

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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

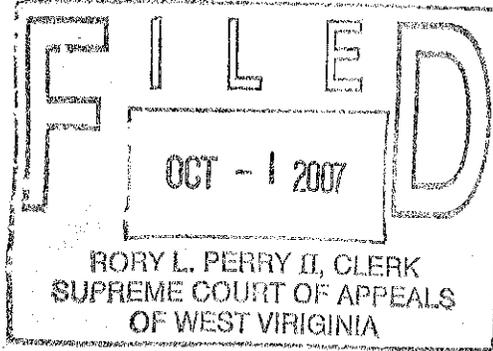
Appellant (Plaintiff below),

v.

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 (Defendants below).



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APPELLANT'S REPLY BRIEF.  
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and as the administrator of  
THE ESTATE OF WALLIE BLESSING,

By Counsel:

  
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I. INTRODUCTION

The Appellees West Virginia Department of Transportation, Division of Highways (“WVDOT”) and Byron Smith, P.E. (“Mr. Smith”) begin their Brief with the statement that “this case sets forth the perfect example of how the State’s insurance coverage works and why it does not....produce an unjust result by denying compensation to [a] party wrongfully injured by the State.” Of course, this is not an accurate characterization of what happened in this case. Not only did the State’s insurance policy not “work,” it didn’t pay. While the Appellant recovered a settlement from another defendant NECC, that defendant was protected by the defenses associated with a “deliberate intent” case and associated offsets. The case against the WVDOT

was predicated upon simple negligence. There is a substantial difference in the leverage between the two types of claims. No, the result was not just, the WVDOT walked away, without paying a dime, citing Immunity of the Sovereign.

Actually, the issues that Appellant raises in this appeal are quite simple. The Circuit Court should not have decided that the WVDOT was immune for several reasons: First, the WVDOT should not have been granted summary judgment without presenting a properly supported motion; Second, the WVDOT has coverage under the National Union Fire Insurance Policy, Policy No. GL 612-53-96, Docket No. 192, Tab A (“National Union Policy”), purchased by the State Board of Risk and Insurance Management (“BRIM”), because the policy should be strictly construed against the insurer; Third, based upon the indemnity agreement in the contract with the employer of Plaintiff’s decedent, National Engineering & Contracting Company (“NECC”), the WVDOT can recover any losses directly from NECC and the WVDOT is an “additional insured,” with coverage under the Liberty Mutual Insurance Policy, Policy No. RG2-651-004134-032; Docket No. 192, Tab B (“Liberty Mutual Policy”); and, Finally, with the easy access to insurance, federal due process issues, and the potential distinction between the State and its agencies, there is a lingering question as to whether the State should enjoy Sovereign Immunity at all.

## II. POINTS AND AUTHORITIES

1. Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W. Va. 1995)
2. Rule 56(c) of the West Virginia Rules of Civil Procedure
3. Nat. Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488(1987)
4. Russell v. Bush & Burchett, Inc. 210 W.Va. 699, 559 S.E.2d 36, n. 8 (2001)

5. W.Va. Const Art. VI, Sec. 35
6. Louk v. Isuzu Motors, Inc., 198 W.Va. 250, 479 S.E.2d 911 (1996)
7. Johnson v. C.J. Mahan Construction Company, 210 W.Va. 438, 557 S.E.2d 845(2001)
8. (Pittsburgh Elevator Co. v. West Virginia Board of Records, 172 W.Va. 743, 310 S.E.2d 675 (1983)
9. State ex. Rel. W.Va. Dept. of Transportation, Highways Division v. Madden, 192 W.Va. 497,500, 453 S.E.2d 331, 334 (1994)
10. Marlin v. Wetzel County Board of Education, 212 W.Va. 215, 569 S.E.2d 462(2002)
11. W. Va. Code § 29-12-15
12. VanKirk v. Green Const. Co., 195 W.Va. 714, 466 S.E.2d 782 (1995)
13. Parkulo v. West Virginia Board of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1997)
14. State ex. rel. Phoenix Insurance Co. v. Ritchie, 154 W.Va. 306, 175 S.E.2d 428 (1970)
15. Coal & Coke Ry. Co. v. Conley, 67 W.Va. 129, 67 S.E. 613(1910)
16. Poindexter v. Greenhow, 114 U.S. 270, 290, 5 S.Ct. 903, 914 (1885)

III. THE WVDOT NEVER PRESENTED A PROPERLY SUPPORTED MOTION FOR SUMMARY JUDGMENT.

Syllabus Point three of Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W.Va. 1995) states: “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 material fact, the burden of production shifts....” Appellees obviously do not agree with this syllabus point.

