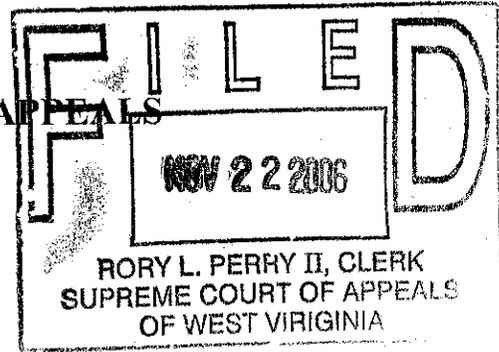


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



**MICHAEL WORLEY and
CYNTHIA WORLEY his wife,**

Appellants,

v.

Appeal No. 33190

BECKLEY MECHANICAL, INC., et al.

Appellees.

BRIEF OF APPELLEES

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

This appeal arises from the rulings of Honorable Judge Robert A. Burnside following a bench trial in Raleigh County, West Virginia on the very specific issue of whether the Appellants' claims were barred by the statute of limitations. The Appellants challenge the lower court's findings and conclusions that Michael Worley's post-injury condition did not amount to "insanity," and the court's application of well-settled precedent that the statute of limitations cannot be tolled for disabilities occurring after the accrual of a cause of action.

In July of 2002, the plaintiffs below and Appellants herein filed an action against defendants Beckley Mechanical, Inc., West Virginia Sprinkler, Inc., Klockner Pentaplast of America, Inc., Riddleberger Brothers, Inc., and Nielsen Contracting for injuries sustained by Michael Worley while attempting to install pipe for a sprinkler system. *See Complaint.*

Defendants filed separate Motions to Dismiss the Complaint on a number of issues, including the issue whether the action was timely filed. By Memorandum Opinion of December 9, 2002, the Court converted the Motions to Dismiss into Motions for Summary Judgment, and denied the motions on that issue because the Judge perceived that an issue of fact existed as to whether Mr. Worley had suffered a disability that tolled the statute of limitations. *See December 9, 2005 Memorandum Order.*

On August 16, 2004, defendants jointly filed a Renewed Motion for Summary Judgment regarding the statute of limitations issue. While the Renewed Motion for Summary Judgment was pending, the Court entered an Agreed Order on September 27, 2004 to bifurcate the trial on issues of fact pertaining to the application of the statute of limitations from the issues of liability and damages. During the pretrial conference, where arguments on the Renewed Motion for Summary Judgment were heard, the Court refused the Motion on the grounds that an issue of fact existed as

to whether the Appellant's condition satisfied the insanity standard. *See* November 3, 2004 Order. Beginning November 16, 2004, the Circuit Court of Raleigh County conducted a three-day bench trial to decide whether Mr. Worley ever suffered a disability that suspended or tolled the running of the statute. Following the bench trial, the parties submitted proposed findings of fact and conclusions of law.

On September 21, 2005, the Circuit Court entered a Memorandum Order finding that from May 28, 2000 until June 3, 2000 the Appellant was not insane within the meaning of the statute of limitations. *See* September 21, 2005 Memorandum Order and December 13, 2005 Final Judgment Order. Additionally, the Court found that based on the lack of objective medical evidence presented at trial, Mr. Worley did not suffer a traumatic brain injury. *See* September 21, 2005 Memorandum Order, p. 5. It is this Order which the Appellants now appeal to this Court.

STATEMENT OF FACTS

Mr. Worley filed an action for work-related injuries sustained during a construction job. This action was admittedly filed more than a month after the statute of limitations expired to file such a claim. Mr. Worley contends that the statute of limitations should be extended for him under West Virginia's "Savings Statute," W. Va. Code § 55-2-15, because he was "insane" for 43 days of the two years allotted by the statute of limitations for him to file suit, and even despite the fact that he was able to file a related medical malpractice action within that time frame.

The underlying incident giving rise to this action

On May 28, 2000, Mr. Worley was using a scissor lift to install pipe for a sprinkler system inside the Klockner Pentaplast plant being constructed near Beckley, West Virginia. He was attempting to rotate a valve on an HVAC chilled water line that was in the path of the sprinkler line. The line was being pressure tested with air. When Mr. Worley loosened the coupling holding the

valve, the valve exploded off the line and struck him in the abdomen, causing Mr. Worley to fall from the scissor lift. *See* Complaint.

Mr. Worley was hospitalized at Raleigh General Hospital from May 28, 2000 through July 10, 2000. With respect to Mr. Worley's condition following the incident, the lower court found that:

- (1) Mr. Worley was injured at approximately 8:30 a.m. on May 28, 2000. He was transported by ambulance to Raleigh General Hospital, arriving at approximately 9:02am. The report filed by the Emergency Medical Technicians states that during transport the he was conscious and complaining of pain.
- (2) The records of the Emergency Room at Raleigh General Hospital show that Mr. Worley was conscious and "alert and oriented" while he was in the Emergency Room. During that time, he communicated to the Emergency Room physicians that he was taking certain medications.
- (3) At some time during the day or evening of May 28, 2000, which was the date of the injury, the Mr. Worley was visited by his employer, Bill Mahaffey. Mr. Mahaffey testified that on that date he engaged in conversation with the Mr. Worley in which the Mr. Worley made statements and showed that he was aware that he had been injured, and in which Mr. Worley joked about his pay being docked while he was in the hospital.
- (4) The notes of the Emergency Room physician state that Mr. Worley had no evidence of head trauma. The report of the examination by Dr. Michael Thorwall on May 28, 2000, stated "no neurological symptoms." A CT scan indicated no closed head injury.
- (5) A series of Glasgow Coma Scale readings were reported. On the morning of May 28, 2000, the Mr. Worley's Glasgow scale was 15 out of a possible 15. During the evening of May 28 and on the following morning, May 29, the Glasgow scale was 14 out of a possible 15. On that day, Dr. Prakash Puranik reported that the Mr. Worley was "conscious, but in significant pain" and "cooperative and coherent."
- (6) The nursing notes from May 28 through June 3, 2000, consistently report that Mr. Worley was "alert, oriented, and cooperative."¹

See September 21, 2005 Memorandum Order, pp. 7-8.

¹The lower court also heard additional substantial evidence introduced by the defendants that Mr. Worley was not "insane" and possessed acceptable levels of functioning in areas of intellect, emotion and physical well-being. *See* Appendix A. Appellees would note here, however, that whether or not Mr. Worley lost consciousness was a strongly contested issue of fact and, as shown in Appendix A, an argument by Appellants based on weak, uncorroborated evidence.

Mr. Worley, following June 3, 2000, did suffer medical complications, including an infected central venous line and a perforated liver incurred during insertion of a chest tube, that caused him to exhibit low levels of functioning. Likewise, there were also times during this period that he possessed much higher levels of functioning. Mr. Worley was discharged on July 10, 2000, and was then transferred to Health South, a rehabilitation facility. He was discharged from Health South on July 18, 2000. *See* Plaintiffs' Trial Exhibit No. 9. Subsequently, he retained two attorneys. On May 28, 2002, the day the statute of limitations expired, a Notice of Claim and Statement of Intent to Provide a Screening Certificate of Merit Against a Healthcare Provider" was filed in the Circuit Court of Raleigh County, West Virginia. *See* "Exhibit B" to Defendants' Renewed Motion for Summary Judgment.

The Worleys filed the instant lawsuit on July 10, 2002, forty-three (43) day after statute of limitations expired for Mr. Worley's personal injury claims. *See* Complaint. In an effort to save their case from dismissal, Appellants' new counsel argued that Mr. Worley suffered a traumatic brain injury and was therefore legally insane and/or mentally incompetent for a period in excess of forty-three (43) days from the date of his injury. *See* Plaintiff's Response to Defendants' Renewed Motion for Summary Judgment.

The lower court's Memorandum Opinion

A three-day bench trial was held before the Honorable Judge Robert A. Burnside pursuant to the Agreed Order bifurcating the statute of limitations issue.

a. The issue tried

The sole issue tried on November 16, 2004 was whether Mr. Worley "suffered from a disability that suspended or tolled the running of the statute of limitations." *See* September 21, 2005 Memorandum Order, p. 3.

This issue of fact derived from the lower court's application of the insanity tolling provision of the "Savings Statute," West Virginia Code §55-2-15, which provides:

"If any person to whom the right accrues to bring any such personal action, suit or *scire facias*, or any such 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 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 mentioned in section eight of this article, except that it shall in no case be brought after twenty years from the time such rights accrues."

See September 21, 2005 Memorandum Order, p. 3.

To define insanity under the savings statute, the lower court looked to the definition of "insane person" under West Virginia Code §2-2-10(n), which definition incorporates "everyone who has a mental illness as defined in section two, article one, chapter twenty-seven of (the West Virginia Code)(§27-1-2)." The court then noted that "West Virginia Code §27-1-2 defines 'mental illness' as 'a manifestation in a person of significantly impaired capacity to maintain acceptable levels of functioning in areas, of intellect, emotion and physical well-being.' See *Albright v. White*, 503 S.E.2d 860 (1998) (noting at fn. 14 that the "insane person" definition of West Virginia Code §2-2-10(n) applies to §55-2-15)." See September 21, 2005 Memorandum Order, p. 3.

