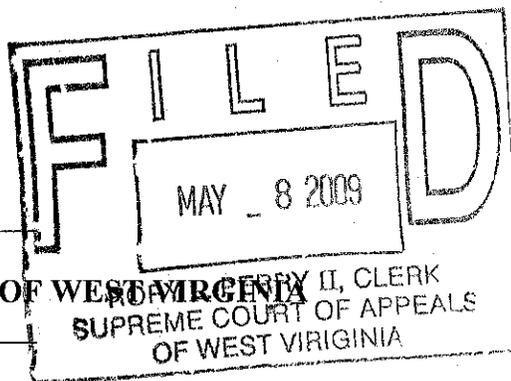


No. 34749



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KEITH WEST and SUSAN WEST, Appellees,

v.

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,
a department or agency of the State of West Virginia;
PAUL A. MATTOX, in his capacity as the commissioner of highways, Appellants.**

**Appeal from Circuit Court of Brooke County
Honorable James P. Mazzone
Civil Action No. 06-61H**

APPELLANTS' BRIEF

May 8, 2009

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and Paul A. Mattox, in his capacity as
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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL.....	1
A. The Initial Pleadings.....	2
B. Rulings of the Circuit Court.....	4
C. The Verdict.....	6
II. STATEMENT OF THE FACTS.....	7
A. The Guardrail.....	7
B. The Accident.....	9
III. STANDARD OF REVIEW.....	9
IV. ASSIGNMENTS OF ERROR AND RULINGS BELOW.....	10
A. Assignments of Error.....	10
B. Rulings Below.....	10
V. POINTS AND AUTHORITIES RELIED UPON.....	11
VI. DISCUSSION OF LAW.....	12
A. DOH is immune from suit.....	12
1. There has been a slow erosion of the State’s immunity; this case presents this Court with the opportunity to affirm what is a narrow exception to immunity.....	12
2. Endorsement #7 is a part of the insurance contract.....	16
3. Lack of signature on Endorsement #7 does not prohibit its incorporation into the policy.....	18
4. The Circuit Court’s creation of an exception (failure to inspect) to the Endorsement is further erosion of the immunity doctrine issue.....	19
(a). The erosion of the immunity doctrine is further proved by the impermissible jury argument for sums in excess of coverage limits.....	21
B. There is no “additional” insurance – only a hold harmless agreement.....	23
1. A hold harmless agreement is not insurance.....	25
C. The Circuit Court made numerous errors during the course of trial.....	28
1. The Circuit Court erred in finding DOH negligent.....	28
2. The Circuit Court erred when it excluded the driver from the verdict form.....	31
3. The Circuit Court erred when it failed to admit impeachment testimony of Mr. West’s lack of restraint.....	33
4. The Circuit Court erred when it failed to inform the jury of Penn Line’s settlement.....	35
VII. RELIEF PRAYED FOR.....	38

TABLE OF AUTHORITIES

Cases

<u>Blessing v. National Engineering & Contracting Co.</u> , 222 W. Va. 267, 664 S.E.2d 152 (2008)	11, 18, 22, 24, 25
<u>Keffer v. Prudential Ins. Co.</u> , 153 W. Va. 813, 172 S.E.2d 714 (1970)	16
<u>Louk v. Isuzu Motors, Inc.</u> , 198 W. Va. 250, 479 S.E.2d 911 (1996)	16, 32, 33
<u>Mellon-Stuart Co. v. Hall</u> , 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987).....	12
<u>O’Neal v. Pocahontas Transp. Co.</u> , 99 W. Va. 456, 129 S.E. 478 (1925)	17
<u>Parkulo v. West Virginia Bd. of Probation and Parole</u> , 199 W. Va. 161, 175, 483 S.E.2d 507, 521 (1996).....	14, 15
<u>Pittsburgh Elevator Co. v. West Virginia Bd. of Regents</u> , 172 W. Va. 743, 310 S.E.2d 675 (1983)	13, 15, 21, 22, 26, 28, 36
<u>Pobro, LLC v. LaFollette</u> , 217 W. Va. 425, 618 S.E.2d 434 (2005)	9
<u>Raleigh General Hospital v. Caudill</u> , 214 W. Va. 757, 591 S.E.2d 315 (2003)	9
<u>Russell v. State Automobile Mut. Ins. Co.</u> , 188 W. Va. 81, 422 S.E.2d 803 (1992)	16
<u>State v. Vance</u> , 207 W. Va. 640, 535 S.E.2d 484 (2000)	9

Statutes

W. Va. Code § 17-4-37	4, 12
W. Va. Code § 17C-15-49(d)	33
W. Va. Code § 29-12-1	13
W. Va. Code § 29-12-5	14
W. Va. Code § 29-12-5(a)(1)	14
W. Va. Code § 29-12-5(a)(3)	14
W. Va. Code § 33-12-11	17, 18

Other Authorities

Constitution of the State of West Virginia	3, 4, 12, 21
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**I. KIND OF PROCEEDING AND NATURE OF
THE RULING IN THE LOWER TRIBUNAL**

The West Virginia Department of Transportation, Division of Highways, a department or agency of the State of West Virginia (“DOH”), and Paul A. Mattox, in his capacity as Commissioner of Highways (“Commissioner Mattox” and collectively “DOH” or “Appellants”) appeal from the judgment entered March 19, 2008, by Judge James P. Mazzone in the Circuit Court of Brooke County, West Virginia after a trial by jury resulting in a verdict in favor of Keith West (“Mr. West”) and Susan West (“Mrs. West” and collectively “the Wests” or “Appellees”) in an amount of more than \$8 million.

The case presents questions about Constitutional immunity¹, an unsigned Endorsement #7 to the State’s insurance policy, a failure to remit that portion of the judgment which exceeds the State’s limit of coverage, and various rulings by the Circuit Court, which eviscerated DOH’s defense. Here, the Circuit Court found the exclusions of Endorsement #7 applied to this accident; but, then the Court erroneously held Endorsement #7 was not a part of the contract because it was not signed. Somehow this abrogated the State’s immunity from suit. Further misreckoning, the Circuit Court refused to remit the judgment amount exceeding the State’s coverage (\$1 Million) because Appellees said there was additional insurance. But that so-called additional insurance is part of a “hold harmless” agreement by the contractor and does not nullify the State’s sovereign immunity. These are the core issues on appeal.

This appeal stems from a single vehicle accident on State Route 7 outside of Blacksville, West Virginia, wherein Mr. West’s father, Richard West, lost control of his vehicle and drove off the road. Richard West purposefully steered his truck between a DOH guardrail and a telephone

¹ This Court has used the terms sovereign immunity and constitutional immunity in its discussions. Sovereign immunity is a common law term; DOH’s immunity from suit derives from our State Constitution.

pole because he believed that he could drive into what he thought was a meadow and stop the vehicle without causing any damage to the truck. Unfortunately, Richard West misapprehended the terrain: the area that he believed to be a meadow was not. The truck went down a hillside, and, although the driver was unharmed, Mr. West, the passenger, was ejected from the truck and suffered a fracture of his upper right arm and a fracture of his hip socket.

A. The Initial Pleadings

On April 19, 2006, the Wests filed suit in the Circuit Court of Brooke County, West Virginia, against DOH and Penn Line Service, Inc. ("Penn Line"), a contractor for DOH that repaired the guardrail that Richard West did not touch with his vehicle. The guardrail, which had been damaged by a previous accident on February 1, 2004, was buckled behind the main guardrail at the time of Mr. West's January 20, 2005 incident. Penn Line repaired the guardrail on February 7, 2005.

Count One of the Complaint alleged that Penn Line negligently failed to install, repair, erect and/or replace the missing section of the guardrail. Count One further alleged that Penn Line and R.L. McCarty, an agent of Penn Line but not a named defendant or an individual identified in the style of the case, negligently exposed the public to a high degree of probability of serious injury by failing to ensure that the repair or replacement of the missing section of the guardrail was completed by some other person or entity if they did not have sufficient time and resources within which to complete the repair or replacement themselves.

Count Two of the Complaint alleged that DOH negligently failed to timely and adequately provide warning to the traveling public that a section of the guardrail was missing.²

² This alleged duty would only arise out of ownership of the guardrail. The Circuit Court in determining insurance liability issues -- not coverage -- found "inspection" was not included under Endorsement #7 but ignored the exclusion regarding ownership.

Count II said DOH failed to warn the public to use extra caution in traveling into and through the section of road in question. Further, the Wests alleged DOH failed to properly and adequately employ, select and supervise individuals in charge of and responsible for constructing, repairing, and doing all things necessary to insure that the State's roads are reasonably safe for motorists. Significantly, in paragraph 37 of the Complaint, the Wests stated that they were seeking recovery from DOH pursuant to the National Union Fire Insurance Company of Pittsburgh, PA policy up to the limits of the liability insurance coverage. Finally, the Wests asked the Court for declaratory judgment that Endorsement #7 of the National Union policy was null and void.