At page 12 of Appellees’ Brief, the Appellees contend: “Appellant is simply wrong in claiming that the Department must disprove the existence of insurance coverage by affirmative

evidence to obtain summary judgment.” Frankly, this assertion makes it necessary to re-examine the West Virginia Rule of Civil Procedure 56(c) and the relevant authority to determine which side is correct on this issue.

Clearly Appellees misconstrue the law. W.Va. R. Civ. P. 56(c) explicitly requires a Motion for Summary Judgment to be properly supported. In this case, the WVDOT attached only one document and no affidavits to its motion for summary judgment: Endorsement 7, an exclusion that applied to the National Union Policy (West Virginia Department of Transportation, Division of Highways’ Motion for Summary Judgment, Docket No. 178). Such an unsupported motion falls way short of the requirements in the law.

Since this case involves the interpretation of an insurance policy, the burden of presenting facts to support the operation of a policy exclusion is absolutely on the moving party. In Syl. Pt. 7 of Nat. Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488(1987), this Court held:

An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.

While the Appellees are not technically the insurer, in cases such as this, where the WVDOT is citing the policy provisions in support of its claim of immunity, and where the WVDOT’s liability or immunity may turn on the operation of a policy exclusion, the McMahon rule certainly extends to Appellees. For example, in Russell v. Bush & Burchett, Inc. 210 W.Va. 699, 559 S.E.2d 36, n. 8 (2001), this Court recognized that “the DOH is asserting that they do not have coverage under the BRIM policy because [the DOH relies on the principle that a lawsuit based on State] activity that is “not covered” by insurance is [barred by W.Va. Const Art. VI,

Sec. 35].” Id., citing Ayersman v. Division of Environmental Protection, 208 W.Va. 544, 549, 542 S.E.2d 58,63(2000). There is no reason why the WVDOT in this situation should be treated any differently than the insurer. It is the insurer, through counsel, that is making the arguments.

The burden to disprove coverage is clearly on the Appellees and their motion for summary judgment was not a properly supported motion. Accordingly, this Court should reverse the lower Court.

#### IV. WVDOT EMPLOYEES WERE ENGAGED IN “CONSTRUCTION.”

The next dispute, between the parties, with respect to the National Union Policy is related to the difference between the words “construction” and “inspection.” Apparently, Appellees contend that the word “construction” in the National Union policy should be limited to manual physical labor. Appellant, on the other hand contends that the term “construction” encompasses more than physical labor. For example, an engineer can be engaged in “construction” if he makes decisions that affect the safety of the labor and how the “physical labor” is performed.

Since there is no dispute that several WVDOT employees were physically present when Appellant’s decedent was killed and during events leading up to the death (Smith, p.24), the Circuit Court’s decision should be reversed, if the WVDOT employees were arguably engaged in “construction.” On the other hand, if, as Appellees contend, the WVDOT employees were merely engaged in “inspection,” then that portion of the Circuit Court Order related to the National Union Policy might be well-founded.

To review, 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).

“Construction” work is the exception to the exclusion in Endorsement 7 of the National Union Policy. “Inspection” work is the exception to the exception to the exclusion in Endorsement 7 of the National Union Policy.

In arguing that the WVDOT workers were only engaged in “inspection,” the Appellees raise several points. First, the Appellees contend that Appellant failed to present evidence that the actions of WVDOT employees were anything other than “inspection”(of course, as noted above, this is not the Appellant’s burden). Nevertheless, this assertion can easily be tested by reference to “Plaintiff’s Memorandum in Opposition to Motion for Summary Judgment,” located at Docket No. 197 in the file. The deposition excerpts and interrogatory response, cited by Appellant in her brief, are in the file. A simple summary of the deposition testimony of Mr. Smith, the Project engineer/supervisor (not “inspector”), reveals the following:

WVDOT’s ability to control construction methods and safety practices.

