

# **Workman, J., Dissenting Opinion, Case No.23869 Brenda Pinnington v. Robert S. Bear, D.O., et al.**

No. 23869 - Brenda Pennington, Executrix of the Estate of William Pennington, v. Robert S. Bear, D.O.; Bluefield Regional Medical Center, Inc., a non-profit West Virginia corporation; Bluefield Health Systems, Inc., a non-profit West Virginia corporation; and Professional Imaging, Inc., a West Virginia corporation

Workman, Justice, dissenting:

I respectfully dissent from the majority because an unjust and unnecessary result has been reached that clearly violates established principles of public policy that favor recovery where persons are injured by the negligence of others. The majority properly recognized the exception established in Miller v. Romero, 186 W. Va. 523, 413 S.E.2d 178 (1991), that permits a tolling of the two-year period required for filing wrongful death actions pursuant to West Virginia Code § 55-7-6 (1994) "where evidence of fraud, misrepresentation, or concealment of material facts is presented." 186 W. Va. at 528, 413 S.E.2d at 183. The majority goes astray, however, in reaching the conclusion that the fraud or concealment must have been that of the entity whom the plaintiff seeks to join as a party.

The majority acknowledges that "at the evidentiary hearing, the appellant produced evidence of fraudulent concealment . . . against BRMC." While the circuit court correctly concluded that the fraud allegedly committed by BRMC could not be imputed to Professional Imaging, the law does not require such imputation. As Justice Cleckley elucidated in Harrison v. Davis, 197 W. Va. 651, 478 S.E.2d 104 (1996), "an extension of the statutory filing period for wrongful death claims requires an affirmative act of fraud,

misrepresentation, or concealment of material facts by the named defendants." Id. at 661, 478 S.E.2d at 114 (emphasis supplied). That is exactly what is alleged to have occurred in this case. BRMW, a named defendant, is the entity alleged to have committed fraudulent acts of concealment with regard to the lung scan.

What the majority has sanctioned is exactly the type of conduct that this Court in Miller sought to protect against. Miller anticipated those cases where, through fraudulent acts of concealment, a plaintiff could be denied a cause of action that he/she would otherwise have had. In this case, the alleged acts of BRMW in concealing the existence of a lung scan have served to prevent Appellant from including Professional Imaging as a defendant and permitting Appellant to proceed on her theory that an employee of Professional Imaging, Dr. Aycoth, failed to properly read a lung scan showing a high degree of probability of pulmonary embolus. The exception crafted in Miller has thus been stripped of its very purpose--to avoid the "intolerable situation" created by the "conceal[ment of] malpractice from the decedent's representatives." 186 W. Va. at 527, 413 S.E.2d at 182. Neither Miller nor Harrison indicate that the fraud has to have been committed by the person or corporation whom the plaintiff is attempting to include as a party under tolling principles.

We note additionally that although the record does not reflect that an indemnification agreement exists between BRMW and Professional Imaging, in other cases the existence of an indemnification agreement would result in an obvious benefit to the concealing party where an indemnitee is prevented from being added as a party through acts similar to those alleged in this case. Such could also be true in the instant case. For example, if the plaintiff/Appellant proceeds against BRMW on the theory of negligent selection of Professional Imaging, or some other theory of agency, then it is possible, under principles of joint and several liability, that the hospital could also benefit by the refusal to permit Appellant to amend her complaint to name Professional Imaging as a defendant.

Lastly, in a scenario such as the one presented here, under the majority's interpretation, the plaintiff should be able to explore a civil action for

damages for fraud. To deny her the opportunity to develop the facts surrounding the possible fraud and to include all the parties who participated directly or indirectly in that fraud would wrongly result in shielding potentially responsible entities from liability for the critical acts of concealment at issue. After all, the impetus for this Court's ruling in Miller was to prevent acts of concealment from being used to bar malpractice suits in the interest of advancing the "strong public policy of this State that persons injured by the negligence of another should be able to recover in tort." Id. (quoting Paul v. Nat'l Life Ins. Co., 177 W. Va. 427, 433, 352 S.E.2d 550, 556 (1986)). The result reached by the majority clearly does not serve this longstanding laudable objective.