No. 35127 -- *Doris Michael and Todd Battle v. Appalachian Heating and Cooling, LLC, and State Auto Insurance Company*

FILED
June 11, 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

McHugh, Justice, concurring, in part, and dissenting, in part:

I wholeheartedly agree with the majority's endeavor to eliminate acts of racial or income-based discrimination in connection with insurance settlements. Without question, the aim of the West Virginia Human Rights Act ("Act")[1] to prevent discriminatory conduct remains as laudatory in purpose as when the legislation was initially adopted in 1967. However, the majority's conclusion that the Legislature has authorized third parties to assert a cause of action for allegedly discriminatory insurance settlements based on the protections extended by the Act is untenable. This is because third-party relief for insurance-related discrimination has never been expressly, or even impliedly authorized in the Act, or in any other legislative enactment for that matter.[2] As a result, the majority has clearly exceeded both the scope of the Act and the intended reach of the Act's protections.

In deciding that the Legislature has authorized a third-party cause of action for discriminatory insurance settlements under the Act, the majority overlooks numerous

[1]*See* 5-11-1 to -21 (2006).

[2]*But see* W.Va. Code § 33-11-4(7) (2006) (prohibiting unfair discrimination in connection with insurance rate setting); W.Va. Code § 33-11-4(9) (proscribing specified "unfair claim settlement practices").

impediments, both legal and logical. First and foremost, is the fact that the Act was never intended to and *does not* address the subject of insurance.[3] Nowhere in the Act is there any language that pertains to the issue of proscribing discriminatory acts in connection with insurance – be it the procurement of a policy or the settlement of a claim. A review of the Act, both its policy statement and its provisions, makes clear that the Legislature intended to limit the reach of the discriminatory conduct prohibited by the Act to matters that involve (1) employment; (2) *access* to places of public accommodation; and (3) procuring housing accommodations or real property and obtaining related financing. *See* W.Va. Code § 5-11-2 (setting forth legislative purpose of W.Va. Human Rights Act).

By presuming that the Plaintiffs' residency in public housing brought them within the ambit of the Act,[4] the majority misapprehends the protections extended by the Act. The definition of "place of public accommodation" provided by the Act demonstrates that public housing and public accommodations are not synonymous. A "place of public accommodations" is defined, in pertinent part, as "any establishment or person . . . which offers its services, goods, facilities or accommodations to the general public. . . ." W.Va. Code § 5-11-3(j). By definition, public housing is not a "place of public accommodations"

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[3]*See* Syl. Pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975) ("The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.").

[4]Plaintiffs contend that they "are members of a protected class under the West Virginia Human Rights Act as they are black and reside in public housing."

because it is not available to the general public.[5] Through its use of the phrase "place of public accommodations," the Legislature was addressing its concern that citizens of this state be provided equal access to places that are utilized by the general public. Thus, the Plaintiffs' residence in public housing does not make them members of a "protected class" under the Act. It is worth noting that a separate legislative enactment - the West Virginia Fair Housing Act - was adopted for the purpose of addressing issues of discrimination that arise in connection with the sale or rental of housing and the "provision of services or facilities in connection therewith."[6] W.Va. Code § 5-11A-5(b).

The area of insurance regulation is separately and extensively addressed in chapter thirty-three of our state code. *See* W.Va. Code §§ 33-1-1 to 33-48-12 (2006 & Supp. 2009). Had the Legislature intended to establish a third-party cause of action for discriminatory settlements, both reason and logic suggest that the enabling provision would have been included within that area of the state code expressly reserved for insurance

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[5]Various issues such as income level, disability, or other legislatively-designated factors control whether an individual qualifies to reside in public housing.

[6]The fact that the Plaintiffs did not assert a claim under the W. Va. Fair Housing Act further suggests that their residency in public housing has no legal significance to the underlying claim. While I appreciate the Plaintiffs' position that they received less damages (not for actual property damage but for their aggravation and inconvenience in connection with their property damage claims) than they believed they were entitled to based on their public housing residency, their claim is controlled by insurance laws and not our human rights laws. *See, e.g.*, W.Va.R. Insurance 114 § 14-6.4.b. (setting forth insurance regulations controlling determination of whether an insurance settlement is "unreasonably low").

regulation.[7] *See id.* This conclusion is buttressed by the fact that this Court relied upon a provision in chapter thirty-three to recognize the existence of an implied third-party cause of action for bad faith settlements. *See* W.Va. Code § 33-11-4(9).[8] And when the Legislature acted to eliminate those third party bad faith causes of action, the clarifying legislation was also enacted as part of chapter thirty-three.[9] *See* W. Va. Code § 33-11-4a (2005).