Penn Line answered the Complaint on May 12, 2006 and cross-claimed against DOH and Commissioner Mattox, seeking indemnification from DOH. Furthermore, on May 23, 2006, Penn Line filed a third-party complaint against Richard West, who moved to dismiss it on March 5, 2007. The Circuit Court entered an Agreed Order on April 25, 2007, dismissing Richard West and the third-party complaint incident to a settlement; neither the party nor settlement was disclosed to the jury.

On June 1, 2007, DOH filed its Answer to the Complaint, its Answer to the Cross-Claim of Penn Line, and its Cross-Claim against Penn Line. In the Answer to the Complaint, DOH invoked immunity pursuant to the provisions of the Constitution of the State of West Virginia.

In the Answer to the Cross-Claim of Penn Line, DOH also invoked immunity pursuant to the provisions of the Constitution of the State of West Virginia. DOH cross-claimed against Penn Line and claimed that the severity of the accident may have been mitigated if the repair to the guardrail had been made more timely by Penn Line. DOH sought indemnification against Penn Line if DOH was found liable in the matter based upon acts or omissions of Penn Line.

B. Rulings of the Circuit Court

On January 29, 2008, the Circuit Court conducted a pre-trial hearing pursuant to the Wests' motion to exclude seat belt evidence, in which the Appellees argued that the Circuit Court should exclude any and all evidence or argument relating to Mr. West's seat belt restraint usage or lack of usage. In response, Penn Line and DOH argued that they should be permitted to offer seatbelt evidence and argument on Mr. West's credibility (at his deposition he said he was wearing a seat belt, but his wife told a doctor that he was not wearing his seat belt). Thereafter, on January 31, 2008, the Circuit Court entered an Order granting the motion to exclude seat belt evidence. On February 16, 2008, the Circuit Court entered an Order holding that it would not preclude an expert from testifying as to conclusions reached regarding the speed of the vehicle, but that it would not allow reference to Mr. West's ejection from the vehicle as one of the bases for any such conclusion.

On February 4, 2008, Penn Line filed a motion for summary judgment for a finding of insurance coverage and on February 8, 2008, the Wests filed a motion for summary judgment on its declaratory judgment action (that there is insurance coverage). On February 26, 2008, the Circuit Court entered an Order wherein it concluded that declaratory judgment was a proper vehicle for deciding the controversies.

Acknowledging that Article VI, Section 35 of the Constitution of the State of West Virginia and W. Va. Code § 17-4-37 is a grant of sovereign immunity to DOH, the Circuit Court found that the policy issued by the National Union Fire Insurance Company was in place during the time of the accident and that the coverage clearly provided for the accident at issue (i.e., it was excluded). But, the Circuit Court held that since Endorsement #7 to the policy was unsigned, it was not a part of the insurance contract, which would have applied to this accident (and would

have excluded DOH from any verdict). The Circuit Court endorsed Appellees' argument that genuine issues of material fact existed as to whether DOH was negligent in its duty to inspect the guardrail³ and held that the duty to inspect was not specifically excluded by Endorsement #7. The Circuit Court then granted Appellees' motion for summary judgment on the declaratory judgment action and Penn Line's motion for summary judgment for an affirmative finding of insurance coverage.

The Circuit Court denied Penn Line's motion for summary judgment with respect to Penn Line's liability to the Wests; the Circuit Court held that issues of material fact remained in dispute. The Circuit Court noted that the parties disagreed over when Penn Line first received notice that the guardrail at issue needed to be repaired. The Wests maintained that Penn Line received a repair order shortly after an unrelated November 8, 2004 accident resulting in the damage to the guardrail but waited nearly three months to complete the repairs. Penn Line asserted that it did not receive notice of the need for the repair until February 3, 2005, four days before the repairs were made. Finding liability at issue, the Circuit Court denied Penn Line's motion for summary judgment.

On February 27, 2008 the Circuit Court entered an Agreed Order of Dismissal of Penn Line incident to a settlement. The Order found that Penn Line's settlement with the Wests was a fair, reasonable and good faith settlement, and the Circuit Court dismissed, with prejudice, Penn Line from the action, including from any and all cross-claims DOH filed against Penn Line for any indemnification and/or contribution. Thereafter, on March 3, 2008, the Circuit Court ruled that Mr. West's father was not to be included on the verdict form – despite the fact he was the driver in a single vehicle accident. The trial against DOH ensued.

³ Again, such a finding is in clear contrast to the ownership, maintenance, use or control language in Endorsement #7.

C. The Verdict

The trial began March 4, 2008. DOH was left virtually defenseless by the Circuit Court's rulings, both pre-trial and during the course of the trial. The jury returned a verdict in favor of the Wests and against DOH in the total sum of \$8,030,298.33. The total verdict for Mr. West was \$7,030,298.33, which included past and future medical damages and future diminished earnings. The Wests claimed that their business was liquidated because of Mr. West's inability to work due to the injuries he received as a result of the January 20, 2005 accident. *Id.* at 122-23. The jury awarded \$168,863 for loss of income to date of the trial and \$1,200,000 for future diminished earning capacity. *Id.* at 175. The verdict for Mrs. West was \$1,000,000 for loss of spousal consortium and future loss of spousal consortium. DOH and Commissioner Mattox filed a motion for a new trial, a renewed motion for entry of judgment as a matter of law, and a motion for entry of an order modifying or altering the judgment. The Circuit Court denied these motions.

In an unusual turn of events, the Circuit Court ordered that the parties undertake discovery necessary to determine the full extent of additional insurance which may apply to the payment of the judgment in the case. These matters concerned a commercial general liability policy and an umbrella policy, which were the subject of a certificate of liability insurance required of Penn Line when it entered into its initial contract with DOH. Both insurance companies moved to intervene in the lower tribunal action, and the Circuit Court granted that motion. There has been no resolution of the insurance coverage issues to date.

Due to these coverage issues, DOH believed there was some question about the finality of the Circuit Court's orders and moved that court for clarification. The Circuit Court declined to do so. The issue of whether DOH is as an "additional insured" pursuant to a certificate of

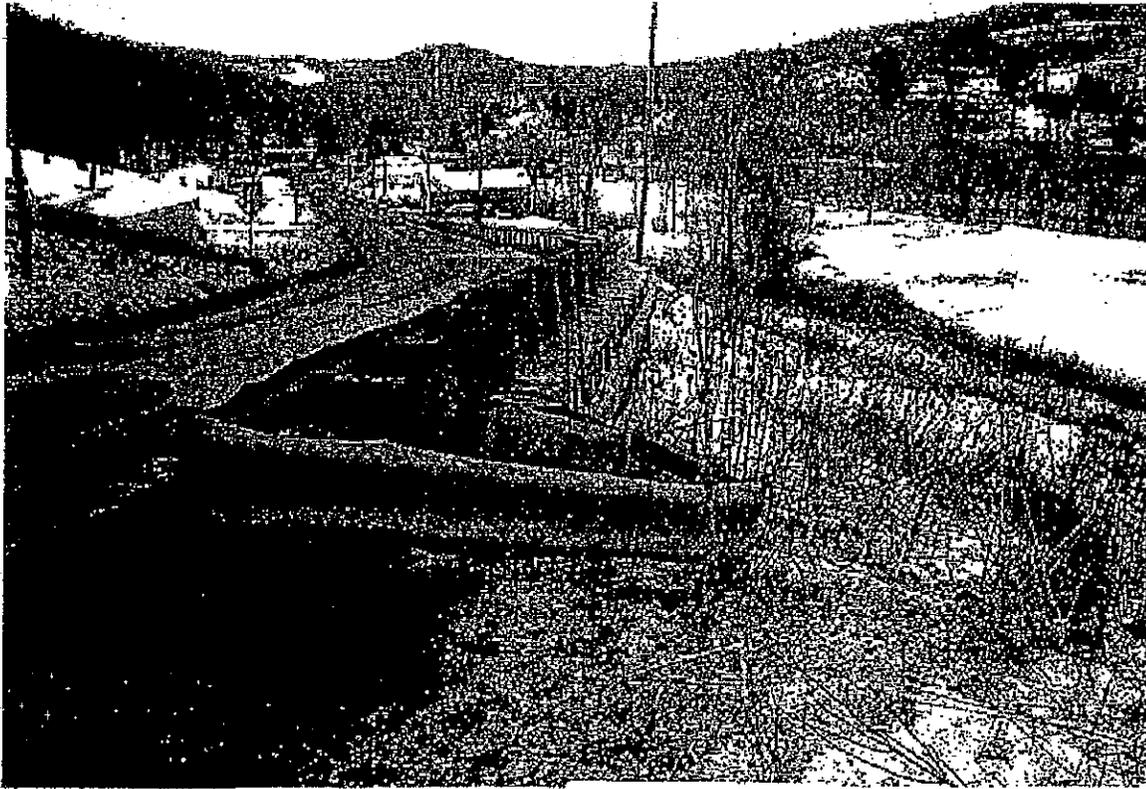
insurance provided by Penn Line incident to its qualification as a successful bidder on the guardrail contract with DOH remains pending. Likewise, the Circuit Court declined to remit or modify the more than \$8,000,000 judgment against DOH, which well exceeds the \$1,000,000 limit of liability of DOH incident to its insurance policy over this accident (and contrary to paragraph 37 of the Wests' Complaint, which sought relief "under and up to the limit of said liability insurance coverage."). The Petition for Appeal was granted on March 12, 2009.

