No. 26603 -- Patsy L. Rose v. Thomas Memorial Hospital Foundation, Inc.

FILED
June 28, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
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Starcher, J., concurring:

I agree with the reasoning employed by the majority in this case. The majority correctly concludes that the plaintiff's attorney simply didn't appeal the right order, and didn't challenge it in the circuit court in the right way.

But I am bothered by this outcome -- an innocent litigant loses because their attorney got lost in a maze of rules. None of this needed to occur, and the circuit judge probably could have made this case go forward rather than have declared it dead on arrival.

The plaintiff in this case went to a building on MacCorkle Avenue in South Charleston, West Virginia that has a sign out front with the logo "Thomas Memorial Hospital." While there, she claims she was malpracticed upon by the hospital's staff, who wrote notes on pieces of paper with the heading "Thomas Memorial Hospital." She hired a lawyer, and the lawyer called the Secretary of State to find out the proper name for the hospital.

The Secretary of State said the name of the business at the building was "Thomas Memorial Hospital Foundation, Inc.," a business which lists its principal office address as the same building on

MacCorkle Avenue in South Charleston, West Virginia.[1] So the lawyer filed a complaint suing the business with that name for malpractice.

After the statute of limitation had expired, the attorney for the hospital went to court and said that plaintiff's lawyer screwed up and sued the wrong defendant. The hospital's lawyer pointed out that the plaintiff's lawyer should have sued the "Herbert J. Thomas Memorial Hospital Association" ("Hospital Association"). The lawyer -- representing both the "Hospital Foundation" and the "Hospital Association" -- moved to dismiss the lawsuit because the proper defendant was not sued within the statute of limitation.

Every lawyer knows that a statute of limitation is designed to protect a defendant from stale lawsuits, lawsuits of which a defendant has no knowledge and no ability against which to defend. When a certain period of time has passed, the defendant can generally relax, safe in the knowledge that the plaintiff will not surprise the defendant many years later with a suit.

In the instant case, the correct defendant -- the "Hospital Association" -- knew it was being sued by the plaintiff for malpractice. The fact that the right defendant hadn't been served with a piece of paper styled "complaint," so as to trigger insurance coverage, is irrelevant. The defendant knew a lawsuit was coming, and had a chance to defend, and had no reason to relax.

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[1]Not surprisingly, the Secretary of State's corporation records are indexed alphabetically by the first letter in the first name. Hence, anyone doing a computer search for "Thomas" Hospital will invariably produce the "Thomas Memorial Hospital Foundation, Inc." It is only by running a search for "Herbert" that the correct defendant, "Herbert J. Thomas Memorial Hospital Association" comes up. *See* "West Virginia Secretary of State Business Organization Information System," http://www.state.wv.us/wvcorporations. Plaintiffs struggling to figure out the correct name of the defendant to sue should keep this in mind.

My point here is that the hospital suffered no prejudice when the plaintiff sued the wrong defendant. The people in charge knew an action was coming, and sent their lawyer down to dismiss the complaint. The lawyer got the complaint dismissed against the "Hospital Foundation." Then the judge let the plaintiff amend her complaint to sue the "Hospital Association," whereupon the judge immediately dismissed the complaint as not being timely filed. This latter action was fundamentally unfair.

The plaintiff in this case should not have been penalized by the defendant's "hide the peanut" strategy of having multiple company names.[2] But the fact remains that the plaintiff's lawyer should

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[2]One commentator lamented the confusion created by insurance companies that use different corporate names and logos to impede the filing of lawsuits:

> Lots of insurance companies operate under group or holding company names, and acquisitions, mergers, reorganizations, and name changes happen all the time. A policyholder's lawyer often can't figure out in advance of filing suit what is, and what isn't, a suable entity.
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> For instance. Federal Kemper Casualty Insurance Company wrote auto policies in West Virginia for years. A few years ago Kemper sold its auto insurance business to Anthem P&C Holdings, a subsidiary of Anthem, Inc., the parent of Anthem Blue Cross/Blue Shield of Indiana. Anthem P&C also acquired Shelby Insurance, Insura, and some other casualty company. All these were operated as the Insurance Company of Decatur for a year or so. Then Anthem Casualty Insurance Company was created to replace Kemper Casualty, with Insurance Company of Decatur disappearing, and Shelby, Insura, and the other one operating as sister companies to Anthem Casualty under Anthem P&C and ultimately Anthem, Inc. Then Anthem P&C sold all of its business (Anthem Casualty, Shelby, Insura, etc.) to Vesta Insurance Company. Vesta then began marketing exclusively under the name of Shelby Insurance. Anthem Casualty, Insura, and the one I can't remember became nonexistent. But there are insurance policies out there in the hands of policyholders written by Kemper, Insurance Company of Decatur, Shelby, Anthem Casualty, and Insura. If one of these policyholders has a dispute, who do you sue? Most of the policy-issuing companies are nonexistent, but how is one supposed to figure all this out? The burden has to be on the insurance

(continued...)

have appealed the judge's order, or immediately filed a motion under Rule 59 of the *West Virginia Rules of Civil Procedure*.

And in the end, an injured person is failed by the justice system.

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[2](...continued)

> people, not only to tell you if you got the wrong one (at least as they see it), but also to specifically identify the right one.
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> The insurance industry creates these structural quagmires to suit its marketing and tax interests, and it has the obligation to clarify the things (as they exist at any given moment) for the rest of us. Complaints should never be dismissed because of a bunch of insurance guys playing hide-the-peanut.

Barry Hill, "Don't Let Insurance Companies Set Your Court's Agenda," 2-3 (August 1998) (presented to the circuit court judicial clerks in Charleston, West Virginia.; available online at http://www.juryverdict.com/43agenda.pdf).