

FILED

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting in part:

The majority opinion has determined that the circuit court had jurisdiction to impose a monetary judgment against the Department of Health and Human Resources, Bureau for Child Support Enforcement (hereinafter referred to as “the DHHR”), even though the DHHR did not have liability insurance coverage for the claim and there was no express statutory waiver of its sovereign immunity by the legislature. As a result of the majority’s ruling, every single activity engaged in and responsibility undertaken by state agencies must now have liability insurance coverage; and if such coverage does not exist, the agency can still be sued in circuit court and a recovery obtained. For the reasons set out below, I dissent.¹

¹To be clear, I understand that the applicable statute and regulation requires DHHR to reimburse an obligor for child support monies that were improperly taken. However, neither the statute nor the rule expressly permit an obligor to file an action in circuit court to obtain a refund. Without such express authority or in the absence of liability insurance coverage, the doctrine of sovereign immunity prevents an obligor from maintaining an action in circuit court against DHHR to recover the money. As I discuss in the body of my dissent, the exclusive remedy for the obligor is to seek a refund in the Court of Claims.

The issue of a refund by DHHR is procedurally different from that of a taxpayer seeking a refund from the Tax Commissioner. The legislature has expressly provided for the issue of a tax refund to be litigated in circuit court, after administrative proceedings. *See* W. Va. Code § 11-10A-19 (2002) (Repl. Vol. 2003). *See also Houyoux v. Paige*, 206 W. Va.

A. The Majority Opinion Has Grossly Misinterpreted Eggleston

In this proceeding the DHHR asserted that it did not have insurance coverage for the judgment imposed against it by the circuit court. In a sweeping and unprecedented manner, the majority opinion holds “that the Board of Risk and Insurance Management had a statutory duty to purchase or contract for insurance to provide coverage for all of the DHHR’s activities and responsibilities.” The opinion states further in footnote 14 that “this Court wishes to make clear that the absence of any such coverage may not be used by the DHHR to deprive the appellee of a refund of his overpayment.” This sweeping pronouncement by the majority opinion has opened the door for every claim against state agencies to be brought in the circuit courts of this state. That is, the majority opinion stands for the proposition that the Board of Risk and Insurance Management (hereinafter referred to as “BRIM”) must provide liability insurance coverage for *every* activity and responsibility that state entities undertake. Further, to the extent that liability insurance coverage for an activity or responsibility of a state entity is not provided, a party may still litigate the case in circuit court and obtain a judgment. This is a profoundly misguided ruling unsupported by precedent or other authority.

The majority opinion purports to rely upon *Eggleston v. West Virginia Dep’t*

357, 524 S.E.2d 712 (1999) (claim for refund); *Doran & Assoc., Inc. v. Paige*, 195 W. Va. 115, 464 S.E.2d 757 (1995) (same). However, no such express statutory or regulatory authority exists for litigating a refund claim against DHHR in circuit court.

of Highways, 189 W. Va. 230, 429 S.E.2d 636 (1993), for the proposition that BRIM must provide liability insurance for all activities and responsibilities of state entities. Specifically, the majority opinion relies on syllabus point 1 of *Eggleston*:

W. Va. Code, 29-12-5(a) (1986), provides an exception for the State's constitutional immunity found in Section 35 of Article VI of the West Virginia Constitution. It requires the State Board of Risk and Insurance Management to purchase or contract for insurance and requires that such insurance policy "shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits."

As will be shown, the majority opinion has taken syllabus point 1 of *Eggleston* out of context and literally pushed the state toward the doorsteps of bankruptcy.

In *Eggleston*, the plaintiff was involved in tractor-trailer accident on a highway and brought an action against the West Virginia Department of Highways. The plaintiff alleged that his accident was caused by DOH's negligence in designing, constructing, maintaining, and failing to properly warn of the unsafe nature of highway. The circuit court found that the insurance coverage provided to the DOH by BRIM did not cover the type of harm complained of by the plaintiff. Consequently, the circuit court granted summary judgment to DOH and dismissed the action. The plaintiff appealed.

