IN THE

Supreme Court of Virginia

RECORD NO. 090313

SCHOOL BOARD OF THE CITY
OF NEWPORT NEWS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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VIRGINIA: IN THE SUPREME COURT

SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, Appellant,	)	
v.	)	Record No. 090313
COMMONWEALTH OF VIRGINIA, Department of the Treasury, Division of Risk Management, Appellee.	)	

REPLY BRIEF OF APPELLANT

COMES NOW the Appellant, the School Board of the City of Newport News (hereafter "the School Board"), and, in Response to the Brief of Appellee, states as follows:

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

The Nature of the Case and Material Proceedings from the Brief of the Appellant is incorporated by reference. This Court certified this appeal on April 13, 2009. The School Board filed the Brief of Appellant

(hereinafter "the School Board's Brief") on May 22, 2009, and the Commonwealth filed the Brief of Appellee (hereinafter "the Commonwealth's Brief") on June 17, 2009.

STATEMENT OF FACTS

The School Board incorporates its Statement of Facts from the School Board's Brief. Certain issues raised in the Statement of Facts in the Commonwealth's Brief are addressed in the Argument below.

QUESTIONS PRESENTED

I. DOES THE SCHOOL BOARD HAVE A COMPENSABLE CLAIM UNDER THE POLICY FOR A JUDGMENT IN A CIVIL ACTION ?

A. WAS THE ACTION BEFORE THE U.S. DISTRICT COURT A CONTINUATION OF THE ADMINISTRATIVE PROCEEDING OR A SEPARATE LAWSUIT?

B. IS A CLAIM FOR MONETARY DAMAGES THAT IS COVERED UNDER THE LANGUAGE OF THE POLICY COVERED WHEN THE UNDERLYING JUDGMENT AROSE OUT OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT?

II. HAS THE DEFENDANT BREACHED ITS DUTY TO DEFEND UNDER THE POLICY?

ARGUMENT

I. The School Board Claim Is Within the Coverage of the Insuring Agreement of the Policy.

The insuring agreement requires the Commonwealth to "pay all sums" arising out of "acts or omissions of any nature", with various exclusions of coverage. App., p. 35, Section I. Two exclusions are at issue in this case. The first is whether the suit filed by the parents in the IDEA case was a separate suit or remained an administrative proceeding. The second is whether the judgment for $102,929.33 entered against the School Board by the U.S. District Court for breach of statutory duties is "monetary damages" which are covered in the Policy.

A. The Action Filed in the U.S. District Court By the Jaynes Was a Separate Lawsuit, Not a Continuation of the Administrative Proceeding.

The issue raised at trial was whether the proceeding filed in the U.S. District Court by the Jaynes was an administrative appeal process or a separate lawsuit. The trial court ruled that the suit took on the characteristics of an administrative proceeding, since such a case was more in the nature of a review of the previous administration hearings for due process issues than a full trial, and, as such, was excluded from

coverage under the Policy. Transcript of hearing, pp. 24 and 27, App. pp. 615 and 618.

The gist of the argument raised in the Commonwealth's Brief is that "the Plan expressly excludes administrative procedures <u>and those similar to administrative procedures</u> from coverage" (emphasis added). Commonwealth's Brief, p. 21.

Clearly, the emphasized clause is not in the Policy language, and appears to be a summary of the trial court's ruling. The Commonwealth's argument in its brief essentially is (1) that, since the matter started as an administrative proceeding, it remained an administrative proceeding, (2) that, since the federal court action was similar to an administrative action, it was an administrative proceeding, (3) that, since 20 U.S.C. §1415(i)(2) refers to the federal court proceeding as a "civil action" is part of the overall statute dealing with enforcement procedures which is entitled "Administrative Proceedings", the title overrides the clear language of the statute, and (4) because various agents of the School Board referred to the first two levels of adjudication as administrative proceedings (Commonwealth's Brief, pp. 5-6, App. at pp. 75, 77, 81, and 104), that the School Board admitted jurisdiction of the U. S. District Court in various

pleadings (Commonwealth's Brief p.7, App. at pp. 182, 203, and 223), and that an attorney representing the School Board referred to the action in the U.S. District Court as an "appeal" in the School Board's Docketing Statement filed in the Fourth Circuit (Commonwealth's Brief p. 100, App. at 242), that the School Board has waived any objection to the Commonwealth's characterization of the federal court action as an administrative proceeding.

