No. 25-ICA-72

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Adrian Osborne
Plaintiff Below, Petitioner

v.

Kevin Mace, Montana Boyce, United Hospital Center, Inc., and West Virginia University Board of Governors
Defendants Below, Respondents

On Appeal From the
Circuit Court of Harrison County, West Virginia
The Honorable D. Andrew McMunn
(Civil Action No. 24-C-231)

BRIEF IN SUPPORT OF PETITION FOR APPEAL

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ASSIGNMENTS OF ERROR

1. The Circuit Court committed reversible error when it dismissed Petitioner's lawsuit which was timely filed within two years of Petitioner reaching the age of eighteen (18) as provided for in W. Va. Code § 55-2-15.

2. The Circuit Court committed reversible error when it failed to conclude that W. Va. Code § 55-7B-4 violated the equal protection Clause found in Section III of Article X of the West Virginia Constitution in its application to Petitioner, who was a minor at the time of his injury and medical treatment, which denied Petitioner the benefit of the statute of limitations provided by W. Va. Code § 55-2-15.

STATEMENT OF THE CASE

On August 31, 2021, Petitioner presented to UHC after sustaining a lower right leg injury while playing high school soccer. *See, Pet Appx. p. 000005, 000121.* Petitioner was a minor on the date of the injury as his birthdate is September 13, 2004. *See, Pet Appx. p. 000004, 000121.* Respondent Mace was the attending physician at UHC who provided care and treatment to Plaintiff. *See, Pet Appx. p. 000005, 000121.* Mace ordered X-rays of Plaintiff's right tibia-fibula which revealed an acute comminuted fracture through the midportion of the tibia and an acute spiral fracture through the midportion of the fibula. *See, Pet Appx. p. 000005, 000121.* Mace noted that Plaintiff had calf tenderness, but that his compartments were not tense "as much as I can tell." *See, Pet Appx. p. 000005, 000121.*

After consulting with Dr. Joseph Fazalare, Mace ordered splinting of Plaintiff's right lower extremity. *See, Pet Appx. p. 000006, 000121.* While Mace's record indicates that Plaintiff was to be splinted, he advised Plaintiff and his father that he would be casted and that the hospital's cast team would be in to place the cast. *See, Pet Appx. p. 000006.* The medical records associated with Plaintiff's August 31, 2021, treatment do not document that a splint was applied

to Plaintiff's right lower extremity. *See, Pet Appx. p. 000006.* Plaintiff recalls that Boyce was the person who applied the splint and that he did so alone, without the assistance of the hospital's "cast team" or any other medical personnel. *See, Pet Appx. p. 000006*. Mace did not reevaluate Plaintiff following the splinting of his right lower extremity. *See, Pet Appx. p. 000006*.

Plaintiff was diagnosed as having compartment syndrome on September 2, 2021, and underwent a four- compartment fasciotomy of his lower right extremity *See, Pet Appx. p. 000008, 000122*. Plaintiff filed the present civil action on September 12, 2024, within two years of attaining the age of 18. *See, Pet Appx. p. 000001*.

Petitioner filed suit against Respondents September 12, 2024. *See, Pet Appx. p. 000001*. Respondents, WVU and Mace filed a motion to dismiss on October 10, 2024, asserting that Petitioner's lawsuit was not timely filed. *See, Pet Appx. p. 000017.* Also on October 10, 2024, UHC and Boyce filed a separate motion to dismiss also based on the statute of limitations. *See, Pet Appx. p. 000034.* Petitioner filed separate responses to Respondents' motion to dismiss on November 14, 2024. *See, Pet Appx. p. 000050 and 000062.* Respondents filed a joint reply on December 11, 2024. *See, Pet Appx. p. 000074.* A hearing on Respondents' motions was held on January 7, 2025. The Court entered its *Order Granting Defendants' Motion to Dismiss* on January 31, 2025. *See, Pet Appx. p. 000120.*

SUMMARY OF ARGUMENT

The trial court committed reversible error when it dismissed Petitioner's lawsuit which was timely filed within two years of Petitioner reaching the age of eighteen (18) as provided for in W. Va. Code § 55-2-15. Petitioner maintains that this issue was previously addressed in *Whitlow v. Board of Education of Kanawha County*, 190 W. Va. 223, 438 S.E.2d 15 (1993) and that the trial court erred in failing to follow its precedent.

