Fisk v. Lemons, No. 24029

Davis, Justice, dissenting:

This case presented three certified questions to the Court: (1) Did W. Va. Code, § 29-12A-5(a)(3) immunize the defendants from liability? (2) Did W.Va. Code, § 29-12A-5(a)(13) immunize the defendants from liability? and (3) Did the plaintiffs have to prove a "special relationship" with the defendants? The majority opinion answered yes to all three questions. I believe the answers the majority reached were legally incorrect and were a tortured result. Therefore, I respectfully dissent.

The majority reached the wrong answers in this case because of a basic misunderstanding of the relationship of the various statutes under consideration. Had the majority applied the proper legal analysis, it would have reached a different, but legally correct result. Unfortunately, the majority's conclusion will add confusion to any analysis of immunity under W.Va. Code, § 29-12A-5. The dissenting analysis is set forth in two parts: (1) The Governmental Tort Claims and Insurance Reform Act, and (2) the application of W.Va. Code, § 62-11A-3(b).

## THE GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT

The certified questions involved provisions contained in the Governmental Tort Claims and Insurance Reform Act (Act). Specifically, the defendants have argued

that they are immune from suit under W.Va. Code, §§ 29-12A-5(a)(3) [1] & 29-12A-5(a)(13).[2] The majority opinion adopted this position. In order to reach its position, the majority opinion analyzed the Act as though W.Va. Code, §§ 29-12A-5(a)(3) & 29-12A-5(a)(13) were the *only* provisions contained in the Act. Justice Cleckley appropriately commented in *Bullman v. D & R Lumber Co*., 195 W.Va. 129, 133, 464 S.E.2d 771, 775 (1995) that:

> [W]e commence with the rule that courts are not at liberty to construe any statute so as to deny effect to any part of its language. Indeed, it is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. *See Kokoszka v. Belford*, 417 U.S. 642, 650, 94 S.Ct. 2431, 2436, 41 L.Ed.2d 374, 381 (1974) ("[w]hen 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into

[1]W.Va. Code, § 29-12A-5(a)(3) immunizes political subdivisions from a loss or claim resulting from "[e]xecution or enforcement of the lawful orders of any court."

[2]W.Va. Code, § 29-12A-5(a)(13) immunizes political subdivisions from a loss or claim resulting from "[a]ny court-ordered or administratively approved work release or treatment or rehabilitation program."

> execution the will of the Legislature[.]'" (Citation omitted)). Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all parts harmonize, if possible, and to give meaning to each. Syl. pt. 1, *Mills v. Van Kirk*, 192 W.Va. 695, 453 S.E.2d 678 (1994); *Pristavec v. Westfield Ins. Co*., 184 W.Va. 331, 400 S.E.2d 575 (1990). That is to say, every word used is presumed to have meaning and purpose, for the Legislature is thought by the courts not to have used language idly.

I do not question the determination that no ambiguous language exists in W.Va. Code, §§ 29-12A-5(a)(3) & 29-12A-5(a)(13). However, such determination does not mean that only those two provisions automatically apply to this case. There are a total of 18 sections contained in the Act. Fundamental statutory analysis dictates that this Court must concern itself with whether or not *any other statutory provision* in the Act qualifies or modifies the language contained in W.Va. Code, §§ 29-12A-5(a)(3) & 29-12A-5(a)(13). (Emphasis added). Had the majority opinion done even a cursory examination of the Act as a whole, it would have found that the immunity under W.Va. Code, §§ 29-12A-5(a)(3) & 29-12A-5(a)(13) has been qualified by another statutory provision in the Act.

In my examination of the Act as a whole, I find that W.Va. Code, § 29-12A-4 enumerates specific conditions that allow a political subdivision to be held liable for a loss or claim. In addition to the Act's specifically enumerated conditions of liability for political subdivisions, W.Va. Code, § 29-12A-4(c)(5) provides in relevant part that "a political subdivision is liable for injury, death, or loss to persons or property *when liability is expressly imposed upon the political subdivision by a provision of this code*." (Emphasis added).[3] The majority opinion failed to acknowledge the existence of W.Va. Code, § 29-12A-4(c)(5). Moreover, the majority refused to analyze its impact on the immunity granted by W.Va. Code, §§ 29-12A-5(a)(3) & 29-12A-5(a)(13).

