No. 17-0039 - *Helio Martinez v. Asplundh Tree Expert Company*

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Davis, Justice, dissenting, joined by Justice Workman:

I respectfully dissent to the majority opinion in this case because it is shamefully inconsistent with the established precedent of this State. In order to reach a very result-oriented decision, the majority distorts the paradigm of analysis engaged in by this Court for decades regarding the retroactivity of statutes.

The approach to be utilized in determinations of retroactive or prospective statutory application is very clear. The analysis begins with the presumption that a statute operates only *prospectively* unless the legislative intent for retroactive application is clearly stated. Syl. pt. 3, *Shanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 270 S.E.2d 178 (1980). Exceptions exist where the matters addressed are procedural or remedial; *even those exceptions*, however, *do not apply* where the alterations attach a new legal consequence to a completed event. *See Public Citizen, Inc. v. First Nat'l Bank in Fairmont*, 198 W. Va. 329, 335, 480 S.E.2d 538, 544 (1996) (emphasis added). The majority's opinion is a classic example of the exception swallowing the rule.

As this Court explained in *Public Citizen,* the pertinent inquiry is whether the statutory alteration "diminishes substantive rights or augments substantive liabilities . . . ." *Id.* at 331, 480 S.E.2d at 540. If it does, it is substantive and not retroactive. Even if it is considered procedural or remedial, as the majority believes the two alterations in this case are, *the alteration still is not retroactive* in all instances.[1] This Court previously has warned that "even here the procedural/substantive distinction is not talismanic." *Id.* at 335, 480 S.E.2d at 544.

> The test of the interpretive principle laid down by the United States Supreme Court in *Landgraf* is unitary. It is whether the [sic] "the new provision attaches *new legal consequences to events completed before its enactment*." If a new procedural or remedial provision would, if applied in a pending case, attach a new legal consequence to a completed event, then it will not be applied in that case unless the Legislature has made clear its intention that it shall apply.

*Id.* (emphasis added) (citing *Landgraf v. USI Film Productions*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)*).*

[1]Interestingly, a procedural or remedial statute is often found to be retroactive because it relates to certain issues. For instance, the United States Supreme Court in *Landgraf v. USI Film Productions*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), explained that "[r]etroactive legislative provisions may serve legitimate purposes, such as responding to emergencies, correcting mistakes, preventing against the circumvention of a new statute during the time after it is proposed but before it is enacted, and serving to advance health, welfare, or safety." *Id*. at 267-68, 114 S. Ct. at 1498, 128 L. Ed. 2d 229. These types of considerations are quite obviously not present in the case *sub judice*.

In *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S. Ct. 2422, 165 L. Ed. 2d 323 (2006), the United States Supreme Court enunciated the "sequence of analysis" in determining retroactivity, as follows:

> [W]e ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of "affecting substantive rights, liabilities, or *duties* [on the basis of] conduct arising before [its] enactment," *Landgraf*, supra, at 278, 114 S. Ct. 1483 . . . . If the answer is yes, we then apply the presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the "absen[ce of] a clear indication from Congress that it intended such a result."

548 U.S. at 37, 126 S. Ct. at 2428, 165 L. Ed. 2d 323 (emphasis added and citations omitted).[2]

The statutory alterations at issue in the present case undeniably attach new legal consequences to events already accomplished. Specifically, the United States District Court

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[2]*See Landgraf*, 511 U.S. at 283, 114 S. Ct. at 1507, 128 L. Ed. 2d 229 (holding that Civil Rights Act of 1991 could not be retroactively applied because its punitive damages provision established new right to monetary relief). *See also U.S. Fid. & Guar. Co. v. United States*, 209 U.S. 306, 314, 28 S. Ct. 537, 539, 52 L. Ed. 804 (1908) ("There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.").

for the Northern District of West Virginia asks this Court to determine whether two recently enacted statutes, which limited the amount of damages the plaintiff would be entitled to receive, can be applied retroactively. The facts show that the plaintiff's cause of action for wrongful termination accrued on September 13, 2013, the date of his discharge. In 2015, the West Virginia Legislature enacted two statutes that limited damages in civil litigation. The first statute, W. Va. Code § 55-7E-3, reduced the amount of front-pay and back-pay a fired employee could receive for failure to mitigate damages, even if he or she proved the employer had acted with malice. The second statute, W. Va. Code § 55-7-29, placed a cap on the amount of punitive damages a plaintiff may receive. Because both statutes were enacted *after* the plaintiff's cause of action accrued, the District Court asked this Court to decide whether the statutes could be applied to the plaintiff. I strongly disagree with the majority's opinion that the statutes are procedural and remedial and can be applied retroactively.[3]

