No. 30734 *James Milton Covington and Jeraldine I. Covington v. Michael John Smith, Walter Lee Forbis, Ryder Truck Rental, Inc., and D.T.F. Trucking, Inc.*

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, C.J., concurring:

The facts of this case are unfortunate: the plaintiff's case got dismissed because of the plaintiff's attorney's inaction or procrastination. Through sloth, the attorney simply did not diligently prosecute the plaintiff's case. A frustrated circuit court dismissed the plaintiff's complaint, and chose to shift the burden for the plaintiff's losses from the potentially negligent tortfeasor to the slothful attorney.

The majority opinion aptly assesses the circuit court's decision to dismiss the case under our existing abuse of discretion standards, and concludes that in this case the circuit court abused its discretion in not reinstating the plaintiff's complaint.

I write separately to address a legal position raised by the appellants in their briefs, but not discussed by the majority opinion. The appellants argued that this Court should adopt a rule such that an attorney's inexcusable, extreme neglect, which is so severe that it amounts to positive misconduct, cannot impair or destroy a client's cause of action. I agree.

A problem that currently exists in the legal profession is that a lawyer who is most likely to "drop the ball" and fail to diligently prosecute a client's case is also most likely to be unable, or simply not bother, to purchase legal malpractice insurance. The end result

is that when a circuit court, like in this case, dismisses a case due to the lawyer's inactivity, the client is left with recourse against a lawyer with few assets. In other words, the client ends up suffering.

California acknowledged this problem in the 1960s, and concluded that inaction and sloth by an attorney should not be grounds for a circuit court to inflict suffering upon an innocent client of the attorney, by dismissing the client's case. In *Daley v. County of Butte*, 227 Cal.App.2d 380, 38 Cal.Rptr. 693 (1964), an intermediate court of appeals examined a situation where the plaintiff's lawyer filed a lawsuit, and then dawdled for nearly two years, only sporadically doing discovery or filing pleadings. When the plaintiff's lawyer failed to show up for several scheduled court hearings, the circuit court dismissed the plaintiff's complaint due to inactivity.

The court recognized the general rule – similar to that in this State – that the "general doctrine charges the client with the neglect of his attorney but gives him redress against the latter." 227 Cal.App.2d at 391, 38 Cal.Rptr. at 700. However, the court went on to alter this harsh rule, holding that "there are exceptional cases in which the client, relatively free from personal neglect, will be relieved of a default or dismissal attributable to the inaction or procrastination of his counsel." *Id.* The court found that the plaintiff's attorney's

> . . . neglect was inexcusable and extreme, amounting to positive misconduct. [The attorney's] consistent and long continued inaction was so visibly and inevitably disastrous, that his client was effectually and unknowingly deprived of representation.
>
> By his refusal to get on with the lawsuit or get out of it, [the plaintiff's attorney] inflicted severe damage on his client's case.

> She had legal representation only in a nominal and technical sense. . . . Under these unusual circumstances, where the client was unknowingly deprived of effective representation, she will not be charged with responsibility for the misconduct of her nominal counsel of record.

227 Cal.App.2d at 391-92, 38 Cal.Rptr. at 700.

The court then stated the rule – known as the "positive misconduct" rule – that where an attorney's inaction rises to a level of active, positive misconduct, the "attorney's authority to bind his client does not permit him to impair or destroy the client's cause of action." 227 Cal.App.2d at 391, 38 Cal.Rptr. at 700. The reasoning for such a rule is obvious:

> Clients should not be forced to act as hawklike inquisitors of their own counsel, suspicious of every step and quick to switch lawyers. The legal profession knows no worse headache than the client who mistrusts his attorney. The lay litigant enters a temple of mysteries whose ceremonies are dark, complex and unfathomable. Pretrial procedures are cabalistic rituals of the lawyers and judges who serve as priests and high priests. The layman knows nothing of their tactical significance. He knows only that his case remains in limbo while the priests and high priests chant their lengthy and arcane pretrial rites. He does know this much: that several years frequently elapse between the commencement and trial of lawsuits. Since the law imposes this state of puzzled patience on the litigant, it should permit him to sit back in peace and confidence without suspicious inquiries and without incessant checking on counsel.

227 Cal.App.2d at 391-92, 38 Cal.Rptr. at 700-701.

The California Supreme Court adopted the positive misconduct rule stated in *Daley* in *Carroll v. Abbott Laboratories, Inc.*, 654 P.2d 775 (1982). The court stated the

general rule that a client is charged with the neglect of his counsel, and that the client's usual redress for that neglect is an action for malpractice.

> However, an exception to this general rule has developed. Excepted from this rule are those instances where the attorney's neglect is of that extreme degree amounting to *positive misconduct*, and the person seeking relief is relatively free from negligence. The exception is premised upon the concept the attorney's conduct, in effect, *obliterates the existence of the attorney-client relationship*, and for this reason his negligence should not be imputed to the client.

654 P.2d at 778 (emphasis in original). The court went on to state that "[t]he issue, therefore, becomes whether counsel's conduct amounted to 'positive misconduct' by which plaintiff was 'effectually and unknowingly deprived of representation.'" *Id.* *In accord*, *Lords v. Newman*, 688 P.2d 290, 294-95 (Mont. 1984) (holding that when case is dismissed due to attorney negligence, "no great abuse of discretion need be shown to warrant reversal" because the "court has been hesitant to impute the neglect of an attorney to his client; and has been loathe to permit this neglect to bar a hearing on the merits."); *Staschel v. Weaver Bros. Ltd.*, 655 P.2d 518, 519 (Nev. 1982) ("To characterize [the attorney's] failure to represent his client as 'inexcusable neglect' would be charitable but hardly candid. His dereliction of the professional obligations owed appellant constituted actual misconduct."). *See generally*, S. Bernstein, Annotation, *Attorney's Inaction as Excuse for Failure to Timely Prosecute Action*, 15 A.L.R.3d 674 (1968).

I agree with the majority's decision to reinstate the plaintiffs' claims in the instant case; I simply would have gone the extra step, and adopted the "positive misconduct"

rule, so that in the future circuit courts will hesitate to punish innocent litigants for the procrastination of their attorneys.