No. 33038 – *Susan M. Jackson, Administratrix of the Estate of Timothy J. Jackson v. The Putnam County Board of Education*

FILED
June 27, 2007
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

I write separately to express my disagreement with the majority opinion in this case. The majority opinion simply ignores the *law* of the case in order to reach its result-oriented decision favoring the Putnam County Board of Education ("Board").

The majority decision rests on a single point, namely, the majority's refusal to recognize the existence of the Putnam County School Board regulations ("Policy Manual").[1] The majority steadfastly takes the position that "the Policy Manual was not 'before the Court.'" This refusal to acknowledge the Policy Manual is the only basis of the majority opinion, notwithstanding the fact that the Policy Manual was quoted in the complaint, the "stipulated facts proposed by the plaintiff," and the pretrial memorandum filed with the circuit court, was attached to the Petition for Appeal filed in this Court, and was discussed in the briefs and argument before this Court.

I would suggest that the Policy Manual – that is, the Board regulations relevant to this case – was before the Court. The Policy Manual was attached as an exhibit to the Petition for Appeal (approved by the Court on January 26, 2006), and by order of this Court on September 7, 2005, the last speaking by this Court in addressing pre-argument motions,

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[1]This document is formally designated: "Policy Manual: Rules and Regulations of the Board of Education of the County of Putnam" [May 20, 2002].

this Court said that, ". . . the Court is of [the] opinion to and doth hereby refuse said motions and further states that *all applicable portions of the policy manual are properly before the Court*." (Emphasis added.)

By refusing to recognize the Policy Manual regulations, the majority has turned back the pages of modern jurisprudence designed to secure a just determination of every action. For instance, Rule 1 of the *West Virginia Rules of Civil Procedure* states, in part, that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Likewise, Rule 2 of the *West Virginia Rules of Appellate Procedure* says that the rules "shall be construed to allow the Supreme Court to do substantial justice." This Court has said that the primary purpose in adopting these rules "was to eliminate the intricacies and interminable delays inherent in the rules of common law pleading." *See Barker v. Traders Bank*, 152 W.Va. 774, 780, 166 S.E.2d 331, 335 (1969).

It is my view that in order to achieve a just determination of this action and to eliminate the intricacies inherent in the presentation of the instant case, this Court should have considered the Policy Manual as being properly before the Court, and, even if not "before the Court," then the Court should have officially taken judicial notice of the Policy Manual – which is clearly a set of regulations promulgated by a government agency. Instead, remarkably and without explanation, the majority ignored its own order and turned a blind eye to the obvious – the *law*.

And, even if one of these relevant Board regulations were not "in the record" or "before the Court," we still had an obligation to consider the regulations. This Court has

had a long history of taking judicial notice of rules and regulations of administrative agencies. In *Foundation For Independent Living, Inc. v. The Cabell-Huntington Board of Health*, 214 W.Va. 818, 591 S.E.2d 744 (2003), this Court took judicial notice that a State Board of Health's rule was superceded by an emergency rule promulgated under the authority of *W.Va. Code*, 16-5D-17 [2003]. In *West Virginia Citizens Action Group, Inc. v. Daley*, 174 W.Va. 299, 324 S.E.2d 713 (1984) and in *McGraw v. Hansbarger*, 171 W.Va. 758, 301 S.E.2d 848 (1983), this Court took judicial notice of the regulations promulgated by the Board of Health that govern the licensing of community health centers. Interestingly in *McGraw*, unlike the instant case, the regulations which were judicially noticed were not even cited in briefs nor were they mentioned in oral argument. In *McGraw*, this Court stated:

> This Court is at a loss understanding why the regulations promulgated by the Board of Health were not cited by counsel in their briefs nor mentioned during oral argument. But irrespective of this oversight on the part of counsel, the regulations, of which we have here taken judicial notice, have the force and effect of law. . . . (citation omitted)

McGraw, 171 W.Va. at 766, 301 S.E.2d at 857, fn. 3. In *State ex rel. Ash v. Randall*, 171 W.Va. 742, 301 S.E.2d 832 (1983), this Court took judicial notice of Public Water Supply Regulations promulgated by the West Virginia Department of Health.

This Court, and all appellate courts, I believe, look beyond the case file for relevant law in deciding cases on review. We look to constitutions, statutory law, and agency regulatory law outside the case briefs on a regular basis.

If this Court would have officially taken judicial notice of the Policy Manual – which the majority refused to consider – it would have been clear that the Board, by its own regulations, assumed the duty to provide bus transportation for the appellant to the show choir retreat at Rippling Waters Campground in Kanawha County.

W.Va. Code, 18-5-13(6)(a) [1997][2] empowered local county school boards to establish their own regulations regarding the transportation of school children to and from board-approved curricular and extracurricular activities. Specifically, *W.Va. Code*, 18-5-13(6)(a) provided:

> Each county board [of education], subject to the provisions of this chapter and the rules of the state board, has the authority: . . . to provide at public expense, according to such rules as the board may establish, adequate means of transportation for school children participating in county board-approved curricular and extracurricular activities . . . .

Furthermore, while the Legislature has given statutory authority to the State Board of Education to promulgate rules regarding the transportation of students participating in county board-approved curricular and extracurricular activities, I find no state regulation touching upon the issues presented in this case.[3] The State Board regulations relating to transportation of students appear to deal primarily with school bus transportation – vehicle maintenance, passenger regulations, discipline, operating procedures, and bus driver

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[2]This code section was rewritten in 2003, and may now be found at *W.Va. Code*, 18-5-13(f)(1) [2003].

