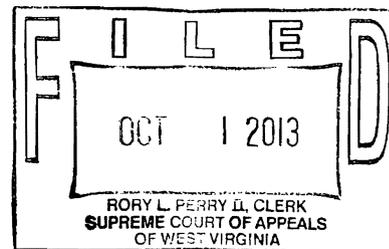


NO: 13-0681

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



**THE MONONGALIA COUNTY COMMISSION,
Defendant Below, Petitioner,**

vs.

**No.: 13-0681
(In the Circuit Court of Monongalia
County, Civil Action 10-C-328)**

**JUDITH L. JOHNSON, Executrix and
Personal Representative of the Estate of Joseph
B. Johnson, Plaintiff, Below, Respondent.**

PETITIONER'S BRIEF

Counsel for Petitioner

Boyd L. Warner, Esq.
WV State Bar ID #3932
Brandy D. Bell, Esq.
WV State Bar ID #9633
WATERS, WARNER & HARRIS, PLLC
701 Goff Building, P. O. Box 1716
Clarksburg, West Virginia 26302-1716
Telephone: (304) 624-5571
Email: boydwarner@aol.com
brandydbell@aol.com

Counsel for Respondent

Bader C. Giggenbach, Esq.
WV State Bar ID #6596
J. Tyler Slavey, Esq.
WV State Bar ID #10786
BREWER & GIGGENBACH, PLLC
P.O. Box 4206
Morgantown, West Virginia 26504
Telephone: (304) 291-5800
Email: wvabg@aol.com
tyler@bglawhelp.com

I.	TABLE OF CONTENTS	
II.	TABLE OF AUTHORITIES.....	iii
	A. Cases.....	iii
	B. Statues and Other Authorities.....	iii
III.	ASSIGNMENTS OF ERROR.....	1
IV.	STATEMENT OF THE CASE.....	1
	A. Factual Background.....	1
	B. Procedural Background.....	3
V.	SUMMARY OF ARGUMENT.....	6
VI.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	7
VII.	ARGUMENT.....	7
	A. The Circuit Court Erred in Denying the Petitioner’s Second Motion to Dismiss or, in the Alternative, Section Motion for Summary Judgment Because the Petitioner is Immune From Liability for Intentional Acts of Its Employees.....	8
	B. The Circuit Court Erred in Denying Petitioner’s Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment Because the Petitioner is Immune From Claims Resulting From Unintentional Misrepresentations.....	14
	C. The Circuit Court Erred in Finding All Immunities Provided Under the Act Inapplicable to Respondent’s Cause of Action.....	18
	D. The Circuit Court Erred in Refusing to Give the Petitioner’s Jury Instruction and Special Interrogatory on Unintentional Misrepresentations.....	19
	E. The Circuit Court Erred in Including the Word “Reckless” in its Definition of Willful or Wanton Misconduct in the Jury Instructions and in Granting Respondent’s Motion in Limine Allowing Her to Use “Reckless” in Her Definition of Willful or Wanton.....	23
VIII.	CONCLUSION.....	25

II. TABLE OF AUTHORITIES

A. Cases

<i>Ewing v. Board of Educ. of County of Summers</i> , 202 W.Va. 228, 503 S.E.2d 541 (1998).....	7
<i>Findley v. State Farm Mut. Auto Ins. Co.</i> , 213 W.Va. 80, 570 S.E.2d 807 (2002).....	8
<i>Fountain Place Cinema 8, LLC v. Morris</i> , 227 W.Va. 249, 707 S.E.2d 859 (2011).....	14
<i>Groves v. Groves</i> , 152 W.Va. 1, 158 S.E.2d 710 (1968).....	10, 11
<i>Harrison v. City of Charleston</i> , No. 11-0598 (W.Va. Supreme Court, November 28, 2011) (memorandum decision).....	9, 10, 12
<i>Holsten v. Massey</i> , 200 W.Va. 775, 490 S.E.2d 864 (1997).....	10, 11, 21, 22
<i>Hutchison v. City of Huntington</i> , 198 W.Va. 139, 479 S.E.2d 649 (1996).....	10
<i>Randall v. Fairmont City Police Dept.</i> , 186 W.Va. 336, 412 S.E.2d 737 (1991).....	8, 19
<i>Skaggs v. Elk Run Coal Co., Inc.</i> , 198 W.Va. 51, 63, 479 S.E.2d 561, 573 (1996).....	8
<i>State v. General Daniel Morgan Post, 548, V.F.W.</i> , 144 W.Va. 137, 107 S.E.2d 353 (1959).....	13
<i>Stone v. Rudolph</i> , 127 W.Va. 335, 32 S.E.2d 742 (1944).....	10
<i>Tennant v. Marion Health Care Foundation, Inc.</i> , 194 W.Va. 97, 459 S.E.2d 374 (1995).....	8
<i>White v. Hall</i> , 118 W.Va. 85, 188 S.E. 768 (1936).....	11, 15
<i>Zirkle v. Elkins Road Public Service Dist.</i> , 221 W.Va. 409, 655 S.E.2d 155 (2007)....	9, 10, 12, 13

B. Statues and Other Authorities

<i>Black's Law Dictionary</i> (9th ed. 2009).....	14
Rule 20, West Virginia Rules of Appellate Procedure.....	7
W.Va. Code § 24-6-8.....	3, 4, 6, 7, 10, 12, 13, 14, 19, 23, 24
W.Va. Code § 29-12A-1.....	9, 19
W.Va. Code § 29-12A-3.....	14
W.Va. Code § 29-12A-3(c).....	9

W.Va. Code § 29-12A-4.....4, 6, 7, 18, 19
W.Va. Code § 29-12A-4(b)(1).....6, 9, 10
W.Va. Code § 29-12A-4(c).....9
W. Va. Code § 29-12A-4(c)(2).....9, 10, 12
W.Va. Code § 29-12A-4(c)(5).....12, 13, 14
W.Va. Code § 29-12A-5(a)(12).....4, 5, 6, 14, 16, 18, 20, 22, 23
W.Va. Code § 29-12A-5(b).....21, 22

III. ASSIGNMENTS OF ERROR

- A. The Circuit Court Erred in Denying the Petitioner’s Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment Because the Petitioner is Immune From Liability for Intentional Acts of Its Employees.
- B. The Circuit Court Erred in Denying Petitioner’s Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment Because the Petitioner is Immune From Claims Resulting From Unintentional Misrepresentations.
- C. The Circuit Court Erred in Finding All Immunities Provided Under the Act Inapplicable to Respondent’s Cause of Action.
- D. The Circuit Court Erred in Refusing to Give the Petitioner’s Jury Instruction and Special Interrogatory on Unintentional Misrepresentations.
- E. The Circuit Court Erred in Including the Word “Reckless” in its Definition of Willful or Wanton Misconduct in the Jury Instructions and in Granting Respondent’s Motion in Limine Allowing Her to Use “Reckless” in Her Definition of Willful or Wanton.