II. STATEMENT OF THE FACTS

A. The Guardrail

On February 1, 2004, there was an accident that damaged the guardrail's end treatment near the location of the January 20, 2005, West incident. (Tr. Tr., March 4, 2008, pp. 206-10). Although the Appellees asserted that the guardrail was missing a section, the end treatment remained attached to the actual guardrail, albeit doubled back behind it. Id. at 210.

On November 8, 2004, Kathy Westbrook, the County Highway Administrator for Monongalia County, West Virginia, discovered the damage to the guardrail that occurred as a result of the February 1, 2004 accident as she was traveling to the western end of the county to conduct business. (Tr. Tr., March 5, 2008, p. 155). Ms. Westbrook stopped and photographed the damage. Id.

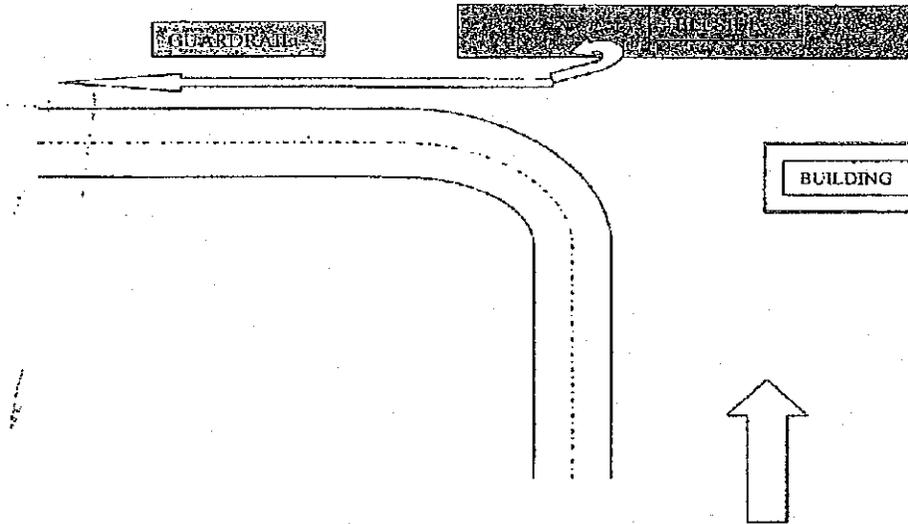


(Tr. Tr., March 7, 2008, pp. 32-36; Discovery, West/Penn Line 0356). Additionally, upon her return to her office that same day, Ms. Westbrook completed a guardrail repair request form. (Tr. Tr., March 5, 2008, p.155). Although Ms. Westbrook called the Pentress station to place barrels or cones at the site, no barrels or cones were present at the site at the time of the January 20, 2005 accident. Id. at 160-162.

Penn Line was the independent contractor for the guardrail repair jobs in District 4 at the time that the damage to the subject guardrail was discovered. (Tr. Tr., March 5, 2008, p. 179). While Ms. Westbrook discovered the damage and requested its repair on November 8, 2004, the repair was not completed until February 7, 2005. Id. at 159, 164.

B. The Accident

It had snowed the evening prior to January 20, 2005, and although the road was basically clear, there were spots of slush and snow that remained. Tr. Tr. March 5, 2008 at 126. The scene of the accident is depicted as follows:



Richard West, who was traveling in the direction as indicated by the (vertical) arrow, was approaching the curve in the road when he ran into slush and lost control of his truck as it began to slide. Id. at 126-127. Although Richard West ultimately regained control of the truck, he could not stop it. Id. at 127. He then intentionally steered the truck between a DOH guardrail and a telephone pole because he believed he could drive into a meadow and stop the vehicle. Id.

III. STANDARD OF REVIEW

A Circuit Court's rulings on questions of law are subject to a de novo review. Syl. pt. 1, Pobro, LLC v. LaFollette, 217 W. Va. 425, 618 S.E.2d 434 (2005); Syl. pt. 1, Raleigh General Hospital v. Caudill, 214 W. Va. 757, 591 S.E.2d 315 (2003) (citations omitted). A Circuit Court's factual findings are reviewed under a clearly erroneous standard. Syl. pt. 3, State v. Vance, 207 W. Va. 640, 535 S.E.2d 484 (2000).

IV. ASSIGNMENTS OF ERROR AND RULINGS BELOW

A. Assignments of Error

1. The Circuit Court erred in its conclusion of law that, in the circumstances of this matter, DOH did not have constitutional immunity from the Appellees' claims for relief.
2. The Circuit Court erred in finding Endorsement #7 was not a part of the Policy.
3. The Circuit Court erred by failing to remit the judgment to \$1,000,000, which is the limit of DOH's insurance coverage, and therefore the only amount for which DOH can be liable.
4. The Circuit Court erred when it determined as a matter of law that DOH was negligent.
5. The Circuit Court erred as a matter of law when it ruled that the issue of the driver's negligence was not to be submitted to the jury.
6. The Circuit Court erred as a matter of law when DOH was precluded from using Mr. West's lack of restraint for credibility purposes.
7. The Circuit Court erred in not disclosing to the jury what occurred with the other defendants.

B. Rulings Below

By Order entered February 26, 2008, the Circuit Court concluded that the policy⁴ issued by National Union Fire Insurance Company was in place for the period covering July 1, 2004 to July 1, 2005, or at the time of the accident involving Mr. West. Reviewing Endorsement #7, the Circuit Court found that the contract clearly provided coverage for the accident; however,

⁴ This policy is numbered # GL 4806296. The policy submitted as a part of the record had a declaration page, which was unsigned; however, the Circuit Court found the policy was valid. DOH could produce a signed declaration page if requested.

because the Endorsement was not signed, the Circuit Court held it was not a part of the contract and this event was not excluded under the insurance contract. The Circuit Court ruled that a declaratory judgment was a proper manner to resolve this issue. The Circuit Court denied Penn Line summary judgment with respect to whether there was a duty owed to Appellees by Penn Line concerning the timing of the repairs to the guardrail. On March 3, 2008, the Circuit Court entered an Order wherein it held that Mr. West's father would not be mentioned on the verdict form. The post-trial motions of DOH encompassing the assignments of error herein were denied by the Circuit Court on June 27, 2008. Most egregious, the Circuit Court failed to remit the judgment amount exceeding the DOH insurance coverage.

V. POINTS AND AUTHORITIES RELIED UPON

Blessing v. Nat'l. Engineering and Contracting Co., 222 W. Va. 267, 664 S.E.2d 152 (2008)

Keffer v. Prudential Ins. Co., 153 W. Va. 813, 172 S.E.2d 714 (1970)

Louk v. Isuzu Motors, Inc., 198 W. Va. 250, 479 S.E.2d 911 (1996)

Mellon-Stuart Co. v. Hall, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987)

O'Neal v. Pocahontas Transp. Co., 99 W. Va. 456, 129 S.E. 478 (1925)

Parkulo v. West Virginia Bd. of Probation and Parole, 199 W. Va. 161, 175, 483 S.E.2d 507, 521 (1996)

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

Pobro, LLC v. LaFollette, 217 W. Va. 425, 618 S.E.2d 434 (2005)

Raleigh General Hospital v. Caudill, 214 W. Va. 757, 591 S.E.2d 315 (2003)

Russell v. State Automobile Mut. Ins. Co., 188 W. Va. 81, 422 S.E.2d 803 (1992)

State v. Vance, 207 W. Va. 640, 535 S.E.2d 484 (2000)

W. Va. Code § 17-4-37

W. Va. Code § 17C-15-49(d)

W. Va. Code § 29-12-1

W. Va. Code § 29-12-5

W. Va. Code § 29-12-5(a)(1)

W. Va. Code § 29-12-5(a)(3)

W. Va. Code § 33-12-11

Constitution of the State of West Virginia

VI. DISCUSSION OF LAW

A. DOH is immune from suit

1. There has been a slow erosion of the State's immunity; this case presents this Court with the opportunity to affirm what is a narrow exception to immunity

The State of West Virginia, including the DOH, enjoys constitutional immunity from lawsuits pursuant to Article VI, § 35 of the West Virginia Constitution, which in part states: “[t]he state of West Virginia shall never be made a defendant in any court of law or equity[.]” This Court has consistently held that this “grant of immunity is absolute and ... cannot be waived by the legislature or any other instrumentality of the State.” Mellon-Stuart Co. v. Hall, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987). Furthermore, “the policy which underlies sovereign immunity is to prevent the diversion of State monies from legislatively appropriated purposes.” Id. (internal citations omitted). Significantly, the Legislature expressly codified this immunity for the DOH: “The State shall not be made the defendant in any proceeding to recover damages because of the defective construction or condition of any state road or bridge.” W. Va. Code § 17-4-37. Effectively, DOH not only enjoys constitutional immunity but is also insulated from liability for the condition of state roads by legislation. Notwithstanding the constitutional immunity of the State, however, a person may file suit against a State agency provided the suit seeks “no recovery

from state funds, but rather allege[s] that recovery is sought under and up to the limits of the State's liability insurance coverage[.]” Syl. pt. 2, Pittsburgh Elevator Co. v. West Virginia Bd. of Regents, 172 W. Va. 743, 310 S.E.2d 675 (1983). While the Wests gave lip service to this condition precedent in their Complaint, they argued to the jury to return a verdict of \$4 million. (Tr. Tr., March 7, 2008, p. 136.)

