

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NOV 23 2011

DOCKET NO. 11-1059

JEFFREY JENKINS AND M. JEAN McNABB,

Plaintiffs-Petitioners,

v.

CITY OF ELKINS, A MUNICIPAL CORPORATION,
STEPHEN P. STANTON, WESTFIELD INSURANCE
COMPANY, NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA, and BOMBARDIER
AEROSPACE CORPORATION,

Defendants-Respondents.

BRIEF OF RESPONDENTS CITY OF ELKINS AND STEPHEN P. STANTON

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I. STATEMENT OF THE CASE

Petitioners Jeffrey Jenkins and M. Jean McNabb filed their Complaint against Respondents the City of Elkins and one of its employees, Stephen P. Stanton (collectively, the “Elkins Respondents”) in the Circuit Court of Harrison County on May 5, 2010. A.R. at 1. The three-count Complaint generally alleges that on October 27, 2008, Mr. Stanton was driving a vehicle owned by the City of Elkins in Harrison County where he caused a collision with a vehicle being driven by Mr. Jenkins and owned by his employer Respondent Bombardier Aerospace WVAC. Count I contains a claim of negligence against Mr. Stanton. Count II contains a claim under the doctrine of *respondeat superior* against the City of Elkins. Count III contains a claim of loss of consortium on behalf of Ms. McNabb. Mr. Jenkins and Ms. McNabb demand an unspecified amount of compensatory damages. A.R. at 6-8.

In addition to serving the Summons and Complaint on the Elkins Respondents, Petitioners obtained service on Bombardier, Gallagher Bassett Service Inc., which is a third-party administrator for Bombardier, and Respondent Westfield Insurance Company, which is an insurance carrier of Petitioners. These parties all appeared and Westfield joined Respondent National Union Fire Insurance Company of Pittsburgh, PA, incorrectly denominated AIG Insurance, which is an insurance carrier of the Elkins Respondents. A.R. at 1.

The Elkins Respondents timely filed Defendants’ Motion to Dismiss on the grounds that they are immune from liability for the claims in the Complaint under the Governmental Tort Claims and Insurance Reform Act (the “Tort Claims Act”), W. Va. Code § 29-12A-1, *et seq.* The West Virginia Uniform Traffic Crash Report, which reflects that Mr. Stanton was cited for failure to yield but not for other offenses involving reckless, careless or negligent driving, is

attached as Exhibit A thereto.¹ The Certificate of Liability Insurance naming the City of Elkins as an additional insured on the State of West Virginia's general liability and automobile policies, which expressly provides: "THE INSURANCE EVIDENCED BY THIS CERTIFICATE IS SUBJECT TO ALL OF THE TERMS, CONDITIONS, EXCLUSIONS AND DEFINITIONS IN THE POLICIES. IT IS A CONDITION PRECEDENT OF COVERAGE UNDER THE POLICIES THAT THE ADDITIONAL INSURED DOES NOT WAIVE ANY STATUTORY OR COMMON LAW IMMUNITY CONFERRED UPON IT" is attached as Exhibit B. A.R. at 25-53.

On August 23, 2010, the Circuit Court held a hearing and converted the Motion to Dismiss to a Motion for Summary Judgment. At that time, however, the Circuit Court ordered the parties to produce copies of insurance policies that might provide coverage for Petitioners' claims. Thereafter, the parties filed certified copies of insurance policies. A.R. at 1-5a.

Beginning in January 2011, each Respondent filed a Motion for Summary Judgment. Attached as Exhibit A to Bombardier's Motion for Summary Judgment is a Workers' Compensation Claim Detail Report, which reports that Mr. Jenkins had been compensated a total of \$170,823.92 through Workers' Compensation, including the following amounts: \$73,016.16

¹ In its decision, the Circuit Court only assumed that Mr. Stanton was negligent and that his negligence caused Mr. Jenkins's injuries. A.R. at 557. Petitioners' Brief incorrectly states on page 7 that liability in this matter is clear and Mr. Stanton admits fault for the accident, citing to A.R. at 563, which is a page reference to the Circuit Court's opinion where it is held that National Union does not have to compensate Petitioners up to the limits of its policy or meet the minimum requirements of West Virginia Code Section 17D-4-12(b)(2). Presumably, Petitioners meant to cite to A.R. at 553, where the Court made a finding of fact that according to the Uniform Traffic Crash Report Mr. Stanton admitted fault and was cited for failure to yield the right-of-way. Although not material to the Court's holdings, which are limited to the issues of immunity and insurance coverage, it should be noted that this finding of fact is not supported by the record. Nowhere in the Uniform Traffic Crash Report does Mr. Stanton admit fault. See A.R. at 40-52. The Court seems to have taken this fact from the Statement of Pertinent Facts beginning on page 2 of Westfield's Motion for Summary Judgment, which Petitioners omitted from the Record Appendix. Copies of pages 2 and 3 of Westfield's Summary Judgment Motion, which are missing from between the Appendix Record at 118-19, are attached hereto as Exhibit A. Petitioners "stipulated" to certain of the facts in Westfield's Statement of Pertinent Facts on page 2 of Petitioners' Motion for Summary Judgment. A.R. at 319. One of the so-called facts to which Petitioners' stipulated was that "Defendant Stanton admitted fault and was cited for failure to yield the right-of-way. See Exhibit 5, State of West Virginia Uniform Traffic Crash Report." Exhibit A. Of course, Petitioners and their insurance carrier Westfield cannot stipulate that Mr. Stanton admitted fault. Manifestly, he did not.

for indemnity; \$81,131.98 for medical; \$12,443.01 for rehabilitation; and \$4,232.77 for expenses. In addition, Mr. Jenkins's Workers' Compensation claim was reserved for an additional \$110,587 in claim benefit payments for future amounts, making the total aggregated Workers' Compensation award \$281,411.00. A.R. at 357-59.²

Petitioners filed a Motion for Summary Judgment as to insurance coverage on March 4, 2011. Petitioners did not attach any exhibits to their Motion for Summary Judgment. As noted above, however, Petitioners purported to stipulate to several numbered paragraphs in the Statement of Pertinent Facts set forth in Westfield's Motion for Summary Judgment, which were omitted from the Appendix Record. A.R. at 319. *See infra* n. 1.

