No. 35496

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FRENCHIE HESS, JR.,

Plaintiff / Appellee,

v.

WEST VIRGINIA DIVISION OF CORRECTIONS,

Defendant / Appellant.

From the Circuit Court of Kanawha County
The Honorable Louis H. Bloom
Civil Action No. 09-C-18

THE WEST VIRGINIA DIVISION OF CORRECTIONS' REPLY TO MR. HESS' RESPONSE TO THE WVDOC'S BRIEF IN SUPPORT OF ITS APPEAL OF THE CIRCUIT COURT'S DENIAL OF THE WVDOC'S MOTION TO DISMISS MR. HESS' COMPLAINT

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OF WEST VIRGINIA

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STATEMENT OF LAW

I. The WVDOC filed its Petition for Appeal in a timely fashion based upon this Court's prior holdings regarding when a party may file a petition for appeal after a ruling regarding only one particular aspect of a case.

Under ordinary circumstances, a party who has lost a case in a circuit court of this state has four months in which to appeal the ruling; otherwise, the right to petition this Court for review is waived and the case is foreclosed. W.V.R.A.P. 3(a). The issue whether a party timely petitions this Court for review of a dispositive motion, however, requires a different analysis.

This Court has held that the clock does not begin to run on a petition for appeal for a party who loses a dispositive motion until the case is entirely disposed of by the circuit court. *Eblin v. Coldwell Banker Residential Affiliates, Inc.*, 193 W.Va. 215, 455 S.E.2d 774 (1995). In *Eblin*, the plaintiffs discovered structural defects in a house they bought and sued the former the former owners, the realtors, the appraiser, and a house inspector who had inspected the house. *Id.* at 455 S.E.2d 775. The circuit court granted summary judgment to all defendants except the house inspector. *Id.* Some time later, the case against the home inspector went to trial and he prevailed. *Id.*

The plaintiffs did not file a petition for appeal regarding the circuit court's decision regarding the motions for summary judgment for 18 months, while the underlying litigation against the home inspector continued. *Id.* at 780. The defendants who prevailed on the dispositive motions argued to this Court that the plaintiffs filed out of time. *Id.* This court reviewed the case to determine, "whether the appeal time on the summary judgment orders commenced running when they were entered, or whether it commenced running when the trial court denied the Eblins' motion for a new trial." *Id.*

This Court determined that the plaintiffs filed in time because a denial of a dispositive motion does not commence the running of time to petition for appeal. *Id.* at 780. West Virginia Rule of Civil Procedure 54(b) governs the time to appeal. Rule 54(b) states:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In the syllabus of *Wilcher v. Riverton Coal Company*, 156 W.Va. 501, 194 S.E.2d 660 (1973), this Court stated that:

> Where multiple claims are involved the trial court should not attempt to enter a final judgment until all the claims have been fully adjudicated, and a summary judgment for a defendant under Rule 56(d), R.C.P. on less than all of the plaintiff's claims is not a final judgment and not appealable under Rule 54(b), R.C.P. unless there is an "express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

An exception applies, however. This Court has held that:

> Where an order granting summary judgment to a party completely disposes of any issues of liability as to that party, the absence of language prescribed by Rule 54(b) of the West Virginia Rules of Civil Procedure indicating that "no just reason for delay" exists and "directi[ng] ... entry of judgment" will not render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court's ruling approximates a final order in its nature and effect.

Durm v. Heck's, Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991).

The *Eblin* court was required, then to determine when the time for appeal of the summary judgment orders for the other defendants began to run. This Court explicitly held that the time for

appeal had not passed and stated, "Accordingly, entry of a *Durm*-type order, while allowing an aggrieved party to take an immediate appeal, does not require that such an appeal be taken at that time, and an aggrieved party may take an appeal at any time until the final appeal time in the case expires." *Id.* at 781.

So too in this case. Nothing in the circuit court's Order indicated an immediate appeal is necessary. The operative text of the Order states:

> WHEREUPON, the Court announced that, after due and mature consideration of the memoranda filed in this matter, the Court is of the opinion that the issues in the WVDOC's Motion to Dismiss on qualified immunity and exhaustion of administrative remedies are better left to the summary judgment stage of the case under WVRCP 56, and therefore, deferred a ruling on same. . . . The WVDOC may raise the issues again pursuant to WVRCP 56 at the appropriate time.

See, Order.

Accordingly, the WVDOC requests that this Court find that its Petition was filed in a timely manner.

II. This Court should direct the circuit court to enter an Order granting the WVDOC's Motion to Dismiss and dismissing the Plaintiff's Complaint with prejudice because the applicable insurance policy does not waive the defense of qualified immunity and the WVDOC merely performs an administrative function with regard to the Stevens Correctional Center, where the Plaintiff was housed at the time of his alleged injury.

