No. 29289 - Mountain Lodge Association, an unincorporated association v. Crum & Forster Indemnity Company, a corporation, and United States Fire Insurance Company, a corporation

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OF WEST VIRGINIA

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Davis, J., dissenting:

This case required the Court to determine whether summary judgment for Crum & Forster Indemnity Co. (hereinafter referred to as "Crum") and against Mountain Lodge Association (hereinafter referred to as "MLA") was appropriate. The majority opinion concluded that the trial court erred in granting summary judgment to Crum. For the reasons outlined below, I believe the trial court correctly granted summary judgment. Therefore, I dissent from the majority opinion.

A. The Majority Opinion Based its Decision on a Finding That an Incomplete Record Was Before the Trial Court

Crum denied insurance coverage to MLA because MLA failed to provide sufficient proof that Mr. Tyler was an employee. Crum took the position that Mr. Tyler was an independent contractor. After both parties moved for summary judgment on the issue of Mr. Tyler's status, the trial court found that no genuine issue of material fact was in dispute and granted summary judgment to Crum. In reversing the summary judgment order, the majority opinion based its decision on the following grounds:

> We agree with the findings of the lower court, enunciated in its final order, that the facts in the record before the lower court are undisputed. However, as we read the record and the findings below, the lower court also concluded that it had before it the complete contract

> between [MLA] and Mr. Tyler. We have difficulty discerning the basis of that conclusion.
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> . . . In the case before us, where the principal issue turns in large part upon what [MLA] and Mr. Tyler agreed to in the contract designating Mr. Tyler as "construction manager," it appears that it would be critical for the record to establish clearly that the relevant documents in the record constitute the entire contract or, if not, what additional or other terms constituted the whole contract.

The above reasoning utilized by the majority to reverse summary judgment is illogical and legally incorrect.

The majority opinion concluded that more information was required to determine Mr. Tyler's status with MLA. In so concluding, the majority opinion has ignored a well-settled principal of law concerning the burden on a party resisting summary judgment. The party resisting summary judgment must produce sufficient evidence to establish a dispute of a material issue of fact. In contrast to this principle, the reasoning used by the majority opinion penalizes Crum for MLA's failure to present evidence regarding the so-called "whole contract" between MLA and Mr. Tyler. In fact, Crum had no duty or burden to present such evidence. Crum's burden was "only [to] point to the absence of evidence supporting the nonmoving party's case." *Latimer v. SmithKline & French Labs.*, 919 F.2d 301, 303 (5th Cir.1990). If additional evidence existed regarding the relationship between MLA and Mr. Tyler, it was the duty of MLA to produce that evidence. *See Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 699, 474 S.E.2d 872, 879 (1996) ("To meet this burden, the nonmovant must identify specific facts in the record and articulate the precise manner in which that evidence supports its claims. As to material facts on which the nonmovant will bear the burden at trial, the nonmovant must

come forward with evidence which will be sufficient to enable it to survive a motion for directed verdict at trial. If the nonmoving party fails to meet this burden, the motion for summary judgment must be granted."). Until the decision in the instant case, neither this Court nor any court in the country had ever held that a party moving for summary judgment be denied summary judgment based upon its adversary's failure to present sufficient evidence to establish a dispute of a material issue of fact.

1. MLA made no motion to produce additional evidence. MLA neither argued on appeal nor before the trial court that it needed more time to obtain evidence pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure.[1] *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 62, 459 S.E.2d 329, 339 (1995) ("When a party does not avail himself of Rule 56(f), it is generally not an abuse of discretion for a circuit court to rule on a motion for summary judgment.").[2] If this had been done, then the majority opinion would have a logical and legal basis for its decision.[3] In syllabus point 1 of

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[1]Rule 56(f) states:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[2]*See* Syl. pt. 3, *Crain v. Lightner*, 178 W. Va. 765, 364 S.E.2d 778 (1987) ("Where a party is unable to resist a motion for summary judgment because of an inadequate opportunity to conduct discovery, that party should file an affidavit pursuant to W. Va.R.Civ.P. 56(f) and obtain a ruling thereon by the trial court. Such affidavit and ruling thereon, or other evidence that the question of a premature summary judgment motion was presented to and decided by the trial court, must be included in the appellate record to preserve the error for review by this Court").