Q: ...if they run into a problem with something that they’ve done, a construction method or something, will they ask for clarification or whether or not they can do it the way they want to do it?

A: They are pretty much the ones who determine how the processes go. But if it’s something that might interfere with the quality of the work, yeah, we’ll interject.

Q: Like, for example, in the case of the issue about using vibratory hammers....they asked for permission to do that and you told them they had permission, right?

A: Eventually, I did yeah.

Q: And that's just one example. There's other examples...where they ask you if they can do something and you tell them if they can do it?

A: Yes. (Smith, pp10-12).

Q: Are you the project engineer responsible for filling out the supervisor's daily reports?

A: Supervisor's Report, yes.

Q: Down toward the bottom, it says "Safety issues with pouring concrete. Will correct these on the next order." ....Did you express concern over safety issues with the workers pouring concrete?

A: As well as I remember, yes?... (Smith, p.17).

Q: Did he [Mr. Booten-NECC Superintendent] say that would fix their safety problems?

A: As well as I remember, he said they would bring in more equipment before the next pour....<sup>1</sup>(Smith, p. 18).

Consistent with the deposition testimony of Mr. Smith, in H.C. Nutting's 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," H.C. Nutting asserts: "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).

Based on the foregoing testimony and Interrogatory responses, WVDOT and Mr. Smith, as the project engineer, refining the unsafe work practices, had the right (and Appellant believes an obligation) to intervene in the work in progress, when he witnessed unsafe events. Mr. Smith was the Project Engineer/Supervisor. A Project Engineer/Supervisor does more than just inspect.

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<sup>1</sup> Unfortunately, the replacement equipment was the tremie scaffold, which proved deadly. If the Court had not granted WVDOT's motion for summary judgment on the immunity issue, Plaintiff would have attempted to demonstrate that the WVDOT employees negligently exercised control and that Mr. Smith committed professional negligence with respect to the concrete pouring techniques that caused Mr. Blessing's death.

The foregoing excerpts presented by Appellant are just excerpts that the Appellant raised to demonstrate that there was an issue of fact. To date, the WVDOT has still not presented any of its own evidence as required by the McMahon rule. (See, West Virginia Department of Transportation, Division of Highways' Reply Brief in Support of Motion for Summary Judgment, Docket No. 199).

Appellees also seem desperate to place all the blame on NECC and complain that they could not be engaged in "construction" because they purportedly do not have the expertise to construct bridges. This is just a diversion. In this case, there is more than enough blame to go around. Both NECC and the WVDOT by its employees have independent duties. Mr. Smith was the project engineer with professional duties regarding safe work sites and who, as the project supervisor, exercised direct control over certain construction methods and in connection with safety issues (such duties are covered by the "Professional Negligence" section of the National Union policy, but for the dispute over Endorsement 7). Appellant even submitted the records from a "practice pour" of a bridge caisson (Plaintiff's Memorandum in Opposition to Summary Judgment, Tab C, Docket No. 192), after which, Mr. Smith actually required NECC to alter its practices. Appellant contends that the sequencing of the concrete pours was negligent. To the extent the work sequencing was unsafe, both NECC and WVDOT share the blame. The WVDOT cannot hide behind the "inspection" exception to the "construction" exception to deny culpability for what they did on the project.

Appellees also claim that if the Appellant's interpretation of the term "construction" is accurate, the "exception" would "swallow the rule." It is ironic that Appellees, who themselves rely on an exclusion in an insurance policy, would invoke the "exception swallowing the rule"

defense. Usually, this complaint is leveled at the exclusion itself, not the exception to the exclusion. Regardless, the argument is misplaced. Plaintiff can rely on the rule of construction that insurance exclusions are to be interpreted broadly against the carrier. See Syl. Pts. 6 and 9 of Nat. Mutual Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488(1987) (Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity will not be defeated. Where ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted).

While the Appellees have countered with another rule of construction, namely that each word should have meaning, that does not provide relief to the Appellees. The word “inspection” can have meaning. It means “to watch,” but not “to act.” Here the WVDOT and Mr. Smith did more than watching. They retained the right to control the processes and procedures, and they exercised that right. This makes them more than mere inspectors/watchers.