Petitioner further maintains that the trial court committed reversible error when it failed

to recognize that *W. Va. Code* § 55-7B-4 violated the equal protection Clause found in Section III of Article X of the West Virginia Constitution in its application to Petitioner, who was a minor at the time of his injury and medical treatment, thereby denying him the benefit of the statute of limitations provided by W. Va. Code § 55-2-15. Petitioner further states that the trial court erred in concluding that there was a "rational basis" between the discriminatory treatment of Petitioner pursuant to the MPLA statute of limitations and the objectives of the MPLA as codified in *W. Va. Code* § 55-7B-1.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner maintains that the discrete issue addressed in this appeal has already been resolved by the West Virginia Supreme Court of Appeals in *Whitlow, supra,* and that it is appropriate for oral argument pursuant to Rule 19 of the *West Virginia Rules of Appellate Procedure.* However, Petitioner recognizes that *Whitlow* involved the interpretation of an identical statute set forth in the Governmental Tort Claims and Insurance Act, not West Virginia's *Medical Professional Liability Act*., and that there appear to be no reported cases that address the issues in the context of *W. Va. Code* § 55-7B-4[1]. As such, it would not be inappropriate for oral argument to proceed pursuant to Rule 20 of the *West Virginia Rules of Appellate Procedure.*

STANDARD OF REVIEW

Petitioner appeals from an order granting a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*" Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.,* 194 W. Va. 770, 461 S.E.2d 516 (1995). Because this Intermediate Court of Appeal's review is *de novo,* it must apply the same standards applicable

[1] Petitioner is familiar with *Wilson v. Kerr*, 2020 W. Va. LEXIS 945 (2020). In *Wilson*, it appears that the Petitioner attempted to raise the statute of limitations applicable to minors under the age of 10, but the appeal was dismissed upon a finding that Petitioner failed to properly identify assignments of error.

to the circuit court in considering the motion. Pursuant to Syl. Pt. 2, *Whitlow, supra*, this Court is required to apply the "rational basis" test to determine whether *W. Va. Code* § 55-7B-4(a) violates the Equal Protection Clause of the West Virginia Constitution.

ARGUMENT

I. The Circuit Court committed reversible error when it dismissed Petitioner's lawsuit which was timely filed within two years of Petitioner reaching the age of eighteen (18) as provided for in W. Va. Code § 55-2-15.

The issue to be answered by this appeal is straightforward. Does the statute of limitations provided in *W. Va. Code* § 55-7B-4, as applied to Petitioner, violate the Equal Protection Clause of the West Virginia Constitution. If this Court answers that question in the affirmative, Petitioner will be entitled to the benefit of the statute of limitations provided for in *W. Va. Code* § 55-2-15 and his action will have been timely filed. Conversely, if this Court concludes that *W. Va. Code* § 55-7B-4 does not violate the Equal Protection Clause, as applied to Petitioner, then his lawsuit was not timely filed.

West Virginia Code § 55-2-15 provides as follows:

> (b) If any person to whom the right accrues to bring any personal action other than an action described in subsection (a) of this section, suit, or scire facias, or any 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 or her 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 §55-2-8 of this code, except that it shall in no case be brought after 20 years from the time when the right accrues.

Ibid. The primary purpose of this savings statute is to extend the tolling period so that the rights of infants and incompetents may be protected." *See, Whitlow, supra,* 190 W. Va. 223, 231. As further acknowledged by the Court, a minor's "rights to file suit are entrusted to a parent or guardian, who may also be a minor, or who may be ignorant or unconcerned, and who, by inaction, could cause a minor to lose the right to file a claim. To require a child of tender years to seek out another adult to vindicate the claim would. . . ignore the realities of the family unit

and the limitations of youth." *Id.* This statutory protection of minors has been in existence in some form since West Virginia achieved statehood. Petitioner acknowledges that *W. Va. Code* § 55-2-15 is a general statute and that *W. Va. Code* § 55-7B-4 is a specific statute which generally is given precedence over a general statute as found by the trial court. *See, Pet Appx. p. 000125.*

Due to its precedential value, Petitioner's arguments below were based on the West Virginia Supreme Court's decision in *Whitlow, supra,* which previously declared unconstitutional a nearly identical statute, enacted by the state legislature in the same year and which contained similar legislative findings. The statute at issue in *Whitlow* was *W. Va. Code* § 29-12A-6 which had been enacted as part of the Governmental Tort Claims and Insurance Reform Act.

