Volume 86 | Issue 2 Article 14

January 1984

Civil Procedure

Elizabeth L. Crittenden
West Virginia University College of Law

CIVIL PROCEDURE

I. SERVICE OF PROCESS

State ex rel. Thomas v. Neal, 299 S.E.2d 23 (W. Va. 1982).

A long accepted procedure for service of process in West Virginia was invalidated by the decision in *State ex rel. Thomas v. Neal*.[1] In *Thomas*, the court held that service of a summons and complaint utilizing posting alone does not meet minimum due process standards. This new holding brings West Virginia into compliance with the principles regarding service of process articulated by the United States Supreme Court in *Green v. Lindsey*.[2]

In *Thomas*, the landlord sued for possession and past-due rent. The return of service showed that the sheriff had posted a copy of the summons to the defendant Thomas's door. This posting procedure was in compliance with long established practice, as well as with the West Virginia Rules of Civil Procedure.[3] A default judgment was entered against Ms. Thomas after she failed to answer the complaint or appear in court. Upon receipt of a writ of possession, Ms. Thomas moved to vacate the judgment and, at the same time, requested a writ of prohibition from the Supreme Court of Appeals staying action on the default judgment.

The facts before the United States Supreme Court in *Greene* were remarkably similar to those in *Thomas*. The appellees in *Greene* were tenants who had been served with writs of possession based on default judgments. A Kentucky statute provided for service of process by posting in forcible entry and detainer actions, provided personal service and service to a responsible family member had been attempted.[4] The appellees in *Greene* said that they had not received a copy of the notice of the action against them. They asserted that the notice procedure provided for by the Kentucky statute did not meet minimum standards of due process so as to be constitutionally adequate. The Court agreed with the appellees and affirmed the Sixth Circuit's holding that the notice provided for was constitutionally deficient.[5]

Mullane v. Central Hanover Bank & Trust Co.[6] recognized that a fundamental due process requirement is notice which, under all the circumstances,

---

[1] 299 S.E.2d 23 (W. Va. 1982).

[2] 456 U.S. 444 (1982).

[3] W. VA. R. CIV. P. 4(d)(1)(A) provides that resident individuals could be served (1) by delivering a copy of the summons and complaint to the individual personally, (2) by delivering a copy at the individual's residence to a family member over age 16 and explaining the documents, or (3) if neither of the other two methods is accomplished, by posting a copy at the front door of the individual's residence.

[4] The Kentucky statute (KY. REV. STAT. § 454.030 (1975)) is limited to forcible entry or detainer proceedings, but, otherwise, is substantially the same as the W. Va. rule in effect at the time of the *Neal* decision.

[5] 456 U.S. at 449.

[6] 339 U.S. 306 (1950).

is reasonably calculated to let all interested parties know of the pending action.[7] Posting in actions in rem has traditionally been viewed as appropriate, but the Court noted in *Greene* that all proceedings (either in rem or in personam) are really against people.[8] The interests of a tenant in continued possession of his residence is obvious. The Court looked to the practical effectiveness of the method of service in advising the parties of an action affecting their interests.[9] In the *Greene* circumstances,[10] the Court found that posting was not a reliable means of giving notice.[11] The Court also looked to the feasibility of possible alternatives, and commented favorably on the possibility of utilizing the mails in addition to posting as a reliable and efficient means of providing interested persons with actual notice of pending proceedings.[12]

It should be noted that the newly effective federal rule regarding summons service[13] allows for service by first-class mail. A notice and acknowledgement are required to be included, along with a post-paid return envelope. Adequate service is assured and verified by return of this acknowledgment. If the acknowledgment is not returned, service must be accomplished by delivery.

In *Thomas*, the West Virginia court found that the ruling in *Greene* clearly applied, and noted that *Greene* did away with distinctions between in rem and in personam actions in determining adequacy of notice.[14] In an earlier decision, the court had held that deprivation of a property right without notice or hearing is, generally, prohibited because of due process protections.[15] The harm done Ms. Thomas because there was no notice reasonably calculated to reach her is the type of harm which concerned the court in *Payne*.[16] The court vacated the default judgment against Ms. Thomas and issued a writ of prohibition staying further proceedings until proper service was achieved.[17]

The court included in *Thomas* a draft of its new service of process rule, which is intended to meet due process requirements.[18] Although procedures

---

[7] *Id.* at 314.

