

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

APPELLANT'S REPLY BRIEF

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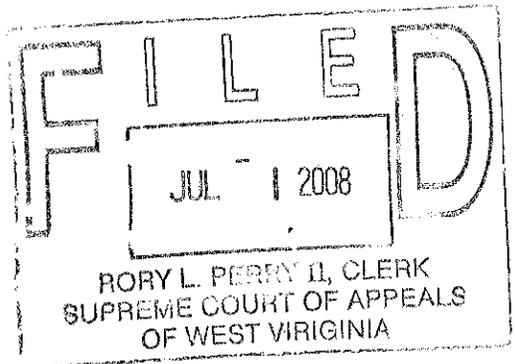


TABLE OF AUTHORITIES

(Mistakenly omitted from the initial brief)

Blankenship v. Richardson, 196 W.Va. 726, 474 S.E.2d 726 (1996)

Burless v. WVU Hospital, 215 W.Va 765, 601 S.E.2d 85 (2004)

Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995)

Eastern Enterprises v. Apfel, 524 U.S. 598 (1998)

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, 406 S.E.2d 440 (1991)

Graham v. Beverage, 211 W.Va. 466, 566 S.E.2d 603 (2002)

Hinchman v. Gillette, et al., 2005 W.Va. (31760), 618 S.E.2d 387 (2005)

Kellar v. James, 63 W.Va 139, 59 S.E. 939 (1909)

Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed. 2d 229 (1994)

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)

Mildred L.M. v. John O.F., 193 W.Va. 345, 452 S.E.2d 436 (1994)

Miller v. Stone, 216 W.Va. 379, 607 S.E.2d 485 (2004)

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994)

Philips v. Larry's Drive-In Pharmacy, Inc. 2007 WVSC 33194-06287

Shanholtz v. Monongahela Power Co., 165 W.Va. 305, 270 S.E.2d 178 (1980)

State v. Harden, 62 W.Va. 313, 58 S.E. 715, 60 S.E. 394 (1907)

Waite v. Civil Service Commission, 161 W.Va. 154, 241 S.E.2d 164 (1977)

Zaleski v. WV Physicians Mut. Ins. Co., 2007 W.V.S.C. 33242-062707

WV Code Sections:

55-7B-9(g)

55-7B-10(b)

55-7B-4

Jeanne Cartwright, the Plaintiff below and Appellant here, responds to the points of argument of Cabell Huntington Hospital, Defendant below and Appellee here, in the following manner:

A. TIFFANY CARTWRIGHT WAS DENIED THE CONSTITUTIONAL RIGHT OF REDRESS BY OPERATION OF THE STATUTE.

Cabell Huntington Hospital (“CHH”) relies upon the Federal District Court of Kansas to contend that Tiffany Cartwright’s position is probably a property interest, but not one worthy of a “constitutional label.” Citing, *Resolution Trust Corp. v. Fleischer*, 862 F. Supp 309 (1994). As applied to this case, the matter is easily distinguished. The District Judge interpreted the state law of Kansas as it pertained to various state common law actions brought by the Resolution Trust Corporation in its efforts to recover sums from the principle agents of failed savings and loan institutions. The Kansas Legislature enacted retroactive laws in an effort to eliminate many of the claims. The Federal District Court recognized a wide variance of authority. For instance, “in *Greyhound Food Management, Inc. v. City of Dayton*, 653 F.Supp. 1207 (SD Ohio 1986) the district court, interpreting Ohio law, found that upon the occurrence of an injury, a person acquires a vested right in those causes of action arising out of the injury under the state law applicable at that time.” *Resolution Trust Corp.* at p. 8. (Emphasis supplied). The Court concluded by certifying the questions presented to the Kansas Supreme Court. It is difficult to understand how the Hospital’s position on the case has any persuasive value.

