

No. 29330 - Affiliated Construction Trades Foundation, a division of the West Virginia Building and Construction Trades Council, AFL-CIO v. The University of West Virginia Board of Trustees, et al.

FILED

December 12, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

December 14, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, concurring in part and dissenting in part:

I write separately because I am fearful this opinion could have a dramatic and chilling effect on contributors' willingness to continue to give money to the Foundations of our colleges and universities. I realize this is difficult to predict, but I firmly believe that is the likely result of this decision. The people who make the monetary contributions give with an understanding that they are contributing to a private, not-for-profit corporation, and they have a right to expect that the money will be spent wisely, judiciously, and carefully. In fact, they have the right to expect that the people who are charged with spending the money will be downright stingy. When they contribute, they anticipate that the money will be spent on education rather than on inflated costs of building projects.

Therefore, I concur in the final result which the majority reached in this opinion. However, I dissent to the Court's reasoning because the gravamen of the opinion will affect future contracts into which private, not-for-profit corporations enter. I do not believe that a private owner of property should be subjected to West Virginia's prevailing wage laws, competitive bidding statutes, or architectural and engineering procurement measures. I also believe the issues discussed in this opinion are moot and the case should have been dismissed as improvidently granted. The majority opinion directly contradicts itself

regarding the mootness issue. In the opening paragraph, the opinion states that the issues presented here are moot but the Court will address them anyway; in footnote seven, the opinion states that the Foundation argues the issues are moot but the majority of this Court disagrees. If this issue had been properly resolved, perhaps we would not be left with this troubling scenario with which we now must wrestle on a case-by-case basis.

Without stating as much, the majority opinion effectively overrules settled law. In *Woodford v. Glenville State College Housing Corp.*, 159 W.Va. 442, 225 S.E.2d 671 (1976), this Court held that a private non-profit housing corporation which constructed a faculty and student housing facility on the Glenville State College campus did not enjoy sovereign immunity because it was not an instrumentality of the State. The purpose of the Housing Corporation was “to borrow necessary funds, to issue securities of the corporation, and ultimately to convey any structures constructed in Glenville to the college.” *Id.*, 159 W.Va. at 443, 225 S.E.2d at 672. The Court reasoned that the Housing Corporation was not created or granted authority to perform any function on behalf of the State by specific enactment of the Legislature. In reaching its result, the Court reasoned:

Funds for the operation of the Housing Corporation were not appropriated by the Legislature. There was no mandate that revenues received and income produced by the Housing Corporation must or would be paid into the State Treasury rather than expended on its own behalf, and monies available to the Housing Corporation to pay off its debts were not obtainable from a State source. On the contrary, the Housing Corporation was a private, non-profit, corporation with no call upon the State treasury and it was not subject to State control in any way. Its revenues were limited to contributions, income from rent payments from prospective faculty and students, and from borrowed funds. Most

importantly, it was not in any regard liable to creditors for amounts in excess of its assets.

Id., 159 W.Va. at 446, 225 S.E.2d at 674 (footnotes omitted).

Later, in *4-H Road Community Association v. West Virginia University Foundation*, 182 W.Va. 434, 388 S.E.2d 308 (1989) (per curiam), this Court specifically held that the West Virginia University Foundation, the same private organization involved in this appeal, is not a public body because “[the Foundation] was not created by state authority, nor is it primarily funded by state authority[.]” *id.*, 182 W.Va. at 439, 388 S.E.2d at 312-13; therefore, the Foundation was not subject to the FOIA. To reach its decision, the *4-H Road Community Association* Court consulted the statutory definition of “public body”¹ and then reasoned the Foundation was private because: (1) it was formed by private citizens pursuant to the general corporate laws of the State; (2) no legislative mandate predated its incorporation; (3) it is not located on state property; (4) it does not utilize state employees; (5) selection of the Board of Directors, and their duties, are governed by the corporation’s by-laws; and (6) the WVU President serves as an *ex officio* member of the Board by virtue of the by-laws rather than by legislative mandate. *Id.*, 182 W.Va. at 437, 388 S.E.2d at 311. That should be the end of the inquiry. I see no need to disrupt or rewrite the law in this area.

However, this is no longer the test which will be used in West Virginia to determine if a private, not-for-profit corporation is indeed private or public. That test has now been overruled. Any time this Court determines that a private, not-for-profit organization passes the five or six-part “public

¹W.Va. Code § 29B-1-2(3) (1977).

improvement” test contained in Syllabus Points 4, 7, and 8 of the majority opinion, that organization is subject to the prevailing wage laws, competitive bidding statutes, and architectural and engineering procurement measures. Moreover, one element of the test is “all other relevant factors [which] bear on the ultimate issue of whether the project is indeed a public project notwithstanding novel financing mechanisms.” This leaves the test wide open for creative argument. All it takes is a little creativity on the part of a judge and a lawyer and any private entity can now become an instrumentality of the State.

