No. 29179 - Stewart B. Law v. Monongahela Power Company, dba Allegheny Power, a corporation, and State of West Virginia Bureau of Commerce, Division of Natural Resources, Public Land Corporation, and State of West Virginia Department of Transportation, Division of Highways

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

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Davis, J., dissenting:

Appellees, Monongahela Power Company (hereinafter referred to as "Monongahela Power"), argued that the summary judgment issues in this case should not be considered because they were untimely filed. The majority opinion recognized that the case had a timeliness problem. Nevertheless, rather than affirming the summary judgment, the majority opinion established an unmanageable rule of law in order to address the merits of the summary judgment order. Due to the majority's departure from precedent, I am compelled to dissent.

A longstanding legal maxim adhered to by this Court is that "[t]he law comes to the help of those who are vigilant, and not to those who sleep on their rights." *Swann v. Young*, 36 W. Va. 57, 70, 14 S.E. 426, 431 (1892). *Accord State v. Salmons*, 203 W. Va. 561,569, 509 S.E.2d 842, 850 (1998); *Coleman v. Sopher*, 201 W. Va. 588, 601, 499 S.E.2d 592, 605 (1997); *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996); *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 707, 57 S.E.2d 725, 732 (1950); *A.C. Fulmer Coal Co. v. Morgantown & K.R. Co.*, 57 W. Va. 470, 476, 50 S.E. 606, 608 (1905); Syl. pt. 6, *Holsberry v. Harris*, 56 W. Va. 320, 49 S.E. 404 (1904). We have explained this principle of law to mean that when attorneys are "careless, and

[do] not attend to their interests in court, and [do] not watch the entries made of record, they must suffer the consequences of their folly. It is far better that they should suffer than that the rights of everybody else should be placed in jeopardy." *Braden v. Reitzenberger*, 18 W. Va. 286, 291 (1881). In the instant proceeding, Mr. Law slept on his rights to timely appeal the summary judgment order entered against him. Rather than allow Mr. Law to "suffer the consequences" for his lack of vigilance, the majority opinion has abandoned well-established principles of law.

### *A. Procedural Posture of Case*

The trial court granted summary judgment to Monongahela Power by order entered January 5, 2000. Under our rules, Mr. Law had four months in which to either file a petition for appeal of the summary judgment order or seek an extension of time within which to appeal from the trial court.[1]

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[1]The appeal period is set out in W. Va. Code § 58-5-4 (1998) (Supp. 2000) as follows:

> No petition shall be presented for an appeal from any judgment rendered more than four months before such petition is filed with the clerk of the court where the judgment being appealed was entered: Provided, That the judge of the circuit court may, prior to the expiration of such period of four months, by order entered of record extend and reextend such period for such additional period or periods, not to exceed a total extension of two months, for good cause shown, if the request for preparation of the transcript was made by the party seeking such appellate review within thirty days of the entry of such judgment, decree or order.

Rule 3(a) of the West Virginia Rules of Appellate Procedure tracks the language of the statute and provides as follows:

> No petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been rendered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree

(continued...)

The record is clear, and the majority opinion has conceded, that Mr. Law failed to file a petition for appeal of the summary judgment order within the four month time frame. Additionally, the majority opinion concedes that Mr. Law did not seek an extension of time within which to appeal from the trial court's ruling. Rather, instead of appealing the summary judgment order, Mr. Law filed a motion for reconsideration with the trial court on January 26, 2000. The trial court denied the motion for reconsideration on September 18, 2000--nine months after the summary judgment order had been entered. Mr. Law thereafter appealed the January 5, 2000, order granting summary judgment to Monongahela Power.

### *B. Motion for Reconsideration*

Prior to the majority's decision in this case, our law had been clear in holding that "[a] motion which would otherwise qualify as a Rule 59(e) motion that is not filed and served within ten days of the entry of judgment is a Rule 60(b) motion regardless of how styled and does not toll the four month appeal period for appeal to this court." Syl. pt. 3, *Lieving v. Hadley*, 188 W. Va. 197, 423 S.E.2d 600 (1992). Mr. Law filed his motion for reconsideration more than ten days after the summary judgment order

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[1](...continued)
or order being appealed was entered, whether the State be a party thereto or not; provided, that the judge of the circuit court may for good cause shown, by order entered of record prior to the expiration of such period of four months, extend and re-extend such period, not to exceed a total extension of two months, if a request for the transcript was made by the party seeking an appeal or supersedeas within thirty days of the entry of such judgment, decree or order. In appeals from administrative agencies, the petition for appeal shall be filed within the applicable time provided by the statute.

was entered.[2] Consequently, the motion had to be treated as a Rule 60(b) motion.

When considering Mr. Law's Rule 60(b) motion, the majority opinion was bound, by precedent, to consider neither the substance of the issues decided by the summary judgment order nor issues which should have been raised during the summary judgment proceeding. "An appeal of the denial of a Rule 60(b) motion brings to consideration for review *only* the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." Syl. pt. 3, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974) (Emphasis added). Justice Cleckley correctly observed in *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996) that "the weight of authority supports the view that Rule 60(b) motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit. . . . In other words, a Rule 60(b) motion to reconsider is simply not an opportunity to reargue facts and theories upon which a court has already ruled." *Powderidge*, 196 W. Va. at 705-706, 474 S.E.2d at 885-886. Moreover, "[i]t is established also that a Rule 60(b) motion does not present a forum for the consideration of evidence which was available but not offered at the original summary judgment motion." *Powderidge*, 196 W. Va. at 706, 474 S.E.2d at 886.

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[2]Had Mr. Law filed his motion for reconsideration within ten days of the circuit court's entry of its order granting summary judgment, the running of the time to appeal the substantive issues addressed in connection with the summary judgment would have been halted pending entry of the circuit court's order on the motion for reconsideration. In syllabus point 7 of *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995), we explained that "[a] motion for reconsideration filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion."

Here, the majority opinion has done exactly what *Powderidge* rejected. The majority reversed the trial court's decision by revisiting matters decided by the summary judgment order. The majority did so because the Rule 60(b) motion was not properly framed. Contrary to our instruction in *Powderidge*, Mr. Law's 60(b) motion simply sought to relitigate issues that had been ruled upon by the circuit court at the summary judgment proceeding, or that should have been presented to the circuit court at that time. As a consequence of the majority's improper consideration of such issues, no summary judgment order will be final after the expiration of the four month appeal period. Indeed, litigants may now file Rule 60(b) motions seeking reconsideration of every issue that has been or should have been decided by summary judgment. Today's decision creates chaos for summary judgment orders. It has also transformed Rule 60(b) into a mechanism with which to attack the merits of *any* final order for which the appeal period has expired.

This was a simple case that should have been affirmed. "The plaintiff's lawyer should have appealed the judge's order, or immediately filed a motion under Rule 59 of the West Virginia Rules of Civil Procedure." *Rose v. Thomas Mem'l Hosp. Found., Inc.*, 208 W. Va. 406, 415-16, 541 S.E.2d 1, 10-11 (2000) (Starcher, J., concurring). The majority opinion has turned a simple case into a procedural monster. The majority decision, in effect, has transformed Rule 60(b) into Rule 59(e). I cannot agree with such a result. "As the saying goes, if it looks like a duck, walks like a duck and quacks like a duck, it most probably is a duck." *Adkins v. West Virginia Dept. of Educ.*, ___ W. Va. ___, ___, ___ S.E.2d ___, ___ (No. 29066 October 31, 2001) (Albright, J., dissenting).

Therefore, I respectfully dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.