

## SUPREME COURT OF APPEALS OF WEST VIRGINIA

### C & O Motors, Inc. v. West Virginia Paving, Inc., 223 W. Va. 469

677 S.E.2d 905 (2009) · No. No. 34330 · Decided May 13, 2009

#### SUMMARY

The Supreme Court of Appeals of West Virginia dismissed an appeal without prejudice because the circuit court's order granted summary judgment on liability but did not resolve damages. The court held that a liability determination without damages is generally interlocutory and not immediately appealable, unless the remaining damages calculation is purely ministerial. It also held that Rule 54(b) certification was unavailable in this single-claim action.

#### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                               |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Appeals of West Virginia                                                                                                                                                                                                                                     |
| WRITING FOR THE COURT | Justice Davis; Judge Moats, sitting by temporary assignment                                                                                                                                                                                                                   |
| JURISDICTION          | West Virginia                                                                                                                                                                                                                                                                 |
| DECIDED               | May 13, 2009                                                                                                                                                                                                                                                                  |
| DOCKET                | No. 34330                                                                                                                                                                                                                                                                     |
| DISPOSITION           | dismissed                                                                                                                                                                                                                                                                     |
| PROCEDURAL POSTURE    | West Virginia Paving appealed from an order denying its motion to join Coady Construction, Inc. as a necessary party and granting summary judgment on liability in favor of C & O Motors. The Supreme Court of Appeals considered whether the order was final and appealable. |
| STANDARD OF REVIEW    | Summary judgment is reviewed de novo. Rule 19 determinations are reviewed for abuse of discretion, while legal questions arising in the Rule 19 inquiry are reviewed de novo. The Court independently determines its appellate jurisdiction.                                  |
| PRECEDENTIAL VALUE    | Published precedential opinion                                                                                                                                                                                                                                                |
| PARTIES               | West Virginia Paving, Inc. v. C & O Motors, Inc.                                                                                                                                                                                                                              |

#### TOPICS

[appellate jurisdiction](#)[final judgment rule](#)[interlocutory appeal](#)[summary judgment](#)[appellate procedure](#)

## PRACTICE AREAS

Appellate procedure

Civil procedure

Torts

## QUESTIONS PRESENTED

1. Whether a summary judgment order determining liability but leaving damages unresolved is a final, immediately appealable order.
2. Whether the unresolved damages issues could be treated as ministerial so as to make the liability judgment final and appealable.
3. Whether Rule 54(b) certification permits an appeal from a partial summary judgment on liability in a single-claim action.
4. Whether the Supreme Court could review the merits of the summary judgment and Rule 19 joinder rulings despite the absence of a final appealable order.

## HOLDINGS

1. An order determining liability without determining damages is a partial adjudication of a claim and is generally not immediately appealable.
2. An immediate appeal from a liability judgment may be allowed when the unresolved computation of damages is mechanical and unlikely to produce a second appeal because only a ministerial task, similar to assessing costs, remains.
3. Rule 54(b) certification is permitted only upon entry of a final judgment as to one or more but fewer than all claims or parties; in a single-claim action, a partial summary judgment on liability is not certifiable for appeal under Rule 54(b).

## KEY QUOTATIONS

*“We now hold that an order determining liability, without a determination of damages, is a partial adjudication of a claim and is generally not immediately appealable.”* (677 S.E.2d at 911)

*“That is, a judgment that does not determine damages is a final appealable order when the computation of damages is mechanical and unlikely to produce a second appeal because the only remaining task is ministerial, similar to assessing costs.”* (677 S.E.2d at 911)

*“Consequently, in an action that has only one claim against the defendant, an order granting partial summary judgment on liability against that defendant is not certifiable for appeal under Rule 54(b).”* (677 S.E.2d at 913)

## FACTUAL BACKGROUND

West Virginia Paving was hired by the West Virginia Division of Highways to remove and resurface asphalt along Route 60 in St. Albans, West Virginia, and engaged Coady Construction, Inc. to perform the asphalt removal. During evening work on May 3 and 4, 2005, dust, debris, and tar allegedly became airborne and were deposited on vehicles in C & O Motors' nearby car lots. C & O paid \$5,740 to clean the vehicles and sued West Virginia Paving after it refused reimbursement.

## PROCEDURAL HISTORY

C & O sued West Virginia Paving to recover the cost of cleaning vehicles allegedly damaged by dust, debris, and tar from a paving project. The circuit court granted summary judgment on liability, denied West Virginia Paving's Rule 19 joinder motion, and later denied reconsideration, but left unresolved C & O's motion for damages and West Virginia Paving's request for a jury trial on damages. The Supreme Court dismissed the appeal without prejudice because the appealed order was not final, was not subject to the ministerial-damages exception, and could not be certified under Rule 54(b) in the single-claim action.

## DISPOSITION

dismissed

## REMAND INSTRUCTIONS

The appeal was dismissed without prejudice. No specific remand instructions were issued.