Upon this consideration of these applicable statutes, the lower court identified the legal standard to determine whether Mr. Worley suffered from a disability:

"the condition which qualifies as 'insanity' for purposes of W.Va. Code §55-2-15 is a mental illness consisting of a 'manifestation in a person of significantly impaired capacity to maintain acceptable levels of functioning in areas of intellect, emotion and physical well-being.' It is this standard by which the evidence presented at the bench trial on November 16, 2004, must be measured."

See September 21, 2005 Memorandum Order, p. 3 (Emphasis added).

This legal standard was proposed and stipulated to by the parties. *See* Plaintiff's Response to Defendants' Renewed Motion for Summary Judgment, pp. 4-5²; *See also* Plaintiff's Argument, p. 1³, and Plaintiff's Proposed Findings of Fact and Conclusions of Law, p. 11. None of these basic legal standards were objected to or contested by the parties prior to or following the bench trial. At no time was it ever argued that this definition of insanity was inappropriate, or that the savings statute must be read as "remedial."

b. The lower court's Trial Findings

In its Trial Findings, the lower court first found that the evidence presented did not support the conclusion that Mr. Worley suffered a "traumatic brain injury." The court found that plaintiffs' expert completely based his opinion on the fact that Mr. Worley lost consciousness, and there was an absence of any physical or objective evidence of trauma to the brain. *See* September 21, 2005 Memorandum Order, p. 5. Accordingly, plaintiff could not sustain the proof required to establish insanity.

The lower court next found that Mr. Worley was not insane at the time of his injury nor the first six days of his stay at Raleigh General Hospital. It is this portion of the trial court's opinion that Appellants horribly misconstrue in an effort to demonstrate error.

In making its determination, the trial court first notes as a matter of law that a person is presumed sane and therefore it is plaintiff's burden to show that he was insane.⁴ *See* September 21,

² Which states that "[defendants'] memorandum accurately determines the context of this motion in relation to West Virginia law."

³ Which states that that "[t]he question of whether Michael Worley was 'insane' as this term is defined as a mental illness may only be answered by a careful analysis of the statute, West Virginia Code 27-1-2. . ."

⁴ Indeed, the parties agreed that it was plaintiff's burden to prove that he was insane. The court discussed this with the parties at trial:

THE COURT: While we were off the record taking care of some paperwork, I received the

2005 Memorandum Order, pp. 5-6. The court does not, in citing criminal cases for this point of law, in any way suggest that it is applying a criminal insanity standard instead of the "mental illness" definition of W. Va. Code § 27-1-2. In fact, in the very next paragraph the trial court reiterates that W. Va. Code § 27-1-2 controls its analysis: "The finding of insanity for purposes of the statute of limitations must be grounded on a finding that he suffers a **'significantly impaired capacity to maintain acceptable levels of functioning.'**" See September 21, 2005 Memorandum Order, p. 6. (Emphasis added).

Next, the court answers the question of what, pursuant to W. Va. Code § 27-1-2, constitutes "an 'acceptable' level of functioning." *Id.* In a very reasoned analysis, the trial court notes that "whether a person has an 'acceptable level of functioning' depends on the level of understanding for the task at hand." *Id.* As such, the trial court reasoned that it should determine "whether the specific plaintiff had an acceptable level of functioning at the time in question to be bound by the running of the statute of limitations." *Id.* Therefore, the court found, if a person possesses a sufficient level of functioning to understand the very things of which he must be aware to commence the running of the statute of limitations under West Virginia law, then he possesses an "acceptable" level of functioning. *Id.* In other words, "if a person has a level of functioning such that he is capable of understanding that he has been injured and the cause of that injury, he is not 'insane' within the meaning of the statute of limitations." *Id.*

defendant's joint bench memorandum on the issue of the burden of proof on the statute of limitations issue, and Mr. Bucci commented that the plaintiff agrees that they do have the burden of proof to show that -- as I understand what you've said, I'll add more to your words, I think you're saying that plaintiff agrees that they have the burden of proof to show that this case falls within the -- call it exception to the statute, in the sense you need to prove that the circumstances were present to show that the statute suspended running during this period. Is that your position?

MR. BUCCI: Yes, Your Honor.

THE COURT: Well, then that means I don't need to read this, doesn't it? You worked all night for nothing. All right, then. Ms. Lambert, you may proceed. See Trial Transcript, p. 26, Ln10-1.

Guided by these principles, the trial court found that, more likely than not, Mr. Worley was not “insane” at the time of his injury or immediately thereafter. *Id.* at p. 7. The court found that the evidence revealed that Mr. Worley possessed an acceptable level of functioning to comprehend what had happened and the fact that he had been injured. *In other words, the lower court found that if Mr. Worley could comprehend the things that would commence the running of the statute of limitations for every other individual in West Virginia, then he must have an “acceptable” level of functioning in intellect, emotion and physical well-being not to be considered “insane.”*

Nowhere in the trial court’s Memorandum does it suggest that any definition of insanity other than the very one endorsed by Appellants is applied. In fact, the trial court does not even reference the insanity standard, as Appellants incorrectly assert. *See* Appellants’ Brief at pp. 12-13.

c. The circuit court’s dismissal based upon its Trial Findings

Based on clear West Virginia precedent and plain statutory language, the lower court found that it need not inquire further than the fact that Mr. Worley was not “insane” following the accident. The Court held that “the statute speaks to ‘insanity’ at the time of the injury. . . Within the terms of the statute, and according to *Harper v. Walker Mfg.*, . . . the Plaintiff would be deemed insane if he had been insane at the time of injury or instantly rendered insane by the injury. . . [t]he statute of limitations makes no provision for the onset of insanity after the injury. While the evidence of Plaintiff’s condition after June 3, 2000, is subject to differing interpretations, it is irrelevant to the issue raised by the statute because he was sane at the time of injury.” *See* September 21, 2005 Memorandum Order, p. 9. The court found that the evidence demonstrated that Mr. Worley was sane for approximately six days following the injury.

In emphasizing the importance of adhering to the Legislature’s clear choice of language, the lower court stated:

"We may not assume that when the Legislature drafted this statute it had not considered the obvious possibility that a person might be sane at the time the cause of action accrues but become insane afterward, or suffer recurring periods of insanity while the statute is running. The Legislature could have chosen to address this possibility with a statutory alternative that allows the suspension of the statute for these periods of insanity and providing that the statute expires only when the intervening periods of sanity accumulate a total of two years. It is the Court's opinion that the Legislature's election not to do so appears to be the result of the balancing of interests of a potential plaintiff who suffers such a condition and the interests of a potential defendant in the clear calculation of a statute of limitations. We must defer to the Legislature's balancing of these valid competing interests." See Memorandum Order, p. 9.

APPELLANTS' ASSIGNMENTS OF ERROR

1. IN THAT THE TOLLING PROVISION OF WEST VIRGINIA CODE §55-2-18 RELATING TO PERSONS WHO ARE "INSANE" IS A REMEDIAL STATUTE, THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN IMPOSING A HIGHER BURDEN ON APPELLANT THAN SHOWING HE HAD A "MENTAL ILLNESS" MEANING A MANIFESTATION IN A PERSON OF SIGNIFICANTLY IMPAIRED CAPACITY TO MAINTAIN ACCEPTABLE LEVELS OF FUNCTIONING IN AREAS OF INTELLECT, EMOTION AND PHYSICAL WELL-BEING.
2. THE CIRCUIT COURT ERRED IN NOT RECOGNIZING THE REMEDIAL PURPOSES OF THE TOLLING PROVISION CONTAINED IN WEST VIRGINIA CODE §55-2-15.

STANDARD OF REVIEW

In Energy Development Corp. v. Moss, 214 W. Va. 577, 583, 591 S.E.2d 135, 141 (2003),

this Court reiterated the appropriate standard of review for an appeal from a bench trial:

In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Further "[t]he finding[s] of a trial court upon facts submitted in lieu of a jury will be given the same weight as the verdict of a jury and will not be disturbed by an appellate court unless the evidence plainly and decidedly preponderates against such finding[s]." Syllabus Point 2, *Fair Oaks*

Homeowners Ass'n, Inc. v. Country Club Inv. and Development Co., Inc., 215 W.Va. 451, 451-52, 599 S.E.2d 874, 874-75 (W.Va. 2004) (citing Syllabus Point 6, *Daugherty v. Ellis*, 142 W.Va. 340, 97 S.E.2d 33 (1956)). See also *Energy Development Corp. v. Moss*, 214 W.Va. 577, 584, 591 S.E.2d 135, 142 (2003) and Sy. Point 6, *Cotiga Development Company v. United Fuel Gas Company*, 147 W.Va. 484, 128 S.E.2d 626 (1962).

Appellants profess only to appeal “questions of law and the interpretation of a statutory scheme relating to tolling provisions” and not the factual determinations made by the circuit court. See Appellants’ Brief, p.10 (“This appeal concerns questions of law and the interpretation of a statutory scheme relating to the tolling provisions of West Virginia Code § 55-2-15 2 . . .”); see also p. 2 and footnotes 1 and 3. They do so in an obvious effort to avoid the “clearly erroneous” standard that applies to the lower court’s findings of fact and “abuse of discretion” standard that applies to its application of law to fact.⁵

There is no evidence in the entire record to suggest that the circuit court used any standard other than that which was agreed upon by the parties. One simply need look over Appellants’ brief, however, and it becomes readily apparent that this appeal truly concerns a disagreement over what the trier of fact considered to be an “acceptable level of functioning” and what Appellants believe to be an acceptable level of functioning. Because this appeal merely involves Appellants’ disagreement with the ultimate disposition, this Court should review the lower court’s determination that Mr. Worley was not “insane” under an abuse of discretion standard.

