No. 11-0681 - Victoria Drumheller, et al. v. James and Diane Fillinger

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

The dispositive issue in this case was whether the defendants waived their right to a jury trial on damages, after defaulting on liability, by participating in a bench trial on damages without objection. The resolution of this simple issue is governed by our longstanding rule of law that "'[t]he waiver [of jury trial] need not be in express words; but if it appears from the record that such waiver was intended by conduct of the parties it is sufficient.'" *Stephenson v. Ashburn*, 137 W. Va. 141, 144, 70 S.E.2d 585, 587 (1952) (quoting *Salzer v. Schwartz*, 88 W.Va. 569, 571, 107 S.E. 298, 299 (1921)).[1] In this case, the defendants' conduct waived the right to trial by jury on the issue of damages. The majority opinion found that waiver occurred in this case. I have chosen to write separately because I disagree with some dicta set forth in the majority opinion.

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[1]This Court consistently has held that "silence may operate as a waiver of objections to error and irregularities[.]" *State v. Grimmer*, 162 W. Va. 588, 595, 251 S.E.2d 780, 785 (1979), *overruled on other grounds by State v. Petry*, 166 W. Va. 153, 273 S.E.2d 346 (1980). This "raise or waive rule" is designed "to prevent a party from obtaining an unfair advantage by failing to give [a] court an opportunity to rule on the objection and thereby correct potential error." *Wimer v. Hinkle*, 180 W. Va. 660, 663, 379 S.E.2d 383, 386 (1989). The "raise or waive rule" also "prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result)." *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996).

The majority opinion strongly suggests that the law in this State allows a trial court discretion to deny a party the right to a jury trial on damages when that right has been properly invoked and not waived. In footnote 23 of the majority opinion, the following dicta appears:

> Because the proceeding is subject to the discretion of the trial court, it would be within the trial court's authority to empanel a jury for the purpose of determining damages should the court deem it necessary. *See* W. Va. Civ. Pro. R. 55(b)(2).

This Court has made clear that "language in a footnote generally should be considered obiter dicta which, by definition, is language unnecessary to the decision in the case and therefore not precedential." *State ex rel. Medical Assurance of West Virginia v. Recht*, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003). I believe that the bench and bar should not rely on footnote 23 as support for the extinguishment of the constitutional right to trial by jury on the issue of damages when the same has not been properly waived.

The right to a jury trial on the issue of unliquidated damages, when there has been a default on liability, was recognized over one hundred years ago by this Court in the case of *Hickman v. Baltimore & O.R. Co.*, 30 W. Va. 296, 4 S.E. 654 (1887), *overruled on other grounds by Richmond v. Henderson*, 48 W. Va. 389, 37 S.E. 653 (1900). This Court held in Syllabus point 1 of *Hickman* that

> there can be no final judgment by default in any action at law

> sounding in damages, in the absence of a writ of inquiry,[2] either in the Circuit Court or before a justice, when the value in controversy or the damages claimed exceeds $20, and *the right of either party, if he demands it, to have such writ executed by a jury, is guaranteed by our Constitution*.

30 W. Va. 296, 4 S.E. 654. (footnote and emphasis added). *See Given v. Field*, 199 W. Va. 394, 484 S.E.2d 647 (1997) (default judgment on liability and jury trial on damages); *White v. Berryman*, 187 W. Va. 323, 418 S.E.2d 917 (1992) (same); *Midkiff v. Kenney*, 180 W. Va. 55, 375 S.E.2d 419 (1988) (same); *Bell v. Inland Mut. Ins. Co.*, 175 W. Va. 165, 332 S.E.2d 127 (1985) (same); *Barker v. Benefit Trust Life Ins. Co.*, 174 W. Va. 187, 189, 324 S.E.2d 148, 150 (1984) (same); *McDaniel v. Romano*, 155 W. Va. 875, 190 S.E.2d 8 (1972) (same); *Bennett v. General Accident Fire & Life Assurance Corp., Ltd.*, 149 W. Va. 92, 138 S.E.2d 719 (1964) (same); *Gainer v. Smith*, 101 W. Va. 314, 132 S.E. 744 (1926) (same); *State ex rel. Anderson v. O'Brien*, 96 W. Va. 353, 122 S.E. 919 (1924) (same).

