No. 28851 -- The Estate of Bobby J. Robinson, deceased, by and through his widow, Tina Marie Robinson, and his mother, Margaret Robinson, as Co-Administratrixes of the Estate v. Randolph County Commission, Paul Brady, Sheriff of Randolph County

Starcher, J., concurring:

FILED
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OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I concur with the majority opinion's decision to reverse the dismissal of the plaintiffs' claims, and to remand this case to the circuit court for additional proceedings. I write separately, however, because I believe that, regardless of the circuit court's lack of factual findings, the Court could have gone further and addressed the legal positions of the parties.

This Court recently made clear that while a court-appointed attorney may be immune from suit for acting negligently during the course of representing a client, the attorney can still be held liable if the attorney acts recklessly. *See* Syllabus Point 5, *Powell v. Wood County Comm'n*, ___ W.Va. ___, ___ S.E.2d ___ (No. 28456, June 8, 2001). ("When a court appoints a private attorney to represent a client pursuant to W. Va. Code § 29-21-1, *et seq.*, and that client then sues the attorney for malpractice in connection with that representation, the attorney shall be immune from liability arising from that representation in the same manner and to the same extent that prosecuting attorneys are immune from liability.") We have often used the following definition for "reckless" conduct:

> The usual meaning assigned to "wilful," "wanton" or "reckless," according to taste as to the word used, is that the actor has *intentionally* done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a *conscious* indifference to the consequences,

> amounting almost to willingness that they shall follow; and it has been said that this is indispensable.

Cline v. Joy Mfg. Co., 172 W.Va. 769, 772 n. 6, 310 S.E.2d 835, 838 n. 6 (1983), *quoting* W. Prosser, *Handbook of the Law of Torts* 185 (4th Ed. 1971) (with emphasis added).

An attorney appointed by a court not only represents a client's interests in the courtroom, but the scope of the representation includes "proceedings which are ancillary to" criminal charges which may result in incarceration. *W.Va. Code*, 29-21-2(2) [1996]. One would presume this would mean taking "protective action when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." *Rules of Professional Responsibility*, Rule 1.14.

The plaintiffs' complaint clearly alleged that the attorney appointed by the court, defendant Dwight Hall, was reckless, and acted with a wanton disregard for the rights of his client, Bobby J. Robinson. Like any other person incarcerated behind bars, Mr. Robinson relied upon the goodwill of others -- such as his jailers and his court-appointed attorney -- to care for his well being. His attorney apparently knew -- not "should have known," but actually knew -- that Mr. Robinson was greatly depressed about his impending divorce, had been diagnosed with a mental illness, and had, *in the recent past*, attempted to commit suicide.

The complaint alleged that Mr. Robinson professed suicidal ideations while he was incarcerated. Mr. Robinson's wife, his mother, and an attorney of high regard apparently told Mr. Hall that Mr. Robinson might commit suicide, and asked that Mr. Hall intervene to see that Mr. Robinson received medical and psychological care.

A reasonable lawyer could have concluded that Mr. Robinson was not in a position to "adequately act in [his] own interest" when he was incarcerated in the Randolph County Jail. As part of Mr. Hall's appointment, he was charged with matters "ancillary" to representing Mr. Robinson in the courtroom on his criminal charges -- which would include taking "protective action" such as seeking medical care or psychological assistance.

It appears that Mr. Hall had the knowledge and the ability to act, to intervene on Mr. Robinson's behalf and to seek medical assistance. With all the knowledge of the risk that Mr. Robinson might commit suicide, Mr. Hall took no action on behalf of Mr. Robinson, appearing consciously indifferent to Mr. Robinson's situation, and consciously indifferent to the likelihood he might die by his own hand. By any account, this, if proven, qualifies as "reckless" conduct.

Before the circuit court, counsel for Mr. Hall argued that the plaintiffs' allegations were "specious" and "not worthy of a response." My reading of the record suggests that the attorneys now representing the plaintiffs' family did not choose to sue Mr. Hall out of a spirit of malice or vindictiveness. One of the plaintiffs' attorneys has nearly 2 decades of experience -- he's been an attorney since 1983, by my reckoning -- successfully pursuing complex negligence actions. It is unlikely that such an experienced, successful trial lawyer would bring a frivolous lawsuit or pursue an action without a reasonable belief that the defendant owed a plaintiff a duty, and failed to carry out that duty.

I am therefore frustrated that the majority opinion did not go further in addressing the legal status of the plaintiffs' claims. The claim asserted by the plaintiffs agsinst Mr. Hall may be novel, but it needs resolution so that attorneys appointed by courts to represent indigent defendants will understand their

duties -- both in the courtroom and out -- towards an incarcerated client.[1] Attorneys are not charged with speculating, diagnosing, or otherwise magically discerning the medical or mental condition of their clients. But when a client is incarcerated, his only outside contact with the "legal world" is his court-appointed attorney. When the attorney has specific knowledge that an incarcerated client has a life-threatening medical or mental condition, the attorney has a duty to act in the client's best interests. The Court should have taken this opportunity and made this clear.

I firmly believe that Mr. Hall owed his client a duty of care, to insure that his incarcerated client received adequate medical and psychological care from his jailors. In the face of this duty, Mr. Hall apparently did nothing. Such evidence could be interpreted by a reasonable fact-finder as evidence that he knew of a particular risk (that Mr. Robinson was psychologically imbalanced and was threatening suicide), and deliberately, intentionally disregarded that risk with a conscious indifference to the consequences of his actions.

In sum, while I believe that there was a sufficient record to find that the complaint stated a cause of action upon which relief could be granted, I agree with the remand of this case to the circuit court for reconsideration. I therefore respectfully concur with the majority's opinion.

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[1]Mr. Hall's failure to act could be interpreted as confusion among members of the Bar regarding their duties towards incarcerated clients. Mr. Hall did not feel compelled to protect Mr. Robinson's medical well-being while he was held in the Randolph County Jail.

However, J. Burton Hunter, III, was an attorney only hired to represent Mr. Robinson in a divorce matter -- yet when he learned of Mr. Robinson's incarceration and his voicing of suicidal ideations, he made a special effort to contact the county commission, the sheriff who oversaw the operation of the jail, and Mr. Hall. Mr. Hunter felt compelled to protect his client, even though Mr. Robinson's incarceration was not within the scope of his representation.