⁵ Appellees would like to avoid clouding the true issues with lengthy explanations of the substantial evidence and arguments presented at trial that ultimately persuaded the trier of fact in their favor. However, because the Appellants repeatedly make impertinent arguments and citations in their brief to convince this Court that the circuit court made incorrect factual findings, attached as **Appendix A** is a refutation of Appellants’ factual arguments.

ARGUMENT OF LAW

I. THE LOWER COURT APPLIED THE VERY STANDARD ENDORSED BY APPELLANTS IN DETERMINING THAT MR. WORLEY WAS NOT “INSANE” AT THE TIME OF HIS INJURY OR FOR A PERIOD THEREAFTER, AND DID NOT ABUSE ITS DISCRETION IN FINDING THAT MR. WORLEY POSSESSED AN ACCEPTABLE LEVEL OF FUNCTIONING SUFFICIENT TO COMMENCE THE RUNNING OF THE STATUTE OF LIMITATIONS.

In their first assignment of error, the Appellants assert that the lower court erred because it did not make a determination of insanity under the definition of “mental illness” under W.Va. Code § 27-1-2, but instead imposed a higher burden of proof on the Appellants by employing the criminal standard of insanity. This argument is intellectually dishonest and a blatant attempt to circumvent arguing, under an abuse of discretion standard, that the trial court is incorrect.

A. The trial court correctly applied West Virginia Code §27-1-2 as the legal standard of insanity and did not erroneously apply the criminal law standard.

A review of the lower court’s Memorandum opinion readily reveals that the trial court expressly used W.Va. Code § 27-1-2 as the standard of insanity by which the evidence at trial had to be measured. *See* September 21, 2005 Memorandum Order, p. 3.⁶ Also, as discussed above, the trial court went through a very thorough analysis of what it considered “acceptable” functioning. *See Id.*, pp. 6-7.

Contrary to Appellants’ assertions, the lower court never even references a criminal standard or the decision of *State v. Rowe*, 168 W.Va. 678, 285 S.E.2d 445, 447 (W.Va. 1981), in its Order. *See* Appellants’ Brief, p. 12. The only reference to criminal law in the Order is *State v. McCauley*, 130 W.Va. 401, 43 S.E.2d 454 (1947)(holding that a person is presumed to be sane for the purposes

⁶ Again, it is important to mention that this legal standard was proposed and stipulated to by the parties. *See* Plaintiff’s Response to Defendants’ Renewed Motion for Summary Judgment, pp. 4-5; *See also* Plaintiff’s Argument, p. 1 and Plaintiff’s Proposed Findings of Fact and Conclusions of Law, p. 11. None of these basic legal standards were objected to or contested by the parties prior to or following the bench trial. *Also see* fn. 4.

of criminal responsibility), and *State ex rel. Azeez v. Mangum*, 195 W.Va. 163, 465 S.E.2d 163 (1995), to reference the appropriate burden of proof. See September 21, 2005 Memorandum Order, p. 5. The only other time the lower court even mentions criminal law is when it states the proposition that “insanity is term of art” (citing *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996)). *Id.*, p. 6.

Appellants even admit that the circuit court “cited the statutory standard applicable to manifesting an ability to maintain acceptable levels of functioning.” See Appellants’ Brief, p. 13 (Emphasis added). However, in what can best be described as a logical stretch, Appellants circularly argue that:

“it is equally clear the Court betrayed its reliance on the wrong standard because it could never explain how someone who lacked the ability to provide personal hygiene, including brushing his teeth, could comprehend his legal rights. Its conclusion follows the criminal responsibility standard. *It is therefore a fair conclusion that the Circuit Court incorporated the criminal responsibility standard of insanity in its findings and thus committed prejudicial error.* See Appellants’ Brief, p. 13. (Emphasis added).

The Appellants read something into the Court’s Order that simply is not there. Their entire basis for this argument is that since the court did not find for them based on the facts, it must have used the wrong standard.

Additionally, Appellants’ contention that the lower court failed to account for the remedial nature of the savings statute in making its decision is a new issue that was never even raised at the trial court level. In light of the fact that the lower court obviously applied the correct legal standard under W.Va. Code § 27-1-2, this argument is really a moot point. But even if it were relevant, this Court has refused to consider matters that were not first before the trial court. See *Proudfoot v. Proudfoot*, 214 W.Va. 843, 591 S.E.2d 767, 769 (W.Va. 2003).

Furthermore, statutes of limitation are statutes of repose and the legislative purpose is to compel the exercise of a right of action within a reasonable time; such statutes represent a statement

of public policy with regard to the privilege to litigate and are a valid and constitutional exercise of the legislative power. *Perdue v. Hess*, 199 W. Va. 299, 302, 484 S.E.2d 182, 185 (1997). Exceptions to the statute of limitations are to be strictly construed, and such exceptions are not enlarged by the courts upon considerations of apparent hardship. *Id.* at 303, 186 (Emphasis added).

In summary, Appellants' first assignment of error is a vain argument that the only way the trial court could ever disagree with their position is by applying a higher standard. This argument is made despite the trial court's multiple express statements that W. Va. Code § 27-1-2 governs the analysis and in the absence of any reference to a criminal standard. It is clear that the lower court did not apply an incorrect higher standard.

B. The trial court's finding was not an abuse of discretion.

The lower court's decision that Mr. Worley possessed an "acceptable" level of functioning to commence the running of the statute of limitations is not an abuse of discretion. "A trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law," *Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996), or "makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." *Gribben v. Kirk*, 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (1995).

Appellants contend that because an individual must be medicated and assisted in bathing, feeding and personal hygiene he or she must not possess an "acceptable level of functioning" and therefore be insane. Their definition of insanity encompasses every individual who undergoes serious medical treatment after an accident and equates physical difficulties to insanity.

It is clear that the lower court simply disagreed with Appellants that a person is "insane" by definition because they are under medical care and must be assisted. One who must take medication is not insane. One who is physically unable to brush one's teeth is not insane. One who needs

assistance in personal hygiene is not insane. The lower court determined that Mr. Worley did not suffer a traumatic brain injury and accepted the various facts showing that Mr. Worley was alert, oriented, interactive and otherwise capable enough to understand what had happened, and did not find this to meet the definition of "mental illness" under W.Va. Code § 27-1-2. This decision is neither an erroneous assessment of the evidence nor a clear error of judgment. In fact, this decision is much more reasonable than Appellants' arguments to the contrary. As such, the lower court's ruling should be affirmed.

II. THE LOWER COURT DID NOT ERR BECAUSE IT FOLLOWED CLEAR WEST VIRGINIA STATUTORY LAW AND PRECEDENT IN DETERMINING THAT THE STATUTE OF LIMITATIONS SHOULD NOT BE TOLLED FOR A SUBSEQUENT DISABILITY.

Appellants argue that the lower court erred in interpreting the savings statute to require Mr. Worley to be "insane" simultaneously with his injury and in requiring continuous insanity throughout his hospital admission. In other, clearer terms, Appellants believe the lower court erred when it held that subsequent insanity will not toll the statute. However, the lower court followed clear West Virginia precedent in requiring the Appellant to be insane at the time his cause of action accrued.

A. The savings statute clearly and unambiguously provides that subsequent insanity will not toll the statute of limitations and this Court should apply its plain meaning.

1. The savings statute is clear and unambiguous.

The language of West Virginia Code §55-2-15 *clearly* provides that:

If any person to whom the right accrues to bring any such personal action, suit or *scire facias*, or any such 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 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 mentioned in section eight of this article, except that it shall in no case be brought after twenty years from the time when the right accrues.

W. Va. Code §55-2-15 (2006)(Emphasis added). The statute, in *plain and unambiguous* terms, requires that a person be insane **at the time the cause of action arose**.

This Court emphasizes the importance of strictly applying the terms of a statute when the language is clear and unambiguous, and its prior holdings are consistent with this rule. It is recognized that courts are not free to read into the language of a statute what is not there, but should apply the statute as written. *Mills v. Van Kirk*, 192 W. Va. 695, 453 S.E.2d 678 (1994); *See also Jones v. West Virginia State Bd. of Ed.*, 218 W. Va. 52, 57, 622 S.E.2d 289, 295 (2005)(holding that it is not for courts to arbitrarily read into a statute that which it does not say). Just as courts are not to eliminate through judicial interpretation words that were purposefully included, the court is obliged not to add to statutes something the Legislature purposefully omitted. *Id.* Straying from the plain meaning of the statute is appropriate only when “there is a clearly expressed legislative intent to the contrary, and where a literal application would defeat or thwart statutory purpose or produce an absurd or unconstitutional result.” *See State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994).

