

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MISTY BLESSING, individually,
and as the administrator of
THE ESTATE OF WALLIE BLESSING,

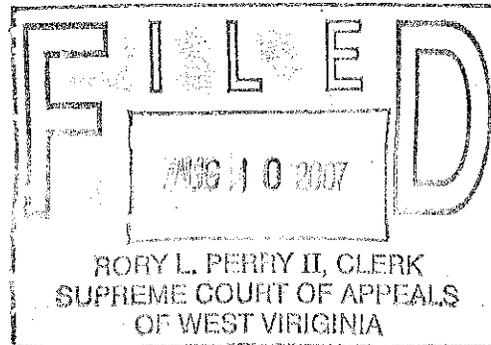
Appellant (Plaintiff below),

v.

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, an agency of the State of
West Virginia; and, BYRON SMITH,
P.E., Individually.

Appellees (Defendants below).

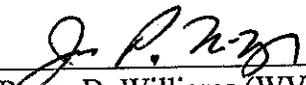
Case No.: 33433



APPELLANT'S BRIEF.

MISTY BLESSING, individually,
and as the administrator of
THE ESTATE OF WALLIE BLESSING,

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TABLE OF CONTENTS

	<u>Page</u>
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.....	1
II. STATEMENT OF FACTS.....	2
III. ASSIGNMENTS OF ERROR.....	6
IV. POINTS AND AUTHORITIES.....	7
V. STANDARD OF REVIEW.....	9
VI. DISCUSSION OF LAW.....	9
VII. CONCLUSION.....	21

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APPELLANT'S BRIEF

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The Petitioner, Misty Blessing, individually and as the administrator of the estate of her late husband, Wallie Blessing, filed a wrongful death action against several Defendants, including the West Virginia Department of Transportation, Division of Highways ("WVDOT") and Byron Smith, P.E. ("Mr. Smith"). The WVDOT and its employee, Mr. Smith moved the Circuit Court for Summary Judgment. The Motion for Summary Judgment of WVDOT and Mr. Smith did not directly address the liability of WVDOT or Mr. Smith. Rather, these Defendants alleged that the Circuit Court lacked subject matter jurisdiction over them as a result of

Sovereign Immunity from civil liability for negligence pursuant to Article VI, Section 35 of the Constitution of the State of West Virginia.

The claims against WVDOT and Mr. Smith were dismissed, by Order of the Circuit Court, dated September 13, 2006, pursuant to the motion for Summary Judgment filed by the WVDOT and Mr. Smith (Docket No. 206). Petitioner Appeals from this Dismissal Order.

In the September 13, 2006 Order, the Circuit Court found that there is no applicable insurance coverage under the State of West Virginia Insurance Policy and that the WVDOT and its employee, Mr. Smith are therefore entitled to claim Sovereign Immunity.

The claims against all Defendants, other than WVDOT and Mr. Smith, have either been voluntarily dismissed or settled. The Circuit Court's Final Order in the case was entered on December 15, 2006 (Docket No. 240).

II. STATEMENT OF FACTS

A. Background.

Plaintiff's decedent, Wallie Blessing worked for Defendant National Engineering & Contracting Company ("NECC"). Defendant NECC contracted with Defendant WVDOT to construct a bridge in Man, Logan County, West Virginia. Plaintiff's decedent was killed while working on a "tremie scaffold" erected during construction of a bridge by the WVDOT in Logan County, West Virginia. Defendant Mr. Smith was the WVDOT in-house Project Supervisor. At all times material hereto, Mr. Smith was an employee of the State of West Virginia and working for the WVDOT.

A "tremie scaffold" is special scaffolding involving a tremie pipe and a concrete hopper. The tremie pipe is used to pour concrete into caissons that form the pillars that the bridge deck

sits upon. On October 3, 2003, Wallie Blessing was working and standing upon the tremie scaffold when it toppled over and he suffered serious physical injuries subsequently resulting in his death on October 5, 2003. The Plaintiff contends that her decedent's death was caused by the negligence of the WVDOT, the Project Supervisor, Mr. Smith and others. Three counts in Plaintiff's Complaint apply to WVDOT and its employee, Mr. Smith: Count III (negligence); Count IV (professional negligence); and, Count V (premises liability)(Amended Complaint, Docket No. 67).