The Elkins Respondents filed their Renewed Motion for Summary Judgment on March 14, 2011, which was again based on the grounds that they are immune from liability for the claims in the Complaint under the Tort Claims Act. The National Union Policy RMCA 160-76-18 is attached to the Renewed Motion for Summary Judgment as Exhibit A. The Uniform Traffic Crash Report and Certificate of Liability Insurance, which also were attached to the original Motion to Dismiss, are attached as Exhibits B and C, respectively. Endorsement No. 10 of the National Union Policy, which became effective on July 1, 2008, is attached thereto as Exhibit D. Endorsement No. 10 reads as follows:

It is agreed that the insurance afforded by this insurance to each West Virginia Political Subdivision, charitable or public service organization or emergency services agency covered by Certificates of Liability insurance on file with the Company, applies subject to the following provisions: . . . 2. *It is agreed that provisions of the Certificate of Liability Insurance issued to each West Virginia*

² Again, Petitioners' Brief on page 7 discusses Mr. Jenkins's injuries and Workers' Compensation benefits without providing an accurate citation to the Appendix Record. Presumably, Petitioners' meant to cite to A.R. at 554 instead of A.R. at 564, which discusses Bombardier's and Westfield's coverage issues. Again, however, even a citation to A.R. at 554 does not support Petitioners' statement because the Circuit Court found only that because Mr. Jenkins was injured while operating a vehicle within the course and scope of his employment he received Workers' Compensation benefits for his injuries. The Court made no finding with respect to the adequacy of those benefits.

Political Subdivision, charitable or public service organization, or emergency services agency are incorporated into this policy.

Id. (emphasis added).

Following briefing on the various Motions for Summary Judgment, Judge Thomas A. Bedell³ entered an “ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS CITY OF ELKINS AND STEPHEN P. STANTON AND THIRD-PARTY DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, AND DENYING IN PART AND GRANTING IN PART SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS JEFFREY JENKINS AND M. JEAN MCNABB, THIRD-PARTY DEFENDANT BOMBARDIER AEROSPACE CORPORATION, AND THIRD-PARTY PLAINTIFF WESTFIELD INSURANCE COMPANY” on June 8, 2011. A.R. at 549-74. Initially, the Court held that Mr. Stanton is immune from liability pursuant to West Virginia Code Section 29-12A-5(b). The Court noted that Petitioners conceded that Mr. Stanton acted within the scope of his employment at the time of the accident. The Court further noted that the West Virginia Code does not expressly impose liability upon Mr. Stanton. The Court rejected Petitioner’s argument that Mr. Stanton acted “recklessly, willfully, and wantonly” on the day of the incident, and held that in any event this Court has held that the Tort Claims Act still applies despite a plaintiff’s allegation that a defendant’s actions were wanton or reckless. A.R. at 556.⁴

The Circuit Court further held that the City of Elkins is immune from liability pursuant to West Virginia Code Section 29-12A-5(a)(11). In reaching this holding, the Court applied the four-part test established by this Court in *O’Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 425

³ Petitioners’ Brief on page 8 incorrectly asserts that Judge James A. Matish ruled on the Motions for Summary Judgment. Although this action was assigned to Judge Matish, Judge Bedell decided the Motions for Summary Judgment and entered the Order. A.R. at 549-74.

⁴ Petitioners have not challenged this holding on appeal. The Circuit Court’s judgment for Mr. Stanton should be affirmed on this ground alone. *Cf. Yousefi v. U.S. Immigration & Naturalization Serv.*, 260 F.3d 318, 326 (4th Cir. 2001) (holding that petitioner waived argument on appeal even though he raised issue in appellate reply brief because he failed to raise issue in his opening appellate brief).

S.E.2d 551 (1992). The Court expressly rejected Petitioners' argument that the National Union insurance policy does not contain appropriate language and/or exclusions to preserve the City of Elkins's statutory immunity, relying on cases such as *Bender v. Glendenning*, 219 W. Va. 174, 632 S.E.2d 330 (2006), and *Hess v. West Virginia Department of Corrections*, 227 W. Va. 15, 705 S.E.2d 125 (2010). The Court further rejected Petitioners' argument that under *Gibson v. Northfield Insurance Co.*, 219 W. Va. 40, 631 S.E.2d 598 (2005), the preservation of immunity must be determined by the political subdivision in its discretion, and determined in any event that the City of Elkins chose to purchase an insurance policy that included the preservation of any and all immunities provided by law. The Court held that under *O'Dell* the immunity extends to the claims for damages not covered by Workers' Compensation. Finally, with respect to the claims against the Elkins Respondents, the Court held under *Marlin v. Bill Rich Construction, Inc.*, 198 W. Va. 635 482 S.E.2d 620 (1996), that because there is immunity from Mr. Jenkins's direct claims there is also immunity from Ms. McNabb's derivative claim for loss of consortium. A.R. at 555-62.