In unmistakably clear terms, the Legislature confined the application of the Act to "only those practices specified in section nine [§ 5-11-9] of this article" that are expressly deemed to be "unlawful discriminatory practices." W.Va. Code § 5-11-3(i). Citing specifically to this limiting language, we have recognized that the principle of liberally construing the Act for purposes of effecting its purposes set forth in West Virginia Code § 5-11-15 "does not apply in ascertaining if an act is an unlawful discriminatory practice" in light of subsection 3(i). *W. Va. Inst. of Tech. v. W. Va. Human Rights Comm'n*, 181 W.Va.

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[7]It is unavailing to suggest that the subject matter of discrimination, as it relates to insurance, would not be contained in chapter thirty-three as the Legislature has included the issue of "unfair discrimination" with regard to both rate setting and benefits payable in West Virginia Code § 33-11-4(7).

[8]*See Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981), *superseded by* W.Va. Code § 33-11-4a (2005).

[9]Logic also undercuts the notion that a legislature who has acted to eliminate third-party causes of action within the schema of insurance regulation would sanction third-party relief against insurers under the human rights act.

525, 537 n. 17, 383 S.E.2d 490, 502 n.17 (1989). Because the Act cannot apply to any discriminatory conduct unless the proscribed conduct falls squarely within subsection nine, the absence of any reference to insurance in the Act is significant. *See* W.Va. Code § 5-11-9.

In trying to find a way to bring an insurance settlement under the Act, the majority looks to the language of West Virginia Code § 5-11-9(7)(A). That provision makes it an "unlawful discriminatory practice" to:

> Engage in any form of threats or reprisals, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section.

W.Va. Code § 5-11-9(7)(A).

Following the Plaintiffs' lead, the majority "cherry picks" certain terms ("embarrass" and "economic loss") from subsection seven (A) to serve its purposes. At the core of the Plaintiffs' complaint is their contention that they were under-compensated for the "aggravation and inconvenience associated with being displaced from their home."[10]

[10]The Plaintiffs do not challenge the amount of the settlement moneys they received in connection with their respective actual property damage claim (Doris Michael and Todd Battle received $19,446.56 and Kitrena Michael received $3,545.15). What they take issue with is the non-economic aspect of the loss–-the "inconvenience and aggravation" they sustained in connection with their property damage claim.

Understandably, the Plaintiffs sought to come under the only provision of the Act that refers to monetary loss[11] as a means of increasing the amount of their insurance settlement.[12] Falling into the intellectual trap set by the Plaintiffs, however, the majority fails to appreciate that the emphasis of West Virginia Code § 5-11-9(7)(A) is not the nature of the resulting harm (i.e. emotional or monetary) but the fact that the conduct was specifically aimed at causing the harm that results. I submit that in overlooking this pivotal language that requires purposeful discrimination, the majority goes seriously astray of the Legislature's intent.

In the six subsections that precede subsection seven of West Virginia Code § 5-11-9, each provision is clearly aimed at two of the three subject matters identified in the Act's statement of legislative purpose. *See* W.Va. Code § 5-11-2. Those two matters are employment and access to places of public accommodation. Subsections one through five are expressly directed at the actions of employers, employment agencies, or labor organizations. *See* W.Va. Code § 5-11-9(1) to (5). Subsection six is directed at any person who is a[n] "owner, lessee, proprietor, manager, superintendent, agent, or employee of any

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[11]As the majority acknowledged, the Plaintiffs cited to West Virginia Code § 5-11-9(A), rather than 5-11-9(7)(A), in their complaints. By averring that the defendant insurer acted "in such a way as to degrade the plaintiffs, to embarrass the plaintiffs and to cause the plaintiffs economic loss as set forth in 5-11-9(A)," they do appear to be referring to the language of West Virginia Code § 5-11-9(7)(A) in their complaint.