In this case, Plaintiff seeks no recovery from the State's coffers. In this regard, in her Amended Complaint, Plaintiff alleged at paragraph 5:

That the plaintiff in this cause of action, regarding only her claim against the WVDOT, seeks to recover under and only up to the limits of the liability insurance coverage in effect and applicable to the allegations in this Complaint against the defendant WVDOT (See Plaintiff's Amended Complaint, Para. 5, Docket No 67).

In this case, there are two insurance policies that the Plaintiff contended provide coverage to the WVDOT and its employees, such as Mr. Smith: the National Union Policy issued to the State of West Virginia and The Liberty Mutual Policy issued to Defendant Balfour Betty Construction, Inc. ("BBCI") and NECC. ("Plaintiff's Memorandum of Opposition to Motion for Summary Judgment of Defendants West Virginia Department of Transportation, Division of Highways and Byron Smith," Docket No. 192, Tab A and Tab B ("Plaintiff's Memorandum in Opposition")). There is also an indemnity agreement in the construction contract between the State and NECC that is the equivalent of insurance [for the purpose of Pittsburgh Elevator Co. v. West Virginia Board of Records, 172 W.Va. 743, 310 S.E.2d 675 (1983)] because it shifts the risk away from the State treasury.

B. The National Union Policy.

In the Motion for Summary Judgment, the WVDOT and its employee Mr. Smith acknowledged that the State of West Virginia has a comprehensive general liability insurance policy, referred to above as the "National Union Policy" that covers the WVDOT and its employees. Nevertheless, both the WVDOT and its employee Mr. Smith contend that because of Endorsement 7 of the National Union Policy, that there is no coverage (See Endorsement 7, "Excluded Premises-Operations"). This Court has construed Endorsement 7 in earlier cases. Every time this Court construes the Endorsement, the State of West Virginia Board of Risk rewrites the endorsement to narrow its scope.

In this case, the Circuit Court concluded that without insurance, Defendants WVDOT and Mr. Smith are immune.

Endorsement 7 states in pertinent part, as follows:

The insurance afforded under this policy does not apply to any claim resulting from the ...construction...of...bridges...but it is agreed that the insurance afforded under this policy does apply ...to claims...which both directly result from and occur while employees of the State of West Virginia are physically present at the site of the incident....performing construction.... (but excluding inspection of work being performed or materials being used by others)....

On its face, the endorsement does not exclude coverage for claims for "bodily injury..."

which both directly result from and occur while employees of the State of West Virginia are physically present at the site of the incident at which the bodily injury...occurred performing construction....(but not including inspection of work being performed or materials being used by others).

The only exhibits attached to the WVDOT motion for summary judgment deal with the State insurance policy itself. There were no references to any transcript of any testimony or other evidence, which obviously was insufficient to make a prima facie motion in the first instance.

C. NECC's Indemnity Agreement with the WVDOT and the "Liberty Mutual Policy".

Plaintiff contended below that the WVDOT and its employee, Mr. Smith should not have been dismissed for at least two other reasons: namely, WVDOT was the beneficiary of an indemnity agreement with another Defendant, NECC; and, WVDOT and Mr. Smith were additional insureds under the "Liberty Mutual Policy" issued to Defendants BBCI and NECC. While the WVDOT filed a motion for indemnity against NECC, the WVDOT never really sought to assert its rights under the Liberty Mutual Policy. In the Dismissal Order, the Court found there was indemnity, but apparently concluded it was meaningless. The likely impetus for the WVDOT's less than enthusiastic attempt to enforce the indemnity clause and the Liberty Mutual coverage is that Endorsement 7 in the National Union Policy has been interpreted, in the past, to give the WVDOT immunity and no party has ever raised the issue of what happens when there is indemnity or another insurance policy. The problem with WVDOT's approach (and the Dismissal Order of the Court) is that Endorsement 7 and the potential immunity that flows from it, only applies to the National Union Policy. It has no bearing or relationship to either the indemnity agreement or the Liberty Mutual Policy that covers an "insured contract."

In this case, the Plaintiff raised three sources of "insurance," or the equivalent, to avoid immunity. In its order, the Circuit Court only addressed the first argument raised and granted the WVDOT summary judgment.

Obviously, "the Liberty Mutual Policy" is relevant here because it covers "insured contracts." An insured contract is a contract that agrees to indemnify owners such as the WVDOT. In this case, there was an "insured contract." Specifically, Defendant WVDOT entered into an indemnity agreement with Defendant NECC wherein NECC agreed to indemnify

Defendant WVDOT and, by extension, its employees.

