

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**DAVID HAWKINS and
KIM HAWKINS, and TYLER
HAWKINS, ASHLEY HAWKINS,
and CHASE HAWKINS, Minors, by and
through their next friend, DAVID HAWKINS**

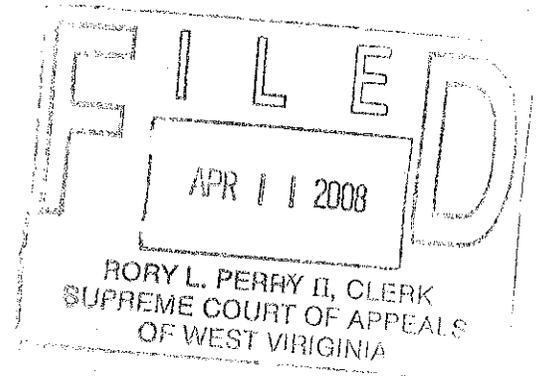
Appellants,

v.

No. 33876

**THE WEST VIRGINIA DEPARTMENT
OF PUBLIC SAFETY a/k/a THE WEST
VIRGINIA STATE POLICE, THE WEST
VIRGINIA COMMISSION ON DRUNK DRIVING
PREVENTION, and J. MATTMAN SECURITY,
INC. d/b/a THE MATTMAN COMPANY.**

Appellee.



APPELLANTS' BRIEF

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Appellee.

APPELLANTS' BRIEF

The Appellants, David Hawkins, Kim Hawkins, Tyler Hawkins and Chase Hawkins, respectfully petition the West Virginia Supreme Court of Appeals as follows:

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The Appellants filed a civil action alleging negligence on the part of Appellees and others resulting from serious Sergeant David Hawkins while in the performance of his work duties for the West Virginia State Police. The Circuit Court granted a motion to dismiss filed on behalf of Appellee West Virginia State Police, finding that the State Police has Workers' Compensation immunity for injury claims of its uniformed members sustained in the course of their employment with the State Police.

STATEMENT OF FACTS

On September 20, 2005, Sergeant David Hawkins was severely injured in the performance of his duties for the West Virginia State Police/Commission on Drunk Driving Prevention (hereinafter CODDP). Sergeant Hawkins was performing his services on the Batmobile which is the mobile office utilized for DUI checkpoints. The Batmobile was manufactured and delivered by Mattman Security, Inc. and contained a defective door latch which protruded into the doorway approximately 1 ½ inches, which created a dangerous hook at approximately elbow level for persons exiting the Batmobile. The same latch appears on each of the four doors to the Batmobile. This hook had, on numerous occasions, caught the shirt sleeves of persons exiting the Batmobile including other employees of the West Virginia State Police or CODDP. Sergeant Hawkins had complained to others and requested that the latches be repaired. On September 20, 2005, Sergeant Hawkins was routinely exiting the Batmobile with the Intoxilyzer case over his shoulder. As he exited the Batmobile, the case caught on the hook, pulling him backwards and causing severe injury. Sergeant Hawkins sustained three herniated discs which required urgent emergency surgery. He has permanent nerve damage to his left leg resulting in extreme pain and foot drop as well as increasing muscle atrophy throughout the left leg. Unable to perform his job, he was forced to take a disability retirement with the West Virginia State Police, which was granted on March 17, 2006.

The West Virginia State Police does not subscribe to the Workers' Compensation Fund, nor has it become self insured under the statute. Pursuant to West Virginia Code § 15-2-10(e), the Superintendent contracted with PEIA to furnish medical and hospital services for duty related injuries. Under subsection (e), the Superintendent has right of subrogation against third parties

for payments made.

West Virginia Code § 15-2-26, continued the Death, Disability, and Retirement fund for the West Virginia State Police. Sergeant Hawkins contributed, monthly between six and nine percent of his salary into the fund. Sergeant Hawkins did not apply for, nor receive Workers' Compensation benefits, but rather completed and submitted the necessary report of injury to the West Virginia State Police, which ultimately ruled his injury to be service related and requested payment of medical expenses from PEIA. He further applied for and was granted a disability retirement from the Death, Disability, and Retirement fund.

