No. 29962 – Westfield Insurance Company and Culton Construction, Inc. v. Triple Crown Flooring, Inc.

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OF WEST VIRGINIA

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OF WEST VIRGINIA

Starcher, Justice, dissenting:

The majority opinion concludes that the trial court failed to fully rule on each of the factors established in Syllabus Point 3 of *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 256 S.E.2d 758 (1979), factors such as the "intransigence on the part of the defaulting party" and the "presence of material issues of fact and meritorious defenses." I dissent because I believe the record clearly establishes intransigence by the defendant and the defendant's insurance company. I believe the circuit court got it right, and that there is nothing to be gained by sending this case back for another hearing.

This is not, as the majority opinion suggests, a small case of an insurance company misplacing some paperwork in a piddling insurance claim. This is about a residential house that burned to the ground after the defendant subcontractor carelessly sanded and refinished the hardwood floors. The general contractor working on the house and its insurance company (the plaintiffs in this case) paid out $438,018.99 to the homeowner – the limits of the policy plus other costs. The general contractor then incurred costs and expenses to rebuild the house, and had lost profits while doing the work. In other words, a substantial sum of money is involved.

The plaintiffs served the defendant with notice of their lawsuit on February 25, 2000. A claims adjuster with the defendant's liability insurer sought an extension of the time to file an answer, an extension that expired April 5, 2000. When no responsive pleading had been received as of May 1, 2000, the plaintiffs filed a motion for a default judgment.

Upon receiving the motion, the defendant, on May 4, 2000, filed a motion for leave to file an answer out of time. However, the defendant never specified *any* basis for its failure to file an answer, never set forth any defenses to the plaintiffs' action, never explained why a late answer would not prejudice the plaintiffs, and never established what material facts that the defendant thought might be in dispute. In fact, the defendant even failed to attach the proposed answer that it wished to file out of time.

The circuit court held a hearing on May 11, 2000, and granted a default to the plaintiffs and against the defendant. On June 14, 2000, the defendant filed a motion to vacate the default order, but again never identified any meritorious defenses or explanations of why it failed to respond to the plaintiffs' complaint.

The plaintiffs then took a deposition of the claims adjuster for the defendant's insurance company. In his deposition, the claims adjuster indicated that he learned of the lawsuit on March 2, 2000, but did not tell the defendant subcontractor to fax the lawsuit papers to him immediately. He did not receive the papers until March 13, 2000 – and then failed to assign the case by fax to an attorney for a response. The claims adjuster also failed to put the answer filing deadline in his claim file diary, and even stated that the insurance company did not have any procedures in place to ensure the timely filing of answers on behalf of its

insureds. The claims adjuster also admitted to not taking any measures to ensure the timely filing of an answer either before or after obtaining an extension of the filing deadline.

Based upon this record, on October 20, 2000, the circuit court concluded that there had been no "excusable neglect" by the defendant and plenty of intransigence by the defendant's insurance company in totally failing to file anything approximating an answer to the plaintiff's complaint. I believe the circuit court was absolutely right, and that its decision should have been affirmed.

The defendant's insurance company failed to timely hire counsel to protect the defendant's interests, dragging out the proceedings, and is now doing everything it can to further delay the proceedings. Hence, on remand, I believe the circuit court should carefully consider the factual record presented by the parties and, as the majority opinion suggests, "rule on the default issue in the present case in light of the factors set forth in Syllabus Point 3 of *Parsons v. Consolidated Natural Gas Supply Corporation, id.*" And once again, I believe the circuit court should again find the defendant was in default and that there is no proper reason to set that default aside.

Accordingly, I respectfully dissent.