No. 23557 -- John Woodruff Kessel and Ray Miller Kessel v. David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty, and Brian P. Conaty

Workman, J., concurring, in part, and dissenting, in part:

This case focuses our attention not only upon new and novel issues of law, but a compelling human tragedy as well. It is about a family faced with a great personal dilemma and the difficult choices that were made. It is also about a legal system that is ill-equipped to sort out and bring resolution to the complex human and moral issues it is with increasing frequency being required to address.

It could be a television mini-series, and the skillful script-writer could make any of the parties extremely empathetic characters or heartless villains. Under our system, it was left to a jury of six average people to make the judgments we now review, under legal instructions given by a competent and thoughtful judge, governing many new issues never previously presented in West Virginia, or in some cases, even in the United States. But with the possible exception of the California lawyer whose own state supreme court found his conduct in this case to be "immoral, reprehensible, and dishonest,"[1] there are no real villains here. There is, however, a $7.85 million judgment

[1]Kessel v. Leavitt, 75 Cal. Rptr.2d 639, 650 (Cal. Ct. App. 1998).

facing one family; a man who may never see his son; difficult legal issues not capable of easy resolution; and a dissertation of law that will have long-range implications on future situations.

I commend Justice Davis on this thorough and lengthy opinion. Its completion obviously involved an immense amount of research and a conscientious effort to fairly consider numerous difficult issues.

I concur with the majority whole-heartedly in its ringing pronouncement of the rights of every parent to a relationship with his or her child. That is not new law but it is important that it be reiterated clearly. The United States Supreme Court held in Lehr v. Robertson, 463 U.S. 248 (1983) that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause." Id. at 261 (citation omitted). Similarly, in West Virginia, this Court has held that this State's Due Process Clause extends "substantial protection" to an "unwed father [who] demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child." Syl. pt. 2, in part, State ex rel. Roy Allen S. v. Stone, 196 W. Va. 624, 474 S.E.2d 554 (1996). We have also enunciated the right to that parent-child relationship in the context of the child's right. In re Brian D., 194 W. Va. 623, 461 S.E.2d 129 (1995);

In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995); Honaker v. Burnside, 182 W. Va. 448, 388 S.E.2d 322 (1989) (recognizing a child's right to continued association with one with whom there is an emotional bond); see also In re Jonathan G., 198 W. Va. 716, 482 S.E.2d 893 (1996) (recognizing child's right in some circumstances to continued association with foster parents).

I concur also with the majority's holding that, "to preserve his parental interest vis-a-vis his newborn child, an unwed biological father must, upon learning of the existence of his child, demonstrate his commitment to assume the responsibilities of parenthood by coming forward to participate in the care, rearing, and support of his newborn child by commencing to establish a meaningful parent-child relationship with his child.

I dissent, however, in several other significant respects:

The numerous instructional errors that the majority concludes were made are so substantial and numerous that cumulatively they must be considered so unfairly prejudicial as to justify retrial for Anne and her parents. Only where trial errors are determined not to have affected the merits of the case and not to have prejudiced the appellants should such error be determined to be harmless. See 1B Michie's Jurisprudence, Appeal and Error § 285 (1995). Given both the significance of individual

instructional errors as well as the cumulative effect of such error,[2] it appears that the jury's verdict in this case likely may have been affected by such improper instructions.

[2]See Syl. Pt. 8, Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 459 S.E.2d 374 (1995) (applying cumulative error doctrine to civil cases).

Although extensive and detailed instructions were given concerning the requirements of both the ICPC and the UCCJA,[3] and advising the jury that these statutes applied to the facts here, the majority correctly concludes that neither of these two compacts were applicable to the instant case and that such instructions were therefore erroneously given. Since the central emphasis of these two acts is providing for the welfare and best interest of children and because their requirements were presented in great detail, it is certainly likely that the jury could have looked to the provisions of these acts for guidance in determining liability and assessing damages. Any determination of liability made with reference to the provisions of these inapplicable laws would constitute reversible error. To simply say, as the majority does, that because the overall jury charge was lengthy there is no reason to believe that the jury placed undue emphasis on such erroneous instructions of law is short-sighted. If the jury was left with an overall impression of legal directives that both delineated and required procedural compliance under the facts of this case, it stands to reason that the jury's verdict could have been affected by such improper instructions.

Another instructional error to which the majority attaches only minor significance concerns the failure of the trial court to give an instruction offered by

[3]The majority observes that "the jury instructions given with respect to the UCCJA were much less onerous than were those instructive of the ICPC in that the UCCJA instructions did not contain any specific instructions indicating that the court determined these provisions to be applicable to the parties' controversy."

Appellants regarding the fact that despite the validity of the ex parte injunction, no violation of such injunction could be found until proof of service on Anne or her personal appearance before the court was shown. The majority takes the view that no error occurred because the trial court remained silent, in effect, by not giving an instruction one way or the other on this issue. Since the jury was instructed, however, that the injunction was valid, the issue once again becomes whether the jury could have placed undue emphasis on the perceived violation of the injunction. The nuances of service and jurisdiction clearly are not within the average juror's realm of experience. Unlike the majority, I find the failure of the trial judge to have given this instruction to constitute reversible error, at least when viewed cumulatively with the other instructional errors.