With regard to the claims for insurance coverage, the Circuit Court held that because the Elkins Respondents are immune from liability National Union is not required to pay for Petitioners' claims. The Court rejected Westfield's argument that the City of Elkins is responsible for meeting West Virginia's minimum financial responsibility requirements under West Virginia Code Section 17D-4-12(b)(2), reasoning that because the Legislature did not draft an exception in Section 29-12A-5(a)(11) and the purpose of the Tort Reform Act was to assist municipalities in procuring adequate liability insurance coverage at a reasonable cost, National Union does not have to compensate Petitioners up to the limits of the policy or meet the minimum requirements of Section 17D-4-12(b)(2). A.R. at 562-63.

The Circuit Court further held that because the National Union policy is inapplicable, Mr. Stanton falls within the definition of an uninsured motorist as defined by West Virginia Code Section 33-6-31(c). The Court held that Bombardier and Westfield each may be responsible up to \$20,000, which is the minimum amount of uninsured coverage required by statute. A.R. at 570-71, 573.

Westfield filed its expert witness disclosure on July 1, 2011, and Bombardier filed its expert witness disclosure on July 5, 2011. Westfield also served interrogatories and document requests addressed to Jenkins and McNabb on July 8, 2011. A.R. at 5.

Petitioners filed a Notice of Appeal in this Court on July 8, 2011. The Notice of Appeal asserts that the June 8 Order is a final decision on the merits as to all issues and all parties despite the fact that the Circuit Court expressly granted in part and denied in part Petitioners', Bombardier's and Westfield's Motions for Summary Judgment.

The Elkins Respondents filed a Motion to Dismiss Appeal on September 13, 2011, on the ground that there is no final judgment. Thereafter, on September 19, 2011, Petitioners filed a Motion to Stay in the Circuit Court, citing West Virginia Rule of Appellate Procedure 28 and West Virginia Code Section 56-6-10. A.R. at 618-623. The Circuit Court entered an AGREED ORDER GRANTING MOTION TO STAY the proceedings on September 28, 2011. A.R. at 625-26. The September 28 Order stayed the proceedings in the Circuit Court until this Court decides the pending appeal and further continued the trial that was scheduled for October 31, 2011. A.R. at 625-27.

On November 9, 2011, this Court entered an Order denying the Motion to Dismiss Appeal.

II. SUMMARY OF THE ARGUMENT

The Circuit Court properly granted summary judgment to the Elkins Respondents because there are no genuine issues of material fact and as a matter of law the Elkins Respondents are immune from liability under the Tort Claims Act. Specifically, the City of Elkins is immune from liability under West Virginia Code Section 29-12A-5(a)(11) because Petitioners' claims result from a claim covered by Workers' Compensation. Petitioners concede that *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 425 S.E.2d 551 (1992), compels the holding of the Circuit Court in this action. This Court should apply the doctrine of *stare decisis* to affirm the Circuit Court's holding based on *O'Dell*.

In addition, the Circuit Court properly held as a matter of law that by purchasing an insurance policy the City of Elkins did not waive its statutory immunity under Section 29-12A-5(a)(11). West Virginia Code Section 29-12A-16(d) expressly provides:

The purchase of liability insurance, or the establishment and maintenance of a self-insurance program, by a political subdivision does not constitute a waiver of any immunity it may have pursuant to [the Tort Claims Act] or any defense of the political subdivision or its employees.

The Circuit Court further properly held that the City of Elkins preserved its statutory immunity under *Bender v. Glendenning*, 219 W. Va. 174, 632 S.E.2d 330 (2006), and *Hess v. West Virginia Department of Corrections*, 227 W. Va. 15, 705 S.E.2d 125 (2010), because the Certificate of Liability Insurance, which was incorporated into the insurance policy by Endorsement No. 10, expressly provides:

THE INSURANCE EVIDENCED BY THIS CERTIFICATE IS SUBJECT TO ALL OF THE TERMS, CONDITIONS, EXCLUSIONS AND DEFINITIONS IN THE POLICIES. IT IS A CONDITION PRECEDENT OF COVERAGE UNDER THE POLICIES THAT THE ADDITIONAL INSURED DOES NOT WAIVE ANY STATUTORY OR COMMON LAW IMMUNITY CONFERRED UPON IT.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principal issues in this appeal relating to the Elkins Respondents have been authoritatively decided, oral argument is not necessary under West Virginia Rule of Appellate Procedure 18(a) unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this appeal is appropriate for argument pursuant to West Virginia Rule of Appellate Procedure 19 and disposition by a memorandum decision.

IV. ARGUMENT

A. Standards of Decision and Review

As noted above, the Circuit Court ruled on various Motions for Summary Judgment. A party is entitled to summary judgment pursuant to West Virginia Rule of Civil Procedure 56 if the record shows there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56. West Virginia courts have granted summary judgment under Rule 56 using the following standard:

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995).

This Court reviews a circuit court’s entry of summary judgment *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 1 (1994). On appeal, the Court applies the same test that the circuit court should have applied initially. *See Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996).

B. The Circuit Court Properly Granted Summary Judgment to the Elkins Respondents because They are Immune Under the Tort Claims Act.

