

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Burkes v. Fas-Chek Food Mart Inc., 217 W. Va. 291

617 S.E.2d 838 (2005) · No. No. 31777 · Decided June 24, 2005

SUMMARY

The Supreme Court of Appeals of West Virginia held that the plaintiff demonstrated good cause under West Virginia Rule of Civil Procedure 4(k) for failing to complete service within 120 days. The court also held that, even absent good cause, the rule permits a circuit court to extend the service period in its discretion, and it reversed and remanded the dismissal without prejudice.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Justice Starcher
JURISDICTION	West Virginia
DECIDED	June 24, 2005
DOCKET	No. 31777
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiff appealed the Circuit Court of Kanawha County's dismissal without prejudice of her civil complaint for failure to effect service of process within 120 days under West Virginia Rule of Civil Procedure 4(k), and the denial of her motion to reinstate the complaint.
STANDARD OF REVIEW	The denial of a motion to reinstate a complaint under Rule 4(k) is reviewed for abuse of discretion; factual findings are reviewed for clear error, and conclusions of law are reviewed de novo.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Marion C. Burkes v. Fas-Chek Food Mart Incorporated

TOPICS

service of process civil procedure statutory interpretation standard of review appellate procedure

PRACTICE AREAS

civil procedure appellate procedure corporate law

QUESTIONS PRESENTED

1. Whether service of process on a domestic corporation through the Secretary of State was sufficient when the certified mailing was returned without being accepted or refused.
2. Whether West Virginia Rule of Civil Procedure 4(k) permits a circuit court to extend the service period in the absence of good cause.
3. Whether Burkes established good cause for extending the time to serve Fas-Chek and reinstating her complaint.

HOLDINGS

1. Service of process on a domestic corporation through the Secretary of State is insufficient when the certified mailing is neither accepted nor refused by an agent or employee of the corporation and is returned for another reason.
2. Under West Virginia Rule of Civil Procedure 4(k), a circuit court must extend the service period when the plaintiff shows good cause; even absent good cause, the court has discretion to extend the period upon motion or on its own initiative.
3. Burkes established good cause under Rule 4(k) for extending the time to serve Fas-Chek and reinstating the complaint.

KEY QUOTATIONS

"We therefore hold that under Rule 4(k) of the Rules of Civil Procedure [1998], if a plaintiff fails to serve a summons and complaint upon a defendant within 120 days, then the circuit court should dismiss the action against that defendant without prejudice. However, the circuit court shall extend the time for service if the plaintiff shows good cause for the failure. In the absence of a showing of good cause, upon motion or upon its own initiative, the circuit court may in its discretion extend the time for service." (844)

"Avoidance of service by a corporate-agent-for-service-of-process's failure to sign for or otherwise accept a certified mailing from the Secretary of State should not inure to the benefit of a corporate defendant, particularly when the defendant has knowledge of the claim." (845)

FACTUAL BACKGROUND

Marion C. Burkes filed a complaint alleging that she slipped and fell on property owned by Fas-Chek Food Mart Incorporated. Her initial complaint misnamed the corporate defendant, and two subsequent attempts to serve the corporation through the Secretary of State encountered problems involving the corporate name and the return of certified mail. After obtaining the correct corporate name and address from Fas-Chek's president and designated agent, Burkes attempted service again, but the mailing was returned marked "Attempted—Not Known." The parties had also engaged in settlement discussions, and the court found that the failure to complete service was not attributable to a lack of diligence by Burkes.

PROCEDURAL HISTORY

Burkes filed a personal-injury complaint after allegedly slipping and falling on property owned by Fas-Chek. She made multiple attempts to serve the corporation, including service through the Secretary of State, but the

certified mailing was returned without an acceptance or refusal. The circuit court dismissed the action without prejudice and later denied reinstatement after finding no good cause. The Supreme Court of Appeals of West Virginia reversed and remanded.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The circuit court must reinstate the complaint and extend the time for service so that Burkes may properly serve Fas-Chek under West Virginia Code § 31D-5-504 or another appropriate method of service.

CASES CITED

- Burgess v. Porterfield, 196 W. Va. 178, 469 S.E.2d 114 (1996)
- Kelley v. Toyota Corp., 210 W. Va. 261, 557 S.E.2d 315 (2001)
- Crowley v. Krylon Diversified Brands, 216 W. Va. 408, 607 S.E.2d 514 (2004)
- Martin v. Randolph Co. Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995)
- State ex rel. Charleston Area Medical Center v. Kaufman, 197 W. Va. 282, 475 S.E.2d 374 (1996)
- Henderson v. United States, 517 U.S. 654, 662 (1996)
- Petrucelli v. Boehringer and Ratzinger, 46 F.3d 1298 (3d Cir. 1995)
- Espinoza v. United States, 52 F.3d 838 (10th Cir. 1995)
- Thompson v. Brown, 91 F.3d 20 (5th Cir. 1996)
- Panaras v. Liquid Carbonic Industries Corp., 94 F.3d 338 (7th Cir. 1996)
- Mann v. American Airlines, 324 F.3d 1088 (9th Cir. 2003)
- Horenkamp v. Van Winkle And Co., Inc., 402 F.3d 1129 (11th Cir. 2005)
- Goodstein v. Bombardier Capital, Inc., 167 F.R.D. 662 (D. Vt. 1996)
- Estate of Hough ex rel. Lemaster v. Estate of Hough ex rel. Berkeley County Sheriff, 205 W. Va. 537, 519 S.E.2d 640 (1999) (per curiam)
- Stevens v. Saunders, 159 W. Va. 179, 220 S.E.2d 887 (1975)

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