

COURT WATCH

FROM THE LAW OFFICES OF FLAHERTY, SENSABAUGH & BONASSO, PLLC
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Cartwright, as guardian and parent of Cartwright, a minor child v. McComas, and Cabell Huntington Hospital, Appeal No. 33868

Appeal from the Circuit Court of Cabell County to the West Virginia Supreme Court of Appeals

ISSUE: Does the MPLA provision providing the right of a minor under ten years of age to file suit prior to a minor’s twelfth birthday permit a hospital to be added as a defendant based on alleged malpractice of a physician, when the original case was filed in April 2003, and when as of July 1, 2003, a hospital may no longer be sued under a theory of “ostensible agency?”

Short answer: Yes.

In *Cartwright v. McComas, et al.*, Plaintiff’s then four-year-old daughter was admitted to Cabell Huntington Hospital (“CHH”) from October 9, 1999 through October 16, 1999. During this time period the defendant physician did not order an MRI. On November 8, 1999, during an office visit, the defendant physician ordered that the child have an MRI of the spine. The MRI was completed in December 1999, and revealed a vascular abnormality which was compressing the child’s spinal cord and causing paralysis. The child was referred out and underwent a surgical procedure elsewhere to resect a hemorrhagic mass near her spinal cord. After the surgery the child continues to be paralyzed and incontinent. Plaintiff’s expert opined that the delay reduced the child’s likelihood of making a recovery.

Plaintiff filed a medical malpractice action against the defendant physician on April 23, 2003, asserting that he deviated from the standard of care by failing to order an MRI of the child’s spine while she was hospitalized at CHH. On June 15, 2005, Plaintiff was granted leave to file an amended complaint to add CHH as a defendant. CHH moved for summary judgment claiming that the 2003 amendments to the MPLA, which took effect on July 1, 2003, precluded the Plaintiff from pursuing a claim against CHH for the acts of the defendant physician (ostensible agency claim). On July 3, 2007, the circuit court entered an order granting summary judgment in favor of CHH. Plaintiff appealed.

On appeal the Court determined that the summary judgment ruling of the lower court which threw out the claim against CCH represents plain error¹, and the Supreme Court reinstated the case in the circuit court..

¹ The necessary elements of plain error are present in this case. The Court pointed out in syllabus point twelve of *Keese v. General Refuse Service, Inc.*, 216 W. Va. 199, 604 S.E.2d 449 (2004), in order “[t]o trigger an application of the “plain error” doctrine there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. . .”

First, the Court determined that reversible error exists because the amendment to the complaint adding the defendant hospital should relate back to the date that the original complaint was filed in 2003, and not to the 2005 date when the amendment was filed. If the 2003 date is used, then the ostensible agency prohibition was not yet part of the MPLA. Second, the Court stated that the Plaintiff child has a substantial right in pursuing her claim against CHH, and failure to preserve the child's right would call into question the fairness and integrity of the judicial process. The Court noted that the Legislature expressly permits an extended time to minors to file malpractice claims. Minors under ten may bring an action until their twelfth birthday. In this case the minor's twelfth birthday was in 2007, well after the plaintiff sought to add the hospital.