
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)

PETITIONER'S REPLY BRIEF

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**TO: THE HONORABLE JUSTICES OF THE INTERMEDIATE COURT OF
APPEALS OF WEST VIRGINIA**

INTRODUCTION

The parties to this appeal agree that the “rational basis” test is the appropriate test for determining whether the minor tolling statute of limitations set forth in *W. Va. Code* § 55-7B-4 violates the Equal Protection Clause provided for in Section 10 of Article III of the West Virginia Constitution. All parties acknowledge the rational basis standard articulated in Syl. Pt. 2, *Whitlow v. Board of Education of Kanawha County*, 190 W. Va. 223, 438 S.E.2d 15 (1993), which provides:

[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* (emphasis added). In *Marcus v. Holley*, the West Virginia Supreme Court clearly and unambiguously held that there are four required elements a court must find to uphold legislation utilizing the rational basis test: “(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 v. Holley*, 217 W. Va. 508, 524, 618 S.E.2d 517, 533 (2005) (emphasis added).

Respondents have vigorously argued every aspect of the rational basis test articulated in *Whitlow* – save one. Respondents have ignored the requirement that “all persons within the class are treated equally.” In fact, the only reference to this portion of the rational basis test is Respondents’ statement that “medical professional liability plaintiffs who were minors at the time of injury are not similarly situated to all other plaintiffs. The differences between *W. Va. Code* § 55-7B-4(a) and *W.*

Va. Code § 55-2-15(b) do not, therefore, implicate equal protection.” *Respondents’ Joint Reply* at p. 15.

Likewise, in adopting the Respondents’ proposed order granting their motion to dismiss, the trial court’s only reference to the “equal treatment” requirement is the following erroneous finding:

Minors such as Plaintiff, who was almost seventeen at the time of his treatment, are treated similarly to other adult litigants (including the insane) asserting a claim under the MPLA. In other words, sixteen-year old Adrian Osborne had the same statutory limits within which to assert a MPLA claim as an eighteen-year-old patient or a mentally incapacitated patient asserting claims under the MPLA. Each of these hypothetical plaintiffs has the same two year timeframe from the date of injury to assert their claim. Rather 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 against the Defendants.

Petitioner’s Appendix, p. 000135. The trial court committed reversible error when it concluded that *W. Va. Code* § 55-7B-4 satisfied the rational basis test without finding that all class members affected by the statute were treated equally as is required by the well-established law in West Virginia. As the statute of limitations set forth in *W. Va. Code* § 55-7B-4 treats minors over the age of ten (10) and under the age of eighteen (18) in a disadvantageous manner when compared to minors under the age of ten (10) and the insane, it violates Petitioner’s equal protection rights and, therefore, is unconstitutional. Accordingly, the trial court’s ruling is in error and this Honorable Court is required to vacate the same and remand this case for further development and trial.

ARGUMENT

A. The trial court erred in dismissing Petitioner’s Complaint.

In this Reply, Petitioner will address herein below Respondents’ arguments in the order they are presented in their *Joint Response*.

1. The statute of Limitations set forth in *W. Va. Code* § 55-7B-4 does not apply as it violates Petitioner's equal protection rights and, therefore, is unconstitutional.

Petitioner has not asserted that the statute of limitations set forth in *W. Va. Code* § 55-7B-4 was subject to extension, based on such theories as equitable tolling or the discovery rule. Petitioner's argument has always been that the minor tolling statute of limitations provided in *W. Va. Code* § 55-7B-4 is unconstitutional as it fails to treat medical malpractice minor plaintiffs ten (10) and over equally when compared to medical malpractice minor plaintiffs under the age of 10 and the insane. Petitioner has argued, and maintains herein, that the minor tolling statute of limitations set forth in *W. Va. Code* § 55-7B-4, on its face and as applied to Petitioner, is unconstitutional and that the trial court erred in dismissing Petitioner's Complaint on that basis.

2. The trial court committed reversible error in dismissing Petitioner's Complaint based on the unconstitutional minor tolling statute of limitation provided in *W. Va. Code* § 55-7B-4.

Respondents have argued "[w]ithout legal support, Petitioner has asserted that the circuit court applied the wrong statute of limitations to his claims." *See, Joint Response at. p. 9.* Respondents' arguments in this regard are inaccurate and untrue as evidenced by the legal authority set forth in Petitioner's response to Respondents' motion to dismiss at the trial court level and within his initial memorandum, as well as, this *Reply*.

