No.: 22-625

SUPREME COURT OF APPEALS OF WEST VIRGINIA

DENISE ORSO,
Petitioner,

v.

Re:
CIVIL ACTION NO.: CC-23-2020-22
Honorable Miki J. Thompson, Circuit Judge

THE CITY OF LOGAN, WEST VIRGINIA,
a municipal corporation,

Respondent.

PETITIONER'S REPLY BRIEF

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III.

INTRODUCTION

The Petitioner contends that the Order signed by the Circuit Court below contains erroneous conclusions concerning the law which governs this case. Those errors have resulted in the award of summary judgment under appeal. In summary, the Circuit Court in making its ruling has arrived at findings of law that concern genuine issues of material facts for a jury to decide. Those facts concern negligence, comparative negligence, negligence by omission and neglect of a duty imposed by law, City control over the Logan sidewalks in their city, and proximate causation. In that the Petitioner's Brief addresses much of these points the arguments will not be repeated in this Reply Brief.

IV.

ARGUMENT

A.

West Virginia Code §17-10-17 and West Virginia Code §29-12A-1 et seq. must be read and interpreted together. The Tort Claims Act alone does not govern Petitioner's claim.

In the Circuit Court's Order which awards summary judgment now under appeal, A8, 13 the Court concludes that:

> "Statutory immunity is governed exclusively by the West Virginia Tort Claims and Insurance Reform Act."

The Respondent City's Brief repeats that error, p. 11, citing as authority the decision in *Bowden v. Monroe County Com'n, 750 S.E. 2d 263 (W.Va. 2013) (sic), see* ftn. 50. *Bowden* was decided in 2017 wherein the Court reversed a wrongful death case in which the Circuit Court had awarded summary judgment to the county. In *Bowden* the Court found that the immunity

provided in W.Va. Code §29-12A-1 et seq. must be considered as coextensive with the common law. The decision reached in *Bowden* relied upon *Randall v. Fairmont City Police Dept., 412 S.E. 2d 737 (W.Va. 1991)* which held:

> "If a special relationship exists between a local government and an individual which gives rise to a duty to such individual, and the duty is breached, causing injuries, then a suit may be maintained against such entity," Id. syl. pt. 7.

An earlier decision in the very same *Bowden* case was decided in 2013. That decision reversed a dismissal under the Rules of Civil Procedure 12(b)(6). The dismissal was said to be granted on the basis of statutory immunities contained in W.Va. Code §29-12A-1 et seq. It was that case (S. Crt. No. 12-0614)[1] which contained the incorrect language that our Tort Claims Act exclusively governs this action. It is here submitted that this exclusivity argument must be rejected and put to rest once and for all. To the point at bar, it was error for the Court below and by counsel which prepared the judgment order to include it together with an incorrect citation.

W.Va. Code §17-10-17 was first enacted in 1933, once amended in 1969. The statute states in clear terms that:

> "Any person who sustains an injury to his person or property by reason of any road or bridge under the control of the county court or any road, bridge, street, alley or sidewalk in any incorporated city. . . .being out of repair due to the negligence of the county court, incorporated city. . . .may recover all damages sustained by him by reason of such injury. . .

As co-existing law this statute and the rights provided for therein must necessarily be considered when interpreting the Tort Claims Act in this action. In reaching any determination a Court must read W.Va. Code §29-12A-1 et seq. together with the rights to bring an action under W.Va. §17-10-17. W.Va. Code §29-12A-4(c)(3) states:

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[1]The 2017 decision in *Bowden* was case no. 16-0597. In each case the Monroe County Commission was represented by the firm which is the Respondent Appellee's counsel here.

> "*Political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public. . . sidewalks* . . . within the political subdivisions *open, in repair, or free from nuisance* except that it is a full defense to such liability when a bridge within a municipality is involved, that the municipality does not have responsibility for maintaining or inspecting the bridge." (Italics added).

It is clear not only that the Tort Claims Act does not exclusively govern this case but that when considering the statutory right to bring on action under W.Va. Code §17-10-17 along with the clear language of W.Va. Code §29-12A-4(c)(3) the Circuit Court in its order, and the Respondent in its argument, have erroneously relied on the Tort Claims Act alone as a basis for summary judgment.