2. This Court has previously applied the savings statute’s plain meaning and should do so in this case.

This Court has applied the savings statute, as written, not to permit tolling for subsequent disabilities.⁷ This Court visited the language at issue in the savings statute in *Mynes v. Mynes*, 47 W. Va. 681, 35 S.E. 935 (1900). In applying the original language of the savings statute from 1868,

⁷ “Once this Court determines a statute’s clear meaning, we will adhere to that determination under the doctrine of stare decisis. *Appalachian Power Co. v. Tax Dept.*, 195 W. Va. 573, 588 n. 17, 466 S.E.2d 424, 439 n. 17 (1995). *See also Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202, 112 S.Ct. 560, 563, 116 L.E.2d 560, 569 (1991)(‘we will not depart from the doctrine of *stare decisis* without some compelling justification’) . . . Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated[.]” *Haney v. County Commission of Preston County*, 212 W. Va. 824, 828, 575 S.E.2d 434, 438 (2002).

which stated that “if, at the time at which the right . . . shall have first accrued, . . . such person was . . . insane . . .,” the *Mynes* court specifically held that “after the statute of limitations has commenced to run, no subsequent disability will interrupt it.” Syl. Pt. 2. See also *Pickens v. Stout*, Syl. Pt., 67 W. Va. 422, 68 S.E. 354, 358 (1910); *F. G. & L. C. Jones v. Lemon et al.*, Syl. Pt. 2, 26 W. Va. 629 (1885) (“It is the settled law, that if the statute has once begun to run, no subsequent event will interrupt it.”); (*Harper v. Walker Manufacturing Company*, 699 F. Supp 85 (S.D. W. Va. 1988) (holding that insanity must exist at time cause of action arose and that subsequent disability would not toll the statute of limitations). As evidenced below, this Court’s application of the language of the savings statute is consistent with the overwhelming majority of states across the nation. Furthermore, the West Virginia Legislature has had over 100 years to correct this Court’s construction of the savings statute and has not done so. It is only for the Legislature to change the clear and express language of the statute to provide an exception for subsequent disabilities.

3. **The policy interests behind statutes of limitations support the lower court’s ruling.**

In *Perdue v. Hess*, 199 W. Va. 299, 302, 484 S.E.2d 182, 185 (1997), this Court thoroughly discussed the policy interests behind statutes of limitations and the Court’s reluctance to create exceptions outside of the express language of the statute:

Statutes of limitation are statutes of repose and the **legislative purpose is to compel the exercise of a right of action within a reasonable time**; such statutes represent a statement of public policy with regard to the privilege to litigate and are a valid and constitutional exercise of the legislative power. *Id.* (Emphasis added).

This Court made it clear in *Perdue* that exceptions to the statute of limitations are to be **strictly construed**, and such exceptions are not enlarged by the courts upon considerations of apparent hardship. *Id.* at 303, 186. (Emphasis added). The reason for this strict construction is because:

“The object of statutes of limitations is to compel the bringing of an action within a reasonable time frame. . . **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**. . . [d]efendants have a right to rely on the certainty the statute of limitations provides. . . [b]y strictly enforcing statutes of limitations, we are both recognizing and adhering to the legislative intent underlying such provisions.” *Id.* (Emphasis added).

The *Perdue* Court further noted its commitment to strictly construing statutes of limitations and rejecting proposed exceptions outside applicable statutes:

“Perhaps we best stated our reluctance to create exceptions to statutes of limitations beyond those already provided by statute in Syllabus Point 3 of *Hoge v. Blair*, 105 W.Va. 29, 141 S.E. 444 (1928): ‘**Exceptions in statutes of limitation are strictly construed and the enumeration by the Legislature of specific exceptions by implication excludes all others.**’ By strictly applying statutes of limitations, we are better able to ensure that causes of action are promptly and timely filed.” *Id.*

West Virginia law and policy are clear. Accordingly, the lower court did not err in finding that any subsequent insanity of Mr. Worley would not toll the statute of limitations.

B. The majority of jurisdictions support West Virginia’s precedent and Appellants’ interpretation of other states’ law is inaccurate.

West Virginia’s law on the issue of tolling for subsequent disabilities comports with the vast majority of jurisdictions around the country. Regardless of Appellants’ arguments and misguided reliance on other jurisdictions’ case law, the overwhelming majority of states and the United States Supreme Court all recognize that once the statute of limitations has commenced to run against a cause of action, its operation is not interrupted by a subsequent disability and that any mental incompetency must exist at the time of the cause of action accrued.

1. The vast majority of states do not permit tolling of the statute of limitations for subsequent disabilities.

In the application of the general rule that once the statute of limitations has commenced to run against a cause of action its operation is not interrupted by any subsequent disability, it is well settled, particularly under states’ savings statutes referring to disabilities existing “at the time the

cause of action accrued," that any mental incompetency must exist at the time the cause of action accrued to toll the running of the statute of limitations. Any incompetency arising after the statute has commenced to run will not suspend its operation.⁸ A nationwide survey of the law on this issue reveals that only six states' saving statutes⁹ (Kansas, Minnesota, Georgia, Virginia, Vermont, and

⁸See 41 A.L.R.2d 726, which cites and notes the following cases in support of the majority rule. *Oliver v. Pullam*, 24 F. 127 (1885, CC NC); *Freer v. Less*, 159 Ark. 509, 252 S.W. 354 (1923); *Larsson v. Cedars of Lebanon Hospital*, 97 Cal. App.2d 704, 218 P.2d. 604 (1950); *Griswold v. Butler*, 3 Conn. 227 (1820); *Taylor v. Houston*, 93 App. D.C. 391, 211 F.2d 427, 41 ALR2d 724 (1954); *Calumet Electric Street R. Co. v. Mabie*, 66 Ill. App. 235 (1896); *Black v. Ross*, 110 Iowa 112, 81 N.W. 229 (1899); *Roelefsen v. Pella*, 121 Iowa 153, 96 N.W. 738 (1903); *Clark v. Trail*, 58 Ky. (1 Met) 35 (1858); *Hale v. Ritchie*, 142 Ky. 424, 134 S.W. 474 (1911) (under statute not only limiting exception to situation where person is of unsound mind at time right of action first accrues, but specifying that "The time within which an action for the recovery of real property may be brought shall not be extended by reason of any disability which did not exist when the right to bring the action first accrued."); *Combs v. Combs*, 200 Ky. 771, 255 S.W. 704 (1923); *Kingman's Committee v. First Nat. Bank of Mayfield*, 246 Ky 404, 55 SW2d 39 (1932); *Gould v. Bank of Independence*, 264 Ky 511, 94 SW2d 991 (1936); *Sharp v. Stephens' Committee*, 21 Ky LR 687, 52 SW 977 (1899) (under statute providing that "the time within which an action for the recovery of real property may be brought shall not be extended by reason of any disability which did not exist when the right to bring the action first accrued"); *Douglas v. York County*, 433 F.3d 143, C.A. 1 (Me. 1995); *McCutchen v. Currier*, 94 Me 362, 47 A 923 (1900); *Allis v. Moore*, 84 Mass. (2 Allen) 306 (1861); *Kelley v. Gallup*, 67 Minn. 169, 69 N.W. 812 (1897); *Nebola v. Minnesota Iron Co.*, 102 Minn. 89, 112 N.W. 880 (1907); *Pannell v. Glidewell*, 146 Miss. 565, 111 So. 571 (1927); *Munzer v. Swedish American Line*, 30 F. Supp. 789 (1939, DC NY); *Asbury v. Fair*, 111 N.C. 251, 16 S.E. 467 (1892); *White v. Scott*, 178 N.C. 637, 101 S.E. 369 (1919) (under statute providing that "no person shall avail himself of a disability, unless it existed when his right of action accrued"); *Richards v. Page Invest. Co.*, 112 Or. 507, 228 P 937 (1924); *Cathcart v. Hopkins*, 119 S.C. 190, 112 S.E. 64 (1922); *Adamson v. Smith*, 9 SCL (2 Mill Const) 269, 12 Am.Dec 665 (1818); *Joy v. Joy*, 156 S.W. 2d 547, error ref (1941, Tex. Civ. App.) (under statute providing that "when the law of limitation shall begin to run, it shall continue to run, notwithstanding any supervening disability of the party entitled to sue or liable to be sued"); *Lincoln v. Norton*, 36 Vt. 679 (1864); *Kenney v. Killian*, 133 F. Supp. 571 (W.D. Mich. 1955), judgment aff'd, 232 F.2d 288 (6th Cir. 1956); *Smith by and through Smith v. City of Reno*, 580 F. Supp. 591 (D. Nev. 1984); *McLendon v. Georgia Kaolin Co., Inc.*, 813 F. Supp. 834 (M.D. Ga. 1992); *Hill v. Clark Equipment Co.*, 42 Mich. App. 405, 202 N.W.2d 530 (1972) (applying Ala. law); *Buck v. Miles*, 89 Haw. 244, 971 P.2d 717 (1999); *Haas v. Westlake Community Hospital*, 82 Ill. App. 3d 347, 37 Ill. Dec. 881, 402 N.E.2d 883 (1st Dist. 1980); *Fager v. Hundt*, 610 N.E.2d 246 (Ind. 1993); *Collins v. Dunifon*, 163 Ind. App. 201, 323 N.E.2d 264 (3d Dist. 1975); *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295, 83 Ed. Law Rep. 841 (Ky. Ct. App. 1993); *Priestman v. Canadian Pacific Ltd.*, 782 F. Supp. 681 (D. Me. 1992) (applying Me law); *Chasse v. Mazerolle*, 580 A.2d 155 (Me. 1990); *Lombard v. Eunice Kennedy Shriver Center for Mental Retardation, Inc.*, 556 F. Supp. 677 (D. Mass. 1983) (applying Mass law); *Stackrow v. New York Property Ins. Underwriter's Ass'n*, 115 A.D.2d 883, 496 N.Y.S.2d 794 (3d Dep't 1985); *Jacobs v. Baylor School*, 957 F. Supp. 1002, 117 Ed. Law Rep. 534 (E.D. Tenn. 1996); *Roman v. A. H. Robins Co., Inc.*, 518 F.2d 970 (5th Cir. 1975) (applying Texas law, citing annotation).