In this regard, the CONTRACTOR'S PROPOSAL form provided to the Defendant NECC by Defendant WVDOT, states:

The acceptance of this proposal for said work, the undersigned will give the required bond with good security, conditioned for the faithful performance of said work, according to said plans and specifications, and the doing of all other things required by said specifications for the considerations herein named and with the further condition that the State of West Virginia shall be saved harmless from any and all damages that might accrue to any person, persons or property by reason of the carrying on of said work, or part thereof, or by reason of negligence of the undersigned, or any person or persons under his employment and engaged in said work (emphasis added) (Plaintiff's Memorandum in Opposition, Tab F, para. 2).

Furthermore, in the CONTRACT between Defendant WVDOT and Defendant NECC, dated December 11, 2002, the "Contractor" (NECC) agreed as follows:

Contractor agrees to conform to the laws of the State of West Virginia in reference to keeping the project open, and to all other legal requirements not mentioned herein, or specified; to keep all employees engaged on said work protected by the Worker's Compensation Fund in compliance with the act of the Legislature of West Virginia, known as the Worker's compensation act, which is made part hereof and to save the Department harmless from all liability for damage to persons or property that may accrue during and by reason of the acts or negligence of the Contractor, his agents, employees, or subcontractors if there be such (emphasis added) (Plaintiff's Memorandum in Opposition, Tab G, para. 4).

Additionally the CONTRACTOR'S PROPOSAL is adopted and made part of the actual CONTRACT:

Understood and agreed that the plans, specifications and proposals, as well as the "information for bidders," a copy of which is hereto attached, are each made a part of this contract, and each and every provision therein not herein specifically set forth shall be considered as binding upon the parties hereto as though the same were herein written (emphasis added) (Plaintiff's Memorandum in Opposition, Tab G, para. 11).

III. ASSIGNMENTS OF ERROR

The Court erred by Granting Summary Judgment to WVDOT and Mr. Smith for the

following reasons:

1. Defendants' Summary Judgment Motion was not supported by evidence.

The Court erred by granting WVDOT and Mr. Smith's Motion For Summary Judgment where the motion for summary judgment did not include evidence and was therefore insufficient to shift any burden to Plaintiffs to rehabilitate, pursuant to Rule 56(c).

2. There remained material issues of fact with respect to the National Union Policy.

The Court erred by granting Summary Judgment to WVDOT and Mr. Smith where there were questions of fact for the jury as to whether WVDOT employees were actually engaged in "construction" rather than simply "inspections," pursuant to Endorsement 7 of the National Union Policy.

3. The Defendants had access to indemnity and insurance, so the State's treasury was never in jeopardy.

The Court erred in narrowly focusing its inquiry under Pittsburg Elevator Co. v. West Virginia Board of Regents, 172 W.Va. 743, 310 S.E. 2nd 675 (1983) on the "National Union Policy" and ignoring the other funding sources available to insulate the State treasury, such as an applicable Indemnity agreement and the fact that WVDOT and Mr. Smith are insured under the "Liberty Mutual Policy."

4. Sovereign Immunity is an archaic method of allocating risk.

The Court erred by relying on the outdated concept of Sovereign Immunity when deciding to grant the Motion for Summary Judgment of WVDOT and Mr. Smith.

IV. POINTS AND AUTHORITIES

A. When a Motion for Summary Judgment is not supported by "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any..." a Court should not grant Defendants' Motion.

Rule 56(c) of the West Virginia Rules of Civil Procedure

B. Summary Judgment is not appropriate when there are material issues of fact.

C. Insurance policies are to be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.

Rule 56(c) of the West Virginia Rules of Civil Procedure

Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W. Va. 1995)

Craig v. Lightner, 178 W.Va. 765, 769 n.2, 364 S.E.2d 778 (1987)

Floyd v. Equitable Life Assurance Society, 264 S.E.2d 648 (W. Va. 1980)

State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995)

Mandolidis v. Elkins Indus., Inc., 161 W.Va. 695, 246 S.E.2d 907 (1978)

D'Annunzio v. Security-Connecticut Life Ins. Co. 186 W.Va. 39, 41, 410 S.E.2d 275, 277 (1991)

