Maynard, J., Dissenting Opinion, Case No.23401 Timothy Gaither v. City Hospital, Inc.

No. 23401 - Timothy Gaither v. City Hospital, Inc., a West Virginia corporation

and

No. 23368 - Linda S. Chancellor, aka Linda S. Holdren, aka Linda S. Payne v. Harry Shannon, M.D.; St. Joseph Hospital, a West Virginia corporation; John Doe Medical Instrument Manufacturing Corporation (now known as Van-Tec, a subsidiary of Boston Scientific Corporation), doing business in the State of West Virginia; P. L. Kupferberg, M.D.; and John Doe Medical Instrument Distributing Company, a corporation doing business in the State of West Virginia

Maynard, Justice, dissenting:

I dissent in Gaither v. City Hospital, No. 23401 (Feb. 24, 1997), and Chancellor v. Shannon, No. 23368 (Feb. 26, 1997), because I believe that, in these opinions, this Court stretches the law in order to disregard the applicable statutes of limitation.

Gaither and Chancellor both concern statutes of limitation. Although not apparent from some of this Court's recent decisions, statutes of limitation continue to serve an important function in the operation of the law. This court has stated that "[t]he basic purpose of statutes of limitations is to encourage promptness in instituting actions; to suppress stale demands or fraudulent

claims; and to avoid inconvenience which may result from delay in asserting rights or claims when it is practicable to assert them." Morgan v. Grace Hospital, Inc., 149 W.Va. 783, 791, 144 S.E.2d 156, 161 (1965) (citations omitted). In Humble Oil v. Lane, 152 W.Va. 578, 583, 165 S.E.2d 379, 383 (1969) this Court explained:

Statutes of limitations are statutes of repose. Their object is to compel the exercise of a right of action within a reasonable time.

At one time the attitude of courts was hostile toward the enforcement of statutes of limitations. However, legislative policy in enacting such statutes is now recognized as controlling and courts, fully acknowledging their effect, look with favor upon such statutes as a defense. . . . "Statutes of limitations are now considered as wise and beneficent in their purpose and tendency; they are looked upon as statutes of repose, and are held to be rules of property vital to the welfare of society. * * * While the courts will not strain either the facts or the law in aid of a statute of limitations, nevertheless it is established that such enactment will receive a liberal construction in furtherance of their manifest object, are entitled to the same respect as other statutes, and ought not to be explained away."

. . . [S]tatutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. It has been widely held that such exceptions "are strictly construed and are not enlarged by the courts upon considerations of apparent hardship." (Citations omitted).

Unfortunately, in Gaither and Chancellor, this Court has resorted to the use of smoke and mirrors and has "explained away" the statutes of limitations.

In Gaither, I believe that the Court radically enlarges the discovery rule which was articulated in Cart v. Marcum, 188 W.Va. 241, 423 S.E.2d 644 (1992), in order to avoid the applicable statute of limitations. An explanation of the evolution and construction of the discovery rule as set forth in Cart is aptly discussed in the majority opinion and will not be reiterated here. I note, however, that in Cart, this Court stated that,

by declaring the existence of a "discovery rule" we do not eviscerate the statute of limitations: the statute of limitations will apply unless the handicaps to discovery at the time of the injury are great and are largely the product of the defendant's conduct in concealing either the tort or the wrongdoer's identity.

Cart v. Marcum, 188 W.Va. 241, 245, 423 S.E.2d 644, 648 (1992). The Court further stated:

The "discovery rule," then, is to be applied with great circumspection on a case-by-case basis only where there is a strong showing by the plaintiff that he was prevented from knowing of the claim at the time of the injury. The general rule is that mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of a statute of limitations. In order to benefit from the rule, a plaintiff must make a strong showing of fraudulent concealment, inability to comprehend the injury, or other extreme hardship:

. . . . However, special rules apply in a case involving particular hardship or other circumstances justifying different accrual rules.

Id. (Footnotes and citation omitted).

I find the distinction made by the majority between Cart and the present case to be a spurious one, and I would simply apply the discovery rule statutorily recognized in W.Va. Code § 55-7B-4 (1986), and set forth in Cart, to the circumstances of this case. The standard this Court adopts here encourages dilatory behavior rather than diligence and allows a party to sleep on his rights. I agree with the hospital that the appellant simply failed to exercise reasonable diligence in discovering the reason for the loss of his leg. In October 1989, the appellant was aware that his leg had been amputated, and his parents were told by Shock Trauma physicians that the delay by City Hospital in transporting the appellant to the trauma center might have caused the loss of the appellant's leg. Nevertheless, for the next three years, the appellant failed to investigate the reason for his injury. In light of the fact that the appellant is an adult and apparently of at least average intelligence, I find his parents' explanation that they were unable to discuss the appellant's amputation with him preposterous. In addition, the appellant failed to request his medical records from the hospital, and failed to speak with anyone at City Hospital or Shock Trauma concerning the causes of his amputation. I also agree with the circuit court that the appellant "had available to him all information necessary in order to discover the alleged act of malpractice by City Hospital, within two years from the date of the alleged occurrence, and he was not prevented from obtaining such information by City Hospital or any other party or entity," and that the appellant's claim, therefore, did not fall within the discovery rule as set forth in Cart. Because I believe that the appellant's claims were, therefore, barred by the applicable statute of limitations, I would affirm the circuit court's grant of summary judgment on behalf of City Hospital.

