

COURT WATCH

FROM THE OFFICES OF FLAHERTY, SENSABAUGH & BONASSO, PLLC.

October 9, 2007

Packard v. Perry, Appeal No. 33214

Petition for Writ of Prohibition from the Circuit Court of Logan County to the West Virginia Supreme Court of Appeals

TOPIC: Whether a juvenile should have the right to claim damages for medical expenses incurred prior to the age of eighteen?

The plaintiffs in *Packard v. Perry* are seeking a writ of prohibition from the West Virginia Supreme Court of Appeals.¹ Plaintiffs, a mother and her son, filed a medical malpractice action against the defendant alleging that the defendant deviated from the standard of care when repairing the son's arm fracture. Defendant moved to dismiss the plaintiffs' claims for medical expenses incurred prior to the son's eighteenth birthday.² The trial court found that the mother could recover medical expenses incurred before the juvenile's eighteenth birthday, but ruled that the juvenile could not collect medical expenses until he reached the age of eighteen. Therefore, the trial court dismissed the juvenile's claims for medical expenses.

Subsequently, the plaintiffs moved to amend the Complaint, in order to add a count for battery as a result of the defendant's failure to obtain informed consent for the surgery performed on the son.³ The trial court denied plaintiffs' motion to amend the Complaint.

Plaintiffs are seeking a writ of prohibition from the West Virginia Supreme Court of Appeals directing the trial court to allow the jury to consider the juvenile's medical expenses. Plaintiffs claim that West Virginia case law is unclear as to whether the child possesses a right to recover past medical expenses. In addition, plaintiffs also are seeking a writ of prohibition to allow them to amend their initial complaint, adding the battery count.

Defendant argues that the trial court properly dismissed the juvenile's claims for medical expenses. Defendant asserts that West Virginia law clearly delineates that there are two separate causes of action in West Virginia when a child is injured – one belonging to the child for post-majority medical expenses and one belonging to the parents for the child's pre-majority medical expenses. Furthermore, defendant argues that the plaintiffs should not be allowed to amend their Complaint, since the plaintiffs had sufficient time in the three years before the trial date to amend their Complaint.

The West Virginia Supreme Court of Appeals heard the parties' arguments on September 19, 2007. Additional Court Watch summaries will be provided as this case develops.

¹ A "writ of prohibition" is "[a]n extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a nonjudicial officer or entity from exercising a power." *Black's Law Dictionary*, 1228 (7th ed. 1999).

² Defendant also moved to dismiss the plaintiffs' claims, alleging that the claims were barred by the statute of limitations. The trial court determined that the statute of limitation claim was an issue to be heard by the jury.

³ Plaintiffs asserts that the defendant received the juvenile's grandparent's consent, but not parental consent.