IV. STATEMENT OF CASE

A. Factual Background

On Sunday, May 11, 2008, at approximately 11:34 a.m., Judith Johnson (hereinafter sometimes referred to as the “Respondent”) called the Monongalia Emergency Centralized Communications Agency (hereinafter referred to as “MECCA”), from her home at 1335 Cain Street in Star City, West Virginia. (911 Transcr., Appx. pp. 312-313) During the phone call, the Respondent informed the MECCA dispatcher that her husband, Joseph Johnson, was having difficulty breathing. (*Id.* at ¶ 2, Appx. p. 312) The MECCA dispatcher asked all of the pertinent questions and attempted to get a medical background on Mr. Johnson to determine what level of medical response was necessary. (*Id.* at ¶¶ 5-18, Appx. p. 312-313) After acquiring the needed information, the dispatcher stated to the Respondent, “Ok, we’ve got an ambulance on the way...” when in fact he did not positively know whether an ambulance was on its way. (*Id.* at ¶ 24, Appx. p. 313)

On or about 11:35-11:36 a.m., the MECCA dispatcher made a call to the Monongalia County Emergency Medical Services (hereinafter referred to as “Mon EMS”) to request an ambulance and within seconds was advised by Mon EMS that another unit must be obtained because it was on another call. (*See Compl. ¶¶ 23-25 (May 10, 2010), Appx. p. 5*) On or about 11:36-11:37 a.m., the MECCA dispatcher made a call to the Morgantown Jan-Care unit to request an ambulance. (*Id. at ¶ 26, Appx. p. 5*) On or about 11:38 a.m., the second unit of Mon EMS advised MECCA that it was arriving at Monongalia General Hospital, and therefore, it could not answer the call. (*Id. at ¶ 27, Appx. pp. 5-6*) On or about 11:39-11:41 a.m., the MECCA dispatcher sent out a Signal 1 in an attempt to get any available ambulance providers in the area to respond. (*Id. at ¶ 28, Appx. p. 6*)

At approximately 11:43 a.m., the Respondent called MECCA again advising the dispatcher where her house was located. (*911 Transc., ¶ 2, Appx. p. 314*) After a brief discussion, the MECCA dispatcher stated “Ok, there is no ambulance exactly responding at this time. We’re trying to get them out there...” (*Id. at ¶ 10, Appx. p. 314*) On or about 11:43 a.m., a second Signal 1 was sent to Jan-Care in response to the unavailability of Mon EMS, and to Mon EMS requesting it to advise as to its status. (*See Compl. at ¶ 40, Appx. p. 7*)

At approximately 11:46 a.m., the Respondent called MECCA for a third time and informed the dispatcher that she was going to take Mr. Johnson to the emergency room. (*911 Transc. ¶ 2, Appx. p. 316*) The Respondent then stated, “[w]ell could you please do me a favor and call uh Mon uh Ruby and tell them I have him on my way?” (*Id. at ¶ 6, Appx. p. 316*) The dispatcher responded, “[y]eah, we can tell’em.” (*Id. at ¶ 7, Appx. p. 316*) On or about 11:47 a.m., the MECCA dispatcher informed Station 60, Jan-Care, and Company 20 to disregard the call concerning the breathing problem on Cain Street. (*See Compl. ¶ 48, Appx. p. 8*)

The Respondent drove Mr. Johnson to Ruby Memorial Hospital in Morgantown, West Virginia, and arrived at approximately 12:00 p.m. where Mr. Johnson received treatment. Mr. Johnson passed away the next day, May 12, 2008, at 3:30 p.m. at Ruby Memorial Hospital. (*Id.* at ¶ 63, Appx. p. 11)

B. Procedural Background

The Respondent filed suit on May 10, 2010, in the Circuit Court of Monongalia County, West Virginia, against several parties including the Petitioner, alleging injuries as a result of the Respondent's telephone calls to MECCA on May 11, 2008. (*See Compl., Appx. pp. 1-23*) The Petitioner timely filed an Answer on May 28, 2010. (*Def.'s Ans., Appx., pp. 24-49*)

On or about June 29, 2010, the Petitioner filed a Motion to Dismiss All Claims Except the Claims for Willful and Wanton Conduct. (*Def.'s Mot. Dismiss, Appx. pp. 50-62*) On September 30, 2010, this Court entered an Order denying the Motion to Dismiss stating that “[t]his Court is of the opinion to let discovery continue, and that the matter may be raised again at the summary judgment stage...” (*Or. Denying Def.'s Mot. Dismiss ¶ 2 (Sept. 30, 2010), Appx. pp. 77-79*)

On or about July 19, 2011, the Petitioner filed a Motion for Summary Judgment in which the Petitioner argued the case should be dismissed, as a matter of law, based upon the Respondent's failure to show willful or wanton misconduct. (*Def.'s Mot. Sum. Jdg., Appx. pp. 80-100*) On February 2, 2012, the Circuit Court entered an Order denying the Motion for Summary Judgment. (*Or. Denying Def.'s Mot. Sum. Jdg. (Feb. 2, 2012) Appx. pp. 129-139*) In the Order, the Circuit Court found, pursuant to W.Va. Code 24-6-8, the Respondent must show that the Petitioner's employees committed “willful or wanton misconduct” in order to hold the Petitioner liable. (*Id. at ¶ 2, App. pp. 129-130*)

On or about January 2, 2013, the Petitioner filed a Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment (hereinafter sometimes referred to as “Petitioner’s Motion”). In the Petitioner’s Motion, the Petitioner argued the Respondent’s cause of action should be dismissed because proof of “willful or wanton misconduct” requires the performance of an intentional act and, pursuant to the West Virginia Governmental Tort Claims and Insurance Reform Act (hereinafter the “Act”), the Petitioner was immune for intentional acts of its employees. (**Def.’s Second Mot. Dismiss, Appx. pp. 140-188**) Alternatively, the Petitioner argued that it was entitled to immunity under W.Va. Code § 29-12A-5(a)(12) for unintentional misrepresentations. (*Id.*)

On May 14, 2013, the Circuit Court entered an Order Regarding Pre-Trial Motions and Rescheduling Trial in which it denied the Petitioner’s Motion. (**Or. Regarding Pre-Trial Mots. (May 14, 2013), Appx. pp. 220-234**) Specifically, the Circuit Court found that W.Va. Code § 24-6-8 expressly imposed liability upon the Petitioner, and therefore, the Petitioner was not immune for intentional acts of its employees pursuant to the Act. (*Id.* at ¶ 5, **Appx. p. 222**) The Circuit Court also found that the immunities contained in W.Va. Code § 29-12A-4 were inapplicable because the cause of action was brought pursuant to W.Va. Code § 24-6-8. (*Id.*) The Circuit Court further found that the Petitioner was not immune for unintentional misrepresentations pursuant to W.Va. Code § 29-12A-5(a)(12). (*Id.* at ¶ 6, **Appx. pp. 222-223**)

The case was tried before the Circuit Court and the jury on May 21-24, 2013. (**See Jdg. Or., Appx. pp. 307-311**) At the conclusion of the evidence, the Circuit Court heard arguments from counsel concerning the proposed jury instructions and verdict form.