[3]Because both statutes limit damages, I will not make a distinction between them in this discussion. However, it is obvious that the new statute regarding mitigation of damages creates and imposes upon the plaintiff a distinctly different duty than that which existed at the time of his termination, thus altering the legal consequence of the his actions immediately following his termination. Likewise, the placement of a new cap on punitive damages alters the rights the plaintiff had as of the time of the alleged wrongful act. *See, e.g.*, *Heffelfinger v. Connolly*, No. 3:06-CV-2823, 2009 WL 112792, at *3 (N.D. Ohio Jan. 15, 2009) ("Ohio courts construing earlier damage cap statutes have similarly concluded that the date plaintiff's cause of action accrued . . . is the relevant date for determining whether a new damages regime applies.").

Over one hundred years ago, this Court held the following in Syllabus point 3 of *Rogers v. Lynch*, 44 W. Va. 94, 29 S.E. 507 (1897):

> No statute, however positive, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared; and the courts will apply new statutes only to future cases unless there is something in the very nature of the case or in the language of the new revision which shows that they were intended to have a retroactive operation.

*See* Syl. pt. 3, *Shanholtz*, 165 W.Va. at 179, 270 S.E.2d at 306 ("A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the statute."). *See also* Syl. pt. 5, *Arnold v. Turek*, 185 W. Va. 400, 407 S.E.2d 706 (1991) ("Statutory changes in the manner and method of distributing the proceeds of a judgment or settlement for wrongful death will not be given retroactive effect, and the statute in effect on the date of the decedent's death will control.").[4] Until the majority's opinion in this case, our law has been crystal clear that a statute operates prospectively absent a clear legislative intent to the contrary. There is absolutely no language in either W. Va. Code § 55-7E-3 or W. Va. Code § 55-7-29 that evidences a legislative intent that either statute should apply retroactively. The majority's

[4]This Court has applied these principles in a variety of contexts. In *Beard v. Lim*, 185 W.Va. 749, 408 S.E.2d 772 (1991), for instance, this Court addressed the issue of alterations to a statute regarding prejudgment interest as applied to special damages and observed that changes in the statutory scheme could not be retroactively applied. *Id.* at 753 n.7, 408 S.E.2d at 776 n.7.

opinion has tortured time-honored legal principles in order to reach a result that, as I will show, the overwhelming majority of the courts in the country have resolutely rejected.

It has been recognized that "most courts that have considered the issue disallowed retroactive application of a statutory damages cap." *Prince George's Cty. v. Longtin*, 419 Md. 450, 487, 19 A.3d 859, 881 (2011).[5] *See Miles v. Weingrad*, 164 So. 3d 1208, 1213 (Fla. 2015) (determining that statutory cap on damages could not be applied retroactively as "precedent from this Court 'has refused to apply the statute retroactively if it impairs vested rights, creates new obligations or imposes new penalties.'" (citation omitted)); *Socorro v. New Orleans*, 579 So. 2d 931 (La. 1991) (same); *United States v. Searle*, 322 Md. 1, 6, 584 A.2d 1263, 1265 (1991) (same); *Klotz v. St. Anthony's Med. Ctr*., 311 S.W.3d 752, 760 (Mo. 2010) (same); *Estate of Bell v. Shelby Cty. Health Care Corp*.,

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[5]The court in *Prince George's County* also noted:

> It is patent that the enormous loss to . . . [the plaintiff] from application of the statutory cap would 'impair' his cause of action. Accordingly, we agree with the Court of Special Appeals that . . . [the plaintiff] had a vested right in bringing his cause of action—with no statutory cap on damages - prior to the enactment of the . . . [Local Government Tort Claims Act] revisions. Although the legislature may, in its wisdom, limit tort damages prospectively, *see, e.g., Murphy v. Edmonds* [,] 325 Md. 342, 601 A.2d 102 (1992) (upholding statutory cap on noneconomic tort damages which applied prospectively), the constitution protects against retroactive application of these limitations.

