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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, dissenting:

By relying exclusively on judicial estoppel to address the issue of whether Appellants could alter their pleadings post-verdict, the majority both obscured and ignored the importance of Rule 15(b) of the West Virginia Rules of Civil Procedure in our jurisdiction. Moreover, by overlooking the use of Rule 15(b), the majority has sent a message, perhaps unwittingly, to the trial courts of this state regarding the impermissibility of amending pleadings to conform to the evidence.

Under Rule 15(b), courts are permitted to freely amend pleadings “[w]hen issues not raised by the pleadings are tried by *express or implied consent* of the parties.” W.Va.R.Civ.Pro. 15(b) (emphasis supplied). The amendment of pleadings is permitted even after judgment under Rule 15(b) for the purpose of causing the pleadings to conform to the evidence. While Appellants did not rely on Rule 15(b), they could have relied upon it to make their arguments post-verdict that the case, as tried, was outside the confines of the Medical Products Liability Act.¹

¹Appellants argued that the instructions given in this case did not refer to the “care and treatment of Allison J. Riggs” but instead just referred to the hospitalization of Ms. Riggs.

From the record it is clear that the verdict form sent to the jury was couched in terms of the hospital's negligence arising not from the direct provision of medical treatment to the plaintiff but as a result of "failing to maintain a safe and proper hospital environment with respect to infection control." As Appellants' counsel argued on appeal, the manner in which this case went to the jury was significantly altered from how it was originally pled both in terms of the parties² against whom liability was sought and in terms of the allegations of harm from the original pleading of the case.³ Significantly, the focus of the case as presented to the jury for deliberation was the violation of a duty to provide a proper disease-free environment rather than negligence arising from the direct provision of medical care to the plaintiff.

For the majority to have solely looked to the doctrine of judicial estoppel as a means of prohibiting any post-verdict amendment of pleadings and to omit any discussion

²By the time this case went to trial, the only remaining defendant was West Virginia University Hospitals ("WVUH"). WVUH had by stipulation agreed that the individually named defendants "did not provide medical care or treatment" to the plaintiff.

³There was also a dispute among the parties as to whether the record accurately reflected the jury charge due to the court reporter's failure to record the trial court's reading of the jury charge. Appellants argued that the jury charge in the record did not comport with that given by the trial court, stating that the words "in the course of treatment" were removed and replaced with "relating to the hospitalization of." While the record on this issue is less than clear due to the non-transcription of the judge's reading of the charge, there is no question from the language of the verdict form that Appellants asked the jury to determine negligence not based on the provision of medical care but based upon the failure to "maintain a safe and proper hospital environment with respect to hospital control."

of the procedural workings of Rule 15(b) was clearly shortsighted. In those cases in which the evidence adduced at trial departs from the four corners of the pleadings, there is a procedural mechanism in place that expressly permits the amendment of pleadings. Under the clear and indisputable authority of Rule 15(b), cases should be decided on the issues that were tried and the pleadings can permissibly be amended as late as post-verdict when necessary to conform to the evidence adduced at trial. By overlooking the significance of Rule 15(b), the majority has downplayed the objective at the heart of the rule -- a clear sanctioning of the necessary procedural flexibility that trial lawyers require as a means of responding to inevitable alterations in the theory of a case. Moreover, I submit that to deny litigants the opportunity to conform their pleadings to the evidence adduced at trial violates not only the spirit of the rules of civil procedure to fairly decide cases on their merit, but also the "letter" of Rule 15(b) of the West Virginia Rules of Civil Procedure.

Accordingly, I respectfully dissent.