Justice Miller began the opinion in *Eggleston* by stating that "[b]efore we address the issue of insurance policy coverage, it is useful to explain the underlying legal

concept that enables the plaintiff to sue the WVDOH.” *Eggleston*, 189 W. Va. at 232, 429 S.E.2d at 638. The opinion then went on to discuss the state’s sovereign immunity and the exception to that immunity when liability insurance coverage is obtained. Regarding insurance coverage, *Eggleston* made the following general observation, which became syllabus point 1:

W. Va. Code, 29-12-5(a) (1986), provides an exception to the State’s constitutional immunity found in Section 35 of Article VI of the West Virginia Constitution. It requires the State Board of Risk and Insurance Management to purchase or contract for insurance and requires that such insurance policy “shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits.”

Eggleston, 189 W. Va. at 232, 429 S.E.2d at 638. The latter quote from *Eggleston* was never intended to mean, or to be interpreted as holding, that BRIM had a statutory duty to provide liability insurance coverage for all activities and responsibilities of state agencies and that a failure to provide such coverage would not preclude an action in a state court against an agency.

If the majority’s interpretation of syllabus point 1 of *Eggleston* is correct, then Justice Miller would not have concluded his preliminary remarks by observing that:

In other jurisdictions which have a similar type of statutory insurance provision, courts have also reached the result that, *insofar as a plaintiff’s damage claim is covered by the state’s insurance policy* barring the assertion of the state’s constitutional immunity, the suit may be maintained.

Our focus is, therefore, whether the insurance policy at issue provides coverage for the type of accident that occurred in this case.

Eggleston, 189 W. Va. at 232-233, 429 S.E.2d at 638-639 (Footnotes omitted) (citations omitted) (emphasis added). If *Eggleston* stood for the proposition that the majority opinion has given it, there would have been no need for Justice Miller to determine whether the policy language covered the claim--the opinion would have concluded that the policy should have covered the claim because BRIM had a statutory duty to provide for all of DOH's activities and responsibilities. Moreover, in reversing the circuit court's ruling, Justice Miller made clear that the "complaint and discovery material contains sufficient facts to come within the liability insurance policy coverage purchased by the WVDOH, at least for purposes of a summary judgment motion." *Eggleston*, 189 W. Va. at 231, 429 S.E.2d at 637. Clearly, *Eggleston* did not expressly or implicitly hold that BRIM has a statutory duty to provide liability insurance coverage for all activities and responsibilities of state agencies; and that a failure to provide such coverage would not preclude an action in a state court against an agency. See *Shrader v. Holland*, 186 W. Va. 687, 689, 414 S.E.2d 448, 450 (1992) (emphasis added) ("The Board of Risk and Insurance Management for the State of West Virginia has purchased an insurance policy *that covers some claims* against the Department of Highways.").²

²Subsequent to the decision in *Eggleston* this Court specifically remanded several cases for a determination of whether a state agency had liability insurance coverage. See *Jeffrey v. West Virginia Dep't of Pub. Safety*, 198 W. Va. 609, 615, 482 S.E.2d 226, 232

***B. BRIM Is Not Required by Statute to Provide Liability
Insurance Coverage for Every State Activity and Responsibility***

The authority for BRIM to provide insurance for state agencies is set out in W. Va. Code § 29-12-5. Under this statute, BRIM has “general supervision and control over the insurance of all state property, activities and responsibilities, including the acquisition and cancellation thereof; *determination of amount and kind of coverage . . .* and any and all matters, factors and considerations entering into . . . coverage of all such state property, activities and responsibilities.” W.Va. Code § 29-12-5(a) (emphasis added). Clearly under the language of this statute the legislature has not made it mandatory that BRIM provide liability insurance coverage for every state activity and responsibility. BRIM has the authority to do this, but it is not required to do so. That is, the determination of the type of coverage, if any, that an agency obtains is a discretionary matter for BRIM.