The Petitioner provided the Circuit Court with Proposed Jury Instruction No. 9 on unintentional misrepresentations, pursuant to West Virginia Code, § 29-12A-5(a)(12), and

Special Interrogatory No. 1, which required the jury to make an initial determination regarding unintentional misrepresentations on the Verdict Form, pursuant to West Virginia Code, § 29-12A-5(a)(12). (**Def.'s Prpsd. Jury Inst. p. 9, Appx. p. 244; Def.'s Prpsd. Verdict Form, Appx. pp. 246-251**) The Circuit Court heard oral arguments concerning the inclusion of Petitioner's Proposed Jury Instruction No. 9 and Special Interrogatory No. 1, relating to unintentional misrepresentations. Ultimately, the Circuit Court included a portion of Petitioner's Jury Instruction No. 9 in the Jury Charge, but did not include Petitioner's Special Interrogatory No. 1 on the Verdict Form. (**See Jury Charge, Appx. pp. 293-302; Verdict Form, Appx. pp. 305-306**)

The Respondent submitted a Motion in Limine regarding the legal standard of proof and a related Jury Instruction requesting the Circuit Court to adopt quotations that contained the word "reckless" several times within the definition of "willful" and "wanton." (**See Pl.'s Mot. in Limine, Appx. pp. 211-214; See Pl.'s Prpsd. Jury Instruction No. 2, App pp. 252-253**) The Petitioner argued that allowing the Respondent to state or suggest that reckless was the legal standard in this case would be improper, prejudicial and cause confusion to the jury. (**Or. Regarding Pre-Trial Mots. ¶¶ 16-17, Appx. pp. 227-228**) The Circuit Court granted the Respondent's Motion in Limine in part and adopted an amended version of Respondent's Proposed Jury Instruction No. 2, which contained the word "reckless." (**Id.; Verdict Form, Appx. pp. 305-306**)

Ultimately, the jury rendered a verdict against the Respondent and awarded damages in the amount of Eight Hundred Eighty-Five Thousand Dollars (\$885,000.00) (**See Verdict Form, Appx. pp. 305-316**)

V. SUMMARY OF ARGUMENT

The Respondent alleges that the Petitioner is liable for the untimely death of her husband based upon statements made to her by Petitioner's employees on May 11, 2008. Pursuant to W.Va. Code § 24-6-8, the Respondent must prove that the Petitioner engaged in willful or wanton misconduct in order to find the Petitioner liable. However, because the Petitioner is entitled to immunity for intentional acts of its employees pursuant to § 29-12A-4(b)(1) of the Act, the Circuit Court should have granted the Petitioner's Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment and dismissed the case. Further, W.Va. Code § 24-6-8 does not fall under an exception to political subdivision immunity for intentional acts, because it does not expressly impose liability upon political subdivisions. Rather, it expressly limits liability for damages against a public agency or county which has established an enhanced emergency telephone system.

Alternatively, the Circuit Court should have granted Petitioner's Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment because the Petitioner is entitled to immunity for unintentional misrepresentations pursuant to § 29-12A-5(a)(12) of the Act. The facts clearly show that any inaccuracies contained in the statements made to the Respondent by the Petitioner's employees were not made with the intent to misrepresent the factual situation.

Additionally, the Circuit Court erred in making the overly broad ruling that the immunities provided by § 29-12A-4 of the Act were inapplicable to the case at hand simply because the Respondent's cause of action was brought pursuant to W.Va. Code § 24-6-8; there is no case law or other evidence to suggest that § 24-6-8 of the West Virginia Code was intended to supersede any portion of the Act.

Lastly, the jury was misled and improperly instructed on the law based upon the Circuit Court's failure to include the Petitioner's Jury Instruction on unintentional misrepresentations in the Jury Charge, and its failure to include Petitioner's Special Interrogatory on unintentional misrepresentations on the Verdict Form. The jury was also misled and improperly instructed on the law based upon the Circuit Court's inclusion of the Respondent's Jury Instruction on the legal burden of proof, which incorrectly included the word "reckless," and allowing Respondent's counsel to suggest to the jury that "reckless" was included in the definition of "willful" and "wanton."

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is suitable for a Rule 20 argument because the application of the immunities provided to political subdivisions pursuant to §§ 29-12A-4 and 29-12A-5(a) of the Act when a cause of action is brought in pursuant to W.Va. Code § 24-6-8, is an issue of first impression. This case is further suitable for a Rule 20 argument because the outcome of the case is of fundamental public importance, as it will set the standard of liability for acts of political subdivisions involved in enhanced emergency telephone systems.

VII. ARGUMENT

Standard of Review

The standard of review applicable to the Circuit Court's denial of the Petitioner's Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment is *de novo*. "[W]hen a party, as part of an appeal from a final judgment, assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed *de novo*." *Ewing v. Board of Educ. of County of Summers*, 202 W.Va. 228, 235, 503 S.E.2d 541, 548 (1998). Furthermore, it is well-established that "[t]his Court reviews *de novo* the

denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.” Syl. Pt. 1, *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W.Va. 80, 570 S.E.2d 807 (2002).

The standard of review applicable to the Circuit Court’s refusal to give the Petitioner’s Jury Instruction and Special Interrogatory on unintentional misrepresentations, and the Circuit Court’s approval of Respondent’s Jury Instruction on the legal burden of proof, including the word “reckless,” is an abuse of discretion standard. “[A] circuit court’s giving of an instruction is reviewed under an abuse of discretion standard.” Syl. pt. 6, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995). However, the standard of review concerning whether the jury was thus properly instructed is a question of law and the review is *de novo*. “Ordinarily, review of evidentiary rulings is under the abuse of discretion standard. We review *de novo*, however, legal premises upon which a trial court based its evidentiary rulings...Of course, our review of the legal propriety of the trial court’s instructions is *de novo*. *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 63, 479 S.E.2d 561, 573 (1996) (*citing State v. Guthrie*, 194 W.Va. 657, 671, 461 S.E.2d 163, 177 (1995)).

