

No. 31637 – Arch A. Moore, Jr., v. CNA Insurance Company, d/b/a Continental Casualty Company

**FILED**

**June 30, 2004**

Maynard, Chief Justice, concurring, in part, and dissenting, in part.

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

This case required the Court to determine whether the circuit court's award of summary judgment in favor of CNA Insurance Company, d/b/a Continental Casualty Company ("CNA"), against former Governor Arch A. Moore, Jr., was appropriate. The majority opinion concluded that the trial court correctly granted summary judgment. For the reasons outlined below, I believe that the circuit court erred in granting summary judgment to CNA. Therefore, I concur, in part, and dissent, in part.

As the *majority correctly states*, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). In this case, I believe that further inquiry concerning the facts was essential with regard to all of the charges against Governor Moore. While it is clear to me that some of the claims against Governor Moore are unquestionably outside of the scope of coverage, we do not know enough, in my view, to make such a finding with regard to *all* of the claims against Governor Moore.

To this end, the circuit court's summary judgment order is inadequate because it does not specifically explain how the State's claims against Governor Moore fall under the exclusion provision of the State's insurance policy. We have held that:

Although our standard of review for summary judgment remains *de novo*, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.

Syllabus Point 3, *Fayette Co. National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997).

As such, this Court cannot perform its function unless the circuit court's order contains both the factual and legal basis for its ultimate conclusion.

In the instant case, given the circuit court's insufficient order, I feel that Governor Moore has demonstrated that factual determinations were still in question and that further inquiry was necessary by the circuit court as to whether he should have received a defense by CNA to the charges against him. This is further highlighted by the fact that in the Federal District Court case against Governor Moore, Senior Federal District Court Judge Richard L. Williams dismissed seven of the eight claims that he considered against Governor Moore in the State's civil action for which Moore sought a defense. *See West Virginia v. Moore*, 895 F. Supp. 864 (S.D.W.Va.1995). I believe that even though a jury could have ultimately found against Governor Moore (if he had not reached a settlement in the case), he conceivably may have been entitled to a defense.

In his July 27, 1995 order, Senior Judge Williams explained that the State would be limited in using Governor Moore's guilty plea to establish all of its claims against him. Judge Williams said:

The State also relies on Moore's guilty plea for evidentiary support. However, by his guilty plea, Moore has only admitted to extorting money which was not lawfully due and owing to him. The plea does not establish that Moore in any way interfered with [the United States Department of Labor] DOL. In fact, even if the Court were to accept as established the facts asserted by the U.S. Attorney at Moore's Rule 11 plea hearing (which it does not) nothing indicates that Moore interfered with DOL.

895 F.Supp. at 867, n.3. Judge Williams further declared that the State did not meet its burden with regard to many of its claims against Governor Moore. Judge Williams said,

a plaintiff must show that he suffered an injury to his business or property proximately caused by the defendant's racketeering activities. Because the State cannot meet this burden, Moore's motion for partial summary judgment is granted in *substantial* part.

*Id.* at 868. (emphasis added.) In its summary of Judge Williams' memorandum opinion, West Publishing probably explained it best when it provided:

On former governor's motion for partial summary judgment, the District Court, Richard L. Williams, Senior District Judge, held that: (1) former governor's alleged racketeering activity allegedly resulting in state of West Virginia's refund to coal company of premiums paid to its black lung fund was not proximate cause of damages to state; (2) even assuming that defendant became governor solely as result of his alleged fraud, state suffered no compensable damages; (3) kickback allegedly paid to former governor and illegal campaign contributions he allegedly accepted were insufficient to establish RICO standing; (4) former governor's failure to report certain campaign

contributions on his federal income tax form did not establish that he underpaid his state taxes; (5) even if former governor accepted bribes and unlawful campaign contributions and failed to disclose such payments, state failed to demonstrate reliance and damages elements of actual fraud; but (6) evidence raised genuine issue of material fact as to whether defendant was unjustly enriched through his conduct as governor, precluding summary judgment on state's unjust enrichment claim.

Furthermore, I believe that a simple review of some of the findings that Judge Williams made in his memorandum opinion in granting partial summary judgment to Governor Moore shows that there were sufficient factual disputes that would have rendered summary judgment inappropriate. Allow me to directly quote a few examples taken from the memorandum opinion entered by Senior Judge Williams, wherein he made the following findings and rulings:

- ! With respect to the refund, DOL officials, not Arch Moore or any other employee of the State of West Virginia, made all of the important decisions.
- ! The State's theory of damages simply is not supported by the evidence. . . . Kizer's companies would have qualified for a refund in January of 1986 because they had been approved by the Department of Labor for self-insured status. Therefore, the \$2.2 million would not have remained in the fund until 1992 when money was transferred to cover a shortfall in the workers' compensation fund.
- ! The State has presented no evidence regarding DOL's process for evaluating Kizer's application to become self-insured. . . . Moore obviously had no control over a federal agency, and the State's own witness, after reviewing the file, found nothing improper about DOL's

decision.

- ! Moreover, the causal chain asserted by the State is too weak to meet the proximate cause requirement for standing under civil RICO.
- ! Assuming Moore became Governor solely as a result of his alleged fraud, the State still suffered no damages--it would have paid a Governor's salary even if Moore had not committed fraud and another candidate had taken the office.
- ! The State also argues that it is entitled to recover the kickback paid to Moore by Kizer and the illegal campaign contributions accepted by Moore. . . . For the reasons noted above, the Court rejects this theory for RICO damages. . . .
- ! The Court simply cannot find an issue of material fact on Moore's tax liability. The State has presented evidence, by virtue of the collateral estoppel effect of Moore's guilty plea, that Moore failed to report certain cash payments as income. The State has never presented evidence that Moore's failure to report those payments increased his tax liability. Through an audit, the State certainly could have tried to gather that evidence. For whatever reason, no such effort was made. Moore, on the other hand, has presented evidence through his affidavit that he owed no additional tax.
- ! Even if it were determined that Moore owed additional tax, the Court is not convinced that civil RICO is an appropriate method for the State to use in recouping that loss. . . . The State of West Virginia could have pursued Moore under state law remedies to retrieve any tax he owed but failed to pay. West Virginia Code § 11-10-1, *et seq.* To this date, West Virginia has failed to avail itself of this option. As such, the State cannot now claim an injury to its business or property and invoke the jurisdiction of the federal courts on a RICO claim in order to collect past due taxes.

! Even assuming that Moore perpetrated a fraud upon the State by accepting bribes and unlawful campaign contributions, the State has not raised genuine issues of material fact as to whether it relied on Moore's actions and was damaged thereby. As explained above, the State would have paid the Governor's salary regardless of Moore's racketeering activities--indeed, regardless of whether Moore was Governor.

Again, let me be perfectly clear, the quotations above are not my words. They are words taken verbatim from *West Virginia v. Moore*, 895 F. Supp. 864 (S.D.W.Va.1995). Accordingly, with these powerful findings of Judge Williams in mind, I feel that Governor Moore should have had the opportunity to introduce all of the evidence with regard to his contention that CNA was bound to provide a defense to the State's charges against him during a thorough trial before the circuit court. I further believe that it is important not to forget that even though many of the claims against Governor Moore were eventually dismissed by the District Court, he was still forced to accumulate significant legal fees as the case lingered for nearly five years. Thus, I believe that CNA Insurance Company is liable for at least some of Governor Moore's defense costs and that Governor Moore had a right to litigate how much of those costs should have been paid by CNA Insurance Company. Therefore, for the reasons stated above, I respectfully concur, in part, and dissent, in part.