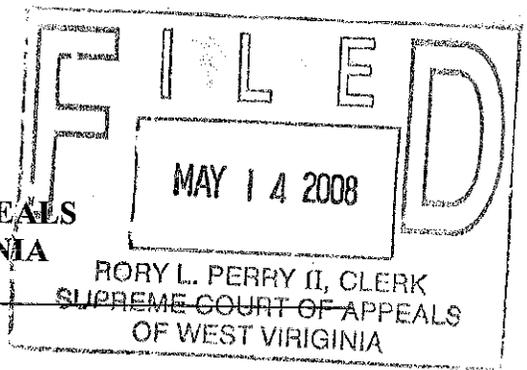


IN THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA



No. 33868

JEANNE CARTWRIGHT, as Guardian and parent of TIFFANY CARTWRIGHT, a
minor child,

Plaintiff Below, Appellant,

Vs.

CABELL HUNTINGTON HOSPITAL, INC.,

Defendant Below, Appellee.

BRIEF OF JEANNE CARTWRIGHT, APPELLANT

Brian Alan Prim, Esquire
PRIM LAW FIRM, PLLC.
30 Chase Drive
Hurricane, WV 25526
(304) 201-2425

Anthony J. D'Amico, Esquire
SAVINIS, D'AMICO & KANE, LLC.
707 Grant Street
Pittsburgh, PA 15219
(412) 227-6556

ASSIGNMENT OF ERROR

1. Whether a cause of action is a property interest for the purposes of constitutional due process.

The Circuit Court of Cabell County did not rule.

2. Whether the retroactive application of W.Va. Code §55-7B-9(g) to Tiffany Cartwright is a violation of constitutional due process

The Circuit Court of Cabell County did not rule.

3. Whether the West Virginia Legislature intended W. Va. Code §55-7B-9(g) to extinguish the vicarious liability cause of action presented in this case.

The Circuit Court of Cabell County held: Yes

I. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

Tiffany Cartwright's cause of action for vicarious medical negligence accrued as early as October 5, 1999. The West Virginia Legislature enacted a statute with an effective date of July 1, 2003 which, per the Circuit Court, revokes her cause of action.

Mrs. Jeanne Cartwright instituted a civil action on her daughter's behalf in April of 2003 in the Circuit Court of Cabell County, West Virginia against Dr. Carl McComas, a neurologist. The action was for damages based upon claimed acts of medical negligence during his 1999 care and treatment of Tiffany, who was four years old at the time. Plaintiff alleged the doctor deviated from the standard of care by failing to order a Magnetic Resonance Imaging ("MRI") study of the child's spine to evaluate a progressive onset of lower extremity paralysis. It was also alleged that the negligence of the doctor delayed the diagnosis and treatment of a hematoma in Tiffany's spine. The

delayed diagnosis and treatment deprived her of an opportunity for a complete reversal of her paralysis.

She was admitted to Cabell Huntington Hospital ("CHH"), by way of the emergency department, from October 5, 1999 through October 14, 1999 and was under the care of Dr. McComas. Plaintiff alleged, by an amended complaint in 2005, that CHH is liable for the negligence of Dr. McComas under a theory of vicarious, ostensible agency liability.

Tiffany, was properly treated in December of 1999 by another physician at another facility. The malformation was repaired, but it had compressed the spinal cord for a period of time long enough to cause permanent and irreversible damage. She now uses a wheel chair for most of her mobility.

Mrs. Cartwright was permitted to amend her complaint in 2005 to add Cabell Huntington Hospital, Inc. as a defendant. The matter proceeded through discovery and a trial by jury was scheduled for July 2, 2007. CHH moved for summary judgment on the theory that W.Va. Code §55-7B-9(g), which has an effective date of July 1, 2003, barred Mrs. Cartwright from any further pursuit of a theory of vicarious liability. Appellant opposed the motion based upon statutory and constitutional grounds. The Court granted summary judgment to CHH by Order of July 3, 2007, in which it passed on consideration of any constitutional issue. The Appellant has entered into a covenant not to sue with Dr. McComas, and now seeks review of the Circuit Court's entry of Summary Judgment concerning Cabell Huntington Hospital.