Russell v. Burchett, 210 W.Va. 699, 539 S.E.2d 36 (2001)

D. Suits which seek no recovery from state funds, but rather allege that recovery will be satisfied by some third party, or up to the limits of any applicable liability insurance coverage, fall outside the traditional constitutional bar to suits against the State

E. When a State Agency or employee is indemnified by a third party co-defendant, they stand "in the same shoes as the insured (co-defendant) for coverage purposes..." under the indemnitor's commercial liability policy if the policy covers "insured contracts." The liability of such employees will not expose the State treasury to losses and therefore, such coverage is sufficient to satisfy the fiscal concerns of Pittsburgh Elevator Co. v. West Virginia Board of Records, 172 W.Va. 743, 310 S.E.2d 675 (1983) and obviate the State's Sovereign Immunity.

F. When a State Agency or employee is indemnified by a third party co-defendant, regardless of whether there is an applicable insurance policy, the liability of such employees will not expose the State treasury to losses and therefore, such indemnity is sufficient to satisfy the fiscal concerns of Pittsburgh Elevator Co. v. West Virginia Board of Records, 172 W.Va. 743, 310 S.E.2d 675 (1983) and obviate the State's Sovereign Immunity.

Rule 56(c) of the West Virginia Rules of Civil Procedure

Mellon-Stuart Co. v. Hall, 178 W.Va. 291, 359 S.E.2d 124 (1987)

Pittsburgh Elevator Co. v. West Virginia Board of Records, 172 W.Va. 743, 310 S.E.2d 675 (1983)

VanKirk v. Green Const. Co., 195 W.Va. 714, 466 S.E.2d 782 (W.Va.,1995)

WV Code 33-1-1. Definitions. Insurance.

WV Code 33-41-2. Privileges and Immunity. Definitions.

WV Code 33-44-3. Unauthorized Insurers Act. Definitions.

Marlin v. Wetzel County Board of Education, 212 W.Va. 215, 569 S.E.2d 462 (2002).

G. Sovereign Immunity is an archaic method of allocating risk.

Pittsburgh Elevator Co. v. West Virginia Board of Records, 172 W.Va. 743, 310 S.E.2d 675 (1983)

Coal & Coke Ry. Co. v. Conley, 67 W.Va. 129, 67 S.E. 613 (1910)

Poindexter v. Greenhow, 114 U.S. 270, 290, 5 S.Ct. 903, 914, 29 L.Ed. 185 (1885)

City of Morgantown v. Ducker, 153 W.Va. 121, 168 S.E.2d 298 (1969)

V. STANDARD OF REVIEW

Perhaps the most comprehensive treatment of the standard of review for summary judgment motions is in Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W. Va. 1995). In that case, our Supreme Court established the following three syllabus points:

1. A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried....
2. Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party....
3. If the moving party makes a properly supported motion for summary judgment

and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party....¹(emphasis added).

VI. DISCUSSION OF LAW

A. Summary Judgment was not appropriate under Rule 56(c).

The Williams Court offered further guidance as to the appropriate standard of review in the body of its opinion wherein it stated:

Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows by "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Williams, 459 S.E.2d at 336. In a case, such as this, where the Defendants' motion is not supported by pleadings, depositions, answers to interrogatories and admissions, a motion for summary judgment should be denied. Moreover, since the Defendants failed to show "by affirmative evidence that there is no genuine issue of a material fact," the burden of production never shifted to the nonmoving party (Plaintiff).

B. Material issues of fact should have precluded summary judgment in this case.

In Williams, supra, this Court cautioned that:

[t]he circuit court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. . . . In assessing the factual record, **we must grant the nonmoving party the benefit of inferences, as "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]"** Anderson, 477 U.S. at

¹ In other words, as suggested in Craig v. Lightner, 178 W.Va. 765, 769 n.2, 364 S.E.2d 778, 782 n.2 (1987), the initial burden of production and persuasion is upon the party moving for a summary judgment." Williams, at 337

255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216. Summary judgment should be denied "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir.) cert. denied, 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951).

Id. at 336 (emphasis added; footnotes and citations omitted). The Court also noted that "in cases of substantial doubt, the safer course of action is to deny the motion and to proceed to trial." Id.

The Supreme Court of Appeals of West Virginia has been particularly hesitant to grant motions for summary judgment where varying inferences can be drawn from evidence in the record. Floyd v. Equitable Life Assurance Society, 264 S.E.2d 648, 650 (W. Va. 1980).

