No. 33433 – *Misty Blessing, Individually and as the Administrator of the Estate of Wallie Blessing v. National Engineering & Contracting Company; et al.*

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Starcher, Justice, concurring:

I concur with the result reached by the majority opinion. I write separately only to reiterate that our sovereign immunity jurisprudence is based on "archaic constitutional language" that has little relevance in the 21st century. *University of West Virginia Bd. of Trustees ex rel. West Virginia University v. Graf*, 205 W.Va. 118, 125, 516 S.E.2d 741, 748 (1998) (Starcher, J., dissenting).

Sovereign immunity is rooted in English law under "the premise that 'the King can do no wrong'" and is derived from the monarchy's prerogatives. Erwin Chemerinsky, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity*, 53 Stan.L.Rev. 1201, 1202 (2001). The United States fought for its independence against a monarchy in favor of a governmental system that is held accountable for its actions. *Id.* at 1202. The doctrine of "sovereign immunity undermines that basic notion." *Id.* at 1202.

Without accountability, what is to prevent a government from acting outside the law? Sovereign immunity allows a state actor to escape liability where a private actor under the same circumstances would be afforded no such luxury; and for that reason should be eliminated from our jurisprudence.

Instead of directly addressing the constitutional contradictions[1] inherent in the doctrine, this Court has "carved exceptions from the prohibition against suing the State."

[1] For an in-depth discussion of these contradictions, *see* 53 Stan. L. Rev. at 1210-16; *see also Pittsburgh Elevator Company v. West Virginia Board of Regents*, 172 W.Va. 743, 750-54, 310 S.E.2d 675, 682-87 (1983).

Graf, 205 W. Va. at 122, 516 S.E.2d at 745. Thus, the issue when the State is facing suit is whether its actions fall within one of the many exceptions (for a listing of exceptions *see id*. at 122-23, 516 S.E.2d at 745-46), leading to wholesale and unnecessary confusion in our jurisprudence. *Id.* 205 W.Va. at 124, 516 S.E.2d at 747 (Starcher, J., dissenting).

The exception presented in the majority opinion is:

> Suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State.

Syllabus point 2, *Pittsburgh Elevator v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983).

My former colleague, Justice Warren McGraw, noted that "[T]he state actually has a perverse incentive to NOT want insurance coverage when facing a large claim . . . [which] runs counter to the goals of risk spreading and protection from catastrophic loss . . . ." *Ayersman v. West Virginia Division of Environmental Protection*, 208 W.Va. 544, 548, 542 S.E.2d 58, 62 (2000) (McGraw, J., concurring).

In the instant case, the Division of Highways ("DOH") argues that because its employee, Mr. Smith, was present in an "inspection" capacity when Mr. Blessing was fatally injured, the National Union policy is not applicable, and the suit is barred by sovereign immunity. The DOH is therefore arguing that it does *not* have insurance coverage – which is contrary to "a normal insured party who wants maximum coverage in an accident . . . ." *Id*. at 548, 542 S.E.2d at 62 (McGraw, J., concurring). Under the DOH's theory, the injured party is afforded absolutely no opportunity to have her case decided on the merits.

"The prospect and actuality of damages can be crucial in creating an incentive for the government to comply with the law." Chemerinsky, 53 Stan.L.Rev. at 1214. Without fear of liability, the State has little incentive to be careful in its actions, because any injuries

resulting from a failure to perform its duties are of no financial consequence.

A principal justification for the doctrine of sovereign immunity is said to be the protection of the financial structure of the State. *Pittsburgh Elevator*, 172 W.Va. at 756, 310 S.E.2d at 688. In his article, Professor Chemerinsky addresses this justification. 53 Stan. L. Rev. 1201, 1216-17. Quoting from *Alden v. Maine*, 527 U.S. 706, 749 (1999)), he discusses how the United States Supreme Court has viewed the doctrine of sovereign immunity as protecting the State from "being thrust, by federal fiat and against its will, into the *disfavored* status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf." 53 Stan.L.Rev. at 1217 (emphasis added).

But who among us could ever view being a debtor as a result of one's own negligent acts as "favorable"? When the State through its own negligence has injured an individual, it is precisely the State that is in a better position to spread the costs of the damages it inflicted – rather than a private citizen, who is left with no remedy. As Chemerinsky argues, "[I]t is better to spread the costs of injuries from illegal government actions among the entire citizenry than to make the wronged individual bear the entire loss." *Id.* at 1217.

The issue should be not whether insurance is available, but whether the State breached its duty and caused damages. Yes, taxpayers may feel the impact of damage judgments on the state treasury, and when taxpayers feel that impact, they will demand better behavior by their government. The ultimate result will be greater government accountability.

Still, I concur.