No. 24972 - University of West Virginia Board of Trustees v. David F. Graf, M.D.

Starcher, Justice, dissenting:

The majority opinion is *per curiam*, a species that we have identified as ordinarily having little or no precedential value. In the instant case, the majority opinion's lack of precedential value is a blessing -- for at least two reasons.

First, the next time we address a case involving the issue of "sovereign immunity," our future jurisprudence will not have to pay much attention to the majority opinion. Second, this dissent can be brief -- and can forego attempting the substantial challenge of proposing a synthesis of, and suggested approach to, our sovereign immunity jurisprudence. Instead, this dissent can simply touch on a few (hopefully) pertinent points.

To its substantial credit, the majority opinion identifies a number of aspects of the sovereign immunity issue. But -- as is entirely appropriate for a *per curiam* opinion -- the majority opinion does not try to synthesize or further develop this area of our law.

Someday, I think, a number of thorny sovereign immunity issues should and will be more thoroughly addressed by this Court. My sense is that our sovereign immunity jurisprudence has come to be -- from a theoretical or academic perspective -- fairly confused. I further sense that this jurisprudential confusion has unfortunately created a fertile field for opportunistic attempts by litigants to escape liability for their wrongdoing, by the last-minute assertion of sovereign immunity.

Frankly, what does rather ancient and eroded constitutional language have to do with a multi-million-dollar hospital corporation's last-ditch attempt to escape paying money to a doctor who had to spend $300,000.00 in attorney fees to get what he was legally entitled to? In my judgment, very little. Yet this scenario, of course, is the instant case in a nutshell.

As the majority opinion barely acknowledges, Dr. Graf got his fee award pursuant to a statute, *W.Va. Code*, 18-29-8 [1992]. Adhering to the principle of brevity, it is not necessary to detail how and why the Legislature puts attorney fee provisions in statutes. The fact is that they do so -- a lot.

These attorney fee statutes are an explicit direction by the Legislature that government agencies shall pay a party's attorney fees when the agency has made such a substantial mistake that a citizen, or an employee, or a business, is required to use a lawyer to correct the agency's action.

Thus, payment of these attorney fees is a legislatively-mandated cost of running the government for the benefit of its citizens. Requiring a state agency to pay these attorney fees is the same as requiring a state agency to pay the gasoline bill for a state road truck at the local convenience store. A statute requiring an agency to pay attorney fees is no more impaired by the doctrine of sovereign immunity than is a statute requiring the same agency to pay its gasoline bills.

Dr. Graf was entitled to this fee payment under the statute. I think he should receive what the Legislature directed. The circuit judge read the statute in a straightforward manner and took the same position. I would affirm the circuit court.[1]

We are supposed to construe statutes constitutionally, if at all possible. Instead, the majority opinion stretches the other way, to rule that the duly-enacted statutory attorney fee provision, as applied to Dr. Graf, is unconstitutional.

The majority opinion is clearly an anomalous, result-oriented decision. Dr. Graf is seen as overreaching by asking for payment of his attorney fees, in addition to his million-dollar "lost income" recovery.

However, because attorney fee provisions are crucial to promoting effective legal advocacy for all citizens, we have no right to use archaic constitutional language to undermine statutes that apply such provisions to *all* citizens -- just because, in a given case, the statute is utilized by a person who probably has plenty of money.

At the least, the majority should have found a more sensible way to say "no" to Dr. Graf.

For the foregoing reasons, I dissent.

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[1] The majority's discussion of the State's so-called "insurance coverage" is particularly confusing. My understanding is that the State reimburses its "insurance carrier" dollar-for-dollar for the carrier's annual payments, plus some sort of service fee. If this is so, then the insurance carrier is simply a pass-through for state funds. By choosing to run an agency's statutorily required payments through an insurance company, can an agency avoid the clear requirements of duly-enacted statutes?