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, the opposing party is only required to respond to a Summary judgment motion that is properly supported by "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In this regard, the Supreme Court has noted that when a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion." Williams, 459 S.E.2d at 335. The contrary is likewise true. If a motion is not properly supported, there is no burden on the nonmoving party to rehabilitate. For example, in order for the Court to determine that there is no question of fact on the National Union Policy, at a minimum, the court would have to conclude the following: There were no State employee(s) present at the site of the incident; and, the employee(s) were not performing construction work

(other than inspection of work being performed by others). Of course, this does not address the indemnity argument or the Liberty Mutual argument.

If, for the sake of argument, the WVDOT had produced evidence on these issues, which it did not, Plaintiff would only need to produce contrary evidence to create a question of fact. In the absence of the State providing any evidence on these issues, the motion for Summary Judgment should have been denied. Mere proffers are not acceptable and unverified pleadings are not evidence.

In this case, the Court apparently adopted WVDOT's argument that since Plaintiff has allegedly failed to specifically allege detailed facts to avoid Endorsement 7 (i.e. employees present, engaged in construction work other than inspection), then the Court can find that the endorsement applies. There are two problems with this argument. First, West Virginia is a "notice pleading state". It is well established that "[c]omplaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995); Accord, Mandolidis v. Elkins Indus., Inc., 161 W.Va. 695, 246 S.E.2d 907 (1978).

Second, in order to demonstrate to the Court that there was a question of fact on these issues, the Plaintiff submitted the following evidence in its response to the WVDOT's Motion for Summary Judgment:

- 1) Deposition excerpts from Byron Smith and Jack Hardin, indicating that State Employees were present at the site of the incident performing what could be construed by a jury as "construction work" other than simple inspection.² (Smith, p. 7)(All references to Mr. Smith's deposition excerpts are in Plaintiff's Memorandum in Opposition, Tab C. Mr. Hardin's deposition excerpts are copied at Tab D).

² The plaintiff does not dispute that some employees present, including Jack Hardin, were called "inspectors." Byron Smith, who was also present, was not an Inspector. Rather, he was the Project Supervisor.

- 2) Answer to Interrogatory No. 2 from "H.C. Nutting Company's Responses to Site Blauvelt Engineers, Inc.'s First Set of Interrogatories and Requests for Production of Documents" in which HC Nutting asserts that "H.C. Nutting would occasionally take verbal direction from WVDOH personnel regarding the frequency of testing, materials to be tested and testing related procedures" Similarly, in the response to Interrogatory Number 5, H.C. Nutting notes: "The frequency of testing a given construction material, as well as the methods of testing the materials, is largely based on established procedures dictated by the WVDOH" (emphasis added). These interrogatory responses alone demonstrate the existence of a genuine question of material fact. (Plaintiff's Memorandum in Opposition, Tab E)

The deposition transcripts and interrogatory responses demonstrate that the WVDOT, in general and Mr. Smith in particular acted as a "construction manager" or "project supervisor," rather than simply an inspector. On the day of the incident, Mr. Smith was present at the site, acting as the "Project Supervisor" (Smith, p. 9) or "Project Engineer" (Smith, p. 25). He even witnessed the event (Smith, p. 24).

In addition, Mr. Smith had the right (and Petitioner believes an obligation) to intervene in the work in progress when he witnessed unsafe events. Mr. Smith actually exercised this right at a "practice pour." (Smith, Depo. at p. 17-18)

During the construction project, Mr. Smith was the State's senior representative on the job site. Mr. Smith and others representing the State reserved the ability to instruct NECC on construction methods (Smith, p. 11). Moreover, the State was responsible for approving progress payments (Smith, p. 9). Normally, such functions are reserved for a "Project Manager" or "Project Supervisor." Mr. Smith could have altered unsafe work practices. In this regard, after the practice pour, Mr. Smith, noted unsafe activities and decided that the procedures would be altered (Smith, p. 17-18).

Clearly, the term "inspection" should be narrowly construed in favor of coverage and the

term "construction" should be broadly construed in favor of coverage. See D'Annunzio v. Security-Connecticut Life Ins. Co. 186 W.Va. 39, 41, 410 S.E.2d 275, 277 (1991). See also Syl. Pts. 4 and 5. of Russell v. Burchett, 210 W.Va. 699, 539 S.E.2d 36 (2001) ("Where policy language is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." and "The general rule of construction in governmental tort cases favors liability, not immunity"). Even if WVDOT employees were engaged in "inspection," they were also engaged in "construction." At a minimum, the Court should have allowed the parties the ability to argue the application of the terms to the jury where the terms are not defined in the policy.