In 1957, the West Virginia Legislature created a statutory exception to the State's blanket constitutional immunity from lawsuits when it created the entity that is now known as the State Board of Risk and Insurance Management (“BRIM”). W. Va. Code § 29-12-1 et seq. The stated purpose for BRIM's creation was to give recognition

[T]o the fact that the state of West Virginia owns extensive properties of varied types and descriptions representing the investment of vast sums of money; that the state and its officials, agents and employees engage in many governmental activities and services and incur and undertake numerous governmental responsibilities and obligations; that such properties are subject to losses, damage, risks and hazards and such activities and responsibilities are subject to liabilities which can be and should be covered by a sound and adequate insurance program; and that good business and insurance practices and principles necessitate the centralization of responsibility for the purchase, control and supervision of insurance coverage on all state properties, activities and responsibilities and the cooperation and coordination of all state officials, departments and employees in the development and success of such a centralized state insurance program. Wherefore, in order to accomplish these desired ends and objectives, the provisions of this article are hereby enacted into law in response to manifest needs and requirements therefore and in the interest of the establishment and development of an adequate, economical and sound state insurance and bonding service on all state property, activities and responsibilities.

W. Va. Code § 29-12-1.

BRIM has a legislative directive to procure insurance coverage for state agencies, as the Legislature gave BRIM “without limitation and in its discretion as it seems necessary for the

benefit of the insurance program, general supervision and control over the insurance of state property[.]” W. Va. Code § 29-12-5(a)(1). But, BRIM “is not required to provide insurance for every state property, activity or responsibility.” W. Va. Code § 29-12-5(a)(3). Indeed, this Court has recognized that

[T]he Legislature may direct such limitation or expansion of the insurance coverage and exceptions applicable to cases brought under W. Va. Code § 29-12-5, as, in its wisdom, may be appropriate. The Legislature has also vested in [BRIM] considerable latitude to fix the scope of coverage and contractual exceptions to that coverage by regulation or by negotiation of the terms of applicable insurance policies.

Parkulo v. West Virginia Bd. of Probation and Parole, 199 W. Va. 161, 175, 483 S.E.2d 507, 521 (1996).

The West Virginia Comprehensive Liability Coverage Form (“the Policy”)⁵, issued by National Union Fire Insurance Company of Pittsburgh, Pennsylvania, provides coverage to the State of West Virginia for certain acts of negligence. Section I, Coverage A of the Policy states that the insurer “will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies.” (Internal quotation marks omitted). Additionally, Section I, Coverage E of the Policy states that the insurer “will pay on behalf of the insureds, individually or collectively . . . all sums which said insureds shall become legally obligated to pay as damages for a loss arising from any [w]rongful [a]ct of the insured.” (Internal quotation marks omitted). “Wrongful act” is defined as “any actual or alleged act, breach of duty, neglect, error misstatement, misleading statement or omission by the insured(s) in the performance of their duties for the [n]amed [i]nsured,

⁵ The West Virginia Comprehensive Liability Coverage Form is the controlling insurance policy in the instant case.

individually or collectively, or any matter claimed against them solely by reason of their being or having been insured(s).” (Internal quotation marks omitted). Significantly, Section II of the Policy limits the total monetary recovery that one may obtain for bodily injury or property damage to \$1,000,000.

Endorsement #7 of the Policy, which modifies the insurance provided pursuant to Section I, provides, in pertinent part, as follows:

It is agreed that the 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 the policy.

(Emphasis supplied; Internal quotation marks omitted). The Policy excludes any claim resulting from the ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use or control of “guardrails,” which the Circuit Court properly found. No employees of the State of West Virginia were physically present at the site of the accident wherein Mr. West incurred his bodily injuries, which nullified the duty to inspect argument of Appellees.

Since Pittsburgh Elevator, this Court has consistently engaged in the process of analyzing the State’s liability insurance policies, including exclusions, to determine whether there is insurance coverage for the specific claims in each case. In Parkulo v. West Virginia Bd. of

Probation and Parole, 199 W. Va. 161, 483 S.E.2d 507 (1996) (whether the West Virginia Board of Probation and Parole could be sued) this Court remanded the case for factual development of whether the insurance policies purchased by BRIM contained specific waivers of quasi-judicial immunity. In Louk v. Isuzu Motors, Inc., 198 W. Va. 250, 479 S.E.2d 911 (1996) this Court held if the State's insurance policy did not provide coverage against DOH's alleged wrongful acts, then DOH was not liable pursuant to the exception to sovereign immunity (the insurance policy contained an endorsement that excluded from coverage certain alleged wrongful acts of DOH). See also, Keffer v. Prudential Ins. Co., 153 W. Va. 813, 172 S.E.2d 714 (1970) and Russell v. State Automobile Mut. Ins. Co., 188 W. Va. 81, 422 S.E.2d 803 (1992) (where the provisions of an insurance policy contract are clear and unambiguous, the provisions are not subject to judicial construction or interpretation).

All of these cases have an effect on trial courts. A decision in Appellant's favor can give clear direction to the lower courts: there must be first an analysis that favors immunity for the state agency, followed by a second acknowledgment that the insurance policy is a narrow exception to immunity (following Pittsburgh Elevator principles) limited to State personnel being present at the time of the occurrence and directly engaged in performing construction, maintenance, repair or cleaning. And it goes without saying any judgment is limited to the amount in the policy.

2. Endorsement #7 is a part of the insurance contract

In its February 26, 2008 Order, the Circuit Court concluded that the policy issued by the National Union Fire Insurance Company was in place during the time of the January 20, 2005 accident and that the coverage clearly provided for the accident at issue. The Circuit Court acknowledged that, as a general matter, endorsements operate to modify an insurance

policy and that, in this case, because Endorsement #7 to the policy was unsigned, the lack of signature created an inherent ambiguity as to whether the endorsement operated to modify the contract. The Circuit Court held that the ambiguity must be resolved in favor of providing coverage.

It is of no moment that Endorsement #7 is not signed. The lack of signature on Endorsement #7 does not prohibit its incorporation into the Policy where the Forms Schedule clearly indicates that Endorsement #7 shall be included and where the Circuit Court repeatedly stated the policy was in place. Individual endorsements to an insurance policy are not signed and the endorsements do not contain any language requiring countersigning to be effective.

The Appellees' reliance on the O'Neal v. Pocahontas Transp. Co., 99 W. Va. 456, 129 S.E. 478 (1925), that an unsigned endorsement does not modify the policy is misplaced. First, W. Va. Code § 33-12-11, which sets forth the requirements for when countersignatures are required, does not even acknowledge a method for countersignature of endorsements. Second, the facts of O'Neal are so distinguishable from those in this case. In O'Neal, the language of the endorsement in question specifically delineates that "this [e]ndorsement, when countersigned by a duly authorized agent of the under mentioned company . . . shall be valid, and shall form part of said policy." O'Neal, 99 W. Va. 456, 129 S.E. 478, 481. In addition, the declarations page for the relevant policy in O'Neal did not list a schedule of endorsements or state whether the endorsement was part of the policy. Id. Here, the language of Endorsement #7 does not require that the Endorsement be countersigned to be part of the Policy. The Policy's Forms Schedule specifically references Endorsement #7 as part of the Policy, as opposed to O'Neal, where the declarations page did not reference or incorporate the endorsement. Properly, in its February 26, 2008 Order, the Circuit Court acknowledged that, as a general matter, endorsements modify an insurance

policy but that, in this case, because Endorsement #7 to the policy was unsigned, the lack of signature created an inherent ambiguity. What ambiguity? There was no discussion about the language of Endorsement #7. There were no other reasons cited by the Circuit Court for the inapplicability of the Endorsement. Following the first analysis rule: there is immunity for state agencies and that is the control point. The erosion of state immunity based upon an unsigned Endorsement, which is dispositive of the legal and fact issues should cease.

