No. 32877 *Donna M. Richmond v. Barry A. Levin, M.D.*

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

Benjamin, Justice, dissenting:

I dissent from the majority's opinion in this matter. Having failed until this appeal to object or otherwise take exception to the procedures used in the trial of this matter below, Appellant Richmond waived her objections to such claimed procedural defects. The opportunity for and failure of Richmond to make use of the jury provisions available to her under Rules 47 and 48 of our Rules of Civil Procedure at the trial level is undisputed. Whether for strategy reasons or for whatever other reasons, Richmond's choice (since, in the absence of an objection below, that is what her decision below must now be presumed to be) was made. By not raising any objection below, despite the clear opportunities provided by Rules 47 and 48 of our Rules of Civil Procedure to do so, Richmond waived any claim she may have had under such rules.

The timing of Richmond's current objections regarding the jury procedures used below, coming as they do for the first time on appeal, attests to such exceptions being motivated not by how the jury decided the matter, but rather from what the jury decided – it decided against her. There is no assertion that the jury deliberated unfairly. There is no complaint that the jury acted improperly. There is no claim that the jury failed to accord to

Richmond all of the procedure she wanted below. And there is no assertion that Richmond was unaware of the procedural rights available to her as set forth in our Rules of Civil Procedure or that she was prevented from exercising an objection to the procedures below prior to this appeal. It is unfortunate that the majority now ignores Richmond's voluntary waiver and rewards her with another trial – all simply because a jury she agreed to decided against her.

This Court has adopted rules governing the preservation of issues for appeal through the use of objection. Rule 46 of the *West Virginia Rules of Civil Procedure* requires a party to notify the trial court of any objection or exception the party has to any action taken by the trial court. Similarly,

> Rule 51 of the *West Virginia Rules of Civil Procedure* provides that '[n]o party may assign as error the giving or the refusal to give an instruction unless the party objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which the party objects and the grounds of the party's objection[.]' *See* Syl. Pt. 5, *Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996).

Doe v. Wal-Mart Stores, Inc., 210 W. Va. 664, 672, 558 S.E.2d 663, 671 (2001). These required notifications provide the trial court the opportunity to address alleged errors or concerns, if the trial court so desires, and also preserves such issues for appellate review.

This Court has previously held that "[a] litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." Syl. Pt. 1, *Maples v. West Virginia Dept. of Commerce*, 197 W. Va. 318, 475 S.E.2d 410 (1996). *See also*, *Doe*, 210 W. Va. at 672, 558 S.E.2d at 671 (quoting *Maples*). In *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996), Justice Cleckley explained that:

> [t]o preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace. *See State v. Miller*, 194 W.Va. 3, 17, 459 S.E.2d 114, 128 (1995). . . . It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.

Thus, "[w]here objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal." Syl. Pt. 1, *State Road Commission v. Ferguson*, 148 W. Va. 742, 137 S.E.2d 206 (1964).

The majority avoids the waiver issue in a footnote by finding constitutional issues may be raised for the first time on appeal. I disagree with the majority's conclusion

that the constitutional waiver exception applies in the instant appeal. Since any constitutional rights of Appellant regarding the procedures below were fully available to her below had she chosen to invoke Rules 47 and/or 48 of the West Virginia Rules of Civil Procedure and since Appellant chose not to avail herself of such rules, she waived the claimed procedural defect below. Where a party is presumptively aware of a procedural defect at the trial level and where that party had the ready ability to then make an objection to such defect under our Rules of Civil Procedure, this Court should not now permit the party to reserve by her silence her objection – raising it on appeal only after she determines that the verdict was not to her liking . It is the unfortunate result of the majority decision that the Court now countenances such a practice.[1]

I respectfully dissent from the majority opinion in this matter.

[1] As to the issue of retroactivity, I agree with the position set forth in Justice Maynard's dissent. Having failed to object to the non-unanimous jury instruction at trial, Richmond waived her retroactivity argument. *See, e.g.*, Syl. Pt. 7, *King v. Kayak Mfg. Corp.*, 182 W. Va. 276, 387 S.E.2d 511 (1989) (holding doctrine of comparative assumption of risk to be applied retroactively to all cases to be tried after filing of opinion and in all cases on appeal "if the point was preserved at trial.").