



No. 33099

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DONNA M. MURRAY,)
)
 Appellant,) From the Circuit Court of
) Ohio County, West Virginia
 v.) Honorable Martin J. Gaughan
) Civil Action No. 04-CAP-6
 STRAUB HONDA HYUNDAI,)
)
 Appellee.)

BRIEF ON BEHALF OF APPELLEE,
STRAUB HONDA HYUNDAI

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BRIEF ON BEHALF OF APPELLEE

STATEMENT OF FACTS

In 1990, the appellant, Donna M. Murray, allegedly sustained hail damage to her automobile and submitted a claim to State Farm, her insurer. State Farm tendered appellant a check for \$1,523.60 which was made payable to "Donna Murray and Straub Body Shop" (R. 37). Appellant alleges she did not have Straub Body Shop repair the hail damage at that time.

Appellant alleges that she was told by State Farm that she could not cash the check for \$1,523.60 and had to hold the check until she dropped comprehensive coverage or dropped State Farm as an insurer. (Appellant's petition p.1). This contention is unsupported by fact. If the appellant elected not to have the hail damage repaired, she was still permitted to negotiate the check.

The appellant held the check, without negotiating it or attempting to negotiate it, for years and years. After holding the check for years, appellant requested that the appellee endorse the check, which appellee did and returned the check to appellant. (R.37-38). Again, appellant held this check, endorsed by the former owner of appellee, for years and years. During this time, appellee did work on appellant's automobile, including painting the same. (R.38).

In January 2003, thirteen (13) years later, appellant attempted to deposit the check dated May 25, 1990, and the check did not clear.

Appellant alleges that a former employee of appellee, Colin Whorton, requested a replacement check pursuant to a letter from State Farm in 1997. Appellant alleges appellee signed appellant's name on the second check or replacement check issued by State Farm in 1997.

Since the time that the 1997 replacement check was issued by State Farm, the appellee has been sold to new owners. (R.39).

In the court below, the appellee filed a motion to dismiss, or in the alternative motion for summary judgment, arguing:

1. Statute of Limitations/Laches;
2. Failure to name an indispensable party; and
3. Failure to name and sue the proper party.

(R.37-42).

The lower court, by Order dated November 4, 2004, granted appellee's motion to dismiss and dismissed appellant's claim with prejudice. (R.167).

PROCEDURAL HISTORY

On February 5, 2004, the appellant, Donna M. Murray, filed a civil complaint against Straub Honda Hyundai seeking approximately \$3,000.00 in alleged damages. The appellee, incorrectly named as Straub Honda Hyundai, filed an Answer thereto. (R.1-22).

On March 18, 2004, Magistrate Rose M. Humway dismissed appellant's complaint finding that the applicable statute of limitations had expired. (R.1-22). Thereafter, on March 18, 2004, the appellant appealed the decision to the Circuit Court of Ohio County, West Virginia.

While the case was pending in the circuit court, appellee filed a motion to dismiss based on numerous grounds, including a statute of limitation defense.

By Order dated November 4, 2004, the Honorable Martin J. Gaughan granted appellee's motion to dismiss and DISMISSED the case with prejudice. It is from this Order that the appellant appeals. (R.167).

STANDARD OF REVIEW

Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo. State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc. 194 W.Va. 770, 461 S.E.2d 516 (1995).

Appellate review of a circuit court's entry of summary judgment is reviewed de novo. Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 775 (1994).

POINTS AND AUTHORITIES

1. Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be

for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative. W.Va. Code 55-2-12.

2. A cause of action based on fraud or deceit is barred by the two-year statute of limitation period of W.Va. Code 55-2-12(a). Alpine Property Owners Ass'n v. Mountaintop Dev. Co., 179 W.Va. 12, 365 S.E.2d 57 (1987); Cavendish v. Moffett, 163 W.Va. 38, 253 S.E.2d 558 (1979); Funeral Servs. ex rel. Gregory v. Bluefield Community Hospital, 186 W.Va. 424, 413 S.E.2d 79 (1991).

3. Mere ignorance on the part of a party of an actionable wrong or that a cause of action exists does not suspend the operation of the statute of limitation. Scott v. Rinehart & Dennis Co., 116 W.Va. 319, 180 S.E.2d 276 (1935).

4. 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. Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of a statute of

limitations; a plaintiff must make a strong showing of fraudulent concealment, inability to comprehend the injury, or other extreme hardship. Cart v. Marcum, 188 W.Va. 241, 423 S.E.2d 644 (1992).