The Circuit Court properly granted summary judgment in favor of the Elkins Respondents because there are no genuine issues of material fact and as a matter of law the Elkins Respondents are immune from liability under the Tort Claims Act. The stated purpose of the Tort Claims Act is “to limit 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.” W. Va. Code § 29-12A-1. To effectuate this purpose, the Tort Claims Act provides that “[a] political subdivision is immune from liability if a loss or claim results from” any one of seventeen occurrences. W. Va. Code § 29-12A-5(a)(1) through (17). Included among these occurrences is “[a]ny claim covered by any workers’ compensation law or any employer’s liability law.” W. Va. Code § 29-12A-5(a)(11) (emphasis added). These immunities are supported by the following findings made by the Legislature in connection with its enactment of the Tort Claims Act:

The Legislature finds and declares that the political subdivisions of this State are unable to procure adequate liability insurance coverage at a reasonable cost due to: The high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services. Therefore, it is necessary to establish certain immunities and limitations with regard to the liability of political subdivisions and their employees, to regulate the insurance industry providing liability insurance to them, and thereby permit such political subdivisions to provide necessary and needed governmental services to its citizens within the limits of their available revenues.

W. Va. Code § 29-12A-2 (emphasis added).⁵

⁵ Additionally, West Virginia Code Section 29-12A-5(b) provides immunity to employees of a political subdivision under certain circumstances. This was the basis of the Circuit Court’s holding that Mr. Stanton is entitled to summary judgment. As noted above, Petitioners do not challenge this holding.

1. The City of Elkins is immune from liability under the Tort Claims Act because Petitioners' claims result from a claim covered by Workers' Compensation.

The City of Elkins is immune from liability under West Virginia Code Section 29-12A-5(a)(11) because Petitioners' claims result from a claim covered by Workers' Compensation. As set forth above, Section 29-12A-5(a)(11) provides that a political subdivision is immune from liability if a claim results from "[a]ny claim covered by any workers' compensation law or any employer's liability law." (Emphasis added.) In *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 425 S.E.2d 551 (1992), this Court upheld the constitutionality of Section 29-12A-5(a)(11), emphasizing that it does not sit to review Legislative policy as follows:

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. [W. Va. Const. art. V, § 1.] Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor the constitutionality of the legislative enactment in question. *Courts are not concerned with questions relating to legislative policy.* The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Id., 425 S.E.2d at Syl. Pt. 1 (citations omitted) (emphasis added).

Specifically, *O'Dell* held that Section 29-12A-5(a)(11) does not violate the equal protection principles of Article III, Section 10 or the "certain remedy" provision of Article II, Section 17 of the West Virginia Constitution. *Id.* at Syl. Pt. 4. The Court further rejected a challenge based on the "special legislation" prohibition found in Article VI, Section 39 of the State Constitution, holding that to the extent that Section mirrors equal protection precepts, it is subsumed in the equal protection principles contained in Article III, Section 10. *Id.* at Syl. Pt. 5. Finally, the Court held that Section 29-12A-5(a)(11) clearly contemplates immunity for political subdivisions from tort liability in actions involving claims covered by Workers' Compensation

even if the plaintiff was not employed by the defendant political subdivision at the time of the injury. *Id.* at Syl. Pt. 6.

With respect to the equal protection challenge, the Court reasoned in part as follows:

. . . W. Va. Code, 29-12A-5(a)(11), affects a relatively small group of plaintiffs who must satisfy four requirements before their claims are barred by the immunity provisions of the Tort Claims Act. First, the plaintiff must have been injured by the negligence of an employee of a political subdivision. Second, the plaintiff must have received the injury in the course of and resulting from his or her employment. Third, the plaintiff's employer must have workers' compensation coverage. Fourth, the plaintiff must be eligible for such benefits.

W. Va. Code, 29-12A-5(a), was designed to make liability insurance more affordable to political subdivisions by reducing the number of tort cases filed against them. Subdivision (11) did so by creating a narrow bar as to suits by those plaintiffs who meet the foregoing four-criterion test. When viewed from the perspective of the other class of plaintiffs who are barred from suing a political subdivision by virtue of receipt of workers' compensation benefits, i.e., the subdivision's own employees, and in view of the clear legislative intent to protect political subdivisions, the disparity is not such that the line drawn violates equal protection.

Id., 425 S.E.2d at 558 (footnote omitted).

In this action, the Circuit Court properly found that the four requirements identified in *O'Dell* have been satisfied as a matter of law as follows:

First, assuming Defendant Stanton was negligent and that his negligence caused Plaintiff's Jenkins's [sic] injuries, Defendant Stanton was an employee of a political subdivision. Second, Plaintiff Jenkins was admittedly driving a vehicle owned by his employer, Bombardier, within the course and scope of his employment. Third, Bombardier is a corporation regularly employing others for the purpose of carrying on business in the State and therefore, is required to subscribe to the workers' compensation fund. W. Va. Code § 23-2-1 (2010). Fourth, Plaintiff Jenkins admitted that he was an employee of Bombardier, and accordingly, he was an employee covered by workers' compensation. W. Va. Code § 23-2-1 (2010).

A.R. at 557.

Petitioners concede *O'Dell* compels the holding of the Circuit Court in this action. Nonetheless, Petitioners' Brief on page 16 argues in this Court for the first time that *O'Dell*

should be overturned as a matter of “current public policies.” Significantly, Petitioners do not challenge Section 29-12A-5(a)(11) under any provision of the State Constitution. Instead, they argue in Petitioners’ Brief on page 16 that *O’Dell* creates an “unfair and harsh result” and on page 18 that *O’Dell* erroneously concluded that by use of the term “any” the Legislature meant to exclude all potential claims.