[12]Because the type of damages the Plaintiffs complain about (aggravation and annoyance) are generally viewed as non-economic in nature, it is questionable whether such alleged loss could even be claimed under W.Va. Code § 5-11-9(7)(A).

place of public accommodations." W.Va. Code § 5-11-9(6). The final subsection – subsection seven – is directed at "any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution." W.Va. Code § 5-11-9(7). In contrast to the preceding six subsections, subsection seven is written in a broader and more encompassing fashion. It is the only subsection that addresses the third aim of the Act: the procurement or financing of housing or real property.

To bring insurers under the Act, the majority concludes that an insurance company comes within the meaning of the term "person" as that term is used in West Virginia Code § 5-11-9(7). *See* W.Va. Code § 5-11-3(a). When you consider the definition of "person" under the statutory definition set forth in West Virginia Code § 5-11-3(a)[13] independent of any other provision of the Act, an insurance company could conceivably fall under the list of entities that qualify as persons. But when you plug that term into West Virginia Code § 5-11-9(7)(A) and conclude, as does the majority, that the Legislature was specifically including insurers within the entities subject to action upon commission of the specified acts of unlawful discrimination, the application does not withstand scrutiny. My conclusion is premised on the fact that the delineated acts of unlawful discrimination in each

[13]A "person" is defined under the Act to include "one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." W.Va. Code § 5-11-3(a).

of the subsections of section nine, as well as the parties to whom subsection seven is aimed at, all fall within one of the Act's three concerns: (1) employment; (2) access to public accommodation; and (3) procurement of housing or real estate and related financing. *See* W.Va. Code § 5-11-9(7)(A). As the Act does not contain even one reference to insurance, it is simply illogical to reach the conclusion that the Legislature specifically included insurers among the potential discriminatory actors it was targeting by its use of the term "person." *See* W.Va. Code §§ 5-11-3(i), -9, -(9)(7). What makes infinitely more sense is to view the legislative omission of insurers from the designated list of potential discriminators as intentional.

Not only is the majority's decision to find authority for including insurers under the definition of "person" demonstrably inconsistent with the Act's purposes, it requires the presumption that by its use of the term "person" the Legislature decided to cast its "unlawful discriminatory practice" net in an uncharacteristically broad fashion. This seems improbable given that the Legislature intentionally constrained the reach of the Act so that it applies to only those "unlawful discriminatory practices" that are expressly set forth in section nine. *See* W.Va. Code § 5-11-9-3(i). The legislative framework of subsection seven correlates specific entities such as employers, labor organizations, and proprietors of places of public accommodation to particularized acts of unlawful discrimination. With the exception of the term "person," each of the entities that is specified within West Virginia

Code § 5-11-9(7)(A) falls squarely within the legislatively-identified purposes of the Act. As a result, the majority's reliance upon the arguably amorphous term "person" as the *only* mechanism by which the Legislature expressed its intent to bring insurance companies under the Act appears both specious and misguided. *See Davis Mem'l Hosp. v. State Tax Comm'r*, 222 W.Va. 677, 683, 671 S.E.2d 682, 688 (2008) (recognizing that "statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part") (citations omitted).

In addition to wrongly finding insurers within the intended reach of the Act, the majority adopted an overly-broad new point of law in holding in its syllabus point seven that West Virginia Code § 5-11-9(7)(A) "prohibits unlawful discrimination by a tortfeasor's insurer in the settlement of a property damage claim when the discrimination is based upon race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status." The question presented by the lower court was limited to seeking guidance on whether the Act provides for a cause of action against a tortfeasor's insurance carrier when the alleged discriminatees are African-American and reside in public housing. Not only did the majority go beyond what was necessary to resolve the question presented, but it failed to properly tailor the new point of law to the statutory language upon which it expressly relies as authority for a third party cause of action. Missing from syllabus point seven is language which tracks the statutory requirement of West Virginia Code § 5-11-9(7)(A) that the alleged

discriminatory conduct was effected for the purpose of causing the statutorily-specified harms. The Legislature was clear in subsection seven (A) that it is not the conduct alone that is the triggering event, but the fact that such conduct was effected for the express *purpose* of harassment, degradation, embarrassment, physical harm, or economic loss. *See* W. Va. Code § 5-11-9(7)(A) (emphasis supplied). By its omission of this essential statutory language, the majority has improperly and unwisely broadened the scope of subsection seven (A) with absolutely no legislative authority. *See id.*