Respondents further argue that "[i]f the 1986 Legislature intended the general savings statute, W. Va. Code § 55-2-15, to apply to medical malpractice actions, it would not have drafted a redundant code section."¹ *Joint Response at. p. 9.* Petitioner disagrees with Respondents'

¹ Respondence have cited *Ho-Rath v. Rhode Island Hosp.*, 115 A.3d 938, 947 (R.I. 2015) as supporting authority for this aspect of statutory construction which seems unnecessary. To the extent that it was cited because it involved a medical malpractice claim, it should be noted that in *Ho-Rath* discussed the application of Rhode Island's general savings statute in conjunction with the statute of limitations applicable to malpractice claims. Petitioner would note that the statute of limitations provisions in the malpractice statue afforded equal treatment to all plaintiffs who were under a disability.

argument. Rules of Statutory construction cannot save legislation that is unconstitutional. By way of example, the same 1986 Legislature drafted the *Governmental Tort Claims and Insurance Reform Act* which included the identical statute of limitations provision for minors² as is contained in *W. Va. Code* § 55-7B-4.

As this Honorable Court is aware, in creating a new syllabus point, the West Virginia Supreme Court held in *Whitlow* that the statute of limitations set forth *West Virginia 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.” Syl. Pt. 3, *Whitlow v. Bd. of Educ. of Kanawha Cnty.*, 190 W. Va. 223, 438 S.E.2d 15 (1993). Likewise, the statute of limitations set forth in *W. Va. Code* § 55-7B-4 is unconstitutional to the extent that it denied Petitioner the benefits of the statute of limitations provided in the general tolling statute under which Petitioner’s Complaint was timely filed. For this reason, the trial court committed reversible error when it dismissed Petitioner’s Complaint based on the statute of limitations provided by *W. Va. Code* § 55-7B-4 instead of *W. Va. Code* § 55-2-15.

3. Specific versus general statute.

Petitioner has not argued that a general statute takes precedence over a specific statute dealing with the same subject. In fact, Petitioner agrees with this statement. Petitioner’s exception with the analysis is simply that a general statute takes precedence over a specific statute dealing with the same subject matter when the specific statute is unconstitutional. In the pending matter, Petitioner has argued that the minor tolling statute of limitations provided in the specific statute (*W. Va. Code* § 55-7B-4) is unconstitutional, both on its face, and as applied to Petitioner and,

² *West Virginia Code* § 29-12A-6.

therefore, the general statute *W. Va. Code* § 55-2-15) takes precedence and provides the applicable statute of limitations in this matter.

B. The MPLA's statute of limitations violated the equal protection rights of Petitioner.

Respondents argue that medical malpractice “plaintiffs who were minors at the time of injury are not similarly situated to all other minor Plaintiffs. The differences between *W. Va. Code* § 55-7B-4(a) and *W. Va. Code* § 55-2-15 do not, therefore, implicate equal protection.” *See, Joint Reply at p. 15.* Respondents’ assertion is grossly misplaced. First, the statute of limitations provided by *W. Va. Code* § 55-7B-4(a) does not treat minor medical malpractice plaintiffs equally and, therefore, absolutely implicates equal protection. Second, the statute of limitations provided by *W. Va. Code* § 55-7B-4(a) does not treat minor medical malpractice plaintiffs over the age of ten (10) equally to the insane and, therefore, implicates equal protection for that reason as well.

For the aforesaid reasons, the underpinning of Respondents’ arguments is fatally flawed. The statute of limitations provided by *W. Va. Code* § 55-7B-4(a) fails to treat medical malpractice plaintiffs between the ages of ten (10) and seventeen (17) equally to others similarly situated individuals in the subject class and, therefore, violates Petitioner’s equal protection rights.

1. Respondents’ arguments fail to address, let alone, establish that all similarly situated persons within the class of plaintiffs included in *W. Va. Code* § 55-7B-4 are treated equally.

Petitioner does not generally object to Respondents’ commentary in this section. However, to be clear, to satisfy the “rational basis” standard, *W. Va. Code* § 55-7B-4 must treat all members within the class equally. As noted herein, the statute of limitations provided by *W. Va. Code* § 55-7B-4 does not treat all class members equally and, therefore, cannot satisfy the “rational basis” standard.