Factually, the *Whitlow* case is similar to Petitioner's appeal as it involved a person, fifteen (15) years of age who was injured when the bleachers at her junior high school collapsed on September 17, 1987. Plaintiff filed a civil action against the Kanawha County Board of Education on March 28, 1991. The Defendant asserted that Plaintiff's claim was time-barred pursuant to *W. Va. Code* § 29-12A-6. Plaintiff argued that *W. Va. Code* 55-2-15 applied and that her civil action was timely filed. The trial court rejected Plaintiff's argument and determined that her action was time-barred pursuant to the provisions contained in *W. Va. Code* § 29-12A-6.

The discrete issue presented in *Whitlow* was whether the general tolling provisions of *W. Va. Code* 55-2-15 were superseded by the more specific tolling provisions set forth in *W. Va. Code* 29-12A-6. *Whitlow, supra,* at 190 W. Va. 225-226. For purposes of this appeal, Petitioner would point out that *W. Va. Code* 29-12A-6 are identical, or nearly identical, to the statutes of limitations provisions in *W. Va. Code* § 55-7B-4. *West Virginia Code* § 29-12A-6(a) provides:

> An action against a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, except as provided in subsection (b)

> of this section, shall be brought within two years after the cause of action arose or after the injury, death or loss was discovered or reasonably should have been discovered, whichever last occurs or within any applicable shorter period of time for bringing the action provided by this code. This section applies to actions brought against political subdivisions by all persons, governmental entities, and the state.

Ibid. West Virginia Code § 29-12A-6(b) provides:

> An action against a political subdivision to recover damages for injury, death, or loss to a minor, ***brought by or on behalf of a minor who was under the age of ten years at the time of such injury, shall be commenced within two years after the cause of action arose or after the injury, death or loss was discovered or reasonably should have been discovered, whichever last occurs, or prior to the minor's twelfth birthday, whichever provides the longer period***.

Ibid (emphasis added). Conversely, *W. Va. Code* § 55-7B-4(a) provides:

> A cause of action for medical injury to a person alleging medical professional liability against a health care provider . . .arises as of the date of medical injury, except as provided in subsection (c) of this section, and must be commenced within two years of the date of such injury or death, or within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such medical injury, whichever last occurs: Provided, That in no event shall any such action be commenced more than 10 years after the date of medical injury.

Ibid. West Virginia Code § 55-7B-4(c) provides:

> A cause of action for injury to a minor, ***brought by or on behalf of a minor who was under the age of 10 years at the time of such injury, shall be commenced within two years of the date of such injury, or prior to the minor's 12th birthday, whichever provides the longer period.***

Ibid. (emphasis added).

The *Whitlow* court, as will be discussed more fully below, concluded that *W. Va. Code* § 29-12A-6 violated constitutional equal protection rights and reversed and remanded the case to the trial court for further proceedings. This court should likewise follow the guidance provided by the West Virginia Supreme Court of Appeals in *Whitlow*. If it does, the result herein will be consistent with the holding in *Whitlow*; the Petitioner's statute of limitations will be governed by *W. Va. Code* § 55-2-15; and, his lawsuit will have been timely filed.

II. The Circuit Court committed reversible error when it failed to conclude that W. Va. Code § 55-7B-4 violated the Equal Protection Clause found in Section III of Article X of the West Virginia Constitution in its application to Petitioner, who was a minor at the time of his injury and medical treatment, which denied Petitioner the benefit of the statute of limitations provided by W. Va. Code § 55-2-15.

A legislative act which arbitrarily establishes diverse treatment for the members of a natural class results in invidious discrimination and where such treatment or classification bears no reasonable relationship to the purpose of the act, such act violates the equal protection and due process clauses of our federal and state constitutions. Syl. Pt. 1, *Oneil v. City of Parkersburg*, 160 W. Va. 694, 237 S.E.2d 504 (1977). In addressing the constitutional challenge to the application of *W. Va. Code* 29-12A-6(b) the *Whitlow* Court started its analysis of West Virginia's equal protection standard:

> [w]here economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, ***and whether ALL persons within the class are treated equally***. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution which is our equal protection clause. (emphasis added) (internal citations omitted).

Syl. Pt. 2, *Whitlow, supra. See, also,* In Syl. Pt. 1, *State ex rel. Boan v. Richardson*, 198 W.Va. 545, 482 S.E.2d 162 (1996).

