

No. 11-1059

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NOV 18 2011

AT CHARLESTON

JEFFREY JENKINS AND M. JEAN MCNABB,

Petitioners and
Plaintiffs Below,

v.

CITY OF ELKINS, A MUNICIPAL CORPORATION,
AND STEPHEN P. STANTON,

Respondents and
Defendants Below,

And

WESTFIELD INSURANCE COMPANY,

Respondent and
Third-Party Plaintiff Below,

v.

AIG INSURANCE a/k/a NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA,

Respondent and
Third-Party Defendant Below,

And

BOMBARDIER AEROSPACE CORPORATION,

Respondent and
Third-Party Defendant Below.

RESPONSE ON BEHALF OF RESPONDENT NATIONAL UNION FIRE
INSURANCE COMPANY OF PITTSBURGH, PA. TO PETITION FOR APPEAL

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I. STATEMENT OF THE CASE¹

On October 27, 2008, Petitioner Jeffrey Jenkins was involved in an automobile accident with Respondent Stephen Stanton. At the time of this accident, Petitioner Jenkins was operating a vehicle owned by his employer, Bombardier Aerospace, within the course and scope of his employment. Similarly, Respondent Stanton was operating a vehicle owned by his employer, the City of Elkins, within the course and scope of his employment. Because Petitioner Jenkins was injured while operating the vehicle within the course and scope of his employment, he received workers' compensation benefits for his injuries.

After learning that Petitioner Jenkins was covered by workers' compensation, the insurer for the City of Elkins, Respondent National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), informed Petitioner Jenkins' attorney that the City was immune from suit pursuant to the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 *et seq.* ("Tort Reform Act"). Thereafter, Petitioner filed suit on April 29, 2010, to recover damages from the City of Elkins and Stephen Stanton.

For the policy years that are affected by the instant matter, the City carried its liability insurance through a special insurance program administered by the West Virginia Board of Risk and Insurance Management ("BRIM"). National Union is the insurance company that provided insurance coverage to BRIM. The City is an additional insured under the insurance policies that were issued to the State of West Virginia by National Union. See National Union Insurance Policy (Joint Appendix pp. 255-303).

¹ It is unclear which section of Petitioners' brief constitutes their "Statement of the Case," as they have provided the following sections: "Kind of Proceeding and Nature of Ruling" and "Statement of Facts." As such, Respondent National Union provides a complete version of the Statement of the Case as it relates to the issues regarding insurance coverage under its policy and the immunities provided by the Governmental Tort Claims and Insurance Reform Act.

After the opportunity for discovery on the insurance coverage issues, during which time each insurer produced a copy of their insurance policy, the parties filed competing motions for summary judgment. The issues were fully briefed for the circuit court. After considering each of the parties' positions, the court issued an Order on June 8, 2011, which, among other things, granted summary judgment to the City of Elkins, Stephen Stanton, and National Union. It is from this Order that Petitioners appeal. See Order Granting Summary Judgment, (**Joint Appendix pp. 549-574**).

II. SUMMARY OF ARGUMENT

W. Va. Code § 29-12A-5(a)(11) clearly and unambiguously provides for immunity to a political subdivision where the injured party was covered by workers' compensation at the time of his injury. The National Union policy at issue clearly provides for the preservation of the City's statutory immunities, such as those contained in the Tort Reform Act. Therefore, the circuit court correctly held that, pursuant to this Court's opinion in O'Dell v. Town of Gauley Bridge, 188 W. Va. 596, 425 S.E.2d 551 (1992), and its application of W. Va. Code § 29-12A-5(a)(11), Petitioners' claims against the City of Elkins, Stephen Stanton, and National Union were barred.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent National Union submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT

A. **Standard of Review.**

The present appeal stems from the circuit court's entry of summary judgment in favor of the City of Elkins, Stephen Stanton, and National Union. This Court has repeatedly held that a circuit court's entry of summary judgment is reviewed *de novo*. Syl. pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). This Court has also held that "[w]here the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, Chrystal R. M. v. Charlie A. L., 194 W. Va. 138, 459 S.E.2d 415 (1995). Finally, this Court has held that the application and interpretation of insurance coverage is reviewed *de novo* on appeal. The "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syl. pt. 1, Tennant v. Smallwood, 211 W. Va. 703, 568 S.E.2d 10 (2002). As such, this Court has stated that "[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal." Syl. pt. 2, Riffe v. Home Finders Assocs., Inc., 205 W. Va. 216, 517 S.E.2d 313 (1999).

