLA provides that the statute of limitations is tolled upon mailing the Notice of Claim. W. Va. Code §55-7B-6(h) (2001). Specifically, it provides, in part, that: "[e]xcept or otherwise provided in this subsection, any statute of limitations applicable to a cause of action against a health care provider upon whom notice was served for alleged medical professional liability shall be tolled from the date of mailing of a Notice of Claim to thirty days following receipt of a response to the Notice of Claim, thirty days from the date a response to the Notice of Claim would be due, ...." *Id.* This subsection clearly demonstrates that the significant act with regard to service of the Notice of Claim by certified mail, is its mailing.

As set forth above, the statute of limitations is tolled upon mailing. Reading W. Va. Code §55-7B-6 in its entirety, giving "significance and effect ...to every section, clause, word, or part of the statute," it is clear that the Legislature intended that once the claim was mailed, the claimant is then relieved of any further action until the health care providers response is received, or should have been received. *Meadows*, 530 S.E.2d 676. Had the Legislature intended to make service of the Notice of Claim complete only upon the health care provider's receipt, it would have made this point clear under W. Va. Code §55-7B-6(h).

**E. DISMISSAL OF THIS ACTION VIOLATES BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS**

Dismissal of this action unconstitutionally deprives Mr. Elmore of the right to vindicate his claim in court before a jury without the limitations subsequently placed upon his potential damages. The claim is a substantial property right. The lower court's ruling to dismiss the case renders the MPLA unconstitutional because it denies Mr. Elmore the most fundamental right under procedural due process: the right to notice. The plain language of the MPLA stated that a claimant, such as the appellant, need only serve his Notice of Claim by certified mail, return receipt request thirty days before commencing suit. That is all the notice the appellant had as to how to proceed prior to filing suit for his claim. The lower court's interpretation deprives Mr. Elmore of notice. A new and different requirement was added by the lower court to the MPLA, which would require Mr. Elmore to wait until Dr. Johnson received the Notice of Claim out of his internal mailbox a number of days after the mail was signed for by the mail clerk at the hospital where he treats patients like Ms. Elmore. This new and different requirement placed upon Mr. Elmore violates procedural due process inasmuch as a claimant has no notice of this different pre-filing requirement.

For the reasons already stated, any differences in the MPLA's language should not defeat a clearly recognized property right simply because the Legislature could not draft a bill cognizable to the ordinary man. On constitutional grounds, it cannot be the case that the Legislature's poor writing skills should be construed against citizens who otherwise have legitimate claims. In conclusion, the test under due process whether a

statute is unconstitutionally vague is that it cannot forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 456 U.S. 950 (1982). In the case at hand, the lower courts' application of the MPLA is unconstitutionally vague and should be reversed.

The 2003 amendments to the MPLA also interfere with Mr. Elmore's substantial property rights by placing new, statutory limits on the damages recoverable. See W. Va. Code §55-7B-8 (2003). The Complaint filed by the Appellant alleges that the malpractice, which resulted in the death of Ms. Elmore, occurred in February 2002. Imposing the statutory maximum on damages based upon the 2003 amendments to the MPLA would constitute a retroactive application of the statute, which would impair Mr. Elmore's existing property rights. Mildred L.M. v. John O.F., 192 W. Va. 345, n. 10, 452 S.E.2d 436, 442, n. 10 (1994).

**F. TO THE EXTENT THAT THE MPLA IS IN CONFLICT WITH THE LAWS AND RULES OF PROCEDURE ESTABLISHED BY THIS COURT, IT IS UNCONSTITUTIONAL.**

The Constitution of West Virginia provides that "[t]he court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law." W. Va. Const. Art. VIII § 3. The application of the MPLA to the instant case reveals that it conflicts with the procedural rules established by this Court in several distinct ways. To begin, according to the court below, application of the MPLA required dismissal of the Complaint, which otherwise meets with every

procedural requirement of the Rules of Civil Procedure. The Legislature, however, does not have authority to determine whether the circuit courts are without jurisdiction over a matter. That is strictly an issue controlled by the State Constitution, Art. VIII, § 6, and the procedural rule-making authority of this Court. This Court determines when a civil action is within the jurisdiction of the circuit courts or when it may be dismissed with prejudice under the Rules of Civil Procedure. To the extent the MPLA determines whether the courts of this State requires dismissal of an action, as held by the court below, it is at odds with the Rules of Civil Procedure.