ASSIGNMENTS OF ERROR

The Circuit Court erred in finding that the West Virginia State Police is entitled to Workers Compensation immunity from the negligence claims of Sergeant Hawkins, when it did not subscribe to Workers' Compensation, nor become self insured under the act.

POINTS AND AUTHORITY RELIED UPON

1. The Circuit Court abused its discretion in finding that Workers' compensation immunity precludes the negligence claim of Sergeant Hawkins' sustained in the course and scope of his employment with the State Police.
2. The Circuit Court abused its discretion in finding that WV Code §23-2-8 grants immunity to the State Police.
3. West Virginia Code §23-2-6.

3. West Virginia Code §23-2-9.
4. State ex rel Abraham Linc Corp v. Bedell, 602 S.E.2d 542 at 549 (W.V. 2004).
5. State ex rel Frazier v. Hurko, 510 S.E.2d 486 at 493 (1998).
6. Crouch v. West Virginia Division of Motor Vehicles, 631 S.E.2d 628 (W.V. 2006).
7. T. Weston, Inc. v. Mineral County, 638 S.E.2d 167 (W.V. 2006).
8. Thompson v. Chesapeake and RW Company, 76 F Supp. 304 (S.D. W.V., 1948).
9. West Virginia Code § 15-2-10(e)
10. West Virginia Code § 15-2-26
11. State ex rel Simpkins v. Harvey, 305 S.E. 2d 268, 172 W.V. 312 (1983).
12. Pittsburgh Elevator Company v. West Virginia Board of Regents, 172 W.V. 743, 310 S.E. 2d 675 (1983).
13. Taylor v. Hoffman, 209 W.V. 172, 544 SE2d 387 (W.V. 2001)

STANDARD OF REVIEW

A Circuit Court's Order granting a Motion to Dismiss is to be reviewed *De Novo* Revine v. Charles County Commissioners, 882 F. 2d 870, (4th Cir. 1989).

DISCUSSION OF LAW

The Circuit Court clearly erred in its finding that the State Police is entitled to the

Workers' Compensation immunity under West Virginia Code §23-2-6. The West Virginia State Police did not subscribe to nor pay into the Workers' Compensation Fund. Sergeant Hawkins has not filed a Workers' Compensation claim nor has he been paid Workers' Compensation benefits. Finally, the State Police did not become self insured under the act. Hence, the State Police have failed to meet the requirements necessary to enjoy the immunity of West Virginia Code §23-2-6.

Only two (2) methods exist for an employer to obtain Workers' Compensation immunity. Under West Virginia Code §23-2-6, an employer may either subscribe to the fund and fully comply with all provisions of the chapter or elect to become a self insurer under West Virginia Code §23-2-9. Code §23-2-6 provides in part:

Any employer subject to this chapter who subscribes and pays into the Workers' Compensation Fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring...(Emphasis supplied)

There is no dispute that the State Police did not subscribe to the Workers' Compensation Fund. The second avenue by which an employer may obtain Workers' Compensation immunity is to make direct payments and achieve self insured status under West Virginia Code §23-2-9. This section provides that certain employers are eligible to apply for permission to self insure the risk. It provides, in part:

- (a) Notwithstanding any provisions of this chapter to the contrary, the following types of employers or employers' groups may apply for permission to self insure their workers' compensation risk including the risk of catastrophic injuries.
 - (1) The types of employers are:
 - (A) Any employer who is of sufficient capability and financial

responsibility to ensure the payment to injured employees and the dependants of fatally injured employees of benefits provided for in this chapter at least equal in value to the compensation provided for this chapter;

- (B) Any employer or group of employers as provided for subdivision (c) of such capability and financial responsibility who maintains its own benefit fund or system of compensation to which its employees **are not required or permitted to contribute** and whose benefits are at least equal in value to those provided for in this chapter; or
- (C) Any employer who is signatory to a collective bargaining agreement...

The statute goes on to provide:

- (2) In order to be approved for self insurance status, the employer **shall:**
 - (A) Have an effective health and safety program at its workplaces; and
 - (B) Provide security or bond in an amount and form determined by the executive director with the approval of the board of managers which shall balance the employers' financial condition based upon an analysis of its audited financial statements...
- (4) Upon a finding that the employer has met all of the requirements of this section, the employer may be permitted self insurance status. (Emphasis supplied)

Numerous other requirements are contained in Code §23-2-9 to earn and maintain self insured status. The West Virginia State Police failed to comply with the requirements to obtain self insured status from the West Virginia Workers' Compensation Fund.