Furthermore, the majority determined that the instructions governing the issue of whether the defendants violated John's due process and equal protections rights were unsupported by any applicable law and constituted an abuse of the trial court's discretion. Here again, the majority concluded that the use of instructions addressing John's due process and equal protection rights which were unsupported by law constituted harmless error because such error was "relatively minimal," and I must disagree. An obvious inconsistency was presented to the jury by virtue of the fact that the trial judge separately instructed the jury that Anne had no duty to notify John of the adoption and then by giving the due process instruction, the trial court simultaneously instructed the jury that John's rights as an unwed father may include "a right to notice of

any adoption of that child and an opportunity to be heard prior to the termination of his parental rights to that child." Especially given the fact that the jury apparently took the jury instructions with them during their deliberations, this incorrect statement regarding the violation of John's constitutional rights likely contributed to the verdict reached.

The fact that, as the majority acknowledges, no other jurisdiction has recognized "a claim based in tort and sounding in fraud in circumstances fairly analogous to those underlying the instant appeal" suggests a pressing need to closely examine the parameters of a cause of action predicated on principles of fraud under the facts of this case. Appellants stress that fraud based on concealment or silence cannot be proven absent a duty to disclose. See Sabet v. Eastern Virginia Medical Auth., 775 F.2d 1266, 1270 (4th Cir. 1985). Based on the facts of this case, Appellants argue that John cannot identify any duty to disclose that they in turn violated. On this issue, Appellants had the trial court instruct the jury that Anne was not obligated "to keep the plaintiffs or either of them apprised of her whereabouts; the progress of her pregnancy or to provide them with any information concerning the birth of her child." In addition, Appellants emphasize that no order was ever entered by the circuit court

which would have required Anne to reveal this information. Based on Appellants' instruction, the trial court also instructed the jury that Anne did not have a duty to provide notice to John regarding the adoption itself.

Since the majority states very clearly that the rights of the plaintiff father began at the moment of birth, then pre-birth conduct obviously could not be the basis for an award of civil damages. However, the jury was permitted to hear a massive amount of evidence regarding pre-birth conduct of all of the defendants. Although such evidence might be admissible with a proper limiting instruction (to show motive or state of mind), no such limiting instruction was given. Thus, all of this evidence was heard by the jury without proper legal instruction with respect to the proper purposes for which they could consider the evidence.[4] Cumulatively, such evidence together with the instructional error should be the basis for re-trial of the liability issues with respect to the relatives.[5]

Furthermore, although John enjoyed substantial rights with respect to his child, and although the defendants had no right to engage in affirmative conduct to

[4]Although ordinarily if a party does not raise an instructional error, then it is deemed waived, here the parities once again did not have the benefit of the majority's holding that John's rights did not begin until the time the child was born.

[5]Lawyer Leavitt did not appeal, thus his verdict is final.

violate those rights, neither did they have any fiduciary or other legal obligation to engage in affirmative acts to protect or ensure his rights. Furthermore, the majority acknowledges that fraud can only be established with regard to acts or omissions committed subsequent to the birth of the child. When the record in this case is scrutinized for acts of concealment on the part of the maternal grandparents, all that can even be suggested is that they may have known the whereabouts of Anne when they were deposed, although there has been no proof of this, and that they may have known the Canadian residence of the adoptive parents, but again there was no proof of this. Even if a theory of fraud properly applies to a case such as this one, the evidence presented at trial with regard to the maternal grandparents does not demonstrate that they violated any alleged duty of disclosure.

Finally, the enunciation for the first time in this context of the availability of the affirmative defense of justification for Anne and her parents seems to dictate that this matter should be retried so that they might avail themselves of such defense if they so choose.[6]

[6]The verdict against lawyer Leavitt, however, would not be subject to such retrial, since he did not post an appeal bond and his appeal was thereby dismissed. Furthermore, because there is such a substantial amount of evidence against Anne's brother, Brian, including evidence of possible lying under oath, his inability to utilize the defense of justification does not appear to be a substantial enough error to warrant retrial when compared to the weight of evidence against him.

As courts are called upon with ever-increasing frequency to resolve difficult social and moral issues, I wish to strike a cautionary note. There are questions of immense moral magnitude that are not capable of easy answers, or susceptible to the facile application of clear-cut rules. Courts must very carefully scrutinize new causes of actions calling into question difficult personal decisions human beings face and the role of family and loved ones in those decisions. I am troubled that, whatever conclusions are made on a legal or moral basis, as to the conduct of these two individuals, John and Anne---and all the other Johns and Annes there are still to come---that the family members of such individuals put themselves at risk of permanent financial ruin because of the human support they may give. As judges, we must to some extent look not only at the legal issues inherent in these situations, but also figuratively put ourselves into the human shoes of the litigants. This observation is in no way intended to denigrate the obligation of any person in our society have an obligation to speak truthfully when placed under oath in a court proceeding, and this separate opinion has carefully excluded any objection to the majority's conclusion that our system cannot countenance perjury or subornation of perjury under any circumstance. Cases like the instant one will continue to require more wisdom than we mortals possess; thus we must tread carefully in enunciating the parameters of these new causes of action and contemplate fully the implications of our rulings in the many diverse factual situations yet to arise.