Since *Whitlow*, the West Virginia Supreme Court of Appeals has provided further guidance to lower courts considering the "rational basis" analysis. The Supreme Court has confirmed that "equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner." Syl. Pt. 11, *Marcus v. Holley*, 217 W. Va. 508, 523, 618 S.E.2d 517, 532 (2005).

In *Marcus, supra*, the West Virginia Supreme Court broke into four required elements the findings that a reviewing court is required to make when determining whether a classification satisfies the "rational basis" test and, therefore, satisfies equal protection principles. The four

required elements are the existence of a (1) rational classification based upon social, economic, historic or geographic factors; (2) a proper governmental purpose; (3) the classification's reasonable relationship to that purpose; and (4) equal treatment of all persons within the class. *Marcus, supra*, 217 W. Va. 508, 524. The trial court failed to address Petitioner's equal protection challenge based on this legal standard.

The trial court goes on to provide that the "Supreme Court of Appeals has already demonstrated its unwillingness to second guess the rationale expressed in *West Virginia Code* § 55-7B-1 in the fact of an equal protection challenge to the non-economic damages cap in a case decided after *Whitlow."* ***See, Pet Appx. p. 000134.*** The trial court's conclusion tends to suggests that it found no legitimate reason to further evaluate other provisions of the *Medical Professional Liability Act.* If true, this would support how the trial court erroneously concluded that the MPLA statute of limitations satisfied the "rational basis" test such that the unequal classification of minors did not violate equal protection principles in granting Defendants' motions to dismiss.

Moreover, as this court is well aware, upholding one portion of *W. Va. Code* § 55-7B-1, et seq., "cannot be read as sanctioning the constitutionality of the entire Act." *Whitlow, supra, at. p. 228. See, also*, Syl. Pt. 6, *Nuckols v. Athey*, 149 W. Va. 40, 138 S.E.2d 344 (1964), which provides that: "[a] statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and the others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained." (internal citation omitted).

It is noteworthy that the trial court chose not to consider any of the *Whitlow* court's and reasoning, particularly since the opinion addressed the same statute of limitations provision that

is now before this Court. Petitioner would also note that ss part of its analysis, the *Whitlow* court identified the legislative reasoning advanced for *W. Va. Code* 29-12A-6 as being to "limit potential litigation and, thereby, to assist political subdivisions in obtaining affordable insurance." *Whitlow, supra*, at 190 W. Va. 231. For clarity, the specific legislative findings set forth in the Governmental Tort Claims and Insurance Reform Act provides:

> The Legislature finds and declares that the political subdivisions of this State are unable to procure adequate liability insurance coverage at a reasonable cost due to: The high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services. Therefore, it is necessary to establish certain immunities and limitations with regard to the liability of political subdivisions and their employees, to regulate the insurance industry providing liability insurance to them, and thereby permit such political subdivisions to provide necessary and needed governmental services to its citizens within the limits of their available revenues.

West Virginia Code § 29-12A-2.

Like the Governmental Tort Claims and Insurance Act, the legislative findings supporting the MPLA as set forth in *W. Va. Code* § 55-7B-1, et seq., generally relate to controlling the cost of liability insurance and controlling litigation. It is also worth pointing out that the same Legislature passed both Acts in 1986. Finally, Petitioner would point out that the legislative findings and declaration of purpose set forth in *W. Va. Code* § 55-7B-1, et seq., fail to identify how minors between the ages of ten (10) and seventeen (17) have affected the litigation of medical malpractice claims; caused liability insurance premiums to rise; created a climate that has impacted compensation to injured plaintiff; caused liability insurance costs to increase; impacted the State's inability to control or regulate insurance; caused medical providers to leave the state; or, the failure of the medical profession to regulate the competency of health care providers. With all of the similarities between *Whitlow* and Petitioner's appeal herein, it is striking that the trial court failed to give due consideration to its analysis and holdings.

The trial court's failure to adhere to the precedent set by *Whitlow* is also stark in light of the factual similarity between these two cases. Both cases have or involve the following: (1) statutes of limitation that are more restrictive than the general savings statute; (2) statutory language that is identical or nearly identical; (3) minors in the ten (10) to seventeen (17) year age classification (Petitioner's classification) that are treated unequally and more severely than other class members in the application of the statutory tolling provisions; (4) minors in the ten (10) to seventeen (17) year age classification that are treated unequally and more harshly than the class of minors in the birth to age ten (10) class in the application of the statutory tolling provisions; (5) statutes that treat both classes of minors differently than the treatment of the insane; and, (6) both cases involve children of nearly the same age (15 and 16).

