STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia ex rel. Manor Care Inc.; HCR Manor Care Services, Inc.; Health Care and Retirement Corporation of America, LLC; and Heartland Employment Services, LLC, Petitioners

FILED
May 24, 2012
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 12-0443 (Kanawha County 10-C-952)

Honorable Paul Zakaib, Jr., Judge of the Circuit Court of Kanawha County; and Tom Douglas, Individually and on behalf of the Estate of Dorothy Douglas, Respondents

MEMORANDUM DECISION

In this original jurisdiction proceeding now before this Court, the petitioners, Manor Care, Inc.;HCR Manor Care Services, Inc.; Health Care and Retirement Corporation of America, LLC, and Heartland Employment Services, LLC, seek a writ of prohibition to prevent enforcement of an order by the respondent, the Honorable Paul Zakaib, Jr., Judge of the Circuit Court of Kanawha County, that precluded the petitioners from adding a proposed verdict form to the record. Upon consideration of the petition, we conclude that the writ of prohibition should be granted.

The Court has considered the petition for writ of prohibition and the record presented by the petitioners. The facts and legal arguments are adequately set forth therein, and the Court previously has decided that oral argument is not necessary to the decision in this case. The facts in this case are not complex, and the case does not present a novel or significant question of law. For these reasons, a memorandum decision is appropriate under Revised Rule 21 of the Rules of Appellate Procedure.

On July 25, 2011, a jury trial in this wrongful death action commenced. The trial court held a jury charging conference on August 4, 2011. At that time, the petitioners tendered a verdict form to the court, opposing counsel, and the court reporter. On August 5, 2011, the jury returned a verdict against the petitioners in the amount of $91.5 million. At some point after the trial the petitioners learned that their proposed verdict form was not made part of the record. Consequently, on December 6, 2011, petitioners filed a motion to correct the record by making their proposed verdict form part of the record. A hearing was held on the motion on February 10, 2012. After the hearing, on March 29, 2012, the circuit court issued an order denying the motion.

The petitioners now request this Court to issue a writ of prohibition to prevent enforcement of the circuit court's order precluding the supplementation of the record with the proposed verdict form. We previously have held that,

> [I]n determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

In the instant case, the petitioners correctly have noted that "[a]nything not filed with the lower tribunal shall not be included in the record on appeal[.]" W. Va. Rev. App. P., 6(b). As stated in Syllabus point 2 of *State v. Bosley*, 159 W. Va. 67, 218 S.E.2d 894 (1975), "[t]he appellate review of a ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not a part of that record." *Accord* Syl. pt. 2, *Proudfoot v. Proudfoot*, 214 W. Va. 841, 591 S.E.2d 767 (2003). We also have observed that "[a]n adequate record of the proceeding is one of the fundamental rights of due process." *Smoot v. Dingess*, 160 W. Va. 558, 561, 236 S.E.2d 468, 471 (1977).

In an effort to make a complete record for post-verdict motions and eventual appeal, the petitioners sought to include into the record a proposed verdict form that they alleged was tendered by them to the trial court during a pre-verdict hearing. There is no dispute that the petitioners tendered a proposed verdict form to the trial court prior to the jury's verdict. The primary reason for the trial court's decision to prevent the petitioners from including the proposed verdict form in the record is that the court was not certain that the proposed verdict form being offered now was the same as that tendered prior to the verdict. We do not find this reason to be a valid consideration for preventing the petitioners from placing the proposed verdict form into the record.

The trial court may very well be correct in questioning whether the proposed verdict form presents issues that may not have been raised prior to the verdict. However, the veracity of the proposed verdict form cannot be determined by precluding it from the record. To the extent that the petitioners attempt to raise issues from the proposed verdict form that cannot be found in the trial

transcript, they will have a difficult time prevailing on those issues in an eventual appeal. In other words, the trial court's decision precludes the petitioners from raising issues in an appeal that may very well have been raised prior to the verdict. If, after the post-verdict motions filed by the petitioners are considered, the trial court determines on the merits that the current proposed verdict form raises issues that were *not brought out previously*, the petitioners can exercise their right to challenge such a ruling in an appeal and will have an adequate record for doing so only if they are permitted to supplement the record.

For the foregoing reasons, we conclude that the circuit court abused its discretion by preventing the petitioners from adding their proposed verdict form to the record. Accordingly, we grant the requested writ of prohibition.

Writ Granted.

ISSUED: May 24, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh
Justice Brent D. Benjamin

DISQUALIFIED:

Chief Justice Menis E. Ketchum