CHH is asking the Court to ignore its holdings, as noted in the Appellant’s Brief, in *Gibson v. Department of Highways*, 185 W.Va. 214, 225, 406 S.E.2d 440 (1991) which cited the United States Supreme Court in *Gibbes v. Zimmerman*, 290 U.S. 326, 54

S. Ct. 140, 78 L.Ed 342 (1933). “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.” *Gibson*, at 185 W.Va. 225.

B. RETROACTIVE APPLICATION OF WEST VIRGINIA CODE §55-7B-9(g) IS A VIOLATION OF CONSTITUTIONAL DUE PROCESS

1. Appellant’s right of redress is a constitutionally protected property interest.

The Hospital avers that Tiffany Cartwright has no property interest and that §55-7B-9(g) is purely remedial. Based upon that, it contends that “the net effect of ... the amendments only reduce Appellant’s remedy; they do not substantively destroy her basic rights.” This Court has clearly held the entire MPLA to be derogative in character and subject to narrow construction. *Philips v. Larry’s Drive-In Pharmacy, Inc.*, 2007 WVSC 33194-06287, p. 7.

For reasons previously cited in this document and the Appellant’s Brief, it is respectfully submitted that Tiffany Cartwright’s vested and constitutionally protected property interest in an accrued cause of action is well established. The net effect of the Circuit Court’s grant of summary judgment to the Hospital is that Appellant’s remedy is “reduced” to zero. In 1999, Tiffany Cartwright accrued causes of action against Cabell Huntington Hospital and Dr. Carl McComas. By operation of the retroactive statute in question, the Circuit Court took her case against the Hospital away from a jury, away from mediation and erased any recovery she may have. No trier of fact has ever heard the merits of the claim against CHH on the theory of ostensible liability. The Court did

so on the grounds that the statute retroactively applied to any cause of action filed after July 1, 2003. Her cause of action was eliminated.

Redress is generally defined as “[s]atisfaction for an injury or damages sustained. Damages or equitable relief.” Black’s Law Dictionary, Sixth Edition (Nolan & Nolan-Haley, West Publishing 1990). Such satisfaction is not to be achieved without access to a trier of fact.

2. The West Virginia Legislature extinguished Tiffany Cartwright’s claim of vicarious liability against Cabell Huntington Hospital.

The Hospital contends that the grant of summary judgment “did not extinguish Appellant’s cause of action against the hospital as she alleges: it merely limited, at the margins, Appellant’s ability to see redress for the claim of ostensible agency.” Tiffany Cartwright accrued a constitutionally protected cause of action in 1999 against the Hospital on the theory of ostensible agency because the doctor that the Hospital chose for her changed her life adversely and forever. The Circuit Court ruled that the matter could not be pursued because of legislative enactments in 2003. Zero is zero. There were no imaginary limitations at the margins.

3. The West Virginia Legislature has not expressed a clear intention.

As noted in the Appellant’s brief, WV Code is vague as to the chronological reach to accrued actions. WV Code §55-7B-4(b) provides a limitation period to minors that is enhanced beyond the norm of two years. Specifically, it provided Tiffany Cartwright, who was four years old at the time of injury, a period of time until her twelfth birthday to file suit against a health care provider. No specific statement of legislative policy regarding such enhancement is known to this writer.

4. Protection of Cabell Huntington Hospital is not the only criteria of a rational basis analysis.

Adequate compensation for victims of malpractice is one of the criteria established by the legislature. WV Code §55-7B-1. The retroactive application of the statute to a minor defies reason. On the one hand, a minor is protected by enhanced limitation periods. On the other, her claim is retroactively erased. Tiffany Cartwright did not have the benefit of lobbyists, and now this Court has the opportunity to provide her the due process of a reasoned society. There are no data present in this matter to indicate that the Legislature considered premium costs concerning the inclusion of minors in the statute as opposed to excluding them. Without such facts, the reasoning behind the statute as applied to this case is at least vague. Would physicians and hospitals have run for the border unless the reach of the derogative statute applied to minors? We have no indication.

C. THE WEST VIRGINIA LEGISLATURE DID NOT CLEARLY INTEND TO EXTINGUISH THE ACCRUED CAUSE OF ACTION IN THIS CASE.

This Court has clearly held the MPLA to be “in derogation of the common law and its provisions must be given a narrow construction.” *Philips v. Larry’s Drive-In Pharmacy, Inc.*, 2007 WVSC 33194-06287, p. 7. Tiffany Cartwright’s prosecution of her case to this point is obvious proof that the act alters the common law and statutory rights of citizens to compensation for injury and death. Her mobility is challenged and severely limited due to the acts and omissions of the physician that Cabell Huntington Hospital chose for her. A shallow application of the act acquits the hospital.

