

No. 28482 - Erie Insurance Property and Casualty Company v. Stage Show Pizza, JTS, Inc., John Paul Harvey

FILED

July 9, 2001

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

RELEASED

July 11, 2001

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

Maynard, Justice, concurring in part and dissenting in part

I concur with the majority's determination that the circuit court erred in finding there was no insurance coverage for the appellant's common law negligence cause of action. As noted by the majority, the record indicates that Stage Show Pizza was in default on its obligations to the workers' compensation fund for failure to pay premiums on the date the appellant was injured. As a result, Stage Show Pizza lost its immunity under W.Va. Code § 23-2-6 (1991) and was subject to a suit for common law damages. Accordingly, Erie has an obligation under its policy to provide coverage to Stage Show Pizza for the appellant's common law action.

I dissent, however, to the majority's holding that Erie must provide coverage for the appellant's deliberate intention cause of action. Erie's policy clearly provides that it does not cover "any obligation for which you or any insurer may become liable under any workers' compensation . . . law." As acknowledged by the majority, this Court ruled in *Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 475 S.E.2d 138 (1996) that a deliberate intention cause of action is a right held by each employee subject to the West Virginia Workers' Compensation Act. We made clear in *Bell* that a statutory deliberate intention cause of action supersedes a common law cause of action and "is woven within the workers' compensation fabric in this State[.]" *Bell*, 197 W.Va. at 139, 475 S.E.2d at 139. Because a deliberate

intention cause of action exists under a workers' compensation law, the Erie policy, by its plain terms, excludes coverage for such a cause of action.

For the reasons stated above, I concur in part and dissent in part.