⁹ See *Kan. Stat. § 60-515(a)* (If the person entitled to bring an action ... at the time the cause of action accrued or anytime the period the statute of limitations is running is an incapacitated person ... , such person

Ohio) expressly permit tolling for subsequent insanity or disability.¹⁰ The majority of states' savings statutes mirror West Virginia's and contain express language requiring that the individual be insane or incapacitated at the time the cause of action accrues.

Like West Virginia, courts in many jurisdictions emphasize the importance of strictly applying the express language of state's tolling statute, requiring that the individual be insane at the time the cause of action accrues. For example, Maryland's Court of Appeals held that an action for alleged assault was barred by the statute of limitations where the plaintiff was confined in a hospital and

shall be entitled to bring such action within one year after the person's disability is removed); *See Minn. Stat. Ann.* §541.15 (any of the following grounds of disability, existing at the time when a cause of action accrued or arising anytime during the period of limitation, shall suspend the running of the period of limitation until the same is removed; provided that such period, except in the case of infancy, shall not be extended for more than five years, nor in any case for more than one year after the disability ceases . . . ; *See Georgia Code Ann.*, § 9-3-31 (Minors and persons who are legally incompetent because of mental retardation or mental illness who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons. If any person suffers a disability . . . after his right of action has accrued and the disability is not voluntarily caused or undertaken by the person claiming the benefit thereof, the limitation applicable to his cause of action shall cease to operate during the continuance of disability.); *See Va. Code Ann.* §8.01-229 (If a person entitled to bring any action is at the time the cause of action accrues. . . incapacitated, such person may bring it within the prescribed limitation period after such disability is removed; or after a cause of action accrues, . . . if a person entitled to bring such action becomes incapacitated, the time during which he is incapacitated shall not be computed as any part of the period within which the action must be brought, except where a conservator, guardian or committee is appointed for such person in which case an action may be commenced by such conservator, committee or guardian before expiration of the applicable period of limitation or within one year after his qualifications as such, whichever occurs later.); *See also Ohio Rev. Code Ann.* §2305.16 (Unless otherwise provided . . . if a person entitled to bring any action . . . is, at the time the cause of action accrues, . . . of unsound mind, the person may bring it within the respective times limited by those sections, after the disability is removed. . . After the cause of action accrues, if the person entitled to bring the action becomes of unsound mind and is adjudicated as such by a court of competent jurisdiction or is confined in an institution or hospital under a diagnosed condition or disease which renders the person of unsound mind, the time during which the person is of unsound mind and so adjudicated or so confined shall not be computed as any part of the period within which the action must be brought.); *See also Vt. St. T.* 12 §551 (When a person entitled to bring an action specified in this chapter is . . . insane . . . at the time the cause of action accrues, such person may bring such action within the times in this chapter respectively limited, after the disability is removed. . . If a person entitled to bring an action specified in this chapter becomes insane after the cause of action accrues but before the statute has run, the time during which the person is insane shall not be taken as a part of the time limited for the commencement of the action.)

¹⁰ In these states, their legislatures chose to place an express statutory exception in their savings statutes. Because those states' savings statutes differ from West Virginia's statute and the majority of other states' statutes, the case law of these six minority states is not applicable to the instant analysis.

reformatory four days after his right accrued. *See Hogan v. Stumper*, 257 Md. 520, 263 A.2d 571 (1970). In making its decision, the Court of Appeals noted that “[o]nce the statute has commenced to run [n]o subsequent disability will arrest it, unless the statute clearly provides.” *Id.* at 521, 572.

The United States Court of Appeals for the D.C. Circuit made a similar holding in *Taylor v. Houston*, 211 F.2d 427, 93 U.S. App. D.C. 391 (1954). In *Taylor*, the plaintiff filed an action alleging assault and battery. *Id.* Twelve days after he was assaulted, he became mentally incompetent for over six months and alleged that this period of mental incompetency was the direct result of the beating inflicted by Appellees. *Id.* The court noted that “courts have consistently refused to interpret such provisions to arrest the running of the limitation period where the disability occurred or arose subsequent to the origin of the cause of action. . . . Where there is a lapse of time between the injury and the insanity, the statute will have started running and will not be stopped.” *Id.* at p. 428, 392.

Iowa’s Supreme Court even held that the statute of limitations was not tolled when an individual who was sane at the time her cause of action accrued later became insane *several hours* after the accident. In *Roelefsen v. City of Pella*, 121 Iowa 153, 96 N.W. 738 (1903), the plaintiff was injured when she fell on an icy sidewalk. She alleged that the pain from the injury became so exceedingly severe that before midnight, became insane, her said insanity taking on the form of distractedness, delirium, flightiness, and unconscious of mind *Id.* Her pain increased in severity for weeks and months and this caused her insanity to continue for several months. She claimed that by reason of the facts, the statute did not begin to run until the alleged disability was removed, and that she had one year thereafter in which to bring her suit. *Id.*

In its holding, the Iowa Court noted that:

“[i]t is fundamental that, if the statute of limitations once begins to run, nothing--not even death--will save the cause of action, in the absence of express statute to that effect. The statute on which plaintiff relies has reference to a disability existing when the cause of action accrued, and not to a case where the statute began to run before

the disability commenced. The language used by the Legislature leaves no doubt on this proposition. When the statute has commenced to run against a cause of action it will not be suspended on account of the death of the party in whose favor the cause of action has existed, or of the minority of the persons to whom his rights have passed . . . **Indeed, it is fundamental that when the statute once commences to run it will not be tolled by the subsequent disability of him in whose favor the cause of action existed . . . Had there been no appreciable length of time between the happening of the accident and the insane condition of mind, there might, possibly, be some question of her right to recover; but we need not speculate on this proposition, for it clearly appears in this case that several hours intervened.**”

Id. at 154, 739. (Emphasis added).

In another relevant case, the Illinois Appellate Court of the First District held that “the insanity contemplated by the statute is that which exists when the injured person becomes entitled to bring his action, and if the statute has once commenced to run, no subsequent disability will interrupt it.” *Calumet Electric Street Railway Company v. Mabie*, 66 Ill. App. 235 (1896). The plaintiff in that case was injured, resumed work for six months following his injury, and was then stricken with paralysis and claimed the statute of limitations should be tolled for his “disability.” The Illinois Appellate Court relied heavily on the analysis of the United States Supreme Court case *McDonald v. Hovey*, which states:

“to allow successive disabilities to protract from the right to sue, would, in many cases, defeat its salutary object, and keep actions alive perhaps for a hundred years or more; that the object of the statute was to put an end to litigation; and to secure peace and repose, would be greatly interfered with, and often wholly subverted, if its operation were to be suspended by every subsequently-accruing disability.” *Hovey*, 110 U.S. 619, 4 S.Ct. 142 (1884)(Emphasis added).

Finally, the same logic was applied in *Roman v. A.H. Robins Company*, 518 F.2d 970 (1975), where a consumer brought a products liability action against a drug company after she had taken a prescription drug Sulla and was diagnosed a month later as having a syndrome caused by an allergic reaction to the drug. Over the next five (5) years, plaintiff had a number of operations and periods of hospitalization and eventually went totally blind, and she asserted that the cumulative effect of her

misfortunes caused her to become a person of unsound mind under the statute. *Id.* The Texas Court held that once the limitations began to run it continued to do so even if one of the disabilities that would toll it arose in the meantime. *Id.* The Court found that although plaintiff suffered from mental disability as a result of taking the prescription medication, all of the evidence suggested that this change in mental condition was a gradual occurrence and that it did not arise on the same day as the injury. *Id.*

A small number of the jurisdictions with similar statutory language to West Virginia, including some of the jurisdictions cited above, have recognized one minor exception to the rule¹¹ and held that when the injury and the insanity resulting directly from the injury occurs later *on the same day*, the two events will be considered legally “simultaneous” and the statute will not begin to run until sanity is restored because courts will not take notice of a *fraction* of a day. Importantly, each of those jurisdictions have expressly declined to stretch that exception by holding that insanity beginning even the day after the injury will not sufficiently toll the statute of limitations. *See, e.g., Pannell v. Glidewell*, 146 Miss. 565, 111 So. 571 (Sup. Ct. Miss. 1927)(if an injured person’s unsoundness of mind begins after the expiration of the day of which he was injured, the statute of limitations is set in motion, and his cause of action is barred); *Taylor v. Houston*, 211 F.2d 427, 93 U.S. App. D.C. 391 (1954)(statute not tolled where lapse of time of twelve days between the injury and the insanity).¹²

¹¹ These limited jurisdictions have recognized the rule adopted in *Nebola v. Minnesota Iron Co.*, 102 Minn. 89, 112 N.W. 880 (1907), which creates this “same day” exception to account for the theory that courts do not take notice of fractions of days. It is also important to reiterate that Minnesota’s tolling statute expressly permits tolling for subsequent insanity.

¹² The only two jurisdictions in the nation with similar statutory law that create an equitable exception for subsequent disabilities occurring *after* the date of injury are *Kyle v. Green Acres at Verona, Inc.*, 44 N.J. 100, 207 A.2d 513 (1965)(permitting individual to toll statute where insanity did not begin until at least two days after the injury), which is cited by Appellants, and *Klammshell v. Berg*, 165 Colo. 540, 441 P.2d 10 (1968)(tolling statute where mental incapacity resulting from assault did not begin until four months

2. The case law cited by Appellants represents the extreme minority view and is completely misinterpreted.

In making their argument that the circuit court erred in requiring Mr. Worley to be insane simultaneously with his injury, Appellants only cite to foreign case law that, in addition to representing the *minority* view, is misinterpreted by Appellants. In fact, many of the cases cited are not even applicable to the instant case.