In its analysis of *W. Va. Code* § 29-12A-6, the *Whitlow* court concluded that "minors have been selected for disparate and more severe treatment than others who are within their same class under *W. Va. Code* § 55-2-15, i.e., the insane. This disparity alone is irrational and violates equal protection principles that demand that those situated in the same class receive equal treatment." *Id.* at 231. The court went on to point out that even had the insane been included in *W. Va. Code* 29-12A-6, "we would still hold, as have other courts, that there is no rational basis for such disparate treatment of minors. Carving suits by infants against political subdivisions out of the general statutory tolling provisions can hardly be thought to substantially diminish the number of suits filed." *Id.* at 231. The same factors that led the *Whitlow* court to conclude that *W. Va. Code* § 29-12A-6 was unconstitutional are present in Petitioner's case, but were not considered by the trial court.

The same analysis should have been employed by the trial court herein and its failure to do so has resulted not only in clear error, but in the dismissal of Petitioner's claim. The law is clear, when analyzing the constitutionality of a statute under the "rational basis" test, ***a***

classification cannot satisfy equal protection principles unless all persons within the class are treated equally. *See,* Syl. Pt. 2, *Whitlow, supra.*, and Syl. Pt. 1, *Boan, supra*. *See, also, Marcus, supra*, 217 W. Va. 508, 524.

Like *Whitlow,* the statute under consideration herein fails to treat all members of the class equally, the class being those individuals within the general savings statute. In analyzing the statute of limitations provisions in *W. Va. Code* § 55-7B-4, minors between the ages of (10) and 17 (seventeen) have been singled out for disparate and more severe treatment than minors from birth to age ten (10); and, minors in general, are singled out for disparate and more severe treatment than the insane who get the benefit of the general savings statute. As all members of the class are not treated equally, *W. Va. Code* § 55-7B-4 cannot, as a matter of law, satisfy equal protection principles and the trial court committed clear error in finding otherwise.

As part of the analysis employed in reaching its decision, the *Whitlow* court addressed the protection the law affords minors in general. Specifically, the Court noted that "[t]he law has traditionally recognized that an infant lacks the mental capacity to act intelligently with regard to his legal rights . . . The general tolling statute in *W. Va. Code* 55-2-15, as well as other similar statutes . . . is designed to extend the tolling period so that the rights of infants may be protected." *Id.* at 231. The Court went on to state that:

> [w]e are unwilling to find a rational basis for the legislative reduction of the tolling period for minors in this case. Their rights to file suit are entrusted to a parent or guardian, who may also be a minor, or who may be ignorant or unconcerned, and who, by inaction, could cause the minor to lose the right to file a claim. To require a child of tender years to seek out another adult to vindicate the claim would, in the words of the Missouri Supreme Court in *Strahler v. St Luke's Hospital, supra*, "ignore the realities of the family unit and the limitations of youth." (citation omitted).

Id. at 231.

In creating a new syllabus point, the *Whitlow* Court ultimately concluded that:

> ***W. Va. Code 29-12A-6 violates the Equal Protection Clause found in Section III of Article X of the West Virginia Constitution to the extent that it denies to***

> ***minors the benefit of the statute of limitations provided in the general tolling statute, W. Va. Code 55-2-15.***

See, Syl. Pt. 3, *Whitlow, supra.* (*emphasis added*). It should be noted that the issue presented by Petitioner herein was anticipated and addressed in dicta in the *Whitlow* opinion, the Court noting that:

> [a]lthough not before us in this case, we note that *W. Va. Code* § 55-7B-4(b), contains a tolling provision for minors identical to *W. Va. Code* 29-12A-6(b), in regard to medical malpractice claims. We need not address the constitutionality of that provision at this time. We note that other jurisdictions have addressed the type of malpractice statute of limitations for minors and have held it to violate equal protection principles.

Whitlow, supra, p. 23.

While the aforesaid language may be dicta, as acknowledged by the trial court (*See, Pet Appx. p. 000136*, it nonetheless logically follows that *W. Va. Code* § 55-7B-4 should be found unconstitutional as the classification at issue herein fails to treat all members of the class equally. Therefore, consistent with the well-established law, the statute cannot satisfy equal protection principles and, therefore, is unconstitutional in its application to Petitioner. *See*, Syl. Pt. 2, *Whitlow, supra.*, and Syl. Pt. 1, *Boan, supra. See, also, Marcus, supra*, 217 W. Va. 508, 524.