If BRIM or the Legislature wants to, they can re-write the exclusion to clarify the meaning of the word “inspection” for next year. They have certainly done so before. In fact, Endorsement 7 and its predecessor, Endorsement 10, have been revised in the past to respond to court cases. cf, Louk v. Isuzu Motors, Inc., 198 W.Va. 250, 479 S.E.2d 911 (1996)(Endorsement 10)and Johnson v. C.J. Mahan Construction Company, 210 W.Va. 438, 557 S.E.2d 845(2001)(Endorsement 7). BRIM has any number of options to clarify the exclusion and the exceptions to the exclusion. For example, BRIM could exclude work performed by the project engineer. BRIM could have, and has, attempted to exclude most everything anyway. Of course, such clarifications would not affect this case.

In this case, if there is any room to debate the meaning of the terms “construction” and “inspection,” Appellant is entitled to the benefit of any ambiguity on the issue of coverage. After the coverage/immunity issue is settled, it is up to the jury to determine whether the WVDOT or Mr. Smith were negligent in the performance of their obligations.

V. THERE IS NO IMMUNITY WHEN THE APPELLANT DOES NOT SEEK TO RECOVER FROM THE STATE’S TREASURY

The primary policy behind the Court’s well-known holding in Pittsburgh Elevator, is that the doctrine of Sovereign Immunity is not implicated if the State’s treasury is not subjected to an unappropriated levy. See, State ex. Rel. W.Va. Dept. of Transportation, Highways Division v. Madden, 192 W.Va. 497,500, 453 S.E.2d 331, 334 (1994)(“these cases stand for the proposition that coverage for such liability accruing from the alleged negligent acts by the State is covered by the limits of the State’s liability insurance coverage and not state funds”). In essence, after the Legislature declared that the State could purchase insurance, there was no good reason to continue the archaic doctrine of Sovereign Immunity if insurance has been purchased or contracted for to cover the loss.

Here, the Appellant has alleged that the WVDOT can recover from NECC pursuant to the indemnity agreement which Appellant asserts is the equivalent of insurance. In addition, the Appellant has also contended that State purchased one insurance policy (the National Union policy) and the WVDOT contracted for another (the Liberty Mutual policy). In support of Appellant’s claim that the State is entitled to coverage under NECC’s Liberty Mutual policy, the Appellant cited Syl. Pt. 4 Marlin v. Wetzel County Board of Education, 212 W.Va. 215, 569 S.E.2d 462(2002), wherein this 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.

Appellees’ response to Syl. Pt. 4 of Marlin is minimal. Appellees only cite the case for the proposition that an indemnity agreement is not insurance (Appellees’ Brief, p.16). Of course, that reference appears to be dicta and does not in any way, dispute or rebut Appellant’s reasoning as to why the WVDOT has coverage under the Liberty Mutual policy. Appellees simply do not address Syl. Pt. 4 of Marlin.

Rather than address the Marlin issue head on, Appellees contend that the Liberty Mutual Policy is not the “State’s Liability Insurance coverage” under W. Va. Code § 29-12-15. While it is true that BRIM did not purchase the Liberty Mutual policy, it certainly did not proscribe the WVDOT from purchasing it. As the Board of Risk and Insurance Management, BRIM should encourage contractual risk shifting because it reduces the risk to the State. Inexplicably, by seeking to avoid the effect of its own insured contract, the WVDOT does the opposite of what is logical in this situation.

The Appellant contends that Appellee has engaged in an overly restrictive reading and application of the general policy behind Pittsburgh Elevator. This conflicts with the recognition of the policy in Madden as well as the Legislature’s stated desire that injured parties receive compensation when a State agency is negligent. In W.Va. Code § 29-12-15, BRIM is charged with endeavoring “to secure the maximum of protection against loss, damage or liability...” and was supposed to complete a survey of all “....construction ...which might affect the insurance protection and coverage required.” If BRIM fulfilled its statutory duties, it might have been aware that state agencies ask for indemnity and this might be a source of additional

compensation. In fact, it might even foster this approach.