3. Lack of signature on Endorsement #7 does not prohibit its incorporation into the policy

Blessing v. National Engineering & Contracting Co., 222 W.Va. 267, 664 S.E.2d 152 (2008) does not require Endorsement #7 to be signed to be considered a part of the policy. This Court specifically did not make this holding. Rather, this Court said in dicta: “[p]referring to allow the lower court to rule upon this issue as an initial matter, we do wish to call the matter to the trial court’s attention for purposes of remand.” Blessing, at 159. In directing the matter back to the lower court, this Court specifically referenced W. Va. § 33-12-11 (2004), acknowledging a statutory provision requiring “countersignature of a licensed residential agent of the insurer on every insurance contract to which the state is a party.” Id. citing W. Va. Code § 33-12-11. This reference is to the Policy -- not an endorsement.

The normal procedure in West Virginia for countersigning of an insurance policy and all applicable forms and endorsements is to sign only the declarations page since the declarations page specifically references and incorporates through the Form Schedule all forms and endorsements applicable to coverage. Individual endorsements are not signed and the endorsements do not contain any language requiring countersigning to be effective. The declarations page is countersigned by an authorized agent in this case, making any argument that Endorsement #7 is

not part of the policy inapplicable. Here, the Circuit Court already found the Policy to be in place; the Endorsement is naturally incorporated.

Remember, the basic premise at issue is a constitutional one: DOH is entitled to immunity from suit unless BRIM has determined that there is insurance coverage. Here, BRIM established an exclusion to the insurance coverage at issue by its decision to include Endorsement #7 to the Policy. This Endorsement excludes accidents involving guardrails; there is immunity from suit. The Circuit Court committed reversible error when it determined that Endorsement #7 was not part of the Policy.

4. The Circuit Court's creation of an exception (failure to inspect) to the Endorsement is further erosion of the immunity doctrine issue

The Circuit Court erred in finding "inspection" to be exempt from the Policy because the employees of DOH were not involved in the accident of January 20, 2005. The DOH's Policy only provides insurance coverage for "bodily injury" or "property damage" arising out of the Department's "ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use, or control of . . . guardrails" when employees of DOH are physically present at the site of the incident "performing construction, maintenance, repair, or cleaning." Activities described as "construction, maintenance, repair, or cleaning" specifically exclude inspection of work being performed or materials being used by others. If DOH employees are not present at the site of the incident performing such activities, no insurance coverage exists and constitutional immunity applies.

The Policy represents the State's effort to obtain "reasonably broad protection against loss, damage or liability to state property and on account of state activities and responsibilities" with regard to activities by DOH. The scope of coverage under the policy reflects a common sense

approach, based on sound public policy, to determining when DOH may fairly be held responsible for an injury involving State roads.

The role of DOH in the maintenance of our State roads, and its relationship to the contractors who build them, provides a rational basis for why insurance coverage is generally available only when employees of DOH are physically present at the site of an incident "performing construction, maintenance, repair, or cleaning," which excludes inspection of the work and materials being performed by others. DOH does not have the manpower, equipment, or the expertise to construct modern bridges and roads. DOH solicits bids from qualified contractors to maintain those bridges and roads. The DOH's insurance contract provides coverage only for losses that occur while DOH employees are actually performing the work which could possibly have resulted in an injury. In other words, coverage is available when DOH employees may possibly be responsible for an injury by virtue of their presence at the scene and the work they are performing. When new roads and bridges are built, DOH employees are not actually performing any of the work attendant to the construction, but rather they are only inspecting the project to ensure that the contractor uses the correct materials and proceeds according to the contract specifications. The contractor, who has been awarded the contract is, simply by virtue of having been deemed the "lowest responsible bidder," is mandated to have in place adequate insurance coverage sufficient to cover any injuries attributable to work performed by the contractor's employees. The construction contracts also have hold harmless provisions to enable DOH to recover any expenses incurred in defending suits brought against the DOH arising out of an accident on a construction project involving a contractor's employees.

When DOH is performing maintenance activities on roads and bridges, DOH employees are present performing the work. If an accident occurs during such maintenance activity, it is

reasonably possible that DOH employees or equipment may be responsible and insurance coverage is available in such circumstances if liability is demonstrated. This eliminates the injustice recognized by Pittsburgh Elevator where our Constitution, by virtue of constitutional immunity, “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” Pittsburgh Elevator, 172 W. Va. at 754, 310 S.E.2d at 686.

(a). The erosion of the immunity doctrine is further proved by the impermissible jury argument for sums in excess of coverage limits

In paragraph 37 of the Complaint, the Appellees parroted the case law language that they did not seek a recovery in excess of the State’s liability insurance but proceeded to do the exact opposite. The Appellees flagrantly ignored their promise in their Complaint throughout the course of the trial. For example, their certified earnings analyst testified that Mr. West had a future loss in wages of \$1,012,221 (Tr. Tr., March 5, 2008, p. 71), lost earnings and household expenses of \$1,313,359, and total future medical costs of \$634,234.84 to \$779,124.36, Id. at 79-80. Finally, during closing argument, and in sharp contrast to the allegations set forth in the Complaint, the Appellees asked for a verdict of \$4,000,000. (Tr. Tr., March 7, 2008, p. 136). DOH immediately asked for a mistrial, inter alia, on the grounds that it was inappropriate to request the \$4,000,000 figure, but the Circuit Court denied the motion. Id. at 137-140.

Section II of the Policy limits the total monetary recovery that a party may obtain for bodily injury or property damage to \$1,000,000. As acknowledged in both Pittsburgh Elevator and the Appellees’ own Complaint, the Appellees were limited by law to seek recovery only up to the amount of the applicable insurance coverage. To the extent that any judgment should have

been entered against DOH, the judgment should have been limited to the amount provided pursuant to the insurance Policy.

In their Response to DOH's Petition for Appeal, Appellees asserted that DOH's reliance upon the proposition that the State's sovereign immunity is lifted only to the extent of the \$1,000,000 BRIM Policy is somehow wrong. (Resp., p. 17, n.2). Appellees believe that because Blessing involved an analysis by the Court as to whether "hold harmless and indemnification" language in a contract between the State and one of its contractors constituted insurance, DOH misinterpreted Blessing. Id.

But this Court has held time and time again one may file suit against a State agency provided the suit seeks "no recovery from state funds, but rather allege[s] that recovery is sought under and up to the limits of the State's liability insurance coverage[.]" Syl. pt. 2, Pittsburgh Elevator Co., 172 W. Va. 743, 310 S.E.2d 675. A plaintiff is limited to the liability insurance coverage provided by the State's insurance policy, as determined by the Legislature. The amount of that liability insurance coverage is \$1,000,000. Period.

This Court held in Parkulo that it will not review suits against the state unless it is alleged the recovery is limited to the applicable insurance coverage.

We recall and emphasize here that Pittsburgh Elevator approved only those suits against the State which "allege that recovery is sought under and up to the limits of the State's liability insurance coverage," acquired under the authority of W.Va. Code § 29-12-5. We emphasize that in actions such as the one before us, the pleadings should state that qualification, limiting the relief sought to the coverage actually provided by the applicable insurance policies. Ideally, the text of the applicable insurance coverages afforded, including any applicable contractual exceptions or limitations contained in the policies, should be included in the record at an early stage of the proceedings so that the trial court can readily determine whether, and to what extent, claims and causes of action pleaded are made subject to litigation in the courts by reason of W.Va. Code § 29-12-5 unless it is alleged that the recovery sought is limited to the applicable insurance

coverage and the scope of the coverage and its exceptions are apparent from the record.

Parkulo at 515.

If this verdict is not remitted to the State's coverage limits, the erosion of constitutional immunity will be complete.

B. There is no "additional" insurance -- only a hold harmless agreement

Appellees' represent that the State may be an additional insured on policies issued to Penn Line. Those policies only pertain to the extent that DOH is liable for acts of negligence committed by the contractor. Appellees settled with Penn Line before trial.

The Circuit Court deferred ruling on DOH's request to reduce the jury's verdict in order to determine if other insurance coverage existed.

What I am going to do is defer ruling on the Division of Highways' request to reduce the verdict until some discovery can occur and information can be submitted to me so that I can properly determine exactly how much insurance coverage there is out there, because I believe a real question exists as to whether or not it is limited only to the million or whether or not there is more insurance coverage than that. And because of that question, I don't believe I can properly reduce the jury's verdict to the one million, because I would -- that presupposes me being convinced that there's only a million. It would have to be reduced to the amount available that -- to the Division of Highways and that I just don't know based on this record. We know there's at least a million, but because of the other issues that we've discussed today, I don't know what it's capped at. So that part of your motion, Dana, I am going to defer until there is additional discovery. Discovery, I would envision, would include discovery directed at the Division of Highways inasmuch as they are listed on this liability of insurance, but while I'm not ordering it, I think it would be difficult to conduct comprehensive discovery without also obtaining discovery from the other insurance company, AIG or Zurich, whoever generated this certificate of liability insurance that lists the Division of Highways as an additional insured under this policy.