In Chancellor, the appellant was definitively notified on October 23, 1991 that a wire had been improperly left in her body from a previous surgery. The appellant filed suit against the doctor, hospital, and then unknown manufacturer of the wire on October 1, 1993, twenty-two days before the two year statute of limitations would have run on a products liability claim. Only then did the appellant began to seriously seek to determine the identity of the manufacturer. As a result, the appellant's amended complaint specifically naming the manufacturer of the wire as a defendant was filed well outside the two year statute of limitations. The Court managed to reverse the grant of summary judgment on behalf of the manufacturer by reasoning that further

inquiry into the steps taken by the appellant's attorney prior to October 1, 1993, alluded to in an affidavit filed by the appellant's attorney, is necessary before summary judgment is appropriate. Again, the Court struggled to find a way to avoid the application of the statute of limitations.

As noted above, according to Cart, in order to benefit from the discovery rule, the appellant must make a strong showing of fraudulent concealment, inability to comprehend the injury, or other extreme hardship. If the appellant is able to make such a showing, I fail to understand why the appellant did not present such evidence prior to the circuit court's ruling on the appellee's summary judgment motion. In the absence of such evidence, I agree with the circuit court that:

[Appellant] has not shown that she acted with reasonable diligence; the [Appellant] has not shown that the handicaps to discovery of the identity of [the manufacturer of the wire] were great and has completely failed to show that the handicaps to discovery of the identity of [the manufacturer] were the product of [the manufacturer's] conduct; there has been no showing whatsoever of any fraudulent concealment by [the manufacturer][.]

In sum, in both Gaither and Chancellor this Court completely ignores the discovery rule's requirement of reasonable diligence, and, in clear contravention of our case law, rewards plaintiffs who exercised willful ignorance.

In W.Va. Code § 55-7B-4 and W.Va. Code § 55-2-12, the Legislature clearly expressed its will to limit lawsuits. As noted above, statutes of limitations serve several important purposes, one of which is the recognition of the fact that things should be over at some point. Even in the world of legal actions, there should be finality. The public perception is that legal actions take too long, cost too much, and never end. Decisions such as Gaither and Chancellor only serve to encourage that belief. For these reasons, I believe that it is

improper for this Court to so blatantly ignore legislative enactments of statutes of limitations.

Also, I cannot help but think that the Court's eagerness to disregard the statute of limitations in Gaither stemmed at least in part from the fact that the defendant was a hospital. The trend in this Court is to transform hospitals into insurance companies and make them the insurers of everyone on the premises. One problem with this is that most hospitals in West Virginia no longer have deep pockets. According to the Center for Rural Health Development, today there are thirty-one small rural hospitals representing about half of all hospitals in West Virginia. Small rural hospitals are characterized as those with fewer than 100 beds, fewer than 5,000 admissions annually, and located in a rural community with fewer than 10,000 persons. As a group, the small, rural hospitals in West Virginia showed a profit of -1.7% in 1991, 0.1% in 1992, -1.6% in 1993, 1.8% in 1994 and 3.7% in 1995. This is not to suggest that larger hospitals in the state have significantly deeper pockets. For the same time period, all hospitals in the state showed a profit of -0.6% in 1991, 1.7% in 1992, -0.2% in 1993, 2.1% in 1994, and 4.5% in 1995. Thirteen of the 55 acute care facilities in the state lost money in 1995, with 33 of the 55 earning below the average statewide profit margin.(1) "Profit" is not really an accurate term and is probably a bad word to use because in present day West Virginia profit has been unfairly given a bad connotation. Further, many of the state's hospitals, including City Hospital in the case at bar, are public, non-profit hospitals.

The above figures illustrate that by unfairly exposing hospitals to damage awards in tort claims which have really expired, this Court could be threatening the health and very existence of many small, struggling hospitals. The result will be a loss of access to quality medical care in West Virginia's countless rural communities. This could be partially prevented if the Court would simply uphold the statutes of limitations wisely enacted by the Legislature.

The Court denied that *Cart* would "eviscerate" the statute of limitations. I think that word means to cut out the guts or disembowel. If so, our statute of

limitations now looks like the inside of a slaughterhouse, with the blood and guts of the statute splattered everywhere. This Court, with its decisions in *Cart, Gaither and Chancellor*, have created an abattoir out of our statute of limitations jurisprudence and have ground up the statute and made it into judicial sausage.

1. Some of the above information concerning hospitals in West Virginia is contained in a report compiled by the West Virginia Hospital Association in cooperation with the Center for Rural Health Development titled Rural Hospitals in West Virginia: Making the transition (October 1996).