The obligatory and narrow construction of the statute reveals that the Legislature provided no clear intention to erase the case presented. We have no indication that

premium costs of the inclusion of minors in the reach of the statute were considered. Therefore, the rational basis, as applied to this case, has to come into serious question. The lobbyists for the hospital industry obviously had great sway, and perhaps haste, in arranging the language of the statute. Now the industry wants Tiffany Cartwright to pay for a lack of clarity. She respectfully asks this Court to give credence to the theory 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). Had the Legislature enacted a law that referred to all cases filed regardless of accrual date, then there would be no question. Then it could be said that they spoke clearly in their retroactive destruction of property rights.

The Appellant is cognizant of the Hospital’s reliance upon *Elmore v. Valley Hospital*, 220 W.Va. 154, 640 S.E.2d 217 (2005); *Miller v. Stone*, 216 W.Va. 379, 607 S.E. 2d 485 (2004); and, *Elam v. Medical Assurance*, 216 W.Va. 459, 607, S.E.2d 788 (2004). It should be noted that the three cases are *Per Curium* decisions. The Hospital also relies upon *Lewis v. Canaan Valley Resort, Inc.*, 185 W.Va. 684, 408 S.E.2d 634 (1991). Mrs. Cartwright will distinguish those cases in the following paragraphs.

Cabell Huntington’s reliance upon *Miller* to support retroactive application of MPLA III is misplaced. In that case, the Court retroactively applied the statute to an accrued cause of action, but the holding did not extinguish Plaintiff’s cause of action, which is what happened to Tiffany Cartwright. It is not asserted that retroactive application to an accrued cause of action is unconstitutional in all instances. Rather, it is asserted that the Circuit Court’s retroactive application of the statute in this case was unconstitutional because it eliminated the accrued viable cause of action.

Likewise, *Elmore* is distinguished because it contemplates procedures necessary prior to the filing of a complaint. The result of the case did not erase an entire cause of action. The citations referenced by the Appellee merely parrot the statute without any reference to issues of retroactivity. In that case, the Circuit Court entered Summary Judgment in favor of the defendant doctor due to the plaintiff's failure to comply with pre-suit notice and the certificate of merit. The Court reversed the entry of Summary Judgment and remanded to the Circuit Court finding that the certificate of merit is not intended to restrict or deny citizens' access to the courts.

Since *Elmore* does not address the issue of whether retroactive application of MPLA II or III which would extinguish an accrued viable cause of action violates the Constitution, it has no application to this case. As previously stated, Mrs. Cartwright does not assert that retroactive application to an accrued cause of action is unconstitutional in all instances, i.e., maximum recoverable damages. Rather, retroactive application in this case was unconstitutional because it extinguished a vested right of redress.

Elam is most easily distinguished because it involves a bad faith claim by a plaintiff which accrued after the enactment of the statute which eliminates such a claim. In addition, there was apparently no constitutional issue raised by the plaintiff / appellant in that case.

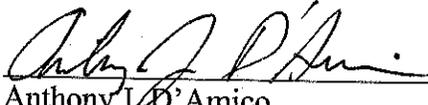
Cabell Huntington's reliance upon *Lewis* is misplaced inasmuch as the case deals with the prospective application of legislation which deprives persons of recognized remedies. The Court held that the West Virginia Skiing Responsibility Act, W.Va. Code, 20-3A-1, *et seq.* of 1984 did not violate the West Virginia Constitution as applied to a

skiing injury which occurred in December of 1987. Inasmuch as the issue before the Court is the retroactive application of legislative enactments which deprive persons of the right of redress, *Lewis* has no application to the matter at bar.

CONCLUSION

Appellant respectfully submits that the ruling granting summary judgment in favor of Cabell Huntington Hospital should be reversed and remanded for the purpose of trial of the issue of the ostensible liability of the Hospital.

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CERTIFICATE OF SERVICE

I, Carl E. Hostler, certify that the foregoing APPELLANT'S REPLY BRIEF was served by first class United States mail on July 2, 2008 upon the following:

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