(Tr., May 30, 2008, pp. 37-38).

In their Response to the Petition for Appeal, Appellees contend that the trial court deferred ruling on the issue of remitting the judgment against DOH to \$1 million to allow discovery on the availability of other insurance, in particular to determine whether the DOH is an additional insured on policies issued to Penn Line. Over the objection of the Appellees, the insurers for Penn Line, Zurich and American Guarantee, were granted leave to intervene by the trial court and filed a declaratory judgment claim with respect to this insurance coverage issue, which remains pending. However, the potential availability of coverage for DOH through one or more insurance policies issued to a contractor of the DOH as an additional insured, does not create an exception to the sovereign immunity afforded to a governmental agency of the State.

Pursuant to the hold harmless agreement in its contract with DOH, such coverage would only be to the extent DOH is liable for the acts of negligence committed by Penn Line. Penn Line settled with the Appellees, and all cross-claims filed by DOH against Penn Line for contribution and/or indemnification were dismissed, with prejudice. Only the issue of the liability of DOH itself proceeded to trial.

Pursuant to Blessing, the bar to constitutional immunity is not lifted because the policies issued to Penn Line do not constitute liability insurance procured by the State through the Board of Risk. Additionally, W.Va. Code § 29-12-5(a)(4)(2004) does not apply to the insurers for Penn Line to prevent them from asserting constitutional immunity as a defense because they did not contract with the Board of Risk to protect the State. Id. Because the insurance policies issued to Penn Line were not required by or relied upon by DOH, or purchased by the State through the Board of Risk and Insurance Management, the coverage, if any, afforded DOH does not create an exception to constitutional immunity. Further, a determination by the trial court of whether there is coverage for DOH as an additional insured under the policies issued to Penn Line does

not alter the conclusion that such coverage is not the type of insurance necessary to lift the bar to constitutional immunity; the fact that the declaratory judgment proceeding remains pending does not render the issue premature. Rather, the issue of whether the Circuit Court erred in failing to modify the jury award is ripe for appeal.

1. A hold harmless agreement is not insurance

This Court has unambiguously stated that contractual hold harmless provisions are *not* insurance. In Blessing, the Court examined whether an indemnification agreement, under which the contractor agreed to hold the DOH and its employees harmless from all liability for damages to persons or property that may as a result of the acts or negligence of the contractor, its agents, employees or subcontractors, was synonymous with insurance for the purpose of the analysis in Pittsburgh Elevator. Citing Marlin v. Wetzel County Bd. of Educ., 212 W.Va. 215, 221, 569 S.E.2d 462, 468 (2002), the Court stated that indemnification agreements are by nature “essentially non-insurance contractual risk transfers.” Id. at 157. Such an agreement and its risk shifting provisions are not the functional equivalent of the liability insurance required by Pittsburgh Elevator for purposes of avoiding the bar of sovereign immunity for a number of reasons. Id. First, the indemnification agreement protects the DOH from damages arising from the acts of the contractor and its subcontractors, but any damages attributable to the acts of the DOH and its employees are not covered by the hold harmless language of the agreement. Thus, the only risk-shifting that the agreement has the potential to effect is as to the acts of non-governmental entities, leaving the State still at risk for damages awarded in connection with the actions of the DOH, contrary to the fundamental premise for sovereign immunity. Id. at 157-58.

Second, central to the decision in Pittsburgh Elevator was the recognition that the pivotal reason suits may be instituted against the State and its agencies was the legislative provision,

W.Va. Code § 29-12-5(a)(4)(2004), proscribing an insurer who contracts with the Board of Risk from asserting sovereign immunity as a bar to litigation. The Court was clear in that decision that the bar of sovereign immunity is lifted *only to the extent of the liability insurance procured by the State through the Board of Risk*. *Id.* at 158 (emphasis in original). Because the indemnification agreement did not stand in the place of an insurance policy issued by an insurer to the Board of Risk for the purpose of protecting the State from damages accruing to it, the Court held that it was not the “practical equivalent” of insurance for the purposes of the Court’s decision in Pittsburgh Elevator. *Id.*

A hold harmless agreement is not insurance for another reason -- neither DOH nor Penn Line is in the “business of insurance” as contemplated by the Legislature. “Insurer is every person engaged in the business of making contracts of insurance.” W. Va. § 33-1-2; see also Hawkins v. Ford Motor Co., 211 W. Va. 487, 491, 566 S.E.2d 624, 628 (2002) (self-insured company not in the “business of Insurance”). Taking the argument to its logical conclusion, if a hold harmless provision constitutes insurance, then any party that includes a hold harmless provision in a contract must be licensed by the West Virginia Insurance Commission to include such a term in a contract.

Pittsburgh Elevator states as follows: “[s]uits 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. 743, 310 S.E.2d 675 (emphasis added). The Court’s phrase “the State’s liability insurance coverage” references the insurance policy procured by the State, as authorized by W. Va. § 29-12-5, to provide liability insurance coverage for claims that fall within the scope of that coverage. Pittsburgh Elevator did not change the character of the State’s immunity to the extent that a State agency may enter into a contract that contains an indemnification provision in its

favor. Pittsburgh Elevator amends the State's immunity to the extent insurance coverage is available under the policy authorized by the Legislature and crafted by BRIM. Other agencies of the Executive Branch, such as DOH, simply do not have the power to unilaterally modify the coverage, as determined by BRIM, by entering into contracts with third parties.

Appellees' essential position is that not only may State agencies, by contract, unilaterally modify the scope of insurance coverage and sovereign immunity established by BRIM, but private parties may do so as well by the simple act of acquiring a private insurance policy that provides coverage for costs covered by a hold harmless agreement. With this power, State agencies and private parties may vest the circuit courts with subject matter jurisdiction over the State where none may have before existed under West Virginia law.

Because the policies issued to Penn Line do not stand in the place of insurance procured by the Board of Risk for the purpose of protecting the State from damages accruing to it, such policies cannot be sufficient to lift the bar to constitutional immunity. In addition, W.Va. Code § 29-12-5(a)(4)(2004) does not apply to the insurers for Penn Line to prevent them from asserting constitutional immunity as a defense because they did not contract with the Board of Risk to protect the State. Id. Nor was Penn Line required by its contract to procure insurance for the benefit of DOH or to add DOH as an "additional insured." See id. (in finding that the property owner was covered under the contractor's liability policy in Marlin, the Court looked to the fact that the construction contract at issue expressly required the property owner to be an "additional insured" on the contractor's liability policy). Because the insurance policies issued to Penn Line were not required by or relied upon by DOH, or purchased by the State through the Board of Risk and Insurance Management, the coverage, if any, afforded DOH does not create an exception to constitutional immunity.

Under Appellees' theory, the State would lose all control of the scope and amount of the insurance coverage that determines the extent of its immunity. Multiple insurance policies are almost always involved in any construction project. Beyond construction projects, multiple insurance policies are usually involved in any litigation where multiple defendants have been named. The existence of insurance coverage under any given policy is usually a question of law where the facts are not in dispute. Murray v. State Farm Fire and Cas. Co., 203 W. Va. 477, 482, 509 S.E.2d 1, 6 (1998). Instead of being able to determine the existence of subject matter jurisdiction by virtue of the State's policy, multiple insurance policies would have to be evaluated in third-party claims. The State would likely find itself mired in endless declaratory judgment actions to determine whether some insurance policy issued by other insurer to a private party might provide some form of coverage that benefits the State in any given situation. This is well beyond the holding of Pittsburgh Elevator.

There is no question the Appellees have an agenda: they seek more than \$8 million from the State's Treasury, which makes a mockery of this Court's long-established limited exception to constitutional immunity. While the Appellees pretend to observe the case law on constitutional immunity, their failure to acknowledge the verdict's impropriety demonstrates their true intent: the evisceration of the Pittsburgh Elevator rule. If there is liability, the Circuit Court should have reduced the jury's verdict pursuant to the applicable terms of the Policy and it committed reversible error in its failure to do so.

C. The Circuit Court made numerous errors during the course of trial

1. The Circuit Court erred in finding DOH negligent

The Circuit Court instructed the jury that, as a matter of law:

The West Virginia DOH was negligent with respect to its duty to inspect the subject guardrail, repair the subject guardrail, and to

warn for [sic] motorists of its non-functional condition. Accordingly, in this case you will only need to determine whether or not the West Virginia DOH's negligence was a proximate cause of the subject accident and, if so, would damages have been sustained by the plaintiffs.