A. The Circuit Court Erred in Denying the Petitioner’s Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment Because the Petitioner is Immune From Liability for Intentional Acts of Its Employees.

The Circuit Court should have granted the Petitioner’s Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment because the Petitioner is immune from liability pursuant to the Act. The purpose of the Act is to “limit [the] liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability.” *Randall v. Fairmont City Police Dept.*, 186 W.Va. 336, 341, 412 S.E.2d 737, 742 (1991); W.Va.

Code § 29-12A-1. It is without question that the Petitioner herein is a political subdivision entitled to the immunities afforded under the Act as a “political subdivision” is defined under the Act as “any county commission, municipality and county board of education...” W.Va. Code § 29-12A-3(c).

Subject to a few exceptions, “a political subdivision is not liable in damages in a civil action for injury, death or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function...” W.Va. Code § 29-12A-4(b)(1). As an exception, “[p]olitical subdivisions are liable for injury, death, or loss to persons or property caused by the *negligent* performance of acts by their employees while acting within the scope of employment.” W.Va. Code § 29-12A-4(c)(2) (emphasis added). Therefore, it follows that “claims of intentional and malicious acts are included in the general grant of immunity provided by W.Va. Code § 29-12A-4(b)(1). Only claims of negligence specified in W.Va. Code 29-12A-4(c) can survive immunity from liability under the general grant of immunity in W.Va. Code, 29-12A-4(b)(1).” *Zirkle v. Elkins Road Public Service Dist.*, 221 W.Va. 409, 414, 655 S.E.2d 155, 160 (2007) (per curiam); *see also Harrison v. City of Charleston*, No. 11-0598 (W.Va. Supreme Court, November 28, 2011) (memorandum decision).

The issue relating to the Petitioner’s immunity under the Act was properly brought before the Circuit Court by the Petitioner’s Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment as “[t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary

disposition.” Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996). Further, “[i]mmunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.” *Id.* at 658. “Public officials and local government units should be entitled to . . . statutory immunity under W.Va. Code, 29-12A-5(a)[] unless it is shown by specific allegations that the immunity does not apply.” *Id.* at 657-58 (citation omitted).

In the case at hand, immunity provided under the Act must be considered because the Respondent’s cause of action falls under the purview of the Act as it is “a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision...” W.Va. Code § 29-12A-4(b)(1).

In its February 2, 2012 Order, the Circuit Court found that, pursuant to W.Va. Code § 24-6-8, the Respondent was required to prove that the Petitioner’s employees engaged in “willful or wanton misconduct” in order to subject the Petitioner to liability. **(Or. Denying Def.’s Mot. Sum. Jdg. ¶ 2 Appx. pp. 129-130)**

This ruling is of particular importance because “willful or wanton misconduct” requires the performance of an *intentional* act. See *Holsten v. Massey*, 200 W.Va. 775, 788, 490 S.E.2d 864, 877 (W.Va. 1997); *Groves v. Groves*, 152 W.Va. 1, 6-7, 158 S.E.2d 710, 713 (1968); *Stone v. Rudolph*, 127 W.Va. 335, 32 S.E.2d 742, 749-50 (1944). Under the Act, the Petitioner is immune from claims relating to intentional acts or omissions of its employees. *Zirkle*, 655 S.E.2d 155 at 160 (2007); see also *Harrison v. City of Charleston*, No. 11-0598 (W.Va. Supreme Court, November 28, 2011) (memorandum decision); West Virginia Code § 29-12A-4(c)(2). Therefore,

the Circuit Court should have granted the Petitioner's Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment and dismissed the Respondent's cause of action.

This Court, in *Holsten v. Massey*, noted:

'The usual meaning assigned to "willful," "wanton" or "reckless," according to taste as to the word used, is that the actor has *intentionally* done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a *conscious* indifference to the consequences, amounting almost to willingness that they shall follow; and it has been said that this is indispensable.'

490 S.E.2d 864 at 877 (*quoting Cline v. Joy Manufacturing Co.*, 172 W.Va. 769, 772, 310 S.E.2d 835, 838 n.6 (1983)) (emphasis provided in *Holsten*). Moreover, in *Groves v. Groves*, this Court noted the difference between negligence and willful or wanton conduct in stating:

'Negligence conveys the idea of heedlessness, inattention, inadvertence; willfulness and wantonness convey the idea of *purpose or design*, actual or constructive. In some jurisdictions they are used to signify a higher degree of neglect than gross negligence. 'In order that one may be held guilty of willful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences *he consciously and intentionally* did some wrongful act or omitted some known duty which produced the injurious result.'

158 S.E.2d 710 at 713 (1968) (*quoting Stone v. Rudolph*, 127 W.Va. 335, 32 S.E.2d 742, 749-50 (1944)) (emphasis added); *see also White v. Hall*, 118 W.Va. 85, 188 S.E. 768, 769 (1936) ("Recklessness may include 'willfulness' or 'wantonness,' but if the conduct is more than negligent, it may be 'reckless' without being 'willful' or 'wanton[.]'")

Further, in its February 12, 2013 Order, the Circuit Court implied the necessity of the intentionality requirement for conduct to be willful and wanton in stating: "Plaintiff's 9-1-1 expert testified at his deposition that if he were to testify at trial that he would testify that the

actions and inactions of MECCA 9-1-1 personnel *amounted to intentional acts[.]*” (*Id.* at ¶ 20, Appx. p. 138) (emphasis added)

Consequently, because liability in this case is predicated on the performance of an intentional act, and the Petitioner herein is immune from claims relating to intentional acts or omissions of its employees under the Act, the Circuit Court should have granted the Petitioner’s Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment and dismissed the Respondent’s cause of action. *Zirkle*, 655 S.E.2d 155 at 160; *see also Harrison v. City of Charleston*, No. 11-0598 (W.Va. Supreme Court, November 28, 2011) (memorandum decision); West Virginia Code § 29-12A-4(c)(2).

The Respondent asserts, however, that her cause of action, brought pursuant to W.Va. Code § 24-6-8, falls under an exception to political subdivision immunity under W.Va. Code § 29-12A-4(c)(5). Nevertheless, the Respondent’s reliance upon W.Va. Code § 29-12A-4(c)(5) is misplaced.