The problem with the first two arguments is that they are contrary to the plain language of the statute and to the prevailing case law in this Circuit that interprets the statute. In fact, although the leading cases were cited at length in the School Board's Brief, the Commonwealth, in its Brief, completely ignores these cases.

The first hearing before a local hearing officer pursuant to 20 U.S.C. §1415(f) and the appeal to a state hearing officer pursuant to 20 U.S.C. §1415(g) are clearly referred to in the text as hearings before local and state agencies. Since an administrative proceeding is by definition a procedure administered by the Executive Branch of the government, clearly these are administrative proceedings. When these two threshold proceedings have concluded, the next step mandated by statute is clearly

referred to under 20 U.S.C. §1415(i)(2) as a "civil action" before either a state court or a U.S. District Court, thus rendering it a judicial proceeding.

The Fourth Circuit, in Kirkpatrick v. Lenoir County Board of Education, 216 F.3d. 380, 384 (4th Cir. 2000), reviewed this same question, and determined that the action filed in Court was a separate civil lawsuit, not simply an administrative appeal. See also, CM v. Board of Education of Henderson County, 241 F.3d 374, 381 (4th Cir. 2000); County Sch. Bd. of Henrico v. Z.P. ex rel. R.P., 399 F.3d 298, 304 (4th Cir. 2005).

The fact that there were some ways in which the Court proceeded similarly to the administrative appeal, specifically making a ruling on the existing record, did not change the fact that this is a separate legal proceeding, not simply an administrative hearing. The fact that the statute requires review of the record has created confusion as to whether the action is essentially an appeal of an administrative procedure or a separate lawsuit. Kirkpatrick, 216 F.3d. at 385. Most of this confusion derives from a judicially-imposed deferential standard of review. Id. at 385. In spite of this standard of discretion, the Court states:

> Although federal courts may defer to the state review officer's decision and thus give the proceeding an appellate attribute, the manner of review does not convert IDEA actions into

> appeals in the face of explicitly clear statutory language that they are original civil actions.

Id. at 385.

The Commonwealth's Brief, at p. 17, suggests that the Fourth Circuit, in its opinion in the underlying case, supports its argument that the federal court action remains an administrative proceeding. This issue of the nature of the federal court civil action was not raised in the suit by the Jaynes against the School Board. When it was raised properly in the Kirkpatrick case, the answer given by the Fourth Circuit does not support the Commonwealth's argument in any particular.

The School Board's Brief goes into the reasoning of the Fourth Circuit in considerably more detail, and that argument is incorporated herein by reference.

The Commonwealth's third point fails because the title of 20 U.S.C. §1415(i), "Administrative Procedures", cannot contradict the plain meaning of the body of the statute at 20 U.S.C. §1415(i)(2). As the Supreme Court stated in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 242, 124 S.Ct. 2466, 2470 (2004), "a statute's caption, however, cannot undo or limit its text's plain meaning".

In support of its fourth point, the Commonwealth's Brief focuses on several statements made by School Board agents referring to the hearings previous to the federal suit as administrative procedures. Since those agents referred to the first two hearings before the local hearing officer and the state hearing officer, of course they were administrative in nature. Once the suit was filed, this ceased to be the case, and the only references made thereafter appear to be the admissions of jurisdiction in pleadings filed by the School Board in the U. S. District Court case and the use of the word "appeal" in the Fourth Circuit docketing statement.

As the School Board stated in its Brief, the Commonwealth cannot raise the argument that the School Board waived any argument that the "civil action" is not an administrative proceeding, since it was not raised in the trial court. This argument cannot be raised for the first time on appeal. See, Kitchen v. City of Newport News, 275 Va. 378, 387, 657 S.E.2d. 132, 137, f.n. 6 (2008).

