

No. 21277 - Mildred Walden, Plaintiff Below, Appellant, v. Jay M. Hoke and Fredrick G. Staker, III, Defendants Below, Appellees

Workman, Chief Justice, dissenting:

The majority concludes that collateral estoppel bars relitigation, in a different jurisdiction, of an issue previously ruled upon by another court. As the majority recognizes, a party cannot circumvent that rule by simply describing the same facts in a different way. While those principles are facially correct, they do not adequately address or resolve the issues presented to this Court in the instant case.

The majority summarily concludes that Mrs. Walden's allegations "boil down to one basic complaint--she did not get part of a workers' compensation award which she believed she deserved." Upon thorough analysis of Mrs. Walden's claims in the legal malpractice action, however, it

is clear that additional issues were raised in the Cabell County claim which had not been litigated in Lincoln County. The Circuit Court of Lincoln County did indeed find that Mrs. Walden knew of the existence of the workers' compensation award and knowingly and intelligently waived her rights thereto. That issue was the only one determined by the Circuit Court of Lincoln County.¹

In the Legal malpractice action brought in Cabell County, however, Mrs. Walden clearly raised issues not previously addressed by the Lincoln County court. For instance, Mrs. Walden claimed that her attorneys were

¹It is actually not clear from the record before us whether the circuit court completely resolved even the issue regarding the workers' compensation award. It concluded that ". . . the

Settlement Agreement of the parties was entered into by the Petitioner without her being subjected to fraud, duress, or other unlawful compulsions to enter said Agreement." This appears to leave open the question of whether the Petitioner waived her interest in the award based on negligent legal advice.

negligent in protecting her interests by failing to prevent her former husband's dissipation of approximately \$40,000 in marital assets. Further, Mrs. Walden claimed that her attorneys neglected to advise her of a possible right to alimony and failed to assert her claim to any real property interest. Mrs. Walden also asserted that her attorneys failed to conduct meaningful discovery. A finding in the Lincoln County action that Mrs. Walden knew of the workers' compensation award and knowingly and intelligently waived her rights thereto should not preclude litigation in Cabell County in issues which were not encompassed within the scope of the Lincoln County inquiry. Mrs. Walden's claim against her attorneys for legal malpractice should have been allowed to proceed, so that she could have had her day in court to fully litigate the issues in her complaint.

We have said on many occasions that a motion for summary judgment should be granted only when there is no genuine issue of material fact and

the moving party is entitled to judgment as a matter of law. W. Va. R. Civ. P. 56(c). We have explained that on appeal, the facts are to be viewed in a light most favorable to the party against whom the summary judgment was rendered. Price v. Bennett, 171 W. Va. 12, 297 S.E.2d 211 (1982). We have also emphasized that because summary judgment forecloses trial on the merits, we have not favored its use where factual development is necessary to clarify application of the law. Coffman v. Shafer, 186 W. Va. 381, 412 S.E.2d 782 (1991). Furthermore, questions of negligence and due care are not ordinarily susceptible to adjudication through summary judgment. Reed v. Smith Lumber Co., 165 W. Va. 415, 268 S.E.2d 70 (1980).

It smacks of lawyer protectionism to deny this plaintiff at minimum the right to develop the facts surrounding her claims which were not addressed in any way by the Lincoln County Circuit Court.