IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

FILED
April 26, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 29966

MARYBETH DAVIS, an incarcerated person
by her next friend and her power of attorney, Gary Davis,
Plaintiff Below, Appellant,

PAUL S. DETCH, Attorney,
Appellant,

v.

GREGORY WALLACE; IRVIN SOPHER; ELIZABETH SCHARMAN;
ANNE HOOPER; BASIL ZITELLI; and DOROTHY BECKER,
Defendants Below, Appellees,

STATE OF WEST VIRGINIA,
Intervenor Below, Appellee.

Appeal from the Circuit Court of Greenbrier County
Honorable Frank E. Jolliffe, Judge
Civil Action 99-C-146

REVERSED AND REMANDED

Submitted: January 9, 2002
Filed: April 26, 2002

Paul S. Detch, Esq.
Lewisburg, West Virginia
Attorney for Appellants

Charles R. Bailey, Esq.
John T. Molleur, Esq.
Bailey & Wyant
Charleston, West Virginia
Attorneys for Gregory Wallace

Eric A. Collins, Esq.

George A. Daugherty, Esq.

Pullin, Knopf, Fowler & Flanagan
Beckley, West Virginia
Attorney for Irwin Sopher and
Anne Hooper

Stephen M. Houghton, Esq.
McCamey & Chilcote
Wheeling, West Virginia
Attorney for Basi Zitelli and
Dorothy Becker

Elkview, West Virginia
Attorney for Elizabeth Scharman

Robert Kevin Hanson
Prosecuting Attorney
Greenbrier County Dickie,
Lewisburg, West Virginia
Attorney for Appellee State of
West Virginia

The Opinion of the Court was delivered PER CURIAM.

Chief Justice Davis dissents and reserves the right to file a dissenting opinion.

Justice Starcher concurs and reserves the right to file a concurring opinion.

Justice Maynard dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syllabus Point. 1, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995).

2. "A court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law." Syllabus, *Daily Gazette Co. v. Canady, Inc.*, 175 W.Va. 249, 332 S.E.2d 262 (1985).

3. "In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case." Syllabus Point 2, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996).

Per Curiam:

The appellant, Marybeth Davis, who is currently incarcerated, appeals from an order of the Circuit Court of Greenbrier County awarding sanctions in the amount of $8,500.00 against the appellant Marybeth Davis, her next friend Gary Davis, and their attorney, Paul S. Detch.

I.

On September 15, 1999, the appellant by her next friend, Gary Davis, sued the appellees, Drs. Gregory Wallace, Irvin Sopher, Elizabeth Scharman, Anne Hooper, Basi Zitelli, and Dorothy Becker, for their conduct in connection with the appellant's criminal trial.[1] Specifically, she alleged that the doctors, as expert witnesses for the State, had negligently performed tests, negligently prepared for testimony, negligently testified, and otherwise failed to meet the "standards of science and medicine as it existed at that time."

In response to the lawsuit, the appellees filed motions to dismiss for failure to state a claim upon which relief could be granted pursuant to *West Virginia Rules of Civil Procedure*, Rule 12(b)(6) [1998]. The Circuit Court of Greenbrier County granted the appellees' motions to dismiss, finding that none of the causes of action stated against the appellees were viable under existing state law.

The appellees thereafter filed motions for sanctions against the appellants and their counsel. The circuit court granted the appellees' motions for sanctions, finding as a matter of law that the claims and other legal contentions made by the appellants were not warranted by existing law, nor did they constitute

[1]On September 15, 1997, Marybeth Davis was convicted of the attempted poisoning by insulin of her son and the murder of her daughter by caffeine. *See State v. Davis*, 205 W.Va. 569, 519 S.E.2d 852 (1999).

a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law pursuant to Rule 11(b) of the *West Virginia Rules of Civil Procedure* [1998].

The circuit court further held that the claims and other legal contentions made in the appellant's complaint were frivolous in nature, and that the allegations and other factual contentions made in the complaint did not have any evidentiary support, nor were they likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Finally, the circuit court found that the appellants filed the lawsuit with a vexatious, wanton, or oppressive intent to intimidate the appellees regarding their testimony at any post-trial hearing in the criminal case, or to seek to punish them for their testimony at the criminal trial.

The circuit court awarded attorneys' fees and related expenses against the appellants, Marybeth Davis and Gary Davis, and their attorney, Paul S. Detch, jointly and severally, in the amount of $8,500.00 as sanctions for their conduct. The trial court had previously dismissed the appellants' lawsuit against the appellees.

The appellants and their attorney now appeal the circuit court's order.

II.

This Court reviews a trial court's assessment of sanctions under an abuse of discretion standard. "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary

and procedural rulings of the circuit court under an abuse of discretion standard." Syllabus Point. 1, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995). "A trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law." *Bartles v. Hinkle*, 196 W.Va. 381, 389, 472 S.E.2d 827, 835 (1996) (discussing the trial court's imposing a $10,000.00 sanction against a party who repeatedly failed to comply with the trial court's discovery orders).