Based on the evidence presented, there was a question of fact on the Endorsement 7 Immunity issue and the Court should have denied the motion for summary judgment filed by the WVDOT and Mr. Smith and allowed the Plaintiff to proceed to full discovery on the issue of the negligence of WVDOT and Mr. Smith and present the matter to a jury.

C. The WVDOT and Mr. Smith are not immune from liability where a suit seeks no recovery from the State treasury.

The State of West Virginia is only immune from suit if said suit exposes the State's general treasury. "[T]he policy which underlies sovereign immunity is to prevent the diversion of State monies from legislatively appropriated purposes. Thus, where monetary relief is sought against the State treasury for which a proper legislative appropriation has not been made, sovereign immunity raises a bar to suit." Mellon-Stuart v. Hall 178 W.Va. 291, at 296, 359 S.E.2d 124, at 129 (1987) (citations and footnote omitted).

However, "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 Pt 2., Pittsburgh Elevator Co. v. West Virginia Bd. of Regents 172 W.Va. 743, at 744, 310 S.E.2d 675, at 676 (W.Va.,1983).

The impact of NECC’s indemnity agreement is clear. In VanKirk v. Green Const. Co., 195 W.Va. 714, 466 S.E.2d 782 (W.Va.,1995), the WVDOT brought an action against a construction contractor for indemnification. The West Virginia Supreme Court held that the WVDOT was entitled to recovery based upon the indemnification and insurance language in the construction contract. The specific contract language from the VanKirk case is very similar to the instant agreement and reads thus:

RESPONSIBILITY FOR DAMAGE CLAIMS:

The Contractor shall indemnify and save harmless the Department, its officers and employees, from all suits, actions, or claims of any character brought because of any injuries or damage received or sustained by any person, persons, or property on account of the operations of the Contractor; ... or because of any act or omission, neglect, or misconduct of the Contractor[.]” (emphasis added).

The phrases “save harmless” and “hold harmless” are terms of art that are used interchangeably with the word “indemnify.”

Black’s Law Dictionary defines a “Hold Harmless Agreement” as “A contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility. Agreement or contract in which one party agrees to hold the other without responsibility for damage or other liability arising out of the transaction. See also Indemnity.”

Black's Law Dictionary defines a "Save Harmless Clause" as "A provision in a document by which one party agrees to indemnify and hold harmless another party as to claims and suits which may be asserted against him. See Hold Harmless Agreement."

The only conclusion to be drawn from the Defendant NECC's "CONTRACTOR'S PROPOSAL" and "CONTRACT" with the Defendant WVDOT is that "that the State of West Virginia [and by extension, employees of the State] shall be saved harmless from any and all damages that might accrue to any person, persons or property by reason of the carrying on of said work"

The indemnity language alone, while not necessarily synonymous with insurance, is nevertheless the practical equivalent of "insurance" for purposes of the analysis set forth in Pittsburgh Elevator Co. v. West Virginia Bd. of Regents 172 W.Va. 743, at 744, 310 S.E.2d 675(W.Va.,1983). The West Virginia Legislature has codified the definition of what insurance is:

WV Code 33-1-1. Definitions. Insurance.

Insurance is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies;

WV Code 33-41-2. Privileges and Immunity. Definitions.

(6) "Insurance" means a contract or arrangement in which a person undertakes to: (A) Pay or indemnify another person as to loss from certain contingencies called "risks," including through reinsurance; and,

WV Code 33-44-3. Unauthorized Insurers Act. Definitions.

(f) "Insurance" is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.

When Defendant NECC agreed to save harmless Defendant WVDOT and its employees, Defendant NECC agreed to indemnify and insure Defendant WVDOT and its employees.