W.Va. Code § 29-12A-4(c)(5) provides:

In addition to the circumstances described in subsection (c)(1) and (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property *when liability is expressly imposed upon the political subdivision* by a provision of this code. Liability shall not be construed to exist under another section of this code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

W.Va. Code § 29-12A-4(c)(5) (emphasis added). A plain reading of W.Va. Code § 29-12A-4(c)(5) reveals that a party may file suit against a political subdivision in accordance with another provision in the West Virginia Code, *only if* that code section *expressly imposes* liability on the political subdivision. *See* W.Va. Code § 29-12A-4(c)(5).

W.Va. Code § 24-6-8 does not expressly impose liability upon political subdivisions as required by W.Va. Code § 29-12A-4(c)(5). Rather, W.Va. Code § 24-6-8, entitled “Limitation of liability,” *limits* liability for damages.

Specifically, W.Va. Code § 24-6-8 provides:

A public agency or a telephone company participating in an emergency telephone system or a county which has established an enhanced emergency telephone system, and any officer, agent or employee of the public agency, telephone company or county *is not liable* for damages in a civil action for injuries, death or loss to persons or property arising from any act or omission, *except* willful or wanton misconduct, in connection with developing, adopting or approving any final plan or any agreement made pursuant to this article, or otherwise bringing into operation or participating in the operation of an emergency telephone system or an enhanced emergency telephone system pursuant to this article.

W.Va. Code § 24-6-8 (emphasis added).

Generally, words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use. Syl. Pt. 4 and 5, *State v. General Daniel Morgan Post*, 548, *V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959). The Petitioner asserts that the plain meaning set forth in W.Va. Code § 24-6-8 limits liability for damages against public agencies, telephone companies or counties relating to enhanced emergency telephone systems, as there are no words set forth in the statute that expressly impose liability. *See* W.Va. Code § 24-6-8. In fact, the statute expressly *limits* liability and sets forth one exception to that limitation. *Id.*

Moreover, liability is not favored when the legislature has clearly provided for immunity. *See Zirkle*, 655 S.E.2d 155 at 159 (*citing* Syl. Pt. 2, *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996)). Here, the Act is clear and unambiguous and states an intention by the West Virginia Legislature to extend the immunity provided by the Act to political subdivisions, unless another code section *expressly imposes liability*. *See* W.Va. Code § 29-12A-

4(c)(5). To construe the statutory scheme otherwise would undermine the general purpose of the Act and contravene the Act's clearly-expressed purpose.

Accordingly, because W.Va. Code § 24-6-8 does not expressly impose liability as required by W.Va. Code § 29-12A-4(c)(5), the Petitioner is immune from liability under the Act for intentional acts of its employees and the Circuit Court erred in denying the Petitioner's Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment.

B. The Circuit Court Erred in Denying Petitioner's Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment Because the Petitioner is Immune From Claims Resulting From Unintentional Misrepresentations.

Alternatively, the Circuit Court should have granted the Petitioner's Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment because the Petitioner is immune from liability pursuant to W.Va. Code § 29-12A-5(a)(12). As set forth in W.Va. Code § 29-12A-5(a)(12):

A political subdivision is immune from liability if a loss or claim results from . . . [m]isrepresentation[s], if unintentional.

W.Va. Code § 29-12A-5(a)(12).

The Act does not define "misrepresentation." *See* W.Va. Code § 29-12A-3. Therefore, it is necessary to refer to the ordinary definition of the word to determine its meaning. *See* Syl. Pt. 2, *Fountain Place Cinema 8, LLC v. Morris*, 227 W.Va. 249, 707 S.E.2d 859 (2011) ("In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.") (citation omitted). Black's Law Dictionary defines "misrepresentation" as follows:

1. The act of making a false or misleading assertion about something, usu. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.

2. The assertion so made; an assertion that does not accord with the facts. – Also termed *false representation*; (redundantly) *false misrepresentation*. Cf. REPRESENTATION (1)). – misrepresent, *vb*.

“A misrepresentation, being a false assertion of fact, commonly takes the form of spoken or written words. Whether a statement is false depends on the meaning of the words in all the circumstances, including what may fairly be inferred from them. An assertion may also be inferred from conduct other than words. Concealment or even non-disclosure may have the effect of a misrepresentation. . . . [A]n assertion need not be fraudulent to be a misrepresentation. Thus a statement intended to be truthful may be a misrepresentation because of ignorance or carelessness, as when the word ‘not’ is inadvertently omitted or when inaccurate language is used. But a misrepresentation that is not fraudulent has no consequences . . . unless it is material.” Restatement (Second) of Contracts § 159 cmt. a (1979).

Black’s Law Dictionary (9th ed. 2009), available at Westlaw BLACKS.

In the case at hand, the Respondent’s cause of action is based entirely on the position that the Petitioner is liable for the untimely death of her husband because of statements made to her by the MECCA 9-1-1 operators. (**See Compl., Appx. pp. 1-23**) Specifically, the Respondent alleges in her Complaint that she was assured during her initial call to MECCA 9-1-1 “that an ambulance was being sent to the Johnson residence at 1335 Cain Street, Star City, West Virginia.” (**Compl. ¶ 20, Appx. p. 4**) Further, the Respondent alleges that a MECCA 9-1-1 operator “assure[d] Mrs. Johnson that 9-1-1 was trying to get an ambulance to come help her husband, and this operator continued to confirm the location of the home, which led Mrs. Johnson to believe that an ambulance was on its way.” (**Id. at ¶ 35, Appx. pp. 6-7**) In the third call, the Respondent alleges that she was advised there were no ambulances available that could be sent to the Johnson residence. (**Id. at ¶ 43, Appx. p. 8**) The Respondent further alleges she asked the 9-1-1 operator to contact Ruby Memorial Hospital to make them aware of her impending arrival and was advised by the operator that the operator could make the call. (**Id. at ¶ 44, Appx. p. 8**)

Based upon these statements, the Respondent contends that the Petitioner is liable because she relied upon alleged inaccuracies contained therein. However, any inaccuracies contained in the statements made by the MECCA 9-1-1 operators were not made with the intent to misrepresent the factual situation or to deceive the Respondent in anyway.

