

No. 34717 - *Howard Wrenn and Sandra Belcher, as Natural Parents and Co-Administrators of the Estate of Matthew Wrenn; and Angelia Harper, as Natural Mother and Administrator of the Estate of Justin Janes v. The West Virginia Department of Transportation, Division of Highways*

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OF WEST VIRGINIA

Davis, J., dissenting:

In this case, two young men met untimely deaths when the vehicle in which they were traveling fell off of a single-lane bridge, which had no posted signs, line markings, shoulder, or guardrails, and plunged fifteen feet into an impoundment of water that had resulted from the failure to clean the culverts over which the bridge traversed. Although the decedents' Estates attempted to recover from the State's insurance policy for the Division of Highways's failure to keep safe and to inspect the subject bridge and corresponding roadway, the majority of the Court has concluded that the applicable policy exclusion precludes coverage under these facts. The majority's decision essentially¹ leaves the victims

¹The DOH suggests, in its brief before this Court, that, in the absence of applicable insurance coverage, the decedents' Estates may seek redress through the Court of Claims. The Court of Claims specifically excludes from its jurisdiction "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." W. Va. Code § 14-2-14(5) (1967) (Repl. Vol. 2000). Claims such as those asserted by the Estates in this case generally may not be brought against the State because the Legislature has granted the State immunity "in any proceeding to recover damages because of the defective construction or condition or any state road or bridge." W. Va. Code § 17-4-37 (1933) (Repl. Vol. 2004). Thus, because the Estates' claims concern the dangerous condition of the bridge and roadway upon which their decedents perished, it appears that jurisdiction of the Estates' claims would be proper in the Court of Claims if

of this fatal accident without a remedy for their losses even though the DOH had been placed on notice as to the dangerousness of this bridge and accompanying roadway several months *before* the decedents were killed when another motorist died in a fatal accident in this same location² and even though the DOH had scheduled and thereafter failed to attend a meeting to discuss local citizens' concerns about the safety of this thoroughfare. Because the result obtained by the majority absolves the DOH of its express statutory duties to keep safe and to inspect the public highways of this State and, thus, fails to hold the DOH accountable for its neglect of those responsibilities under the egregious facts of this case, I respectfully dissent.

The roads and bridges of this State are vital thoroughfares that must be maintained to ensure the safety of our citizenry. In this regard,

[t]he Legislature notes that there are public highways that run over the surface of this land, over and through the navigable streams, rivers and waterways on this earth and above the surface of this earth in the form of highways in the sky,

coverage is not provided by the State's policy of insurance. *See* 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.").

²After the first fatal accident, a second accident occurred when a sheriff's deputy's vehicle veered off the bridge and into the impoundment of water thereunder; the sheriff's deputy survived this accident. Following these two accidents, a third accident, which resulted in two fatalities, occurred on this same stretch of public highway; it is this third accident that is the subject of the instant proceeding.

commonly known as airways. The Legislature finds that each of these types of public highways are essential to the development of this state and that *the health and safety of each of the citizens of this state are affected daily by the availability of each of these three types of public highways*, and that it is in the best interests of the people of this state that each of these be recognized and included within the meaning of public highways. . . .

W. Va. Code § 17-1-3 (1989) (Repl. Vol. 2004) (emphasis added). To accomplish these objectives, the Legislature has assigned the Commissioner of the Division of Highways the task of maintaining the State’s public highways. As they relate to the Estates’ claims at issue herein, such obligations include the following tasks:

[i]n addition to all other duties, powers and responsibilities given and assigned to the commissioner in this chapter, the commissioner may:

. . . .

(3) *Conduct investigations and experiments, hold hearings and public meetings and attend and participate in meetings and conferences within and without the state for purposes of acquiring information, making findings and determining courses of action and procedure relative to advancement and improvement of the state road and highway system;*

. . . .

(36) *Investigate road conditions, official conduct of department personnel and fiscal and financial affairs of the department and hold hearings and make findings thereon or on any other matters within the jurisdiction of the department[.]*

W. Va. Code § 17-2A-8 (2002) (Repl. Vol. 2004) (emphasis added).

Under the egregious facts of the case *sub judice*, it is apparent that the DOH neglected to fulfill its statutory duties to keep the State’s public highways safe, in accordance with W. Va. Code § 17-1-3, and to inspect the public highways of this State, pursuant to W. Va. Code §§ 17-2A-8(3,36), insofar as there is no evidence that the DOH “[i]nvestigate[d] [the subject] road conditions”³ or otherwise acted to “improve[]”⁴ this particular thoroughfare. Moreover, despite the DOH’s obligation to “hold hearings and public meetings and [to] attend and participate in meetings and conferences . . . for purposes of acquiring information, making findings and determining courses of action and procedure relative to . . . improvement of the state road and highway system,” it is undisputed that the DOH failed to attend a scheduled meeting with concerned citizens to discuss these treacherous road conditions, which meeting was scheduled to be held *before* the occurrence of the fatal accident at issue herein. In the course of scheduling this missed meeting, the DOH was informed of the first fatal accident, which resulted in one person’s death, and thus had been put on notice of the dangerousness of the subject bridge and roadway and its corresponding duties to inspect and to keep safe this specific portion of public highway. *After* this missed meeting, the Estates’ decedents were killed when they were involved in a subsequent fatal accident on the same bridge and accompanying roadway; this second fatal accident claimed the lives of two victims.