Furthermore, according to the statute, the West Virginia State Police is ineligible for such self-insured status under its current benefit package. Code §23-2-9 (a)(1)(B) provides that the employer must maintain its own benefits fund to which its employees are not required or

permitted to contribute. The death, disability, and retirement fund maintained by the State Police requires a monthly payroll deduction from each member of the State Police of between 6-9% of his or her salary. Specifically West Virginia Code §15-2-26(b) provides in part:

There shall be deducted from the monthly payroll of each member of the department and paid into the fund 6% of the amount of his or her salary: provided, that beginning the first day of July, 1999 there shall be deducted from the monthly payroll of each member and paid into the fund 7 ½ % of the amount of his or her salary: provided however, that after the first day of July 1995, there shall be deducted from the monthly payroll of each member and paid into the fund 9% of the amount of his or her salary...

Accordingly, the State Police was not even eligible, at the time of this accident, to obtain self insured status from the Fund.

If the State Police desires to obtain Workers' Compensation immunity it must fully comply with the Workers' Compensation statute. This Court has stated:

This Court has consistently respected the preeminence of the statutory schemes of workers' compensation law...the right to workers' compensation is wholly statutory and is not in any way based upon the common law. The statutes are controlling and the rights, remedies, and procedure provided by them are exclusive.

State ex rel Abraham Line Corp v. Bedell, 602 S.E.2d 542 at 549 (W.V. 2004).

This Court further stated:

When an employer subscribes to and pays premiums into the fund, and complies with all other requirements of the act, the employer is entitled to immunity for any injury occurring to an employee and shall not be liable to respond in damages at common law or by statute.

State ex rel Frazier v. Hrko, 510 S.E.2d 486 at 493 (1998).

The West Virginia Workers' Compensation statutes provide the manner by which

employers may obtain Workers' Compensation protection. The statutes are clear and, thus, are not subject to construction. Crouch v. West Virginia Division of Motor Vehicles, 631 S.E.2d 628 (W.V. 2006). If the State Police desires protection from the Fund, it must demonstrate compliance with the statutes. The State Police has not complied with the statutes and, thus, protection is not afforded.

The Circuit Court clearly erred in finding that West Virginia Code §23-2-8 somehow grants immunity to the State Police. Code §23-2-8 describes the result for an employer, other than the State of West Virginia, who fails to subscribe to the Fund. A non-subscribing employer, other than the State of West Virginia, is automatically liable for injuries occurring during the course of employment and shall not avail himself of common law defenses. Conversely, the State of West Virginia would not be automatically liable and could raise common law defenses. Petitioners acknowledge under the statute they must still prove negligence against the State of West Virginia. However, West Virginia Code §23-2-8 does not grant the State Police immunity. Immunity is granted only by West Virginia Code §23-2-6, to which the State Police has not complied.

The Circuit Court abused its discretion in holding that West Virginia Code §23-2-8 grants the State Police immunity. It is a commonly accepted construction that a statute must be given its plain ordinary meaning. Thompson v. Chesapeake and RW Company, 76 F Supp. 304 (S.D. W.V., 1948). Further, significance and effect must, if possible, be given to every section, clause, word, or part of a statute. T. Weston, Inc. v. Mineral County, 638 S.E.2d 167 (W.V. 2006). The Circuit Court failed to give effect to the statutory requirements for the employer to obtain immunity under West Virginia Code §23-2-6.

Also, where two statutes covering the same subject matter cannot be reconciled, the duty of the Court is to require that a specific statute be given precedence over a general statute relating to the same subject matter. Crouch v. West Virginia Division of Motor Vehicles, 631 S.E.2d 628 (W.V. 2006). Accordingly, since the specific statute granting immunity is West Virginia Code §23-2-6, and the State Police failed to comply with the requirements to obtain Workers' Compensation immunity, the State Police cannot obtain immunity under a more general statute describing the loss of common law defenses. West Virginia Code §23-2-8 clearly strips a non-state employer of common law defenses and makes it automatically liable if it fails to subscribe to the fund. This statute applies to all employers except the State of West Virginia and hence, the State Police, can maintain their common law defenses in this negligence action.

