

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1059

JEFFREY JENKINS AND M. JEAN McNABB,

Plaintiffs-Petitioners,

v.

CITY OF ELKINS, A MUNICIPAL CORPORATION,
STEPHEN P. STANTON, WESTFIELD INSURANCE
COMPANY, NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA, and BOMBARDIER
AEROSPACE CORPORATION,

Defendants-Respondents.



RESPONDENTS CITY OF ELKINS' AND STEPHEN P. STANTON'S
RESPONSE TO CROSS-ASSIGNMENT OF ERROR
IN BRIEF OF WESTFIELD INSURANCE COMPANY

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I. SUMMARY OF THE ARGUMENT

As set forth more fully in the Brief of Respondents City of Elkins and Stephen P. Stanton, the Circuit Court properly granted summary judgment to Mr. Stanton and the City of Elkins (collectively, the “Elkins Respondents”) because there are no genuine issues of material fact and as a matter of law the Elkins Respondents are immune from liability under the Governmental Tort Claims and Insurance Reform Act (the “Tort Claims Act”). Although not raised in the Petition for Appeal, in its Response Brief beginning on page 5, Respondent Westfield Insurance Company argues that the City of Elkins is responsible to Petitioners at least up to West Virginia’s minimum financial responsibility requirements such that National Union Fire Insurance Company of Pittsburgh, PA’s coverage must apply up to the limits set forth in West Virginia Code Section 17D-4-12(b)(2). This argument appears to be intended as a cross-assignment of error although Westfield lacks standing to raise this issue on appeal because it was not prejudiced by the Circuit Court’s holding on this issue. Moreover, Westfield does not strictly comply with West Virginia Rule of Appellate Procedure 10(f).¹ In any event, Westfield’s argument is without merit because the Court properly held that National Union is not required to provide insurance coverage for Petitioners’ claims because the City of Elkins is immune from liability. The Court further soundly reasoned that if insurers are required to pay for claims from which their insureds are immune, then the very purpose of the Tort Claims Act – to aid political subdivisions “to procure adequate liability coverage at a reasonable cost”, W. Va. Code § 29-12A-2, – would necessarily be frustrated. A.R. at 562-63.

¹Westfield does not meet the first requirement for a cross-assignment of error since Westfield is not prejudiced by the Circuit Court’s holding that because the Elkins Respondents are immune from liability the City of Elkins is not responsible for Petitioners’ claims up to West Virginia’s minimum financial responsibility requirements under Section 17D-4-12(b)(2) because this holding is completely independent of the holdings regarding Westfield’s coverage issues. Moreover, the cover page of Westfield’s Response Brief does not clearly reflect that it contains a cross-assignment of error.

II. ARGUMENT

As a threshold matter, Westfield apparently joins Petitioners in urging this Court to reverse the Circuit Court's holding that the Elkins Respondents are immune from liability under the Tort Claims Act. To the extent that Westfield joins this argument, the Elkins Respondents incorporate their Brief of Respondents herein.

Westfield's principal cross-assignment of error – and the one not addressed by Petitioners – is that if National Union is not exposed to pay the maximum coverage allowed under its policy it should be exposed to pay at least up to the mandatory minimum limits prescribed in West Virginia Code Section 17D-4-12(b)(2). The Circuit Court soundly rejected this argument, reasoning that “[b]ecause Defendant Stanton and the City of Elkins are immune from liability, . . . National Union is not required to pay for Plaintiffs claims. . . . [T]he amount of liability limits within [the City's] insurance policy is simply a moot point.” A.R. at 562. The Court then explained the implications of forcing the City's insurer to pay for the claim despite the immunity of its insured as follows:

Furthermore, if the Court were to accept Westfield's argument, the concept of immunity in W. Va. Code § 29-12A-5(a)(11) would be undermined. In support of this contention, W. Va. Code § 17D-4-12 was originally enacted in 1951 and amended in 1959, 1979, and 1991. Notably, the 1991 and 1979 versions contain the same language under the latest version of § 17D-4-12(b)(2). In contrast, the Tort Reform Act was legislatively enacted in 1986. At that time, the West Virginia Legislature was aware of W. Va. Code § 17D-4-12(b)(2); however, it did not create an exception for § 17D-4-12(b)(2).

Moreover, according to W. Va. Code § 29-12A-2 (2008), the purpose of the Tort [Claims] Act was to establish certain immunities and limitations to assist municipalities in procuring adequate liability insurance coverage at a reasonable cost. If the City in this particular situation was required to satisfy W. Va. Code § 17-D-4-12(b)(2), the purpose of the Tort [Claims] Act would be frustrated. By forcing National Union to compensate the Plaintiffs, the current premiums charged, which were established with an expectation that no judgments or settlement would be paid in this type of case, will increase, possibly making it unaffordable for municipalities to purchase. Therefore, this Court is of the opinion that because the Legislature did not draft an exception in § 29-12A-

5(a)(11) and the purpose of the Tort [Claims] Act was to assist municipalities in procuring adequate liability insurance coverage at a reasonable cost, National Union does not have to compensate the Plaintiffs up to the limits of the policy or meet the minimum requirements of W. Va. Code § 17D-4-12(b)(2).

A.R. at 562-63 (footnote omitted).

Westfield does not challenge or even acknowledge the Circuit Court's sound reasoning and reliance on the Legislature's stated purpose in establishing the immunities under the Tort Claims Act. Instead, beginning on page 5 of its Response Brief, Westfield simply quotes the UIM mandatory minimum statute, incorrectly claims that the Elkins Respondents and National Union "proffer that policy exclusions bar all claims against them[,]” and cites inapposite cases to argue that National Union must meet the minimum coverage amounts prescribed in Section 17D-4-12(b)(2).

