

No. 26004 - Joe Bailey, et al. v. Norfolk and Western Railway Company

Davis, J., concurring in part and dissenting in part:

**FILED**

December 15, 1999  
DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

December 15, 1999  
DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

The majority has committed an injustice by indulging itself in the ill-advised self-appointed role of judge and jury. Through its opinion, the majority has miserably failed in its commitment to uphold basic legal standards and has deliberately pummeled fundamental concepts of due process and appellate jurisdiction in this State. Reduced to its analytical essence, this case presented two general issues for resolution by this Court. First, was the judgment valid as to the age discrimination claim brought by the 62 plaintiffs who were 40 years old, or older, at the time of the alleged discrimination? Second, was the judgment valid as to the age discrimination claim brought by the five plaintiffs who were *under* 40 years of age at the time of the alleged discrimination? As to the first question, the majority ruled that the judgment for the 62 plaintiffs was valid. With this conclusion I agree and therefore concur in that part of the majority's opinion. As to the second question, the majority ruled that, under a theory dubbed "collateral victim," the judgment for the five plaintiffs was valid. With this conclusion I disagree and therefore dissent to that portion of the majority's opinion.

The basis of my dissent is that Norfolk and Western Railway Company (hereinafter "Norfolk & Western") was denied state and federal constitutional due process

by the majority's decision to create a "new" cause of action under W. Va. Code § 5-11-9(7), and to then *sua sponte* decide that cause of action against Norfolk & Western on appeal.

### **DENIAL OF DUE PROCESS**

Five of the plaintiffs were not 40 years old or older at the time they were allegedly discriminated against because of their age. Yet, those five plaintiffs attempted to invoke a cause of action for age discrimination under our State's Human Rights Act. Under W. Va. Code § 5-11-3(k) of the Human Rights Act, there is an express legislative requirement that to maintain a cause of action for age discrimination a party must be "forty or above" at the time of the discrimination. These five plaintiffs have attempted to get around the legislatively-imposed age limitation by advancing two alternative theories. They assert their age discrimination cause of action either on the basis of a "continuous tort" or under the "association doctrine."

On appeal the majority opinion rejected both theories proffered by the five plaintiffs. The majority opinion ruled that neither the continuous tort nor the association doctrine were applicable to the plaintiffs' claim. Based upon the historical legal doctrines of this Court and the time-honored precedents of Anglo-American jurisprudence, the majority should have ended its analysis and reversed the judgment as to these five plaintiffs. The parties presented below and argued on appeal *only* the theories of continuous tort and the association doctrine. Thus, based upon settled precedent, the majority was compelled to terminate its analysis. *See Kronjaeger v. Buckeye Union Ins. Co.*, 200 W. Va. 570, 585,

490 S.E.2d 657, 672 (1997) (“We frequently have held that issues which do not relate to jurisdictional matters and which have not been raised before the circuit court will not be considered for the first time on appeal to this Court.”); Syl. pt. 2, *Trent v. Cook*, 198 W. Va. 601, 482 S.E.2d 218 (1996) (“[T]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review.”); *Barney v. Auvil*, 195 W. Va. 733, 741, 466 S.E.2d 801, 809 (1995) (“Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered.”); *Whitlow v. Board of Educ. of Kanawha County*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) (“Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal.”); *Michigan Nat’l Bank v. Mattingly*, 158 W. Va. 621, 626, 212 S.E.2d 754, 757-58 (1975) (“[T]his Court will not consider nonjurisdictional questions not acted upon by the trial court.”); Syl. pt. 4, *Wheeling Downs Racing Ass’n v. West Virginia Sportservice, Inc.*, 157 W. Va. 93, 199 S.E.2d 308 (1973) (“This Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.”); *Konchesky v. S.J. Groves & Sons Co., Inc.*, 148 W. Va. 411, 414, 135 S.E.2d 299, 302 (1964) (“[I]t has always been necessary for a party to object or except in some manner to the ruling of a trial court, in order to give said court an opportunity to rule on such objection before this Court will consider such matter on

appeal.”).<sup>1</sup>

The majority *sua sponte* decided in this opinion that it would create a new theory of liability to benefit these five plaintiffs. Embarking on this course, the majority determined that the independent cause of action for economic loss found in W. Va. Code § 5-11-9(7)(A) would partly save the plaintiffs’ judgment. However, in order to completely save the judgment, the majority created a unique creature in discrimination law and titled it “collateral victim.” In doing so, the majority proclaimed that, while the five plaintiffs did not meet the age discrimination requirement, they were nevertheless collateral victims of age discrimination who suffered economic loss. The majority then concluded that under W. Va. Code § 5-11-9(7)(A) and the collateral victim doctrine, the plaintiffs’ judgment should be sustained.<sup>2</sup>

---

<sup>1</sup>We have explained this limited scope of review thusly:

The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we have the benefit of its wisdom.