Notably, the Respondent's Complaint alleges that Petitioner's conduct could be considered intentional only in the context of willful or wanton conduct. (*Id.* ¶¶ 72-73, Appx. pp. 12-13) In fact, the Respondent asserts "[t]he actions and inactions of the MECCA operators/employees were not such that these individuals *intentionally sought* to harm Mr. and Mrs. Johnson[.]" (*Id.* ¶ 72, Appx. p. 12) Furthermore, by written discovery, the Respondent stated, "[t]he actions of the MECCA operators and any and all other agents, servants, or employees, as referenced in paragraph 66 of Plaintiff's Complaint, were willful or wanton in the sense that these acts or failures to act were done in a reckless disregard of the rights of Mr. and Mrs. Johnson, and the acts or failure to act were coupled with the knowledge that injury would probably result." *Pl.'s Resp. to First Set of Comb. Disc. Req.* ¶ 9, attached hereto as "Exhibit B." As such, the Respondent implicitly recognizes the MECCA 9-1-1 operators did not intentionally convey inaccurate information to Mrs. Johnson. Rather, the essence of the Respondent's cause of action is that Mrs. Johnson relied on alleged inaccurate statements made by the MECCA 9-1-1 operators (i.e., advising Mrs. Johnson an ambulance was on the way and advising her that the operator would notify the hospital of her impending arrival), not that the MECCA 9-1-1 operators conveyed the alleged inaccuracies with an intent to deceive Mrs. Johnson. (*Id.* at ¶¶ 21, 44, Appx. pp. 5, 8) Absent some evidence that the Petitioner's employees misrepresented facts with the intent to deceive Mrs. Johnson, the Petitioner is entitled to immunity pursuant to West Virginia Code § 29-12A-5(a)(12).

The lack of intentional misrepresentation in this case is buttressed by the testimony of the Respondent's 9-1-1 expert, Paul Linnée. In his deposition, Mr. Linnée testified as follows:

[MR. WARNER]

Q. Tell me what you believe from your review of the documents that 911 did wrong.

A. I think that - - - this is, in my opinion, a relatively very straightforward case. What 911 did wrong was *mislead* Ms. Johnson into believing on two occasions that an ambulance was enroute, which enabled Ms. Johnson to stay put with her failing husband with the expectation that an ambulance would be there shortly.

(Linnée Dep. 13:4-11, Feb. 17, 2011, Linnée Dep. Transcript attached hereto as "Exhibit C.")

(emphasis added). Mr. Linnée agreed that the intent of the 9-1-1 operators was not to mislead Mrs. Johnson so that Mr. Johnson would suffer injury:

[MR. WARNER]

Q. If this was the only cause, only problem in the case, is that the operator said, hey, we've got an ambulance on the way, and a call had been made at the time before that was said, you would at least agree, would you not, that the conduct of the 911 operator was not for the purpose of causing injury to the plaintiff or the person who was ill?

A. I would agree - - -

MR. GIGGENBACH: I object to the form of the question. Go ahead.

A. I would agree that it was not the 911 operator's intent to cause harm to Mr. Johnson.

Q. There wasn't any design on the 911 operator's part to intentionally mislead her so that her husband would suffer injury.

A. I agree specifically with the so that her husband would suffer injury part. That was not the intent.

Q. This operator appeared to have been trying to get her help and thought he was, at least from that communication.

A. I believe that was the operator's intent to cause for help to be sent to the Johnson residence. It's my view, however, that the - - - were the operator

to have said to Ms. Johnson, okay, I have notified the ambulance, we wouldn't be here today.

(Ex. C at 22:18-23:19.) Later, Mr. Warner and Mr. Linnée engaged in the following questioning:

[MR. WARNER]

Q. Well, we may be getting to a matter of whether or not you are qualified to render an opinion on the state of mind of the 911 operator. The question may be as to whether or not his conduct appears for the purpose and design of causing harm. Now as I understand your testimony you do not believe that the conduct of the 911 operators was for the purpose or design of causing harm to Mrs. Johnson's husband.

A. That is correct.

(Ex. C at 43:19-44:3.)

Consequently, as evidenced by the Respondent's allegations contained in her Complaint and discovery responses and by the Respondent's 9-1-1 expert's deposition testimony, it is clear that there is no issue of fact regarding the nature of the information conveyed by MECCA 9-1-1 operators. To the extent that the MECCA 9-1-1 operators misrepresented facts to the Respondent, they did not do so intentionally.

Accordingly, because the MECCA 9-1-1 operators did not intentionally misrepresent information to Mrs. Johnson, the Petitioner was entitled to summary judgment pursuant to the immunity granted under West Virginia Code § 29-12A-5(a)(12), and Petitioner's Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment should have been granted by the Circuit Court.

C. The Circuit Court Erred in Finding All Immunities Provided Under the Act Inapplicable to Respondent's Cause of Action.

In addition to specifically finding that the Petitioner was not immune from liability for intentional acts of its employees nor for unintentional misrepresentations pursuant to the Act, the Circuit Court went one step further and found that all of the immunities provided by § 29-12A-4

of the Act were inapplicable based upon the fact that the Respondent's cause of action was brought pursuant to W. Va. Code § 24-6-8. **(Or. Regarding Pre-Trial Mots. ¶ 5, Appx. p. 222)**

The Circuit Court erred in making the overly broad ruling that the immunities provided by § 29-12A-4 of the Act were inapplicable simply because the Respondent's cause of action was brought pursuant to another statute. In general, no causes of action are brought pursuant to the Act. *See* W.Va. Code § 29-12A-1 et. seq. Rather, the purpose of the Act is to limit liability to political subdivisions by granting immunity to political subdivisions and its employees for all claims filed against them which fall under the purview of the Act and are not subject to an exception. *Id*; *See Randall*, 186 W.Va. 336, 412 S.E.2d 737. Furthermore, there is no case law or other evidence that suggests that the legislature intended for W.Va. Code § 24-6-8 to supersede the Act in any way.

Accordingly, despite the fact that the Respondent's cause of action is brought pursuant to W.Va. Code 26-4-8, the Act applies and entitles the Petitioner to the immunities provided therein.

D. The Circuit Court Erred in Refusing to Give the Petitioner's Jury Instruction and Special Interrogatory on Unintentional Misrepresentations.

The Petitioner provided the Circuit Court with Proposed Jury Instruction No. 9, which stated:

The Court instructs the jury that political subdivisions are immune from liability for claims resulting from unintentional misrepresentations. Accordingly, if the jury finds that the statements made by the MECCA 9-1-1 phone operators to Mrs. Johnson were unintentional misrepresentations, the jury cannot find the Defendant, Monongalia County Commission, liable for damages suffered by the Plaintiff.

West Virginia Code, § 29-12A-5(a)(12). (Def.'s Prpsd Jury Inst. No. 9, Appx. p. 244) The Petitioner also provided the Circuit Court with a Proposed Verdict Form which included proposed Special Interrogatory No. 1 as follows:

Do you find that the statements made by the MECCA 9-1-1 operators and relied upon by Mrs. Johnson on May 11, 2008 were unintentional misrepresentations?