(Tr. Tr., March 7, 2008, pp. 106-07). The Circuit Court apparently forgot the testimony of Appellees' expert witness, Andrew E. Ramisch, who testified as follows regarding Richard West's actions during the January 20, 2005 accident:

He had enough traction that he could control the vehicle, so he turned it back toward the road, and then he saw that there was this – that the guardrail was broken and he didn't want to hit the broken end of the guardrail, so he made a conscious effort to go between the sign and the guardrail, and thinking it was a meadow, not knowing it was a big pit.

(Tr. Tr., March 4, 2008, pp. 225-226). Thereafter, on cross-examination, Mr. Ramisch testified regarding Richard West's steering of his vehicle during the course of the accident:

He was aiming it straight ahead because he didn't want to hit the pole and he didn't want to hit the damaged guardrail and there was nothing to tell him that he shouldn't go behind that area. That's what he was doing. He was doing that on purpose, yes. Mr. West deliberately drove his car straight past the end of that guardrail between the telephone pole and the guardrail.

Id. at 298.

The Circuit Court also apparently neglected to take into consideration Richard West's deposition testimony, quoted during trial, wherein Richard West testified as follows:

I tried braking the truck kept going sideways [sic]. I let off the brake so I could steer it, because I could see an opening ahead. I could see the guardrail on the left. I could see a telephone pole there. And as I was sliding, I know it didn't take too long to do it, but it was still quick enough that I could control the truck with the steer. I couldn't stop it. And I thought that I was going off into a meadow, and if I went into that meadow, I wanted to go straight off into it. So I was able to let off the brake and pump the brake to where I was able to control the front end of the truck to get it to

straight over the hill, over that hill. And I thought I was going into a meadow there.

Id. at 272-73. Richard West's trial testimony that "I was interested in trying to go through them [referring to the guardrail and the telephone pole] at the time," was consistent with his previous deposition testimony as noted above. (Tr. Tr., March 5, 2008, p. 139).

Given this repeated testimony, the Circuit Court should not have taken the issues of inspection of and repairs to the guardrail away from the jury and made a finding of negligence on DOH's part when the driver purposely missed hitting the guardrail. The Circuit Court erroneously instructed the jury that DOH was negligent, as a matter of law, with respect to its duties to inspect and repair the guardrail, as well as with respect to its duty to warn motorists of the guardrail's non-functional condition. But this Court has consistently held that "it is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting[.]" Stanley v. Chevathanarat, 222 W. Va. 261, 664 S.E.2d 146, 151 (2008) (citing Syl. pt. 2, in part, Graham v. Crist, 146 W. Va. 156, 118 S.E.2d 640 (1961) (additional citations omitted)); see also Hatten v. Mason Realty Co., Syl. pt. 5, 148 W. Va. 380, 135 S.E.2d 236 (1964) ("Questions of negligence ... present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them."). The Circuit Court should have permitted the jury to determine whether DOH was negligent and it committed reversible error in taking from the jury its opportunity to do so.

While DOH firmly believes that the Circuit Court was clearly erroneous on carving out "inspection" from Endorsement #7, it was likewise in error to find DOH negligent and not submit that issue to the jury (at a minimum). The nub of this matter is the driver never intended to hit the guardrail. This alone precludes a finding of negligence and creates a jury question.

2. The Circuit Court erred when it excluded the driver from the verdict form

It is accepted practice to include all tortfeasors in the apportionment question. This may include nonparties, who may be unknown, and persons alleged to be negligent but not liable in damages to the injured parties because of immunity. Miller v. Monongahela Power Co., 184 W. Va. 663, 403 S.E.2d 406 (1991), overruled on other grounds by Mallet v. Pickens, 206 W. Va. 145, 522 S.E.2d 436 (1999); Bowman v. Barnes, 168 W. Va. 111, 282 S.E.2d 613 (1981).

The Appellees filed a motion to exclude and prohibit DOH from arguing, suggesting, or offering any evidence that the driver of the vehicle was negligent or responsible for causing Mr. West's injuries. DOH asserted that Richard West should be listed on the verdict form so that the jury had the option of attributing a percentage of fault to him. (Tr. Tr., March 6, 2008, p. 129). The Circuit Court stayed with its decision, reflected by its March 3, 2008 Order, refusing to allow a non-party to appear on the verdict form for purposes of attributing fault, despite the fact that Richard West was formerly a third-party defendant to the lawsuit. [The Circuit Court also denied the post-trial reconsideration of the issue of the driver's negligence. [Tr. Tr., May 30, 2008, p. 36].] The Circuit Court completely hamstrung DOH by its March 3, 2008 ruling that in a single vehicle accident, the parties could not argue or suggest to the jury that it allocate a percentage of fault to the driver.

This Court's point of law established in Syllabus Point 3 of Davis v. Sargent, 138 W. Va. 861, 78 S.E.2d 217 (1953) and cited in Louk v. Isuzu Motors, Inc., should have provided sufficient guidance for the Circuit Court: "The questions of negligence and contributory negligence are for the jury when the evidence is conflicting or when the facts, though undisputed, are such that reasonable men may draw different conclusions from them." Syl. pt. 10, Louk v. Isuzu Motors, Inc., 198 W. Va. 250, 479 S.E.2d 911. The rule in West Virginia is quite clear:

We likewise rely on the rules applicable to concurrent negligence, that no one defendant need be the sole cause of the injury sustained if the negligence of two or more parties concurred in time and place and the negligence of each proximately contributed to the resulting harm. Then recovery may be had against all the parties whose negligence proximately contributed to the injury.

Louk v. Isuzu Motors, Inc., 198 W. Va. at 262, 479 S.E.2d at 923.

In their Response to DOH's Petition for Appeal, the Appellees assert that DOH incorrectly cited Miller and Bowman for the proposition that all tortfeasors should be included on a verdict form, regardless of whether or not a party to the action. (Resp., p. 35). The Appellees maintain that these cases are inapplicable because the legal principle involved in those cases addressed the comparative negligence of the plaintiff. Id.

The Appellees confuse DOH's argument. As Miller clearly notes: "[t]he defendant's second assignment of error is that the lower court should not have withheld from the jury the issue of Homer Laughlin's [a former co-defendant who had been dismissed from the suit] negligence." Miller, 184 W. Va. at 669, 403 S.E.2d at 412. In Miller, the Court held that it was error, albeit harmless error, for the trial court to have prevented the defendant from "point[ing] the finger at Homer Laughlin." Id.

Here, the Circuit Court's denial of DOH's reasonable request that the driver, who alone set the sequence of events into play, should be on the verdict form is far more than harmless error. In Louk, the Court surmised that DOH's role in reviewing and approving the permit for a new road connecting the Wal-Mart site to the primary road may have constituted an intervening cause. Louk, 198 W. Va. at 263, 479 S.E.2d at 924. The Court next conjectured that DOH's permit approval could have constituted the sole proximate cause of the accident and perhaps absolve other participants. Id. In Louk, this Court determined that the jury was entitled to consider whether the DOH's role was truly independent and separate or whether the

development of the access plan and design was a team effort in which all the defendants had a contributing role. This was the result despite the fact that this Court found DOH subject to immunity for the accident. “Although the DOH is no longer a party to this action, the jury may consider the negligence of all joint tortfeasors, whether parties or not.” Louk, 198 W. Va. at 266, n.14, 479 S.E.2d at 927, n.14. The jury here should have been able to consider the negligence, if any, of a former third party defendant. The Circuit Court committed reversible error when it excluded the driver from the verdict form.

3. The Circuit Court erred when it failed to admit impeachment testimony of Mr. West’s lack of restraint

Mr. West’s ejection from the truck in which he was a passenger was probative evidence and proper for the jury to hear because this fact would impeach Mr. West’s credibility.

On January 29, 2008, the Circuit Court conducted a pre-trial hearing pursuant to the Wests’ motion to exclude seat belt evidence, in which the Appellees asserted that the Circuit Court should exclude any and all evidence, reference or argument relating to Mr. West’s seat belt restraint usage or lack of usage pursuant to state statute, W. Va. Code § 17C-15-49(d). The Appellees argued that the fact of ejection was prejudicial to them because it raised the possibility that the jury would find, outside of the evidence, that Mr. West was unrestrained and penalize Mr. West for this omission, which would be contrary to the statutory provision that lack of seat belt usage does not give rise to issues of comparative negligence. Id. In response, Penn Line and DOH argued that they should be permitted to offer evidence and argument on Mr. West’s seat belt usage, or lack thereof, as such evidence went to Mr. West’s credibility. At his deposition, he said he was wearing a seat belt; his wife told a doctor four days after the accident that he was not wearing his seat belt. On January 31, 2008, the Circuit Court entered an Order wherein it granted the motion to exclude seat belt evidence.