B. **The circuit court properly applied the law of the State of West Virginia when it found that the claims against the City of Elkins, Stephen Stanton, and their insurer, National Union, were barred pursuant to the statutory immunity provided by the Tort Reform Act.**

1. **The O'Dell opinion, and its application of W. Va. Code § 29-12A-5(a)(11), was, and still is, good law.**

The circuit court's June 8, 2011, Order, properly applied this Court's well-settled jurisprudence in determining that the City of Elkins, Stephen Stanton, and National Union could not be held liable for Petitioners' injuries pursuant to the immunity provisions of the Tort

Reform Act. It is undisputed that the Tort Reform Act provides that a political subdivision is “immune from liability if a loss or claim results from . . . [a]ny claim covered by any worker’s compensation law or any employer’s liability law.” W.Va. Code § 29-12A-5(a)(11). This Court has held that this statute is unambiguous, and that it “clearly contemplates immunity for political subdivisions from tort liability in actions involving claims covered by workers’ compensation even though the plaintiff was not employed by the defendant political subdivision at the time of the injury.” O’Dell, *supra* at 564. It is further undisputed that Petitioner Jenkins has met all four requirements that this Court previously set forth, which must be met in order for his claims to be barred by the Tort Reform Act.² As such, Petitioners have asked this Court to declare this well-settled, unambiguous law to be invalid because it “creates an unfair and harsh result” and was based on “flawed reasoning.” Petitioners are clearly grasping at straws, and their argument has no merit.

In asking this Court to overturn its decision in O’Dell, Petitioners are asking the Court to reverse its prior well-settled precedent and determine that the term “any” as used in W. Va. Code § 29-12A-5(a)(11), does not mean in any and all cases, but only in limited circumstances. As presently written by the Legislature of the State of West Virginia, there can be but one interpretation of W. Va. Code § 29-12A-5(a)(11). If the Legislature did not intend for the Tort Reform Act to bar claims against a political subdivision where the injured person was working at the time of the accident, it could have amended the statute after the O’Dell decision came down. It has not. As this Court stated in O’Dell, “[i]f the legislature had intended to afford tort liability immunity to political subdivisions only with regard to suits by its own employees, it could easily

² First, the plaintiff must have been injured by the negligence of an employee of a political subdivision. Second, the plaintiff must have received the injury in the course of and resulting from his or her employment. Third, the plaintiff’s employer must have workers’ compensation coverage. Fourth, the plaintiff must be eligible for such benefits. O’Dell, *supra* at 558.

have done so . . . by inserting the words ‘by an employee’ in the statute.” O’Dell, supra at 565. This Court has previously found that W. Va. Code § 29-12A-5(a)(11) is “clear and unambiguous,” and the statutory language has not changed since that determination. See, Zelenka v. City of Weirton, 208 W. Va. 243, 248, 539 S.E.2d 750, 755 (2000). As this Court stated:

The Legislature has clearly provided for immunity under the facts of this case. Therefore, we ‘may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.’ Lewis v. Canaan Valley Resorts, Inc., 185 W.Va. 684, 692, 408 S.E.2d 634, 642 (1991), *citing* City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511, 517 (1976).

Id. As such, Petitioners’ argument that the O’Dell decision should be reversed and abrogated has no merit and should be disregarded.