Appellants first cite three completely inapplicable cases which all stand for the proposition that a "lucid interval" will not toll the statute of limitations unless the interval lasts sufficiently long enough for the individual to look into his rights in the matter: *Duncan v. Vick*, 7 Ky. L. Rptr. 756, 13 Ky.Op. 1074 (1886), *Clark's Executor v. Trail's Administrators*, 58 Ky. 35 (1858) and *Libertelli v. Hoffman-La Roche, Inc.*, 565 F. Supp 234 (S.D.N.Y. 1983). None of these three cases are applicable to the instant case because they only pertain to lucid intervals which occur during a period of insanity that begins *at the time the cause of action accrues*. Mr. Worley was, according to the weight of the evidence and the trier of fact's determination, not insane at the time his cause of action accrued.

In *Duncan v. Vick*, 7 Ky. L. Rptr. 756, 13, Ky.Op. 1074, cited above, the court actually barred plaintiff's claim because, while it was true that there were brief times when the plaintiff was mentally affected, it appeared that he was at times "in his proper mind, and sufficiently long for him to have known that his right to the land was in peril and to have asserted his right to it by suit." *Id.* Additionally, in *Clark's Executor v. Trail's Administrators*, 1 Met. 35, 58 Ky. 35, also cited above, the Court held that "[i]f the statute begins to run, a subsequent state of insanity will not stop it from running; but it will continue to run on, notwithstanding the insanity of the person whose rights will be affected by the bar." *Id.*

afterward).

Finally, in *Libertelli v. Hoffman-La Roche, Inc.*, 565 F. Supp. 234 (S.D.N.Y. 1983), the New York tolling provision required disability of the plaintiff at the time the cause of action accrues. Not only does the court in this case deny plaintiff's motion for summary judgment on the insanity tolling issue, but further, the court endorses many propositions advanced by Appellees in the instant case. The court held that, "if the plaintiff had a lucid interval of significant duration, preceded and followed by a period of insanity, the toll is lost and is not resurrected when a plaintiff relapses into insanity." *Id.* The Court also cautioned that the toll for insanity should be "narrowly interpreted." *Id.* The *Libertelli* court also denied plaintiff's motion for summary judgment when it found that plaintiff's toll was lost when she experienced a lucid interval during which she regained her ability to protect her legal rights.

Appellants also attempt to rely on another New York case, *Lynch v. Carlozzi*, 284 A.D.2d 865, 727 N.Y.S.2d 504, (N.Y. 2001), stating that insanity at the time of the cause of action should be extended due to disability. Appellants cite *Lynch* for the proposition that disability need not be adjudicated before the accrual of the cause of action. Plaintiff's reliance on this case is misplaced. The *Lynch* court did not decide that defendant was in fact disabled but rather that a hearing was required to determine if plaintiff was under disability *as of the accrual of the cause of action*. *Id.* at 868. In *Lynch*, the plaintiff had commenced an action in 1999 for personal injuries sustained in an accident in 1991. *Id.* at 855-56. A doctor opined that plaintiff suffered from a mental disability following the accident and that such condition prevailed at the time of the execution of the settlement release. *Id.* at 856. Importantly, these conclusions were completely un rebutted by the defendant. As a result, the court was left with only plaintiff's evidence to rely upon when making its conclusion. The court concluded not that that plaintiff was, in fact, disabled, but only that a triable issue of fact

existed that he *may* have suffered from such mental disability sufficient to toll the limitations period from the time his cause of action accrued. *Id.* at 868.

The Appellants cite a Michigan case in support of their arguments, *Hill v. Clark Equipment Company*, 42 Mich. App. 405, 202 N.W.2d 530 (1972), that is factually distinguishable from the instant case. In *Hill*, an Alabama employee brought an action against a forklift manufacturer for personal injuries sustained in employment when a heavy bale of cardboard fell on him while he was operating the truck without a steel canopy. *Id.* at 407, 531. Importantly, the plaintiff's condition in *Hill* existed *at the time the cause of action accrued* and did not develop at a later time. The Court, noting the principle that the "insanity of the plaintiff at the time the claim accrues tolls the running of the statute of limitations," found that an issue of fact existed as to whether plaintiff was insane following his injury. *Id.* at 408, 532.

Appellants also rely on *Cline v. Lever Bros. Co.*, 124 Ga.App. 22, 183 S.E.2d 63 (Ga. 1971), where the Appellants state that the court tolled the statute of limitations until the claimant regained capacity to act for himself. First, and most importantly, Georgia's tolling statute specifically allows tolling for subsequent disabilities. Accordingly, Georgia law is not applicable on this basis. Furthermore, the court in this case engaged in absolutely no analysis to arrive at its conclusion. Rather, the court merely states that "when a person injured becomes so mentally and physically incapacitated so as to be incapable of acting for himself in carrying on his business and in prosecuting his claim, and where the guardian is appointed for him, the statute of limitation for the bringing of an action is tolled until such time as he regains capacity to act for himself or until a guardian is appointed." *Id.* at 23, 65-66. The plaintiff had alleged that he was and had been incompetent from the time of his injury to the time of the appeal, and never even alleged that a "lucid interval" existed.

The Appellants also rely on *Feeley v. Southern Pacific Transp. Co.*, 234 Cal. App. 3d 949, 285 Cal. Rptr. 666 (Ca. 1991), another factually distinguishable case, where the plaintiff was an independent contractor who was knocked unconscious while working and remained so for 12 days. *Id.* at 951. During this period, he was hospitalized, and underwent cranial surgery to repair the damage. *Id.* In this case, plaintiff was “insane” from the time the cause of action accrued, and had been continuously for 12 days.

Finally, Appellants rely on *Kyle v. Green Acres at Verona, Inc.*, 207 A.2d 513, 44 N.J. 100 (1965), where the New Jersey Supreme Court held, contrary to the language of its savings statute, that “a defendant whose negligent act brings about plaintiff’s insanity should not be permitted to cloak himself with the protective garb of the statute of limitations.” *Id.* at 111. In *Kyle*, the plaintiff fell and fractured her hip on defendant’s icy sidewalk on January 23, 1957, and subsequent to this event, stayed in a nursing home for a month. A couple of days after her accident, while in the hospital, plaintiff began noticing physical symptoms similar to those which accompanied a previous mental ailment she had suffered in 1942. She was later admitted to a New York hospital for treatment of the hip and treatment of a nervous disorder with shock therapy. *Id.* at 102. She was released on July 31, 1957, and stayed at home until August. *Id.* On October 13, 1957, she was officially committed insane. *Id.* She remained insane through the remainder of the statute of limitations period and was released to a nursing home in April of 1961. She was officially discharged in March 1962, and she instituted suit on May 28, 1962. *Id.*

The plaintiff contended that where the defendant’s negligence itself caused insanity, the running of the statute of limitations should be suspended until sanity is restored. *Id.* at p. 107, 520. Despite New Jersey’s plain statutory language requiring simultaneous insanity, the *Kyle* court felt that based on the facts of the case, justice “require[d] it to carve out an equitable exception to the general

principle that there is not time out for the period of time covered by the disability if the disability accrued at or after the cause of action accrued” to avoid applying the harsh result of a literal interpretation of the statute of limitations. *Id.*

It is important to note that *Kyle* is factually distinguishable from the instant case because plaintiff became insane within a couple of days after her accident, and *remained insane throughout the remainder of the statute of limitations period*, giving her very little opportunity to enforce her rights.¹³ In contrast, after his hospital stay, Mr. Worley had ample opportunity, in fact, at least 687 days, to file an action (and even did file a medical malpractice action). Furthermore, application of *Kyle* to the instant case would not even save Mr. Worley from statute of limitations because the evidence shows that he was sane for the last twelve days of his hospital stay. For these reasons, the *Kyle* case does not, and should not be, applied in this case.

3. **In addition to the fact that the *Kyle* decision is inapplicable to the instant case, it also creates an exception that is contrary to West Virginia policy and unnecessary.**

The *Kyle* decision represents a lonely minority view because it sets undesirable policy. The limited jurisdictions that recognize a minor exception for subsequent insanity occurring on the *same day* where the insanity was a direct result of the injury make a “stretch” for the sake of equity that still sufficiently comports with the plain intent of statutes requiring simultaneous insanity. The *Kyle* case, however, radically departs from the plain language of New Jersey’s savings statute and holds that if a plaintiff becomes insane as a result of a defendant’s act *anytime before the statute of limitations expires*, the running of the statute shall be suspended. Adoption of a rule like that in *Kyle*

¹³ It is also interesting that even two of the seven Justices that concurred stated that the facts of the case did not even appear to warrant such a radical departure from the language of the statute or from the ancient and settled rule that once the period of limitations commences to run, a subsequent disability does not interrupt it. *Id.* at 116.

would blur the bright line provisions of West Virginia's savings statute, destroy the certainty that statutes of limitations are intended to create, and would open a "pandora's box" of problems for our court system.¹⁴ Courts would be faced with plaintiffs attempting to "cherry pick" days of insanity or incompetency between the date of injury and institution of suit, causing courts to analyze each and every subsequent event which possibly create brief periods of insanity. For example, every auto accident plaintiff who subsequently undergoes a root canal or knee surgery due to injuries he sustained in the wreck would require the court to determine how many additional days should be tacked onto the limitations period for the days in which he was rendered incompetent during and after surgery.