³W. Va. Code § 17-2A-8(36).

⁴W. Va. Code § 17-2A-8(3).

Despite this clear violation of the DOH's statutory duties to keep safe the public highways of this State and to inspect the same, the majority has determined that the victims' families have no remedy in this case because insurance coverage for their claims is precluded by Endorsement Number 7 of the State's policy of insurance. I respectfully disagree. Where, as here, a claim is made against the State's insurance coverage, this Court repeatedly has held that a finding of liability, not immunity, is favored. "The general rule of construction in governmental tort legislation cases favors liability, not immunity. Unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail." Syl. pt. 2, *Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (1996). Accord Syl. pt. 3, *Zirkle v. Elkins v. Road Pub. Serv. Dist.*, 221 W. Va. 409, 655 S.E.2d 155 (2007) (per curiam); Syl. pt. 2, *Smith v. Burdette*, 211 W. Va. 477, 566 S.E.2d 614 (2002); Syl. pt. 5, *Russell v. Bush & Burchett, Inc.*, 210 W. Va. 699, 559 S.E.2d 36 (2001); Syl. pt. 1, *Zelenka v. City of Weirton*, 208 W. Va. 243, 539 S.E.2d 750 (2000); Syl. pt. 2, *Reed v. Bord*, 206 W. Va. 568, 526 S.E.2d 534 (1999) (per curiam); Syl. pt. 2, *Calabrese v. City of Charleston*, 204 W. Va. 650, 515 S.E.2d 814 (1999); Syl. pt. 1, *Brooks v. City of Weirton*, 202 W. Va. 246, 503 S.E.2d 814 (1998). This Court has recognized this constructive rule favoring liability because the Legislature has determined insurance coverage for the State's agencies to be necessary to ensure that persons injured through the State's negligence are compensated for their injuries. See W. Va. Code § 29-12-1 (1957) (Repl. Vol. 2004) (recognizing need for state insurance); W. Va. Code § 29-12-5(a)(2)

(2006) (Supp. 2008) (authorizing Board of Risk and Insurance Management to procure state insurance). *See also Russell v. Bush & Burchett, Inc.*, 210 W. Va. at 706, 559 S.E.2d at 43 (“*W. Va. Code*, 29-12-1 [1994] evidences a remedial legislative purpose that the State establish mechanisms that will assure that the State is financially responsible and accountable for injuries occasioned by culpable State action.”).

When interpreting an exclusion contained in a policy of insurance, such as Endorsement Number 7 at issue herein, the language is construed strictly and against the insurer. “Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.” Syl. pt. 5, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. United States Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998). When such language is plain, the policy language is applied as it is written. Syl. pt. 2, *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 479 S.E.2d 911 (1996) (““Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” Syllabus, *Keffer v. Prudential Ins. Co.[of America]*, 153 W. Va. 813, 172 S.E.2d 714 (1970).’ Syllabus point 1, *Russell v. State Automobile Mutual Insurance Company*, 188 W. Va. 81, 422 S.E.2d 803 (1992).”).

Here, the decedents’ Estates have made claims against the State’s policy of

insurance for injuries they sustained by virtue of the DOH's failure to keep safe and to inspect the bridge and corresponding roadway upon which the fatal accident occurred. Under the plain language of the State's insurance policy, coverage is provided for "any actual or alleged act, *breach of duty, neglect, . . . or omission by the 'insured(s)'*⁵ *in the performance of their dut[ies.]*" (Emphasis and footnote added). While Endorsement Number 7 details numerous actions, or inactions, of the State that are specifically excluded from coverage, it does not reference either the State's failure to keep safe or to inspect the State's public highways. Absent the specific inclusion of such language in this Endorsement, the exclusionary language does not apply, and coverage is provided for the victims' injuries. *See State ex rel. Baker v. Bolyard*, 221 W. Va. 713, 719, 656 S.E.2d 464, 470 (2007) ("[I]nclusion unius est exclusio alterius" ('the inclusion of one is the exclusion of others')[.]" (footnote and citation omitted)). In short, the majority's contrary interpretation and application of this exclusion is wrong.

Therefore, in light of the blatant dereliction of the DOH's clear statutory duties in this case; the majority's decision which not only fails to hold the DOH accountable for its actions and inactions but effectively absolves the DOH of any responsibility for the tragic, fatal accident that unnecessarily and untimely claimed the lives of the Estates' decedents; and the simple fact that the subject policy of insurance clearly provides coverage for the Estates'

⁵The DOH is an insured under the State's policy of insurance.

claims alleging that the DOH neglected to fulfill its obligations to keep safe and to inspect the public highways of this State, I respectfully dissent.