The only issue of waiver raised in the trial court was an objection by the Commonwealth to the School Board's emphasis on the fact that Division of Risk Management ("DRM") employees had indicated that once a suit was filed, the School Board should then report the claim. The

Commonwealth claimed that its employees were not empowered to make such a waiver. Transcript, p. 16, App. at p. 607. The School Board stated that it raised these facts not as a defense of waiver, but as evidence of a course of dealing that demonstrated the Commonwealth's previous interpretation of the insurance policy issued by VA Risk 2 ("the Policy"). Transcript, p. 21, App. at p. 612. The Commonwealth's argument that its government employees could not waive the rights of the Commonwealth would apply alike to School Board employees.

Also, a waiver is "the voluntary, intentional abandonment of a known legal right, advantage or privilege. Both knowledge of the facts basic to the exercise of the rights and the intent to relinquish that right are essential elements". Fox v. Deese, 234 Va. 412, 425, 362 S.E.2d. 699, 707 (1987). Nothing quoted in the Commonwealth's Brief comes anywhere close to showing intent of the School Board to abandon its position that the judgment in the federal suit was the basis of a legitimate claim.

The Commonwealth's assertion that the underlying judgment arose from an administrative proceeding is contradicted by the plain language of the statute and the case law interpreting that statute and statutes in general. The Commonwealth has made no attempt to differentiate the

holding in the Kirkpatrick case from the case at hand. Also, the Commonwealth cannot assert that the School Board waived its claim under the Policy for the first time on appeal, nor can it demonstrate such a waiver.

B. The Claim, Arising Out of a Federal Court Judgment Against the School Board for Reimbursement of Tuition, Is Within the Coverage Afforded Under the Language of the Insuring Agreement.

The basic question in this case is the meaning of the insuring agreement in the Policy, which is a matter of state law. The insuring agreement requires the Commonwealth to "pay all sums" arising out of "acts or omissions of any nature". App. at p. 35. Exclusion 10 in the Policy excludes "claims, demands or other actions seeking relief or redress in any form other than monetary damages, including, but not limited to, injunctive relief". (emphasis added). App. at p. 35. As the DRM employee states at App. p. 160, the Commonwealth denied this claim in part because the Commonwealth interpreted the Jaynes' demand to reinstate the decision of the LHO as an injunction, even though the ad damnum of the suit specifically requests reinstatement of the money judgment.

The Supreme Court in Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985) found

that entering a judgment for reimbursement of tuition against a school board that was in violation of the IDEA is proper. This was most recently reiterated in Forest Grove School District v. T.A., 2009 WL 1738644 (U.S.), page 10, June 22, 2009. See also, Anderson v. Thompson, 658 F.2d. 1205 (7th Cir. 1981).

These cases also indicate, for purposes of the IDEA, reimbursement was not regarded as a monetary damage. As the Anderson court pointed out, the legislative history of the IDEA is void of any mention of a "private right of action for damages" under the IDEA, but the Court nonetheless found a "limited damage award" for reimbursement. Anderson, 658 F.2d. at 1211, 1213.

The purpose served by this characterization is clear, as it is stated in Sellers v. School Board of the City of Manassas, 141 F.3d. 524, 526-527 (4th Cir. 1998):

> While the Act permitted reimbursement, it did not create a private cause of action for educational malpractice.
>
> The purpose of these procedural mechanisms is to preserve the right to a free appropriate public education, not to provide a forum for tort-like claims of educational malpractice...

The Sellers Court further stated that neither the structure of the statute nor

the Supreme Court findings allowed damages for compensatory or punitive damages, pain and suffering, emotional distress, and other consequential damages. Id. at 527. See also, J.S. v. Isle of Wight County School Board, 402 F.3d. 468, 479 (4th Cir. 2005).