2. West Virginia Code § 55-7B-4 is not rational legislative classification.

The majority of Section B.2. restates the findings and declaration of purpose set forth by the legislature and Petitioner notes the accuracy of the same. However, as set forth in response to Section B.1., *W. Va. Code* § 55-7B-4 cannot be deemed rational when it fails to treat all class members equally. As support for their position, Respondents refer to a number of provisions within the MPLA. Respondents maintain that footnotes 75 – 82 relate to the legislature’s requisite balancing efforts. Petitioner would note that every provision of the MPLA referred to in the aforesaid footnotes treats all persons equally, but for *W. Va. Code* § 55-7B-4, which treats medical malpractice minor plaintiffs unequally to other class members.

3. *W. Va. Code* § 55-7B-4 does not bear a reasonable relation to a proper government purpose.

Respondents argue that *W. Va. Code* § 55-7B-4 bears a reasonable relation to a proper government purpose in that it (1) allows health care providers and insurance carriers to better predict and account for liability exposure; and, (2) prevents litigation of stale claims. The arguments set forth by Respondents show the arbitrary and capricious nature of *W. Va. Code* § 55-7B-4. It strains logic to reasonably believe that a two-year statute of limitations for minors over the age of ten bears a reasonable relation to the stated government purpose when minors under the age of ten have more than two years (in some instances as many as 11 years and 364 days) to assert their claims. If the issue of staleness or predicting liability exposure was an important factor in enacting the MPLA the Legislature would have applied the two-year statute of limitation across the board for all medical malpractice plaintiffs subject to *W. Va. Code* § 55-2-15; or at least as to all minors.

Respondents’ also argue that minors in Petitioner’s class “are treated similarly to other adult litigants, including the insane who would assert a claim under the MPLA.” *See, Respondents’ memorandum at p. 24.* Respondents’ argument is misplaced. First, Petitioner was dependent on others

to assert his claims for him until he turned eighteen whereas adult litigants have the legal right to assert their own claims. Specifically related to Petitioner, more than a year of his two-year statute of limitations had expired before he had the legal right to assert a claim on his own, effectively reducing his statute of limitations to less than one (1) year. Adults do not have this impediment. Second, contrary to Respondents' arguments, the statute of limitations for the insane under the MPLA is tolled until his/her disability ceases. Finally, Respondents have maintained that the *MacDonald* case upholding the non-economic damages cap supports their position. However, Petitioner maintains that the non-economic damages cap applied equally to all medical malpractice plaintiffs and, therefore, satisfied the "rational basis" test. *West Virginia Code* § 55-7B-4 does not treat all class members equally and, therefore, cannot satisfy the "rational basis" test.

4. *Whitlow is dispositive Petitioner's appeal.*

Petitioner maintains that the issue in *Whitlow* is identical to the issue presented in this appeal. The *Governmental Tort Claims and Insurance Reform Act* and the MPLA were each enacted in 1986 by the same Legislature. The statutory legislation regarding the minor statute of limitations of both acts are identical. The "rational basis" standard under which *Whitlow* was decided is the same "rational basis" standard that this Honorable Court must employ in determining whether the same minor tolling statute of limitations for class members over the age of ten (10) as provided for in the MPLA violates the State's equal protection clause.

In *Whitlow*, the West Virginia Supreme Court of Appeals determined that the minor tolling statute of limitations for plaintiffs over the age of ten (10) violated equal protection and held that the Petitioner in its case was entitled to the benefit of the statute of limitations provided is *W. Va. Code* § 55-2-15. Petitioner maintains that the minor statute of limitations set forth in the MPLA does violate equal protection and that he is entitled to the benefit of the statute of limitations provided in

W. Va. Code § 55-2-15, not because of “the dicta in footnote 16” (*see, Joint Response at p. 26*), which is extremely persuasive, but because of the unequal statute of limitations treatment he received by virtue of Petitioner being a medical malpractice minor plaintiff over the age of ten (10) when his cause of action accrued.

a. Factual and legal differences between Tort Act and MPLA.

Respondents argue that the *Governmental Tort Claims and Insurance Reform Act* and the MPLA are so different that this Honorable Court should ignore holdings and rationale in *Whitlow*. The legislature’s rationale in both pieces of legislation is the same; namely, to reduce litigation, limit the period of exposure and make insurance more affordable. In addressing the equal protection arguments, the *Whitlow* court reasoned that “the initial and obvious flaw in this reasoning is that minors have been selected for disparate and more severe treatment than others who are within the 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.” *Whitlow, supra*, 190 W. Va. 223, 231, 438 S.E.2d 15, 23.

