No. 34716 - *Stanley W. Dunn, Jr., and Katherine B. Dunn v. Douglas S. Rockwell, Carol K. Rockwell, and Martin & Seibert, L.C.*

FILED
November 24, 2009
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring, in part, and dissenting, in part, joined by Benjamin, C.J.:

In this proceeding, the Court was called upon to decide whether the trial court correctly granted summary judgment in favor of two defendants: Carol K. Rockwell and the law firm of Martin & Seibert. The majority opinion affirmed summary judgment in favor of the law firm. I concur in that decision. However, the majority opinion reversed the summary judgment ruling in favor of Mrs. Rockwell. I dissent from that decision. Further, as set out below, I dissent from two procedural matters addressed in the majority opinion.

1.
The Majority Opinion Overruled Two Principles of Law in *Cart v. Marcum* but Adopted Those Same Principles of Law in its Majority Opinion

For reasons that are not clear to me, the majority opinion expressly overruled the decision in *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992). It is unnecessary for the majority opinion to have overruled *Cart* because the majority opinion actually proceeded to adopt the two key principles of law set out in the *Cart* opinion. Before I address the essence of my argument on this issue, some historical background information

is necessary.

The decision in *Cart* set out a principle of law that limited the discovery rule to situations where the defendant engaged in conduct that prevented a plaintiff from knowing of his/her cause of action. Subsequent to *Cart*, this Court issued the opinion of *Gaither v. City Hospital, Inc*., 199 W. Va. 706, 487 S.E.2d 901(1997). The *Gaither* opinion set out a more general principle of law regarding the application of the discovery rule to toll the running of the statute of limitations.[1] In the concurring opinion of Justice Starcher in *Miller v. Monongalia County Board of Education*, 210 W. Va. 147, 556 S.E.2d 427 (2001), he explained how *Gaither* and *Cart* should be applied. Justice Starcher wrote:

> If the lawsuit was filed after the time period specified in the statute, the plaintiff can assert the discovery rule as stated in *Gaither v. City Hospital*. . . . As a last resort, the plaintiff can allege some affirmative misconduct by the defendant prevented the plaintiff from knowing of the elements of their cause of action, as stated in *Cart v. Marcum*.

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[1]*Gaither's* general discovery rule is set out in Syllabus point 4 of the opinion as follows:

> In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

199 W. Va. 706, 487 S.E.2d 901.

Miller, 210 W. Va. at 153, 556 S.E.2d at 556. Subsequent to *Miller*, this Court applied *Gaither* and *Cart* in the manner suggested by Justice Starcher. *See Legg v. Rashid*, 222 W. Va. 169, 663 S.E.2d 623 (2008) (per curiam); *Roberts v. West Virginia Am. Water Co.*, 221 W. Va. 373, 655 S.E.2d 119 (2007); *Davey v. Estate of Haggerty*, 219 W. Va. 453, 637 S.E.2d 350 (2006) (per curiam); *Merrill v. West Virginia Dep't of Health & Human Res.*, 219 W. Va. 151, 632 S.E.2d 307 (2006) (per curiam); *McCoy v. Miller*, 213 W. Va. 161, 578 S.E.2d 355 (2003) (per curiam).

Prior to the majority's opinion in this case, the decision in *Cart* stood for two principles of law. The first principle is set out in Syllabus point 2 of *Cart* as follows:

> The "discovery rule" is generally applicable to all torts, unless there is a clear statutory prohibition of its application.

188 W. Va. 241, 423 S.E.2d 644. The majority opinion overruled this principle of law in *Cart*. However, the majority opinion then adopts this same principle of law in new Syllabus point 2 of its opinion as follows:

> The "discovery rule" is generally applicable to all torts, unless there is a clear statutory prohibition of its application.

This "overruling" might at first blush appear to be a mere unintentional lapse in logic. However, it was more than a mere unintentional lapse in logic because, as I will show, it was repeated.

The second principle of law that *Cart* stood for was set out in the opinion as

follows:

> The "discovery rule" . . . is to be applied with great circumspection on a case-by-case basis only where there is a strong showing by the plaintiff that he was prevented from knowing of the claim at the time of the injury. . . . In order to benefit from the rule, a plaintiff must make a strong showing of fraudulent concealment[.]