[8] 456 U.S. at 450.

[9] *Id.* at 451.

[10] Depositions before the district court had indicated that process servers had on previous occasions had problems with children tearing down notices posted on doors in the apartment complex in question.

[11] 456 U.S. at 454.

[12] *Id.* at 455.

[13] FED. R. CIV. P. 4(d)(8).

[14] 299 S.E.2d at 25.

[15] State *ex rel.* Payne v. Walden, 156 W. Va. 60, 190 S.E.2d 770 (1972).

[16] 299 S.E.2d at 25.

[17] *Id.* at 26.

[18] *Id.* at 25.

to adopt the new rule have been initiated, it has not yet been formally promulgated.[19] It should, nevertheless, prove helpful in analyzing the content of the draft rule as set forth in *Thomas*.

The proposed Rule 4(d) provides for personal or substituted service either by delivering or by both mailing and posting within the state. The existing rule makes no mention of mailing process. Individuals other than infants, incompetents and convicts may be served by several methods.[20]

Personal delivery of a copy of the summons and complaint is listed as the first alternative for service in both the existing and proposed rules. The proposed rule, however, goes beyond the existing rule in that it requires "due diligence, including at least one attempt at personal service during working and one attempt during non-working hours"[21] before alternative means of service may be utilized. The existing rule allows for alternative service if the individual is not found on the first attempt to make personal delivery.[22]

---

[19] A hearing was held on the proposed rule change, pursuant to W. VA. CODE § 51-1-4 (1981) and additional comments were solicited through the W. Va. Bar Ass'n. The court has these comments under consideration and no final action has been taken.

[20] The portion of the text of the proposed rule involving service on such individuals is given below. New or modified portions of the rule are italicized.

Draft Amendment to W. VA. R. CIV. P. 4(d):

Process; personal or substituted service. Personal or substituted service of process shall be made by delivering, or *both mailing and posting* within the State a copy of the summons and of the complaint together, in the manner prescribed in this subdivision. In any action in which there are unusually large numbers of defendants the court upon motion may order that the complaint need not be served on the defendants. The plaintiff shall furnish the person making service with such copies of the complaint or order as are necessary. Personal or substituted service shall be made in the following manner:

(1) Individuals.—Upon an individual other than those described in paragraphs (2), (3), and (4) of this subdivision.

(A) By delivering a copy of the summons and of the complaint to him personally; or

(B) *If he be not found after due diligence, including at least one attempt at personal service during working and one attempt during non-working hours,*

(i) *By sending a copy of the summons and complaint by registered or certified mail, return receipt requested, restricted delivery to addressee only, with instructions to forward, to his usual place of abode or usual place of business, and posting on the front door of his usual place of abode;* or

(ii) By delivering a copy of the summons and of the complaint at his usual place of abode to a member of his family above the age of 16 years residing therein, and giving to such person information of the purport of the summons and complaint, *and mailing copies of the same by certified or registered mail as in subparagraph (B)(i) to his usual place of abode*; or

(C) By delivering a copy of the summons and of the complaint to an agent or attorney-in-fact authorized by appointment or by statute to receive or accept service of process in his behalf.

[21] W. VA. R. CIV. P. 4(d)(1)(B) (proposed Dec. 15, 1982) (appearing in *Thomas*).

[22] W. VA. R. CIV. P. 4(d)(1)(A).

If personal delivery is not made, the existing rule allows delivery and explanation to a family member above age sixteen at the individual's usual place of abode.[23] The proposed rule would require return receipt/requested delivery mailing in addition.[24] While the existing rule allows posting if neither of the first two alternatives is accomplished,[25] the proposed rule again adds the mailing requirement.[26] Requirements for delivery to agents and attorneys-in-fact, as well as service on infants, incompetents and convicts, remain the same under the proposed rules as in the existing rules.