[3]"If the moving party makes a properly supported motion for summary judgment and can show by (continued...)

Powderidge, Justice Cleckley addressed the procedure that may be used by a party needing additional time to marshal evidence in opposition to summary judgment:

> An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

See also Harbaugh v. Coffinbarger, 209 W. Va. 57, 543 S.E.2d 338 (2000) (per curiam) (affirming summary judgment where party failed to use Rule 56(f) to obtain additional evidence); *Payne's Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co.*, 200 W. Va. 685, 490 S.E.2d 772 (1997) (per curiam) (same); *Brewer v. Hospital Mgmt. Assocs., Inc.*, 202 W. Va. 163, 503 S.E.2d 17 (1998) (per curiam) (same); *Pennington v. Bear*, 200 W. Va. 154, 488 S.E.2d 429 (1997) (affirming summary judgment and trial court's denial of Rule 56(f) motion).

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[3](...continued)
affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either: (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) or the West Virginia Rules of Civil Procedure." Syl. pt. 3, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

Even though MLA never asserted it had additional evidence to present to preclude summary judgment, the majority asserts that more evidence *may exist regarding the contract between MLA and Mr. Tyler*. This Court has previously held that "Rule 56 does not impose upon the circuit court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment. Nor is it our duty to do so on appeal." *Powderidge*, 196 W. Va. at 700, 474 S.E.2d at 880. Assuming arguendo that such evidence exists, *Powderidge* clearly establishes that summary judgment was still appropriate.

One of the issues this Court faced in *Powderidge* concerned the plaintiff's motion for reconsideration of an order granting summary judgment to the defendant. We initially observed the following regarding the plaintiff's motion for reconsideration:

> The plaintiff's motion for reconsideration cites several crucial and important facts. Facts which, if properly documented and presented at the summary judgment proceeding, would have been sufficient to preclude the granting of the motion for summary judgment.

Powderidge, 196 W. Va. at 705, 474 S.E.2d at 885.

In the *Powderidge* motion for reconsideration, reference was made to an affidavit that this Court found created a disputed material issue of fact in the case. However, through apparent error by the plaintiff, the actual affidavit was not attached to the motion for reconsideration, and was never seen by the trial judge. The trial judge therefore denied the motion for reconsideration. In spite of the known existence of the affidavit, which was presented on appeal, this Court affirmed the denial of the plaintiff's

motion for reconsideration. We reasoned in *Powderidge* as follows:

> Even if the circuit court would have reconsidered its summary judgment ruling, the motion filed by the plaintiff was not sufficient to permit a different outcome. Although the motion alleged new facts, the facts were never properly documented as required by Rule 56(e). The plaintiff's proffered affidavit of Mr. Bell was never tendered to the circuit court; only some of the salient points of the affidavit were restated in the motion's memorandum. When a party opposing summary judgment fails to comply with the formalities of Rule 56(e), a circuit court may choose to be lenient in the exercise of its discretion to deal with deficiency. However, discretionary leniency does not stretch so far that Rule 56(e) becomes meaningless. *See Peterson v. United States*, 694 F.2d 943, 945 (3rd Cir.1982) (failure to attach key documents to affidavit violated Rule 56(e)); *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir.1987) (unauthenticated documents may not be relied upon to defeat a motion for summary judgment).

Powderidge, 196 W. Va. at 706-07, 474 S.E.2d at 886-887.

Powderidge is clear. If evidence sufficient to preclude summary judgment exists but is not properly presented to the trial court, summary judgment must be granted. In the instant proceeding, assuming that evidence of the majority's so-called "whole contract" exists, *Powderidge* nevertheless mandates the granting of summary judgment because such evidence was not properly tendered to the trial court. Therefore, I respectfully dissent from the majority decision in this case. I am authorized to state that Justice Maynard joins me in this dissenting opinion.