W.Va. Code, § 29-12A-4(c)(5) is the controlling provision in this case. It requires that this Court determine whether or not a specific provision exists in the Code which authorizes a cause of action against the defendants in this case, notwithstanding W.Va. Code, §§ 29-12A-5(a)(3) & 29-12A-5(a)(13). The plaintiffs argued, and I agree, that W.Va. Code, § 62-11A-3(b) cannot be ignored. Instead, this section provides the cause of action in this case.

**THE APPLICATION OF W.VA. CODE § 62-11A-3(b)**

[3]In this Court's recent decision in *Holsten v. Massey*, ___ W.Va. ___, ___, 490 S.E.2d 864, 876 (1997), Justice McHugh pointed out that employee immunity under the Act is lost pursuant to W.Va. Code, § 29-12A-5(b)(3) when "[l]iability is expressly imposed upon the employee by a provision of th[e] code."

The majority opinion refused to consider the impact of W.Va. Code, § 62-11A-3(b) in this case,[4] by using the legally unsound argument that the circuit court did not address the provision. Whether or not the circuit court examined the application of W.Va. Code, § 62-11A-3(b) to this case is irrelevant.[5] To properly analyze and answer the legal question necessitates addressing the legal issue because of the immunity exception contained in W.Va. Code, § 29-12A-4(c)(5). We held in syllabus point 6 of *Miller v. Lambert*, 195 W.Va. 63, 464 S.E.2d 582 (1995) that:

> When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in W.Va. Code, 51-1A-1, et seq., and W.Va. Code, 58-5-2 [1967], the statute relating to

[4]W.Va. Code, § 62-11A-3(b) is the specific governmental immunity and liability provision for inmates released for work specifically under chapter 62, article 11A. The relevant language in W.Va. Code, § 62-11A-3(b) provides:

> (b) Neither the sheriff, the county commission or community service agency to which the person is assigned shall be liable for injury or damage to third parties *intentionally committed* by the person so sentenced *or for any action* on behalf of the person so sentenced *except in the case of gross negligence on the part of the sheriff, county commission* or community service agency or the supervisor of the person so sentenced. (Emphasis added).

[5]The majority opinion also chides the plaintiffs for urging the application of W.Va.

certified questions from a circuit court of this State to this Court. Syllabus Point 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993).

---

Code, § 62-11A-3(b) on appeal.

The record shows clearly that defendant Russel Dean Lemons was placed on work release under W.Va. Code, § 62-11A-1. Pursuant to W.Va. Code, § 62-11A-3(b) county commissions and sheriff departments are generally immune from liability for "intentional" acts or "any action" by inmates released for work under chapter 62, article 11A.[6] However, W.Va. Code, § 62-11A-3(b) contains an exception to the general immunity it grants. The statute specifically provides that the immunity it bestows is lost "in the case of gross negligence on the part of the sheriff, county commission or community service agency or the supervisor of the person so sentenced." Clearly, W.Va. Code, § 62-11A-3(b) authorizes a cause of action against a county commission and sheriff department when their gross negligence permits an inmate, released for work under chapter 62, article 11A, to intentionally or otherwise harm a third party.

In the case at hand, the immunity alleged by the defendants under W.Va. Code, §§ 29-12A-5(a)(3) & 29-12A-5(a)(13), is nonexistent as a result of the immunity exception contained in W.Va. Code, § 29-12A-4(c)(5) and the right of action bestowed by W.Va. Code, § 62-11A-3(b). "Statutes relating to the same subject matter, whether enacted at the same time or at different times, and regardless of whether the later statute refers to the former statute, are to be read and applied together as a single statute[.]" Syl.

[6]Chapter 62, article 11A contains work release provisions in W.Va. Code, § 62-11A-1, 62-11A-1a & 62-11A-2.

