

No. 33458

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

IN RE:

Civil Action No. 06-P-122

PETITION FOR APPOINTMENT OF
TRUSTEES FOR WOODLAWN CEMETERY

APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE FRED L. FOX, II, JUDGE

BRIEF OF THE APPELLANT, WOODLAWN CEMETERY
COMPANY BY AND THROUGH ITS BOARD OF
DIRECTORS AND ITS PRESIDENT, JACK LEE DECKER

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

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**STATEMENT OF THE KIND OF
PROCEEDING AND NATURE OF THE RULING BELOW**

On or about September 18, 2006, the respondents, John D. Hardesty, Jr., William D. Wagner, Frank Clark, Jr., Janice Watkins Cosco, and Douglas A. Hutchinson filed A Petition for Appointment of Trustees for Woodlawn Cemetery with the Circuit Court of Marion County, West Virginia. On or about December 4, 2006, a hearing was

held before the Honorable Fred L. Fox, Judge of the Circuit Court of Marion County, West Virginia.

The Woodlawn Cemetery is owned by the Woodlawn Cemetery Company which is a West Virginia corporation. The Woodlawn Cemetery Company was, at all times relevant hereto, in good standing with the West Virginia Secretary of State. Jack Lee Decker is the President of the Woodlawn Cemetery Company pursuant to the records of the West Virginia Secretary of State.

The petitioners were present at the hearing they scheduled and were represented by counsel. The corporation, Woodlawn Cemetery Company, was not served or given notice of the proceeding before the Circuit Court. The president of the corporation, Jack Decker, discovered that a hearing had been set with respect to the petition and appeared without counsel at the hearing.¹

On or about December 15, 2006, an Order Granting Petition for Appointment of Trustees for Woodlawn Cemetery was entered. The court appointed the appellees, John D. Hardesty, Jr., William B. Wagner, Frank Clark, Jr., Janice Watkins Cosco, and Douglas A. Hutchinson, as Trustees of the Woodlawn Cemetery.

On or about December 29, 2006, Woodlawn Cemetery Company by and through its Board of Directors and its President, Jack Lee Decker, filed a motion requesting the Circuit Court to reconsider

¹ The Appellees published a notice of hearing, however, neither the petition nor a notice of hearing was properly served on the Appellant.

the Order Granting Petition for Appointment of Trustees for Woodlawn Cemetery. On or about January 12, 2007, a response was filed to the motion to reconsider.

By Order entered January 18, 2007, the Circuit Court of Marion County denied the Motion to Reconsider the Order Granting Petition for Appointment of Trustees for Woodlawn Cemetery. The Circuit Court did not even afford the corporation an opportunity to have a hearing with respect to the motion to reconsider.

Because the Circuit Court of Marion County abused its discretion in granting the Petition for Appointment of Trustees for Woodlawn Cemetery, it is respectfully requested that this Court reverse the Orders of the Circuit Court of Marion County, West Virginia entered on December 15, 2006 and January 18, 2007, respectively, and remand the case for entry of judgment in favor of the Woodlawn Cemetery Company and its Board of Directors, Jack Lee Decker, President.

STATEMENT OF FACTS

Pertinent to this proceeding, on or about April 18, 1975, the Woodlawn Cemetery was identified as a perpetual West Virginia corporation, however, the corporation was established as evidenced by the Secretary of State information on or about December 16, 1885. The Woodlawn Cemetery Company² is currently and, at all

² The West Virginia Secretary of State identifies the corporation as Wood-Lawn Cemetery Company.

times since its inception, has been a West Virginia corporation and has been a West Virginia corporation in good standing with the West Virginia Secretary of State. The West Virginia Secretary of State identified Jack Lee Decker as the President of the corporation, Susan Brown as the Secretary, and Chris Decker as the Treasurer of the Woodlawn Cemetery Company at all times relevant hereto.

The Appellees never attempted to properly serve the Woodlawn Cemetery Company with notice of the petition for appointment of trustees for Woodlawn Cemetery. Further, the Woodlawn Cemetery Company is not a church, religious sect, society, congregation, denomination, benevolent, fraternal, patriotic, literary, temperance or charitable society, order, lodge or association.

ASSIGNMENT OF ERROR

1. The Circuit Court of Marion County committed a clear abuse of discretion in granting the Petition for Appointment of Trustees for Woodlawn Cemetery where the appellees failed to properly serve the Woodlawn Cemetery Company, a West Virginia corporation.