In summary, the proposed West Virginia rule continues the existing methods of serving process, but requires that the additional safeguard of mailing be undertaken when substituted service is used. This requirement is a response to the guidelines set forth by the United States Supreme Court in *Mullane* and *Greene* and serves as a protection of due process rights. While the federal system requires return of acknowledgements as an assurance that actual notice has been received, the West Virginia proposed rule does not rely on mail service alone, but utilizes that method only in connection with some other effort at giving notice.

II. COLLATERAL ESTOPPEL

Conley v. Spillers, 301 S.E.2d 216 (W. Va. 1983).

The plaintiffs in a personal injury action petitioned the West Virginia Supreme Court of Appeals for a writ of prohibition in *Conley v. Spillers*[27] because the trial court refused to grant a summary judgment request based on the grounds of collateral estoppel. In denying the writ, Justice Miller has written the definitive explication of the law of collateral estoppel and res judicata in West Virginia.

With the *Conley* decision, West Virginia joined the majority of jurisdictions which no longer require mutuality in every situation in which collateral estoppel is asserted.[28] Prior to the decision in this case, the application in West Virginia of either res judicata or collateral estoppel was, generally, dependent upon mutuality of parties.[29] As used in this sense, mutuality of par-

---

[23] *Id.*

[24] W. VA. R. CIV. P. 4(d)(1)(B)(ii) (proposed Dec. 15, 1982) (appearing in *Thomas*).

[25] W. VA. R. CIV. P. 4(d)(1)(A).

[26] W. VA. R. CIV. P. 4(d)(1)(B)(i) (proposed Dec. 15, 1982) (appearing in *Thomas*).

[27] 301 S.E.2d 216 (W. Va. 1983).

[28] Bernhard v. Bank of Am. Nat'l Trust & Sav., 19 Cal. 2d 807, 122 P.2d 892 (1942) is recognized as the first decision modifying the mutuality rule. Judge Traynor there allowed a defendant not bound by a previous judgment to assert it against the plaintiff in the subsequent suit. Since that time a majority of courts have allowed some modification of the rule, though only under certain conditions, which vary among jurisdictions. *See* Annot., 31 A.L.R.2d 1044 § 4 (1970 & Supp. 1983).

[29] United Fuel Gas Co. v. Hays Oil & Gas Co., 111 W. Va. 596, 163 S.E. 443 (1932). There were, however, at least two exceptions to this general rule. *See* State Farm Mut. Auto. Ins. Co. v.

ties requires that the parties in the first suit must be identical to (or in privity with) the parties in the second suit in which one of these doctrines is applied.[30] Privity refers to a legal relationship such that the non-party's interests have been represented by an authorized party, or the non-party's legal rights were based on those of a party in the prior suit.[31] The word "privity" actually describes a relationship between two persons which would justify the conclusive application of a judgment involving the party upon the non-party.[32]

Due process considerations prevent binding a party to a judgment unless that party had an opportunity to be heard in the previous litigation.[33] Since the party which is bound to a judgment by action of collateral estoppel had such an opportunity in the first suit, no significant due process objections bar the modification of the mutuality rule.[34]

The petitioners in this case had brought suit against the City of Weirton and Manufacturer's Light & Heat Company for injuries sustained in a gas explosion. The Conleys had acted as guardians ad litem in a previous suit concerning their minor daughter's injuries from the same explosion. In that first suit, the jury returned a verdict against the City of Weirton and the Gas Company. That verdict was affirmed against both defendants.[35]

The Conleys then instituted a second suit seeking compensation for Mrs. Conley's injuries and Mr. Conley's loss of consortium and incurring of medical expenses on his wife's behalf. When the trial court refused to grant a summary judgment in favor of the Conleys in the second suit, they sought a writ of prohibition from the West Virginia Supreme Court of Appeals, asserting that the trial court had exceeded its legitimate authority.

In the second suit, the Conleys sought to apply the doctrine of collateral estoppel to establish the liability of the defendants for the personal injuries suffered by Mrs. Conley. The Gas Company argued that this was a separate cause of action and, therefore, should not be controlled by the principles of res judicata.

Justice Miller first distinguished between the concepts of res judicata and collateral estoppel. Both concepts are aimed at preventing unnecessary

---

DeWess, 143 W. Va. 75, 101 S.E.2d 273 (1957) (holding that the right of subrogation is derivative, and thus barred by dismissal of the insured's action), and Williguerod v. Sharafabadi, 151 W. Va. 995, 158 S.E.2d 175 (1967) (denying recovery against master after a directed verdict in favor of servant).