This Court should apply the doctrine of *stare decisis* to affirm the Circuit Court’s holding based on *O’Dell*. The Court discussed the doctrine of *stare decisis* in *Haney v. County Commission*, 212 W. Va. 824, 575 S.E.2d 434, Syl. Pt. 2 (2002) (per curiam). In *Haney*, the Court refused to overturn its holding in *Adkins v. City of Huntington*, 191 W. Va. 317, 445 S.E.2d 500,503 (1994), that “[a] city, as a political subdivision of the state, is entitled to the statutory exemption for qualifying employers in West Virginia Code § 21-5C-1(e) (1989) and therefore, is not subject to the overtime pay requirements imposed by West Virginia Code § 21-5C-3(a) (1989).” *Id.* at Syl. Pt. 2. In applying doctrine of *stare decisis* to uphold *Adkins* the Court reasoned in *Haney*:

Our *Adkins* decision is recent in that it is less than nine years old. Also, the language at issue in *Adkins* is verbatim to the language at issue in the instant case. We have said that “[o]nce this Court determines a statute’s clear meaning, we will adhere to that determination under the doctrine of *stare decisis*.” *Appalachian Power Co. v. Tax Dept.*, 195 W. Va. 573, 588 n.17, 466 S.E.2d 424, 439 n.17 (1995). *See also Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202, 112 S. Ct. 560, 563, 116 L. Ed. 2d 560, 569 (1991) (“we will not depart from the doctrine of *stare decisis* without some compelling justification.” (Citation omitted)). “*Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike the context of constitutional interpretation, the legislative power is implicated[.]*” *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173, 109 S. Ct. 2363, 2370-2371, 105 L. Ed. 2d 132, 148 (1989), *superseded by statute on other grounds as stated in Turner v. Arkansas Ins. Dept.*, 297 F.3d 751 (2002). The Legislature has had more than eight years to correct this Court’s construction of W. Va. Code § 21-5C-1(e), as set forth in *Adkins*, if it disagreed with it, and it has not done so.

Id., 575 S.E.2d at 438 (emphasis added).

The Court further noted in *Haney* that many of the arguments advanced by the appellant for a different statutory construction were already considered and rejected by the Court in *Adkins*. Accordingly, the Court addressed only the new arguments presented in *Haney*. *Id*

Similarly, in *Verba v. Gaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001) (per curiam), the Court applied the doctrine of *stare decisis* to refuse to reconsider challenges to the cap on the amount recoverable for a noneconomic loss in a medical professional liability action in West Virginia Code Section 55-7B-8 that were previously considered in *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991). The Court stated:

[W]e find no reason to revisit the constitutional issues previously raised in *Robinson*. Rather, we believe that our prior ruling is subject to the judicial doctrine of *stare decisis* which rests on the principle, that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.

Verba, 552 S.E.2d at 410.

The Court in *Verba* considered and rejected a new argument that Section 55-7B-8 violates the separation of powers doctrine of the State Constitution. With respect to that argument, the Court concluded that Article VII, Section 13 of the State Constitution “authorizes the Legislature to enact statutes that abrogate the common law which includes the power to “set reasonable limits on recoverable damages in civil causes of action.” *Id*.

In this action as in *Haney* and *Verba*, the Court should apply the doctrine of *stare decisis* to refuse to consider Petitioners’ public policy and statutory construction challenges to Section 29-12A-5(a)(11). Petitioners have raised no new arguments that this Court has not already rejected in *O’Dell*. For example, with respect to the equal protection arguments *O’Dell* reasoned in part as follows:

Here, the plaintiffs argue that W. Va. Code, 29-12A-5(a)(11), creates two disparate classes of tort victims. However, the line drawn is not without some logic. We note that all persons covered by workers' compensation forfeit their common law tort remedies against their employers, absent willful injury. W. Va. Code, 23-2-6 (1991). That those who are not covered by workers' compensation retain their right to sue their employers for full damages does not mean that our workers' compensation law violates equal protection.

Id., 425 S.E.2d at 558.

The Court continued in *O'Dell*:

In this case, . . . the legitimate state purpose underlying W. Va. Code, 29-12A-5(a)(11), is clear – to enable political subdivisions of the State to obtain affordable liability insurance. That the legislature has chosen to confer immunity on governmental tortfeasors in suits by certain victims and not in actions by others is not, of itself, evidence that the distinction bears no rational relationship to this state interest.

. . . Here, the legislature attempted to remedy a crisis which was threatening the solvency of political subdivisions and their ability to provide the most fundamental of local government services. While we may not agree that the decision to prevent those victims of governmental tortfeasors who have access to workers' compensation benefits from recovering further damages in a civil suit is the best or fairest approach to take to resolve the problem, we cannot say that it does not bear a reasonable relationship to the purpose of the statute.

Id., 425 S.E.2d at 560.

With respect to the statutory construction arguments, *O'Dell* continued in part:

The plaintiffs read this provision as providing immunity to political subdivisions only with regard to suits brought by their own employees for injuries incurred on the job. In essence, they argue that the immunity conferred by W. Va. Code, 29-12A-5(a)(11), is merely duplicative of the immunity from suit by employees conferred upon covered employers under the Workers' Compensation Act. Because these plaintiffs were not employed by the political subdivisions which they seek to hold responsible for their injuries, the plaintiffs contend that the defendants have no immunity in these proceedings.

...