Each of the statutes which govern this case specifically sets forth the entities which are covered. The prevailing wage statute applies to any “public authority” which includes

any officer, board or commission or other agency of the State of West Virginia, or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement, including any institution supported in whole or in part by public funds of the State of West Virginia or its political subdivisions[.]

W.Va. Code § 21-5A-1(1) (1961). Competitive bidding applies to “the state of West Virginia, every political subdivision thereof, every administrative entity that includes such a subdivision, all municipalities and all county boards of education.” W.Va. Code § 5-22-1(a) (2000). The architectural and engineering procurement statute applies to “all state departments, agencies, authorities, quasi-public corporations and all political subdivisions, including cities, counties, boards of education and public service districts.” W.Va. Code § 5G-1-2(a) (1990).

These statutes are clear and need no interpretation. To interpret them is to legislate. Nonetheless, the majority rejects and bypasses the plain meaning of the statutes as they are written by claiming to delve into “legislative intent.” In fact, the majority admits they are legislating by stating,

We acknowledge that the wage act, as currently written, clearly hinges its operation on the existence of a contract having been signed by a public authority. *See* W.Va. Code § 21-5A-6. Barring statutory amendment to section six to include language indicating that an entity acting on behalf of a “public authority” can sign a contract which invokes the protections of the wage act, *we feel compelled to read in such language* in the interest of upholding the laudatory policy advanced by the wage act of establishing a floor for the workers engaged in construction for the public’s benefit. (Emphasis added).

If the Legislature intended to include private, not-for-profit organizations, the statute would clearly state as much.

After sidestepping the clear meaning of the statutes, the majority forges ahead blindly following precedent from other jurisdictions without so much as recognizing or acknowledging that these statutes vary greatly from jurisdiction to jurisdiction. Nine states do not even have prevailing wage laws and nine states which used to have prevailing wage laws have since repealed them. The laws in the remaining thirty-two states differ vastly. For instance, the contract threshold amounts before the prevailing wage applies to contracts varies from \$2,000 in some states to \$600,000 in other states. Also, some states specifically include surveyors, public employees, janitors, school boards, truck rentals, and printing in their prevailing wage laws while other states specifically exclude highways, schools, public utilities, local projects,

and maintenance.² The Supreme Court of Monroe County in New York recognized the inconsistencies in these laws by stating, “Authority from other jurisdictions is of limited value due to the differing statutory schemes in each state; this is particularly true for those states that provide a statutory definition of ‘public work’ or ‘public project’.” *Penfield Mechanical Contractors, Inc. v. Roberts*, 119 Misc.2d 105 n.1, 462 N.Y.S.2d 393 n.1 (1983). The taxpayers and gratuitous contributors in West Virginia would certainly be better served if the majority had recognized as much and would have just simply applied the statutes as they are written and followed settled case law from our own jurisdiction.

Moreover, for every case that the majority located and cited which applied the prevailing wage rate or competitive bidding or architectural and engineering procurement statutes a case can be found in another jurisdiction which refused to apply these statutes to a lease arrangement. I believe that these cases are of limited value in this jurisdiction, regardless of which way the court held, without first comparing and contrasting the statutes upon which the decision is based.

Furthermore, the facts in the cases relied upon by the majority differ from the facts in the case *sub judice*. For example, in *State ex inf. Webster v. Camdenton*, 779 S.W.2d 312 (Missouri 1989), the city sold lots to a contractor requiring the purchaser to build a firehouse and police station on the lots and then to grant the city a lease with an option to purchase the improved property. That is simply

²*Prevailing Wage Legislation: The Davis-Bacon Act, State “Little Davis-Bacon Acts,” the Walsh-Healey Act, and the Service Contract Act*, The Wharton School, Industrial Research Unit, University of Pennsylvania 1988.

not the case here. The City of Camdenton is a public entity; the Foundation is not. The city sold the lots; the university owned nothing to sell--in fact, the contractor was charged with site selection. The city demanded a lease with an option to purchase; the university can cancel their lease at any time with thirty days notice. In *Division of Labor Standards v. Friends of the Zoo*, 38 S.W.3d 421 (Missouri 2001), a charitable organization that was funded by private contributions was building a zoo reptile house on behalf of the city. The parties agreed the reptile house is a “public works;” the zoo superintendent, a city employee, was also the charitable organization’s executive director. Even with these facts, the Supreme Court of Missouri did not hold that the project was subject to the prevailing wage rate; rather, the court remanded for a determination of whether the city, through its employee, was engaging in public works. In the case before the Court, the parties certainly do not agree that the Center is a “public improvement.” Also, the president of the university merely serves as an *ex officio* member of the Board by virtue of the by-laws, not by legislative mandate. Since the point is made, I see no need to go on and on.

Because I believe that private entities should not be subjected to these statutes, I would not try to evade the plain meaning by supposedly probing into legislative intent when our law clearly states that “[c]ourts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed.” Syllabus Point 1, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

Accordingly, I concur in the majority opinion’s final result but respectfully dissent to the court-made law which will govern future contracts that are entered into by private entities in this State.