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July 20, 2000

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

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Davis, J., Concurring:

Although this case presented two certified questions to the Court, the majority opinion correctly determined that only one question needed to be answered. The certified question that was reduced to its analytical essence, so read: “Does W. Va. Code § 29-12A-5(a)(11) (1986) grant immunity to a political subdivision in a wrongful death case where the recoverable benefits under workers’ compensation are limited to reasonable funeral expenses pursuant to W. Va. Code § 23-4-4(a) (1995)?” In view of the nature of the narrow, nonconstitutional argument raised by the plaintiff in this case, the majority opinion answered the certified question in the affirmative. I fully concur in the answer provided by the majority opinion. I write separately to emphasize two points that were critical to my decision to join the majority opinion.

**A. WORKERS’ COMPENSATION BENEFITS WERE LIMITED
BECAUSE THE DECEDENT HAD NO DEPENDENTS**

This case was not filed in the circuit court by the spouse, children, or other dependents of the decedent. In fact, Mr. Zelenka, the decedent, did not have a spouse, child or any other dependents. This case was prosecuted by the apparent non-dependent executrix of the decedent’s estate.¹ I believe this point is critical in understanding the impact of the monetary limitation of \$5,000.00 provided by W. Va.

¹The record does not indicate what degree of kinship, if any, the executrix had with the decedent.

Code § 23-4-4(a), pursuant to W. Va. Code § 23-4-10(a).

Under W. Va. Code § 23-4-10(a), workers' compensation benefits payable for fatal injuries are denied only when the decedent has no dependents.² This provision of the latter statute limits benefit payments to only medical expenses under W. Va. Code § 23-4-3 and funeral expenses under W. Va. Code § 23-4-4(a). *See* Syllabus point 3, *Hudson v. State Comp. Com'r*, 121 W. Va. 461, 5 S.E.2d 108 (1939) (“The purpose of the Workmen’s Compensation Act is to afford protection against industrial hazards to an employee, his dependents, and, in certain circumstances, his partial dependents.”).

Footnote two of the majority opinion states “that the sum of \$5,000.00 appears to us to be an inadequate amount both in a wrongful death action and as reasonable funeral expenses.” Even so, it must be understood that the de minimus amount of workers' compensation benefits payable in this case was triggered solely because Mr. Zelenka had no statutory dependents.

²A dependent is defined by W. Va. Code § 23-4-10(d) as follows:

“Dependent”, as used in this chapter, shall mean a widow, widower, child under eighteen years of age, or under twenty-five years of age when a full-time student as provided herein, invalid child or posthumous child, who, at the time of the injury causing death, is dependent in whole or part for his or her support upon the earnings of the employee, stepchild under eighteen years of age, or under twenty-five years of age when a full-time student as provided herein, child under eighteen years of age legally adopted prior to the injury causing death, or under twenty-five years of age when a full-time student as provided herein, father, mother, grandfather or grandmother, who at the time of the injury causing death, is dependent in whole or in part for his or her support upon the earnings of the employee; and invalid brother or sister wholly dependent for his or her support upon the earnings of the employee at the time of the injury causing death.

B. THE PLAINTIFF FAILED TO CONSTITUTIONALLY CHALLENGE THE APPLICATION OF THE IMMUNITY STATUTE

The second point deserving discussion involves the type of challenge presented by Mr. Zelenka in arguing against the City's statutory immunity. Mr. Zelenka seeks to strip the City of its statutory immunity based upon the argument that the workers' compensation funeral expense benefit was not "meaningful." Mr. Zelenka urges this Court to "legislate" by inserting the term "meaningful" in the immunity statute, W. Va. Code § 29-12A-5(a)(11), for the sole purpose of abrogating the city's immunity.

W. Va. Code § 29-12A-5(a)(11) is clear and unambiguous. Political subdivisions are immune from liability for "[a]ny claim covered by workers' compensation law[.]" The statute does not say any "meaningful" claim. The majority opinion, by following our longstanding rules of statutory construction, correctly refused to destroy the immunity granted to the city by the Legislature. There is no ambiguity in the statute's meaning. *See* Syl. pt. 1, in part, *Ohio County Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983) ("Judicial interpretation of a statute is warranted only if the statute is ambiguous[.]"); Syllabus point 5, *State of West Virginia v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.").

The only serious challenge to the city's statutory immunity had to be based upon

constitutional grounds. As the majority opinion pointed out, in footnote 8 of the opinion, “the plaintiff made clear that she does not . . . challenge the constitutionality of this immunity.” By failing to urge a constitutional argument, Mr. Zelenka provided absolutely no basis for this Court to invade the authority of the Legislature to deprive the City of its immunity under the circumstances of this case.

This Court has previously upheld the constitutionality of W. Va. Code § 29-12A-5(a)(11), in the context of plaintiffs who received workers’ compensation benefits. *See* Syl. pt. 4, *O’Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 425 S.E.2d 551 (1992) (“W. Va. Code § 29-12A-5(a)(11), giving political subdivisions immunity from tort liability in suits by injured persons whose claims are covered by workers’ compensation or employer’s liability laws, does not violate the equal protection principles of Article III, Section 10 or the ‘certain remedy’ provision of Article III, Section 17 of the West Virginia Constitution.”). However, we have never been asked to determine the constitutionality of the statute when workers’ compensation benefits were limited to funeral expenses paid on behalf of a decedent. Therefore, the instant case is clearly distinguishable from the facts and constitutional question set forth in the *O’Dell* decision.³ While I do not know the outcome had the plaintiff had brought a constitutional challenge, I do know that such a challenge was the only viable mechanism for this Court to seriously consider removing the city’s immunity.

³In *O’Dell*, which involved three consolidated cases, each of the plaintiffs had received workers’ compensation benefits for nonfatal injuries.