Westfield's argument fails because it ignores the salient fact that the Elkins Respondents are statutorily immune from liability under the undisputed circumstances of this case. Contrary to Westfield's argument, the Elkins Respondents do not rely on ambiguous "policy exclusions" its insurer drafted in contravention of public policy or the West Virginia Code; but on the immunity unambiguously conferred by the West Virginia Legislature in West Virginia Code Section 29-12A-5(a)(11). Accordingly, the cases Westfield cites are inapplicable. *See Jones v. Motorists Mut. Ins. Co.*, 177 W. Va. 763, 766, 356 S.E.2d 634, 637 (1987) (holding that "no 'named driver exclusion' endorsement is of any force or effect in an automobile liability insurance policy in this State up to the limits of financial responsibility required by [W. Va. Code § 17D-4-12]."); *Adkins v. Meador*, 201 W. Va. 148, 153, 494 S.E.2d 915, 920 (1997) (finding that the insurer's exclusion limiting coverage for a highway construction worker to instances where he occupied a vehicle was "void and ineffective as against public policy.").

On page 6 of its Response Brief, Westfield also cites *Blake v. State Farm Mutual Automobile Insurance Co.*, 224 W. Va. 317, 685 S.E.2d 895 (2009) (*per curiam*) to note that the underlying policy of the Motor Vehicle Safety Responsibility Law is to provide a minimum level of financial security to third-parties who might suffer injuries from negligent drivers. However, in *Blake*, this Court rejected the circuit court's conclusion that "[t]he exclusionary language relied upon by State Farm is unenforceable because it is contrary to and more restrictive than the property damage liability coverage required by . . . the State's Financial Responsibility Statute." *Id.*, 685 S.E.2d at 899-900 (finding that this conclusion and its implications were "contrary to the plain language of West Virginia Code § 17D-4-12(e) and the manifest intent of the legislature.") Moreover, this Court determined that the insurer had no duty to indemnify its insured because the "loss that occurred in [*Blake*] was not only outside the coverage provided by the State Farm policy, . . . but it is also outside the coverage that is mandated by the provisions of the West Virginia Code . . ." *Id.*, 685 S.E.2d at 900. *See also Blankenship v. City of Charleston*, 223 W. Va. 822, 827, 679 S.E.2d 654, 659 (2009) (holding that "[b]ecause the policy did not extend insurance coverage to the type of project giving rise to the injury in question, the lower court was correct in finding that [the insurer] had no duty to defend or duty to indemnify the [plaintiff's] claim against the [insured].").

In this action, the Circuit Court avoided the mistake made by the lower court in *Blake*. If the Circuit Court required National Union to satisfy the requirements of the Financial Responsibility Statute notwithstanding the undisputed immunity of the Elkins Respondents, it would be contrary to the manifest intent of the Legislature in immunizing political subdivisions where the claim was already covered by the workers' compensation system. Furthermore, just as in *Blake* and in *Blankenship*, the loss that occurred here was outside the coverage provided to the Elkins Respondents due to the express preservation of statutory immunities as a condition

precedent to coverage, unequivocally incorporated into the policy through Endorsement No. 10. Where there is no liability coverage for the plaintiff's claim, whether it results from legislatively-sanctioned immunity or an unambiguous policy exclusion, there should be no duty for the insurer to indemnify the insured by paying out on the plaintiff's claim. Therefore, *Blake* and *Blankenship* support the Circuit Court's reasoning that the immunity of its insured under the Act and the manifest intent of the legislature in regulating insurance costs relieved National Union of any obligation to pay the mandatory minimum amounts prescribed in Section 17D-4-12(b)(2).

On page 8 of its Response Brief, Westfield further cites *Miller v. Lambert*, 195 W. Va. 63, 464 S.E.2d 582 (1995), to argue that "the National Union policy must provide liability limits which at a minimum meet our state's legal requirements." *Miller* is wholly inapposite. The simple fact is that the liability limits under National Union's policy meet West Virginia's legal requirements. Nonetheless, Petitioners are not entitled to any payment based on the Circuit Court's holding that the Elkins Respondents are immune from liability under Section 29-12A-5(a)(11). In any event, as the Circuit Court correctly recognized, whether the policy limits meet statutory minimum standards is simply a "moot point" in this case in light of the Elkins Respondents' immunity from liability under the Act. A.R. at 562.

Finally, Westfield's reliance on West Virginia Code Section 33-6-17 on page 8 of its Response Brief is unfounded. By its very terms, the application of Section 33-6-17 requires a showing that the otherwise valid "insurance policy ... contains any condition or provision not in compliance with this chapter" *Id.* Westfield points to no condition or provision within that Chapter 33 of the West Virginia Code in alleging that the National Union insurance policy contains an unduly restrictive provision. Rather, Westfield cites the minimum coverage requirements contained in Chapter 17 in arguing that the policy is offensive to public policy. Therefore, Section 33-6-17 has no application to this action.

III. CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the Brief of Respondents City of Elkins and Stephen P. Stanton, this Court should affirm the Circuit Court's grant of summary judgment to the Elkins Respondents and National Union in all respects.

Dated this 7th day of December, 2011.

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CERTIFICATE OF SERVICE

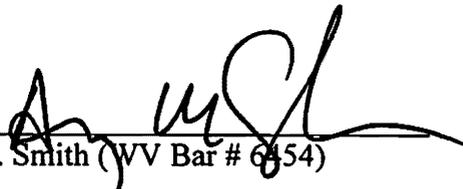
I hereby certify that on this 7th day of December, 2011, true and accurate copies of the foregoing "Respondents City of Elkins' and Stephen P. Stanton's Response to Cross-Assignment of Error in Brief of Westfield Insurance Company" were deposited in the U.S. Mail contained in postage-paid envelopes addressed to all other parties to this appeal as follows:

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