In Respondent's argument the City attempts to trivialize the importance of W.Va. Code §17-10-17 and cases previously decided under the said statute:

> "Thus, Petitioner's reliance on an outdated reading of W.Va. Code §17-10-17 and outdated case law that conflicts with the Tort Claims Act must fail," Brief p. 11.

The cases decided under W.Va. Code §17-10-17 just as the statute itself must be reconciled with the provisions of the more recent W.Va. Code §29-12A-1 et seq. which was enacted in 1986 to "limit liability of political subdivisions and provide immunity. . . *in certain instances*," Id. The legislature's findings for this legislation was specifically intended to reduce what legislators had determined were high costs associated with defending the claims, W.Va. Code §29-12A-2. The kinds of claims which remain available are those that have historically existed pursuant to the interpretation of W.Va. Code §17-10-17 by this very Court, that is Court precedent or *Stare Decisis*. The Respondent by its argument would have this Court ignore precedent because it is "old." Petitioner would instead characterize precedent as time-honored and exactly what proper jurisprudence is all about.

The Respondent also argues that Petitioner has waived the argument that W.Va. Code §17-10-17 operates within W.Va. Code §29-12A-4, Brief 12-13. Here the Respondent's Brief relies on Respondent's interpretation of the Plaintiff's Memorandum made in Response to the City's Summary Judgment Motion, see Brief p. 12, ftn. 52 referring to App. 642-643. For starters, the City's Motion for Summary Judgment which was then being addressed relied on 1) lack of duty as the wire which Mrs. Orso tripped on did not belong to the City 2) any duty related to sidewalks had been transferred by the City to owners of adjacent property 3) the City had no duty to warn as they had no knowledge of the tripping hazard and 4) the open and obvious doctrine in W.Va. Code §55-7-28 bars Mrs. Orso's claim, App. 638-639. In making this particular response it would not have been necessary to frame the specific response which Respondent now claims was waived. To reiterate, counsel for the City prepared the Order which is now under appeal, A28. It was the City's counsel who framed the issue to which Petitioner's Brief is directed.

Not only is there no waiver in this instance, but this argument is consistent with and contained in the Petitioner's Circuit Court filings, see A 639-640; and see Respondent's Reply in Response to The City of Logan's Motion for Summary Judgment, A671, 673 in which the City replies:

> "Plaintiff suggests that W.Va. Code §17-10-17 takes precedence over the Tort Claims Act. However, applying traditional tools of statutory construction. . . W.Va. Code §17-10-17 yields to the Tort Claims Act's immunity."

Both here and below the City relies on *Wheeling Park Com'm v. Dattoli, 787 S.E. 2d 546 (W.Va. 2016)* which Petitioner addresses here and addressed below. Statutory construction of W.Va. Code §17-10-17 and 29-12A-1 et seq. The interplay between and co-existence of these statutes

has been at the center of this litigation from the time of its filing. There is no waiver.

B.

Premises liability principles have been erroneously employed.

In its Brief the Respondent City relies upon premises liability principles, Brief p.17. Under the subject of "Ownership of the Subject Wire," A15, the Circuit Court relies on premises liability, Order paragraph 17. The reliance on premises liability is the subject of Argument II of Respondent's Brief pp. 13 involving the wire loop ownership. Respondent again references premises liability, Brief p. 20. Respondent argues that it is the Petitioner who is confused about the application of such principles for claims such as Mrs. Orso's, Brief p. 21. The Respondent also asserts that "Plaintiffs in *Dattoli* made the same arguments. . . that premises liability principles do not apply under the Tort Claims Act," Id. On the contrary Dattolis are said to have argued that *Carrier v. City of Huntington, 501 S.E. 2d 466 (W.Va. 1998)* indicates that injuries on public property are governed by the specific provisions of W.Va. Codes §29-12A-4(c), 787 S.E. 2d at 552, therefore argued the Dattolis their cause of action was statutorily created. This Appellant does not so argue. It is the *right* to bring this claim under the statute, W.Va. Code §17-10-17, but that claim is one which is judged under principles of negligence.

Nothing could be clearer than the rejection of premises liability in *Carrier*:

> "We conclude that premises liability principles are not applicable in an action against a municipality," 501 S.E. 2d at 470.

