No. 33190 *Michael Worley and Cynthia Worley, his wife v. Beckley Mechanical, Inc., et al.*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I concur with the result reached by the majority opinion, reversing the dismissal of the plaintiff's complaint. I write separately because I am inclined to take a somewhat different approach to the issues raised in the instant case.

First, as the majority opinion ably discusses, scientific and public understanding of brain disorders has hugely improved since the time when the statute in question, *W.Va. Code,* 55-2-15 [1923] was enacted.

Moreover, our ability to ameliorate these disorders has improved as well. Today, many people with severe mental illnesses are not "insane" for all times. Rather, the severe and acute disabling symptoms of many brain disorders can be abated with medical treatment. (And the symptoms can also recur, of course.) Today's law must recognize this fundamental fact.

Second, *W.Va. Code*, 55-2-15 (1923), read literally, *only* applies in instances when a person is "insane" – i.e., severely disabled by a brain disorder – *at the time that their right to bring a suit accrues.* The statute *by its own terms* has no applicability to the facts of the instant case – where the plaintiff's right accrued *before* he became "insane."

However, in the interest of fairness, the majority opinion looks to what the statute "intends," even if that intention contradicts the statute's literal meaning. I do not

quarrel with taking such an approach – in order to apply a statute that was created in earlier times to modern realities. For a good discussion of how courts do this all the time, *see* Calabresi, Guido, "A Common Law for the Age of Statutes," Harvard University Press 1982.

But there is another way that such fairness could be reached in the instant case (and in future cases), without contradicting the statute's clear meaning. This Court could simply hold that the running of the statute of limitations *may* be equitably tolled or suspended during the period of a plaintiff's "insanity."

This approach might, in some cases, result in greater fairness than the approach of the majority opinion. Under the majority opinion's approach, a party who is injured might be seen as required to have *almost immediately* filed suit to avoid a possible legal bar to his claim – if a mental illness should later render him incapable of taking action within the statute of limitations. This would not be prudent or fair. We should not be in a position of pushing people to file lawsuits quickly; nor should we sanction unfairness against people with disabilities.

The law is not so obsessed with statutes of limitation as to preclude equitably tolling statutes of limitation in some cases of temporary disability. After all, an injured twelve-year-old has *six years* to file a tort action, and the law finds no problem in subjecting a defendant to such a potential delay in a claim being brought.

Therefore, I suggest that a court could, for good cause shown and in accord with equitable principles, extend a statute of limitations to exclude periods of "insanity" –

rather than impose an up-front duty to file a lawsuit while one is still sane or risk being forever barred from suit.

As I read the majority opinion, it does not preclude such an equitable tolling. I think a trial court that had good grounds for such a holding would find support on appeal, for the "fairness" reasons that underlie the majority opinion.

Consequently, I concur.