*Whitlow v. Board of Educ. of Kanawha County*, 190 W. Va. at 226, 438 S.E.2d at 18.

<sup>2</sup>Let me be clear here, because the majority decision is very unclear. The majority has invoked W. Va. Code § 5-11-9(7)(A) and attached a spurious and totally

This result obtained in the majority opinion, though, is just plain wrong. The plaintiffs did not even assert W. Va. Code § 5-11-9(7)(A) at the trial level or on appeal. Nor did the plaintiffs present any evidence regarding W. Va. Code § 5-11-9(7)(A) at the trial level or on appeal. Neither did Norfolk and Western present evidence to rebut such a cause of action under W. Va. Code § 5-11-9(7)(A) at the trial level or on appeal. Presumably, such evidence is lacking because none of the parties envisioned the resolution of their controversy on this ground. By its decision in this case, the majority has determined that in West Virginia a plaintiff no longer has to present a claim at the trial court level in order to prevail. The majority decision proclaims that the Supreme Court of Appeals of West Virginia has the authority to create a cause of action for a plaintiff and to render judgment for him or her. Further, the majority decision has stated unequivocally that in West Virginia a defendant no longer has a right to know the basis of a cause of action and no longer has a right to present

---

undefined doctrine to it called “collateral victim.” Together, the statute and the doctrine represent a new cause of action in the State of West Virginia. Obviously, this Court has the inherent authority to recognize a new cause of action. However, there are limited ways in which this may constitutionally be accomplished. First, a party may advocate a new theory at the trial level, prevail, and on appeal this Court may recognize the new cause of action. Second, if a party advocates a new cause of action below, but is prevented from litigating the matter, on appeal this Court may recognize the unlitigated new cause of action and remand the matter for trial. *See West Virginia Human Rights Comm’n v. Wilson Estates, Inc.*, 202 W. Va. 152, 503 S.E.2d 6 (1998) (recognizing a new unlitigated cause of action on appeal and remanding for trial); *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996) (recognizing a new unlitigated cause of action on a certified question to the Court and remanding for trial); *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978) (recognizing a new unlitigated cause of action on appeal and remanding for trial). Until the decision in this case, this Court has never *sua sponte* created a cause of action and decided the merits of the new cause of action against a defendant. Anglo-American jurisprudence simply prohibits such conduct by an appellate court.

evidence on a cause of action. This view of litigants' rights is erroneous.

Fundamental to the jurisprudence of all civilized nations is the idea of notice and an opportunity to be heard for all parties. In the United States, this concept has taken on constitutional dimensions.<sup>3</sup> In both the federal constitution and the West Virginia Constitution, due process of law has been guaranteed to everyone.<sup>4</sup> “The most basic of the procedural safeguards guaranteed by the due process provisions of our state and federal constitutions are notice and the opportunity to be heard, which are essential to the jurisdiction of the court in any pending proceeding.” *State ex rel. United Mine Workers of America, Local Union 1938 v. Waters*, 200 W. Va. 289, 297, 489 S.E.2d 266, 274 (1997). *See Chesapeake & Ohio Sys. Fed’n v. Hash*, 170 W. Va. 294, 299, 294 S.E.2d 96, 101 (1982). Moreover, “the court which undertakes to determine the rights of the parties must have jurisdiction of the proceeding, . . . the parties to the proceeding must have due notice,

---

<sup>3</sup>“The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.” *Anderson Nat’l Bank v. Lockett*, 321 U.S. 233, 246, 64 S. Ct. 599, 606, 88 L. Ed. 692, 705 (1944).

<sup>4</sup>Article III, Section 10, of the West Virginia Constitution guarantees that “[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” This same guarantee is articulated in the Fourteenth Amendment to the United States Constitution, which provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” Over sixty years ago, this Court firmly stated that “[t]he due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard.” Syl. pt. 2, *Simpson v. Stanton*, 119 W. Va. 235, 193 S.E. 64 (1937).

and . . . they must be afforded a reasonable opportunity to be heard before their rights are adjudicated or determined.” *Walter Butler Bldg. Co. v. Soto*, 142 W. Va. 616, 636, 97 S.E.2d 275, 287 (1957). *See also State ex rel. Peck v. Goshorn*, 162 W. Va. 420, 249 S.E.2d 765 (1978); *State ex rel. Payne v. Walden*, 156 W. Va. 60, 190 S.E.2d 770 (1972); *State ex rel. Bowen v. Flowers*, 155 W. Va. 389, 184 S.E.2d 611 (1971).