Appellees' assertions regarding the Liberty Policy also contradict the WVDOT's incredible claim that the WVDOT can benefit from the indemnity clause in the contract between NECC and WVDOT, but the Plaintiff cannot. In this regard, the WVDOT states: "The construction contracts also have hold harmless provisions to enable the Department [but presumably not anyone else] to recover expenses incurred in defending suits, such as this one...."(Appellees' Brief, p. 9, also Appellees Brief, pp. 17-19). That is truly astounding. Why would an indemnity clause and consequent "insured contract" protect the WVDOT and not extend to an injured party? The applicable indemnity agreement and the Liberty Mutual Policy, certainly do not support Appellees' restrictive analysis.

The indemnity agreement in the Contractor's Proposal, which the WVDOT concedes is incorporated into the contract by reference,(Appellees' Brief, p. 4) is quite broad. It states:

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).

When this language is coupled with the Liberty Mutual Policy the only reasonable conclusion is that the WVDOT and Mr. Smith are covered by the Liberty Mutual Policy. The specific reason that this Court previously held that the beneficiary of an insured contract "stands in the same shoes" as the "named insured" for coverage purposes, is to protect against "tort liability," not simply for the indemnified party to recover court costs. See Syl. Pt. 5 of Marlin ("The phrase 'liability assumed by the insured under any contract' ...refers to...that other party's tort liability").

Since WVDOT and Mr. Smith have coverage under the Liberty Mutual Policy, pursuant to the “insured contract,” the Court is probably wondering why the WVDOT and its insurer did not simply follow the lead of the insured in Marlin and file a declaratory judgment to determine its available coverage under the Liberty Mutual Policy. It certainly filed a cross-claim against NECC to assert the indemnity clause. This cross-claim was never addressed by the lower court, because the lower court dismissed this case, based solely on the purported immunity issue and the National Union Policy.

Apparently, this failure by the WVDOT to attempt to garner insurance coverage is an anomaly that is unique to claims against the State and has apparently surfaced before. In Russell v. Bush & Burchett, Inc. 210 W.Va. 699, 559 S.E.2d 36, n. 8 (2001), this Court noted that

The system inadvertently creates an incentive...to argue at every opportunity that a given activity is not covered....This sentiment which is the perverse opposite of the desires of a normal insured party who wants maximum coverage in an accident, runs counter to the goals of risk spreading and protection from catastrophic loss that our law has come to favor. (Emphasis added)

It is only necessary to examine the relationships in this case to see how this perverse situation was at play in this case. National Union, by its insurance administrator, AIG, hired the lawyer that is defending the WVDOT. The natural monetary incentive of National Union is to hide behind immunity at all cost. Why dig up coverage, even if it might benefit an injured party, when you may fare better (as they did here) by ignoring the issue? It seems to matter little strategically to National Union that the WVDOT bargained and likely paid for the Liberty Mutual Policy in the contract price with NECC.

Similarly, Liberty Mutual presumably hired the counsel for NECC. NECC didn't want to get involved in the coverage dispute, with the potential for complete indemnity hanging over its

head. Not surprisingly, Liberty Mutual, who hired the NECC lawyer, took the approach that is fostered by this “perverse” situation and decided to do nothing, knowing full well that coverage issues might be decided by the lower court in the context of the immunity determination. NECC even filed a reply to Plaintiff’s Response to the WVDOT’s motion for summary judgment. In its reply, NECC, and its counsel, hired by Liberty Mutual, complained that the Court had no right to interpret the Liberty Mutual Policy as Liberty Mutual was not a party (Memorandum of National Engineering & Contracting Co. and Balfour Beatty Construction in Opposition to Plaintiff’s Response to Motion for Summary Judgment, Docket No 197). Of course, Liberty Mutual did not intervene as a party, even though it was fully aware of the situation. It merely suggested in a footnote 3 of its reply that it ought to have a right to file a brief if the Court was going to get into the coverage issues. Why should Liberty Mutual get more involved if the Circuit Court was going to dismiss the whole case, including cross-claims, based on Endorsement 7?

