No. 33833 – *Charles and Kathryn Beahm v. 7-Eleven, Inc. and Melissa Spinks*

FILED
December 30, 2008
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

I dissent to the majority opinion's determination that the plaintiff's claims were barred by *res judicata*.

The fundamental basis for a *res judicata* determination is that the prior ruling must have resolved the case on the merits. The "prior ruling" referenced in the instant case involves the parties in the *Proctor, et al.* litigation in federal court, and the federal court's summary judgment ruling dismissed those plaintiffs' claims as barred by the statute of limitation.

The plaintiffs in this case, Charles and Kathryn Beahm, were *never* a party to the *Proctor* litigation in federal court. More importantly, the Beahms discovered that their land had been polluted by defendant 7-Eleven's negligence several years *after* the plaintiffs in the *Proctor* case discovered the pollution. The record indicates that while the gasoline leak from the 7-Eleven tank was discovered in February 2000, monitoring wells did not find pollution on the plaintiff's land until February 2002. The Beahms did not learn of the pollution finding until April 30, 2002, and filed the instant suit in the circuit court on January 24, 2003 – well within the statute of limitation.

Put simply, the plaintiffs timely filed their case once they discovered that their land had been damaged by 7-Eleven's negligence. The majority opinion was wrong to

conclude that the plaintiffs' case was barred by the statute of limitation through operation of the doctrine of *res judicata*, merely because the federal district court decided that the *Proctor* plaintiffs' cases were barred by the statute of limitation.

I therefore respectfully dissent.