No. 30362 - Betty A. Tiernan v. Charleston Area Medical Center, Inc., a West Virginia corporation

FILED
December 11, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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RORY L. PERRY II, CLERK
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Starcher, Justice, concurring:

I entirely agree with the partially dissenting opinion's position that basing a breach of promise claim on simply reading a newspaper article would be such a "far afield" stretch as to be untenable – at least under the facts of the instant case.

However, the majority opinion makes no such stretch. Rather, it is the dissent that has stretched – not just into the outfield, but entirely outside the park – by inexplicably failing to inspect the record, and then by wrongly accusing the majority of distorting that record.

The partially dissenting opinion accepts the circuit court's characterization of the record as showing that the *sole* basis for Ms. Tiernan's breach of promise claim was her reading of a newspaper article. The opinion then affirmatively ratifies that characterization of the record – twice – by stating that "Ms. Tiernan made no claim that the [promise] was made directly with her or other nurses at a meeting[;]" and that "the newspaper article was the only piece of evidence presented by Ms. Tiernan to show [a promise]."

Let us, by consulting the record, examine the accuracy of these two statements that are made by the partially dissenting opinion.

Pages 341-342 of the record, part of the "Plaintiff's Response to Defendant's Memorandum Regarding Remanded Issues [before the lower court on the issue of summary judgment,]" include the following language:

> As the Court will note by reference to the Plaintiff's interrogatory answer provided therein, the Plaintiff clearly stated that the Defendant's representative, George Velianoff, *told the Plaintiff* and approximately 140 nurses and 35-40 administrative staff who also attended a meeting regarding the protested float policy that the nurses had "every right to talk to newspaper reporters and that he would not retaliate if they chose to speak up."[Emphasis added.][1]

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[1]Plaintiff Betty A. Tiernan's Response to Defendant's First Set of Interrogatories, also in the record, states in pertinent part as follows (note that this response is the alleged substance of a communication between Ms. Tiernan and the Defendants):

> INTERROGATORY NO. 1:
>
> 1. Please give the substance of any and all conversations, communications or statements by or between you and any agent or employee of any of the Defendants relative to this matter.
>
> ANSWER:
>
> . . . During the middle of March, plans were underway to have a meeting of nurses in order to openly discuss their concerns regarding staffing issues, floating, on-call, etc. Mike Bloomfield, RN, was working with Mr. Velianoff and Ms. Latorre to arrange this forum. Flyers were distributed at the three (3) divisions of CAMC about the nurses' meeting.
>
> On April 7, 1994 at 7:00 p.m., approximately 140 nurses and 35-40 administrative staff attended the meeting. I was under the impression that nurses would be chairing the meeting with questions directed to the appropriate administrators. I found out that Mr. Velianoff would chair the meeting. Before the meeting started, Mr. Velianoff announced that it was called to his attention that representatives of the press were in the audience and he would not start the meeting until the press left.
>
> There was some discussion about this situation; the nurses wanting the media to stay, administration wanting them to go. The

(continued...)

This assertion by Ms. Tiernan to the lower court, in response to CAMC's renewed motion for summary judgment, demonstrates that the statement in the partially dissenting opinion – that Ms. Tiernan "made no claim" that the promise was made directly to her or other nurses at a meeting – is one hundred percent wrong.

Also equally and entirely wrong is the statement in the partially dissenting opinion that there was "no evidence" of the promise being made to Ms. Tiernan, other than the newspaper article. To the contrary, Ms. Tiernan's sworn interrogatory answers were evidence, when submitted in response to a motion for summary judgment.

Therefore, in direct contradiction of the two statements made in the partially dissenting opinion, one can see that the record is crystal clear that Ms. Tiernan claimed before the lower court that she was at the meeting where the promises were allegedly made – and that she backed up her claim with evidence. Suggesting that her claim merely comes from a newspaper article is simply incredible.

These facts, to reiterate, are simply, fully, and clearly shown in the record.

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[1](...continued)

two (2) female reporters left without incident.

Mr. Velianoff stated nurses had every right to talk to newspaper reporters and that he would not retaliate if they chose to speak up. He did say something to the effect that this particular meeting was closed to the media as well as the public; that it was considered a staff meeting being held on CAMC property.

The majority of the discussion during the meeting dealt with floating nurses, or resource sharing. Mr. Velianoff handled most of the questions and comments posed by the nurses, with little input from the other administrators. The meeting ended at approximately 9:30 p.m.

The only conceivable explanation for the partial dissent's error on this issue is that it accepted the truth of erroneous statements in the lower court's order (and in a CAMC brief) – without actually examining the record to see if those statements were correct.

It is natural that on occasion judicial opinions will make inaccurate statements because the opinion has accepted as reliable statements that are made in a brief or order. There is rarely time or need to check every statement in such summary documents against the original record; and in most cases, any such inaccuracies are not important.

But when one intends to directly accuse others on the Court of distorting the facts in the record, I believe that it behooves the accuser to check and see whether the record in fact supports the accusation. In the instant case, obviously, no such check was made, and the results speak for themselves.

To summarize: in responding to CAMC's motion for summary judgment, Ms. Tiernan asserted directly to the lower court, with supporting direct evidence, that she had been at the meeting where a promise was allegedly made. Consequently, the majority opinion is correct in holding that her claim on this issue raised material questions of fact.