No.26847 - Jack Crafton, et al. v. Honorable Robert A. Burnside, Jr., et al.

Scott, J., dissenting:

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OF WEST VIRGINIA

In crafting a new syllabus point which reads, "Rule 60(b) of the *West Virginia Rules of Civil Procedure* does not apply to a motion to amend or reconsider a pre-trial scheduling or case management order," the majority has correctly stated the law. Yet, even a cursory review of the record in this case demonstrates that the majority was misguided in its resolution of this case. The unstated rule of law applied in this case, had the majority been forthright in its holding, is: "The plaintiffs should have been allowed to withdraw their consent to reverse bifurcation and the circuit court abused its discretion in failing to allow them to do so, notwithstanding their failure to make such a request." This is a remarkable holding.

Plaintiffs argued below, as well as in this Court, that they had a right to modification of the agreed order, notwithstanding their prior consent, because original counsel was inexperienced and because they would suffer prejudice in the form of added expense. The fact that the majority granted Plaintiffs a writ of prohibition on these grounds is beyond comprehension. The record clearly establishes that Plaintiffs never moved to withdraw their consent to reverse bifurcation. The majority awarded Plaintiffs extraordinary relief on the basis of facts disproved in the record and on a legal principle that was argued neither below nor in this Court.

The majority states that it reached "the firm conclusion that the principal reason" for the trial court's denial of Plaintiffs' motion to modify was the existence of the joint agreement of counsel to bifurcation. This conclusion is based upon pure surmise and conjecture, as well as a disregard of the trial court's actual consideration of the issue. In rejecting Plaintiffs' argument that such bifurcation would result in increased expense, the trial judge bolstered his ruling by reference to Plaintiffs' initial consent **and** the fact that the parties had been working under the consent order for over a year. Contrary to what the majority states, the trial court's order reflects an initial determination that the agreed-upon procedure was entirely appropriate, which it was, and a secondary determination that Plaintiffs were not prejudiced as a result of this agreement, as they were not.

The majority's focus on Rule 60(b) is a complete red herring and is a patent disregard of the law. Whether the trial court should have addressed Plaintiffs' motion for reconsideration under Rule 16(e), as expanded by the inherent power of the Court to do justice, rather than under Rule 60(b), is irrelevant. This Court has repeatedly held that as long as the trial court reaches the correct legal conclusion,

the ruling will be upheld.[1] Consequently, the majority opinion should have focused on whether the trial court reached the correct legal conclusion, and **not** whether it applied the proper rule.

The majority totally disregarded the critical inquiry necessary for an issuance of a writ of prohibition: What "prejudice" was actually shown to justify the extraordinary remedy of prohibition? Noticeably absent from the majority opinion is any discussion of the criteria typically applied by this Court to decide whether a writ of prohibition should issue in a case where the undeniable standard of review is whether an abuse of discretion occurred.[2] We have previously and consistently held, that:

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[1]This Court has previously stated in State v. Boggess, 204 W. Va. 267, 512 S.E.2d 189 (1998), that when a lower court makes the right ruling for the wrong reason:

> "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, Barnett v. Wolfolk, 149 W.Va. 246, 140 S.E.2d 466 (1965); see also Cumberland Chevrolet Oldsmobile Cadillac, Inc. v. General Motors Corp., 187 W.Va. 535, 538, 420 S.E.2d 295, 298 n. 4 (1992)(stating that "even if the reasoning of a trial court is in error ... we are not bound by a trial court's erroneous reasoning"); State ex rel. Dandy v. Thompson, 148 W.Va. 263, 274, 134 S.E.2d 730, 737, cert. denied, 379 U.S. 819, 85 S.Ct. 39, 13 L.Ed.2d 30 (1964)(stating in criminal context that "correctness of ... [trial court's] final action is the only material consideration, not the stated reasons for [the trial court's] taking such action").

204 W. Va. at ___, 512 S.E.2d at 198.

[2]Rulings made by a lower court concerning bifurcation are reviewed by this Court under an abuse of discretion standard. See Light v. Allstate Ins. Co., 203 W. Va. 27, 506 S.E.2d 64 (1998); Barlow v. Hester Indus., Inc.,198 W.Va. 118, 479 S.E.2d 628 (1996); State ex rel. State Farm Fire & Cas. Co. v. Madden, 192 W.Va. 155, 451 S.E.2d 721(1994).

