

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

Civil Action No. 04-C-2576
Honorable Irene C. Berger

NATIONAL ENGINEERING &
CONTRACTING COMPANY, a foreign corporation,
BALFOUR BEATTY CONSTRUCTION, INC.
a foreign corporation, and the WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, an agency of the
State of West Virginia,
SITE-BLAUVELT ENGINEERS, INC.;
ARROW CONCRETE COMPANY;
ARROW CONCRETE OF WEST VIRGINIA, INC.;
H.C. NUTTING COMPANY; and
BYRON SMITH, P.E., Individually,

Defendants.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER
GRANTING WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS' MOTION FOR SUMMARY JUDGMENT**

Pending before the Court is a Motion for Summary Judgment submitted by the West Virginia Department of Transportation, Division of Highways and Byron Smith, P.E., (hereinafter collectively the "Department"), by and through their counsel, Timbera C. Wilcox and Dinsmore & Shohl LLP. The Department seeks summary judgment on two grounds. First, the Department argues that State sovereign immunity bars the Plaintiff's claims because the State's liability insurance policy does not provide coverage for the claims asserted. Second, the Department maintains that the public duty doctrine bars those same claims. Based on the briefs submitted, the arguments of counsel, and the record in this matter, the Court hereby GRANTS the Department's Motion for the reasons set forth below:

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CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

I. FINDINGS OF FACT

- 1) Plaintiff Misty Blessing is the duly appointed administrator of the estate of Wallie Blessing.
- 2) Defendant, the West Virginia Department of Transportation, Division of Highways, is an agency of the State of West Virginia.
- 3) Defendant, Byron Smith, was at all relevant times an employee of the West Virginia Department of Transportation, Division of Highways.
- 4) On or about October 3, 2003, Wallie Blessing was working as an employee for National Engineering & Contracting Company ("NECC") at a construction site known as the Man/Rita Bridge in Logan County, West Virginia.
- 5) NECC, also named as a defendant in this action, had been awarded a contract by the Department to build the Man/Rita Bridge. The contract between the Department and NECC contains a "hold harmless" provision in favor of the Department that appears in pertinent part as follows: "Contractor [NECC] agrees . . . 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 [NECC], his agents, employees, or subcontractors if there be such."
- 6) On or about October 3, 2003, Defendant Byron Smith was an employee of the Department in the position of Project Supervisor at the Man/Rita Bridge site. As Project Supervisor, Mr. Smith was in charge of a team of Department inspectors and was responsible for various administrative duties.
- 7) On or about October 3, 2003, Wallie Blessing sustained fatal injuries in a fall from scaffolding while working at the Man/Rita Bridge construction site.

8) At the time and place of Wallie Blessing's injuries, no employees of the Department were physically present performing construction, maintenance, repair, or cleaning, (but excluding inspection of work being performed or materials being used by others).

9) On or about September 17, 2004, Plaintiff filed a Complaint asserting various claims arising from Mr. Blessing's accident against the Department and other defendants.

10) Plaintiff's Complaint, as amended, asserts five claims or counts against the various Defendants for damages arising from Wallie Blessing's accident. Of the five counts, only three name the Department as a Defendant. Count III asserts a simple negligence claim against the Department and others because they allegedly "negligently encouraged or failed to discourage the use of an unsafe 'tremie' scaffold for the purposes of concrete placement at the Man/Rita Bridge, which scaffold violated multiple provisions of federal regulations and accepted standards of the industry." (Am. Compl. at ¶ 38). Count IV asserts that Byron Smith, P.E., and others "acting in their capacity as registered professional engineers when decisions were made about the method for pouring the concrete. ... had a professional duty to require that a safe method for concrete placement be implemented." (Id. at ¶ 41). Count V asserts a claim for premises liability/negligence against the Department claiming that the Department, "[a]s the property owner, ..., has a duty to provide plaintiff's decedent with a safe place to work and warrant that the job site was safe." (Id. at ¶ 45). In sum, of the five counts, only Counts III, IV, and V name the Department as a Defendant.

11) At the time of the accident, the Department had in effect a policy of liability insurance issued by National Union Fire Insurance Company of Pittsburgh, Pennsylvania, which provides coverage for certain acts of negligence. Endorsement 7 of this policy modifies the State's insurance as follows:

It is agreed that this insurance afforded under this policy does not apply to any claim resulting from the ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use, or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warnings, markers, markings, guardrails, fences, or related or similar activities or things but it is agreed that the insurance afforded under this policy does apply (1) to claims of "bodily injury" or "property damage" 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" or "property damage" occurred performing construction, maintenance, repair, or cleaning (but excluding inspection of work being performed or materials being used by others) and (2) to claims of "bodily injury" or "property damage" which arise out of the maintenance or use of sidewalks which abut buildings covered by this policy. (emphasis added)

12) Plaintiffs' Amended Complaint seeks recovery against the Department under and up to the limits of the State's liability insurance coverage.

