

No. 32669 – *Fairmont General Hospital, Inc. v. West Virginia Health Care Authority; United Hospital Center, Inc., and West Virginia United Health Systems, Inc.*

No. 32670 – *Fairmont General Hospital, Inc. v. West Virginia Health Care Authority; United Hospital Center, Inc., and West Virginia United Health Systems, Inc.*

FILED

December 16, 2005

Starcher, J., dissenting:

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Frankly, I have no idea whether the majority opinion’s reasoning is correct. I suspect, however, that the case for the five mile limitations’ facial invalidity is not so pat or facile as the majority opinion suggests. Furthermore, the majority opinion fails to address the real concern of the appellee Fairmont General Hospital in this case – a negative effect on an established community hospital that is located but a few miles from the site of the proposed new hospital.

First, the issue of the facial validity of the “five mile limitation” was neither argued nor briefed to this Court – or, as far as I can see, to the circuit court. Consequently, this Court did not have the benefit of analysis, research, or advocacy on this issue from the excellent lawyers on all sides of this case – to lay out the positives and the negatives of the position taken by the majority opinion. Nor did this Court have before it the positions and analysis of other governmental and private actors who have a vital interest in the validity of the State’s Health Plan – of which the “five mile limitation” is but a small part.

As Justice Davis has noted in her separate opinion, it is entirely possible that

the majority opinion's gratuitous and unnecessary ruling has the potential to gut West Virginia's Health Plan. Whether the majority opinion has a sound basis for doing so is unknowable – because there has been no adversarial testing of the theory adopted by the majority.

This sort of “judicial activism” often occurs when courts arrogate to themselves the task of seeking out and deciding an issue that no one has brought to or argued before the Court. It is then that one may more often see opinions that are flawed in their premises, and that can wreak havoc that is unthought of and unintended by the court that issued the opinion. I fear that the majority opinion in the instant case has such a potential.

Second, where was the Health Care Authority's concern or lack of concern for the appellee taken into account in the opinion? Unfortunately, this is an example where the giants of an industry simply roll over a weaker facility. Because of this decision, I prognosticate that within a few years following the opening of the grand new UHC facility along Interstate-79, Fairmont General Hospital will cease being a community-based hospital operated by a local board of directors. It will either have to “join Wal-Mart” and become part of the conglomerate, or it will be required to change its mission – perhaps to become a long-term care facility, or something of such nature.

Having said all this, I reiterate that the majority might properly have reached its current conclusion – and I might have agreed with it – had all issues been vigorously presented to this Court by the parties. Particularly, with respect to the “five mile limitation point,” the instant case should have been ordered to be re-briefed and re-argued on the major

issue identified by the majority. Then the members of this Court would have had a basis, and a clear right, to rule on the major issue raised by the majority opinion.

Absent such re-briefing and re-argument, this Court is “flying blind,” and basically guessing at a proper result. I cannot join in such a “blind guess,” so I dissent from the majority opinion’s reasoning and its new syllabus point.