

No. 29766 - *Sue Martin Politino v. Azzon, Inc., and John P. See and Brenda See v. Rodney Politino and Sue's Reclamation & Construction*

FILED

June 24, 2002

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

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June 26, 2002

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Albright, Justice, dissenting:

I must dissent from the majority's conclusion that dismissal of all counterclaims by summary judgment was appropriate in this case. The majority arrived at its decision to affirm the lower court's ruling by construing the civil conspiracy counterclaim proffered by Azzon, Inc. and the Sees as distinct and separate from the other counterclaims asserted, and thereby reduced, if not ignored, the significance of Rodney Politino's fiduciary duty to Azzon, Inc. in relation to the other evidence in the record. Since the evidence is subject to more than one interpretation, summary judgment was not an appropriate disposition of this case.

Despite the characterization by counsel of Mr. Politino's role with Azzon, Inc. as an employee who operated heavy equipment and supervised the work crews at job sites, the evidence established that at all relevant times Mr. Politino was a director, officer and stockholder of Azzon, Inc. As a director and officer of Azzon, Rodney Politino stood in a fiduciary capacity to the corporation which included the duty to maintain "the utmost good faith" in his dealings involving Azzon. *Young v. Columbia Oil Co. of West Virginia*, 110 W.Va. 364, 370, 158 S.E. 678, 681 (1931). Although the majority explains in footnote one that any wrongdoing by Rodney Politino was only relevant to the liability of Sue Politino

individually if the claimed wrongdoing could in some way be imputed to her, the majority ignores how the evidence regarding Rodney Politino's actions for Sue's Reclamation & Construction, Inc. (hereinafter "Sue's Reclamation") --while under a fiduciary duty to Azzon-- had anything to do with Sue Politino individually. A closer examination of the conspiracy counterclaim as it relates to the alleged conversion of property supports the theory of Mrs. Politino's individual liability.

While not endorsing the circuit court's conclusion with regard to the conversion claim that Azzon's equipment had been abandoned, the majority stated that there was no evidence that Sue Politino personally assumed control or dominion over the equipment and therefore there was no evidence to support a claim of conversion. However, for some unexplained reason¹, the majority did not examine the evidence as the conspiracy-to-convert claim that was asserted. There is adequate evidence in the record to defeat summary judgment of the allegation that Rodney Politino and Sue Politino acted in concert to divert the corporate

¹The majority made an initial determination that the civil conspiracy claim failed because the record supported the singular conclusion that the activities of Sue and Rodney Politino in establishing Sue's Reclamation & Construction, Inc. simply demonstrated a desire to establish a successful and competitive business enterprise rather than an intention to create a rival company for the purpose of damaging or destroying Azzon, Inc. As a result, the majority dismissed substantive consideration of conspiracy as part of the conversion or unjust remedy claims. In its discussion of either of these latter claims, the majority simply curtailed examination of a conspiracy by referring to its previous determination that a conspiracy did not exist. In so doing, the evidence and circumstances were never evaluated as a conspiracy to commit the individual "unlawful overt acts" necessary to prove a civil conspiracy claim. 15A C.J.S. *Conspiracy* § 1(2) (1967).

assets of Azzon, Inc. by using Azzon's equipment with no benefit derived therefrom for Azzon. Based on his deposition and the nature of the work all agreed he performed for Azzon, there is evidence that Rodney Politino knew at the time that the lowboy trailer was used to transport equipment for purposes other than Azzon business that the trailer was the property of Azzon, Inc. If it is proved that Rodney Politino used Azzon's equipment without benefit to Azzon, it may also be found that Rodney Politino breached his fiduciary duty to Azzon. The evidence also supports an inference² that Sue Politino, being more than casually familiar with the operations of Azzon, knew that the equipment belonged to Azzon, Inc., that the Azzon equipment was being used to transport her personally owned equipment to further the business of Sue's Reclamation and that no remuneration was paid to Azzon for the use of its equipment. There is evidence that Sue Politino was aware of the fiduciary duty of directors and officers of a corporation because of her position with Sue's Reclamation and knew that Rodney Politino had a fiduciary duty to Azzon when Azzon's equipment may have been used by the Politinos without Azzon's knowledge or authorization. One reasonable conclusion from these facts is that Sue Politino, individually, was part of a conspiracy with Rodney Politino to convert the property of Azzon, making summary judgment of this claim inappropriate.

²See 16 Am.Jur.2d *Conspiracy* § 68 (1998) ("The general rule is that conspiracy liability is sufficiently established by proof showing concert of action or other facts and circumstances from which the natural inference arises that the unlawful, overt acts were committed in furtherance of common design, intention, or purpose of the alleged conspirators.") (footnote omitted).

Likewise, a similar interpretation of the evidence regarding the unjust remedy claim may be made.

The conclusion reached by the majority is most troubling because the allegation of breach of fiduciary duty by a corporate officer is never seriously examined, apparently because the person who initiated the suit was not that corporate officer. I appreciate the majority's reluctance to allow inappropriate causes of action to be raised in unrelated or virtually unrelated cases. However, it is clear that the evidence in this case, considered in the light most favorable to the nonmoving party, does not support summary judgment on the counterclaims. *Masinter v. WEBCO. Co.*, 164 W.Va. 241, 242, 262 S.E.2d 433, 435 (1980). As we stated in *Aetna Casualty and Surety Co. v. Federal Insurance Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963), "[t]he question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined." *Id.* at 171, 133 S.E.2d at 777. It is quite unfortunate that this distinction has been overlooked by the majority.