

FILED

December 16, 2005

released at 10:00 a.m.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

I write separately to reiterate the “positive misconduct” rule that I outlined in my concurrence to *Covington v. Smith*, 213 W.Va. 309, 582 S.E.2d 756 (2003). I dissent to the majority opinion’s failure to adopt the rule because, factually, this case is a perfect example of why such a remedial rule is needed.

The positive misconduct rule is simple: where an attorney engages in extreme, inexcusable, repeated neglect or inaction that is so disastrous that the client is effectively and unknowingly deprived of legal representation, the client will not be held responsible for the attorney’s neglect. It is called positive misconduct because the inaction is so severe that it rises to a level of, and often seems to be accompanied later by, deliberate misconduct on the part of the lawyer. *See Covington*, 213 W.Va. at 326-27, 582 S.E.2d at 773-74 (Starcher, J., concurring).

The positive misconduct rule doesn’t encompass simple attorney mistakes, nor does it apply to deliberately-chosen delay strategies by attorneys which have an unintended consequence. The rule kicks in when the attorney takes a course of action that is anathema to the role of an aggressive advocate. It protects a client when a lawyer goes on a frolic and detour from his responsibilities with disastrous results.

Whatever the lawyer's motivation – whether stupidity, cupidity, timidity, or mental illness – when the lawyer's conduct, in effect, obliterates the existence of the attorney-client relationship, and the client seeking relief is relatively free from negligence, then the client should be excused from association with the lawyer and freed from the consequences of the lawyer's actions.

In this case, pure sloth by attorney Robert Browning got a good case dismissed in December 1999. Pure, positive misconduct by the attorney got that dismissal hidden from his clients for several years. This case, in a nutshell, is a classic example of positive misconduct by a lawyer. The circuit court should have permitted the case to be reinstated through the operation of this doctrine.

I concede that it took the plaintiffs' new lawyer, Sherri D. Goodman, until September 2003 – almost four years after the dismissal – to take action to get the case reinstated, and the defendants might have suffered some prejudice by the intervening time period. But, the plaintiffs never learned of Browning's misconduct until May 2002 and did not hire Ms. Goodman until August 2002. Up to September 2003, Ms. Goodman reasonably relied upon the three term rule in Rule 41 of the *Rules of Civil Procedure* and *W.Va. Code*, 56-8-12 in forming her legal opinion that, as a matter of law, the case simply could not be reinstated. I dissent because the majority opinion now punishes the plaintiffs for their misplaced trust in Browning, and punishes them because Ms. Goodman initially performed her role as a lawyer and obeyed the written law.

Ms. Goodman showed some moxie in this case when, on September 24, 2003, she encouraged the circuit court to toss the three term rule to the wind and do the right thing – reinstate the plaintiffs’ case so it could be resolved on its merits. Ms. Goodman raised the Court’s opinion and my separate opinion in *Covington* – which was filed on July 11, 2003 – as routes the trial court could take to fairly remedy attorney Browning’s flagrant abandonment of his responsibilities to the plaintiffs. Unfortunately, the trial court and now this Court have refused to take that step toward fairness.

The circuit court, and this Court, should not have “ducked” the issue; they should have done the right thing and reinstated the plaintiffs’ case through the operation of the positive misconduct rule. I therefore respectfully dissent.