No. 27472 -- Ayersman v. West Virginia Division of Environmental Protection

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OF WEST VIRGINIA

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McGraw, J., concurring:

While I agree with the majority that this case should be reversed, I would reverse for different reasons. In my view the issues of the definition of pollution or the sufficiency of the circuit judge's actions are red herrings.

At issue in this case is an insurance policy for the DEP that purports, on its face, to exclude coverage for pollution abatement work. This sort of exclusion might make sense for a standard commercial or industrial policy where, for example, an insurer wishes to avoid liability for the removal of asbestos from a insured company's older manufacturing plant. Indeed, this exclusionary language probably originated in such a policy. But in a policy for an agency that has as a primary goal, if not in fact its *raison d'etre*, the abatement of pollution, such an exclusion is patently absurd.

This would be akin to issuing an insurance policy for a NASCAR driver that refused to provide coverage for "claims arising from the operation of a motor vehicle at speeds above 70 miles per hour." For "Joe Driver" that exclusion might be reasonable; for "Joe NASCAR Driver," it is ridiculou

When an insurance carrier for the state makes such arguments it highlights a recurring problem with our law of immunity. Namely, that the state actually has a perverse incentive to NOT want

insurance coverage when facing a large claim. Historically, the State of West Virginia had been immune from suit, as established in our State Constitution:

> The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggested.

West Virginia Constitution, Section 35 of Article VI. However, in more recent times actions of this Court and the Legislature have gradually established exceptions to this general rule. In our seminal case on the subject, we ruled: "Suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State." Syl. pt. 2, *Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983).

We have also explained that our law now requires the state to carry insurance for certain activities:

> W. Va. Code, 29-12-5(a) (1986), provides an exception for the State's constitutional immunity found in Section 35 of Article VI of the West Virginia Constitution. It requires the State Board of Risk and Insurance Management to purchase or contract for insurance and requires that such insurance policy "shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits."

Syl. pt. 1, *Eggleston v. West Virginia Dept. of Highways*, 189 W. Va. 230, 429 S.E.2d 636 (1993). The Legislature has also recognized the strong desirability of maintaining insurance coverage:

> Recognition is given to the fact that the state of West Virginia owns extensive properties of varied types and descriptions representing the investment of vast sums of money; that the state and its officials, agents and employees engage in many governmental activities and services and incur and undertake numerous governmental responsibilities and obligations; that such properties are subject to losses, damage, destruction, risks and hazards and such activities and responsibilities are subject to liabilities which can and should be covered by a sound and adequate insurance program;

W. Va. Code § 29-12-1. (1957).

A major problem with this system is that, because activity that is "not covered" by insurance is immune, the system inadvertently creates an incentive for the state's insurers and their lawyers to argue at every opportunity that a given activity is not covered by any insurance. This sentiment, which is the perverse opposite of the desires of a normal insured party who wants maximum coverage in an accident, runs counter to the goals of risk spreading and protection from catastrophic loss that our law has come to favor:

> Although sovereign immunity provisions were common in nineteenth century state constitutions, today they are very much the exception rather than the rule. Our survey in *Pittsburgh Elevator* identified only five other states whose constitutions still contain sovereign immunity sections and only two (Alabama and Arkansas) with provisions as rigid as ours. 172 W. Va. at 749 n. 6, 310 S.E.2d at 681 n. 6. It may well be that the strict sovereign immunity imposed by Section 35 has outlived its perceived utility and that West Virginia should join the rest of the country and adopt more flexible legislative resolutions to the issues surrounding governmental liability. Certainly, modern notions of fairness and accountability tend to support doctrines that provide relief to individuals injured by another's conduct and that spread the risk of loss from such injuries through governmental and insurance programs. The West Virginia Legislature, for example, following our decisions abolishing the common law immunities

> for local governments, crafted a comprehensive statute designed to accommodate the competing goals of compensating individuals injured by official misconduct and of maintaining the stability of local governments. See The Governmental Tort Claims and Insurance Reform Act, W. Va. Code, 29-12A-1, et seq.

Gribben v. Kirk, 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (1995) n. 12. In my view, this case is just another, though glaring, example of the problems inherent in our sovereign immunity jurisprudence. The time is soon coming, I believe, when this situation will improve.

Finally, I would have focused not on the order of the lower court, but upon the *McMahon* case mentioned by the majority in footnote 5, specifically: "Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Syl. pt.5, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987).

Therefore I respectfully concur with the majority opinion. I am authorized to state that Justice Starcher joins in this concurrence.