No. 31506 - West Virginia Department of Health and Human Resources Employees Federal Credit Union v. Cynthia Tennant

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

In this proceeding Ms. Tennant argued that she was denied her right to a jury trial. The majority opinion concluded that Ms. Tennant waived her right to a jury trial. I agree with the majority's determination that a waiver occurred. I write separately because I believe a waiver occurred on different grounds from those relied upon by the majority opinion. Thus,for the reasons set forth below, I respectfully concur.

We Have No Rule Governing Jury Demand upon Removal of a Case to Circuit Court

The majority opinion found that Ms. Tennant waived her right to a jury trial by failing to request a jury trial under Rule 38 of the West Virginia Rules of Civil Procedure. I agree with the majority's conclusion that there was a waiver. I do not agree with its rationale. Once a party properly demands a jury trial in magistrate court, the party should not be required to comply with Rule 38 upon removal to the circuit court. At a minimum, the party should be required only to alert the trial court that a jury trial was demanded in the magistrate court. Several factors have guided me to this position.

First, the authority to remove a civil action from magistrate court to circuit court is governed by W. Va. Code § 50-4-8 (1978) (Repl. Vol. 2000).[1] This statute is silent as to whether parties must file new pleadings when a case is removed to circuit court. Moreover, the West Virginia Rules of Civil Procedure are silent on this issue. The accepted practice has been that parties do not have to file new pleadings when a case is removed from magistrate court to circuit court. The magistrate court pleadings are used. *See Istituto Per Lo Sviluppo Economico Dell' Italia Meridionale v. Sperti Prod., Inc*., 47 F.R.D. 310, 313 (S.D.N.Y. 1969) (citation omitted) ("Generally, [parties] in a removed action [are] not required to refile or revise old pleadings[.]"). *See also Freeman v. Bee Machine Co., Inc*., 319 U.S. 448, 452, 63 S. Ct. 1146, 1147, 87 L. Ed. 1509, 1513 (1943) (noting that a court has the power to order a repleading if it deems that step necessary). A review of the file in this case shows that no new pleadings were filed. The case was tried on the pleadings filed in magistrate court.

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[1]W. Va. Code § 50-4-8 reads in full:

> At any time before trial in a civil action involving less than three hundred dollars the action may be removed to circuit court upon the concurrence of all parties and upon the payment of the circuit court filing fee. At any time before trial in a civil action involving three hundred dollars or more, any party may, upon payment of the circuit court filing fee, cause such action to be removed to the circuit court. All appropriate documents shall then be forwarded along with such fee to the clerk of the circuit court. The matter shall then be heard by the circuit court.

Rule 12(a) of the Magistrate Court Rules of Civil Procedure imposes a deadline for when a motion to remove must be filed.

The fact that new pleadings are not filed in an action removed to circuit court is an important jurisdictional issue. In Syllabus point 5 of *Cable v. Hatfield*, 202 W. Va. 638, 505 S.E.2d 701 (1998), we held:

> Rule 3[b] of the West Virginia Rules of Civil Procedure requires, in mandatory language, that a completed civil case information statement accompany a complaint submitted to the circuit clerk for filing. In the absence of a completed civil case information statement, the clerk is without authority to file the complaint.

Notwithstanding *Cable's* pronouncement, a civil case information statement is not filed in a removal action. The pleadings filed in the magistrate court are used, and, thus, deemed to satisfy all requirements for initiating an action in circuit court. Again, there is no actual rule governing this matter. Its resolution stems from common practice.

Insofar as our laws are silent on whether new pleadings must be filed in a removal action, so, too, are they silent regarding the requirements for demanding a jury trial in a removal action. The majority opinion has, without any substantive analysis, determined that in all removal actions, litigants must comply with Rule 38 in order to demand a jury trial. I believe that the majority opinion on this issue is wrong. In essence, we permit the jurisdictional civil case information statement to be overlooked. That is, the majority permits Rule 3(b)'s *jurisdictional* requirement to be overlooked in a removal action, but imposes Rule 38's *nonjurisdictional* requirement on litigants. "To me this is a strange and illogical anomaly which locates the cart well ahead of the horse." *Crum v. Ward*, 146 W. Va. 421,

459, 122 S.E.2d 18, 38-39 (1961) (Haymond, J., dissenting).

I believe the best resolution of the jury issue should have been guided by the way federal courts address the matter in actions removed from state court to federal courts. "[F]ederal appellate case law supports the view that a party need not file a new jury demand in federal court if one that would have satisfied the federal requirements was filed in state court." *Wyatt v. Hunt Plywood Co., Inc*., 297 F.3d 405, 415 (5th Cir. 2002). *See* Fed. R. Civ. Pro., Rule 81(c) ("A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal."). The reason for this is "because the previously filed [jury] demand became a part of the federal court record." *Mondor v. United States Dist. Court for the Cent. Dist. of Cal.*, 910 F.2d 585, 586 (9th Cir. 1990). I believe the federal approach to this issue should have been adopted because the magistrate court jury demand becomes a part of the record in circuit court when a case is removed.[2] Therefore, I concur.

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[2]Ms. Tennant demanded a jury trial in her answer to the complaint in magistrate court. That answer became a part of the record in circuit court. No new answer was required or filed. I believe Ms. Tennant waived her right to a jury trial because she permitted a bench trial to occur without raising any objections to the trial court. "[F]ailure to object to alleged errors at trial is considered a technical waiver of the right to object to the alleged error on appeal." *Adkins v. Foster*, 187 W. Va. 730, 732 n.3, 421 S.E.2d 271, 273 n.3 (1992) (citing *Roberts v. Stevens Clinic Hosp., Inc*., 176 W. Va. 492, 496, 345 S.E.2d 791, 795 (1986)). Moreover, "when a party does not reassert the right to a jury trial prior to a bench trial . . . or knowingly participates in a bench trial, . . . that party waive[s] his right to trial by jury through inaction or inadvertence." *Winter v. Minnesota Mut. Life Ins. Co.*, 199 F.3d 399, 407 (7th Cir. 1999).