No. 22-0428 — *Todd Kent, Mark Spessert, Christopher Kutcher, City of Charles Town, Bradley Meacham, Glenna Hosby-Brown, William Roper, and City of Ranson v. Christopher Sullivan*

FILED
May 9, 2024
released at 3:00 p.m.
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BUNN, JUSTICE, concurring, joined by Chief Justice Armstead:

I concur with the majority's identification of the circuit court's error regarding immunities and its concise instructions to the circuit court to determine whether immunity applies to the petitioners under the Governmental Tort Claims and Insurance Reform Act. *See* W. Va. Code §§ 29-12A-1 to -18. Further, the majority correctly states, and notes in its Syllabus, that we review the circuit court's disposition of the petitioners' motions to dismiss de novo. *See* Syl. pt. 4, *Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998).[1] However, the majority's sua sponte application of the plain error standard of review to reach its conclusion is unnecessary and overreaching. I respectfully disagree with this standard's use in this opinion.

[1] The Court has repeatedly recognized that de novo "'means "[a]new; afresh; a second time."'" *Vanderpool v. Hunt*, 241 W. Va. 254, 259, 823 S.E.2d 526, 531 (2019) (alteration in original) (quoting *Gastar Expl. Inc. v. Rine*, 239 W. Va. 792, 798, 806 S.E.2d 448, 454 (2017)); *see also W. Va. Div. of Corr. & Rehab. v. Robbins*, 248 W. Va. 515, 523, 889 S.E.2d 88, 96 (2023). Furthermore, "'[w]e have often used the term "*de novo*" in connection with the term "plenary." . . . Perhaps more instructive for our present purposes is the definition of the term "plenary," which means "[f]ull, entire, complete, absolute, perfect, unqualified."'" *Gastar Expl. Inc.*, 239 W. Va. at 798, 806 S.E.2d at 454 (first alteration added, other alterations in original) (quoting *State ex rel. Clark v. Blue Cross Blue Shield of W. Va., Inc.*, 203 W. Va. 690, 701, 510 S.E.2d 764, 775 (1998)).

We have repeatedly acknowledged that our use of the plain error standard of review should be rare and "exercised sparingly." *See, e.g.*, Syl. pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).[2] When the Court exercises this standard of review, we only correct plain error if it "affects substantial rights" and "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). And typically, although not exclusively, the Court's recognition of sua sponte plain error occurs in criminal cases.[3] *See In re K.L.*, 233 W. Va.

---

[2] Syllabus point 7 of *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), provides the following:

> An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

[3] The West Virginia Rules of Criminal Procedure specifically provide for plain error review. *See* W. Va. R. Crim. P. 30 (regarding plain error in jury instructions); W. Va. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). In Syllabus point one of *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998), a criminal appeal, the Court held that "[t]his Court's application of the plain error rule *in a criminal prosecution* is not dependent upon a defendant asking the Court to invoke the rule. We may, sua sponte, in the interest of justice, notice plain error." (Emphasis added). In non-criminal cases seeking to review purported plain error sua sponte, opinions often quote this Syllabus point, but only the second sentence, as the majority did in this case. *See, e.g.*, Syl. pt. 1, *Cartwright v. McComas*, 223 W. Va. 161, 672 S.E.2d 297 (2008) (per curiam) (quoting Syllabus point 1 of *Myers* in part); Syl. pt. 2, *In re K.L.*, 233 W. Va. 547, 759 S.E.2d 778 (2014) (per curiam) (same); Syl. pt. 2, *In re Adoption of J.S.*, 245 W. Va. 164, 858 S.E.2d 214 (2021) (same).

547, 552 n.6, 759 S.E.2d 778, 783 n.6 (2014) (per curiam) (applying plain error standard when reviewing the termination of parental rights in an abuse and neglect proceeding and recognizing that "[a]lthough the practice of noticing plain error *sua sponte* is usually applied in criminal cases, it is not exclusive to such cases").

Here the majority claims that the petitioners' assigned errors fail to address the circuit court's "overarching error" relating to its immunity determinations, so the majority must, on its own, find plain error. The majority later justifies the standard's use in a conclusory footnote, but never attempts to detail the specific prejudice to petitioners or to explain how the lower court's error "seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceedings." *See* Syl. pt. 7, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. The majority relies on Syllabus points one and two in *Cartwright v. McComas*, 223 W. Va. 161, 672 S.E.2d 297 (2008) (per curiam), to justify its noticing of plain error. However, the Court in *Cartwright* analyzed *how* the plain error standard applied when reviewing the circuit court's application of the statute of limitations to a minor child under the Medical Professional Liability Act. *See generally Cartwright*, 223 W. Va. 161, 672 S.E.2d 297.[4] If we *must* apply the plain error standard in reviewing a civil appeal, we should provide an analysis, rather than a conclusion, to explain our approach.