419 Md. at 489-90, 19 A.3d at 883.

318 S.W.3d 823, 833 (Tenn. 2010) (same); *Neiman v. Am. Nat'l Prop. & Cas. Co.*, 236 Wis. 2d 411, 422, 428, 613 N.W.2d 160, 164-65, 167 (2000) ("'Strong common-law tradition defines the legislature's primary function as declaring law to regulate future behavior. Thus, as a matter of justice, no law should be enforced before people can learn of its existence and conduct themselves accordingly. In short, retroactivity disturbs the stability of past transactions.'" (citations omitted)); *Martin by Scoptur v. Richards*, 192 Wis. 2d 156, 212, 531 N.W.2d 70, 93 (1995) (same); *Berghauer ex rel. Estate of Berghauer v. Heyl*, 249 Wis. 2d 488, 639 N.W.2d 223 (Wis. Ct. App. 2002) (same); *Bramble v. Virgin Island Port Auth.*, No. ST-06-CV-678, 2015 WL 1744241, at *6 (V.I. Super. Apr. 10, 2015) (same). *See also Alamo Rent-A-Car v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994) (same); *Exec. Builders, Inc. v. Trisler*, 741 N.E.2d 351, 361 (Ind. Ct. App. 2000) (same); *Murphy Homes, Inc. v. Muller*, 337 Mont. 411, 429, 162 P.3d 106, 120 (2007) (same); *Seltzer v. Morton*, 336 Mont. 225, 270, 154 P.3d 561, 595 (2007) (same); *Blair v. McDonagh*, 177 Ohio App. 3d 262, 282, 894 N.E.2d 377, 391 (2008) (same).[6] The reason for this is that "[a]pplication of a damages cap deprives a person of compensation, just as abrogating a cause of action does." *Prince*

[6] *Compare Carswell v. Oklahoma State Univ.*, 62 P.3d 786, 789 (Okla. Civ. App. 2003) (holding statute that increased the amount of recovery effected a substantive change in the law and operates prospectively); *Greenvall v. Maine Mut. Fire Ins. Co.*, 788 A.2d 165, 167 (Me. 2001) (same); *Schultz v. Natwick*, 249 Wis. 2d 317, 328, 638 N.W.2d 319, 325 (Wis. Ct. App. 2001) (same); *and Greenwald v. Sugarloaf Residential Prop. Owners Ass'n, Inc.*, No. A17A0420, 2017 WL 2243130, at *3 (Ga. Ct. App. May 23, 2017) (statute permitting award of attorney's fees and expenses could not be applied to case filed before effective date of statute).

*George's Cty.*, 419 Md. at 487, 19 A.3d at 881.

Although the majority's opinion, at its best, crudely tries to argue that a law limiting damages is procedural and remedial, this argument is hollow and woefully unconvincing. It was observed in *Estate of Bell* that "for more than three decades Tennessee's appellate courts have consistently ruled that a change to the law that alters the amount of damages constitutes a substantive, as opposed to a procedural or remedial, change." 318 S.W.3d at 829-30. A statute altering the amount of damages "is clearly substantive as opposed to merely procedural because it has the effect of changing the law regarding the amount of damages recoverable in personal injury lawsuits. The very substance of the claim for damages, the amount thereof, is affected by the legislation." *Socorro*, 579 So.2d at 944. In *Klotz*, the court articulated an "underlying repugnance" to a retroactive application of laws and held that a court "cannot change the substantive law for a category of damages after a cause of action has accrued[.]" *Klotz*, 311 S.W.3d at 760.

To be clear, "[u]nder the great weight of authority, the measure and elements of damages are matters pertaining to the substance of the right and not to the remedy." *Thomas v. Cumberland Operating Co.*, 569 P.2d 974, 977 (Okla. 1977). Thus, "[s]tatutes and amendments imposing, removing or changing a monetary limitation on recovery for personal injuries or death are generally held to be prospective only." *Thomas*, 569 P.2d at

976. For example, in *Seltzer*, the plaintiff brought an action against the defendants for malicious prosecution and abuse of process. 336 Mont. at 228, 154 P.3d at 569-70. A jury returned a verdict in favor of the plaintiff that included punitive damages. *Id*. at 267, 154 P.3d at 593. On appeal, the defendants argued that the punitive damages should have been reduced based upon a recently enacted cap on such damages. The appellate court disagreed, ruling as follows:

> In *Dvorak v. Huntley Project Irrigation District*, 196 Mont. 167, 639 P.2d 62, (1981), . . . the jury returned a verdict for plaintiffs in the amount of $5,000 compensatory damages and $40,000 punitive damages against each of the three defendants. On appeal, this Court considered whether a statute prohibiting punitive damages awards against government entities was applicable to a cause of action that arose before the statute was enacted. . . . In resolving the appeal, this Court observed that the plaintiffs' cause of action arose in 1974, while § 2-9-105, MCA, was not enacted until 1977. Even though § 2-9-105, MCA, was in effect when the jury rendered its verdict in 1980, this Court held that the statute was not applicable to the case because it was enacted after the plaintiffs' cause of action arose.
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> Here, in its post-verdict order reviewing the punitive damages awards, the District Court relied on *Dvorak* in concluding that except as otherwise expressly provided by the Legislature, a new law limiting recovery of punitive damages does not apply to punitive damages awarded on a claim that accrued prior to the effective date of the statute. Thus, observing that Seltzer's tort claims accrued prior to the effective date of [the statute], the District Court determined that the statutory cap does not require a reduction of the jury's punitive damages awards against the Defendants. We agree.