II. CONCLUSIONS OF LAW

1) Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment shall be entered where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Williams v. Precision Coil, Inc., 459 S.E.2d 329, 336 (W. Va. 1995).

2) In accordance with Article VI, Section 35 of the Constitution of the State of West Virginia, and Pittsburgh Elevator v. W.Va. Bd. of Regents, 310 S.E.2d 675 (W.Va. 1983), all claims against the State of West Virginia and its employees are barred by sovereign immunity unless insurance coverage exists under the State's liability insurance policy for the claims alleged. The existence of insurance coverage is an essential element of Plaintiff's claims because in the absence of insurance coverage, sovereign immunity bars the claims. Accordingly,

Plaintiff bears the burden of proof to demonstrate facts that would create insurance coverage under the policy.

3) The Department's insurance policy specifically excludes coverage for claims for bodily injury or property damage "resulting from the ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use, or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warnings, markers, markings, guardrails, fences, or related or similar activities or things" unless the claims "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, maintenance, repair, or cleaning (but excluding inspection of work being performed or materials being used by others)"

4) Counts III, IV, and V, the only counts naming the Department as a defendant, assert negligence claims and seek damages arising from Wallie Blessing's accident on or about October 3, 2003, which occurred during the construction of the Man/Rita Bridge. These claims seek damages for bodily injury resulting from the Department's "ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use, or control of . . . bridges." Therefore, no insurance coverage exists by virtue of the exclusionary language set forth in Endorsement 7 unless Mr. Blessing's injuries directly resulted from and occurred while "employees of the State of West Virginia were physically present at the site of the incident . . . performing construction, maintenance, repair, or cleaning (but excluding inspection of work being performed or materials being used by others)"

5) The record of this matter contains no evidence that any employee of the State of West Virginia was physically present at the site of Wallie Blessing's accident "performing

construction, maintenance, repair, or cleaning (but excluding inspection of work being performed or materials being used by others)” Mr. Smith’s conduct as the Project Supervisor does not amount to performance of “construction, maintenance, repair, or cleaning.”

6) In the absence of such evidence, insurance coverage under the State’s liability insurance policy for the claims set forth in the Complaint, as amended, does not exist.

7) The hold harmless provision set forth in the contract between the Department and NECC is not the State’s liability insurance within the meaning of Pittsburgh Elevator, but in the event any liability for damage to persons or property were to accrue to the Department as a result of the facts and circumstances set forth in the Complaint, as amended, the hold harmless provision set forth in the contract between NECC and the Department would apply.

8) Since no insurance coverage under the State’s liability insurance policy exists for the claims set forth in the Complaint, as amended, the claims are therefore barred by sovereign immunity.

9) The public duty doctrine is inapplicable to this case.

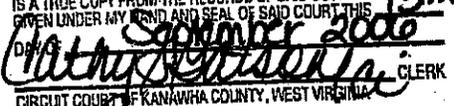
In light of the above, the Court finds that there is no genuine issue of material fact to be tried and the facts warrant judgment in favor of the Department as a matter of law.

WHEREFORE, the Court GRANTS the Motion for Summary Judgment submitted by the Department and DISMISSES Plaintiff’s claims against it and Mr. Smith with prejudice. All parties’ objections and exceptions to this ruling are noted.

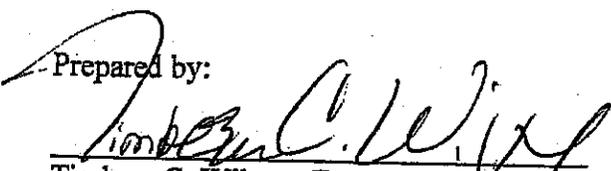
IT IS SO ORDERED this 13th day of September 2006.

ENTER:


Judge Irene C. Berger

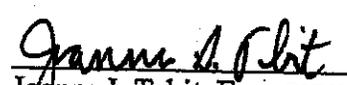
STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 13th
September 2006

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

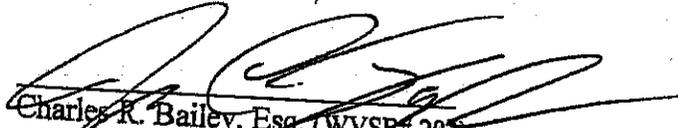
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