Cart, 188 W. Va. at 245, 423 S.E.2d at 648.[2] The majority opinion overruled this principle of law in *Cart*. Then, the majority opinion applies this same principle of law in new Syllabus point 5 of its opinion, in part, as follows:

> [I]f the plaintiff is not entitled to the benefit of the discovery rule, then the court should determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled.

Two things should be understood about new Syllabus point 5 of the majority opinion. First, it adopts the principle of law set out *Cart*. Second, to legitimize its adoption

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[2]This principle was set out more generally in Syllabus point 3, in part, of *Cart* as follows:

> [T]he "discovery rule" applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury.

188 W. Va. 241, 423 S.E.2d 644.

and application of *Cart's* principle of law, new Syllabus point 5 of the majority opinion states that its "fraud" principle of law is not a discovery rule. That is, the quoted part of the new syllabus point starts out by saying: "[I]f the plaintiff is not entitled to the benefit of the discovery rule[.]" In other words, the new syllabus point attempts to say that *Gaither* is the discovery rule and the "fraud" principle it sets out is not a discovery rule. Simply put, this is wrong. Ultimately, under the majority's "fraud" principle, if a plaintiff establishes fraudulent concealment, the new syllabus point states that "the statute of limitation is tolled." Despite the majority opinion's attempt to disassociate its "fraud" principle from being an aspect of the discovery rule, "'it looks like a duck, walks like a duck and quacks like a duck[.]'" *Law v. Monongahela Power Co.*, 210 W. Va. 549, 563, 558 S.E.2d 349, 363 (2001) (per curiam) (Davis, J., dissenting) (quoting *Adkins v. West Virginia Dep't of Educ*., 210 W. Va. 105, 109, 556 S.E.2d 72, 76 (2001) (per curiam) (Albright, J., dissenting)). There simply is no logic to new Syllabus point 5 of the majority opinion, nor was there any logic in its overruling *Cart* and ultimately passing off the principles of *Cart* as its own creation.

2.
Rather than Clarifying the Law on a Cause of Action for Civil Conspiracy, the Majority Opinion Has Added Confusion

New Syllabus point 8 of the majority opinion states:

> A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by lawful

> means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff.

New Syllabus point 9 of the majority opinion states:

> A civil conspiracy is not a *per se*, stand-alone cause of action; it is instead a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but shared a common plan for its commission with the actual perpetrators.

There simply is no need for, nor logic to support, the creation of new Syllabus points 8 and 9. Ultimately, the end result is that our law on civil conspiracy is no longer simple and straightforward.

In *Kessel v. Leavitt*, 204 W. Va. 95, 128, 511 S.E.2d 720, 753 (1998), we said that "[t]he law of this State recognizes a cause of action sounding in civil conspiracy." This Court recognized the concept of a civil conspiracy in *Dixon v. American Industrial Leasing Co.*, 162 W. Va. 832, 253 S.E.2d 150 (1979), where we adopted the definition of civil conspiracy set forth in 15A C.J.S. *Conspiracy* § 1(1). The Court stated in *Dixon*:

> As succinctly stated in 15A C.J.S. Conspiracy, Sec. 1(1), a civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means.

Dixon, 162 W. Va. at 834, 253 S.E.2d at 152. This Court went on to hold in Syllabus point 1 of *Dixon*, in part, the following:

> In order for civil conspiracy to be actionable it must be

> proved that the defendants have committed some wrongful act or have committed a lawful act in an unlawful manner to the injury of the plaintiff[.]

See Cook v. Heck's Inc., 176 W. Va. 368, 342 S.E.2d 453 (1986) (discussing civil conspiracy); *Wells v. Smith*, 171 W. Va. 97, 297 S.E.2d 872 (1982) (same), *overruled on other grounds by Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). Prior to the decision in the majority opinion, our law on civil conspiracy was rather straightforward. However, I have no doubt that, as a result of the majority opinion's unwarranted "clarification" of the tort of civil conspiracy, a great deal of confusion will now surround this cause of action.

3.
The Majority Opinion Has Litigated the Rights of a Defendant Who Was Not a Party to this Appeal

The facts of this case revealed that the plaintiffs sued three defendants: the law firm, Mrs. Rockwell, and Douglas S. Rockwell. The circuit court granted partial summary judgment in favor of Mrs. Rockwell and the law firm. The circuit court *did not* grant summary judgment to Mr. Rockwell. Consequently, this appeal did not involve any claim the plaintiffs have against Mr. Rockwell. Despite the fact that the plaintiffs' claims against Mr. Rockwell *were not before this Court*, the majority opinion decided Mr. Rockwell's rights with respect to the continuous representation doctrine.