The problem with this argument is that it requires us to read into W. Va. Code, 29-12A-5(a)(11), a term which does not appear there. Indeed, the only references to the term "employee" in the immunity statute are found in W. Va. Code, 29-12A-5(b) and -5(c), which relate to immunity for employees of political

subdivisions who injure third parties. That the omission of this term from the provisions of subsection (a) was not inadvertent is evidenced by the fact that other provisions of the Tort Claims Act make specific reference to suits by employees of the political subdivision. *See* W. Va. Code, 29-12A-18.

...

Finally, to adopt such a construction would place us in a position where we would be holding that the legislature had, in effect, accorded a duplicate immunity in W. Va. Code, 29-12A-5(a)(11), to that which already existed under W. Va. Code, 23-2-6. This would run counter to our normal rule of statutory construction that the legislature is presumed to be aware of its existing statutes. *Hudok v. Board of Educ.*, 187 W. Va. 93, 415 S.E.2d 897 (1992); *State ex rel. Roach v. Dietrick*, 185 W. Va. 23, 404 S.E.2d 415 (1991).

Id., 425 S.E.2d at 562-63, 565.

At last, this Court reasoned in *O'Dell*:

The plaintiffs' final contention is that the use in the statute of the phrase "[a]ny claim covered by workers' compensation law" indicates that W. Va. Code, 29-12A-5(a)(11), was intended to provide immunity only to the extent that the plaintiff is compensated for his or her injuries by the workers' compensation benefits he or she receives. They interpret the word "claim" to mean a claim for workers' compensation and assert that the political subdivision has no immunity from liability for elements of damages, such as pain and suffering, total lost wages, and mental anguish, not compensated by such benefits.

We cannot agree with such a construction of the word "claim." . . . It must be remembered that a workers' compensation claim is not based on negligence. It encompasses a variety of statutory monetary benefits, some of which are included in the normal tort claim. We decline to assume that the legislature intended to use the word "claim" in such a limited fashion. Consequently, we conclude that W. Va. Code 29-12A-5(a)(11), provides immunity to a political subdivision for all damages arising from a tortious injury, not merely for those contemplated by workers' compensation.

Id., 425 S.E.2d at 565 (citation omitted).

More recently, in *Zelenka v. City of Weirton*, 208 W. Va. 243, 539 S.E.2d 750, Syl. Pt. 4 (2000), this Court held that Section 29-12A-5(a)(11) grants immunity to a political subdivision in a wrongful death case even where the recoverable benefits under Workers' Compensation are limited to reasonable funeral expenses. The Court reasoned:

The plaintiff complains of the disparity in recovery available under workers' compensation law and a wrongful death action. In *O'Dell*, however, we rejected the argument that the failure of workers' compensation law to provide compensation for "elements of damages, such as pain and suffering, total lost wages, and mental anguish" means that a claim is not "covered" by workers' compensation under W. Va. Code § 29-12A-5(a)(11). We reiterated in *Brooks v. City of Weirton*[, 202 W. Va. 246, 503 S.E.2d 814, 820 (1998)] that "the mere fact that there is difference between the remedies available under workers' compensation and those available in a wrongful death action does not require the conclusion that there has been 'no recovery of benefits . . . in lieu of damages recoverable in a civil action.'"

. . . [T]he general rule of construction in governmental tort legislation cases favors liability, not immunity. *The statutory provision at issue, however, is clear and unambiguous. Our task, therefore, is not to construe it but, rather to simply apply it to the facts of the case.* The difficulty with the plaintiff's argument is that it requires us to read into W. Va. Code § 29-12A-5(a)(11) the term "meaningful," as defined by the plaintiff, as a qualification of the term "covered." We decline so to do. *The Legislature has clearly provided for immunity under the facts of this case. Therefore, we "may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determination made in areas that neither affect fundamental rights nor proceed along suspect lines.*

Id., 539 S.E.2d at 754-55 (citations omitted) (footnotes omitted) (emphasis added). *See also State ex rel. City of Martinsburg v. Sanders*, 219 W. Va. 228, 632 S.E.2d 914, 920 (2006) (relying on *O'Dell* to again refuse to assign limited meaning to word "claim" in Section 29-12A-5(a)(11) in light of Legislature's expressed intention regarding immunity).

Petitioners' reliance on *Michael v. Marion County Board of Education*, 198 W. Va. 523, 482 S.E.2d 140 (1996), which is cited on page 18 of Petitioners' Brief, is misplaced. *Michael* held that the immunity from liability extended to political subdivisions by Section 29-12A-5(a)(11) includes immunity from "deliberate intent" causes of action brought pursuant to West Virginia Code Section 23-4-2(c)(2). *Id.*, 482 S.E.2d at Syl. Pt. 4. In reaching its holding, the Court explained its decision in *O'Dell* as follows:

Just as we declined in *O'Dell* to read the term "employee" into West Virginia Code § 29-12A-5(a)(11) for the purpose of limiting immunity to those cases in which a political subdivision was sued by its own employee, we similarly refuse

to impose a statutory exception for “deliberate intent” causes of action when such limiting language does not appear within the statute. *See* 188 W. Va. at 610, 425 S.E.2d at 565.

...

We explained in *Randall v. Fairmont City Police Department*, 186 W. Va. 336, 412 S.E.2d 737 (1991), that “the general rule of construction . . . favor[s] liability, not immunity: *unless the legislature has clearly provided for immunity under the circumstances. . . .*” *Id.* at 347, 412 S.E.2d at 748 (emphasis supplied). *Finding the provisions of West Virginia Code § 29-12A-5(a)(11) free from ambiguity, we previously determined in O’Dell that the Randall rule favoring liability over immunity in certain instances was inapplicable.* 188 W. Va. at 609, 425 S.E.2d at 564.