II. STATEMENT OF THE FACTS OF THE CASE

On October 5, 1999, Jeanne Cartwright brought her then four year old daughter, Tiffany Cartwright, to the Emergency Room of Cabell Huntington Hospital following an office visit with the child's pediatrician. The chief complaint at the time was progressive weakness of her legs, over the preceding few weeks, along with weakness of the trunk and incontinence. At first, Tiffany was seen in the hospital's emergency department. Thereafter, she was evaluated by the pediatricians on call at the hospital. The pediatricians felt that she may have been suffering from a neurological disorder known as Guillain Barre Syndrome and ordered a neurological consultation with Dr. McComas. Dr. McComas entered the case by virtue of a phone call from Cabell Huntington Hospital.

On October 5, 1999, Tiffany was admitted to Cabell Huntington Hospital under the care of Dr. McComas, in order to rule out Guillain Barre Syndrome. The standard of care required that the doctor include spinal cord lesion within his differential diagnosis and to order a Magnetic Resonance Imagery ("MRI") of the spine to determine if a lesion was compressing the spinal cord.

Tiffany remained in CHH from October 5, 1999 through October 16, 1999 under the care of Dr. McComas. During this admission, he treated her for Guillain Barre Syndrome, when in reality she was suffering from a bleeding vascular malformation that was compressing her spinal cord and causing paralysis. No MRI was utilized for Tiffany while she was under the care of Dr. McComas at CHH.

On November 8, 1999, Tiffany had an office visit with Dr. McComas. He determined, during this visit, that she was not suffering from Guillain Barre Syndrome

and ordered an MRI of her spine. The MRI, conducted on December 17, 1999, revealed a spinal cord lesion.

On December 29, 1999, the lesion was surgically resected at Columbus Children's Hospital. Plaintiff's expert witnesses testified, via depositions, that Tiffany was misdiagnosed at CHH. They further opined that the failure to use an MRI upon her admission to the hospital and the delay in repair negated the possibility of a complete recovery. Tiffany is, and will remain, paralyzed and incontinent for the rest of her life. It is asserted by plaintiff's experts that the delay in diagnosis and treatment of her condition caused Tiffany to lose a substantial chance to have a complete recovery from her paralysis.

The Appellant's attorneys certify that the facts alleged are faithfully represented and that they are accurately presented to the best of our ability pursuant to Rule 4(c) of the West Virginia Rules of Appellate Procedure.

POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW.

Standard of Review

"A circuit court's entry of summary judgment is reviewed *de novo*. Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). "Where the issue . . . is clearly a question of law or involving an interpretation of an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 W.E.2d 415 (1995).

1. A cause of action is a property interest protected by constitutional due process.

The negligent acts which placed Tiffany Cartwright in a wheel chair for the rest of her life occurred in Cabell Huntington Hospital during October and November of 1999.

She has had a right of redress via vicarious liability ever since Cabell Huntington Hospital selected her treating physician.

This Court has answered the issue in *Gibson v. Department of Highways*, where it was held that:

“ . . . when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision . . . is implicated. The term ‘vested right,’ as used in the certain remedy provision, means that an actual cause of action which was substantially affected existed at the time of the legislative enactment. The United States Supreme Court has acknowledged that an accrued cause of action is a vested property right and is protected by the guarantee of due process.” *Citing Gibbes v. Zimmerman*, 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342 (1933). *Gibson v. Department of Highways*, 185 W.Va. 214, 225, 406 S.E.2d 440 (1991).

Justice Davis, concurring in *Hinchman v. Gillette, et al.*, 2005 W.Va. (31760), 618 S.E.2d 387 (2005), contributed the following:

“It is provided in Article III, Section 17 of the state constitution that “[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, *shall have remedy by due course of law*[.]” (Emphasis supplied by Justice Davis.) The Certain Remedy Clause is a constitutional guarantee that all citizens have a right to seek redress for injuries in the courts of this state. *See* Syl. Pt. 8, *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920 (1988) (“It is beyond argument that the courts of this state are open to all and that parties in litigation should have access to their legal proceedings, W.Va. Const. , art. III, §17, and such access to court proceedings is also required as a part of due process, W.Va. Const., art. III, §10.”) *Hinchman*, at the 16th page. (Emphasis added.)

The United States Supreme Court has held that “a cause of action is a species of

Property protected by the Fourteenth Amendment's Due Process Clause.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422,428 (1982), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The *Logan* Court also noted that the “hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except ‘for cause.’” *Id.*, at 430. “[T]he types of interests protected as ‘property’ are varied and, as often as not, intangible, relating ‘to the whole domain of social and economic fact.’” *Id.* Tiffany Cartwright has provided no cause that would permit the removal of her property interest in a cause of action.