[30] 301 S.E.2d at 221.

[31] J. FLEMING & G. HAZARD, CIVIL PROCEDURE § 11.22 (2d ed. 1977).

[32] *Id.*

[33] 301 S.E.2d at 221 n.6.

[34] *Id.*

[35] Long v. City of Weirton, 214 S.E.2d 832 (W. Va. 1975).

litigation and conserving judicial resources and both require that the first judgment be a final order based on the merits by a court of competent jurisdiction.[36] Justice Miller noted that the central inquiry in res judicata is whether the cause of action in the second suit is the same as the first suit. In collateral estoppel, the second suit is on a different cause of action and the inquiry focuses on whether or not the issues presented by that second suit were actually litigated in the first suit.[37]

As noted earlier, application of res judicata and collateral estoppel has traditionally required that the parties in the two suits be identical or in privity with each other. Basic to this requirement was the due process concern for granting a party an opportunity to fully litigate his position before being bound by a judgment. This due process concern is still fully acknowledged by the court, despite the modification of the mutuality rule as it applies to collateral estoppel.[38] When two intervenors sought to assert collateral estoppel against the Conleys, based on their exoneration from liability in the *Long* case, the court refused to apply collateral estoppel principals.[39] The Conleys had not been parties to the first suit and the court found that the mere fact that they had acted as guardians ad litem to a party in the first suit was not sufficient to establish the required privity.[40]

Strangers to a first suit may use the modified collateral estoppel doctrine in two ways. A "defensive" use of the doctrine prevents the plaintiff from reviving a claim which has already been lost against another defendant, thus barring the plaintiff's cause of action. On the other hand, an "offensive" use of collateral estoppel stops the defendant from relitigating an issue previously lost, for example, allowing the plaintiff to avoid the burden of proving the defendant's liability.

It has already been pointed out that one of the purposes of the collateral estoppel doctrine is conservation of judicial resources. However, the offensive use of collateral estoppel may actually encourage parties not to join in the initial litigation, but to wait for the results of the first suit.[41] It is possible that the unfettered offensive application of collateral estoppel would result in an increased amount of litigation arising from the same occurrence or transaction.

While the court recognizes the right of a stranger to assert collateral estoppel, that right is not automatic, depending on the facts before the judge.[42]

---

[36] 301 S.E.2d at 220.
[37] *Id.*
[38] *Id.* at 225.
[39] *Id.* at 227.
[40] *Id.* at 226.
[41] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31 (1979).
[42] 301 S.E.2d at 224.

The trial court is given broad discretion in determining the appropriateness of the application of the doctrine.[43] It is not surprising, therefore, that the petitioners' writ of prohibition was denied in this case.

Hinkle v. Black[44] set a standard for issuing writs of prohibition in matters other than a trial court acting in excess of its jurisdiction. *Hinkle* required that the errors in question be "plainly in contravention of a clear statutory, constitutional or common law mandate which may be resolved independently of any disputed facts."[45] The trial court's discretion determines the appropriateness of the application of collateral estoppel. A writ of prohibition cannot be issued in response to simple abuse of discretion by the trial court.[46] Many factual inquiries are made in determining if invoking collateral estoppel is appropriate. Indeed, Justice Miller observed, disputed factual issues may be at the cope of the decision whether or not to allow the use of collateral estoppel.[47] In this case, the question of whether the plaintiff could have easily joined in the initial litigation presented a mixed issue of law and fact and so the decision of the trial court was given deference.

With the *Conley* decision, the court established expanded opportunities for the use of the doctrine of collateral estoppel in West Virginia, apparently abandoning entirely the mutuality requirement. At the same time, the court makes it clear that the trial courts will be able to exercise broad discretion in determining when invoking the doctrine is appropriate without having to be apprehensive of routine interference with those decisions by the higher court through issuing writs of prohibition.

III. PERIOD FOR APPEAL FROM MAGISTRATE'S JUDGMENT

Bosserdet v. Poe, 298 S.E.2d 133 (W. Va. 1982) (per curiam).