Id., 482 S.E.2d at 145 (emphasis added).⁶

Contrary to the argument on page 18 of Petitioners’ Brief, this Court in *O’Dell* correctly concluded that by using the term “any” the Legislature meant to exclude all potential claims. As the Court held in *Michael*, “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” *Michael*, 482 S.E.2d at Syl. Pt. 3. Moreover, this Court has held that “[i]n the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meanings.” *Thomas v. Firestone Tire & Rubber Co.*, 164 W. Va. 763, 266 S.E.2d 905, Syl. Pt. 1 (1980). Significantly, in *Thomas* this Court further held that “[t]he word ‘any’ when used in a statute, should be construed to mean any.” *Id.* at Syl. Pt. 2 (emphasis added). In *Thomas*, the Court concluded that “[t]he plain meaning of [West Virginia Code Section] 46A-2-

⁶ The Court further noted the significance of the fact that the Tort Claims Act was enacted in 1986, which was three years after amendments to West Virginia Code Section 23-4-2(c), and stated: “Because the Legislature is presumed to be aware of its own laws, *we can only assume that the omission of any limiting language from [Section] 29-12A-5(a)(11) is indicative of an intention to provide a broad, all-encompassing type of immunity.*” *Id.*, 482 S.E.2d at 146 n.13 (emphasis added). In *O’Dell*, this Court properly relied on a similar assumption that the Legislature was aware of the immunity that already existed under West Virginia Code Section 23-2-6, and did not mean to accord a duplicate immunity under Section 29-12A-5(a)(11). Moreover, not only is the Legislature presumed to be aware of its own laws, it is also presumed not to be redundant and futile. *See Newark Ins. Co. v. Brown*, 218 W. Va. 346, 624 S.E.2d 783, Syl. Pt. 4-5 (2005) (holding it is always presumed that Legislature will not enact meaningless or useless statute).

122 requires that the provisions . . . regulating improper debt collection practices in consumer credit sales must be applied alike to *all* who engage in debt collection, be they professional debt collectors or creditors collecting their own debts.” *Id.* at Syl. Pt. 3 (emphasis added). The Court reasoned as follows:

The Court must determine the meaning of the word “any” in the context of this statute.

A preeminent authority, 1 The Oxford English Dictionary (reissue, 1970) at p. 378, would offer the following definitive commentary:

1. Gen. An indeterminate derivative of one, or rather of its weakened adj. form a, an, in which the idea of unity (or, in plural, partivity) is subordinated to that of indifference as to the particular one or ones that may be selected. In sing. = A-no matter which; a-whichever, of whatever kind, of whatever quantity. In pl. = Some-no matter which, of what kind, or how many.

Support for the Oxfordian view can be found as well in Webster’s New Collegiate Dictionary (1979), at p. 51; Black’s Law Dictionary 86 (5th ed. 1979); Ballentine’s Law Dictionary 80 (3rd ed. 1969). For an overview of judicial decisions which have dealt with the meaning of the word, see generally 3A Words and Phrases, “Any” (Perm. Vol. 1953); *Id.*, “Any” (Cum. Suppl. 1979).

This Court has also considered the meaning of the word “any.” We cited a basic rule of statutory construction that in the absence of specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning. *Tug Valley Recovery Center v. Mingo County Commission*, W. Va., 261 S.E.2d 165 (1979). See also, *State v. Cole*, W. Va., 238 S.E.2d 849 (1977); *Wooddell v. Dailey*, W. Va. 230 S.E.2d 466 (1976); *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970); *Wilson v. Hix*, 136 W. Va. 59, 65 S.E.2d 717 (1951); *Miners v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1931).

We are impressed that the word “any” represents a fundamental and irreducible concept. It is a statute wrought from the letters A, N and Y; a monument to an idea; an artistic rendering designed to signify a meaningful unit of English language. The Court is led to the unavoidable conclusion that the word “any,” when used in a statute, should be construed to mean, in a word, any.

Id., 266 S.E.2d at 908-09 (emphasis added).

Far from coming to a “sweeping and incorrect conclusion” as suggested on page 18 of Petitioners’ Brief, the Court in *O’Dell* emphasized the Legislature’s use of the term “any,”

quoted Syllabus Points 1 and 2 from *Thomas*, and properly concluded that Section 29-12A-5(a)(11) “clearly contemplates immunity for political subdivisions from tort liability in actions involving claims covered by workers’ compensation even though the plaintiff was not employed by the defendant political subdivision at the time of the injury.” *O’Dell*, 425 S.E.2d at 564. *See also Hose v. Berkeley Cnty. Planning Comm’n*, 194 W. Va. 515, 460 S.E.2d 761, 768-69 (1999) (relying on *Thomas* and *O’Dell* to hold that West Virginia Code Section 29-12A-5(a)(9) clearly contemplates immunity for political subdivisions from tort liability for any loss or claim resulting from licensing powers or functions, regardless of the existence of special duty relationship).

Finally, the argument in Petitioners’ Brief on pages 18 through 19 based on the absurd results doctrine frankly is itself absurd. This Court has emphasized the limited nature of the absurd results doctrine as follows:

We have previously signaled that it is the Court’s duty “to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.” *State v. Kerns*, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990). This does not mean, however, that we are at liberty to substitute our policy judgments for those of the Legislature whenever we deem a particular statute unwise. As one commentator has astutely observed,

The absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said.