> "[i]n determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among the litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. pt. 1, Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979).

Syl. Pt. 1, State ex rel. Cavender v. McCarty, 198 W.Va. 226, 479 S.E.2d 887 (1996) (emphasis added). Despite the clear requirement that writs of prohibition issue only upon a demonstration of "substantial, clear cut, legal error[][,]" the majority failed to mention the applicable standard. Id. Such a discussion must be at the critical center of any decision to issue a writ of prohibition.

We must ignore the syllabus to find the real reasons behind the decision in this case. In section one, the majority states that Plaintiffs will be sorely prejudiced because the bifurcation agreed to by their initial attorney "might be more financially burdensome on plaintiffs' counsel in financing the cases." Then, in section three, the majority opines that the attorney who agreed to reverse bifurcation suffered from both "undisputed inexperience and ignorance . . . ." I suppose it is safe to say that every attorney is inexperienced and ignorant compared to some other lawyer as to some specific area of practice. But what about the necessity of an evidentiary showing? There is no evidence in this record to support the suggestion that Plaintiffs' original counsel was any more ignorant than present counsel, or that either individual was ignorant of the significant factors involved in the agreement to bifurcate, or that any purported ignorance

prejudiced their clients.[3] Moreover, this Court has previously stated, in dicta, that "[t]he mere fact of retaining new counsel, in the absence of incompetent prior representation, does not constitute "manifest injustice" under Rule 16, *WVRCP* [1992] such that it entitles . . . [the movant] to relief from the court's previously uncontested deadlines." State ex rel. State Farm Fire & Cas. Co. v. Madden, 192 W.Va. 155, 161, 451 S.E.2d 721, 727 (1994).

The only "prejudice" to the movants referenced in the majority opinion is the **possibility** that the prosecution of the action might be more expensive to Plaintiffs' counsel in "financing the cases." Is this "might be" evidence relevant to the question of prejudice? Actually, it might be less expensive for everyone to bifurcate the trial as the parties agreed. The question of causation is the engine driving these cases and that issue was the first to be decided. Resolution of that issue might result in quick settlements, and the "might be" evidence cuts both ways. Unlike the majority opinion, the trial court's decision reflects the fact that thoughtful consideration was given to the prejudice that changing or altering the reverse bifurcation agreement would have on all the parties involved. The majority, however, appears to recognize any prejudice which **might be** suffered by Plaintiffs in proceeding under the bifurcation order and to totally

[3]What the record does reveal is that the motion for a case management order, which included the request to bifurcate, was filed on April 29, 1998. Nearly three months later, on July 20, 1998, the trial court conducted a hearing on the motion. The agreed order was not entered until September 29, 1998. Assuming, arguendo, that Plaintiffs' original counsel felt he was inexperienced at the time the bifurcation issue arose, he certainly had ample time to consult and become educated in this area prior to signing the agreed order! Further, the only evidence of his "inexperience" which can be gained from his affidavit is that he believed he was "inexperienced" because Plaintiffs' new counsel told him he was.

ignore any prejudice which **might be** suffered by Defendants[4] from the rescission of the bifurcation agreement.

There is an absolute lack of any evidence which supports Plaintiffs' averment, and the majority's conclusion, that an increased financial burden would be placed on Plaintiffs' new counsel.[5] Moreover, the majority offers no guidance on how great a financial burden is necessary to justify the issuance of a writ of prohibition. Does it need to be considered in relation to the value of the case? Or the net-worth of the lawyers? Or the fairness of the increased fees and expenses, if any, caused by the bifurcation? Critical to the issue, but completely ignored by Plaintiffs and the majority, is the fact that the trial judge had not decided whether there would be separate trials before separate juries. The pretrial order, agreed to by the parties, specifically defers decisions on the consolidation of claims for the causation/damages phase and the number of juries to be used. Thus, absent a requirement of separate trials before separate juries, how could there be any extra expense caused by the bifurcation of the issues? In short, there is nothing in the record of this case which demonstrates any prejudice, manifest injustice, or

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[4]Once again, the majority lobs in another red herring, by justifying the failure to discuss any prejudice to the Defendants as follows: "[T]he defendants did not assert in their response [before the lower court] that they had engaged in such pre-trial conduct, based on the bifurcation aspects of the case management order, so that they would be irretrievably prejudiced by revision of the order." The Defendants did not have to assert this in their response! The burden of proof for the motion for reconsideration was on the Plaintiffs. It never shifted to the Defendants. The Defendants' response to the motion appropriately focused on the standard of review the trial court should use in deciding whether to grant the motion and whether the Plaintiffs had produced sufficient evidence to meet the standard.