Petitioners’ proposal that the burden of indemnifying injured parties is best relegated to “low-cost, BRIM-secured private insurance policies to absorb these losses” shows a grave misunderstanding of how the State of West Virginia’s “insurance” policy works. See Petitioners’ brief, page 18. Lest there be confusion in this regard, it is West Virginia taxpayer dollars that are allocated to pay indemnity losses. BRIM is not a traditional insurance arrangement whereby the State of West Virginia pays a premium that would typically be based upon a prior loss history. “BRIM is not indemnified by the insurance company, and the insurance company is compensated for claim handling by a negotiated fee.” See State of West Virginia Board of Risk and Insurance Management (An enterprise fund of the primary government of West Virginia), 2010 Comprehensive Annual Financial Report, p. 5, (available at <http://www.state.wv.us/BRIM/Finance/2010%20CAFR/2010%20CAFR.pdf>). To the extent that Petitioners assert that public policy dictates that West Virginia’s municipalities and taxpayers

will be better served by the elimination of the legislative protections enacted by their elected officials, which have been previously upheld by this Court, this argument must fail.

2. **The insurance policy purchased by the City of Elkins through the BRIM program from National Union specifically preserved all immunities, including those provided by W. Va. Code § 29-12A-5(a)(11).**

Petitioners assert that the National Union insurance policy at issue herein does not contain sufficient language to preserve the immunities provided by the Tort Reform Act. Contrary to Petitioners' assertion, West Virginia law does not require a specific preservation of immunities in a political subdivision's insurance policy. However, if the Court is of the opinion that a specific preservation is required, the policy contains a provision that meets said requirement. In support of their argument, Petitioners' cite to this Court's decision in Bender v. Glendenning, 219 W. Va. 174, 632 S.E.2d 330 (2006) (per curiam), for the proposition that the insurance policy "must contain appropriate language and/or exclusions which specifically preserves the statutory immunity." However, in Bender the Court acknowledged that the existence of a policy of insurance does not eliminate the Tort Reform Act's grant of immunity. Bender does not require an insurer or an insured to explicitly preserve the immunity provided by the Tort Reform Act. While Bender discusses the need for "appropriate language and/or exclusions which specifically preserve the Act's immunity provisions," and "limiting language and/or exclusions," Bender did not add a new legal requirement for the preservation of statutory immunity.

This Court has specifically held that it "will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our State Constitution."³ There can be no doubt that Bender is not a signed opinion, and that it does not contain a new syllabus point imposing a non-waiver obligation. As such, the reference to

³ Syl. pt. 2, Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290 (2001).

“appropriate language” in Bender is not a new legal requirement. Instead, this language is dicta, and was not determinative of the outcome in Bender. The Court in Bender merely expressed that some limiting language or exclusion is necessary to exclude insurance coverage, something that was lacking in Bender.

The insurance policy and the facts at issue in Bender are vastly different from those at issue here. In Bender, this Court concluded that insurance coverage under a Continental Casualty Company (“Continental”) insurance policy existed to cover a teacher for allegations by a student of sexual abuse and/or assault by the teacher. The Court reached this conclusion, from which two Justices dissented, because it found that the Continental insurance policy was extremely broad and did not contain any appropriate limiting language to preclude insurance coverage in Bender. The Court stated that the Continental policy at issue contained only one provision that attempted to exclude coverage in the case, which was not clearly limiting.

Further, Bender does not address immunity issues at all, but merely discusses exclusionary language. Unlike Bender, the main issue in this case, which was determined by the circuit court, was whether the City is immune from suit for the claims brought by the Plaintiffs below. None of the immunity provisions listed in W. Va. Code § 29-12A-5 were at issue in Bender, and none played a role in Bender’s holding, indicating that it is a mistake to read a requirement for the preservation of the immunities provided for in the Tort Reform Act into Bender. While the Court found no applicable exclusionary language in the Bender case, the insurance policy in this case contains such appropriate language. Specifically, the Certificate of Liability Insurance clearly provides:

IT IS A CONDITION PRECEDENT OF COVERAGE UNDER THE POLICIES THAT THE ADDITIONAL INSURED DOES NOT WAIVE ANY STATUTORY OR COMMON LAW IMMUNITY CONFERRED UPON IT.

See Certificate of Liability Insurance, (**Joint Appendix p. 303**). Surely it is undisputed that this language is clear and unambiguous. Furthermore, as this Court recently made clear, it is irrelevant that the language appears in the Certificate of Liability Insurance, as opposed to the body of the insurance policy. See Hess v. W. Va. Div. of Corrections, 227 W. Va. 15, 705 S.E.2d 125 (2010). In Hess, the Court stated:

. . . [I]n analyzing whether qualified immunity bars the instant negligence Complaint, the first determination that must be made is whether the relevant insurance policy waives the defense of qualified immunity. In the instant case, the insurance policy at issue . . . does not waive the Appellant's qualified immunity. Rather, the Certificate of Liability Insurance to the policy expressly provides that 'the additional insured [Division of Corrections] does not waive any statutory or common law immunities conferred upon it.'