Due process of law prohibits all courts from denying any defendant the right to know, in advance, the basis of a plaintiff’s cause of action.<sup>5</sup> Due process of law also prohibits all courts from denying a defendant the right to present a defense to a cause of action.<sup>6</sup> “Both federal and state due process clauses require that a party to a law suit be afforded adequate notice and a realistic opportunity to be heard in his own defense.” *State*

---

<sup>5</sup>The majority decision has also stripped plaintiffs of the right to know in advance upon what theory they, themselves, will proceed. Obviously, plaintiffs will not complain about the loss of this right, because they will always benefit from the majority’s new procedure of *sua sponte* creating and deciding the merits of a new and unlitigated cause of action.

<sup>6</sup>It was firmly set out in Syllabus point 1 of *Simpson v. Stanton*, 119 W. Va. 235, 193 S.E. 64 (1937), that the constitutional guarantee of due process law,

properly applied, secures to a litigant a reasonable opportunity to be heard when the processes of the courts are invoked against him; and where that opportunity has been denied by the refusal to grant a reasonable time in which to prepare and file pleadings setting up his defense, this [C]ourt will not pass on the merits of the case until opportunity is given to file such pleadings in the court of original jurisdiction, and a hearing had thereon in said court.

*ex rel. Thomas v. Neal*, 171 W. Va. 412, 413, 299 S.E.2d 23, 25 (1982). The majority opinion has proclaimed that due process of law no longer exists in West Virginia for civil defendants. *But see Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 300, 359 S.E.2d 124, 133 (1987) (“Longstanding due process protections such as notice and an opportunity to be heard are scrupulously applied.”); *Schupbach v. Newbrough*, 173 W. Va. 156, 158, 313 S.E.2d 432, 435 (1984) (“The due process clauses of our State and Federal Constitutions afford parties the procedural rights of notice and opportunity to be heard.”). The majority decision has taken an affirmative position that in West Virginia civil defendants are *persona non grata*.

The decision in this case clearly signals that the majority has lost touch with the constitutional restraints on this Court. The majority has no authority to create a cause of action against a defendant, to refuse to permit the defendant to defend the cause of action, or to pronounce judgment against the defendant on the new unlitigated cause of action.<sup>7</sup>

---

<sup>7</sup>We previously have attempted to articulate the facets of constitutional due process:

Though it is difficult, perhaps impossible, to define fully and accurately due process of law or to visualize or enumerate the particular requirements of due process of law in the various and complicated situations which occur in the field of constitutional law, due process of law has been held to mean that the court which undertakes to determine the rights of the parties must have jurisdiction of the proceeding, that the parties to the proceeding must have due notice, and that they must be afforded a reasonable opportunity to be heard before their rights are adjudicated or determined. It has been stated generally that the requirement of due process of law is satisfied when a trial is had



“[B]efore there can be any final adjudication of [a litigant’s] property rights, a person deprived of property must be afforded notice and a reasonable opportunity to be heard.” *Anderson v. George*, 160 W. Va. 76, 77, 233 S.E.2d 407, 408 (1977). The majority’s *sua sponte* procedure in this case undermines the essence of democracy and fair play. “It is fundamental to our constitutional structure that parties will be treated fairly by government and courts.” *State ex rel. Graves v. Daugherty*, 164 W. Va. 726, 727, 266 S.E.2d 142, 143 (1980).<sup>8</sup>

---

according to the settled course of judicial proceedings as regulated by the law of the state. This Court has said that due process of law means the due course of legal proceedings according to the rules and the forms which have been established for the protection of private rights. Due process of law is such procedure as is within the limits of those fundamental principles of liberty and justice which underlie our civil and political institutions. One requirement of due process of law is that every defendant must be given his day in court. The underlying purpose of the due process of law clauses of the federal and state constitutions is to guarantee that the rights of persons may be dealt with in judicial proceedings only after due notice and a fair and reasonable opportunity for a hearing in accordance with procedure which has been ordained for the preservation of personal and property rights.

*Walter Butler Bldg. Co. v. Soto*, 142 W. Va. 616, 636, 97 S.E.2d 275, 287 (1957) (citations omitted).

<sup>8</sup>“One of the basic constitutional guarantees of due process is, of course, that no one shall be deprived of a substantial right by an arm of the State without notice and the opportunity to be heard in a meaningful manner.” *In re Willis*, 157 W. Va. 225, 239, 207 S.E.2d 129, 138 (1973).

I must, therefore, strongly dissent from the majority's decision regarding the five plaintiffs who were under the age of 40 at the time of the alleged discriminatory action. I am authorized to state that Justice Maynard joins me in this dissent and also reserves the right to file a separate opinion.