

No. 33433 *Misty Blessing, Individually and as the Administrator of the Estate of Wallie Blessing v. West Virginia Department of Transportation, Division of Highways, an Agency of the State of West Virginia, et al.*

FILED

June 23, 2008

released at 3:00 p.m.

RORY L. PERRY II, CLERK

**SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Benjamin, Justice, concurring:

I concur with the majority decision. I write separately because I would remand the decision of the circuit court on somewhat different grounds.

Upon review of this matter, I agree with the circuit court's conclusion that based upon the evidence and deposition testimony presented, no genuine issue of material fact existed with respect to Mr. Smith's conduct as the project supervisor because he did not perform "construction, maintenance, repair or cleaning" on the project site. Rather, Mr. Smith's role in the construction at issue was unquestionably clear, as his duties were specifically relegated to "inspection" of work. Additionally, I agree with the circuit court's conclusion that no genuine issue of material fact existed with respect to Mr. Hardin's conduct as an inspector who reported to Mr. Smith at the construction site because Mr. Hardin specifically testified that his duties were also "quality control" in nature. Indeed, the various examples of conduct provided by the Appellant do in fact reinforce the Appellee's assertion that these men were only inspecting the project to ensure that the contractor uses the correct

materials and proceeds according to contract specifications.

In light of the purpose and nature of this type of conduct, I would also hesitate to define the term “inspection” in such a narrow manner as proposed by the Appellant. The majority recognizes, as do I, that the coverage obtained under the National Union policy is specifically designed for instances when Department employees may be responsible “for an injury by virtue of their presence at the scene and the work they are performing.” The work the Department performs for the purpose of inspecting the project is outside the risks sought to be covered by the National Union policy. This is precisely why the Department requires contractors to have their own insurance policy in place to cover any injury attributable to the work performed by the contractor’s employees.

Furthermore, with respect to the issues surrounding this case, I must state my serious reservations regarding the constitutionality of this Court’s prior decision in *Pittsburgh Elevator v. West Virginia Board of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983), with respect to the issue of sovereign immunity. Although that issue was not presented by the parties to this action, if the appropriate case presents itself in the future, I believe this Court should revisit this issue to determine whether it is appropriate to judicially create an exception to sovereign immunity which the West Virginia Constitution explicitly prohibits.

Those issue aside, I concur in the majority's decision to remand the case to provide the circuit court an opportunity to review and rule upon the issue of the unsigned endorsement. That issue, at this juncture, should be developed and ruled upon as an initial matter at the circuit court level.