No. 33096 *James S. Kessel, M.D., Richard M. Vaglienti, M.D., and Stanford J. Huber, M.D. v. Monongalia County General Hospital Company, d/b/a Monongalia General Hospital, a West Virginia non-profit corporation, Mark Bennett, M.D., individually, Bennett Anesthesia Consultants, P.L.L.C. and Professional Anesthesia Services, Inc.*

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**OF WEST VIRGINIA**

Starcher, J., dissenting:

The main issue in this case was whether the circuit court was bound to apply federal antitrust precedents to the appellants' case, when the circuit court was interpreting West Virginia antitrust statutes that were markedly different from the federal antitrust statutes.

I dissent because I think the question answers itself: because West Virginia's statutes are different from the federal statutes, then the Legislature must have intended for our statutes to have a different interpretation and reach than the federal statutes. That means that federal antitrust cases shouldn't be relied upon as binding authority by West Virginia courts.

The majority opinion holds otherwise, and in its interpretation of the West Virginia antitrust statutes at issue, almost exclusively parrots federal cases interpreting federal antitrust law. I believe this was a mistake, for several reasons.

First, this Court is duty-bound to operate independently of federal courts, and should not view federal court decisions as a sacred script to be followed by faith and not reason. We made clear in Syllabus Point 3 of *Brooks v. Isinghood*, 213 W.Va. 675, 584 S.E.2d 531 (2003) that "[a] federal case interpreting a federal counterpart to a West Virginia

rule . . . may be persuasive, but it is not binding or controlling." The Court in *Brooks* – interpreting a state *Rule of Civil Procedure* that paralleled the *Federal Rules of Civil Procedure* – unanimously reasoned that the Court should avoid having our legal analysis of West Virginia law "amount to nothing more than Pavlovian responses to federal decisional law." 213 W.Va. at 675, 584 S.E.2d at 531. Likewise, in *Stone v. St. Joseph's Hosp. of Parkersburg*, 208 W.Va. 91, 538 S.E.2d 389 (2000), this Court recognized that the West Virginia Human Rights Act mirrored federal civil rights statutes in many ways. Still, the Court went on to find that the Act, "as created by our Legislature and as applied by our courts and administrative agencies, represents an independent approach to the law of disability discrimination that is not mechanically tied to federal disability discrimination jurisprudence." 208 W.Va. at 106, 538 S.E.2d at 404.

Second, *W.Va. Code*, 47-18-16 [1978] says that the West Virginia Antitrust Act is to be (a) "construed liberally" and (b) construed "in harmony with ruling judicial interpretations of comparable federal antitrust statutes." The Legislature didn't say West Virginia courts were supposed to mimic federal courts. West Virginia courts are to harmonize their rulings with federal rulings when the case involves a "comparable federal antitrust statute[]," but do so in a way that liberally and generously accomplishes the remedial goals of the West Virginia Antitrust Act. And if there is no comparable federal antitrust statute, then courts are to construe the Act "liberally." Period. This Court is under no duty to apply federal case law in determining the scope of the Act where the federal and state statutes are not "comparable." *See State ex rel. Palumbo v. Graley's Body Shop, Inc.*,

188 W.Va. 501, 507 n.1, 425 S.E.2d 177, 183 n.1 (1992) ("[A] violation of West Virginia's Antitrust Act may not necessarily give rise to a violation of the federal antitrust laws.")

The majority opinion, however, resigns this Court to being a sock puppet for the federal judiciary, regardless of whether the federal antitrust statute is comparable to West Virginia's antitrust statute.

The federal antitrust statute, the Sherman Act, is written in very general terms. The federal statute declares broadly that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the various States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

The first half of the West Virginia Antitrust Act mirrors the federal statute. *W.Va. Code*, 47-18-3(a) [1978] states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State shall be unlawful." Clearly, without question, *W.Va. Code*, 47-18-16 is a legislative mandate that *W.Va. Code*, 47-18-3(a) be interpreted in harmony with federal cases interpreting 15 U.S.C. § 1, because the two statutes are not just "comparable," they are virtually identical.

But the second half of the West Virginia Antitrust Act is found nowhere in the federal antitrust statutes. *W.Va. Code*, 47-18-3(b) lays out various actions that are defined as *per se* restraints on trade or commerce. Further, other *per se* violations are listed in legislative rules enacted by the Legislature, violations which have no corollary in federal antitrust statutes. *See* 142 C.S.R. § 15.3.1. These provisions were designed by the

Legislature to make West Virginia's antitrust law different from federal law. Different means that the statutes are not "comparable."

The majority opinion, however, ignores the mandate of *W.Va. Code*, 47-18-16, which talks only about "comparable federal antitrust *statutes*." The majority opinion hinges upon the fact that there was "federal antitrust *law*," in the form of federal court decisions interpreting the Sherman Act, at the time the Legislature enacted *W.Va. Code*, 47-18-3(b). Again and again, the majority opinion talks about "the development of *law* . . . under Section 1 of the Sherman Act," the "status of federal *law* at the time the WVATA was enacted," and "the status of federal antitrust *law* at the time [the Legislature] enacted the WVATA."

The end result is that the majority opinion re-interprets the phrase "federal antitrust statutes" in *W.Va. Code*, 47-18-16 to mean "federal court cases interpreting federal antitrust statutes."

This plainly was not what the Legislature meant when it adopted the West Virginia Antitrust Act. The Legislature created *per se* categories of restraints of trade and commerce in *W.Va. Code*, 47-18-3(b), categories that are not found in any federal statute. Accordingly, these categories should be liberally construed to accomplish the goal of free trade and commerce in West Virginia. There might be a federal court case or two that could offer persuasive reasoning to assist in interpreting *W.Va. Code*, 47-18-3(b). Instead, the majority opinion has decided not to interpret West Virginia's law, but rather has chosen to mechanically tie up and cripple the effect of the West Virginia Antitrust Act with federal decisional jurisprudence.

I therefore respectfully dissent.