No. 29696 - Keith Wolfe, dba Petersburg Motor Company v. John C. Welton, Jr.

**FILED**
**December 12, 2001**
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Davis, J., concurring:

The plurality opinion reinstated a verdict returned by a jury in magistrate court, after concluding the circuit court erred by vacating that verdict. I agree with the plurality opinion's holding that the circuit court's ruling should be reversed and the jury verdict reinstated. However, I do not agree with the reasoning used by the plurality in reaching its conclusion. For the reasons set forth below, I concur in the judgment of the plurality opinion, but disagree with its rationale.

### *A. This Case Should Have Been Resolved on the Grounds of Procedural Defects*

The appellee, Keith Wolfe, d/b/a Petersburg Motor Company (hereinafter referred to as "Mr. Wolfe"), failed to file a notice of appeal and petition for appeal from magistrate court to the circuit court. The plurality opinion ultimately reasoned that neither of these procedural defects precluded the circuit court's jurisdiction. I believe that, singularly or collectively, the procedural defects precluded the circuit court's jurisdiction.

***1. Controlling law.*** Resolution of these issues is controlled by this Court's decision in *Cable v. Hatfield,* 202 W. Va. 638, 505 S.E.2d 701 (1998). *Cable* involved the filing of a petition

for writ of mandamus in the circuit court to compel the circuit clerk to file a civil complaint submitted by mail. The circuit court dismissed the mandamus petition for several reasons. One reason was the plaintiff's failure to file a civil case information statement with the complaint. On appeal, this Court addressed the issue of whether or not a circuit clerk could refuse to file a complaint that did not contain a civil case information statement.

In *Cable* we found that under Rule 3 of the West Virginia Rules of Civil Procedure, "[e]very complaint shall be accompanied by a completed civil case information statement in the form prescribed by the Supreme Court of Appeals." *Cable* concluded that "[t]his rule utilizes the term 'shall,' and thus is mandatory." *Cable*, 202 W. Va. at 646, 505 S.E.2d at 709. As a result of finding that Rule 3 "mandated" the filing of a civil case information statement with a complaint, this Court set out the following legal principle in syllabus point 5 of *Cable*:

> Rule 3 of the West Virginia Rules of Civil Procedure requires, in mandatory language, that a completed civil case information statement accompany a complaint submitted to the circuit clerk for filing. In the absence of a completed civil case information statement, the clerk is without authority to file the complaint.

Following *Cable,* I now proceed to discuss the fatal errors in Mr. Wolfe's attempt to prosecute his appeal from magistrate court to circuit court.

***2. Failure to file notice of appeal in magistrate court.*** The record is clear. Mr. Wolfe did not file a "notice of appeal" in this case. This issue is addressed by Rule 18(a) of the Rules of Civil Procedure for Magistrate Courts. Rule 18(a) provides explicitly that "[n]otice of appeal *shall* be filed

in magistrate court."[1] The language in this rule is clear and mandatory. Under Rule 18(a) any party seeking to appeal a decision from magistrate court to the circuit court *must* file a notice of appeal. Under this Court's ruling and reasoning in *Cable*, failure to comply with Rule 18(a)'s mandatory procedure is fatal to an appeal and prevents a circuit court from having jurisdiction to proceed to the merits of a case.[2] Consequently, in the instant proceeding a basis for reversing the circuit court's decision should have been Mr. Wolfe's failure to file the mandatory notice of appeal.[3]

***3. Failure to file petition for appeal in circuit court.*** Mr. Wolfe did not file a petition for appeal in circuit court. Yet, the case was reviewed by the circuit court. While I believe that the failure to file a notice of appeal was sufficient to reverse this case, I will assume for the sake of argument that such failure was harmless error so that I may reach the issue of the failure to file a petition for appeal.

The procedure for filing a petition for appeal is outlined in W. Va. Code § 50-5-12(c) (1994) (Repl. Vol. 2000), which states:

> (c) In the case of an appeal of a civil action tried before a jury, the

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[1]The rule sets out a time frame in which the notice of appeal must be filed.

[2]In the context of criminal appeals this Court has held firm to the rule that filing of notice of intent to appeal "is mandatory and jurisdictional." Syl. pt. 1, in part, *State v. Legg*, 151 W. Va. 401, 151 S.E.2d 215 (1967). *See also City of Philippi v. Weaver*, 208 W. Va. 346, 540 S.E.2d 563 (2000) (affirming defendant's conviction after finding she failed to timely file a notice of appeal from the circuit court to the Supreme Court); *Spaulding v. Warden, West Virginia State Penitentiary*, 158 W. Va. 557, 212 S.E.2d 619 (1975) (holding that assignments of error for direct appeal were lost because of failure to file notice of intent to appeal).

[3]I take issue with and strongly disapprove of the plurality opinion's reasoning that filing a bond form may take the place of filing an actual notice of appeal. Nowhere in Rule 18(a), the controlling law, does it provide for an alternative method for satisfying the requirement of filing a notice of appeal.

following provisions shall apply:

> (1) To prepare the record for appeal, the party seeking the appeal *shall file with the circuit court a petition* setting forth the grounds relied upon, and designating those portions of the testimony or other matters reflected in the recording, if any, which he or she will rely upon in prosecuting the appeal. . . .

(Emphasis added). The statute clearly mandates the filing of a petition for appeal. The statute leaves no room for discretion. If a party wishes to appeal, that party *must* file a petition for appeal. Pursuant to *Cable*, failure to comply with the statute's mandatory procedure is fatal to an appeal and prevents a circuit court from having jurisdiction to proceed to the merits of the case. This Court has previously held that an "'appellate court does not acquire jurisdiction and cannot entertain an appeal unless the appeal petition is filed within the prescribed appeal period.'" *Asbury v. Mohn*, 162 W. Va. 662, 665, 256 S.E.2d 547, 548-549 (1979) (quoting *State v. Legg*, 151 W. Va. 401, 406, 151 S.E.2d 215, 219 (1967)).

In the instant proceeding, the circuit court was reviewing this case under its "appellate" jurisdiction. As an appellate court, it could not obtain jurisdiction of the appeal without a petition for appeal being filed.[4] Consequently, the circuit court's decision should have been reversed on this basis. For the

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[4]The fact that Mr. Wolfe filed a memorandum of law does not cure the jurisdictional defect. In addition to requiring a petition for appeal, the applicable statute provides for submission of memorandum of law. W. Va. Code § 50-5-12(c)(3) (1994) (Repl. Vol. 2000) states:

> After the record for appeal is filed in the office of the circuit clerk, *the court may*, in its discretion, schedule the matter for oral argument or require the parties to submit written memoranda of law.

(Emphasis added). Under this provision, the trial court has discretionary authority to require the filing of (continued...)

reasons herein explained, I concur with the majority opinion's ultimate decision to reverse the circuit court's ruling, though I reach this conclusion on different grounds. I am authorized to state that Justice Maynard joins me in this concurring opinion.

[4](...continued)
a memorandum of law.