

No. 35629

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

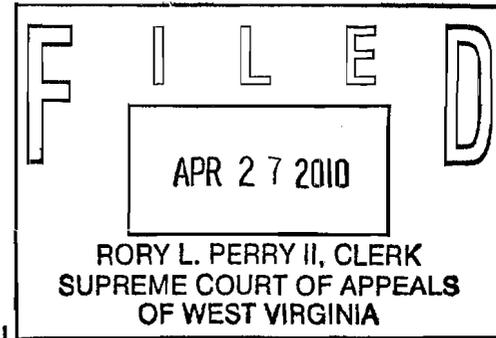
STATE EX REL. MARY ALIFF,
AS GUARDIAN AND NEXT FRIEND
OF SARAH ALIFF, AN INFANT,

Petitioner,

v.

HONORABLE DAVID M. PANCAKE,
JUDGE OF THE CIRCUIT COURT OF
CABELL COUNTY,

Respondent



From the Circuit Court of
Cabell County, West Virginia
Civil Action No. 09-C-0252

VERIFIED PETITION FOR WRIT OF MANDAMUS

STEPHEN B. FARMER
West Virginia State Bar No. 1165
R. CHAD DUFFIELD
West Virginia State Bar No. 9583
FARMER, CLINE & CAMPBELL, PLLC
746 Myrtle Road (25314)
Post Office Box 3842
Charleston, West Virginia 25338
(304) 346-5990

Counsel for Petitioner

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VERIFIED PETITION FOR WRIT OF MANDAMUS

NOW COMES the Petitioner, Mary Aliff, Guardian and Next Friend of Sarah Aliff, an infant, and seeks a Writ of Mandamus requiring the Respondent, the Honorable David M. Pancake, Circuit Judge of Cabell County, to appoint a guardian *ad litem* for the minor child, Sarah Aliff, and to set a hearing on the Petitioner's previously filed "Verified Petition and Application of Mary Aliff, Parent and Next Friend of Sarah Aliff, an Infant, to Settle a Personal Injury Claim" (hereinafter "Verified Petition"). The Verified Petition was filed in Cabell County Circuit Court on April 1, 2009 and was assigned civil action number 09-C-0252. Despite being filed more than twelve (12) months ago, the Respondent has failed to discharge his mandatory and nondiscretionary duty, as set forth in

West Virginia Code, §44-10-14, to act upon the Verified Petition and therefore, mandamus should be granted as a matter of right.

This Honorable Court has original jurisdiction in this matter pursuant to Article VIII, § 3 of the Constitution of West Virginia, *West Virginia Code*, §§51-1-3, 53-1-3, and Rule 14 of the *West Virginia Rules of Appellate Procedure*.

MEMORANDUM OF LAW CITING RELEVANT AUTHORITIES

I. STATEMENT OF FACTS AND BACKGROUND

Petitioner Mary Aliff is the natural mother of the infant, Sarah Aliff (hereinafter “Sarah”). On March 3, 2008, while Sarah was just two years of age, she was attacked by a German Shepherd dog while playing within the confines of the Petitioner’s yard. As a result of the attack, Sarah suffered multiple injuries including bites, abrasions and a lacerated and partially severed left ear that required surgical repair. At the recommendation of her treating doctor, Sarah was evaluated by a plastic surgeon who opined that some of the damage to Sarah’s left ear was permanent, but that she would greatly benefit from three (3) reconstruction surgeries, at a total cost of Forty Nine Thousand Dollars (\$49,000.00). The surgeries cannot be undertaken until Sarah’s ear reaches adult size, which should occur between the ages of six (6) and eight (8).

The dog that attacked Sarah was owned by Petitioner’s neighbors, Charles and Kimberly Spears (hereinafter “Spears”). At the time of the attack, the Spears were insured by State Farm Insurance Companies (hereinafter “State Farm”). Petitioner, through counsel, filed a claim on behalf of Sarah with State Farm. In an attempt to settle Sarah’s claim, State Farm offered the full policy limits of the Spears’ liability insurance policy, which was Three Hundred Thousand Dollars (\$300,000.00), as well as full policy limits of the medical payments coverage provided by the policy,

which was Five Thousand Dollars (\$5,000.00). The Petitioner, on behalf of Sarah, tentatively accepted the substantial policy limits settlement offer, pending Court approval as required by *West Virginia Code*, §44-10-14, which is referred to as the *Minor Settlement Proceedings Reform Act*.