Id. at 130. From the foregoing, it is clear that the inclusion of the appropriate language in the Certificate of Insurance acts to preserve the immunities conferred upon political subdivisions by the Tort Reform Act.

Petitioners assert that the preservation of immunities language contained in the Certificate of Insurance is ambiguous, and that Endorsement #10 of the insurance policy, which incorporates the Certificate of Insurance into the policy, is vague. Petitioners appear to assert that because the preservation of immunities language is contained only in the Certificate of Insurance and not in the body of the policy, then the policy is somehow ambiguous. However, Petitioners fail to recognize that the above-referenced endorsement, Endorsement #10, specifically incorporates the Certificate of Insurance into the policy, (**Joint Appendix p. 297**). This clearly does not rise to the level of a conflict in the policy such that it creates an ambiguity, as the policy and Certificate are in agreement as the policy specifically incorporates the Certificate. Even if the Court were to conclude that Endorsement #10 is vague, the policy would

still not be ambiguous because the Certificate would preserve the immunities and the policy would be silent on the issue. Clearly, this does not conflict, and the language contained in the Certificate should control when the policy is read as a whole.

Petitioners cite two opinions in support of their assertion that the policy language is conflicting and therefore ambiguous. However, neither of these opinions is applicable to the present set of facts. In D'Annunzio v. Security-Connecticut Life Ins. Co., 186 W. Va. 39, 410 S.E.2d 275 (1991), this Court found policy language to be conflicting and therefore created an ambiguity that was construed in favor of coverage. However, the D'Annunzio policy contained an actual conflict, as there were multiple dates within the insurance policy that could be construed as having been the "issue date." The policy issued by National Union in the present case has no such multiple conflicting statements. The National Union policy only provides that "THE ADDITIONAL INSURED DOES NOT WAIVE ANY STATUTORY OR COMMON LAW IMMUNITY CONFERRED UPON IT," and contains no statements that directly contradict the foregoing, as was the situation in D'Annunzio. Petitioners also cite to this Court's opinion in Romano v. New England Mut. Life Ins. Co., 178 W. Va. 523, 362 S.E.2d 334 (1987), wherein this Court found a conflict between the language contained in a master group policy and language contained in a brochure that was provided to the individual insureds. In Romano, the policy contained an "Actively at Work" requirement and the brochure did not notify the insured of such requirement, therefore the Court found that there was coverage. Although Romano is somewhat similar factually in that it involved two documents, one that spoke to the issue and one that was silent, it is distinguished in that the document provided to the insured was silent on an issue that would preclude coverage. In the case *sub judice*, the insured, City of Elkins, was provided with the Certificate of Insurance which specifically preserved the immunities of the

Tort Reform Act, and therefore the insured was never in a position where it thought that coverage existed when it did not. Clearly, neither factual situation that was at issue in the two cases cited by Petitioners is applicable to the facts of the present case, as there is no conflict between the policy and the Certificate.

In the case *sub judice*, the insured, City of Elkins, was provided with the Certificate of Insurance, which specifically preserved the immunities of the Tort Reform Act. The Petitioners' misunderstanding of the BRIM policy provided to the City of Elkins, was further evidenced below when, on more than one occasion, National Union reminded counsel that "coverage" was never "denied" under the policy issued to the City of Elkins, but rather the City of Elkins was immune from liability and the policy in question preserved all those immunities that had been conferred upon the City. See National Union's Reply in Support of Motion for Summary Judgment, (**Joint Appendix p. 518**).

3. Petitioners' argument that the circuit court prematurely dismissed their claims against the National Union policy is completely without merit.