The WVDOC is entitled to qualified immunity because the insurance policy that covers Mr. Hess' claim does not contain explicit language that waives the defense of qualified immunity and the WVDOC performs purely administrative functions with regard to the Stevens Correctional Center, which is operated and maintained by the McDowell County Commission.

This Court recently addressed sovereign qualified immunity from suits for negligence. *See, J.H. v. West Virginia Div. of Rehabilitation Services*, 680 S.E.2d 392 (W. Va. 2009) and *Robinson*

v. Pack, 223 W. Va. 828, 679 S.E.2d 660 (2009).

In *J. H.*, the plaintiff claimed that the WVDRS was negligent because it failed to properly supervise Jeff Bell, another resident and quasi-employee who allegedly sexually abused J. H., in the "Attendant Care Unit"; failed to provide proper security to J. H.; failed to properly to enforce rules at the Rehabilitation Center concerning curfews, bed checks, "lights out", etc.; failed to cease Jeff Bell's status as student/client resident and employee status after receiving complaints of similar conduct by Jeff Bell; and failed to coordinate rules and responsibilities of staff in the dormitories and staff in the hospital. *Id.*

Upon service of the complaint, the WVDRS filed a motion to dismiss arguing (1) there was no express waiver or alteration of the State's statutory or common law immunities in the applicable insurance contract; (2) the Plaintiff's negligence claims against the Division were barred by the doctrine of qualified immunity; and (3) the Division owed no special duty to J. H. *Id.*

Upon review of the circuit court's order that granted the WVDRS' motion to dismiss, the West Virginia Supreme Court of Appeals revisited the issues of sovereign and qualified immunity at play in Mr. Hess' case.

Article VI, Section 35 of the West Virginia Constitution grants *sovereign* immunity for claims against the State by providing, in relevant part, that "[t]he State of West Virginia shall never be made defendant in any court of law or equity [.]" Sovereign immunity aside, however, the Legislature authorized the purchase of liability insurance providing coverage of State "property, activities and responsibilities." W. VA. CODE § 29-12-5.

Following the Legislature's lead, in *Pittsburgh Elevator v. West Virginia Board of Regents*, 310 S.E.2d 675 (W. Va. 1983), the West Virginia Supreme Court of Appeals held that "[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." *Id.* at 676. Accordingly, an insurance policy vitiates *sovereign* immunity.

To the extent that Mr. Hess argues the WVDOC is not entitled to sovereign immunity in this case, he's correct. But that analysis is entirely separate and apart from the analysis of whether it is entitled to qualified immunity. Regarding *qualified* immunity, in *Parkulo*, the Court held in syllabus points eight and nine that:

> A public executive official who is acting within the scope of his authority and is not covered by the provisions of W. Va. Code, 29-12A-1, et seq., is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.
>
> In cases arising under W. Va. Code § 29-12-5, and in the absence of express provisions of the insurance contract to the contrary, the immunity of the State is coterminous with the qualified immunity of a public executive official whose acts or omissions give rise to the case.

J. H. at Syl. Pts. 5 and 6 (citing *Parkulo v. West Virginia Bd. Of Prob. and Parole*, Syl. Pts. 8 and 9, 483 S.E.2d 507 (1996)). Further, the qualified immunity available to public officials is also available to state agencies, independent of the presence of sovereign immunity. *Parkulo* at Syl. Pt. 9.

In *J.H.*, this Court held:

> Consequently, the first issue that must be determined in analyzing the issue of qualified immunity and the applicability of this immunity to a State agency is whether the State's insurance policy expressly waives common-law immunity for tort liability. In the instant matter, no such waiver exists. Thus, the second inquiry is whether the State entity was exercising a legislative or judicial function or an administrative function involving the determination of a fundamental governmental policy.

J. H. at 402.

In the case at hand, there is no language in the applicable insurance policy that expressly waives qualified immunity from negligence claims. The WVDOC meets the second part of this test because *it does not operate the facility in which Mr. Hess was injured.* The Stevens Correctional Center is operated and maintained by the McDowell County Commission, not the WVDOC. Accordingly, the WVDOC *literally* only performs an administrative function with regard to the facility in which Mr. Hess alleges he was injured because of negligence.

Given the foregoing, this Court should direct the circuit court to enter an Order that grants the WVDOC's motion to dismiss based upon qualified immunity and dismisses with prejudice Mr. Hess' claim.

PRAYER FOR RELIEF

The circuit court erred when it denied the WVDOC's motion to dismiss because the WVDOC is entitled to qualified immunity as a matter of law. Accordingly, the WVDOC requests that this Court remand Mr. Hess' case back to circuit court for dismissal with prejudice of Mr. Hess' action.

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CERTIFICATE OF SERVICE

I certify that on June 17, 2010, I served this Reply to Mr. Hess' Response to the WVDOC's Brief in Support of its Appeal by United States Postal Service on the following:

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