No. 31773 - Rita Mae Louk v. Serge Cormier, M.D.

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Maynard, Justice, dissenting:

A court should exercise the greatest caution and restraint when deciding its own power. I wish the majority had done so here. By ruling that this Court, simply by its own judge-made rules, can strike down a statute passed by the entire legislature is sobering indeed! This ruling not only invalidates important provisions of the medical malpractice reform package but also serves as a warning that this Court has the absolute power to declare null and void any part or the entire reform package. The mechanism for grinding a statute out of existence is for the Court simply to declare that the statute conflicts with an existing rule of this Court or to make a new rule which conflicts with the statute. In either case, the statute becomes unconstitutional.

One of the reforms struck down by this decision is a provision which allows non-unanimous verdicts in medical malpractice cases. Thirty-four other states already allow non-unanimous jury verdicts in civil trials.[1] If all but 16 states permit non-unanimous verdicts in some form, why is it so offensive in West Virginia? If it is true that this Court's rule conflicts with the statute, why not change our rule to comport with the overwhelming

[1]Matthew Tulchin, *An Analysis of the Development of the Jury's Role in a New York Criminal Trial*, 13 J.L. & Pol'y, 425, 498 n. 4, (2005) (citation omitted).

national trend and the will of the people expressed through an act of the Legislature?

In an effort to respond to a perceived crisis in the availability of medical care and the cost of medical malpractice insurance, the Legislature passed the statute at issue. The majority now overrules the statute, which is clear and unambiguous, and which was properly enacted by the Legislature and signed into law by the Governor. I heartily dissent to such disregard for the constitutional prerogatives of the Legislature and the Governor – separate and coequal branches of State government. I believe that such drastic steps are unnecessary.

The majority, in invalidating W.Va. Code § 55-7B-6d (2001), creates a conflict where one simply does not exist. Specifically, the majority's decision hinges upon its finding that Rule of Civil Procedure 48 and W.Va. Code § 55-7B-6d are in conflict. Not so. These provisions are *not* in conflict. Rule 48 provides *one* exception to the general understanding that verdicts should be unanimous. The rule itself nowhere purports to be the *only* way in which a non-unanimous verdict may be returned. West Virginia Code § 55-7B-6d provides a second exception to the general rule that verdicts are to be unanimous. These provisions are not in conflict; rather, they are cumulative. In other words, they clearly provide two ways in which a non-unanimous verdict may be returned.

This is illustrated by comparing the language of West Virginia Rule of Civil Procedure 48 with its federal counterpart. According to our State rule,

> The parties may stipulate that the jury shall consist of any number fewer than six or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

In contrast, Federal Rule of Civil Procedure 48 provides:

> The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

Conspicuous by its absence in the West Virginia Rule 48 is the phrase "[u]nless the parties otherwise stipulate . . . the verdict shall be unanimous." Again, the purpose of our rule is to permit parties to stipulate to non-unanimous verdicts. However, W.Va. Rule 48 *does not* mandate that all jury verdicts in civil cases must otherwise be unanimous or that the *only* exception to a unanimous verdict is where the parties stipulate to the contrary. This Court has held that in considering the constitutionality of a legislative enactment, "every reasonable construction must be resorted to by the courts in order to sustain constitutionality," and "the negation of legislative power must appear beyond reasonable doubt." Syllabus Point 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965). In the instant case, I do not believe that the negation of W.Va. Code § 55-7B-6d appears beyond a reasonable doubt.

Further, there is certainly nothing inherently wrong with non-unanimous jury verdicts in civil cases that should cause this Court to disfavor such verdicts. In fact, as I said

earlier, 34 states allow non-unanimous verdict in civil trials. Therefore, for this reason also, I see no valid reason to strike down non-unanimous verdicts in medical malpractice cases where the Legislature has clearly and unambiguously provided for such verdicts.

Finally, I note that the majority also strikes a non-severability provision. The reader should understand that the Legislature passed, as part of its reform package, what I call a "poison pill" non-severability provision. Simply put, it says that if this Court strikes down any part of specified articles in House Bill 601, which makes up part of the Medical Professional Liability Act, then every other provision of House Bill 601 shall be deemed invalid and of no further force and effect. The majority now says the Legislature cannot do that. This I find astonishing. The majority actually says the Legislature cannot reverse a statute *it* passed. It seems to me if the Legislature has the power to enact a law, it certainly has the power to repeal the same law. At any rate, I do not need to reach that provision in this dissent. Since there is no conflict between the statute and this Court's rule, I would find the statute to be valid and constitutional. Thus, the non-severability clause would not be implicated.

Accordingly, for the reasons stated above, I dissent to the majority opinion.