2. The Circuit Court of Marion County committed a clear abuse of discretion when it misapplied West Virginia Code § 35-5-1 et seq. and granted the Petition for Appointment of Trustees for Woodlawn Cemetery essentially destroying a valid West Virginia corporation.

STANDARD OF REVIEW

In reviewing challenges to the findings and conclusions of the circuit court, the appellate court must apply a two-prong deferential standard of review. This Court reviews the final order and the ultimate disposition under an abuse of discretion standard, while considering the factual findings under a clearly erroneous standard. All questions of law are subject to de novo review by this Court. Appalachian Emergency Medical Services, Inc. v. State Tax Commissioner, 218 W. Va. 550, 625 S.E.2d 312 (2005); Walker v. West Virginia Ethics Commission, 201 W. Va. 108, 492 S.E.2d 167 (1997); Burgess v. Porterfield, 196 W. Va. 178, 469 S.E.2d 114 (1996).

POINTS AND AUTHORITIES

- I. The Circuit Court of Marion County Clearly Abused its Discretion in Granting the Petition for Appointment of Trustees for Woodlawn Cemetery Where the Appellees Failed to Properly Serve and Give Notice to the Woodlawn Cemetery Company, a West Virginia Corporation.

Burkes v. Fas-Chek Food Mart, Inc., 217 W.Va. 291, 617 S.E.2d 838 (2005)

- II. The Circuit Court of Marion County Clearly Abused its Discretion When it Misapplied West Virginia Code § 35-5-1 et seq. and Granted the Petition for Appointment of Trustees for Woodlawn Cemetery.

Concerned Loved Ones and Lot Owners Association v. Pence, 181 W.Va. 649, 383 S.E.2d 831 (1989).

DISCUSSION

- I. The Circuit Court of Marion County, West Virginia, Clearly Abused its Discretion in Granting the Petition for Appointment of Trustees for Woodlawn Cemetery Where the Respondents Failed to Properly Serve and Give Notice to the Woodlawn Cemetery Company, a West Virginia Corporation.

The Woodlawn Cemetery Company is a West Virginia corporation and has been a West Virginia corporation in good standing with the West Virginia Secretary of State at all times relevant hereto. Despite the status of Woodlawn Cemetery Company as a West Virginia corporation in good standing, the appellees refused to serve the corporation with the petition for appointment of trustees.

Rule 4(d)(5) of the West Virginia Rules of Civil Procedure requires that personal or substituted service shall be made upon a private corporation by delivery or mailing a copy of the summons and complaint to an officer, director, or trustee thereof. It is undisputed that the appellees did not ever attempt to serve the corporation with their petition or a notice of hearing.

The West Virginia Secretary of State identifies, and has identified as all times relevant hereto, Jack Lee Decker as the President, Susan Brown as the Secretary, and Chris Decker as the Treasurer of the Woodlawn Cemetery Company. Additionally, the West Virginia Secretary of State recognizes the President, Jack Lee Decker, as the agent of the corporation for service of process.

The appellees refused to serve any of these officers with the summons or the complaint. Pursuant to Rule 4(k) of the West Virginia Rules of Civil Procedure, 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 the defendant without prejudice. Burkes v. Fas-Chek Food Mart, Inc., 217 W.Va. 291, 617 S.E.2d 838 (2005).

The Woodlawn Cemetery Company was denied its right of due process by not being made a party to this proceeding with a full and complete opportunity to present evidence, cross examine witnesses, and provide direct testimony. Failure to serve the petition on the corporation mandates that the December 14, 2006 and January 18, 2007 Orders of the Circuit Court be reversed.

West Virginia Code § 31D-8-809 provides that a Circuit Court may remove a director of a corporation from office, however, the proceeding must be commenced by the corporation or by its shareholders holding at least 10% of the outstanding shares of any class of stock. In order to remove a director the Court must find that the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation and the directors removal is in the best interest of the corporation. If the shareholders commence a proceeding to remove a director the corporation must be a party defendant.

The appellees failed to comply with any provision of West Virginia Code § 31D-8-809 with respect to the petition to supplant the board of the directors of the Woodlawn Cemetery Company with a board of trustees designated by the Circuit Court of Marion County. Accordingly, the Orders replacing the corporate board of directors with a board of trustees must be reversed.