It is inconceivable that the trial court would have concluded, as it did, that there was a rational basis which satisfied equal protection principles in light of the differing and unequal treatment received by minors between the ages of ten (10) and seventeen (17), from other members of their class, in the application of the statute of limitations provided by *W. Va. Code* § 55-7B-4. As noted earlier, such unequal treatment, as a matter of law, fails to satisfy equal protection principles. The trial court committed error in reaching this conclusion.

The Court erroneously concludes that "[m]inors such as Plaintiff, who was almost seventeen at the time of this treatment, are treated similarly to other adult litigants (including the insane) asserting a claim under the MPLA." *See, Pet Appx. p. 000135.* The trial court's legal

conclusion in this regard is based on a clear misapplication of the law. It is irrelevant for the trial court to compare Petitioner to an adult for purposes of evaluating whether *W. Va. Code* § 55-7B-4 satisfies equal protection principles. The relevant consideration is how Petitioner is treated in comparison to other member of his class, namely, minors from birth to age ten (10) and the insane. The trial court committed error by failing evaluate Petitioner's equal protection challenge consistent with the well-established legal standards identified herein. *See,* Syl. Pt. 2, *Whitlow, supra.,* and Syl. Pt. 1, *Boan, supra. See, also, Marcus, supra*, 217 W. Va. 508, 524. Moreover, it was further error for the trial court to ignore or address the more severe, unequal and disparate treatment Petitioner's class members receive pursuant to *W. Va. Code* § 55-7B-4 in comparison to the class of minors from birth to age ten (10).

The trial court further erred in concluding that Petitioner receives the same treatment as the insane under *W. Va. Code* § 55-7B-4. Pursuant to *Williams v. CMO Mgmt., LLC*, 239 W. Va. 530, 803 S.E.2d 500 (2016), the group of minor in Petitioner's class are not afforded the same treatment as the insane as this latter class member is entitled to the benefit of the statue of laminations provided in *W. Va. Code* § 55-2-15, West Virginia's general savings statute. Based on the trial court's erroneous conclusion, Petitioner has two years to file suit under the MPLA statute and more than a year of that time he has no independent legal right to file a lawsuit and must enlist someone else to file it for him. In reality, sixteen-year (16) old Petitioner would have approximately eleven months in which to file suit after reaching the age of majority.

The trial court next commits error in concluding that "[r]ather than being treated more harshly than other plaintiffs under the MPLA, Mr. Osborne has been given the same statutory period within which to assert his claims." For the reasons already stated, the trial court's conclusion constitutes clear error and is the result of its failure to properly apply the established law. *See,* Syl. Pt. 2, *Whitlow, supra.,* and Syl. Pt. 1, *Boan, supra. See, also, Marcus, supra,* 217 W. Va. 508, 524.

As an aside, The trial court ultimately, and erroneously, concludes that it is not persuaded that the opinion of the West Virginia Supreme Court of Appeals in *Whitlow* compels the conclusion that *W. Va. Code* § 55-7B-4 is unconstitutional. In support of this conclusion, the trial court notes that in the thirty-two (32) years since the *Whitlow* decision the West Virginia Legislature has not revised the MPLA statute of limitations to be consistent with the *Whitlow* decision. While this may be an accurate statement, it hardly supports the logical conclusion that *W. Va. Code* § 55-7B-4 meets constitutional muster.

The fact that the legislature has not modified *W. Va. Code* § 55-7B-4 to be consistent is not surprising. The legislature has yet to modify *W. Va. Code* § 29-12A-6, the language of which remains the same today as it did which Whitlow was decided. Additionally, Petitioner would note that since its passage in 1986, the MPLA statute of limitations has only been challenged on one occasion. The case was *Wilson v. Kerr*, 2020 W. Va. LEXIS 945 (2020), raised the constitutionality of *W. Va. Code* § 55-7B-4, but was dismissed without a decision being rendered.

Petitioner maintains that the trial court erred in its application of the well-established law to the fact presented herein. Consequently, the trial court has committed reversible error.

CONCLUSION

For all of the foregoing reasons, Petitioner prays that this Honorable Court enter an Order reversing the ruling of the trial court and remanding the case for further proceedings.

Respectfully submitted this 30th day of April, 2025.

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