In its rush to create a new cause of action, the majority overlooks the critical fact that a cause of action already exists for the conduct at issue in the underlying case. Under 42 U.S.C. § 1981 (2006), "[a]ll persons . . . shall have the same right in every State and Territory *to make and enforce contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ." *Id.* (emphasis supplied). The authority to seek redress for discrimination occurring in the context of insurance claims and settlements has been recognized to exist under this federal rights statute. *See Harris v. McDonald's Corp.*, 901 F.Supp. 1552, 1558 (M.D. Fla. 1995); *Singh v. State Farm Mut. Auto Ins. Co.*, 860 P.2d 1193, 1198-99 (Ala. 1993).[14]

[14]While the plaintiffs could have included a claim for relief under 42 U.S.C. § 1981 in their complaint, they did not.

Under 42 U.S.C. § 1981, the statutory language that pertains to the making and enforcement of contracts is the fulcrum that permits a cause of action for discriminatory insurance settlements to be maintained. Commenting on why insurance settlements fall under this language, the Alaskan Supreme Court observed: "It is well established that a settlement is a contract, provided that it meets minimal contractual requirements." *Singh*, 860 P.2d at 1199. It is of no surprise then that every single court which has recognized the type of claim under discussion has either looked to a state enactment that expressly recognizes relief for discrimination in connection with the making of or enforcement of contracts[15] or to 42 U.S.C. § 1981. Based on the authority relied upon by the majority, it is clear that West Virginia is the only state to recognize a cause of action for third-party relief under a state human rights act when the subject legislation lacks a provision that expressly prohibits discrimination with regard to the making and enforcement of contracts.[16] This distinction is not only critical, it is determinative.

Because our Act lacks the necessary basis for asserting discriminatory conduct against insurance companies – either inclusion of "the making and enforcement of contracts"

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[15]*See Ellis v. Safety Ins. Co.*, 672 N.E.2d 979, 987 (Mass. App. Ct. 1996) (applying state law to allow first-party civil rights claim to survive summary judgment but disallowing third-party claim based on lack of contractual relationship between third parties and insurer).

[16]While the majority cites California as prohibiting discrimination in insurance settlements, that codification does not provide for a third-party cause of action. *See* Cal. Code Regs. Administrative Law 10, § 2695.7(a) (2006).

language or specific identification of insurers as entities within the intended reach of the Act – the majority's conclusion that the Act "prohibits unlawful discrimination by a tortfeasor's insurer in the settlement of a property damage claim" is not defensible. Rather than condoning any acts of alleged discriminatory conduct that may have occurred in this case, I seek only to apply the statute as it was written.[17] Convinced that the Act does not authorize a third party cause of action against insurers, I respectfully dissent from the majority's conclusion to the contrary. Of the four new points of law created by the majority, I do not take issue with the thrust of syllabus point five because it merely recites the statutory language of West Virginia Code § 5-11-9(7)(A).[18] Accordingly, I concur, in part, and dissent, in part.

[17]While the majority claims to be applying the Act, the absence of a defensible basis for presuming that the Legislature intended to address the issue of insurance-related discrimination outside chapter thirty-three of the Code demonstrates that the majority has indeed engaged in interpretation to reach its desired result.

[18]With regard to the majority's statement in syllabus point five that three distinct causes of action are created in West Virginia Code § 5-11-9(7)(A), the Act does not explicitly recognize the establishment of a cause of action for the proscribed discriminatory conduct. Instead, the Act contemplates the filing of a complaint before the Human Rights Commission. *See* W.Va. Code § 5-11-10. As an alternative to filing such a complaint, this Court has recognized that relief may be sought from a circuit court. *See* Syl. Pt. 1, *Price v. Boone County Ambul. Auth.*, 175 W.Va. 676, 337 S.E.2d 913 (1985).