SUPERIOR COURT
OF THE STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: July 24, 2003
Decided: November 24, 2003

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Re: *Fossett & Strock v. DALCO Construction*
C.A. No. 02A-09-012-FSS
Upon Appellee's Motion to Dismiss –

Dear Counsel:

This is an appeal from the Court of Common Pleas. Based on Appellants having violated the old "mirror image rule," Appellee challenges the court's jurisdiction. In other words, Appellants failed to name the parties identically as below. They omitted a defendant who was dismissed in the original action. The "mirror image rule," however, requires Appellants to file appeals against the exact same parties who appeared below.

Appellee, Plaintiff-below, originally filed suit in Justice of the Peace Court against Appellants, Barry Fossett and Judith Strock, and First Union on May 16, 2001. Appellee sought final payment on a house they had recently finished constructing for Appellants. On June 15, 2001, First Union Mortgage Corporation responded, asserting that the complaint merely named "First Union," and was served on First Union National Bank, a separate entity from FUMC. On September 12, 2001, the Justice of the Peace Court dismissed First Union as a party and entered judgment for Appellee against Appellants.

On September 26, 2001, Appellants filed a Notice of Appeal, requesting trial *de novo* in the Court of Common Pleas. Appellants failed to include First Union in the caption. Appellee moved to dismiss on November 8, 2001. Appellants responded, and after hearing oral argument on November 30, 2001, the Court of Common Pleas granted the motion. Appellants then filed this appeal.

Now, Appellants ask: Is there a "mirror image rule" in Delaware? The answer is, "Yes." In 1857, *McDowell v. Simpson*[1] held:

> If the declaration in appeal from a justice of the peace fails to correspond with the transcript of the suit below, in the names and number of the parties, the character or right in which they sue, or in the cause or form of action, the proper mode to take advantage of it is by motion to set it aside for irregularity . . . .[2]

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[1] 1 Houst. 467 (Del. Super. Ct. 1857).

[2] *Id.* See *Freedman v. Aronoff*, 1994 WL 555429, at *2 (Del. Super. Ct.) (parties need appear in caption, not necessarily ancillary information).

More than one hundred years later, *Sulla v. Quillen*[3] reasoned that the "McDowell rule," or the "mirror image rule," assures retrial of the same cause of action that occurred in Justice of the Peace Court.[4] The Court of Common Plea's jurisdiction to hear an appeal is stripped where there is any variance from the lower proceeding.[5]

In 1969, *Cooper's Home Furnishings, Inc. v. Smith*[6] was mindful of the potential hardship plaintiffs might endure because of the "nicety in pleadings," but the court still followed the old rule.[7] Similarly, *Panzer Management Company v. Farrall*[8] considered whether the strict "mirror image rule" was inconsistent with the "liberalities of modern day pleading practice" and concluded it is not.[9]

Appellants rely on *Wright v. Shaw*,[10] to no avail, for their contention that the rule no longer applies. First, no court has followed *Wright.* Further, *Wright* suggests there is no need to include names of non-appealing defendants, unless there

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[3] 1987 WL 18425 (Del. Super. Ct.).

[4] *Id.* at *1.

[5] *Hicks v. Taggart*, 1999 WL 462375, at *3 (Del. Super. Ct.) (citing *McIlvaine v. Townsend*, 1997 WL 718650 (Del. Super. Ct.)).

[6] 250 A.2d 507 (Del. Super. Ct. 1969).

[7] *Id.* at 508.

[8] 1987 WL 8223 (Del. Super. Ct.).

[9] *Id.* at *2.

[10] 188 A.2d 669 (Del. Super. Ct. 1963).

may be joint liability between them.[11] Appellee, however, sought payment from Appellants and First Union. Appellee claimed that First Union Mortgage Corporation, as mortgagee, agreed not to release funds to Appellants until Appellee received final payment. Despite Appellee's technical mistake, having misnamed the mortgagee, there existed the possibility for joint liability between Defendants. For example, in lieu of granting the mortgagee's motion to dismiss, the Court of Common Pleas might have allowed Appellees to amend their complaint.

Appellants suggest a simple alternative to dismissal. They contend that their appeal should go forward despite their having failed to name First Union, and Appellee can "still file a claim against First Union if it so desire[s]." Appellants do not explain, however, how Plaintiff can add a new party to an appeal. Further, Appellants chose to move the case to the Court of Common Pleas. The burden to assemble the parties to their appeal should fall on Appellants. Besides, the proposed alternative suggestion is judicially uneconomical.

Even if the "mirror image rule" is old-fashioned and harsh as it is, this is not an attractive opportunity to circumvent it, much less to abolish it. While the rule exists, practitioners must proceed with caution.

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[11] *Id*. at 672. See *Dzedzej v. Prusinski*, 259 A.2d 384, 386 (Del. Super. Ct. 1969) (failing to join party prevents court from determining rights of defendants as between themselves.)

For the foregoing reasons, Appellants' appeal is barred and therefore ***DENIED***.

IT IS SO ORDERED.

Very truly yours,

FSS/lah
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