No. ***29005*** ***Alisha Johnson, as personal representative for the State of George Robertson v. C.J. Mahan Construction Company, a foreign corporation; Janssen and Spaans Engineering, Inc., a foreign corporation; West Virginia Department of Transportation, Division of Highways; Dywidag Systems International, Inc., a foreign corporation***

FILED
January 8, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
January 9, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Burnside, Judge, dissenting:

1. The BRIM policy is a state-funded self insurance arrangement which constitutes a limited waiver of sovereign immunity.

The legislature authorized the purchase of liability insurance providing coverage of State "property, activities, and responsibilities," to provide compensation for claims that otherwise would have been barred by sovereign immunity. *West Virginia Constitution*, Article VI, §35 *W.Va. Code* §29-12-5. *Parkulo v. West Virginia Bd. of Probation and Parole*, 199 W.Va 161, 483 S.E.2d 507 (1997) See also, *Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172 W.Va 743, 310 S.E.2d 675 (1983).

The Legislature created The State Board of Insurance [Risk and Insurance Management] (BRIM) to supervise the state's liability insurance plans. W.Va Code 29-12-1, *et seq.* Pursuant to this responsibility, BRIM established the equivalent of a self insurance program administered by, but not funded by, a private insurance company, American International Group (AIG). The "premium" in the BRIM arrangement is a fund set aside by the State from which the claims are paid. The determination of which claims should be paid and which denied is governed by the "policy," which, like an ordinary insurance policy, states coverages and exclusions from coverage. Since public funds, rather than

ordinary insurance, pay the claims, this system constitutes the legislative waiver of a degree of sovereign immunity as to those claims covered by the program, but only to such claims. To the extent that certain categories of claims are not covered by the BRIM policy, immunity has not been waived.

2. The exclusionary language is unambiguous and should be applied according to its terms

Notwithstanding that this "policy" is not an ordinary insurance policy, the application of the ordinary rules of construction of an insurance policy yield the conclusion that the exclusionary language is unambiguous and should be applied according to its terms.

Russell and the majority herein correctly hold that the Department of Highways has the duty to select a contractor who is financially responsible, but that this duty does not mandate that the Department "ascertain and take into account the worker safety record or performance of a contractor/bidder..." Without doubt, the contractor should be in good standing with Workers Compensation Commission and it should carry sufficient liability insurance to compensate its employees for damages arising from "deliberate intention" claims.

The majority assumes, without analysis, that this is a special duty owed by the DOH to the individual employee of a contractor, as distinguished from a public duty owed to the public at large, within the meaning of *Wolfe v. City of Wheeling*, 182 W.Va. 253, 387 S.E.2d 307 (1989) and subsequent cases on that point. Accepting the assumption *arguendo* that a breach of that duty gives rise to a claim against the DOH by an individual employee of the negligent contractor, it does not support the conclusion that the BRIM policy covers such a claim.

BRIM is "clearly clothed with the authority to tailor the coverages and exceptions to those deemed necessary to the protection of the State and those wishing to assert a claim against it." *Parkulo* at 170. ...."[T]he Legislature may direct such limitation or expansion of the insurance coverages and exceptions applicable to cases brought under *W.Va Code* §29-12-5, as, in its wisdom, may be appropriate. The Legislature has also vested in the State Board of Insurance (Risk and Insurance Management) considerable latitude to fix the scope of coverage and **contractual exceptions** to that coverage by regulation or by negotiation of the terms of particular applicable insurance policies…." *Parkulo* at 521-522 (boldface added).

This is exactly what happened here. The Legislature, speaking through BRIM, chose to exclude claims "resulting from the.... construction.... of a bridge." The majority opinion refuses to apply this exclusion on the grounds that exclusionary language should be construed against the insurer, citing to Syllabus Point 4 in the companion case, *Russell v. Bush & Burchette, Inc.*, No. 2839 _____, W.Va._____, _____ S.E.2d _____ (filed November 28, 2001).

Russell's syllabus point 4 cites to *National Mutual Insurance Company v. McMahon & Sons, Inc*., 177 W.Va 734, 356 S.E.2d 488 (1987). *McMahon* holds to the long established principle that a court does not "construe" an exclusionary term unless it first finds that it is ambiguous." *McMahon* at 740. In *McMahon*, that predicate existed, upon which this Court correctly proceeded to construe the exclusionary language strictly against the insurer. However, *McMahon* is misapplied in *Russell*, with the result that exclusionary language is construed strictly against the insurer just because it is exclusionary, irrespective of whether it is ambiguous. If this becomes the rule, an insurance policy could rarely contain an enforceable exclusion.

The exclusionary language requires careful reading, but that requirement does not render it ambiguous. If the language is clear, it is to be applied, not construed.

When the Department of Highways builds a bridge, it must hire a private contractor to do it. When that happens, it is the contractor, and not the DOH, who does the building. It is the contractor's duty to perform the work competently and safely. The contractor owes this duty by contract to the State, and by various statutory and common law principles to its employees and third parties.

