No. 31697 - Brad Bowyer v. HI-LAD, Inc., dba Comfort Inn of Charleston, a West Virginia Corporation and Westfield Insurance Company; Security & Surveillance, Inc..

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OF WEST VIRGINIA

Davis, Justice, dissenting, joined by Chief Justice Maynard:

In this case the majority affirmed a jury verdict for the plaintiff, Mr. Bowyer, on the grounds that he had established by a preponderance of the evidence that his employer, the defendant, recorded conversations by him in violation of the West Virginia Wiretapping and Electronic Surveillance Act, W. Va. Code § 62-1D-1, *et seq*. I dissent on two separate grounds. First, the majority's determination that the jury verdict was supported by circumstantial evidence is simply wrong in view of the fact that not a scintilla of evidence was introduced to sustain the verdict. Second, under the facts presented in this case, it is clear that Mr. Bowyer lacked standing to assert a claim alleging a violation of the West Virginia Wiretapping and Electronic Surveillance Act. Accordingly, I respectfully dissent.

A. The Law of Circumstantial Evidence Has Limitations

In affirming the jury verdict in the instant case, the majority opinion concluded that there was "sufficient *circumstantial* evidence that the jury could conclude the [defendant] acquired the contents of Mr. Bowyer's oral communications through the use of an electronic device." Majority Slip. op. at 10. I disagree.

The law in this State is clear in holding that "[a]lthough mere speculation will not sustain the plaintiffs' burden of proof, both direct and circumstantial evidence can be used[.]" *Cale v. Napier*, 186 W. Va. 244, 247, 412 S.E.2d 242, 245 (1991). We have further explained that "'[c]ircumstantial evidence is adequate as proof if its quality is such that the jury believes that the greater probability of truth lies therein.'" *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 647, 403 S.E.2d 189, 195 (1991) (quoting *Vernon v. Lake Motors*, 488 P.2d 302, 306 (Utah 1971)). However, circumstantial evidence is "'not sufficient when the conclusion in question is based on surmise, speculation or conjecture.'" *Willey v. Riley*, 541 N.W.2d 521, 527 (Iowa 1995) (quoting 32A C.J.S. *Evidence* § 1039, at 753-54 (1964)). *See also Lacy v. CSX Transp. Inc.*, 205 W. Va. 630, 642, 520 S.E.2d 418, 430 (1999) ("'A jury will not be permitted to base its findings of fact upon conjecture or speculation.'" (quoting Syl. pt.1, *Oates v. Continental Ins. Co.*, 137 W. Va. 501, 72 S.E.2d 886 (1952))). The court in *Summers v. Fort Crockett Hotel, Ltd.*, 902 S.W.2d 20 (Tex. App. 1995), succinctly addressed the limitations of circumstantial evidence to prove a legal theory as follows:

> An ultimate fact may be established by circumstantial evidence, but the circumstances relied upon must have probative force sufficient to constitute a basis of legal inference. It is not enough that the facts raise a mere surmise or suspicion of the existence of the fact or permit a purely speculative conclusion. The circumstances relied on must be of such a character as to be reasonably satisfactory and convincing, and must not be equally consistent with the non-existence of the ultimate fact.

Summers, 902 S.W.2d at 25.

In the instant case, Mr. Bowyer was required to put on evidence that

demonstrated the defendant had recorded his conversations in violation of the West Virginia Wiretapping and Electronic Surveillance Act. However, Mr. Bowyer failed to produce *any* evidence that the defendant actually recorded or videotaped a single conversation in which he had participated. Instead, the totality of Mr. Bowyer's evidence in this respect consisted of "four hours of both video and audio interceptions of [other] hotel employees and members of the public speaking in the vicinity of the hotel's front desk and the hotel bar." The majority's conclusion that this was sufficient circumstantial evidence upon which the jury could properly find that the defendant recorded Mr. Bowyer's conversations is simply untenable.

Moreover, the evidence presented by Mr. Bowyer is a classic example of the type of circumstantial evidence that compels a jury to engage in improper gross speculation. Under the decision by the majority, the traditional limitations imposed upon the use of circumstantial evidence have now been removed. In essence, the majority opinion permits circumstantial evidence to encompass any evidence that allows a jury to speculate in reaching its conclusion. This definition of circumstantial evidence directly contradicts this Court's prior precedent in this regard, and, therefore, I dissent.

B. Mr. Bowyer Lacked Standing

This Court has previously indicated that "standing is defined as '[a] party's

right to make a legal claim or seek judicial enforcement of a duty or right.'" *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting Black's Law Dictionary 1413 (7th ed.1999)). Ultimately, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343, 354 (1975). Further, "[s]tanding is a jurisdictional requirement that cannot be waived, and may be brought up at any time in a proceeding." Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b), at 21 (Supp. 2004).

> The decisions of this Court and other jurisdictions have pointed out that an appellate court has the inherent authority and duty to *sua sponte* address the issue of standing, even when the parties have failed to raise the issue at the trial court level or during a proceeding before the appellate court.

State ex rel. Abraham Linc Corp. v. Bedell, ___ W. Va. ___, ___, 602 S.E.2d 542, 554 (2004) (Davis, J., concurring). In the instant case, the parties did not raise the issue of standing; however, in view of the evidence presented during the trial, this Court had a duty to *sua sponte* address the issue.

In my concurring opinion in *Bedell*, I noted the following regarding the issue of standing:

> The decisions of this Court have recognized two types of standing inquiries. First, the issue of standing may be presented in the context of a litigant asserting an alleged right that is

unique to him or her. This is known "as first party standing[.]" *Romano v. Harrington*, 664 F. Supp. 675, 679 (E.D.N.Y.1987). In this specific context, we articulated the elements for establishing standing in syllabus point 5 of *Findley* as follows:

> Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an "injury-in-fact"--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

The second context in which standing may be analyzed occurs when a litigant seeks to assert the rights of a third party. This standing issue "is also commonly known as jus tertii standing." *Pennsylvania Psych. Soc. v. Green Spring Health Servs., Inc*., 280 F.3d 278, 287 n.7 (3d Cir. 2002). In this situation "[i]t is a well-established rule that a litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties." *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002). We have previously noted that

> [t]raditionally, courts have been reluctant to allow persons to claim standing to vindicate the rights of a third party on the grounds that third parties are generally the most effective advocates of their own rights and that such litigation will result in an unnecessary adjudication of rights which the holder either does not wish to assert or will be able to enjoy regardless of the outcome of the case.

Snyder v. Callaghan, 168 W. Va. 265, 279, 284 S.E.2d 241, 250 (1981) (citation omitted).

___ W. Va. at___, 602 S.E.2d at 555-56 (Davis, J., concurring). Finally, in order to establish *jus tertii* standing, "[t]he litigant must have suffered an injury in fact . . .; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 1370-71, 113 L.Ed.2d 411, 425 (1991) (internal quotations and citations omitted).

In the instant proceeding, the record overwhelmingly demonstrated that Mr. Bowyer had neither first party nor *jus tertii* standing in this case. Under both standing principles, Mr. Bowyer had to establish that he suffered an injury-in-fact. However, Mr. Bowyer's evidence established only that the defendant may have violated the West Virginia Wiretapping and Electronic Surveillance Act by recording conversations of people other than himself. This possible injury-in-fact to other people simply cannot be used by Mr. Bowyer to establish first party standing or *jus tertii* standing. Consequently, the verdict in this case should have been reversed and the case dismissed on the grounds that Mr. Bowyer's evidence failed to establish that he had standing to bring the complaint.

For the reasons stated, I dissent. I am authorized to state that Chief Justice Maynard joins me in this dissenting opinion.