On April 1, 2009, and in accordance with the *Minor Settlement Proceedings Reform Act*, Petitioner filed her “Verified Petition” which requested that the Respondent approve the settlement and the proposed distribution of settlement proceeds. See “*Verified Petition and Application of Mary Aliff, Parent and Next Friend of Sarah Aliff, an Infant, to Settle a Personal Injury Claim*,” Ex. A. Specifically, if the settlement was approved and after payment of the DHHR/Medicaid subrogation lien and attorney fees and expenses, Two-Hundred, Twenty-Eight Thousand, Seventy-Four Dollars and Nineteen Cents (\$228,074.19) would remain available for placement into a federally insured, interest bearing trust account for Sarah’s future benefit, as required by *West Virginia Code*, §44-10-14(g)(4). The civil action was assigned to the Respondent, Judge David M. Pancake, Circuit Judge of Cabell County.

Along with the Verified Petition, the Petitioner’s counsel provided the Respondent with a proposed “*Order Appointing Guardian Ad Litem and Setting a Date for a Hearing on the Verified Petition*” (hereinafter “Order”). See *Order*, Ex. B. The proposed Order provided the Court with a convenient and efficient method to comply with the Respondent’s duties, pursuant to *West Virginia Code*, §§44-10-14(d) and 44-10-14(e), which specifically requires the Court to appoint a guardian *ad litem* and set the matter for a hearing.

Despite the fact that the Verified Petition and proposed Order were filed and submitted to the Respondent more than twelve (12) months ago, the Respondent has not appointed a guardian *ad litem* or set a hearing date in the matter. Thus, the tentative settlement has not been approved by the

Court, no trust account has been established for Sarah's future benefit, and all interest the settlement monies could have earned in the past twelve (12) months is lost.

Since the filing of the Verified Petition, Petitioner's counsel's office has contacted the Respondent's office by phone on sixteen (16) different occasions.¹ On each occasion, Petitioner's counsel's office requested a hearing date. Each time, the Court's office indicated that the Respondent had been ill, that a backlog of cases that needed hearing dates existed, and that the Court had not set a hearing date in this matter. In addition to the phone calls, Petitioner's counsel wrote four (4) letters to the Respondent, requesting that the Court appoint a guardian *ad litem* and set the matter for a hearing. *See Letters*², Ex. C. The correspondence reminded the Court that because the settlement had not been approved, the settlement monies were not gaining the interest they otherwise could, if the Court approved the settlement and directed the settlement monies be placed in trust. *See Letters*, Ex. C. Despite the numerous phone calls, letters, and the passage of more than twelve (12) months, the Respondent has failed to appoint a guardian *ad litem* and set a hearing date.

II. STANDARD OF REVIEW

"Mandamus lies to require the discharge by a public officer of a nondiscretionary duty." Syl. pt. 3, State ex rel. Greenbrier County Airport Auth. v. Hanna, 151 W.Va. 479, 153 S.E.2d 284 (1967). A "writ of mandamus will not issue unless three elements co-exist: (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which

¹ Specifically, Petitioner's counsel called the Court's office requesting hearing dates on April 10, 24, May 7, 11, 26, June 12, 24, July 23, August 14, September 16, October 14, 15, November 4, 2009, and December 9, 2009, and January 13, and March 17, 2010.

² Exhibit C contains letters dated April 28, October 8, and November 6, 2009, and February 15, 2010.

the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syl. pt. 2, State ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969).