However, we are not dealing with this question in this case. The basic question is whether the damages sought by the School Board are monetary damages under the terms of the policy, a matter that is established by state law. What the School Board is seeking is payment under a claim against a Virginia issued policy for a judgment rendered against it by a federal court for failure to comply with a federal act. The Policy language states the insurer will "pay all sums" arising out of "acts or omissions of any nature", and this would certainly include the judgment suffered by the School Board. The statement that such a claim must be for monetary damages would be determined by a state law definition of "monetary damages". The cases cited in the School Board's Brief indicate that "monetary damages" certainly includes reimbursement damages. See, Nichols Construction Corporation v. Virginia Machine Tool Company, L.L.C., 276 Va. 81, 91, 661 S.E.2d. 467, 472 (Va. 2008); Martin v. Moore,

263 Va. 640, 644, 561 S.E.2d. 672, 674 (2002); West Square, L.L.C. v. Communication Technologies, Inc., 275 Va. 425, 429, 649 S.E.2d. 698, 700 (2007). The fact that federal courts have developed a rarified definition of "monetary damages" for the IDEA in order to avoid a deluge of litigation for "educational malpractice" should not influence the determination at state law of whether a money judgment entered against the school board for failure to comply with a statute is a "sum arising out of acts of omissions of any nature".

The "damages" referred to in the federal cases are analogous to those routinely sought in insurance claims for bodily or personal injury and property damage. The vast number of liability policies include insuring agreements that cover only personal injury, bodily injury, or property damage. This Policy includes considerably broader language. An insurance policy is a contract, and generally speaking, the words in the contract are given their ordinary meaning. Graphic Arts Mutual Insurance Company v. C. W. Warthen Company, Inc., 240 Va. 457, 459, 397 S.E. 2d. 876, 877 (1990).

The Policy language is broad enough to cover the judgment suffered by the School Board, and, as such, the claim should have

been honored by DRM. The Commonwealth's statement that to find for the School Board in this case would be tantamount to a decision that the Commonwealth would be required to bear the expense for the education of all disabled children in the state where a local school board fails to provide for a free appropriate public education (Commonwealth's Brief, p. 12) misses the point completely. Only where the Commonwealth has issued an insurance policy with language that it chose that includes an insuring agreement as broad as the one at issue here could it be held liable for such costs.

II. The Commonwealth Breached Its Duty to Defend Under the Policy.

"Only when it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations does the company have no duty to defend." Parker v. Hartford Fire Insurance Co., 222 Va. 33, 35, 278 S.E.2d. 803, 804 (1981); Travelers Insurance Co. v. Obenshain, 219 Va. 44, 46, 245 S.E.2d. 247, 249 (1978).

The Commonwealth argues that the duty to defend is co-extensive with liability under the contract. Although the above holding would contradict that, this is not the issue here.

The School Board's claim falls under the insurance agreement and should have been honored. As such, a defense should have been provided by the insurer.

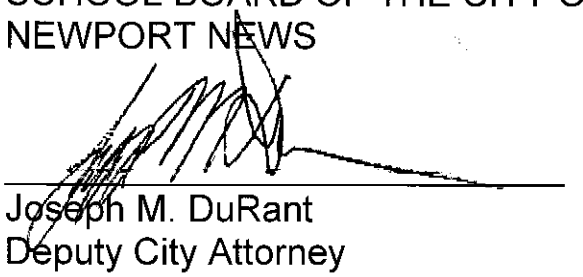
Since the Court never got beyond the denial of the School Board's claim, the duty to defend and the damages sought would be subject to review at retrial after remand.

CONCLUSION

The School Board is entitled to coverage under the Policy for the amount of the federal court judgment and also should be awarded attorney's fees and costs it incurred in defending the federal court action as damages due to the Commonwealth's breach of its duty to defend. The School Board requests that this Court remand this case to the Circuit Court of the City of Newport News, with instructions that judgment be entered in favor of the School Board of the City of Newport News and that the Circuit Court conduct further proceedings to determine the amount of damages to be awarded to the School Board, and for such further relief as this Court deems necessary and proper.

Respectfully Submitted,

SCHOOL BOARD OF THE CITY OF NEWPORT NEWS



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CERTIFICATE

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5. Fifteen copies of this Reply Brief were filed in the Office of the Clerk of the Supreme Court of Virginia along with one electronic copy of the Reply Brief by email as a PDF attachment and three copies of the Reply Brief were mailed to opposing counsel at the address referenced, all on June 29, 2009.

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