In the per curiam decision in *Bosserdet v. Poe*,[48] the West Virginia Supreme Court of Appeals construed the Code section which provides for an extention of time to file an appeal from a judgment in magistrate's court beyond the normal twenty days upon a showing of good cause.[49] The court found that when a mistaken belief prevented the appellant, John Poe, from filing a

---

[43] *Id.*

[44] 262 S.E.2d 744 (W. Va. 1979).

[45] *Id.* (syllabus point One).

[46] State *ex rel.* Peacher v. Sencindiver, 233 S.E.2d 425, 426 (W. Va. 1977).

[47] 301 S.E.2d at 226.

[48] 298 S.E.2d 133 (W. Va. 1982) (per curiam).

[49] W. VA. CODE § 50-5-12 (1978) provides in pertinent part:

Any person may appeal the judgment of a magistrate court to the circuit court as a matter of right by requesting such appeal not later than twenty days after such judgment. . . . No bond shall be required of any government agency or authority or of a person who has filed an affidavit pursuant to section one [§ 59-2-1], article two, chapter fifty-nine of this Code. If no appeal is perfected within such twenty-day period, the circuit court of

timely appeal, principles of equity would authorize the granting of an appeal within the ninety day extended time period specified in the statute.

The magistrate's court had entered a judgment against the appellant for $1,129.00 plus costs. Following that ruling, the magistrate informed appellant that he would have to file a bond in the amount of the judgment in order to appeal. The magistrate did not, however, tell the appellant that no appeal bond is required from a party who has filed an affidavit stating that he is unable to pay fees or costs under a Code provision[50] which allows poor persons to utilize the court system without such payments. Mr. Poe had been injured and was unemployed at the time of the magistrate's judgment. Although appellant wished to appeal, he did not have the financial resources to file a bond, which he understood was necessary to perfect his appeal.

At the magistrate court, appellant Poe had been without counsel. The appellant obtained counsel after the normal twenty-day appeal period had expired but prior to the ninety-day extended period for granting an appeal provided for in West Virginia Code section 50-5-12 upon a showing of good cause. Even though appellant asserted he could show good cause for not appearing earlier, the circuit court denied appellant's petition to appeal the magistrate's ruling.[51]

The court reversed the circuit court's decision, finding that appellant Poe had shown good cause for not appealing within twenty days.[52] The magistrate had provided appellant with incomplete information, which under the circumstances, amounted to incorrect information regarding the appellant's appeal options.[53] This incorrect information led appellant to the mistaken belief that he was required to post a bond, regardless of his financial position, before he could appeal the judgment which had been entered against him.[54]

The test for establishing good cause for failure to file a timely appeal was set forth in *Powell v. Miller*.[55] In that case, the court listed "mistake" among the examples of factors which would constitute good cause for failure to make a timely appeal.[56] Since the magistrate's information had led the appellant to

---

the county, may, not later than ninety days after the date of judgment, grant an appeal upon showing of good cause. . .

[50] W. VA. CODE § 59-2-1 (1966) allows poor persons to sue or defend a suit in court without payment of fees or costs and provides for assigning of counsel and other assistance without any costs to the poor person. A poor person is defined as one who files "an affidavit stating that he is pecuniarily unable to pay fees or costs, or counsel fees."

[51] 298 S.E.2d at 134.

[52] *Id.* at 135.

[53] *Id.*

[54] *Id.*

[55] 41 W. Va. 371, 23 S.E. 557 (1895).

[56] *Id.* at 375, 23 S.E. at 559. Other examples of "good cause" as required by the statute are listed as fraud, accident, surprise or some adventitious circumstance beyond the control of the party.

a "mistaken" belief about the proper appeal procedure, the court found that the *Powell v. Miller* test had been met.[57]

This decision serves as a warning to magistrates to be cautious in advising persons appearing in magistrate's court of their statutory rights and responsibilities. Even though the language in section 50-5-12 allowing for an extended appeal period is permisive, this decision also shows that the denial of a petition to appeal, once good cause had been shown, is likely to result in reversal.

Elizabeth L. Crittenden

[57] 298 S.E.2d at 135.