There is a presumption that the Legislature is familiar with all existing law applicable to the subject matter and intends each statute to harmonize completely with other law. State ex rel Simpkins v. Harvey, 305 S.E. 2d 268, 172 W.V. 312 (1983). In drafting the Workers' Compensation Act, as well as the State Police Act, found in West Virginia Code §15-2-1 et seq, the Legislature is presumed awareness of Sovereign Immunity, as well as, West Virginia Code §29-12-1 et seq, and the common law permitting suits against the State of West Virginia to the extent that liability insurance has been procured. See Pittsburgh Elevator Company v. West Virginia Board of Regents, 172 W.V. 743, 310 S.E. 2d 675 (1983). Further, had it intended to grant the State Police additional immunity, provisions could have easily been included in West Virginia Code §15-2-1 et seq, authorizing medical services and the Death, Disability and Retirement fund.

Although the State Police desires immunity from employee lawsuits, it has chosen not to

comply with the statutory requirements necessary to enjoy immunity. Our Legislature has been clear on how to achieve this status. The Circuit Court ignored the clear Legislative mandates to provide protection, which the State Police chose not to obtain. The Circuit Court's role was to apply the statute and not torture the language to achieve an end result that is not justified or fair. Petitioners request that this Court apply the clear statutory mandates and reverse the Circuit Court's ruling.

The Appellants argue that the Workers' Compensation Act and the Death, Disability and Retirement Act, read in *Pari Mater*i require the granting of immunity to the State Police. However, this court has made it clear, that statutes relating to different subjects are not in *Pari Mater*i. Taylor v. Hoffman, 209 W.V. 172, 544 SE2d 387 (W.V. 2001). The Workers' Compensation Act, is a comprehensive, no fault system, applicable to all employers. Chapter 15, Article 2, applies only to the State Police and authorizes the Superintendent to provide a benefits package, to which the employees generously contribute.

The issue before this Court is not whether the West Virginia State Police have provided a quality benefits package to its employees nor whether that package is equivalent or superior to workers compensation benefits. Appellant alleges that the State Police benefits are superior to workers compensation and therefore are entitled to immunity under the workers compensation act. The fallacy to this argument is obvious. Should any employer providing an equivalent or superior benefits package be entitled to workers compensation immunity without subscribing to the act?

Permitting Sergeant Hawkins' suit against the State Police is not an absurd result. Sergeant Hawkins contributed to the benefits package provided by the State Police, not unlike employees in the private sector contributing toward their health insurance or benefits package. A

benefits package with a reputable employer might include health insurance, retirement and disability benefits to which the employee contributes a portion of the premium. In that instance, the employee would have not only the benefits of health insurance, disability and retirement, but would in addition, have the no fault protection of Workers' Compensation and the employer would have immunity from common law suits, provided it remained compliant with the act. This is analogous to Appellant's argument. He contributed generously to his benefits package and seeks damages from the State Police for negligence. The State Police is permitted to raise common law defenses, unlike delinquent employers who are subject to the act, and is only responsible under the doctrine of Sovereign Immunity to the Plaintiffs, to the extent that the liability insurance written by AIG applies. In addition, the State Police has a right of subrogation against remaining defendants, who contributed to Sergeant Hawkins injury. See West Virginia Code §15-2-10 (e). This is hardly an absurd result to a young man rendered totally disabled, due in part to the negligence of State Police.

RELIEF REQUESTED

WHEREFORE, the Petitioners respectfully requests that this Court grant the appeal and reverse the Circuit Court's ruling and find that Respondent, West Virginia State Police, does not have Workers' Compensation immunity from the subject injury claim and for such other relief as this Honorable Court deems appropriate.

Respectfully submitted,



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Plaintiff's,

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Civil Action No. 06-C-1404

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PREVENTION, and J. MATTMAN SECURITY,
INC. d/b/a THE MATTMAN COMPANY.

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 2008, I served the foregoing

Appellant's Brief upon the following by depositing true copies thereof in the United States mail,
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