III. ARGUMENT

A WRIT OF MANDAMUS SHOULD BE ISSUED AS THE PETITIONER HAS A CLEAR LEGAL RIGHT TO A HEARING, RESPONDENT HAS A NONDISCRETIONARY DUTY TO SET A HEARING, AND NO OTHER LEGAL REMEDY EXISTS

A. Petitioner has a clear legal right to have a guardian *ad litem* appointed and a hearing on her Verified Petition.

The *Minor Settlement Proceedings Reform Act*, codified in *West Virginia Code* § 44-10-14, provides the framework for settling a personal injury claim of an infant or minor who is under eighteen (18) years of age. The *Act* provides that a parent, guardian, or a next friend of an injured infant or minor has the right to negotiate a settlement of the injury claim and to thereafter file a petition in circuit court where the child resides, asking the Court to approve the settlement. *See W.Va. Code*, §44-10-14(a), (b), and (c). After filing the verified petition, the Act states that the court “shall” appoint a guardian *ad litem* for the child and “shall” set a hearing date, at which time the court must determine if the settlement is fair, reasonable, and in the minor’s best interests. *See W.Va. Code*, §44-10-14(d) and (e).

As required, Petitioner negotiated a tentative settlement of Sarah’s claim and filed a Verified Petition. Accordingly, the Petitioner complied with her duties and has a legal right to have a guardian *ad litem* appointed, and a legal right to a hearing. Thus, Petitioner has satisfied the first requirement for the issuance of a writ of mandamus by demonstrating that she has a legal right to the relief she is requesting. *See Syl. pt. 2, State ex rel. Kucera*, 153 W.Va. 538, 170 S.E.2d 367.

B. Respondent has a legal duty to appoint a guardian *ad litem* and set a hearing.

Upon the filing of a verified petition, the *Minor Settlement Proceedings Reform Act* imposes a mandatory and nondiscretionary duty upon the Respondent to appoint a guardian *ad litem* and set a hearing on the verified petition. See *West Virginia Code*, §44-10-14(d) and (e)(the Court “shall” appoint a guardian *ad litem* and “shall” set a hearing). Despite the Respondent’s duties, and despite the Petitioner’s multiple requests that he appoint a guardian *ad litem* and set a hearing, the Respondent has taken no action in this matter.

While neither the *Minor Settlement Proceedings Reform Act* nor the *West Virginia Trial Court Rules* set a specific time period for when the Court must set a hearing in this matter, most courts set these matters for a hearing within a few weeks or months, and certainly within a year. Further, the *Code of Judicial Conduct* provides that “[a] judge shall dispose of all judicial matters promptly, efficiently, and fairly.” See Canon 3B(8), *Code of Judicial Conduct*. The Respondent’s handling of this matter has been anything but prompt or efficient. Further, the delay is unfair to the injured child, Sarah, who, in the event the settlement is approved, has lost more than a year’s worth of interest on a substantial amount of settlement monies. Accordingly, the Petitioner has satisfied the second requirement for the issuance of a writ of mandamus by demonstrating that the Respondent has a legal duty to act. See Syl. pt. 2, *State ex rel. Kucera*, 153 W.Va. 538, 170 S.E.2d 367.

C. Petitioner has no other adequate means of relief.

The *Minor Settlement Proceedings Reform Act* requires the Petitioner to file her Verified Petition in the County in which the child resides. See *W.Va. Code*, §44-10-14(b). Accordingly, Cabell County is the only appropriate venue for this action. Further, no order has been entered regarding this matter, and thus, the Petitioner does not have the ability to file a petition for appeal.

Therefore, Petitioner has no other means of relief available to her, other than to seek an order from this Court requiring the Respondent to act. Accordingly, the Petitioner has satisfied the third and final requirement for the issuance of a writ of mandamus. See Syl. pt. 2, State ex rel. Kucera, 153 W.Va. 538, 170 S.E.2d 367.