Furthermore, an exception really is not necessary. Those who encounter long bouts of insanity or incapacitation subsequent to their injury, like long-standing coma victims, remain protected under the law because a committee would be appointed. *See Dearing v. Dearing*, 646 F.Supp. 903 (S.D.W.Va. 1986) (acknowledging the merit of the defendant's argument that, for the purposes of the savings clause, a disability is removed upon the appointment of a committee to handle the incompetent's affairs). West Virginia has recognized that it is not only the legal right, but it is the legal duty, of a committee to sue for damages done to the estate of the incompetent. *Id.* at 911.

For these reasons, in addition to the many others cited above, the *Kyle* exception should not be adopted.

CONCLUSION

The Circuit Court of Raleigh County correctly determined, under West Virginia Code § 27-1-2, that Mr. Worley was not "insane" at the time his cause of action accrued and a period of time

¹⁴ Indeed, no rule of law could be more widely accepted and easily understood than that a statute of limitations imposes a bright line test as to when a cause of action has been timely filed. *See Cart v. Marcum*, 188 W.Va. 241, 245, 423 S.E.2d 644, 648 (1992) (recognizing predictability that bright line rules like a strict statute of repose create).

thereafter. The Appellants' disagreement with the lower court's application of the law to the facts are not sufficient to constitute an abuse of discretion. Likewise, the lower court correctly found that the statute of limitations commenced to run, uninterrupted by any subsequent disability, on the date of Mr. Worley's injury. Any change in this result should be effectuated by the Legislature.

RELIEF REQUESTED

Based upon the foregoing, the defendants/respondents respectfully pray that the Supreme Court of Appeals of West Virginia affirm the Circuit Court of Raleigh County's Order.

**WEST VIRGINIA SPRINKLER,
RIDDLEBERGER BROTHERS, INC.,
NIELSEN BUILDERS, INC., KLOCKNER
PENTAPLAST OF AMERICA, INC. and
BECKLEY MECHANICAL, INC.,**

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On Behalf of Beckley Mechanical, Inc.

APPENDIX A

CLARIFICATION OF APPELLANTS' CITATIONS TO THE LOWER COURT RECORD

- A) **The medical evidence supports the lower court's conclusion that it is more likely than not that Appellant was sane from May 28 through June 3, 2000 and for the last twelve days of his hospital stay.**
- 1) **There was ample evidence to support the lower Court's finding that Mr. Worley did not suffer a traumatic brain injury as a result of his fall.**

The exclusive theory of insanity presented at trial was an alleged traumatic brain injury incurred by Mr. Worley in his fall. In an effort to meet their burden of proof, plaintiffs below and Appellants herein retained Dr. Joseph Whelan to attempt to establish that Mr. Worley was rendered incompetent from two separate causes, traumatic brain injury and encephalopathy. At trial, Dr. Whelan acknowledged that the encephalopathy did not effect Mr. Worley's mental state until approximately June 10th, 2000. Therefore, the only opinion presented by Dr. Whelan relevant to the issue at bar is whether Mr. Worley suffered a traumatic brain injury upon his fall which immediately rendered him "insane." For this reason, Appellants repeatedly argue that Mr. Worley suffered a loss of consciousness.

The medical records presented at trial do not establish a loss of consciousness. In fact, of the seven medical records that refer to the underlying event, only two suggest loss of consciousness. Moreover, even if it were true that Mr. Worley suffered a loss of consciousness, this fact alone would not establish traumatic brain injury. (See Defendants' Trial Exhibits). The medical records are completely devoid of medical support for a traumatic brain injury or incompetency immediately upon Appellant's fall or for several days thereafter. In fact, the defendants presented voluminous

medical records and exhibits evidencing Appellant's competency on May 28, 2000 through June 3, 2000. The pertinent medical evidence presented at trial includes:

- The first emergency care providers on the scene found Appellant responsive enough to rate him 14 of 15 on the Glasgow Coma Scale. That scale, as identified by the experts who testified at trial and the Merritts textbook on Neurology, is commonly used to measure the significance of brain injury. Of the numerous health care providers that administered the scale on Appellant, not one record perceived Appellant to have a even moderate brain injury, let alone a severe brain injury as alleged by appellants' expert.
- Appellant was transported to Raleigh General Hospital arriving around 9:02 a.m. During this time, Appellant was conscious and "complaining of pain all over." (Defendants' Trial Exhibit 1- EMT Report, May 28, 2000) (The EMT report was also attached as an Exhibit to plaintiffs' Petition).
- The Emergency Department Trauma Chart indicates that Appellant was **conscious** and informed doctors that he was taking medications for his arthritis. On his medical chart, Appellant's level of consciousness is noted as being both "alert and oriented." (Defendants' Trial Exhibit 9 - Emergency Department Trauma Chart, May 28, 2000).
- The Emergency Physician Record notes that Appellant had no evidence of head trauma. (Defendants' Exhibit 9 - Emergency Physician Record, May 28, 2000).
- On the same morning of the accident, Appellant scored a 15 (fifteen) on the Glasgow Coma Scale. Fifteen (15) is the best possible score an individual can obtain on the Glasgow Scale which is used by medical personal to rate the severity of head and other injuries based on reactions of the injured person. (Defendants' Trial Exhibit 9 - Emergency Department Trauma Chart, May 28, 2000).
- A physical examination by Dr. Michael Tornwall on May 28, 2000 revealed evidence of physical impairment, but "no neurological symptoms." Also, a CT scan revealed no evidence of a closed head injury. (Defendants' Trial Exhibit 9 - "History and Physical Examination" performed by Dr. Tornwall).
- On the evening May 28, 2000, Appellant's Glasgow scores were a fourteen (14) out of a possible fifteen (15). (Defendants' Trial Exhibit 9 - Neurological Flow Sheet).
- On May 28, 2000, Bill Mahaffy, a close friend and boss of Appellant, visited Mr. Worley at Raleigh General Hospital. Mr. Mahaffy testified that Appellant was in obvious physical pain but was able to carry on a normal conversation. Mr. Mahaffy further testified that Appellant made jokes about getting his pay docked while he was in the hospital, and specifically described the mechanism of his injury. Mr. Mahaffy's testimony was never disputed or rebutted during the bench trial. (See day 2 Trial Transcript, Pages 81-82).

- On May 29, 2000, Dr. Prakash Puranik reported in his consultation note that Appellant was "conscious, but in significant pain." Dr. Puranik further stated that Appellant was "cooperative and coherent." (Defendants' Trial Exhibit 9 - Consultation).
- On that same day, Appellant's level of consciousness was reported as "alert, oriented, [and] cooperative." (Defendants' Trial Exhibit 9 - Respiratory Care Assessment/ Reassessment).
- Appellant's Glasgow scores were again a fourteen (14) out of a possible fifteen (15) on this May 29, 2000. (Defendants' Trial Exhibit 9 - Neurological Flow Sheet).
- Dr. Deaconson, whose deposition is part of the record as Defendant's Exhibit 13, was one of Mr. Worley's treating physicians. He is Board Certified in General Surgery and Critical Care. Dr. Deaconson testified that if one of his patients was suffering from mental injury he would indicate that in the chart and refer the patient for a psychological or neuropsychological consult. (Defendants' Trial Exhibit 13 - Dr. Deaconson Deposition Transcript). He did **neither** in Mr. Worley's case, and did not note any such impairment for the entire time he treated him. He further indicated that he did not order a referral for a neurological consult because Mr. Worley did not have a traumatic brain injury. Dr. Deaconson cared for Mr. Worley from June 28, 2000 through July 10, 2000. During that time Dr. Deaconson allowed Mr. Worley to sign two informed consent documents and met with him on a daily basis. It is not plausible that Dr. Deaconson, and all of the other medical staff that cared for Mr. Worley during the entirety of his hospitalization, missed a significant mental impairment.
- Evidence was submitted that, at the outset of Appellant's hospitalization, on numerous occasions during Appellant's hospitalization, and a week before his discharge from the hospital, Appellant's Glasgow Coma Scale score was consistently high (14-15 and 15-15).

