No. 23948 - Jana Lynn Tudor v. Charleston Area Medical Center, Inc., A West Virginia Corporation, and Janice Smith

Maynard, Justice, concurring in part, and dissenting in part:

I dissent in part because I simply fail to see a tort here. This is just another case where a hospital is forced to pay hundreds of thousands of dollars in damages when it did nothing wrong.

I concur with the majority that the trial court erred in not granting the appellants' motion for remittitur, which would have set aside the punitive damages award. I would, however, reverse the entire jury verdict in this case. Here, I address two of the issues upon which I disagree with the majority. First, I disagree with the majority's conclusion that the trial court did not err in refusing to direct a verdict in favor of the appellants on the constructive retaliatory discharge issue. I also disagree with the unwarranted modification of this Court's holding in

Dzinglski v. Weirton Steel Corp., 191 W.Va. 278, 445 S.E.2d 219 (1994), in Syllabus Point 14 of the majority opinion.

I agree with the appellants that the appellee failed, as a matter of law, to show that any of her actions were in support of a substantial public policy of the State and to establish the necessary elements of a constructive discharge. I believe the West Virginia Code of State Regulations § 64-12-14.2.4 (1987) is simply too general and indefinite to be considered a substantial public policy. When this Court chose the phrase "substantial public policy" in *Harless v. First National Bank* (*"Harless I"*), 162 W.Va. 116, 246 S.E.2d 270 (1978), it was articulating the narrow parameters of an exception to the at will employment doctrine. The substantial public policy exception certainly does not encompass every broad policy pronouncement found in the voluminous code of state regulations.

Also, I do not believe the appellee established the necessary elements of a constructive retaliatory discharge. "In order to prove a constructive discharge, a plaintiff must establish that working conditions

created by or known to the employer *were so intolerable that a reasonable person would be compelled to quit."* Syllabus Point 6, in part, *Slack v. Kanawha County Housing,* 188 W.Va. 144, 423 S.E.2d 547 (1992) (emphasis added). Concerning this issue, the majority states:

> In the present case, the evidence presented by the Appellee revealed that she regularly worked her shifts for over two years alone, without either another nurse or care giver to assist her. Moreover, at times, she was left alone on her shift to care for up to nine seriously ill patients.

This evidence, however, is plainly not relevant to the necessary elements of a constructive retaliatory discharge. The conditions described above were the normal working conditions of the position held by the appellee. *Anyone* holding the same position of the appellee would have worked under these exact conditions. Even if the appellee had not complained to and angered her supervisor, she would still have operated under the conditions described above. In other words, these conditions *had nothing to do with retaliation.* In constructive retaliatory discharge cases, the plaintiff must show a nexus between her actions in support of a substantial public policy and the creation of intolerable working conditions by the employer.

Here, there is no such nexus. In fact, under the Court's reasoning here, anyone finding the regular conditions of her job stressful and demanding could simply quit and have a cause of action for constructive retaliatory discharge. Absent the evidence concerning the demanding nature of the appellee's job, the appellee is left with evidence of a reprimand, a below average evaluation, and disputed testimony concerning denied requests for vacation time and transfers. Such evidence clearly does not rise to the level of showing conditions so intolerable that a reasonable person would be compelled to quit.

Second, I dissent to the modification of this Court's holding in Syllabus Point 8 of *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994):

> In permitting recovery for emotional distress without proof of physical trauma when the distress arises out of the extreme and outrageous conduct intentionally caused by the defendant, damages awarded for the tort of outrageous conduct are essentially punitive damages. Therefore, in many cases emotional distress damages serve

> the policy of deterrence that also underlies punitive damages.

In *Dzinglski,* this Court explained:

> In *Mace v. Charleston Area Medical Center Foundation, Inc.,* 188 W.Va. 57, 422 S.E.2d 624, 633 (1992), we expressed our concern that in cases where damages for emotional distress are sought, "a claim for emotional distress without any physical trauma may permit a jury to have a rather open hand in the assessment of damages." In *Wells v. Smith,* 171 W.Va. 97, 297 S.E.2d 872 (1982), we recognized that in permitting recovery for emotional distress without proof of physical trauma where the distress arises out of the extreme and outrageous conduct intentionally caused by the defendant, damages awarded for the tort of outrageous conduct are essentially punitive damages. Therefore, in many cases emotional distress damages serve the policy of deterrence that also underlies punitive damages.
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> By allowing the jury to consider punitive damages, the trial court permitted the jury to stack punitive damages upon punitive damages, thereby effectively imposing two punitive damage verdicts against Weirton Steel for the same acts.

Dzinglski, W.Va. at 288, 445 S.E.2d at 229. The requirement of proof of physical trauma is to show the need for compensatory damages and guarantee that punitive damages are not awarded twice. It prevents an openendedness in the jury's assessment of damages.

In Syllabus Point 14 of the majority opinion, all of this is undone. Now added to proof of physical trauma is "concomitant medical or psychiatric proof of *emotional or mental trauma, i.e. the plaintiff fails to exhibit either a serious physical or mental condition requiring medical treatment, psychiatric treatment, counseling* ***or the like[.]"*** (Emphasis added). Now, in order to receive "compensatory damages" in addition to punitive damages, a plaintiff must simply present substantial evidence of some kind of "*treatment for . . . depression, anxiety, or other emotional or mental problems[.]"* (Emphasis added). This syllabus point is an invitation to a jury to stack punitive damages upon punitive damages. Notable is the fact that expert psychiatric testimony apparently is not required to show the seriousness of the plaintiff's emotional or mental condition, since the majority states in the opinion, "nor are we requiring

the introduction of expert testimony to prove the plaintiff's claim." In light of this new rule, what plaintiff in a tort of outrage claim will not testify to experiencing emotional or mental problems as a result of the defendant's conduct. Not having the benefit of this syllabus point, the appellee in the instant case apparently did not cry big enough tears on the witness stand. I reiterate that this new rule is a step backward in allowing juries a free hand in awarding punitive damages in the guise of "compensatory" damages for "emotional and mental injuries" in addition to damages assessed against the defendant based on his conduct. It is an open invitation for the awarding of double recoveries. Further, I do not believe that Syllabus Point 15 of the majority opinion does much to mitigate this danger. The majority opinion reintroduces an openendedness into this area of the law that *Dzinglski* was designed to correct.

In conclusion, for the reasons stated above, I dissent in part. I reiterate that I would reverse the entire jury verdict in this case.