The relationship between the State and its contractor is nearly identical to that between a private citizen and an independent contractor. Two principles of the relationship between a principal and its independent contractor make the exclusionary language necessary, proper, and clear. The first is the rule that when an independent contractor negligently injures a third party, the principal is generally not liable to at third party for the negligent hiring of the contractor. There are numerous exceptions to this rule, one of which is that the principal should bear liability for negligent hiring if the "exercise of reasonable diligence would disclose facts demonstrating clear incompetence for contemplated task." *Thomson v. McGinnis*, 195 W.Va. 465, 465 S.E.2d 922 (1995). *Thompson* also said, however, that the principal "has no affirmative duty to conduct comprehensive inquiry into credentials of independent contractor, or to engage in personal inquiry into credentials of contractor who is licensed and reputable individual or firm."

The second principle is that the negligence of the independent contractor is generally not imputed to its principal. The major exception to this rule arises when the principal directs the conduct of the independent contractor with such detail that the "independent" contractor is no longer independent. *Chenoweth v. Settle Eng'rs, Inc*., 151 W.Va 830, 156 S.E.2d 297 (1967).

It is in this context that the exclusionary language should be examined. The policy excludes "any claim resulting from the ownership, design, selection, **installation**, maintenance, location, supervision, operation, **construction**, use, or control of .... bridges" The *Russell* opinion and the majority in *Johnson* skip over the issue of whether the exclusion is ambiguous, and refuse to apply the policy exclusion because of the conclusion that the selection of a contractor is sufficiently "anterior" to the construction of a bridge that it is not a part of the construction of a bridge.

The majority's conclusion overlooks the way the DOH is required to operate. A private entity may choose between hiring a contractor or doing the work himself. However, the Department of Highways is **required by statute** to hire a contractor to build a bridge. W.Va. Code §17-4-19. Thus, for the DOH, the hiring of a contractor is an inseverable stage of building a bridge. It does not have the capacity to build a bridge without hiring a contractor, and a contractor cannot be hired without selecting one. Under these circumstances, the selection of a contractor by the DOH cannot possibly be "anterior" to the construction of a bridge.

If one reads the complete text of the policy exclusion, it becomes apparent that it reflects the generally accepted principles in the relationship between a principal and an independent contractor. The **exception** to the exclusion provides that the exclusion does not apply "to claims of bodily injury...which...occur while employees of the State of West Virginia are **physically present** at the site of the incident..."(boldface added). Obviously, if the principal is present when the contractor commits a negligent act, an issue of fact arises whether the principal, here the DOH, is exercising such direct control over the independent contractor that the liability for the negligence of the independent contractor is imputed by law to its principal.

The BRIM policy is intended to cover certain negligent acts committed **by the State** or its agencies, including those that occur on the contractor's work site while an agent of the State is present. But it excludes certain claims, among which are those arising from the construction of a bridge, which as shown above must, for the DOH, encompass the selection of a contractor. This exclusion does not "nullify the purpose of indemnifying the insured" as forbidden by syllabus point 9, *McMahon*, but it reasonably and permissibly limits that indemnity.

In this context, the exclusionary language is of sufficient clarity that it does not require judicial construction.

3. The majority's refusal to apply the exclusion shifts to the taxpayers of West Virginia the liability for the negligence of a private contractor.

The purpose of the BRIM arrangement is to provide compensation to those persons who have certain claims against the State. It is not intended to pay claims owed by private companies who contract with the State. According to the majority's construction of this language, however, the BRIM policy will cover not just the State, but also its private contractors.

As discussed above, the DOH is required by statute to hire a contractor to build a bridge. It is not permitted to build the bridge itself. The contractor is required to get its own insurance and pay its own bills, and the DOH is required to select a contractor who has sufficient insurance to protect the employees of the contractor. The result is that the private contractor gets liability insurance to protect his injured employees, and the taxpayers fund BRIM to satisfy claims against the State.

If a private company injures or kills one of its employees by an act that supports a "deliberate intent" action, and its own liability insurance is inadequate to compensate that employee, the company

ordinarily pays the excess damages out if its own pocket, unless it had the foresight to purchase sufficient excess liability insurance. However, under the rule of the present case, if that same private company happens to have a contract to build a bridge for the State, the contractor's excess liability is shifted to the taxpayers of the state of West Virginia.

If the BRIM system is made liable for a claim grounded on the failure of the DOH to make sufficient inquiry into a contractor's financial responsibility, the BRIM policy becomes, in effect, the umbrella insurer of the state's contractors. This is clearly not the intent of W.Va. Code §29-12-1, *et seq*. The decision whether the State of West Virginia should accept that vast financial responsibility belongs to the taxpayers, speaking through the Legislature, and not to this Court.

This Court should apply the policy exclusion according to its clear and unambiguous terms. In the absence of liability insurance, or its BRIM equivalent, the State may not be a party to a personal injury action. *Pittsburgh Elevator v. West Virginia Board of Regents*, 172 W.Va. 743 (1983). The Circuit Court of Logan county should be affirmed in its finding that the exclusion in the policy excludes this claim, and that the Department of Highways should be dismissed as a Defendant.

On these grounds, I respectfully dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.