To reinstate causes of action against Mrs. Rockwell, the majority opinion

decided a potential defense by Mr. Rockwell. The majority opinion did this as follows:

> On this record, it appears that there is evidence to say that questions of material fact exist for the finder of fact to resolve regarding whether the two-year statutes of limitation on the Dunns' five causes of action against Lawyer Rockwell were tolled. In other words, on remand, the finder of fact should resolve whether the statute of limitation was tolled until the Spring of 2005 by his continuous representation of the Dunns in their effort to purchase the Hoover/Gray farmland.

Maj. Op. at 38. The legal significance of what the majority opinion has done is very unsettling. In the event Mr. Rockwell loses the case below and appeals, he cannot assign as error the trial court's denial of any summary judgment motion he made regarding the continuous representation doctrine.[3] The majority opinion in the instant appeal has already decided that the issue must go to the jury. The resolution of this issue against Mr. Rockwell, when the claims against him *were not properly before this Court*, sets a dangerous precedent.

I believe that the majority opinion was compelled to decide the rights of Mr. Rockwell because that was the only way in which it could reverse the summary judgment order in favor of Mrs. Rockwell.[4] I cannot tolerate nor will I ever approve of litigating the

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[3]I will note that Mr. Rockwell did in fact file a motion for summary judgment, which was denied by the circuit court. Under our rules, Mr. Rockwell could not directly appeal the denial of his motion for summary judgment. Any such appeal would have to come after the case has been resolved on the merits.

[4]In my review of the plaintiffs' brief, I found that they raised the continuous representation doctrine only in the context of trying to keep the law firm in the case. Specifically, the plaintiffs stated in their brief:

rights of a party not before this Court in order to keep another party in the case.

The majority's decision to *sua sponte* determine that Mr. Rockwell's potential defense under the continuous representation doctrine presented jury issues is inconsistent with this Court's recent decision in *State ex rel. Board of Education of County of Putnam v. Beane*, 224 W. Va. 31, 680 S.E.2d 46 (2009) (per curiam). The decision in *Beane* involved an abuse and neglect proceeding in the Circuit Court of Wood County. In that case, the circuit court entered an order requiring the Putnam County Board of Education ("the School Board") to provide and pay for a full-time nurse for a special-needs student. The School Board filed a writ of prohibition with this Court seeking to prevent enforcement of the order because it was not a party to the litigation in Wood County. We granted the writ to the School Board based upon the following reasoning:

> While doing what is in the best interests of the child is the primary goal of abuse and neglect proceedings, this goal does not relieve a court from complying with fundamental due process requirements. The most fundamental due process protections are notice and an opportunity to be heard. As we held in Syllabus Point 2 of *Simpson v. Stanton*, 119 W. Va. 235,

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> In its final examination of the statute of limitations, the circuit court held that the plaintiffs failed to offer any proof that the "continuous representation" doctrine should be applied to toll the statute of limitations on their claims against Martin & Seibert.

Appellant's Br. at 31 (citation omitted). The plaintiffs did not raise the issue of the continuous representation doctrine against Mrs. Rockwell. Rather, the majority opinion asserted this issue against her.

> 193 S.E. 64 (1937): "The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard."
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> . . . .
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> The circuit court clearly denied the School Board its fundamental due process rights to notice and an opportunity to be heard. In so doing, the circuit court did not have before it important evidence concerning the child's medical and educational history. We find it troubling that neither the special prosecuting attorney, the guardian *ad litem*, DHHR, nor the circuit court recognized the need to include the School Board in these hearings wherein the School Board's interests were considered and decided *ex parte*.

Beane, 224 W. Va. at ___, 680 S.E.2d at 50-51.

Although I totally agreed with this Court's questioning of the trial court in *Beane* for deciding the rights of a *party not before that court*, I am very troubled to find that the majority in this case would do exactly what we prohibited the trial court in *Beane* from doing. In the final analysis, the majority opinion stands for the following proposition: due process prevents a trial court from litigating the rights of a party not before that court, but this Court has the authority to disregard due process in order to achieve a certain result. This double standard is wrong and establishes a very dangerous precedent.

For the reasons set out above, I respectfully concur, in part, and dissent, in part. I am authorized to state that Chief Justice Benjamin joins me in this separate opinion.