Rule 11(b) of the *West Virginia Rules of Civil Procedure* provides that:

> By presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, [if] specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

West Virginia Rules of Civil Procedure, Rule 11(b) [1998].

An important purpose of Rule 11 of the *West Virginia Rules of Civil Procedure* is to prevent frivolous lawsuits or lawsuits filed for an improper purpose. "The purpose of Rule 11 and Rule 37 of the West Virginia Rules of Civil Procedure is to allow trial courts to sanction parties who do not meet minimum standards of conduct in a variety of circumstances." *Bartles v. Hinkle*, 196 W.Va. at 389, 472 S.E.2d at 835. Rule 11 with its possible sanctions "deters much frivolous litigation (thereby conserving judicial resources), compensates the victims of vexatious litigation, and educates the bar about appropriate

standards of conduct." Alan E. Untereiner, Note, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale Law Journal 901, 902 (1988) (footnotes omitted).

West Virginia trial courts have the authority to sanction parties that file frivolous lawsuits. "A court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law." Syllabus, *Daily Gazette Co., Inc. v. Canady, Inc.*, 175 W.Va. 249, 332 S.E.2d 262 (1985). However, there are some limitations on a trial court's ability to levy sanctions:

> In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

Syllabus Point 2, *Bartles v. Hinkle, supra*.

At the heart of this case is the issue of whether the appellants filed a "frivolous" lawsuit that was neither grounded in existing state law nor was "a good faith argument for the application, extension, modification, or reversal of existing law."

The appellants' took the novel approach of suing the opposing party's expert witnesses for negligence and malpractice. The appellants claimed that the expert witnesses (among other alleged acts of misconduct) mishandled tissue samples, mislabeled and misread tissue samples, and concealed evidence that would have been useful in the defense of appellant Marybeth Davis in the underlying criminal action.

The appellants argued that expert witnesses who commit negligence in pre-trial preparation of reports and on the witness stand should be held liable for their mistakes.

The law regarding witness immunity is sparse in West Virginia, and the issue of expert witness immunity has not been addressed by this Court. Historically, in West Virginia and in other jurisdictions, witnesses have been regarded as having an absolute immunity regarding their testimony given during a trial. This immunity encourages witnesses "to speak freely without the specter of subsequent retaliatory litigation for their good faith testimony. The immunity was created at common law to shield the percipient [fact] witness who was called into court to testify as to what he saw, heard, or did that was relevant to an issue in the case." Christopher M. McDowell, Note, *Authorizing the Expert Witness to Assassinate Character for Profit: A Reexamination of the Testimonial Immunity of the Expert Witness*, 28 U. Mem L. Rev. 239, 275 (1997).

However, an emerging body of case law[2] and scholarly work[3] questions the granting of absolute immunity to expert witnesses for in-court testimony or out-of-court preparations for trial including compiling data and generating reports.

Courts that have contemplated allowing expert witnesses to be held liable for their negligent behavior find that the typical policy concerns that promote absolute immunity for fact witnesses do not apply to expert witnesses. Fact witnesses are often bystanders and are assumed to be unbiased. Expert witnesses, however, are generally "procured by parties to testify because the testimony is expected to benefit the party procuring the expert." Christopher M. McDowell, *supra*, 28 U. Mem. L. Rev. at 261. Discussing the policy concerns underlying witness immunity, the Pennsylvania Supreme Court noted that:

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[2]*See, e.g., James v. Brown*, 637 S.W.2d 914 (Tex. 1982) (finding that the adverse expert-witness psychiatrist owed a statutory duty of care to the plaintiff); *Levine v. Wiss & Co.*, 97 N.J. 242, 478 A.2d 397 (1984) (holding that immunity would not protect an expert witness-accountant from a claim of negligent compilation of an appraisal for a judicial proceeding); *Mattco Forge, Inc. v. Arthur Young & Co.*, 5 Cal. App. 4th 392, 6 Cal.Rptr.2d 781 (Ct. App. 1992) (holding that witness immunity would not shield an expert witness-accounting firm from otherwise actionable professional malpractice); *Murphy v. A.A. Mathews*, a Div. of CRS Group Engineers, Inc., 841 S.W.2d 671 (Mo. 1992) (*en banc*) (finding that an expert who provided negligent litigation support was not protected by witness immunity); *but see Bruce v. Byrne-Stevens & Associates Engineers, Inc.*, 113 Wash.2d 123, 776 P.2d 666 (1989) (holding the expert witnesses were protected by witness immunity to ensure expert objectivity).

