No. 24142: West Virginia Human Rights Commission, on its own behalf and on behalf of Caprice A. Stephen v. Wilson Estates, Inc., a West Virginia corporation, and Brian K. Wilson

McCUSKEY, Justice, concurring:

I concur with the majority's conclusion that our West Virginia Fair Housing Act makes association-based discrimination in housing unlawful. However, the majority arrived at their destination by following a twisted and dangerous shortcut rather than following the direct route clearly shown on the road map of West Virginia jurisprudence. I intend this concurrence to provide more concise directions for future travelers on this important legal route.

The statute involved in this case, *W.Va. Code* § 5-11A-5, provides it shall be unlawful:

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, ancestry, sex, familial status, blindness, handicap or national origin.

This is markedly different from the language of another West Virginia discrimination statute, *W.Va. Code* § 5-11-9(6)(A), the portion of the West Virginia Human Rights Act which deals with public accommodations. That statute provides:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions:
>
> * * *
>
> (6) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations to:
>
> (A) Refuse, withhold from or deny to any individual because of *his* race, religion, color, national origin, ancestry, sex, age, blindness or handicap, either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of such place of public accommodations. [Emphasis added.]

In comparing these two statutes, it is important to note that *W.Va. Code* § 5-11-9 makes it unlawful to discriminate against an individual because of "his" race, religion, etc., whereas *W.Va. Code* § 5-11A-5, does not include the word "his". Even the most inexperienced legal scholar would conclude that the Legislature's decision to include the word "his" in one anti-discrimination statute and exclude it in the other is much more than a hair-splitting distinction.

Other jurisdictions which have examined similar anti-discrimination statutes have held that the inclusion of a word which specifically indicates that an individual is discriminated upon because of "his" race, rather than race generally, is critically

important in determining whether the statute proscribes only direct discrimination or whether it also proscribes association-based discrimination. When the word "his" is included, other jurisdictions have held that association-based discrimination is not actionable. When it is not included, association-based discrimination is proscribed. *See Buffi v. Ferri*, 106 R.I. 349, 259 A.2d 847 (1970), and *McGill v. 830 S. Michigan Hotel*, 68 Ill. App. 2d 351, 216 N.E.2d 273 (1966).

Using this more concise analysis, the majority would still easily have reached the ultimate decision which it did reach in the present case, that is, that association-based discrimination in housing is unlawful.

Instead of using this approach, the majority, as reflected in footnote 12, indicates that our body of discrimination law implicitly contains an inherent basis for holding that association-based discrimination is unlawful. The cases which I have cited above suggest that there is nothing of this sort inherent in discrimination law generally, and I cannot see how it is magically inherent in our law. Discrimination is made unlawful by statute, not by common law, and, thus, our discrimination statutes are in derogation of our common law. In ignoring the specific language of our statutes, and in finding an inherent basis for proscribing association-based discrimination, the majority has turned its back on the long-standing principle that statutes in derogation of the common law should be strictly construed. *Rhodes v. J.B.B. Coal Co.*, 79 W.Va. 71, 90 S.E. 796

(1916).

I am also disturbed by the deference that the majority has given to federal statutes and federal decisions when, in the case before us, no federal statute is involved and no federal precedent is controlling. While I believe that federal decisions can often be helpful in providing guidance in analyzing our law, the fundamental basis of much of federal discrimination law is distinct from the fundamental basis of our state law. As pointed out in *Ranger Fuel Corporation v. Human Rights Commission*, 180 W.Va. 260, 376 S.E.2d 154 (1988), West Virginia's law, when properly construed and applied, can actually afford more protection to individuals in protected classes. Here, the majority, which was aware of the cases which I have cited above, has unconsciously usurped the Legislature's power to proscribe association-based discrimination generally. What our Legislature actually said, and the cases which I have cited, do not support such a broad proscription. The majority therefore, has chosen federal enactments, which are worded differently from our law, and federal decisions based on those enactments, to serve as the basis of their decision.

Those who know me know that I disapprove of discrimination, and I want to reiterate that I concur with the result reached by the majority. However, I believe that this Court is setting a dangerous precedent by conjuring up an "inherent" basis for the decision in this case. It is dangerous to blindly use federal statutes and decisions as

controlling authority in discrimination cases brought under our state's statutes.

I am authorized to state that Justice Maynard joins in this concurring opinion.