[3]*See* Legislative Rule, Board of Education, West Virginia School Bus Transportation Policy and Procedures Manual (4336), 126 CSR § 92 [2004].

qualifications. The state regulations, however, do include a provision relating to curricular and extracurricular trips *when school buses are used* – but this section does not require that county boards of education use buses. *See* 126 CSR § 92.20 [2004]. This decision is left to the local boards of education.

The Putnam County School Board chose to adopt its own regulations relating to student trips. Specifically, the Board's regulation in the Policy Manual, Section T.3.4, defines student trips as follows:

> Student trips. Student trips include but are not limited to extracurricular trips, curricular trips and recreational trips. Extracurricular trips are those associated with extracurricular activities such as athletics, bands, clubs, and so forth. Curricular trips are those which supplement and extend classroom instruction. Such trips must be closely tied to cognitive instructional learning outcomes and should provide students with experiences and opportunities that are an extension of topics being studied in the classroom.

Timothy Jackson's trip to Rippling Waters Campground was a curricular trip. The Show Choir classes met every day as part of the standard curriculum at Winfield High School. The Show Choir retreat to Rippling Waters was to supplement and extend classroom instruction, and was tied to the instructional learning that was being studied in the classroom. While the Show Choir course could be taken by students for credit or without receiving credit, Timothy Jackson took the course for credit. Furthermore, attendance at performances, at after-school rehearsals, and at the retreat at Rippling Waters Campground were mandatory for all students who participated in the Show Choir.

Section T.3.4 of the Policy Manual also addresses a requirement to provide bus transportation in prescribed circumstances:

> Trips involving ten (10) students or more *must* be made on school buses or charter buses. The principal may determine the mode of transportation for trips involving less than (10) students. (W.VA. CODE 18-5-13).

(Emphasis added.) The trip in question in this case involved the transportation of in excess of forty students, but, for some reason the Board, through Winfield High School, elected not to use buses – in contravention of this specific policy.

Significantly, the Putnam County Board of Education revised the Section T.3.4 regulation in May 2005, in apparent recognition of the instant case.[4] The revised Section T.3.4 reads as follows:

> It is *recommended* that trips involving ten (10) or more students be made on school or chartered buses. The principal may approve a teacher/sponsor/coach's request of transporting students to an event in automobiles providing that *only* the teacher/sponsor/coach and parents/guardians transporting their own children are permitted to drive. Cars must travel to an event in a caravan. With the approval of the teacher/sponsor/coach, a parent/guardian may sign out their child to ride home with them after an event. *Students shall not be permitted to drive*.

(Emphasis added.)

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[4]The complaint in the instant case was filed on September 26, 2003, and by order on June 29, 2005, the circuit court of Putnam County granted summary judgment in favor of the Putnam County Board of Education.

Section T.3.9. of the Board's 2002 version of its regulations – the regulations that were in place at the time of the incident that gave rise to this lawsuit – is further evidence of the Board's assumption of the duty to provide transportation under the circumstances of this case. Section T.3.9. of the regulations reads as follows:

> Transportation in private vehicles. Students *shall not* be transported in private vehicles during the school day except in an emergency situation and then only with the approval of the principal.
>
> On extracurricular trips, students *shall not be permitted to drive their own automobiles*; nor shall they be permitted to drive an automobile owned by another person, such as a Board employee, to transport themselves and others to an athletic event or any other extracurricular event.

(Emphasis added). Even though Section T.3.9. appears to relate primarily to extracurricular trips and emergency situations, the language clearly expresses a Putnam County Board of Education policy of not allowing students to drive themselves or other students to school activities.

In its defense, the Board argues, in part, that another "policy manual," the "Winfield High School General Admission, Handbook of Policies and Procedures" ("the Handbook") supercedes its own regulations and establishes the applicable policy regarding student drivers to the event that is relevant to this case. The Board's Policy Manual does permit a sponsor, coach, or director develop a handbook of rules and regulations for a variety of activities. *See* Policy Manual Section I.7.2. However, there is nothing in the language of this Section that authorizes a sponsor, coach or director to overrule the statutorily-authorized

Board regulations generally governing the transportation of students. Therefore, I believe that any Handbook policy for a specific activity that contradicts the express language of Board regulations is void.

Finally, I recognize that some may suggest that reversing the circuit court in this case might have the effect of crippling both curricular and extracurricular activities in our public schools. I disagree. First, reversing the circuit court decision would only mean that the appellant would have the opportunity to present the case to a jury. It does not mean that a jury would find in favor of the appellant. Second, the enabling statute – *W.Va. Code*, 18-5-13 [1997] – allows a county board of education to establish a transportation policy; nothing in the enabling statute requires a local board of education to assume any specific duty with respect to the transportation of students to activities such as the one in the instant case. As previously noted, the defendant Board in this case amended its student transportation policy in 2006 to eliminate the mandatory language requiring bus transportation to events of more than ten students, reducing the same to a recommendation. At the same time the Board strengthened the prohibition against students driving themselves or other students to school activities.

Simply put, for the majority opinion to ignore the Putnam County Board of Education regulations that were operative at the time of the events that led to this case and that were acknowledged as being "properly before the Court" in this Court's September 7, 2005 order defies logic, common sense, and the *law*. For the reasons set forth in this dissent,

I would reverse and remand this case, thereby permitting the appellant the opportunity to present the case to a jury.

I am authorized to state that Justice Albright joins in this dissent.