In a similar vein, the West Virginia Supreme Court has held “[for due process purposes,] “[a] ‘property interest’ includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.” Syllabus Point 4 of *Zaleski v. West Virginia Physicians Mutual Ins. Co.*, 2007 W.V.S.C. 33242-062707 (2007), citing Syllabus Point 3, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E. 2d 164 (1977). The *Zaleski* Court found a property right in the continuance of State sponsored medical liability insurance. The *Waite* Court found that a State civil service employee has a property interest in continued uninterrupted employment.

A substantive right to a worker's compensation claim has been granted the status of being a property right. *Blankenship v. Richardson*, 196 W.Va. 726, 474 S.E. 2d 726 (1996). Most relevant to Mrs. Cartwright's position is the Court's analysis in

Blankenship which summarized that:

“It is clear that, but for the application of W.Va. Code, 23-4-6(n)(1) [1995] to petitioner Ullom's request for reopening for consideration of PTD benefits, his request would, at the very least, have been considered and that, further, upon proper proof, may have been awarded.” *Blankenship* at pp. 738-739. [emphasis supplied].

The statutory provision in that case operated to retroactively do away with Mr. Ullom's claim by changing the rules for permanent total disability awards. His claim was filed three days after the effective date of the statute in question. *Id.*, at 732. Like the Claimant there, Mrs. Cartwright is seeking to have, at the very least, the opportunity to have the merits of her daughter's claim considered by a tribunal, and, upon proper proof, an award on her behalf. Tiffany Cartwright's cause of action and a substantial part of her future welfare were not merely limited nor procedurally burdened by the statute in question. Those rights were substantively extinguished by the fact that the Circuit Court of Cabell County declined to recognize a cause of action as a property right. The merits of her case against CHH are yet to have their substance reviewed by any tribunal.

This Court, in *Blankenship*, has held that due process is "the least frozen concept of our law – the least confined to history and the most absorptive of powerful social standards of a progressive society[.]" *Blankenship*, at 739 citing *Bowman v. Leverette*, 169 W. Va. 589,597, 289 S.E.2d 435, 440 (1982), quoting Justice Frankfurter's concurrence in *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585,591, 100 L.Ed. 891, 900 (1956). Justice McHugh concluded in *Blankenship* that "It is no strain upon the purpose of due process protection to conclude that the Legislature may not so narrow the avenues of justice so as to preclude the petitioner Ullom's consideration for PTD benefits." *Id.*, at 739.

Mrs. Cartwright seeks the same conclusion. It is no strain upon fundamental fairness to hold that the Legislature may not arbitrarily erase a four year old child's right of redress for a life altering injury. Tiffany Cartwright is going to spend the rest of her life wondering why Cabell Huntington Hospital assigned a physician to her who failed to

order a test that is widely accepted as the standard of care under the circumstances. Is she also fated to question the legislative pardon of liability of the hospital?

2. Retroactive application of West Virginia Code §55-7B-9(g) to Tiffany Cartwright is a violation of constitutional due process.

The legislature chose to do away with decades of common law regarding the vicarious liability of hospitals. The hospitals are to be lauded for their legislative victory which, in essence, overrules this Court. Whether the back of Tiffany Cartwright should bear the cost of that victory is a critical question. Appellant respectfully submits that, for the purposes of due process, the cause of action at the center of this case is a property right. In addition, the retroactive revocation of that property right is a violation, as applied to this case, of constitutional due process.

This Court has previously held that:

“ . . . legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the court, in the exercise of their undoubted authority, have made, for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would, in effect, sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the courts.” *State v. Harden*, 62 W. Va. 313, 351, 58 S.E. 715, 60 S.E. 394 (1907).

“It has been stated repeatedly that new legislation should not generally be construed to interfere with existing contracts, rights of action, suits, or vested property rights.” *Mildred L.M. v. John O.F.*, 193 W.Va 345, 352 fn. 10, 452 S.E.2d 436 (1994), citing *Landgraf v. USI Film Products* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). “[A] State cannot be permitted to defeat the constitutional prohibition against taking property with due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.” *Id.*

That final proposition has an especially poignant effect in the civil action of a minor. The legislature has chosen to provide minors a special status in regard to limitation periods for a medical liability cause of action. West Virginia Code §55-7B-4. A suit on behalf of Tiffany Cartwright could have commenced anytime prior to her twelfth birthday in 2007. The Circuit Court of Cabell County is, by its Order, saying that her right to confront the hospital via the theory of vicarious liability is not subject to due process because, retroactively, the property being taken never existed.

