

No. 33918 – J.H. v. West Virginia Division of Rehabilitation Services, a State Agency

FILED

July 27, 2009

Benjamin, Chief Justice, concurring:

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

I concur with the holding of the Court. I write separately to again question the jurisprudence of this Court’s holding in *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983). The majority incorporates as Syllabus Point 2 herein, the second syllabus point of *Pittsburgh Elevator*, in which this Court held that “[s]uits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State’s liability insurance coverage, fall outside the traditional constitutional bar to suits against the State.”

As set forth in my concurring opinion in *Blessing v. National Engineering & Contracting Co.*, 222 W.Va. 267, 664 S.E.2d 152 (2008), I believe the constitutionality of the *Pittsburgh Elevator* decision should be reconsidered by this Court in view of the clear and unambiguous mandate of sovereign immunity set forth in our Constitution. The Constitution of West Virginia, Art. VI, § 35 (1872). Judicially-created exceptions to clear and unambiguous mandates in the Constitution of West Virginia are neither appropriate nor legitimate. Although it may be tempting, perhaps even expedient, for this Court to nullify or amend constitutional provisions for reasons we deem important or necessary, we must resist this urge lest this Court exceed both its legitimate power and our role in constitutional governance. In this manner, we serve the greater good when we adhere to our constitutional

mandate, not when we except ourselves from our constitutional obligations in order to serve partisan agendas or to satisfy some vague personal notion of cosmic justice. Such is a disrespect to the document from which we derive our power.

I further believe that this Court should also make inquiry into how payments in a claim such as this would be made to one making a claim against a State agency. Should payments be made directly or indirectly from a state agency and not from a separate bona fide insurance policy purchased by the State, *Pittsburgh Elevator*, in my opinion, would not, by its own terms, apply.

I do not dissent herein, however, because the constitutional viability of *Pittsburgh Elevator* was not properly raised as error herein. The issue not being properly being before the Court, I do not fault my colleagues for not addressing the issues of sovereign immunity and coverage and concur in the majority opinion.