Defendants WVDOT and Mr. Smith were also insured by virtue of specific language in the Liberty Mutual Policy. The Liberty Mutual General Liability Policy provides coverage for "Bodily Injury" "that the insured becomes legally obligated to pay as damages because of "bodily injury" ...to which this insurance applies" (Liberty Mutual Policy, page 1, Bates 03949, Plaintiff's Memorandum in Opposition, Tab B). There is a contractual liability exclusion in the Liberty Mutual Policy, except for cases where the insured has entered into an "insured contract" (Liberty Mutual Policy, page 2, Bates 03950). Here, there is no question that there was an "insured contract" between WVDOT and NECC. In the policy, "insured contract" is defined as "That part of any other contract or agreement...under which you assume the tort liability of another to pay damages because of "personal injury"..." (Liberty Mutual Policy, page 4, Bates 03975). The policy goes on to state "We will defend any claim made or "suit" brought against the "indemnatee".... to the same extent and on the same terms that we would defend if the "indemnatee" were the insured under the policy...." (Liberty Mutual Policy, page 4, Bates 03976).

Consistent with similar policy language, in Marlin v. Wetzel County Board of Education, 212 W.Va. 215, 569 S.E.2d 462(2002), the Supreme Court examined the issue of whether a property owner (like the WVDOT) has the rights of an "additional insured" under a liability insurance policy issued to general contractor (like NECC) that was hired by the property owner to perform construction work (The precise situation here). In that case, the construction contract included an indemnity agreement.

Initially, the Court found that as a result of the indemnity agreement, the construction contract was an "insured contract" sufficient to give rise to coverage for the owner against the

insurance policy of the Contractor. 212 W.Va. at 222, 569 S.E. 2d at 469.

In Syllabus Point 4 of Marlin, the Court concluded:

In a policy for commercial general liability insurance and special employer's liability insurance, when a party has an 'insured contract,' that party stands in the same shoes as the insured for coverage purposes.

In Syllabus Point 5, of Marlin, the Court concluded:

The phrase "liability assumed by the insured under any contract" in an insurance policy, or words to that effect, refers to liability incurred when an insured promises to indemnify or hold harmless another party, and thereby agrees to assume that other party's tort liability.

In applying Marlin to the facts of this case, it becomes clear that the WVDOT has coverage under the Liberty Mutual Policy. Since there are two applicable insurance policies (National Union and Liberty Mutual) and an indemnity agreement here, the Court should find it unnecessary to re-examine the immunity issue. In this case, Plaintiff claims the benefit of Syllabus Point 2 of Pittsburgh Elevator and contends that this syllabus point is sufficient to keep the Defendants WVDOT and Mr. Smith in this case. In an effort to clarify Syllabus Point 2 of Pittsburgh Elevator, as relating to this case, the Plaintiff proposes that the Syllabus point be reformulated to read:

Suits which seek no recovery from state funds, but rather allege that recovery will be satisfied by some third party, or up to the limits of any applicable liability insurance coverage, fall outside the traditional constitutional bar to suits against the State.

Under the circumstances of this case and the authority of Pittsburgh Elevator, the Court should have denied the Motion for Summary Judgment of WVDOT and Mr. Smith.

D. The continuing validity of the archaic Sovereign Immunity Bar is outdated and should be reconsidered.

The law promulgated in the Pittsburgh Elevator case remains the benchmark case when a

state agency claims immunity from suit. In Pittsburgh Elevator, the West Virginia Supreme Court made several important observations concerning the reasons for holding that there is no immunity if the State has insurance coverage. For example, the Court noted:

the constitutional bar to suit contained in article VI, section 35, is apparently irreconcilable with the fundamental rights of due process and access to the courts guaranteed by article III. See State ex. rel. Phoenix Insurance Co. v. Ritchie, 154 W.Va. 306, 175 S.E.2d 428 (1970). Pittsburgh Elevator, 172 W.Va. at 750, 310 S.E. 2d at 682.

The Court distinguished between the "State" and the "government of the State:"

In distinguishing between the "State" and the "government of the State," the Court in Coal & Coke Ry. Co. v. Conley, [67 W.Va. 129, 67 S.E. 613(1910)] relied upon the decision of the United States Supreme Court in Poindexter v. Greenhow, 114 U.S. 270, 290, 5 S.Ct. 903, 914, 29 L.Ed. 185 (1885), where, in discussing the same distinction, the Court stated: This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people, from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say "L'Etat, c'est moi." Of what avail are written constitutions, whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple and naked; and of communism, which is its twin; the double progeny of the same evil birth. 114 U.S. at 291, 5 S.Ct. at 914-915, 29 L.Ed. at 192. Pittsburgh Elevator, 172 W.Va. at 751, 310 S.E. 2d at 683.