Ms. Carrier fell while walking on a city sidewalk as did Mrs. Orso.

While *Dattoli* does indeed narrow the *Carrier* decision by referencing distinctions as to one's status as invitee, licensee or trespasser, *Dattoli* does not as Respondent would have it simply open up a complete disregard of the holding in *Carrier*. If that were the case the Court's

decision in *Dattoli* would have overruled *Carrier*. The issue is whether genuine issue of material fact exists when employing principles of negligence. More particularly 1) whether a duty to the Plaintiff exists 2) whether the Defendant breached that duty 3) whether that breach was the proximate cause of the injuries or damages sustained. As argued *infra* genuine issues of material facts do exist under the law of negligence and can only be achieved by a proper conclusion as to the applicable law.

C.

The Respondent misinterprets its own ordinances. Moreover known facts indicate that the City controls the sidewalks of Logan which is a question of fact.

Logan City Ordinance Sec. 23-7 states:

> "All public sidewalks and curbs hereafter constructed, [after 3/13/62] reconstructed, replaced, curbed, recurbed, paved or repaved, whether under order or authority of the abutting property owner or under order or authority of the city, shall be in accordance with the provisions of this article and shall meet and comply with the minimum specifications and standards set out in this article," A351-352.

The foregoing is a statement evincing the control by the City of Logan over sidewalks in the City. The Court's interpretation and the Respondent's arguments to the contrary are erroneous as a matter of law. This conclusion was merely confirmed by the photos of street repairs and accompanied by the newspaper article, A608-609. More confirmation of this comes from the deposition of the Street Commissioner Kevin Marcum, A582. This issue is one for the jury, not the Court, to decide.[2]

[2]The Respondent argues in a footnote that Petitioner has abandoned arguments concerning "home rule" and neglect of duty. As to "home rule" the evidence is that Logan became a home rule city in 2019, see Deptofrevenue@revenue.wv.gov. The accident was in 2018. This is a tort of omission, neglect of responsibility as is stated in Petitioner's Brief, p. 12.

D.

The open and obvious doctrine must not be interpreted to permit a Court to make material fact findings.

It has long been the law that questions of negligence, comparative negligence and proximate causation present questions of fact for the jury to determine, *Sheff v. Huntington, 16 W.Va. 307 (1880); Blankenship v. Williamson, 132 S.E. 492(1926); Sewell v. Lawson, 177 S.E. 293 (1934); Nugen v. Hildebrand, 114 S.E. 2d 896 (1960); Armstead v. Holbert, 122 S.E. 2d 43 (1961); Pygmon v. Helton, 134 S.E. 2d 717 (1964); Biddle v. Haddix, 179 S.E. 2d 215 (1971); Stewart v. George, 607 S.E. 2d 394 (2004); Mays v. Chang, 579 S.E. 2d 561 (2003); Tug Valley Pharmacy v. All Plaintiffs Below, 773 S.E. 2d 627 (2015) syl pt. 3*. In the Order under appeal the Court has erred in its findings and conclusions as to these material questions, A 35-38.

W.Va. Code §55-7-28 does not change the requirements for judgment under Rule 56 of our Rules of Civil Procedure. In fact that statute states in subsection (b) that:

> "Nothing in this section creates, recognizes, or ratifies a claim or cause of action of any kind."

Nor can this statute overrule or modify our Rules of Civil Procedure or the considerable body of law cited above. *What the statute does is to make the open and obvious doctrine a necessary jury instruction when the facts indicate its relevance, see W.Va. P.J.I. §1000 but only if the Court otherwise considers the case one for adopting components of premises liability, see discussion supra regarding Carrier and Dattoli*, supra pp. 5-6.

VI.

CONCLUSION

For the foregoing reasons and those in the Petitioner's Brief the Circuit Court's award of summary should be reversed and the case be remanded for trial.

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CERTIFICATE OF SERVICE

The undersigned, James M. Cagle, counsel for the Petitioner, Denise Orso, does hereby certify that a true and correct copy of the ***Petitioner's Reply Brief*** was served via e-filing through File & ServeXpress to Duane J. Ruggier, II, Esq., Evan S. Olds, Esq. counsel for Respondent City of Logan, WV, on this the 3rd day of January, 2023.

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