No. 30731 - State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General v. Telecheck Services, Inc., et al.

FILED
May 23, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring, in part, and dissenting, in part:

In this case, the state Attorney General, Darrell V. McGraw, Jr., appealed from a circuit court order denying his request for a preliminary injunction against Telecheck Services, Inc. Prior to actually addressing its merits, the majority opinion examined Telecheck's contention that this Court had no jurisdiction to hear an appeal from an order denying a preliminary injunction. The majority opinion rejected Telecheck's jurisdictional argument and concluded that the Court has jurisdiction to hear an appeal from an order denying a preliminary injunction. I concur in the majority resolution of the jurisdictional challenge.

However, when reviewing the issue presented on appeal, the majority opinion concluded that the circuit court applied the wrong legal standard. The majority opinion, through a terse statement in footnote 21, has tossed aside the issue presented on appeal and remanded the case for a proceeding on the claim for a permanent injunction. I believe that the majority opinion incorrectly analyzed the law and facts of this case. For the reasons set out below, I dissent.

A. The Circuit Court Found Insufficient Evidence of Deceptive Practices

Under W. Va. Code § 46A-6-104, the Attorney General had to present some evidence that Telecheck engaged "in unfair or deceptive acts or practices[.]" The circuit court found the evidence presented did not prove to be an unfair or deceptive "pattern or practice." The majority opinion found that, in using the phrase "pattern or practice" in its order, the circuit court applied the wrong legal standard. According to the majority opinion, the circuit court should have determined whether there was evidence that Telecheck engaged "in unfair or deceptive acts or practices[.]" The majority has made a distinction where there simply is none.

"[T]he terms 'pattern' and 'practice' have common meanings. 'Pattern' is defined as 'a regular, mainly unvarying way of acting or doing,' and 'practice' is defined as 'a frequent or usual action; habit; usage.'" *State v. Russell*, 848 P.2d 743, 750 (Wash. App. 1993) (quoting Webster's New World Dictionary 1042, 1117 (1976)). In other words, under their common meanings, the terms pattern and practice are interchangeable. That being true, it becomes quite evident that the majority opinion is disingenuous in its attempt to show that the circuit court applied the wrong legal standard.

Had the majority attempted to be "fair" in this case, it would have reasoned that the term "pattern" was harmless surplusage. Unfortunately, the majority opinion was determined to reach a predestined outcome. Consequently, the majority opinion welded the

phrase "pattern and practice" together to show that it is not found in the applicable statute. Although the term "pattern" was not in the statute, the word "practice" was used dispositively in the statute. Therefore, the circuit court's order should have been construed to mean that there was insufficient evidence of an unfair or deceptive act or "practice"; and there was insufficient evidence of an unfair or deceptive act or "pattern" with the latter being surplusage.

B. The Majority's Disposition is Illogical and Legally Wrong

Even if I agreed with the majority opinion that the circuit court's use of the phrase "pattern or practice" was fatal, I would not join the disposition of the case chosen by the majority.

The Attorney General sought specific relief from this Court. The Attorney General sought to have this Court find that it provided sufficient evidence to warrant a preliminary injunction, and therefore this Court should grant that relief. See Franklin D. Cleckley, et al., Litigation Handbook on West Virginia Rules of Civil Procedure, 1020 (2002) ("[W]hen a circuit court refuses to award a preliminary injunction . . . the Supreme Court may, *upon a proper showing*, award a preliminary injunction."). (Emphasis added.) Alternatively, the Attorney General sought to have this Court reverse and remand the case for another hearing on the preliminary injunction request under the purported correct legal standard.

The majority opinion, in an unprecedented manner, has determined that the issue of the preliminary injunction can be by-passed, and the trial court should proceed directly to the issue of a permanent injunction. This relief, which was not requested (indeed until the decision in this case no attorney could have imagined seeking such relief), is illogical and has no basis in law. I have not discovered any case in the annals of Anglo-American jurisprudence, wherein an appellate court has sua sponte stripped a litigant of the right to have a hearing on a request for a preliminary injunction, and ordered the case to proceed directly to the permanent injunction proceeding.[1]

Obviously, the majority opinion had a definite reason for by-passing the preliminary injunction hearing in this case. That reason is veiled in the following language from the majority opinion: "a significant record has already been made, we conclude that remanding for a de novo proceeding on preliminary relief would be wasteful of judicial resources." In other words, the Attorney General had a huge bite at the apple and failed. Therefore, the majority decided to simply *assist* the Attorney General by leaving the preliminary injunction issue unresolved and ordering the parties to litigate the permanent

[1]Instead of by-passing the preliminary injunction issue, the majority could have required the issue to be disposed of under Rule 65(a)(2) of the West Virginia Rules of Civil Procedure. "Under Rule 65(a)(2) a trial court is given discretion to, sua sponte or upon a request by the parties, order the trial of the action on the merits to be advanced and consolidated with the hearing of the application for a preliminary injunction." Cleckley, Litigation Handbook on West Virginia Rules of Civil Procedure, at 1023. In other words, to be logical and legally sound, the majority opinion could have concluded that the issue of a preliminary injunction should be consolidated with the permanent injunction issue. Instead, the majority threw out logic and Rule 65(a)(2), and ordered the preliminary injunction claim be tossed in the trash can.

injunction issue. This is a disingenuous disposition.

The majority's decision to turn logic and the law upside down was necessary because, even under the so-called correct legal standard, the Attorney General would have been denied a preliminary injunction on remand. That is, there were absolutely no facts in the "significant record" that properly showed the Attorney General had established evidence of Telecheck having engaged in improper practices. This point triggers language contained in Rule 65(a)(2). Under Rule 65(a)(2) "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial." Cleckley, Litigation Handbook on West Virginia Rules of Civil Procedure, at 1022-1023. As a result of the majority's disposition, technically there has been no preliminary injunction hearing. Consequently, Telecheck cannot rely on Rule 65(a)(2) and avoid having to reprove issues that were already proven in the preliminary injunction proceeding that was tossed aside by the majority.

In view of the foregoing, I concur, in part, and dissent, in part. I am authorized to state that Justice Maynard joins me in this separate opinion.