[3]Mary Virginia Moore, Gary G. Johnson and Deborah F. Beard, *Liability in Litigation Support and Courtroom Testimony: Is it Time To Rethink the Risks?*, 9 J. Legal Econ. 53 (Fall 1999); Leslie R. Masterson, *Witness Immunity or Malpractice Liability for Pro-fessionals Hired as Expert?*, 17 Rev. Litig. 393 (1998); Douglas R. Richmond, *The Emerging Theory of Expert Witness Malpractice*, 22 Cap. U. L. Rev. 693, 694 (1993); W. Raley Alford, III, Comment, *The Biased Expert Witness in Louisiana Tort Law: Existing Mechanisms of Control and Proposals for Change*, 61 La. L. Rev. 181 (2000); Eric G. Jensen, Comment, *When "Hired Guns" Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness*, 62 UMKC L. Rev. 185 (1993); Randall K. Hanson, *Witness Immunity Under Attack: Disarming "Hired Guns,"* 31 Wake Forest L. Rev. 497 (1996); *but see* Adam J. Myers III, *Misapplication of the Attorney Malpractice Paradigm to Litigation Services: "Suit within a Suit" Shortcomings Compel Witness Immunity for Experts*, 25 Pepperdine L. Rev. 1 (1997).

"[t]he goal of ensuring that the path to truth is unobstructed . . . is not advanced by immunizing an expert witness from his or her negligence in formulating that opinion." *LLMD of Michigan, Inc. v. Jackson-Cross Co.*, 559 Pa. 297, 306, 740 A.2d 186, 191 (1999).

In *LLMD of Michigan, Inc. v. Jackson-Cross Co.*, 740 A.2d 186 (Pa. 1999), the Supreme Court of Pennsylvania expanded the liability of expert witnesses to include negligence in the preparation of testimony. The Pennsylvania Supreme Court found that witness immunity did not bar professional malpractice suits when the allegations of negligence were not premised on the substance of the expert's testimony but were premised on the expert's negligent preparation in reaching conclusions offered at trial, or on the expert's use of a faulty methodology. In considering the policy concerns underlying expert witness immunity, the Pennsylvania court found that witness immunity should not protect expert witnesses who do not "render services to the degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession." *Id.*, 559 Pa. at 306-307, 740 A.2d at 191.

A Louisiana court, also considering the different policy interests underlying witness immunity, noted:

> With no sanction for incompetent preparation, however, an expert witness is free to prepare and testify without regard to the accuracy of his data or opinion. We do not see how the freedom to testify negligently will result in more truthful expert testimony. Without some overarching purpose, it would be illogical, if not unconscionable, to shield a professional, who is otherwise held to the standards and duties of his or her profession, from liability for his or her malpractice simply because a party to a judicial proceeding has engaged that professional to provide services in relation to the judicial proceeding and that professional testifies by affidavit or deposition.

Marrogi v. Howard, 805 So.2d 1118, 1133 (La. 2002) (holding that witness immunity does not bar a claim against a retained expert witness for negligence performance of his duty).

Many courts, of course, have been understandably unwilling to allow a party to sue the opposing party's expert witness for malpractice or negligence, in part because there is no reliance between the expert witness and the opposing party and because of the fear of retaliatory lawsuits. *See, e.g.*, Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls, and Proposed Responses*, 18 Yale J. on Reg. 253 (2001); Douglas R. Pahl, Casenote, *Absolute Immunity for the Negligent Expert Witness: Bruce v. Byrne-Stevens*, 26 Willamette L. Rev. 1051 (1990). However, at least one law review article argues that "[i]t should not be unreasonable, however, for a litigant to expect an adverse expert witness to observe the same standard of care applicable outside the context of litigation services." W. Raley Alford, III, Comment, *The Biased Expert Witness in Louisiana Tort Law: Existing Mechanisms of Control and Proposals for Change*, 61 La. L. Rev. 18 (2000).

The rulings of other jurisdictions holding that expert witnesses may be held liable in some circumstances for their negligence preparation of evidence or opinions offered in court and various scholarly works on the subject of witness immunity demonstrate a good faith argument for extension of the law of witness immunity in West Virginia.

West Virginia law is not settled in the area of expert witness immunity and, at this time, we are not addressing the issue of witness immunity. We are simply addressing whether a trial judge, who correctly identified the current state of law in West Virginia, abused his discretion by sanctioning a litigant

and her attorney for expounding a novel cause of action that is not currently recognized in West Virginia.

Among jurisdictions that have addressed the issue of expert witness malpractice, there is a plurality of opinions. Therefore, the appellants cannot be found to have made their claim in bad faith because bad faith requires "the assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law." *See Newcome v. Turner*, 179 W. Va. 309, 367 S.E.2d 778 (1988) (*per curiam*) (holding that the plaintiffs could not be accused of bad faith when asserting a claim in an unsettled area of West Virginia law).

III.

We therefore find that the trial court abused its discretion in sanctioning the appellants. We reverse the trial court's levying of sanctions in the form of attorneys' fees and related expenses, and remand this case for the entry of an order in accordance with this opinion.

Reversed and Remanded.