5. The general rule is that on a de novo appeal from a magistrate court judgment, the amount demanded cannot be increased beyond the jurisdictional limit of the magistrate court. Monongahela Power Co. v. Starcher, 174 W.Va. 593, 328 S.E.2d 200 (W.Va. 1985).

A R G U M E N T

The appellant, on her own, held the original check for over thirteen (13) years. The appellee did nothing to prevent the appellant from attempting to negotiate this check. Consequently, assuming arguendo that appellant had a claim against appellee, it was governed, at a maximum, by a two year statute of limitation as found by the lower court.

A cause of action based on fraud or deceit is barred by the two-year statute of limitation period of W.Va. Code 55-2-12(a). Alpine Property Owners Ass'n v. Mountaintop Dev. Co.,

179 W.Va. 12, 365 S.E.2d 57 (1987); Cavendish v. Moffett, 163 W.Va. 38, 253 S.E.2d 558 (1979); Funeral Servs. ex rel. Gregory v. Bluefield Community Hospital, 186 W.Va. 424, 413 S.E.2d 79 (1991).

The lower court found that appellant's cause of action as set forth in her complaint was a cause of action for fraud, and governed by the two year statute of limitation. (R.168). This finding and ruling by the lower court was not erroneous.

West Virginia law is well settled that,

Mere ignorance on the part of a party of an actionable wrong or that a cause of action exists does not suspend the operation of the statute of limitation. Scott v. Rinehart & Dennis Co., 116 W.Va. 319, 180 S.E.2d 276 (1935).

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. Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of a statute of limitations; a plaintiff must make a strong showing of fraudulent concealment, inability to comprehend the injury, or other extreme hardship. Cart v. Marcum, 188 W.Va. 241, 423 S.E.2d 644 (1992).

The lower court found that the appellant should have reasonably discovered her alleged injury long before she did.

The lower court found that the cause of action would have accrued in February 1997, when the second check was issued, and if the appellant would have exercised reasonable diligence in attempting to negotiate the check, she would have discovered the nature of her alleged injury. This finding by the lower court was not erroneous. The appellant's excuse why she held the check (State Farm demanded her to do so) is not supported by fact. Moreover, the appellant admits that the earliest start of the statute of limitation was February 11, 1997. (R.53).

The lower court held that W.Va. Code 46-3-118(c) applies only to the party to whom one is trying to enforce to pay the draft, or in other words, the obligor of the draft, that being State Farm, and that W.Va. Code 46-3-118(c) was not applicable to this case. (R.169). This ruling was not erroneous.

Statutes of limitations are designed to prevent stale claims and to prevent a party from being prejudiced by the delay in bringing a claim. Delay can cause loss of evidence and/or witnesses. Here, during appellant's delay, the business was sold and employees have left. The appellee has been prejudiced by this delay, the exact effect the statute of limitations is designed to protect against.

Lastly, the appellant requests that this Court separate the circuit court appeal from the initial magistrate court case. Clearly, "an appeal from the judgment of a magistrate, which under law is tried de novo in the appellate court, is a continuation of the same action, not a new suit. Cook v. Continental Cas. Co., 82 W.Va. 250, 95 S.E. 835 (1918).

Also, this Court has held that, "the general rule is that on a de novo appeal from a magistrate court judgment, the amount demanded cannot be increased beyond the jurisdictional limit of the magistrate court". Monongahela Power Co. v. Starcher, 174 W.Va. 593, 328 S.E.2d 200 (W.Va. 1985).

Consequently, appellant's request to "separate" the circuit court appeal from the magistrate court case is unsupported by law and is without merit and should be summarily rejected.

C O N C L U S I O N

The lower court did not err by granting appellee's motion to dismiss and by dismissing appellant's claim as the lower court properly found that appellant's cause of action was barred by the applicable statute of limitation. The lower court properly found that the appellant unreasonably held the

check for years and reasonably should have discovered any alleged injury long before she did.

PRAYER FOR RELIEF

Wherefore, your appellee respectfully prays that the appellant's appeal be DENIED and that the appellee be awarded its fees and costs and for such other and further relief as is just and proper.

Respectfully submitted, Appellee
Straub Honda Hyundai,

By: Louis J. John
Counsel

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CERTIFICATE OF SERVICE

Service of the foregoing Brief on Behalf of Appellee was made upon the Appellant, by mailing a true copy thereof, U.S. mail, postage prepaid to appellant, pro se, at her last known address, 67828 Brokaw Road, St. Clairsville, OH 43950, on this 12th day of October, 2006.

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