No. 28463 - Edward L. Daniel v. Charleston Area Medical Center, Inc., a West Virginia Corporation, and John Doe

FILED
March 9, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Davis, J., concurring:

This case presented a medical malpractice procedural issue that was of first impression for this Court. Namely, whether the trial court was required to afford the plaintiff a reasonable period of time to retain a medical expert to address the issue of proximate cause. The majority opinion correctly determined, as is set out in Syllabus point 4 of the opinion, that "[u]pon a trial court's determination that an expert witness is required to prove standard of care or proximate cause in an action brought under the West Virginia Medical Professional Liability Act, West Virginia Code §§ 55-7B-1 to 11 (1986) (Repl.Vol. 2000), a reasonable period of time must be provided for retention of an expert witness." The majority holding in this case was dictated by statute. I, therefore, concur with the majority decision. I write separately because I believe trial courts and lawyers need additional guidance in understanding and applying the holding in this case.

Reconciling Rule 16 of the West Virginia Rules of Civil Procedure and the West Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-1

A scheduling order was entered in this matter pursuant to Rule 16(b) of the West Virginia Rules of Civil Procedure.[1] Pursuant to the scheduling order, the parties were required to identify experts

[1]Rule 16(b) provides:

(continued...)

by December 10, 1999. The deadline for expert identification expired without the plaintiff designating an expert. The trial court ultimately granted summary judgment to CAMC because it determined that Mr. Daniel was required to use a medical expert, but failed to identify one within the time frame of the scheduling order. This Court recently stated that "Rule 16(e) specifically provides that a scheduling order controls litigation 'unless modified by a subsequent order.'" *State ex rel. Crafton v. Burnside*, 207 W. Va. 74, ___, 528 S.E.2d 768, 772 (2000). In *State ex rel. State Farm Fire & Casualty Co. v. Madden*, 192 W. Va. 155, 161, 451 S.E.2d 721, 727 (1994), we explained "that the circuit court was acting within his discretion . . . by refusing to allow [the defendant] to designate experts after the expiration of the deadlines established in the scheduling order." *See also Bartles v. Hinkle*, 196 W. Va. 381,

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[1](...continued)

> (b) Scheduling and Planning. Except in categories of actions exempted by the Supreme Court of Appeals, the judge shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail or other suitable means, enter a scheduling order that limits the time:
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> (1) To join other parties and to amend the pleadings;
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> (2) To file and hear motions; and
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> (3) To complete discovery.
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> The scheduling order also may include:
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> (4) The date or dates for conferences before trial, a final pretrial conference, and trial; and
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> (5) Any other matters appropriate in the circumstances of the case.
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> A schedule shall not be modified except by leave of the judge.

392, 472 S.E.2d 827, 838 (1996) ("A succession of violations . . . indicating a general unwillingness to comply with a court-imposed scheduling order, is enough for us even to justify a default [as a sanction].").

As demonstrated by the foregoing case law, precedent would appear to require affirming the trial court in this case. Indeed, had this not been a medical malpractice case within the confines of W. Va. Code § 55-7B-6, under the Rules of Civil Procedure we would be compelled to affirm the trial court's decision since the court was correct in requiring plaintiff to use an expert. However, the Rule 16(b) scheduling order in this case was qualified by the application of W. Va. Code § 55-7B-6, which, as discussed below, controls the issue of identifying a medical expert in actions for medical professional liability.[2]

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[2]An issue that was not raised by the parties in this case concerns whether the legislature had authority to address civil procedure matters in W.Va. Code § 55-7B-6. This Court has indicated that "[u]nder article [VIII], section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law." Syl. pt. 1, *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988). Further, "[u]nder Article VIII, Section 8 [and Section 3] of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl. pt. 1, *Stern Brothers, Inc. v. McClure*, 160 W. Va. 567, 236 S.E.2d 222 (1977).

In prior decisions of this Court we have approved of specific provisions in the Medical Professional Liability Act, which touched upon procedural matters that fell under the direct constitutional supervisory authority of this Court. In *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991), this Court held that the legislature could limit noneconomic damages recoverable for medical malpractice. In *McGraw v. St. Joseph's Hospital*, 200 W. Va. 114, 488 S.E.2d 389 (1997), we approved of the legislature granting trial courts discretion under W. Va. Code § 55-7B-7 to

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(1) The required status conference. Under W. Va. Code § 55-7B-6(a) a mandatory status conference must occur in a medical malpractice case "not less than nine nor more than twelve months following the filing of answer by all defendants[.]" This provision of the statute must be harmonized with Rule 16, which includes no time period specifically designated for holding any type of status conference under Rule 16.