Indeed, the West Virginia Attorney General issued an official opinion in 1963 that recognized BRIM’s discretion in determining insurance coverage for state agencies. In that opinion the Attorney General wrote that BRIM has “the authority to determine whether or not a particular State governmental activity was sufficiently grave and its employees were

(1996) (“If the State has not procured insurance indicating such coverage, the public duty doctrine serves as a bar to the Appellant’s suit. If the State’s insurance does provide coverage, the action may proceed, and liability will be limited only by the limits of insurance coverage.”); *Parkulo v. West Virginia Bd. of Probation and Parole*, 199 W. Va. 161, 180, 483 S.E.2d 507, 526 (1996) (“There remains only the question of whether the actual provisions of such policy . . . cover the operation of the Parole Board. . . . We remand to develop the record on the coverage issue[.]”).

undertaking the discharge of the kind of responsibilities that should be insured against claims of damage.” 50 Op. W. Va. Att’y Gen. 230, 234 (Mar. 6, 1963).³ See also CSR 115-2-7.1 (1990) (“The Board shall determine and establish rates, rate programs, deductibles, and coverages as needed.”).

Under the majority opinion, BRIM does not have discretion to determine what type of coverage a state agency should have. The majority opinion has found that BRIM “must” obtained liability insurance coverage for all activities and responsibilities of all state agencies.

C. Under the Majority Opinion No Claim Against a State Agency Need Ever Be Filed in the Court of Claims

Prior to the decision in the instant case, this Court had held that if a state agency did not have liability insurance coverage for an injury or harm allegedly committed by it, an action against the agency could not be maintained in the circuit courts of this state. Cf. Syl. pt. 2, *Pittsburgh Elevator v. West Virginia Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983) (“Suits 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.”). However, an injured

³The language in W.Va. Code § 29-12-5(a) that was construed by the Attorney General in 1963 is the same language that exists in the statute today.

party could maintain an action in the Court of Claims against the state agency. *See* Syl. pt. 3, *G.M. McCrossin, Inc. v. West Virginia Bd. of Regents*, 177 W. Va. 539, 355 S.E.2d 32 (1987) (“Application to the court of claims is the exclusive remedy available to a sophisticated commercial entity, chargeable with knowledge of the rule of sovereign immunity, which chooses, nevertheless, to contract with a state agency.”).

This Court recently noted that “[t]he Legislature has established the Court of Claims by law and delegated to it the Legislature’s power to investigate certain claims against the State that may not be prosecuted in the courts because of the State’s sovereign immunity.” *State ex rel. McLaughlin v. West Virginia Court of Claims*, 209 W. Va. 412, 415, 549 S.E.2d 286, 289 (2001) (per curiam) (footnotes omitted). *See also State ex rel. C & D Equip. Co. v. Gainer*, 154 W. Va. 83, 92, 174 S.E.2d 729, 734 (1970) (“Any monetary claims against an agency of the state which is immune from suit is within the jurisdiction of the Court of Claims.”).⁴ The Court of Claims “is authorized to consider and approve claims

⁴Pursuant to W. Va. Code § 14-2-13 (1967) (Repl. Vol. 2003) the jurisdiction of the Court of Claims extends to:

1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the State or any of its agencies, which the State as a sovereign commonwealth should in equity and good conscience discharge and pay.

2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of setoff or counterclaim on the part of the State or any state agency.

against the State not otherwise cognizable in the regular courts of the State, and to recommend an award to the Legislature.” *Pittsburgh Elevator*, 172 W. Va. at 754 n.7, 310 S.E.2d at 686 n.7.⁵

Under the majority’s decision, if a litigant has a claim against any state entity, and there is no liability insurance coverage for the claim, the litigant does not have to file an action in the Court of Claims. The majority opinion has determined that lack of liability insurance coverage is not a bar to litigating an action against a state agency in circuit court, because BRIM has a statutory duty to provide such coverage.

The majority’s ruling completely fails to recognize the costs to taxpayers if BRIM has to maintain liability insurance coverage for every activity and responsibility that the state undertakes. Moreover, the majority’s ruling completely fails to understand the costs to taxpayers if BRIM does not maintain liability insurance coverage for every activity and responsibility that the state undertakes.

In view of the foregoing, I dissent.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination.

⁵Under W. Va. Code § 14-2-14(5) the Legislature has withheld from the Court of Claims the power to consider “any claim . . . [w]ith respect to which a proceeding may be maintained against the State, by or on behalf of the claimant in the courts of the State.”