The only reason Appellant even raised the Liberty Mutual Policy was to demonstrate that the WVDOT had insurance coverage, notwithstanding the WVDOT’s protestations to the contrary, in order to avoid summary judgment, pursuant to the discovery order of the circuit judge. This, of course, is the same reason that the WVDOT invoked the National Union Policy.<sup>2</sup>

We know from VanKirk v. Green Const. Co., 195 W.Va. 714, 466 S.E.2d 782 (1995), that the WVDOT can recover from a third party, such as NECC based upon the indemnification and insurance language in the construction contract. It is no leap of logic for the Appellant to

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<sup>2</sup> The Court may consider asking BRIM and Liberty Mutual to file Briefs regarding the Liberty Mutual issue, as it did in a similar situation in Russell v. Bush & Burchett, Inc. 210 W.Va. 699, 559 S.E.2d 36, n. 8 (2001). The problem with doing this is that the two entities with privity to the Liberty Mutual policy; NECC and WVDOT, had every right to intervene below and were aware of these proceedings through their respective insurance counsel. They strategically decided not to intervene. Under these circumstances, the Court should feel free to interpret the Liberty Mutual Policy for the limited purpose of determining if it overcomes the Sovereign Immunity defense.

contend that the indemnity obligation can be satisfied by the Liberty Mutual Policy when the WVDOT “steps into the shoes” of NECC as an “additional insured.”

In the end, although Pittsburgh Elevator was decided in the context of a policy purchased by BRIM, there is no harm to the State to recognize the applicability of the general legislative policy where there is another applicable insurance policy that covers a state agency. Under Appellant’s theory, the State’s treasury remains secure. The Appellees contend that only the Legislature can abrogate Sovereign Immunity by authorizing the purchase of insurance under W.Va. Code § 29-12-5. The short answer to this argument is that the Court also has the power and has done so in the past. Moreover, no one is abrogating the policy behind the Immunity, if the loss is covered by indemnity or insurance. There is no practical distinction between a “named insured” and an “additional insured.” Appellant sees no reason why the Court does not simply look at the Liberty Mutual policy and apply it pursuant to its contractual terms and conditions.

W.Va. Code § 29-12-5 gives BRIM “general,” but not “exclusive” control over insurance for State agencies. Interestingly, the statute also authorizes insurance to be both “purchased” and “contracted for.” Clearly the Liberty Mutual policy was “contracted for” by the WVDOT. If you follow the Appellees’ logic, BRIM could purchase and contract for insurance, but state agencies would be prohibited from contracting for insurance through indemnity clauses, even if such contracting is part of the overall insurance strategy of BRIM. This seems to be an artificial distinction.

Finally, the WVDOT infers that it would be too complex for circuit courts to analyze multiple insurance policies. In response, Appellant contends that there is absolutely no harm for the trial court to wrestle with the terms of more than one insurance policy. Courts and litigants

do this every day. It will not cause the world to end.

## VI. THE SOVEREIGN IMMUNITY BAR IS OUTDATED.

The Appellant still contends that the Sovereign Immunity Bar is outdated. In Pittsburgh Elevator, this Court even suggested that this might be the case, but refused to decide the issue because it was not raised. The Appellant conceded that this Court reaffirmed the continuing validity of the concept in Parkulo v. West Virginia Board of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1997), however, the Court has never addressed some of the original points made in dicta in Pittsburgh Elevator that relate to fairness and the distinction between the "State" and its "subdivisions." For example, in Pittsburgh Elevator, this 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 also 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...."

Obviously a full analysis of the Sovereign Immunity issue is not necessary if the Court finds there is coverage under the National Union Policy or the Liberty Mutual Policy.

The issue related to the Liberty Mutual Policy may be one more of a series of exceptions to the Immunity rule. In this regard, the Court further noted in Pittsburgh Elevator that "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, there are still federal equal protection issue related to the Sovereign Immunity.

The Pittsburgh Elevator court 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).

To the extent that Pittsburgh Elevator and other cases that recognize immunity for State agencies, in the absence of insurance, they should be overruled or modified 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).

Furthermore, NECC agreed to indemnify WVDOT. NECC was insured by NECC. NECC is responsible to WVDOT regardless of National's and Liberty's positions.

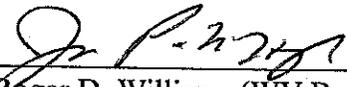
## VII. CONCLUSION

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  
By Counsel:

  
\_\_\_\_\_  
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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.

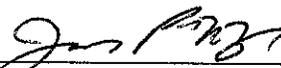
CERTIFICATE OF SERVICE

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 Reply 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 15<sup>th</sup> day of October, 2007

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