In practice, trial courts should address the § 55-7B-6 mandatory status conference through the Rule 16 scheduling procedure. In other words, the initial scheduling order should provide the date that the court and parties will convene for the mandatory status conference. When this procedure is followed, the problem presented in the instant case should not arise, so long as the status conference is scheduled reasonably prior to the date the parties are required to designate their expert witnesses.[3] This last

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[2](...continued)
require expert testimony in medical professional liability cases. However, in *Mayhorn v. Logan Medical Foundation*, 193 W. Va. 42, 49, 454 S.E.2d 87, 94 (1994), we indicated that the legislature could not outline when an expert is qualified to testify in a medical malpractice action. In *Gaither v. City Hospital, Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997), we approved of the legislature imposing an outside limit of ten years on the filing of medical malpractice claims, regardless of the date of discovery, unless there is evidence of fraud, concealment, or misrepresentation of material facts by the health care provider.

In my judgment, the procedural issues promulgated in W. Va. Code § 55-7B-6 are not in conflict with Rule 16(b), but rather they supplement the Rule. However, as I indicated, the issue of whether W. Va. Code § 55-7B-6 offends the constitutional authority of this Court to regulate procedural matters in the trial courts of this State was not presented to this us. Thus, this issue is still alive until properly presented to this Court for resolution.

[3]The statute actually requires "the defendant to schedule such conference." This requirement does not preclude the trial court from setting a date for the status conference in the initial scheduling order. *See* Rule 16(b)(4) ("The scheduling order also may include . . . [t]he date or dates for conferences before (continued...)

requirement is elaborated on below.

(2) Determining the need for medical experts at the required status conference. When a mandatory status conference is held pursuant to W. Va. Code § 55-7B-6, the statute specifically requires the issue of medical experts be discussed. In this respect, § 55-7B-6(a)(2) expressly requires that during the conference a plaintiff "certify to the court that either an expert witness has or will be retained to testify on behalf of the plaintiff as to the applicable standard of care or that under the alleged facts of the action, no expert witness will be required." The statute also provides that "[i]f the court determines that expert testimony will be required, the court shall provide a reasonable period of time for obtaining an expert witness[.]" These provisions must also be harmonized with the scheduling order entered pursuant to Rule 16(b).

Typically, trial courts will enter an initial scheduling order that establishes the cutoff date for identifying experts, as was done in this case. However, W. Va. Code § 55-7B-6(a)(2) qualifies this practice in the context of medical malpractice cases. Establishing a cutoff date for identifying a medical expert must be done at the mandatory status conference under W. Va. Code § 55-7B-6. As ruled in the instant case, establishing a cutoff date in an initial scheduling order for identifying a medical expert in a medical malpractice case is not controlling.

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[3](...continued)
trial[.]"). If, for some reason, the date for holding the mandatory status conference is not inserted in the scheduling order, then pursuant to W. Va. Code § 55-7B-6(a)(2) the defendant must "schedule such conference with the court upon proper notice to the plaintiff."

Also, the statute contemplates a meaningful hearing on the issue of a medical expert. During the conference the parties should be prepared to discuss substantive issues in the case as they relate to medical expert testimony. This is necessary as the trial court must ultimately determine whether to require medical expert testimony. An accurate record of the conference should be made to allow for a meaningful review should a party later challenge the basis of the trial court's decision.

Finally, it must be understood that an initial Rule 16(b) scheduling order may continue to establish a cutoff date for identifying *nonmedical* experts. The mandatory status conference under W. Va. Code § 55-7B-6 applies only to medical experts.

(3) Other considerations at the mandatory status conference. It is also required by W. Va. Code § 55-7B-6(a)(1) that, during the status conference, the parties "[i]nform the court as to the status of the action, particularly as to the identification of contested facts and issues and the progress of discovery and the period of time for, and nature of, anticipated discovery[.]" This provision, simply requires updating the trial court on the progress of matters that are ordinarily covered in the scheduling order, except for the issue of medical experts.

With these additional observations, I concur in the decision rendered in this case. I am authorized to state that Justice Maynard joins me in this concurring opinion.