Yes _____ No _____

If you answered "Yes" to Interrogatory 1 above, please proceed to Jury Verdict Form No. 1 and have your Foreperson sign the Jury Verdict Form 1. If you answered "No" to Interrogatory 1 above, please proceed to Interrogatory No. 1 below.

(Def.'s Prpsd Verdict Form, Appx. pp. 246-251)

The Petitioner's Proposed Jury Instruction No. 9 and Special Interrogatory No. 1, relating to unintentional misrepresentations, should have been included in their entirety in the Jury Instructions and Verdict Form because political subdivisions, such as the Petitioner herein, are immune from liability if a loss results from an unintentional misrepresentation, pursuant to W.Va. Code § 29-12A-5(a)(12).¹

The Circuit Court heard oral arguments concerning the inclusion of Petitioner's Proposed Jury Instruction No. 9 and Special Interrogatory No. 1, relating to unintentional misrepresentations. Ultimately, the Circuit Court included a portion of Petitioner's Jury Instruction No. 9 in the Jury Charge, but failed to include Petitioner's Special Interrogatory No. 1 on the Verdict Form. In its Jury Charge, the Circuit Court instructed, in part:

A political subdivision is immune from liability if a loss or claim results from misrepresentation, if unintentional. However, a political subdivision is not immune from liability if a loss or claim results from acts or omissions that are willful or wanton.

¹ Please see Section B. of Petitioner's Brief for a full discussion concerning the applicability of W.Va. Code § 29-12A-5(a)(12).

(Jury Charge, ¶ 33, Appx. p. 301) The final Verdict Form, however, did not include an Interrogatory on unintentional misrepresentations. **(See Verdict Form, Appx. pp. 305-306)**

The Circuit Court's reasoning for including only a portion of Petitioner's Jury Instruction No. 9 on unintentional misrepresentations, and not including Petitioner's Special Interrogatory No. 1 on unintentional misrepresentations on the Verdict Form is not entirely clear to the Petitioner. However, it appears that the Circuit Court's reasoning was based upon a discussion of the Public Duty Doctrine and the Act as set forth in *Holsten v. Massey*, 200 W.Va. 775, 490 S.E.2d. 864 (1997). **(See Tr. Transcr. Appx. Vol. II pp. 6-12)** Specifically, the Circuit Court stated:

And the Supreme Court case of *Holsten versus Massey*, 200 W.Va. 775, 900 S.E.2d 864, 1 1997 case, in footnote 6 –or syllabus 6—excuse me—the Court stated that the wanton or reckless conduct exception to an employee as the term “employee” is defined in the Governmental Tort Claims and Insurance Reform Act, immunity under West Virginia Code 29-12A-5(b)(2), 1986, of Governmental Tort Claims and Insurance Reform Act is an exception to the public duty doctrine separate and distinct from the common law or special relationship exception to the public duty doctrine.

The Court finds that the Supreme Court case of *Holsten v. Massey* is - - sets forth the standard when it reviewed the history of the public duty doctrine and the evolution of the immunity statute. The Court opined in *Holsten* that the public duty doctrine, which is the role that evolved from common law was not based on immunity, instead was based on the absence of any immunity. And the Court further opined that the enactment of the Governmental Tort Claims and Insurance Reform Act did not abrogate the public duty doctrine but was consistent with the public duty doctrine.

Under the public duty doctrine, the local government's entity's liability was predicated upon a breach of general duty owed to the public as a whole. And under the public duty doctrine, it was necessary to show that there was a connection between the actor and the harmed party. And the Court concluded that the public duty doctrine does not apply when the allegations are against the government's entity - - the government entity's officer or employee for willful, wanton or reckless behavior - - and reckless behavior.

The Court went on to opine that the public duty doctrine does not apply to cases involving allegations of willful and wanton misconduct because the Tort Immunity Act - or because the West Virginia Governmental Tort Claims and Insurance Reform Act states that willful and wanton conduct is not immune and thus provides a completely separate statutory exception.

The Court went on to say that the wanton or reckless conduct of an employee to immunity found in West Virginia Code 29-12A-5(b)(2) is in addition to the special relationship exception to the public duty doctrine. And then the Court went on finally to say that the only way to reconcile the legislature's express removal of immunity from an employee whose conduct is wanton or reckless with the public duty doctrine is to conclude that West Virginia Code 29-A-5(b)(2) is another exception to the public duty doctrine separate and apart distinct from the common law special relationship section to the public duty doctrine,

So I hope that the Court has sufficiently ruled in this case, Mr. Warner, I believe I am correct in my ruling.

(Tr. Transcr. 7:14-9:14 Appx. Vol. II pp. 7-9)

The Circuit Court's reliance on the reasoning in *Holsten* is misplaced in this instance for two reasons. First, the Public Duty Doctrine was never an issue in this case. Neither party argued for or against the Public Duty Doctrine at any point in time. Second, the immunity provision addressed in *Holsten* and discussed at length by the Circuit Court is W.Va. Code 29-12A-5(b)(2), which sets for an exception to immunity for an *employee* of a political subdivision. This provision of the Act was not the issue before the Circuit Court, because the Respondent did not sue an *employee* of a political subdivision. Rather, the Respondent sued only the political subdivision itself, making the immunities provided in W.Va. § 29-12A-5(a) applicable, not W.Va. 29-12A-5(b).

As previously stated, under W.Va. § 29-12A-5(a)(12), a *political subdivision* is immune from liability if a loss or claim results from: . . . [m]isrepresentation, if unintentional." W.Va. Code § 29-12A-5(a)(12). Accordingly, the Petitioner submits that the Circuit Court erred in including only a portion of its Jury Instruction No. 9 on unintentional misrepresentations in the Jury Charge and erred in failing to include its Special Interrogatory No. 1 on unintentional misrepresentations on the Verdict Form.

The Circuit Court's err on this issue becomes clear when considering the inconsistency of the Circuit Court's rulings. In its May 14, 2013 Order, the Circuit Court held that immunities provided by the Act were inapplicable to this case simply because the Respondent's cause of action was brought pursuant to W.Va. Code § 24-6-8. **(Or. Regarding Pre-Trial Mots. ¶ 5, Appx. pp. 222)** Despite that ruling, the Circuit Court included a portion of Petitioner's Jury Instruction No. 9 on unintentional misrepresentations, which is based upon an immunity provided under the Act. **(Jury Charge, ¶ 33, Appx. p. 301)** However, the Circuit Court did not include Petitioner's Special Interrogatory No. 1 on unintentional misrepresentations on the Verdict Form requiring the jury to make an initial determination concerning unintentional misrepresentations, despite the fact that the Circuit Court instructed the jury on unintentional misrepresentations **(See Verdict Form, Appx. pp. 305-306)** The Circuit Court's inconsistencies on this issue make clear that the jury was misled and improperly informed of the law.