II. The Circuit Court of Marion County Clearly Abused its Discretion When it Misapplied West Virginia Code § 35-5-1 et seq. and Granted the Petition for Appointment of Trustees for Woodlawn Cemetery.

The circuit court relied upon West Virginia Code § 35-5-1 et seq. to grant the relief sought by the appellee's petition and supplement a corporate board of directors with a board of trustees selected by the circuit court. However, this Article of the West Virginia Code does not apply to the Woodlawn Cemetery Company or any other corporation owning a cemetery.

West Virginia Code § 35-5-1 states as follows:

Where any conveyance, dedication or devise was made of land for burial grounds, to any church, religious sect, society, congregation, or denomination, or to any benevolent, fraternal, patriotic, literary, temperance, or charitable society, order, lodge or association, that has dissolved or become extinct in the county and vicinity where such burial grounds are situated, and the trustees of the same have moved or died, the circuit court of such county, upon the application of five or more persons having relatives buried in such burial grounds, shall appoint five trustees, who for the time being and their successors shall be invested with all the powers necessary to promote and carry out the

object and purposes named in such conveyance, dedication or devise.

This Court has previously stated that West Virginia Code § 35-5-1, et seq. applies only to those entities specifically identified in Section 1.

West Virginia Code § 35-5-1 does not include a duly established West Virginia corporation, such as Woodlawn Cemetery Company. Concerned Loved Ones and Lot Owners Association v. Pence, 181 W.Va. 649, 383 S.E.2d 831 (1989). This Court in Concerned Loved Ones and Lot Owners Association v. Pence, supra., stated that:

Obviously, West Virginia Code, 35-5-2 [1967] does not apply to all cemeteries, but only to those which are enumerated in the statute, private, profit making corporations are not among those entities enumerated in West Virginia Code, 35-5-2 [1967].³

The Woodlawn Cemetery is owned and operated by the Woodlawn Cemetery Company which is a West Virginia corporation, therefore, West Virginia Code § 35-5-1 et seq. has no application to the Woodlawn Cemetery Company and could not form the basis of the Circuit Court's action.

Furthermore, West Virginia Code § 35-5-1 only applies to those cemeteries that have dissolved or become extinct. At all times relevant hereto, the Woodlawn Cemetery Company was in good standing

³ The enumeration discussed is contained in West Virginia Code § 35-5-1 and specifically does not include West Virginia corporations.

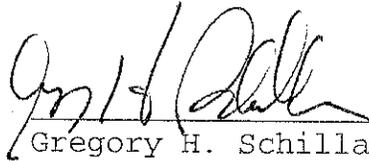
as a West Virginia corporation. Accordingly, the Circuit Court inappropriately applied West Virginia Code § 35-5-1 to the Woodlawn Cemetery Company.

The appellees assert that the corporation violated West Virginia Code § 35-5A-2, West Virginia Code § 35-5A-3 and West Virginia Code § 35-5A-4 with respect to the operation of the permanent endowment fund of the corporation. However, even assuming violations of these statutory sections, Article 5A of Chapter 35 of the West Virginia Code does not provide for the removal of a corporate board of directors and its replacement with a board of trustees pursuant to West Virginia Code § 35-5-1. West Virginia Code § 35-5A-8 contains the only penalties for a violation of West Virginia Code § 35-5A-2; 35-5A-3; and, 35-5A-4 with none of the possible penalties being removal of the Board of Directors of a corporation.

CONCLUSION

For all the foregoing reasons the appellant, Woodlawn Cemetery Company, by and through its Board of Directors and its President, Jack Lee Decker, respectfully requests that this Court reverse the Orders of the Circuit Court of Marion County, West Virginia entered on December 15, 2006 and January 18, 2007, respectively, and remand this case for entry of judgment in favor of the Woodlawn Cemetery Company.

Dated this 9th day of July, 2007.



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CERTIFICATE OF SERVICE

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

I hereby certify that on the 9th day of July, 2007, I served
the foregoing **BRIEF OF THE APPELLANT, WOODLAWN CEMETERY COMPANY BY
AND THROUGH ITS BOARD OF DIRECTORS AND ITS PRESIDENT, JACK LEE
DECKER** upon all opposing parties by depositing a true copy thereof
in the United States mail, postage prepaid, in envelopes addressed
as follows:

Neal J. Hamilton, Esquire
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Post Office Box 509
Fairmont, West Virginia 26555-0509