The Petitioner, by filing this Petition, in no manner wishes to criticize or disparage the Respondent, who is undoubtedly qualified to preside over this matter. Further, the Petitioner is sensitive to the fact that the Respondent indicated that he was ill and had fallen behind in setting these matters for hearing. However, the Petitioner has taken all other reasonable actions in an attempt to resolve this issue, without filing this Petitioner for Writ of Mandamus. However, at this point, the Respondent refuses to act and the Petitioner has no other means of relief available to her. Further, the unreasonable delay is causing the child to lose interest that the settlement monies could be gaining if the settlement was approved and the monies were placed into an appropriate trust account, as required by *West Virginia Code*, §44-10-14(g)(4).

IV. RELIEF REQUESTED

WHEREFORE, the Petitioner respectfully requests this Court to issue a rule against the Respondent to show cause why a Writ of Mandamus should not be issued against him, requiring the Respondent to appoint a guardian *ad litem* and set a hearing on the Verified Petition filed in the underlying matter.

MARY ALIFF, as Guardian and next Friend of
Sarah Aliff, an Infant,

Petitioner,

By Counsel:



STEPHEN B. FARMER (W. Va. State Bar No. 1165)

R. CHAD DUFFIELD (W. Va. State Bar No. 9583)

FARMER, CLINE & CAMPBELL, PLLC

746 Myrtle Road (25314)

Post Office Box 3842

Charleston, West Virginia 25338

(304) 346-5990

Counsel for the Petitioner

No. _____

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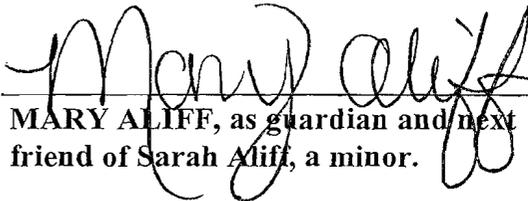
Respondent.

From the Circuit Court of
Cabell County, West Virginia
Civil Action No. 09-C-0252

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF CABELL, to-wit:

I, Mary Aliff, as Guardian and Next Friend of Sarah Aliff, an infant, after first being duly sworn, avers and says that I am the Petitioner in the foregoing civil action and that as such, I have read the foregoing "Petition for Writ of Mandamus" and that the Petition provided to the Court is true, to the best of my knowledge and belief.



MARY ALIFF, as guardian and next
friend of Sarah Aliff, a minor.

Taken, sworn to, and subscribed before the undersigned authority this 23 day of April, 2010.

My commission expires Sept 7, 2017


NOTARY PUBLIC



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MEMORANDUM OF NAMES AND ADDRESSES

Pursuant to Rule 14(a) of the *West Virginia Rules of Appellate Procedure*, Petitioner submits the following memorandum of names and addresses of persons upon whom the rule to show cause, if granted, should be served:

Petitioner: Mary Aliff, as Guardian and next Friend of Sarah Aliff, a Infant

Counsel: Stephen B. Farmer, Esq.
R. Chad Duffield, Esq.
Farmer, Cline & Campbell, PLLC
746 Myrtle Road (25314)
Post Office Box 3842
Charleston, West Virginia 25338
(304) 346-5990

Respondent: The Honorable David M. Pancake, Judge
Cabell County Circuit Court
Cabell County Courthouse
750 5th Avenue, Room 217
Huntington, West Virginia 25701
(304) 526-8612

Counsel: Attorney General Darrell V. McGraw, Jr.
Capitol Complex, Building 1, Room E26
Charleston, West Virginia 25305
(304) 558-2021

Counsel: W. Joseph Bronosky, Esq.
Campbell Woods, PLLC
517 9th Street, Suite 1000
Post Office Box 1835
Huntington, West Virginia 25719-1835
(304) 529-2391

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ADDENDUM OF EXHIBITS

- Exhibit A Verified Petition and Application of Mary Aliff, Parent and Next Friend of Sarah Aliff, an Infant, to Settle a Personal Injury Claim (exhibits omitted) (9 pages)
- Exhibit B *Proposed* Order Appointing a Guardian Ad Litem and Setting a Date for a Hearing on the Verified Petition (2 pages)
- Exhibit C Letters dated April 27, October 8, and November 6, 2009, and February 15, 2010 (exhibits omitted)(4 pages)

EXHIBITS
ON
FILE IN THE
CLERK'S OFFICE