Pt. 1, in part, *Owens-Illinois Glass Co. v. Battle*, 151 W.Va. 655, 154 S.E.2d 854 (1967). *See Mangus v. Ashley*, ___ W.Va. ___, ___, 487 S.E.2d 309, 314 (1997) ("It is axiomatic that a court must whenever possible read statutes dealing with the same subject matter in pari materia so that the statutes are harmonious and congruent, giving meaning to each word of the statutes, and avoiding readings which would result in a conflict in the mandates of different statutory provisions.).

W.Va. Code, §§ 29-12A-5(a)(3) & 29-12A-5(a)(13) are not in conflict with W.Va. Code, § 62-11A-3(b). In addition to chapter 62, article 11A, there are several other independent and separate provisions in the Code which permit inmates to be released for work. *See* W.Va. Code, § 62-11B-5(1)(A); W.Va. Code, § 31-20-9(a); W.Va. Code, § 25-1-3; W.Va. Code, § 17-15-4(a); W.Va. Code, § 7-9-19. However, only W.Va. Code, § 62-11A-3(b) and W.Va. Code, § 17-15-4(d) authorize civil actions against governmental authorities for harm done by inmates on work release pursuant to the latter provisions. Therefore, the immunity granted in W.Va. Code, §§ 29-12A-5(a)(3) & 29-12A-5(a)(13) applies to inmates released to work under statutes other than chapter 17, article 15 and chapter 62, article 11A.[7]

[7]Obviously, the legislature did not intend under the Act to prohibit governmental liability under *all* work release statutes. The Act was created in 1986. The statute authorizing liability under W.Va. Code, § 17-15-4(d) was enacted in 1943, and the statute authorizing liability under W.Va. Code, § 62-11A-3(b) was created in 1985.

Based upon the above, I believe the wrong result was attained by the Court in this case. The defendants did not have immunity under W.Va. Code, § 29-12A-5(a)(3) or W.Va. Code, § 29-12A-5(a)(13). The plaintiffs have express authority under W.Va. Code, § 62-11A-3(b) to bring this action on a theory of gross negligence. Therefore, the "special relationship" test of *Wolfe v. City of Wheeling*, 182 W.Va. 253, 387 S.E.2d 307 (1989) and *Randall v. Fairmont City Police Dep't*, 186 W.Va. 336, 412 S.E.2d 737 (1991) have no application in this case.

I should further note that the result reached by the majority in this case will be a serious impediment to protecting the safety of citizens from persons who are not

---

Even though the Act was last in time, there are factors which clearly show the legislature *did not* intend to affect the liability authorization in W.Va. Code, §§ 17-15-4(d) & 62-11A-3(b) through its passage of the Act.

First, W.Va. Code, § 17-15-4(d) was last amended in 1987. Prior to the amendment, the statute authorized liability when harm resulted from "the sheriff's neglect, malfeasance or carelessness." The 1987 amendment raised the standard for liability to "gross negligence or malfeasance." Clearly, had the legislature intended to implicitly repeal the liability authorization of W.Va. Code, § 17-15-4(d) through its enactment of the Act, it would not have refined the proof necessary to maintain an action under W.Va. Code, § 17-15-4(d) after it created the Act.

Second, the legislature amended chapter 62, article 11A in 1988, 1989, 1992, 1993, and 1994. At no time during any of those amendments did the legislature repeal or modify in any manner W.Va. Code, § 62-11A-3(b). In other words, had the legislature intended to repeal the liability authorization under W.Va. Code, § 62-11A-3(b) it had numerous opportunities to do so; but, did not.

properly supervised while on work release. It will be interesting to observe how the majority gets out of the legal dilemma it created in this case to insure other victims are protected who have been attacked by work release inmates who are not under proper supervision because of gross negligence. Under the majority's analysis, legislation is unnecessary to reach the result desired by it because the majority acted in lieu of the legislature. Under my analysis, the legislature would be the proper forum to reach the result desired by the majority.