The Court further noted in Pittsburgh Elevator that its decisions have not always "adhered to the distinction recognized in Coal & Coke Ry Co. v. Conley, supra, although, in order to avoid problems of irreconcilability, the Court has over the years carved exceptions from the prohibition against suing the "State" contained in article VI, section 35." Pittsburgh Elevator, 172 W.Va. at

752, 310 S.E. 2d at 684.

Finally, the Court in Pittsburgh Elevator concluded:

It is anomalous, indeed, that our constitution protects property which is damaged, for example, through the negligence of the State Road Commission in the course of constructing a roadway, see State ex rel. Phoenix Insurance Co. v. Ritchie, supra, but would not protect the life and limbs of a person negligently run down by a truck driven by an employee of the State Road Commission during construction of the same roadway. See Syllabus Point 1, Mahone v. State Road Comm'n, supra. ("The state road commission of West Virginia is a direct governmental agency of the state, and as such is not subject to an action for tort.") Undeniably, problems of equal protection are present in such a situation. Pittsburgh Elevator, 172 W.Va. at 754, 310 S.E. 2d at 686 (emphasis added).

In Pittsburgh Elevator, the appellant never questioned the continuing validity of the State's Immunity, so the Court decided it was not necessary to directly address the apparent inconsistencies in the law. Pittsburgh Elevator, 172 W.Va. at 755, 310 S.E. 2d at 687. Rather, the Court decided to simply recognize another exception to the immunity provisions of Article VI, Section 35 of the West Virginia Constitution. In doing so, the Court wrote Syllabus Point 2 of Pittsburgh Elevator as follows:

It is reasonable to conclude that 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. Pittsburgh Elevator, 172 W.Va. at 756, 310 S.E. 2d at 688.

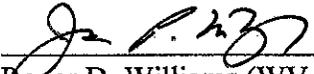
To the extent that Pittsburgh Elevator and other cases that recognize immunity for State agencies, in the absence of insurance, such as City of Morgantown v. Ducker, 153 W.Va. 121, 168 S.E.2d 298 (1969), they are no longer good law and should be overruled to recognize Plaintiff's due process right to seek recovery directly from WVDOT and Mr. Smith, even in the absence of insurance, in accordance with Coal & Coke Ry. Co. v. Conley, 67 W.Va. 129, 67 S.E. 613(1910) and Poindexter v. Greenhow, 114 U.S. 270, 290, 5 S.Ct. 903, 914 (1885).

VII. CONCLUSION

Based on the foregoing, Defendants WVDOT and Mr. Smith can no longer claim immunity for several reasons: 1) The WVDOT and Mr. Smith are “insured” by an insurance policy issued by National Union Fire Insurance Company Policy No. GL 612-53-96. (“National Union Policy”); 2) The WVDOT and Mr. Smith are indemnified by NECC; and 3) The WVDOT and Mr. Smith are insured as an “additional insured” by an insurance policy issued by Liberty Mutual Insurance (Policy No. RG2-651-004134-032) to NECC (“Liberty Mutual Policy”)

For the foregoing reasons, neither the WVDOT nor Mr. Smith is immune from civil liability and the Plaintiff requests that this Court reverse the Decision of the Circuit Court granting them Summary Judgment.

MISTY BLESSING, Individually, and as
Administrator of the ESTATE OF WALLIE
BLESSING
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IN THE SUPREME COURT OF WEST VIRGINIA

MISTY BLESSING, individually,
and as the administrator of
THE ESTATE OF WALLIE BLESSING,

Appellant (Plaintiff Below),

v.

Case No. 33433

West Virginia Department of Transportation,
Division of Highways, an agency of the State
of West Virginia; and, Byron Smith, P.E., Individually

Appellees.

CERTIFICATE OF SERVICE

I, James P. McHugh, counsel for the Appellant, Misty Blessing, individually, and as the administrator of the Estate of Wallie Blessing do hereby certify, a copy of the foregoing

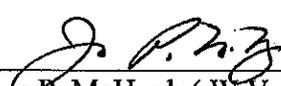
Appellant's Brief was served upon the Appellees' counsel herein, by placing the same in the

United States mail, postage prepaid and addressed to the following:

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This 10th day of August, 2007


James P. McHugh (W.Va. Bar No. 6008)