Moreover, medical malpractice minor plaintiffs over the age of ten (10), like Petitioner, receive more severe treatment than medical malpractice minor plaintiffs under the age of the (10) as the older class of minors have two (2) years to file suit whereas minors under the age of ten (10) always have more than two (2) years to file suit in every instance. As in *Whitlow*, this Honorable Court should conclude that the minor tolling provisions set forth in *W. Va. Code* § 55-7B-4 is “irrational and violates equal protection principles that demand that those situated in the same class receive equal treatment.” *Id.*

b. W. Va. Legislature has not amended MPLA minor tolling statute.

Petitioner acknowledges the legislative bills identified by Respondents. However, the

legislature's failure to revise the statute of limitations for minor plaintiffs as provided in the MPLA has no bearing on whether the statutory provisions violate equal protection principles. Petitioner does not find this unusual as the legislature has yet to modify *W. Va. Code* § 29-12A-6(b) despite the fact that it was declared unconstitutional by the West Virginia Supreme Court of Appeals more than 32 years ago.

Respondents also refer to the 2017 modification of the MPLA regarding the statute of limitations for actions against nursing homes. Petitioner acknowledges this modification, but again notes that the modification of the statute of limitations applied equally to all class members. Respondents next refer to *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005), regarding the Supreme Court decision addressing the constitutionality of a twelve-person jury. *Louk* is irrelevant to the equal protection challenge in the present case but, nonetheless, Petitioner would note that the statute in question applied equally to all class members.

c. Decisions by Courts in other states regarding minor statutes of limitation in medical malpractice claims.

Petitioner is in agreement that other states have addressed the issue of minor statutes of limitation in medical malpractice cases, some of which have been favorable and some unfavorable. It is, however, Petitioner's position that the manner in which other states have resolved such issues are not particularly relevant to how the issue should be handled by this Honorable Court. Petitioner would note that oftentimes these other jurisdictions have rely on legal principles that are not necessarily consistent with West Virginia's legal principles.

However, one particular case that is somewhat analogous to the Petitioner's appeal is *Schwan v. Riverside Methodist Hosp.*, 6 Ohio St. 3d 300, 452 N.E.2d 1337 (1983) which held that:

Legislation must apply alike to all persons within a class, and reasonable grounds must exist for making a distinction between those within and those without a designated class. . . This attention to the propriety of the classification remains an

important aspect of equal protection analysis. . . Equal protection of the laws requires the existence of reasonable grounds for making a distinction between those within and those outside a designated class. . . The reasonableness of a statutory classification is dependent upon the purpose of the Act.

Our review of the language of R.C. 2305.11(B) leads us to conclude that the statute creates a distinction -- without reasonable grounds -- between medical malpractice litigants who are younger than ten years of age and those who are older than ten but still minors. For example, R.C. 2305.11(B) a child whose cause of action accrues on the day *before* his tenth birthday may file an action any time until his fourteenth birthday. Yet, if the same cause of action accrued on the day *after* the child's tenth birthday, the one year (plus notice) provision of R.C. 2305.11(A) apparently controls.

We recognize that the General Assembly often must draw lines in legislation. Yet, it is the age of majority which establishes the only *rational* distinction. Young people eagerly anticipate their legal "adulthood." At the age of majority, our society puts them on notice that they are assuming an array of rights and responsibilities which they never had before. Age ten, however, arrives with little fanfare. It is difficult to imagine that parents or guardians -- much less the children themselves -- would recognize that any change in status occurs on a child's tenth birthday.

We acknowledge, however, the importance of the purpose of Am. Sub. H. B. No. 682 to alleviate the "medical malpractice crisis" of the mid-1970's. Section 5 of that Act requires that the Superintendent of Insurance report annually to the General Assembly the effectiveness of amendments to each of several sections of the Revised Code on reducing medical malpractice insurance premiums. R.C. 2305.11(B), however, was not of sufficient consequence to be included among those provisions for annual review. Therefore, in light of our conclusion that R.C. 2305.11(B) creates an irrational classification which does not *rationaly* further the purpose of Am. Sub. H. B. No. 682, we hold that R.C. 2305.11(B) is unconstitutional on its face with respect to medical malpractice litigants who are minors.

Id. 6 Ohio St. 3d at 303-303 (internal citations omitted).

CONCLUSION

For the reasons set forth in the initial memorandum, as supplemented herein, Petitioner prays that this Honorable Court enter an Order reversing the ruling of the trial court and remanding the case for further proceedings.

This 16th day of June, 2025.

/s/ Michael D. Crim

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