No. 29008 - David M. Harris, M.D. v. Hamilton Jones and Mutual Insurance Agency, Inc,. a West Virginia corporation

Maynard, Justice, dissenting:

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I dissent because I do not believe that the discovery rule operates to toll the statute of limitations which governs Dr. Harris's tort causes of action.

The evidence indicates that Dr. Harris's PNRRG policy clearly provides that "State Insurance Insolvency Guaranty Funds Are Not Available For The Risk Retention Group." Presuming the misrepresentations alleged by Dr. Harris are true, he knew when he received the policy that he had unwittingly purchased a policy which was not guaranteed, that Hamilton Jones and Mr. Jones' employer were the parties who sold him the policy, and that their failure to inform caused him to purchase the policy. Therefore, under syllabus point 4 of *Gaither v. City Hosp., Inc.*,199 W.Va. 706, 487 S.E.2d 901 (1997), that is when the tort statute of limitations of two years began to run. Because Dr. Harris did not file his action until 1998, his action was untimely, and the circuit court properly granted summary judgment against him.

Dr. Harris also alleges that he was misled by being sold a policy of a company known to be unsound at the time of the purchase. It appears from the facts that PNRRG was placed in receivership in 1992 or 1993. Because Dr. Harris was being sued at this time, he obviously became aware soon

thereafter of the financial condition of his malpractice insurer. Again, presuming that his allegations are true, Dr. Harris knew he was harmed by the fact that his malpractice insurer was financially incapable of satisfying a judgment against him, and that this was because the defendants misrepresented the financial condition of the insurer at the time of his purchase of the policy. Therefore, the statute of limitations began to run on this tort cause of action in 1993 so that the 1998 lawsuit was untimely and summary judgment was proper.

The majority concludes, however, that a rational trier of fact could find that Dr. Harris "did not have reason to appreciate the significance of the lack of Guaranty Fund coverage" until the summer of 1997. It is simply incredible that a person of Dr. Harris's intelligence who knew when he purchased the policy in 1990 that it was not guaranteed, did not come to "appreciate the significance" of this fact until seven years later. If this is in fact true, I certainly would not want Dr. Harris to by my doctor. To the contrary, the evidence shows that Dr. Harris knowingly bought a deficient insurance policy in order to save money, and when his bargain went sour he appealed to the legal system for help. Nevertheless, it simply is not the role of courts to save perfectly capable people from bad bargains.

Especially troubling is the majority's continued expansion of the discovery rule in order to disregard applicable statutes of limitations. As I have said many times, statutes of limitations serve important functions in our legal system. "The basic purpose of statutes of limitations is to encourage promptness in instituting actions; to suppress stale demands or fraudulent claims; and to avoid inconvenience which may result from delay in asserting rights or claims when it is practicable to assert

them." *Morgan v. Grace Hospital, Inc.*, 149 W.Va. 783, 791, 144 S.E.2d 156, 161 (1965) (citations omitted). In *Cart v. Marcum*, 188 W.Va. 241, 245, 423 S.E.2d 644, 648 (1992), this Court explained:

> by declaring the *existence* of a "discovery rule" we do not eviscerate the statute of limitations: the statute of limitations will apply unless the handicaps to discovery at the time of the injury are great and are largely the product of the *defendant's* conduct in concealing either the tort or the wrongdoer's identity.

This original purpose of the discovery rule, which was to protect innocent plaintiffs from wrongful acts of concealment by defendants, was abandoned in *Gaither*. In that case, the inquiry of whether the defendant concealed the tort or the wrongdoer's identity shifted to the question of what the plaintiff knew and when he or she knew it. As a result, the discovery rule was distorted beyond recognition in order to protect dilatory, apathetic, and willfully ignorant plaintiffs.

Now the majority of the Court distorts *Gaither*. Apparently, the dispositive issue is no longer what the plaintiff *knew* and when he *knew* it but, rather, when the plaintiff came to "appreciate the significance" of the tort. As a result, a plaintiff can *know* about a tort in 1990, but not come to "appreciate the significance" of the tort until 1997. Such reasoning eviscerates statutes of limitations. It is a small step from this case to doing away with statutes of limitations altogether, which, I believe, is what some members of this Court desire.

Because the circuit court properly applied the discovery rule, as stated in *Gaither*, to rule that Dr. Harris's tort actions were untimely as a matter of law, I would affirm the grant of summary judgment against Dr. Harris. Accordingly, I dissent.