No. 28851 – ***The Estate of Bobby J. Robinson, deceased, by and through his widow, Tina Marie Robinson, and his mother, Margaret Robinson, as Co-Administratrixes of the Estate v. Randolph County Commission, Paul Brady, Sheriff of Randolph County.***

FILED
July 12, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 13, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, J., concurring:

I concur with the majority opinion's decision to reverse the dismissal of the Plaintiffs' claims and to remand this case to the circuit court for additional proceedings. I write separately to underline the need for a full consideration of the claims dismissed below on the erroneous ground that they did not state a claim upon which recovery could be had.

A complaint should not be dismissed on a Rule 12(b)6 motion unless it appears beyond doubt that there is no provable set of facts which would entitle the plaintiff to relief. *Owen v. Board of Education,* 190 W. Va. 677, 441 S. E.2d 398 (1994). And, we have said that, even in the case of motions for summary judgment, time for adequate discovery should be allowed before consideration of the motion where there is a reasonable prospect that actionable facts can be obtained in the discovery process. *Harrison v. Davis,* 197 W. Va. 651, 478 S. E.2d 104 (1996). Our law favors cases being decided on their merits, and the standard for overcoming a 12(b)6 motion is a liberal one with a light burden of proof. *John W. Lodge Distributing Co. v. Texaco,* 161 W. Va. 603, 245 S. E.2d 157 (1978).

Here it appears from the record that the Plaintiffs were denied any opportunity to conduct discovery and the motion to dismiss for failure to state a claim was granted upon a conclusion of law, that the lawyer representing Plaintiffs' decedent owed that decedent no duty to seek help for the decedent when he threatened suicide while incarcerated in jail, accused of the offense for which the lawyer represented decedent.

I understand the reluctance of the trial court to find that counsel for incarcerated defendants owe their clients some sweeping duty to investigate each jailhouse complaint heard from their clients. However, it cannot be denied that the relationship of lawyer-client is a highly fiduciary one, requiring of the lawyer good faith and fidelity to the interests of a client, who may have reposed the highest personal trust and confidence in his or her lawyer. See 7 Am.Jur.2d *Attorneys at Law* § 137 (1997). Because the case below was cut off before discovery was even begun, we do not know yet if Plaintiffs can bring forth facts that tend to prove that, in all the circumstances of the case, decedent's counsel breached not some novel and sweeping duty, but his clearly established fiduciary duties as decedent's lawyer (including those of fidelity and good faith).

In the case before us, Plaintiffs can have no recovery against the lawyer Defendant unless it is shown that the lawyer acted recklessly. *See* Syllabus Point 5, *Powell v. Wood County Commission*, ___ W. Va. ___, ___ S. E.2d ___ (No. 28456, June 8, 2001). Therefore, Plaintiffs must show conduct of the decedent's lawyer which is not merely negligent, but, in the circumstances, reckless. As daunting

as that may be, it cannot fairly be said to be impossible, absent a fair opportunity to the Plaintiffs to obtain and adduce that evidence in a judicial setting, by discovery or by trial.

Since we do not here know the circumstances in which the defendant lawyer disregarded his client's call for help, it cannot in my view be said here and now that the lawyer's conduct was or was not reckless. However, common experience tells us that jailhouse suicides are not infrequent. Common experience tells us that a threat of suicide may or may not be serious, but it is always disturbing. Common experience tells us that a call to a lawyer is most often a call for help of some kind. And, I respectfully suggest that the common experience of lawyers practicing criminal law gives them some ability to distinguish a crank jailhouse call from a genuine plea for help, the latter requiring a response commensurate with the fiduciary duty lawyers owe their clients, and consistent with the fidelity and good faith inherent in the lawyer-client relationship.

In an employment context, this Court recognized that the wilful disregard of a recognized safety standard, with subjective realization of the standard and the potential for grave harm flowing from its disregard, amounted to reckless, deliberate and intentional conduct. *Mandolidis* v. *Elkins Industries, Inc.*, 161 W. Va. 695, 246 S. E.2d 907 (1978). While our Legislature later supplanted the resulting cause of action with a statutory one, it appears that the fundamental principle of that case retains vitality. In my view, it cannot now be said that Plaintiffs might not, in the context of the fiduciary relationship between Plaintiffs' decedent and his lawyer, prove such a set of facts and circumstances as would entitle the Plaintiffs

to relief for reckless conduct. Clearly, Plaintiffs should have a reasonable opportunity to pursue their claims as pled or provable.