Rule 403 of the West Virginia Rules of Evidence provides in pertinent part: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [.]” Notably, the litmus test is not whether the evidence is prejudicial.

This Court has acknowledged:

A party is always prejudiced by relevant, damaging evidence submitted by the opponent, and the law will not exclude evidence on the basis of “prejudice.” Counsel must use “unfair prejudice,” cite Rule 403, and apply the balancing test. It is safe to say that almost all evidence introduced is prejudicial in one degree or another; indeed, that is usually why it is introduced. If the prejudice caused by the evidence outweighs its probative value, it should be excluded.... The fact that a piece of evidence hurts a party’s chances does not mean it should be automatically excluded. If that were true, there would be precious little left in the way of probative evidence in any case. The question is not one of prejudice, but unfair prejudice under Rule 403.

Sydenstriker v. Mohan, M.D., 217 W. Va. 552, 561, 618 S.E.2d 561, 570 (2005) (Internal citation omitted). “Rule 403 was never intended to exclude relevant evidence simply because it is detrimental to one party’s case.” Id.

Here, use of the lack of restraint as impeachment evidence should have been controlling. Mrs. West told Dr. Fournier’s office four days after the accident that her husband was not wearing a seat belt. (Tr., January 29, 2008, p. 10). The statement is an admission by a party against interest. It is a prior inconsistent statement and an exception to hearsay, Rule 803. [These reasons are distinguished from this Court’s ruling in Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc., 223 W. Va. 209, 672 S.E.2d 345 (2008), which concerned crashworthiness.]

DOH should have been allowed to present Mrs. West’s statement to attack Mr. West’s credibility. The unfair prejudice to the Appellees did not “substantially outweigh” the critical nature of the information in the defense of this matter. Any potential unfair prejudice could have been addressed by a proper jury instruction rather than the preclusion of the testimony. The trial court

committed reversible error when it failed to admit impeachment testimony of Mr. West's lack of restraint.

4. The Circuit Court erred when it failed to inform the jury of Penn Line's settlement

The Appellees maintained that DOH was negligent in delaying the repair of the guardrail, which if timely repaired, might have been struck by the Ford truck. When Penn Line settled with the Appellees, DOH became the target defendant – but under the theory advanced by the Appellees in their Complaint against Penn Line and not DOH. The Appellees' contentions of DOH's direct liability should have prompted the Circuit Court to reconsider its ruling regarding constitutional immunity.

The Appellees' Complaint, like the complaint in Johnson v. C. J. Mahan Construction Co., 210 W. Va. 438, 557 S.E.2d 845 (2001), centered upon DOH's alleged negligent retention of Penn Line. In Johnson, the estate of a bridge worker and former employee of Mahan Construction Company ("Mahan") brought a wrongful death action against DOH and Mahan, a general contractor for a bridge project. Johnson, 210 W. Va. at 440, 557 S.E.2d at 847. The employee died after he was struck and knocked off the bridge by a rod or bar that separated from the structure. Id. The estate's cause of action against DOH was negligence based upon hiring, retaining, supervising and monitoring of Mahan and failing to inspect Mahan's work on a regular and continual basis. Id. This cause of action is virtually identical to the Appellees' allegation set forth in paragraph 32 of their Complaint, wherein they alleged that DOH was negligent in failing to properly and adequately employ, select and supervise an independent contractor who was in charge of and responsible for constructing and repairing and doing "all things necessary to ensure that state roads are reasonably safe for motorists, including the plaintiffs, and including the repairing, maintaining and timely installation of damaged or destroyed guardrails."

In Johnson, DOH filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Pittsburgh Elevator and contended the selection and retention of a contractor in a bridge construction project were excluded under its liability insurance coverage and Endorsement #7. Johnson, 210 W. Va. at 441, 557 S.E.2d at 848. The circuit court dismissed DOH as a party because of the language of the exclusionary clause of DOH's liability policy. Id.

This Court reversed and remanded the case for further proceedings with regard to allegations that DOH was negligent in its bidding process. Johnson, 210 W. Va. at 442, 557 S.E.2d at 849. The majority (Justice Davis deemed herself disqualified) held that the selection of a contractor was sufficiently "anterior" to the construction of the bridge and therefore would not fall under the construction provisions of Endorsement #7. Id. The dissent (Justice Maynard and Judge Burnside sitting by designation) vigorously argued that such claims only applied while employees of the State of West Virginia are physically present at the site of the incident. Johnson, 210 W. Va. at 443-444, 557 S.E.2d at 851-852.

Here, the Appellees seized upon this "anterior" exception to insurance coverage prohibition and alleged that DOH was negligent in retaining Penn Line. But Appellees elected not to try this issue against Penn Line, opting instead to assign direct liability to DOH. DOH did not breach its duty to the public and did not cause damages. If DOH had any duty whatsoever, it was to provide notice to Penn Line to repair the end piece. But once Penn Line settled with the Appellees, the issue of the notice concluded and the Circuit Court should have revisited the issue of constitutional immunity.

The decision of whether or not to inform the jury of a previous party's settlement is left to the discretion of the circuit court. "In the absence of a written stipulation by the parties, the better rule is to leave the question of the manner of handling the offset occasioned by the settlement by a joint tortfeasor, as

well as the manner of informing the jury that such party has been dismissed from lawsuits, to the sound discretion of the trial court.” Syl. pt. 2, Groves v. Compton, 167 W. Va. 873, 280 S.E.2d 708 (1981).

In Matney v. Lowe, 191 W. Va. 220, 444 S.E.2d 730 (1994), this Court affirmed the trial court’s decision to permit the defendant to mention the existence of settling defendants who were no longer parties to the suit. This Court disagreed with the appellant’s argument that the circuit court’s decision to permit a reference to the settling defendants prejudiced the jury into thinking that the appellant had received sufficient compensation through prior settlements. Matney, 191 W. Va. 222-223, 444 S.E.2d 732-733. Citing Groves v. Compton, this Court noted “[w]e do not believe that any fixed rule can be set except to state that neither counsel should be permitted to take unfair advantage of the settlement and dismissal in presenting and arguing their case.” 191 W. Va. 223, 444 S.E.2d 733 (Internal citation omitted).

In their Response to DOH’s Petition for Appeal, the Appellees assert that DOH never requested that the Circuit Court advise the jury of the facts surrounding Penn Line’s settlement. (Resp., p.33). The Appellees note a brief discussion that occurred between the attorneys and the Circuit Court regarding the issue of informing the jury of Penn Line’s settlement wherein counsel for DOH questioned the Circuit Court as to how the issue of the settlement would be presented. Id. According to the dialogue, the attorneys and the Circuit Court agreed to defer resolution of the issue and never revisited the issue. Id. at 34. The Appellees maintain that the Circuit Court could not have abused its discretion when counsel for DOH failed to raise the issue of Penn Line’s settlement again. Id.

But the issue was raised, and by not acting upon it, the Circuit Court denied the application. The Circuit Court’s failure to permit a reference to Penn Line, the settling defendant, prejudiced DOH: The jury never knew the component of the case regarding the

failures, omissions or nonfeasance of Penn Line as to the guardrail had been settled. The Circuit Court should have known that failure to advise the jury of the settlement would prejudice DOH and permit the Appellees to take unfair advantage of the settlement and dismissal of Penn Line in presenting and arguing their case. Accordingly, the Circuit Court committed reversible error when it failed to inform the jury of Penn Line's settlement.

VII. RELIEF PRAYED FOR

Judgment for Appellees should be reversed and judgment entered for DOH pursuant to a de novo finding that Endorsement #7 is a part of the Policy. The same relief pertains if this Court finds this matter is barred by constitutional immunity because the Appellees seek more than the limits of the State's liability insurance coverage. And the judgment should be overturned and judgment entered for DOH as a matter of law because the driver never intended to hit the guardrail: again, immunity prevails. In the alternative, the Circuit Court's glaring errors committed during the trial (the failure to inform the jury of the Penn Line settlement, the exclusion of the driver, Richard West, on the verdict form, and the failure to admit impeachment testimony of Mr. West's lack of restraint) mandate reversal and a new trial if the Court finds the Policy did not apply and the Wests may willfully seek more than Policy limits.

RESPECTFULLY SUBMITTED,

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, and PAUL MATTOX, in his
capacity as the Commissioner of Highways

By SPILMAN THOMAS & BATTLE, PLLC

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

KEITH WEST and SUSAN WEST,

Plaintiffs Below/Appellees,

v.

No. 34749

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, a department or agency
of the State of West Virginia,

Defendant Below/Appellants.

CERTIFICATE OF SERVICE

I, Charles L. Woody, counsel for Defendants/Petitioners, do hereby certify that I have served the foregoing "Appellants' Brief" upon counsel of record by depositing a true and exact copy thereof in the United States Mail, First Class postage prepaid, this the 8th day of May, 2009, addressed as follows:

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