[5]The problems arising from lawyer-financing of lawsuits have proven to be immense. What is the proper policy for the courts to follow when such problems arise? That discussion must await a later day, as there is no evidence in this case which would permit an evaluation of that issue.

abuse of discretion sufficient to warrant the granting of a writ of prohibition. See McCarty, 198 W. Va. at 227, 479 S.E.2d at 888.

The majority would like us to believe that Plaintiffs' counsels' increased financial burden warrants issuance of the writ of prohibition. The crude, but unfortunately justifiable implication, from issuance of the writ, however, is that the majority must have been affected by, or subconsciously agreed with, the contention made by Plaintiffs, both in their memorandum in support of the petition and in oral argument:

> Professors Wright and Miller have discussed the impact of bifurcation on plaintiffs. Wright and Miller note a study concluding that while bifurcated cases take 20% less time than routine cases, defendants win in only 42% of the cases routinely tried while prevailing in 79% of the cases tried by bifurcation.

For the majority to reward Plaintiffs in the face of this shameless appeal to prejudice and bias is incredulous!

Another unfortunate message derived from the issuance of this writ is that trial judges no longer have control over how cases are managed during the pretrial phase, even if the parties are in agreement.[6] Now, rather than a writ of prohibition being a rare "extraordinary" remedy, it is readily

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[6] As noted in the following excerpt by a leading author on the subject, such an intrusion by an appellate court is highly unusual:

> [A]lthough objections to pretrial orders may be reviewed on appeal after the case has been resolved at the trial level, it is unlikely that it will lead to a reversal. There are basically two reasons for this: first, the order usually reflects the agreement of the parties and second, since the content of and

(continued...)

available when a party changes his/her mind about a pretrial order, previously agreed to, and the trial court refuses to alter or amend the order. The clear import of the majority opinion is that the evidentiary threshold to justify issuance of a writ of prohibition has just been dropped to an unbelievably low level, especially when a new, more prominent lawyer enters the case.[7] Since two of the four members of the majority served formerly as circuit court judges, as did I, I am left in utter amazement at this unjustifiable interference with the orderly disposition of these complex cases.

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[6](...continued)

> any decision to modify a pretrial order is a matter of trial court discretion, an appellate court will not interfere absent a showing of abuse of that discretion. It also felt that the best way to insure an effective pretrial conference system is to keep appellate interference to a minimum.

6A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 1527 at 260-62 (1990)(emphasis added and footnotes omitted).

[7]The lowering of the threshold necessary for a writ of prohibition is in direct contravention to this Court's precedent. In syllabus point one of State ex rel. Affiliated Construction Trades Foundation v. Vieweg, ___ W. Va. ___, 520 S.E.2d 854 (1999), this Court held:

> "'"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va.Code, 53-1-1." Syl. pt. 2, State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977).' Syllabus point 3, State ex rel. McDowell County Sheriff's Dept. v. Stephens, 192 W.Va. 341, 452 S.E.2d 432 (1994)." Syllabus Point 1, State ex rel. Charleston Area Medical Center, Inc. v. Kaufman, 197 W.Va. 282, 475 S.E.2d 374 (1996).

Accord State ex rel. Sims v. Perry, 204 W. Va. 625, 515 S.E.2d 582 (1999); State ex rel. State v. Reed, 204 W. Va. 520, 514 S.E.2d 171 (1999); State ex rel. United Hosp. Ctr., Inc. v. Bedell, 199 W.Va. 316, 484 S.E.2d 199 (1997).

On remand, while the majority has required the trial judge to revisit the bifurcation issue de novo, without giving any effect to Plaintiffs' prior consent, the trial judge is reminded that the decision to bifurcate need not be changed, if he concludes that it is the correct procedure to use in this case. The majority stopped short of totally usurping the function of the trial court on this issue. Therefore, absent specific findings of substantial prejudice or manifest injustice to either party, it remains within the trial court's purview to conclude that the decision to bifurcate was sound.

For the foregoing reasons, I respectfully dissent.