## CASES CITED

- Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994)
- Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California, 547 F.3d 962 (9th Cir. 2008)
- James M.B. v. Carolyn M., 193 W. Va. 289, 456 S.E.2d 16 (1995)
- Coleman v. Sopher, 194 W. Va. 90, 459 S.E.2d 367 (1995)
- Province v. Province, 196 W. Va. 473, 473 S.E.2d 894 (1996)
- United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982)
- Younker v. Eastern Associated Coal Corp., 214 W. Va. 696, 591 S.E.2d 254 (2003)
- Hubbard v. State Farm Indemnity Co., 213 W. Va. 542, 584 S.E.2d 176 (2003)
- City of Waite Park v. Minnesota Office of Administrative Hearings, 758 N.W.2d 347 (Minn. Ct. App. 2008)
- Farm Labor Organization Committee v. Ohio State Highway Patrol, 308 F.3d 523 (6th Cir. 2002)
- LeBoeuf, Lamb, Greene & MacRae v. Worsham, 185 F.3d 61 (2d Cir. 1999)
- Gamboa v. Chandler, 101 F.3d 90 (9th Cir. 1996)
- Albright v. UNUM Life Insurance Co. of America, 59 F.3d 1089 (10th Cir. 1995)
- In re Miscott Corp., 848 F.2d 1190 (11th Cir. 1988)
- In re Goldblatt Bros., Inc., 758 F.2d 1248 (7th Cir. 1985)
- Garzaro v. University of Puerto Rico, 575 F.2d 335 (1st Cir. 1978)
- Freeman v. Califano, 574 F.2d 264 (5th Cir. 1978)
- Bacadam Outdoor Advertising, Inc. v. Kennard, 721 So. 2d 226 (Ala. Civ. App. 1998)
- Ramco Industries, Inc. v. C & E Corp., 773 N.E.2d 284 (Ind. Ct. App. 2002)
- Gunter v. City of St. James, 91 S.W.3d 724 (Mo. Ct. App. 2002)
- Keef v. Department of Motor Vehicles, 262 Neb. 622, 634 N.W.2d 751 (2001)

- Mid-Century Insurance Co. v. Pavlikowski, 94 Nev. 162, 576 P.2d 748 (1978)
- Freeman v. Reliance Insurance Co., 68 N.C. App. 620, 315 S.E.2d 798 (1984)
- Choice Financial Group v. Schellpfeffer, 696 N.W.2d 504 (N.D. 2005)
- Bautista v. Kolis, 142 Ohio App. 3d 169, 754 N.E.2d 820 (2001)
- Swift v. Milner, 296 Pa. Super. 463, 442 A.2d 1144 (1982)
- Stettner Clinic, Inc. v. Burns, 61 S.W.3d 16 (Tex. App. 2000)
- Franklin v. District of Columbia, 163 F.3d 625 (D.C. Cir. 1998)
- Winston Network, Inc. v. Indiana Harbor Belt Railroad Co., 944 F.2d 1351 (7th Cir. 1991)
- State ex rel. White v. Cuyahoga Metropolitan Housing Authority, 79 Ohio St. 3d 543, 684 N.E.2d 72 (1997)
- GeoSouthern Energy Corp. v. Chesapeake Operating, Inc., 241 F.3d 388 (5th Cir. 2001)
- Apex Fountain Sales, Inc. v. Kleinfeld, 27 F.3d 931 (3d Cir. 1994)
- Guido v. Guido, 202 W. Va. 198, 503 S.E.2d 511 (1998)
- Durm v. Heck's, Inc., 184 W. Va. 562, 401 S.E.2d 908 (1991)
- Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976)
- Rudd Construction Equipment Co. v. Home Insurance Co., 711 F.2d 54 (6th Cir. 1983)
- Williams v. St. Louis Diecasting Corp., 611 F.2d 1223 (8th Cir. 1979)
- McCormick v. West Virginia Department of Public Safety, 202 W. Va. 189, 503 S.E.2d 502 (1998)
- Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 860 F.2d 1441 (7th Cir. 1988)
- Caplan v. Tofel, 33 A.D.3d 748, 822 N.Y.S.2d 760 (2006)
- Farm Family Mutual Insurance Co. v. Thorn Lumber Co., 202 W. Va. 69, 501 S.E.2d 786 (1997)
- Maplewood Community, Inc. v. Craig, 216 W. Va. 273, 607 S.E.2d 379 (2004)
- Nutter v. Nutter, 218 W. Va. 699, 629 S.E.2d 758 (2006)
- Walker v. Option One Mortgage Corp., 220 W. Va. 660, 649 S.E.2d 233 (2007)
- MasterCard International Inc. v. Visa International Service Association, Inc., 471 F.3d 377 (2d Cir. 2006)
- Runkle v. Genesis Worldwide II, Inc., 143 F. App'x 515 (4th Cir. 2005)
- Burton v. Burton, 223 W. Va. 191, 672 S.E.2d 327 (2008)
- Dixon v. American Industrial Leasing Co., 157 W. Va. 735, 205 S.E.2d 4 (1974)
- Brooks v. Isinghood, 213 W. Va. 675, 584 S.E.2d 531 (2003)
- Butler v. Price, 212 W. Va. 450, 574 S.E.2d 782 (2002)
- Coury v. Tsapis, 172 W. Va. 103, 304 S.E.2d 7 (1983)