In a dissenting opinion, Justice Starcher has submitted that:

“Nevertheless, accepting arguendo the statutes as written, I believe that the circuit judge erred in deciding to apply the 2003 amendments to the Medical Professional Liability Act to the instant case. The petitioner – who alleges that her deceased child was the victim of medical malpractice in June 2001 – filed her case on June 9, 2003, and the statutory changes at issue did not take effect until July 1, 2003. It is a fundamental rule of statutory construction that statutory changes are presumed to apply prospectively only. *See* W.Va. Code 2-2-10(b) [1989]; Syllabus Point 3 *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E. 2d 178 (1980). Furthermore, constitutional due process protections generally preclude the retroactive application of a statute where to do so would impair an existing property right. *See, e.g., Mildred L.M. v. John O.F.*, 192 W.Va. 345, 351 n. 10, (1994) (“It has been stated repeatedly that new legislation should not generally be construed to interfere with existing contracts, rights of action, suits, or vested property rights.) Lastly, statutes that limit or are in derogation of the common law are to be given a narrow construction. *See, e.g., Syllabus Point 1, Kellar v. James*, 63 W.Va. 139, 59 S.E. 939 (1909) (“Statutes in derogation of the common law are strictly construed.”)

Appellant respectfully submits that the realm of fundamental fairness that forms due process should be substantially enlarged in this case due to Tiffany’s status as a minor. When the malpractice reform statute is applied to minors, it has a potential retroactive reach of at least ten years. There is no indication that the legislature intended such a result. One source has cautioned that “. . . if the legislature wishes to destroy

property rights retrospectively, it should speak clearly.” (Constitutional Law, Seventh Ed., p. 493 at fn. 42, Nowak & Rotunda, West Publishing, 2004).

The United States Supreme Court has noted that breadth of time of a retroactive statute is a “significant determinant” to be considered within a due process analysis. *Eastern Enterprises v. Apfel*, Syllabus Point 2 (c), 524 U.S. 598 (1998). Therein, the Court also noted the general proposition that “[r]etroactive legislation is generally disfavored. It presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transaction.” *Id.*, citing *General Motors Corp. v. Romein*, 503 U.S. 181, 191. In *Eastern*, the Court summarized:

“Although the Court has been hesitant to subject economic legislation to due process scrutiny as a general matter, this country’s law has harbored a singular distrust of retroactive statutes, and that distrust is reflected in this Court’s due process jurisprudence. For example, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, the Court held that due process requires an inquiry into whether a legislature acted in an arbitrary and irrational way when enacting a retroactive law. This formulation has been repeated in numerous recent cases, e.g., *United States v. Carlton*, 512 U.S. 26, 31, which reflect the recognition that retroactive lawmaking is a particular concern because of the legislative temptation to use it as a means of retribution against unpopular groups or individual, *Landgraf v. USI Film Products*, 511 U.S. 244, 266. Because change in the legal consequences of transactions long closed can destroy the reasonable certainty and security which are the very objects of property ownership, due process protection for property must be understood to incorporate the settled tradition against retroactive laws of great severity.” Syllabus Point 2(c).

As applied to Tiffany Cartwright, the statute in question reaches back almost four years to revoke the substantial right of redress of a four year old child. The fact that the statute, as applied to minors, could accomplish the same result over a span of at least ten years raises a glaring question as to whether the legislature anticipated such a result. Appellant respectfully submits that such ambiguity and vagueness rises to the level of being arbitrary and irrational, as the U. S. Supreme Court has cautioned.

3. The Legislature did not intend W.Va. Code §55-7B-9(g) to extinguish the accrued cause of action in this case.

The hospital relied exclusively upon §55-7B-9(g) which eliminated vicarious liability for a hospital when a non-employee doctor has liability coverage of at least one million dollars. This Court has reviewed that particular section in one case. In *Burless v. West Virginia University Hospital*, 215 W.Va. 765, 601 S.E. 2d 85 (2004) the Court suggested:

“The statute was enacted after the two causes of action at issue in this case accrued. Therefore, the statute has no application to our resolution of the instant claims.” *Id.*, at fn. 13. (Emphasis supplied)

Such a finding in this case would preserve the cause of action for the Appellant. The negligence in the two consolidated cases decided by the *Burless* Court occurred in 1998 and 1999. In *Burless* the Court has provided dicta that the statute is inapplicable to causes of action which accrued prior to the enactment of the statute. Appellant respectfully submits that the dicta should be made a holding so as to eliminate the present ambiguity.

