No. 28482 – ***Erie Insurance Property and Casualty Company v. Stage Show Pizza, JTS, Inc., a West Virginia corporation, and John Paul Harvey***

FILED
July 9, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
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Albright, J., concurring in part and dissenting in part:

I concur fully in the judgment of this Court that the "Employers' Liability–Stop Gap" provisions of the commercial general liability insurance policy at issue in this action provided coverage for the deliberate intent action brought against Stage Show Pizza, JTS, Inc. by the appellant John Paul Harvey. Unless that stop-gap coverage is construed to provide coverage in the case of a deliberate intent action for which the workers' compensation provides employers no immunity, those policy provisions must be seen as essentially illusory and meaningless. Such a construction would be absurd. Moreover, the history of the development of *W.Va. Code §*23-4-2(c)(2) and the emergence and marketing of such "stop-gap" insurance coverage in this state track each other rather nicely. This tends to confirm that the conclusion reached by the majority in regard to coverage for the deliberate intent action in consonant with the intent of the parties to the insurance contract, as expressed by the language in the "stop gap" portion of the insurance policy at issue, even though the parties have failed to update the language since our decision in *Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 475 S.E.2d 138 (1996), afforded the appellee insurance company an occasion to argue that such "stop-gap" coverage no longer extended to the purpose for which it was designed and marketed.

However, I dissent strongly from the conclusion of the majority that the parties intended to afford coverage of the common-law negligence action in this case, which is viable solely because the employer here defaulted in the payment of workers' compensation premiums. The majority holding implies that the employer and the insurer contemplated that the employer would default in the payment of those premiums. The majority holding finds that the employee's right to sue the employer in an action for negligence at common law, free and clear of the several defenses of which the employer is deprived because of having defaulted in the payment of workers' compensation premiums, did not arise "under any workers' compensation . . . law."

In its effort to find a deep pocket from which the Plaintiff below might recover a slam-dunk verdict for negligence in a trial in which the employer (and its insurer) is deprived of several common law defenses, the majority has twisted the agreement of the parties into something it is not and blithely dismissed the underlying public policy issues raised by the Court's opinion by reciting blandly, if not blindly, that "these public policy concerns do not appear to be implicated in the instant case, and have not been raised by the parties." Simply put, it is wrong to shift from the employer here to its insurer the burden placed by the law on the employer for its failure to timely and fully pay workers' compensation payments. That is not the purpose for which this employer purchased this insurance. That public policy concern is most clearly implicated here and was certainly raised by the parties as an integral part of the action here appealed.