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[2]The common law term "writ of inquiry" that was used to describe the damages proceeding after default as to liability is still used in modern litigation. *See Tudor's Biscuit World of America v. Critchley*, 229 W. Va. 396, ___ n.7 729 S.E.2d 231, 237 n.7 (2012) ("One of the six assignments—alleging that the circuit court erred by granting default judgment where Tudor's had no notice of the motion for default judgment or the writ of inquiry—was not briefed before this Court or below."); *Evans v. Holt*, 193 W. Va. 578, 582 n.7, 457 S.E.2d 515, 519 n.7 (1995) ("It is undisputed that at the time of the default judgment and the writ of inquiry, the Appellant had not appeared, either by filing an answer or other responsive pleading, or by making an appearance in court."); *White v. Berryman*, 187 W. Va. 323, 327, 418 S.E.2d 917, 921 (1992) ("The writ of inquiry was tried to a jury on August 23, 1990. No one representing the appellants was present, and the jury returned a $500,000 verdict for the plaintiff.").

Although *Hickman* was decided before we adopted the Rules of Civil Procedure, the constitutional right to a jury trial has been in existence since the founding of the State. The right to trial by jury in civil cases is set out in Article III, section 13 of the West Virginia Constitution, which provides: "In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved. . . ." The majority opinion wrongly has implied in footnote 23 that this Court's constitutional authority to promulgate a procedural rule addressing default judgment, Rule 55(b)(2), gave the Court the authority to nullify the express right to jury trial guaranteed by this State's Constitution. This Court does not have the right to deny citizens the constitutionally granted right to jury trial merely because a defendant has defaulted on the issue of liability. We stressed in *Barlow v. Daniels*, 25 W. Va. 512 (1885), *overruled on other grounds by Richmond v. Henderson*, 48 W. Va. 389, 37 S.E. 653 (1900), that the right to a jury trial is not determined by the form of the proceeding:

> This is a positive guarantee, an imperative command, that in all cases at common law, . . . where the value in controversy is over $20, the trial by jury shall be preserved, and that in no such case can any party, if he requires it, be deprived, of the right of such trial. . . . This sacred and absolute right cannot be taken away or impaired . . . by the form of the proceeding. . . . It is the right, and not the proceeding, that is guaranteed by the constitution. . . . The right protected is entirely distinct from the form of the proceeding in which it is asserted.

Barlow, 25 W. Va. at 518-19.

Moreover, this Court addressed the general requirement for a determination of damages under Rule 55(b)(2) after a default judgment as to liability in *Farley v. Economy Garage*, 170 W. Va. 425, 294 S.E.2d 279 (1982). In *Farley*, we observed that

> Lugar & Silverstein also note that this provision of Rule 55(b)(2) is compatible with our prior practice embodied in W. Va. Code, 56-6-11, which in pertinent part provides:
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> "The court, in an action at law, if neither party require a jury, or if the defendant has failed to appear and the plaintiff does not require a jury, shall ascertain the amount the plaintiff is entitled to recover in the action, if any, and render judgment accordingly."

Farley, 170 W. Va. at 427, 294 S.E.2d at 280. Clearly, *Farley* implicitly acknowledged that the right to a jury trial on damages was not changed by the adoption of Rule 55(b)(2).

Although I agree with the majority that this case should be affirmed, I disagree with the implication of footnote 23 that Rule 55(b)(2) extinguished the fundamental constitutional right to trial by jury on damages. This is a right that only the citizens of our State can extinguish through a constitutional amendment.[3]

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[3]There are obvious, undesirable, litigation strategies that could result from the implication of footnote 23 of the majority opinion. For example, good defense attorneys might evaluate complaints on the basis of advising a defendant to allow default judgment on liability so as to avoid allowing a jury to decide compensatory and punitive damages. Other post-answer filing tactics also could be employed to cause a default judgment on liability to occur as a sanction in order to avoid a jury determination of compensatory and punitive damages.

In view of the foregoing, I respectfully concur.