*Seltzer*, 336 Mont. at 268-70, 154 P.3d at 594-95 (internal quotations omitted).

Additionally, in *Alamo Rent-A-Car*, the plaintiff filed an action for malicious prosecution against the defendant. 632 So.2d at 1354. A jury returned a verdict for the plaintiff. One of the issues raised on appeal was whether a statutory amendment that capped punitive damages applied retroactively to the plaintiff's cause of action. The Florida Supreme Court held that it did not for the following reasons:

> The amendment became effective October 1, 1987. The instant cause of action arose during September 1986, which was . . . before the effective date of the amendment. This action was filed on October 2, 1987, one day after the effective date of the amendment. To determine whether the amendment applies to the instant cause of action, we must examine whether the amendment is one of substantive or procedural law.
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> A substantive statute is presumed to operate prospectively rather than retrospectively unless the Legislature clearly expresses its intent that the statute is to operate retrospectively. This is especially true when retrospective operation of a law would impair or destroy existing rights. Procedural or remedial statutes, on the other hand, are to be applied retrospectively and are to be applied to pending cases.
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> . . . [S]ubstantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights. Following this rationale, we find section 768.73(1)(a) to be a substantive rather than procedural statute. Punitive damages are assessed not as compensation to an injured party but as punishment against the wrongdoer. Consequently, a plaintiff's right to a claim for punitive damages is subject to the plenary authority of the legislature. The establishment or elimination of such a claim is clearly a substantive, rather than procedural, decision of the legislature because such a decision

> does, in fact, grant or eliminate a right or entitlement. Because we find that section 768.73(1)(a) is substantive rather than procedural, we find that the amendment to section 768.73(1)(a) does not apply to the instant cause of action. This is true even though Mancusi's cause of action was filed after the effective date of the amendment.

*Alamo*, 632 So. 2d at 1358 (internal citations omitted).

Finally, in *Martin by Scoptur*, a child and her parents brought a medical malpractice claim for treatment the child received after she suffered injuries from riding her bicycle into the back of a truck. 192 Wis. 2d at 162-63, 531 N.W.2d at 73. At the time of the injury, there was no limit on the amount of noneconomic damages a plaintiff could recover in a medical malpractice action. Almost a year after the malpractice occurred, the legislature enacted a cap on such damages of $1,000,000. The plaintiffs subsequently filed a medical malpractice action, and a jury awarded the plaintiffs $2,150,000 in noneconomic damages. On appeal, the Wisconsin Supreme Court held that applying the cap to the plaintiffs' verdict would have changed what they would have recovered under the law that existed at the time of the accident. In finding the cap could not apply retroactively, the Supreme Court reasoned as follows:

> Since the cause of action accrued at a time when no cap existed on the amount of noneconomic damages recoverable, application of the cap to the Martins' cause of action constitutes a retroactive application. If we allowed the cap, it would act here to limit the recovery of a cause of action which, when it accrued, was unlimited.

. . . .

> To deprive the Martins and litigants like them of their recovery in the ephemeral hope that this retroactive application will further the few purposes cited for the retroactive application of the cap, violates the most fundamental notions of fairness and strikes at the heart of due process.
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> Accordingly, we hold that retroactive application of the cap on noneconomic damages . . . would be unconstitutional under the Due Process Clause of the United States and Wisconsin Constitutions.

*Id.* at 199 & 212, 531 N.W.2d at 88 & 93.

In the final analysis, "legislation which involves mere procedural or evidentiary changes may operate retrospectively; however, legislation which affects substantive rights may only operate prospectively." *Fowler Props., Inc. v. Dowland*, 282 Ga. 76, 78, 646 S.E.2d 197, 200 (2007). This basic principle of fairness has been unjustifiably gutted by the majority's unbalanced, severely skewed, and result-driven scales of justice.

In view of the foregoing, I dissent. I am authorized to state that Justice Workman joins me in this dissenting opinion.