It is well settled that “. . . a cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortuous overt acts or omissions cease.” Syllabus Point 11 of *Graham v. Beverage*, 211 W.Va. 466, 566 S.E.2d 603 (2002). In this case, the last acts occurred in December of 1999.

The Legislature established the effective date of §55-7B-9(g) by stating that it shall “apply to all causes of action alleging medical professional liability which are filed on or after the first day of July, two thousand three.” W.Va. Code §55-7B-10(b). That is a remarkably brief statement to be used retroactively for the elimination of all vicarious

liability claims on behalf of all minors in the event that the treating physician has a minimum amount of liability insurance. It is easy to infer that the Legislature perceived that it was reaching back two years, the general limitations period for a medical negligence case. It is respectfully submitted that the Legislature did not intend the elimination of Tiffany Cartwright's accrued cause of action.

The fundamental, substantive, constitutional right of redress has been taken from a child. In addition, it was taken across an expanse of time in excess of three and one-half years. By no means can it be said that the Legislature expressly intended such result. The hospital maintains that an implied result is absolutely apparent. Appellant disagrees.

The Court's recent holding in *Philips v. Larry's Drive-In Pharmacy, Inc.* is most applicable to the instant matter. 2007 WVSC 33194-06287. Therein, the Court found that the Medical Professional Liability Act ("MPLA") "alters the 'common law and statutory rights of our citizens to compensation for injury and death[.]' W.Va. Code, 55-7B-1. In other words, by its own terms, the entire MPLA is an act designed to be in derogation of the common law." *Philips*, p. 6. The Court held that the door of statutory construction is open when "the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Philips*, at p. 6, citing *Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 505 S.E. 2d 654, 659 (1998) (quoting *Hereford v. Meek*, 132 W. Va. 373, 386, 52 S.E. 2d 740, 747 (1949)). The *Philips* Court concluded that "the MPLA is in derogation of the common law and its provisions must be given a narrow construction." *Philips*, p. 7.

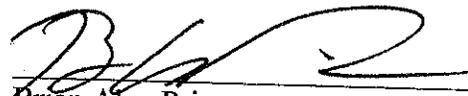
The ambiguity presented by this case is the chronological reach of the statute. Undoubtedly, there is no express language in W.Va. Code 55-7B-9(g) which considers the case of a minor. Reasonable minds are uncertain and disagree as to the reach of the section. A narrow construction of this derogative statute favors the Appellant.

The Legislature has provided extended limitations periods for minors. That extension is erased if the Circuit Court's boundless construction of the statute is permitted to stand.

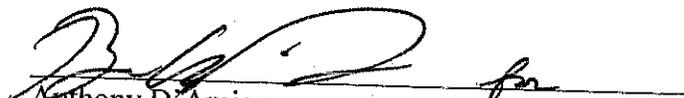
PRAYER FOR RELIEF

Appellant respectfully submits that the Order of the Circuit Court of Cabell County should be reversed and remanded for further proceedings.

JEANNE CARTWRIGHT, AS GUARDIAN
AND PARENT OF TIFFANY CARTWRIGHT,
A MINOR CHILD,
By Counsel,



Brian Alan Prim
Carl E. Hostler
PRIM LAW FIRM, PLLC
30 Chase Drive
Hurricane, WV 25526
304-201-2425



Anthony D'Amico
SAVINIS, D'AMICO & KANE, LLC.
707 Grant Street, Suite 3626
Pittsburgh, PA 15219

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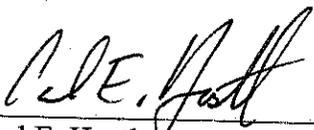
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CERTIFICATE OF SERVICE

I, Carl E. Hostler, certify that the foregoing BRIEF OF JEANNE CARTWRIGHT, APPELLANT was served by first class United States mail on May 14, 2008 upon the following:

David D. Amsbary, Esquire
BAILES, CRAIG & YON
P.O. Box 1926
Huntington, WV 25720-1926



Carl E. Hostler
PRIM LAW FIRM, PLLC
P.O. Box 430
Hurricane, WV 25526
304-201-2425