Second, Appellant argues that Rule 5(b) of the West Virginia Rules of Civil Procedure provides the controlling authority as to whether service of the Notice of Claim is complete upon mailing. The lower court held that W. Va. Code §55-7B-6(e) confers a procedural right to the health care provider to demand mediation. It is clear that the procedural rules of the Legislature and this Court are in conflict. In view of the fact that this Court has primary constitutional authority to administer and control the procedural aspects of litigation, it should resolve this conflict either according to its established rules and procedures, such as Rule 5(b), W. Va. R. C. P., or according to the interests of justice and law. Kenamond v. Warmuth, 179 W. Va. 230, 366 S.E.2d 738 (1998) (holding that procedural statutes are subject to modification or annulment by this Court under the West Virginia Constitution.)

### CONCLUSION

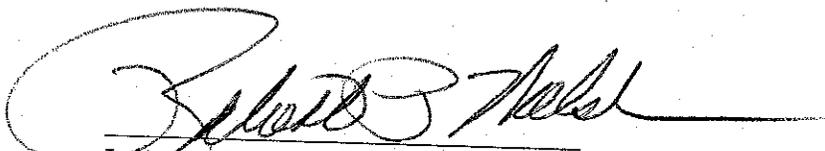
Appellant met the plain language of the Medical Professional Liability Act. The Notice of Claim and Screening Certificate of Merit met every requirement necessary to

file suit and maintain a civil action. The lower court's interpretation conflicts with other provisions of the statute. For all the foregoing reasons, Appellant/Plaintiff respectfully prays that this Honorable Court grant his Appeal and reverse the circuit court's ruling which granted defendant's Motion to Dismiss thereby dismissing the case in its entirety. Furthermore, the MPLA violates a number of constitutional provisions, and should be stricken in its entirety. In addition, Appellants respectfully request that they be awarded the costs and expenses incurred in prosecuting this appeal, including reasonable attorney fees, as well as any other relief deemed appropriate by the Court.

Respectfully submitted,

LARRY D. ELMORE

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33006

LARRY D. ELMORE, individually  
and as Administrator of the Estate  
of Dorothy Mae Elmore, Deceased,

Plaintiff/Appellant,

vs.

Civil Action No. 03-C-136  
(Honorable James J. Rowe)

TRIAD HOSPITALS, INC., a Delaware  
corporation, d/b/a Greenbrier Valley  
Medical Center; JOHN M. JOHNSON,  
D.O.; and BJSM MED, INC., a West  
Virginia corporation,

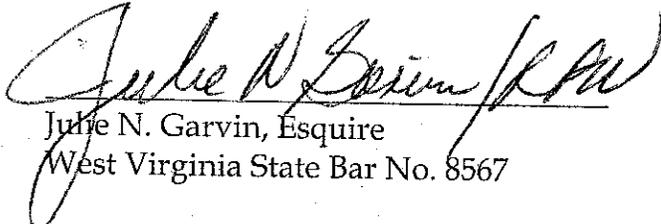
Defendants/Appellees.

CERTIFICATE OF SERVICE

I, Julie N. Garvin, counsel for appellant/plaintiff, do hereby certify that true and exact nine (9) copies of the foregoing "Brief of Appellant, Larry D. Elmore" were served upon:

Barry M. Taylor, Esquire  
Max L. Corley, III, Esquire  
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Post Office Box 2688  
Huntington, West Virginia 25726-2688  
Counsel for Defendants, John M. Johnson, D.O. and BJSM Med, Inc.

in an envelope properly stamped, addressed and deposited in the regular course of the United States Mail, this 22<sup>nd</sup> day of June, 2006.

  
Julie N. Garvin, Esquire  
West Virginia State Bar No. 8567