The weight of the evidence at trial heavily supported the fact that Mr. Worley was not insane during the first several days of his hospital stay. Due to complications resulting from treatment, namely an infection and sepsis from a central venous line which occurred towards the end of the first week, and a punctured liver from the mis-insertion of a chest tube that caused bile leakage into his body cavity occurred in the middle of his hospitalization, Mr. Worley became gravely ill during the middle period of his hospitalization. However, the lower court did not need to address these facts, just as it did not need to address the overwhelming evidence that Mr. Worley was not insane the week prior to his discharge.¹

¹ The defendants presented an alternative argument that if Appellant was competent one day between his injury and the day he was discharged from Raleigh General Hospital (July 10, 2000), then he failed to meet

2) **Although appellant may have lacked mental capacity between June 4 and June 27, 2000, the medical evidence shows that appellant was sane for the last twelve days of his hospital stay.**

Because the Circuit Court found that Mr. Worley was not insane at the time his cause of action accrued, it was irrelevant for the Court to consider his medical condition throughout the remainder of his hospital stay. However, the Appellants spend several pages in their brief mischaracterizing the evidence of insanity during the final days of Mr. Worley's hospitalization. Even if the lower Court had found that Mr. Worley was insane on the date of his injury, the medical evidence clearly shows that he was sane for the last several days of his hospital stay. The defendants below and Appellees herein submitted a plethora of evidence that Michael Worley was competent and sane not only at the outset of his hospitalization, but at the end of his hospitalization as well:

- On May 30, 2000, Mr. Worley's condition began to worsen. Dr. Cannon notes in his consultation note of that date that "He has been stable for 48 hours, however, this morning he has been worsening. . ." (See Plaintiffs' Petition Appendix A, p. 10).
- Dr. Deaconson's Discharge Summary indicates that Mr. Worley developed complications during his stay due to certain medical procedures. He had central venous line sepsis and had his liver punctured when a staff surgeon mistakenly inserted a chest tube above the diaphragm. (Defendants' Trial Exhibit 9 -Discharge Summary).
- Dr. Deaconson acted as the primary physician responsible for Mr. Worley's care from approximately June 28, 2000, through Appellant's discharge from Raleigh General Hospital on July 10, 2000. (Defendants' Trial Exhibit 13 - Deaconson Transcript, pgs 24, 25 and 29).
- While Dr. Deaconson was serving as the physician of record for Mr. Worley, he saw Appellant at least once per day. (Deaconson Tr. P. 29). During these daily visits, Dr. Deaconson would spend between ten (10) and fifteen (15) minutes with Appellant. (Deaconson Tr. P. 72). Regarding his discussions with Appellant, Dr. Deaconson testified that he would "talk with the patient [Worley] and ask him a barrage of questions, ... talk with family members who are there, ... talk with the nursing staff who are with them for the whole

the statute of limitations by that amount of time. Although this alternative argument turned out to be superfluous to the final analysis, Appellees would point out to this Court that the evidence presented at trial addressed Mr. Worley's mental status throughout the entirety of his hospitalization at Raleigh General Hospital.

shift, and get everybody's input and then embark on an examination and look at the lab values from that morning, and make any decision..." (Deaconson Tr. P. 72).

- On June 28, 2000, Mr. Worley informed Dr. Deaconson that he was well aware of his medical history. Mr. Worley told Dr. Deaconson that he had never had abdominal surgery before and had never been to the hospital, except for a concussion he suffered years ago when he fell on ice. Dr. Deaconson further noted that Mr. Worley was conversant and not in any distress. (Defendants' Trial Exhibit 9 - Consultation with Dr. Deaconson).
- Dr. Deaconson performed two (2) surgical procedures upon Mr. Worley for which he obtained written informed consent from him. (Plaintiffs' Trial Exhibit 2 - Informed Consent Forms).
- Prior to Mr. Worley going into surgery on June 28, 2000, it was noted that he was alert, calm, and apprehensive. (Defendants' Trial Exhibit 9 - Perioperative Report).
- Dr. Deaconson acknowledged Mr. Worley's competency on June 28, 2000 in the operative note for that surgery. Dr. Deaconson also testified that Appellant was "thoroughly counseled regarding the potential risk" of surgery. Further, he testified that Mr. Worley seemed to understand these risks and he gave informed consent. (Defendants' Trial Exhibit 13 - Deaconson Tr. P. 16-17).
- Dr. Deaconson testified that if he suspected Mr. Worley was suffering from a mental deficiency, he would have noted the same in his chart and ordered additional diagnostic studies or consultation with additional medical specialists. (Deaconson Tr. P. 50 - 52).
- On June 28, 2000, Mr. Worley also gave informed consent to have anesthesia administered. (Defendants' Trial Exhibit 9 - Raleigh General Hospital Consent to Administration of Anesthesia).
- Mr. Worley's level of consciousness was reported as "alert, oriented, [and] cooperative." (Defendants' Trial Exhibit 9 - Respiratory Care Assessment/ Reassessment).
- Throughout June 29, 2000, Mr. Worley was oriented to time, person, and place. (Defendants' Trial Exhibit 9 - Nursing Assessment and Med-Surg Shift Assessment).
- On June 30, 2000, Mr. Worley was thoroughly counseled regarding an up-coming surgical procedure to drain fluid from his lungs. During this time, Mr. Worley was alert and responsive to stimulation. (Defendants' Trial Exhibit 9 - Perioperative Report).
- Dr. Deaconson stated that Mr. Worley and his family understood the procedure and readily gave informed consent. (Defendants' Trial Exhibit 9 - Operative Report and Defendants' Trial Exhibit 13 - Deaconson Tr. P. 20).
- On July 2, 2000, Mr. Worley was reported as being alert and oriented to time, person, and place. (Defendants' Trial Exhibit 9 - Patient Care Notes).

- Throughout July 2, 2000 to July 3, 2000, Mr. Worley was alert and oriented to time, person, and place. He also scored a perfect fifteen (15) out of fifteen (15) on eight separate Glasgow evaluations. (Defendants' Exhibit 9 -Nursing Assessment for July 2-3, and July 3, 2000)).
- On July 3, 2000 at 11:50p.m., his level of consciousness was reported as being "alert, oriented, and cooperative." (Defendants' Trial Exhibit 9 - Respiratory Care Assessment/ Reassessment).
- Dr. Deaconson further testified that, "[his] initial impression is that he [Worley] was doing well and continued to do well between July 2 and July 7, 2000. I didn't notice a deterioration." (Defendants' Trial Exhibit 13 - Deaconson Tr. P. 36).
- On July 4, 2000, Mr Worley was assessed four times throughout the day. During each nursing evaluation he was oriented to time, person, and place. Also, he scored a perfect score of fifteen (15) on the Glasgow Scale. (Defendants' Trial Exhibit 9 -Nursing Assessment). His patient care notes on July 4, 2000, reported "no neurological deficits noted." (Defendants' Trial Exhibit 9 - Patient Care Notes).
- Mr. Worley's patient care notes on July 5, 2000, reported "no neurological deficits noted." (Defendants' Trial Exhibit 9 - Patient Care Notes). His level of consciousness was reported as being "alert, oriented, and cooperative." (Defendants' Trial Exhibit 9 - Respiratory Care Assessment/Reassessment).
- On July 6, 2000, Mr. Worley, on four separate occasions, was reported as being oriented to time, person, and place. Also, he received perfect scores of fifteen (15) on each Glasgow evaluation. (Defendants' Trial Exhibit 9 - Nursing Assessment).
- On July 7, 2000, Mr. Worley stated to his health care providers, "[I'm] ready to go to rehab center so I can get home." He also is alert and oriented and denies pain. (Defendants' Trial Exhibit 9 - Patient Care Notes).
- It was also observed that Mr. Worley was watching television with his son. Further, Appellant received perfect Glasgow Coma scores throughout the entire day. (Defendants' Exhibit 9 - Nursing Assessment).
- Mr. Worley's level of consciousness is reported as being alert, oriented, and cooperative. (Defendants' Trial Exhibit 9 - Respiratory Care Assessment/ Reassessment).
- In relation to the decision to discharge Mr. Worley from Raleigh General Hospital to HealthSouth, Dr. Deaconson testified that by July 7, 2000, he thought Appellant was a viable candidate for rehabilitation at HealthSouth. (Defendants' Trail Exhibit 13 - Deaconson Tr. P. 85 - 87).
- In addition, Dr. Deaconson testified that if Mr. Worley had mental issues prior to his discharge it would have been documented in his discharge summary. (Deaconson Tr. P. 88).

- On July 8, 2000, Mr. Worley received perfect Glasgow Coma Scores. (Defendants' Trial Exhibit 9 - Nursing Assessment).
- On July 9, 2000, Mr. Worley was noted as being alert, oriented and cooperative. (Defendants' Trial Exhibit 9 - Respiratory Care Assessment/ Reassessment).
- Mr. Worley's own trial exhibit demonstrates that there is absolutely no evidence that he was incompetent on July 9, 2000. (Plaintiffs' Trial Exhibit 1 - Calendar Exhibit) (This calendar was also attached as an exhibit to plaintiffs' Petition for Appeal.)
- On July 10, 2000, his discharge date, Mr. Worley was oriented to time, person and place. (Defendants' Trial Exhibit 9 - Med-Surg Shift Assessment).
- Mr. Worley's Discharge Summary listed eleven (11) principal diagnosis from the injuries that he sustained. Of all the injuries and diagnosis listed, there was no mention of "traumatic brain injury." (Defendants' Trial Exhibit 9 - Discharge Summary).

Even if the lower court had found that Mr. Worley was insane on the date of his injury, the evidence at trial clearly shows that he was sane for the last several days of his hospital stay. At the very least, Appellants would still have missed the statute of limitations by at least twelve (12) days because he was sane from June 28, 2000 to July 10, 2000. Appellants mislead this Court in arguing that Mr. Worley was insane during his entire hospital stay.

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MICHAEL WORLEY and
CYNTHIA WORLEY his wife,

Appellants,

v.

Appeal No. 33190

BECKLEY MECHANICAL, INC., et al.

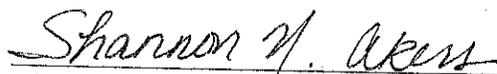
Appellees.

CERTIFICATE OF SERVICE

The undersigned, as counsel for West Virginia Sprinkler Inc., does hereby certify that a copy of the foregoing "**BRIEF OF APPELLEES**" was served this 22nd day of November, 2006, via United States mail, addressed to the following:

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