

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BARRY FOSSETT and )  
JUDITH STROCK, ) No. 607, 2003  
)  
Plaintiffs Below, ) Court Below: Superior Court  
Appellants, ) of the State of Delaware in  
) and for New Castle County  
v. )  
) C.A. No. 02A-09-012  
DALCO CONSTRUCTION CO., )  
)  
Defendant Below, )  
Appellee. )

Submitted: June 8, 2004  
Decided: August 20, 2004

Before **STEELE**, Chief Justice, **HOLLAND, JACOBS**, Justices, **LAMB\*** and **STRINE,\*** Vice Chancellors, constituting the court *en banc*.

***ORDER***

This 20<sup>th</sup> day of August 2004, upon consideration of the parties' briefs, it appears to this Court that:

1. Appellee/Plaintiff-below, DALCO, originally filed suit on May 16, 2001 in Justice of the Peace Court #12 against Barry Fossett and Judith Strock, and "First Union" to recover for non-payment of the final draw on a recently constructed house which Fossett and Strock had occupied. First Union Mortgage Corporation ("FUMC"), an entity over which the court had no jurisdiction, answered the complaint and moved to dismiss, asserting that DALCO incorrectly identified and served First Union National Bank. On September 12, 2001, the

\*Sitting by designation pursuant to Del. Const. Art. IV § 12.

Justice of the Peace Court entered a money judgment solely against Fossett and Strock, and dismissed First Union as a party.

2. On September 26, 2001, Fossett and Strock filed a timely appeal to the Court of Common Pleas requesting a jury trial *de novo*. The appeal, captioned “Dalco Construction Co., Plaintiff Below/Appellee, v. Barry Fossett and Judith Strock, Defendants Below/Appellant,” failed to include as parties either of the First Union entities from the original action. DALCO moved to dismiss the appeal for lack of subject matter jurisdiction because the caption violated the rule established by *McDowell v. Simpson*,<sup>1</sup> commonly known among practitioners as the “mirror-image rule.” After hearing oral argument, the Court of Common Pleas judge granted the motion. On appeal to the Superior Court, that Court dismissed Barry Fossett and Judith Strock’s<sup>2</sup> appeal from the Court of Common Pleas for lack of subject matter jurisdiction, explaining that: “Even if the ‘mirror image rule’ is old fashioned and harsh as it is, this is not an attractive opportunity to circumvent it,

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<sup>1</sup> 1 Houst. 467 (Del. Super. 1857) “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 . . .” See also *Freedman v. Aronoff*, 1994 Del. Super. LEXIS 467, 1994 WL 555429, at \*2 (Del. Super.) (requiring that same original parties appear in caption, but not necessarily ancillary information).

<sup>2</sup> Referred to collectively throughout this Opinion as “Appellants”.

much less abolish it. While the rule exists, practitioners must proceed with caution.”<sup>3</sup> We review questions of law decided by the Superior Court *de novo*.<sup>4</sup>

3. Appellants concede that they did not comply with the rule but argue that they should be excused from compliance here because their omission could have prejudiced no one but themselves. Appellants insist that they were denied their statutory right to a *de novo* appeal of their original action merely because they failed to comply with an antiquated, non-statutory, common law procedural requirement – a failure that did not prejudice any other party.

4. We acknowledge that there is a policy rationale for the rule. The rule provides for an adequate and fair hearing of the *entire* matter *de novo* by affording all parties to the Justice of the Peace proceeding an opportunity to argue their version of the facts, to present their view of the law’s application to those facts, and to assure the *de novo* reviewing court that all relevant issues that could be presented can be heard. The rule also spares a judge hearing an appeal *de novo* from having to consider assertions about facts and law attributable to a party below who or which was not made a party to the *de novo* appeal. Lastly, the mirror image rule arguably avoids difficulties that might arise in joining unnamed parties

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<sup>3</sup> *Fossett & Strock v. DALCO Construction*, C.A. No. 02A-09-012-FSS (Decided November 24, 2003) citing *McDowell v. Simpson*, Del. Super. 1 Houst. 467 (1885).

<sup>4</sup> *General Motors Corp. v. New Castle County, et al.*, 701 A.2d 819, 822 (Del. 1997).

after the expiration of the fifteen-day jurisdictional limit for an appeal from Justice of the Peace Court.<sup>5</sup>

5. There is a serious question, however, whether the mirror image rule should be regarded as an unyielding principle of subject matter jurisdiction or whether it should be considered a *de facto* rule of procedure. Although it has been in existence since 1857, the rule has, for reasons not discernible to us, evaded adoption as a formal court rule. Because it is critical for a litigant to know the consequences of a party's failure to comply with the rule, that distinction is pivotal and would be the focus of our deliberations in this case, had the parties fairly presented the issue to the Court of Common Pleas and Superior Court for resolution. They did not present that critical issue, however, to the very courts which would be directly affected by the policy considerations. Since the parties to this appeal did not present the issue to the courts below, we cannot resolve the question for the first time on appeal.

6. Because the trial judge's ruling is consistent with Superior Court precedent,<sup>6</sup> we are unable to conclude that the Superior Court judge erred by dismissing the appeal. Accordingly, we affirm the trial judge's ruling in this case.

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<sup>5</sup> 10 *Del. C.* § 9571.

<sup>6</sup> While we recognize that Civil Rule 72.3, governing appeals *de novo* in the Court of Common Pleas does not explicitly require that an appellant must name the parties exactly as they appeared in the proceeding below, the Court of Common Pleas does provide a packet of information for litigants wishing to take an appeal from Justice of the Peace Court, also available at [http://courts.state.de.us/How%20To/Appeals/?CCP\\_jpappeals.htm](http://courts.state.de.us/How%20To/Appeals/?CCP_jpappeals.htm), that states the following in

7. In order to avoid further confusion about the mirror image rule's nature, consequences, or application to future litigants, we direct the Justice of the Peace Court, consistent with its statutory obligation under 10 *Del.C.* § 9505, to revise immediately its appeal form to include a clear statement of the mirror image rule's strict caption and joinder requirements. Further, we direct the Court of Common Pleas to determine as promptly as practicable whether the mirror image rule has continued efficacy; and, *if so*, to adopt formally a civil rule that is sufficiently clear to put all parties taking an appeal from the Justice of the Peace Courts on notice that failure to comply with a codified mirror image rule will result in a jurisdictional defect and in dismissal of the appeal.<sup>7</sup>

Accordingly, the judgment of the Superior Court is AFFIRMED.

BY THE COURT

/s/ Myron T. Steele  
Chief Justice

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the first paragraph under the heading *General Instructions*: “The named parties and issues outlined in the appeal must be filed exactly as it was in the Justice of the Peace Court.”

Apparently, the Defendants Below/Appellants failed nonetheless to properly caption their appeal.

<sup>7</sup> The Court of Common Pleas should, e.g., consider the implication, if any, of 10 *Del.C.* § 9571 as well as the practical consequences of more intense motion practice in that court.