

No. 25981 -- Peter S. Hartmann v. The Morningstar Building Company, Inc., a West Virginia corporation; Gary Morningstar, individually and as vice president of Morningstar Building Company; Cary Morningstar, individually and as president of Morningstar Building Company; and Judy Morningstar, individually as secretary of Morningstar Building Company; The Morningstar Companies, Inc., a West Virginia corporation; The Morningstar Consulting Company, Inc., a West Virginia Corporation; and The Village, LLC, a West Virginia limited liability company

FILED

December 15, 1999

**DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

RELEASED

December 17, 1999

**DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Maynard, Justice, dissenting:

I disagree with the majority that the appellant did not receive sufficient notice and an opportunity to be heard before his action was dismissed by the circuit court. Accordingly, I would affirm the circuit court's dismissal of the action.

The appellant sued the defendants on October 12, 1995. For more than two years and five months, the appellant sat on his lawsuit and did nothing to prosecute it against the remaining defendants, Judy Morningstar and The Village. Consequently, Judy Morningstar moved to dismiss for failure to prosecute on March 27, 1998. This motion was ultimately granted on July 22, 1998.

Despite the appellant's obvious failure to do anything in regards to his lawsuit, the majority reverses the dismissal by the circuit court. The majority reasons that the appellant did not receive proper notice and an opportunity to be heard on the motion to

dismiss. The facts show that the appellant filed a memorandum in opposition to Judy Morningstar's motion to dismiss on April 10, 1998, which obviously means that he had actual notice of the motion. While the record does not reflect that the appellant received notice of the circuit court's reconsideration of Judy Morningstar's motion or The Village's original motion, the record does show that a status conference was held in which counsel for the parties apparently had an opportunity to argue the defendants' motions to dismiss. Although a transcript of this hearing is not included in the record, the circuit court's order of dismissal states that the circuit court reached its conclusions, in part, "upon the pleadings formerly filed and read herein and upon the argument of counsel and matters *developed at a status hearing recently convened in this matter.*" (Emphasis added.)

I conclude from the above, that the appellant had an opportunity to present his opposition to the motions to dismiss before the circuit court. Also, he was not taken by surprise at the status hearing because he had actual notice of at least Judy Morningstar's motion to dismiss. Further, the fact that by the time the status hearing was held more than two and one-half years had elapsed since his filing of the lawsuit lends further support to my belief that the appellant was not caught off guard by the defendants' motions to dismiss for failure to prosecute.

In conclusion, I would affirm the circuit court because I believe the appellant's own conduct, and not any failure of the circuit court to provide notice, brought about the dismissal of the appellant's lawsuit. Accordingly, I dissent.