[4] While the West Virginia Rules of Civil Procedure contain no analog to West Virginia Rule of Criminal Procedure 52(b), which generally regards noticing plain error in criminal cases, certain rules applicable to civil cases specifically provide for plain error review in limited circumstances. West Virginia Rule of Civil Procedure 51 regards jury

Of greater concern, the majority's use of the plain error standard of review is unnecessary. We need not employ any sua sponte power to identify error when the petitioners already addressed the error in their appeal. The petitioners requested review of the circuit court's failure to dismiss them on immunities grounds. As the majority noted, we review the circuit court's order de novo. Certainly, the petitioners' assigned errors could have more accurately assessed the lower court's specific errors in determining their immunity. Still, their claims of error before this Court and the arguments in their motions to dismiss below are broad enough for the Court to address the circuit court's overarching error in its analysis, as we have in many civil cases before this Court, without resorting to

---

instructions and explicitly allows a court or an appellate court a limited ability to "notice plain error in the giving or refusal to give an instruction" even if a party did not object to the instruction. The reviewing court may only notice plain error if it is in the "interest of justice," although the Rule does not *require* that the court notice plain error. W. Va. R. Civ. P. 51 (stating, in part, "[n]o party may assign as error the giving or the refusal to give an instruction unless the party objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which the party objects and the grounds of the party's objection; *but the court or any appellate court, may, in the interest of justice, notice plain error in the giving or refusal to give an instruction*, whether or not it has been made the subject of objection" (emphasis added)); *see* Syl. pt. 1, *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974) ("Where an objection is made to [a jury] instruction for the first time on appeal and such instruction is not so deficient so as to require invocation of the 'plain error' rule, in consonance with Rule 51 [of the West Virginia Rules of Civil Procedure], this Court will not consider the late objection.").

Similarly, West Virginia Rule of Evidence 103, entitled "Rulings on Evidence," provides in subsection (e) that "[a] court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." Still, the plain error doctrine allowing for review of an unpreserved evidentiary error "is reserved for the most egregious circumstances" and "the alleged error must have seriously affected the fairness or integrity of the trial." *In re Tiffany Marie S.*, 196 W. Va. 223, 234, 470 S.E.2d 177, 188 (1996) (failing to find that the circuit court committed plain error in the admission of certain evidence).

plain error review. *See, e.g.*, *Metro Tristate, Inc. v. Pub. Serv. Comm'n of W. Va.*, 245 W. Va. 495, 502-03, 859 S.E.2d 438, 445-46 (2021) (acknowledging petitioner's problematic brief but discerning that the brief "has effectively raised only one question for this Court"); *Fairmont Tool, Inc. v. Davis*, 246 W. Va. 258, 266, 868 S.E.2d 737, 745 (2021) (recognizing petitioner's brief lacked assignments of error but determining the Court would "construe" the brief's headings "as assignments of error").

The majority's avoidable and ill-advised use of the plain error standard of review both weakens our self-imposed restraint on its application and undermines the recognition of the seriousness of error when we determine plain error exists and must be corrected. In recognizing the constraints of plain error review in *criminal* cases, the United States Supreme Court has advised against an "unwarranted extension" of the "exacting definition of plain error" to avoid "skew[ing] [Federal Rule of Criminal Procedure 52(b)'s] 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1046, 84 L. Ed. 2d 1 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163, 102 S. Ct. 1584, 1592, 71 L. Ed. 2d 816 (1982)). Furthermore, the Court's plain error review in civil cases must be "'severely constricted,' as 'a civil litigant "should be bound by his counsel's actions."'" *Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020) (en banc) (quoting *Sec. & Exch. Comm'n v. Yang*, 795 F.3d 674, 679 (7th Cir. 2015)); *see also C.B. v. City of Sonora*, 769 F.3d 1005,

1018 (9th Cir. 2014) (en banc) (recognizing that "the stakes are lower in the civil context and, consequently, plain errors should 'encompass[] only those errors that reach the pinnacle of fault envisioned by the [plain error] standard'" (first alteration in original, other alteration added) (quoting *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002)); *Smith v. Kmart Corp.*, 177 F.3d 19, 26 (1st Cir. 1999) ("Plain error is a 'rare species in civil litigation,' encompassing only those errors that reach the 'pinnacle of fault' envisioned by the standard set forth above." (quoting *Cambridge Plating Co. v. Napco, Inc.*, 85 F.3d 752, 767-68 (1st Cir. 1996)). The better approach to resolving this case would have been to refrain from finding plain error, and, instead, to recognize reversible error as raised in the petitioners' assignments.