Petitioners' argument that the circuit court prematurely dismissed their claims without permitting a sufficient inquiry into whether any coverage exclusion was of the free will and volition of the City of Elkins is completely preposterous. The City of Elkins chose to purchase an insurance policy through BRIM that included the preservation of any and all immunities provided by the law. In fact, the City of Elkins filed a motion to dismiss Plaintiffs' claims on June 14, 2010, wherein it asserted that all of the Plaintiffs' claims were barred by the Tort Reform Act and that the City of Elkins did not waive its statutory immunity. See Motion to Dismiss, (**Joint Appendix pp. 25-34**). In support of Petitioners' position that a political subdivision may incorporate limiting terms into its insurance policy only if the decision to do so was made by the political subdivision in its sole discretion, they cite to this Court's opinion in

Gibson v. Northfield Insurance Co., 219 W. Va. 40, 631 S.E.2d 598 (2005). However, Petitioners overlook the fact that Gibson had nothing to do with statutory immunity and the Tort Reform Act, and was decided based on a set of unique facts that are not present in the case *sub judice*. In actuality, Gibson dealt with the inclusion of limiting language that allowed the insurance company to reduce the available liability limits by the cost of investigating and defending the claim, which this Court determined to be contrary to public policy. Furthermore, Petitioners have failed to accurately set forth this Court's holding in Gibson, which was that:

[A]n insurance company may incorporate limiting terms and conditions that violate W.Va. Code 33-6-31 into a governmental entity's insurance policy. However, to be permissible under W.Va. Code 29-12A-6(a), the limiting terms and conditions in the insurance policy must clearly be determined by the political subdivision in its discretion.

Gibson, supra at 607. There have been absolutely no allegations by anyone in this matter that the inclusion of the preservation of immunities in the policy issued to the City of Elkins would violate W. Va. Code 33-6-31. Clearly, Petitioners' reliance on Gibson is misplaced. Petitioners had the opportunity to conduct discovery as it relates to the question of insurance coverage, but chose not to pursue any evidence that may support their position. There is no evidence to support Petitioners' position because none exists. The City chose to preserve the immunities conferred upon it by the Tort Reform Act.

C. Petitioners' remaining arguments, which are not related to National Union, fail; as the circuit court appropriately applied all of the insurance coverages at issue herein.

Petitioners assert that the circuit court erred by reducing the amount of UIM/UM coverage available under both the Bombardier and Westfield policies based on the governmental vehicle exclusion contained in each. The circuit court appropriately determined that the governmental vehicle exclusions were applicable given the fact that it was undisputed that the

vehicle being driven by Stephen Stanton was in fact a government owned vehicle. However, the circuit court properly determined that the statutory minimum UM coverage requirement would apply to each policy, and provided coverage in the amount of \$20,000.

Petitioners also assert that the circuit court erred by determining that medical payments coverage under the Greenwich policy did not apply based on an exclusion for injuries arising out of and in the course of employment. It is undisputed that the accident that caused Petitioner Jenkins' injuries occurred while he was working. Therefore, the circuit court properly applied the insurance coverage under the Greenwich policy and determined that said exclusion acted to preclude coverage for medical payments.

V. CONCLUSION

The circuit court, in its well reasoned Order, properly applied the law of the State of West Virginia in concluding that because Petitioners injuries were covered by workers' compensation, he is unable to recover damages under a policy of insurance issued by National Union which provided insurance coverage to the City of Elkins and its employee, pursuant to the Tort Reform Act. Based on all of the foregoing, the circuit court's opinion, as it relates to National Union, should be affirmed.

**NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA**

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CERTIFICATE OF SERVICE

I, Glen A. Murphy, counsel for National Union Fire Insurance Company of Pittsburgh, PA, do hereby certify that I have served a true copy of the foregoing **Response on Behalf of Respondent National Union Fire Insurance Company of Pittsburgh, Pa. to Petition for**

Appeal, upon the following, by placing the same in the United States mail, first class, postage prepaid, and addressed as follows on November 17, 2011:

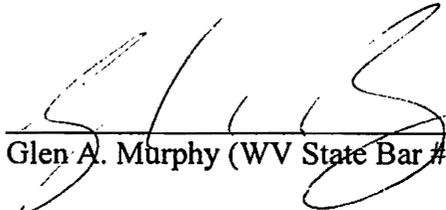
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