Consequently, based upon the Circuit Court's failure to include Petitioner's Jury Instruction No. 9 on unintentional misrepresentations in its entirety in the Jury Charge, and upon the Circuit Court's failure to include Petitioner's Special Interrogatory No. 1 on unintentional misrepresentations on the Verdict Form, the instructions provided to the jury were improper, misleading and did not sufficiently instruct the jury of the law in accordance with W.Va. Code § 29-12A-5(a)(12).

E. The Circuit Court Erred in Including the Word "Reckless" in its Definition of Willful or Wanton Misconduct in the Jury Instructions and in Granting Respondent's Motion in Limine Allowing Her to Use "Reckless" in Her Definition of Willful or Wanton.

The Respondent submitted a Motion in Limine requesting the Circuit Court to adopt several lengthy quotations concerning the burden of proof on liability. **(Pl.'s Mot. in Limine Regarding Legal Standard, Appx. pp. 211-214)** The quotes contained in Respondent's Motion

in Limine made several references to the word “reckless” in addition to “willful” and “wanton.”

(Id.)

At the May 7, 2013 hearing on this issue, the Respondent argued that all of the quotations contained in its Motion in Limine should be included in the instructions to the jury regarding the applicable legal standard for the burden of proof, including reference to the word “reckless.”

(See Or. Regarding Pre-Trial Mots. ¶ 16, Appx. pp. 227-228)

On the other hand, the Petitioner argued that it was improper to instruct the jury, and to allow the Respondent to state or suggest to the jury, that recklessness was the burden of proof in this case. *(Id.)* The Petitioner argued that, based upon the Circuit Court’s February 2, 2012 Order, W.Va. Code § 24-6-8 limited the Petitioner’s liability in this matter to misconduct that is willful or wanton. **(Id.; Def.’s Obj. to Pl.’s Prpsd Jury Inst. ¶ 4 Appx. pp. 269-270)** Accordingly, the Petitioner argued that allowing the Respondent to state or suggest that reckless is the legal standard in this case would be improper, prejudicial and cause confusion to the jury.

(Id.)

Nevertheless, the Circuit Court granted the Respondent’s Motion in Limine in part and adopted the Respondent’s Proposed Jury Instruction No. 2, over the Petitioner’s objection, which was amended to read:

“Wanton misconduct’ refers to ‘[a]n act, or a failure to act when there is a duty to do so, in reckless disregard of another’s rights, coupled with the knowledge that injury will probably result.”

Perrine v. E.I. du Pont de Nemours and Co., 225 W.Va. 482, 694 S.E.2d 815, n. 30 (2010)(citing Black’s Law Dictionary 1014(7th ed. 1999)).

(Jury Charge ¶ 28 Appx. p. 300)

Furthermore, during closing arguments Respondent’s counsel was allowed to make numerous references to the word “reckless” without Petitioner’s counsel having the ability to

object in front of the jury, based on the prior ruling of the Circuit Court. (**See Tr. Transcr. Vol. III pp. 1-50**) In fact, Respondent's counsel made reference to the word "reckless" a total of fifteen (15) times during the closing arguments to the jury. (*Id.*)

As the Circuit Court ruled in its February 2, 2012 Order, liability in this case may be imposed upon the Petitioner only if the jury finds that the conduct of the Petitioner rose to the level of willful or wanton misconduct. (**Or. Denying Def.'s Mot. Sum. Jdg. ¶ 2, Appx. pp. 129-130**) The term "reckless" bears no consequence to the issue of liability in this case.

Additionally, this Court has stated "[t]o be 'reckless,' one must be more than 'negligent.' Recklessness may include 'willfulness' or 'wantonness,' but if the conduct is more than negligent, it may be 'reckless' without being 'willful' or 'wanton[.]'" *White v. Hall*, 118, W.Va. 85, 188 S.E. 768, 769 (1936) (internal citation omitted).

Consequently, the Jury Instructions regarding the Respondent's burden of proof given by the Circuit Court were improper, misleading and misstated the law. Furthermore, it was improper and misleading to allow Respondent's counsel to suggest to the jury that "reckless" was the burden of proof in this case.

VIII. CONCLUSION

For all of the reasons stated herein, the Petitioner respectfully requests a ruling from this Honorable Court finding that the Circuit Court erred in denying Petitioner's Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment; ordering the case to be reversed and remanded for the entry of an order granting the Petitioner's Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment; and dismissing the Respondent's cause of action.

Alternatively, the Petitioner respectfully requests a ruling from this Honorable Court finding that the jury was improperly instructed on the law, setting aside the verdict, and remanding the case for a new trial.

Respectfully submitted this 30th day of September, 2013.



Boyd L. Warner (*WV State Bar ID #3932*)
Brandy D. Bell (*WV State Bar ID # 9633*)

WATERS, WARNER & HARRIS, PLLC
701 Goff Building, P. O. Box 1716
Clarksburg, West Virginia 26302-1716
Telephone: (304) 624-5571
***Counsel for Petitioner,
Monongalia County Commission***

NO: 13-0681

IN THE SUPREME COUNTY OF APPEALS OF WEST VIRGINIA

CHARLESTON

THE MONONGALIA COUNTY COMMISSION,
Defendant Below, Petitioner

vs.

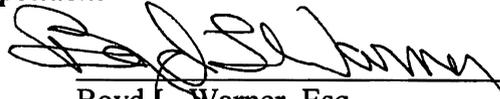
No.: 13-0681

JUDITH L. JOHNSON, Executrix and
Personal Representative of the Estate of Joseph
B. Johnson, Plaintiff, Below, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September, 2013, I served a true copy of the foregoing "Petitioner's Brief" and "Appendix" upon the following by depositing a true copy thereof in the United States mail, postage prepaid, in a sealed envelope addressed as follows:

Bader C. Giggenbach, Esquire
J. Tyler Slavey, Esquire
BREWER & GIGGENBACH
P. O. Box 4206
Morgantown, West Virginia 26504
Counsel for Respondent



Boyd L. Warner, Esq.
Brandy D. Bell, Esq.
WATERS, WARNER & HARRIS, PLLC
701 Goff Building, P.O. Box 1716
Clarksburg, West Virginia, 26302-1716
Counsel for Petitioner