2A Norman J. Singer, *Statutes and Statutory Construction* § 46:07, at 199 (6th ed. 2000) (footnote omitted). The absurd results doctrine merely permits a court to favor an otherwise reasonable construction of the statutory text over a more literal interpretation where the latter would produce a result demonstrably at odds with any conceivable legislative purpose. *See State ex rel. McLaughlin v. Morris*, 128 W. Va. 456, 461, 37 S.E.2d 85, 88 (1946) (citing *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E.350 (1938)). *It does not, however, license a court to simply ignore or rewrite statutory language on the basis that, as written, it produces an undesirable policy result.*

Taylor-Hurley v. Mingo Cnty. Bd. of Educ., 209 W. Va. 780, 551 S.E.2d 702 (2001) (emphasis added).

The Court did not ignore the doctrine of absurd results in *O'Dell*. The discussion in *O'Dell* began with a statement of the Legislature's purposes and findings in support of the Tort Claims Act. *O'Dell*, 425 S.E.2d at 556. The Court ultimately concluded that Section 29-12A-5(a)(11) bears a reasonable relationship to the legitimate stated purpose of enabling political subdivisions to obtain affordable liability insurance. *Id.*, 425 S.E.2d at 558-61. In light of this reasonable relationship, the doctrine of absurd results is simply inapplicable.

For these reasons, this Court should affirm the Circuit Court's reliance on § 29-12A-5(a)(11) and *O'Dell* in concluding that the Elkins Respondents are immune from liability. This Court should further decline Petitioners' invitation to overturn almost two decades of sound precedent and judicial deference to the Legislature's findings and unambiguous choice of words in drafting the Act.

2. The City of Elkins' insurance policy with National Union does not waive immunity from liability under the Tort Claims Act.

The Circuit Court properly held as a matter of law that by purchasing an insurance policy, the City of Elkins did not waive its statutory immunity under Section 29-12A-5(a)(11). West Virginia Code Section 29-12A-16(d) expressly provides:

The purchase of liability insurance, or the establishment and maintenance of a self-insurance program, by a political subdivision does not constitute a waiver of any immunity it may have pursuant to [the Tort Claims Act] or any defense of the political subdivision or its employees.

This Court upheld the constitutionality of Section 29-12A-16(d) in *Pritchard v. Arvon*, 186 W. Va. 445, 413 S.E.2d 100 (1991). The Court held:

W. Va. Code, 29-12A-16(d) [1986], which provides that the purchase of liability insurance or the establishment of an insurance program by a political subdivision

does not constitute a waiver of any immunity or defense of the political subdivision or its employees, does not violate equal protection principles as set forth in W. Va. Const. art. III, § 10.

Id. at Syl. Pt. 7.

The Court reasoned as follows:

As to whether this statutory provision bears a reasonable relationship to a proper governmental purpose, we conclude that it does. As pointed out by the defendant Arvon, by limiting a political subdivision's liability, the political subdivision is thereby encouraged to purchase liability insurance to defend itself for actions for which there is no immunity. As a result, one of the legislative objectives of the Act, which is to make insurance more available and more affordable to political subdivisions, is met.

As we stated in *Randall*: "We believe that the qualified tort immunity provisions of the Act are rationally based and reasonably relate to a proper governmental purpose, specifically, . . . to stabilize the political subdivisions' ability to obtain affordable liability insurance coverage by defining the risks to be covered." *Randall*, 186 W. Va. At 346, 412 S.E.2d at 747.

Id., 413 S.E.2d at 106-07.

Notwithstanding the plain language in Section 29-12A-16(d) and its application in *Pritchard*, Petitioners' Brief argues beginning on page 20 that the City of Elkins's insurance policy does not contain sufficient language to preserve immunity under *Bender v. Glendenning*, 219 W. Va. 174, 179, 632 S.E.2d 330, 336 (2006) (per curiam). This argument is wholly without merit for several reasons.

Bender did not directly address the question whether a political subdivision waived immunity under the Tort Claims Act. Instead, the appellants in *Bender* argued that the insurance policy at issue provided coverage for criminal and intentional acts of sexual misconduct alleged against Donald Ray Glendenning, Jr., who was a former Webster County Board of Education employee. The Court focused its inquiry on the insurance policy's exclusionary language and

merely found that the insurance policy at issue in that case provided insurance coverage for the acts of sexual misconduct. *Id.*, 623 S.E.2d at 333. The Court reasoned as follows:

Reviewing the Continental policy at issue in this case, we are able to identify only one provision that attempts to exclude coverage in the case *sub judice*. Endorsement Number 6 of the policy states,

It is agreed that:

A. The terms of the policy which are in conflict with the statutes of the state of West Virginia wherein certain provisions and coverages included under this policy are not permitted and are hereby amended to cover only those provisions and coverages as apply and conform to such statutes.

While this clause purportedly seeks to preserve the immunities granted to political subdivisions and its employees by the West Virginia Governmental Tort Claims Act, we do not find that it is sufficiently "conspicuous, plain, and clear" so as to clearly identify the precise limitation of liability it is intended to impart. Syl. Pt. 10, in part, National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 356 S.E.2d 488. See also Syl. Pt. 5, id. ("Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated."). Because there are no other provisions in the Continental policy which seek to exclude from coverage an insured's criminal or intentional acts, we find that coverage existed under the subject policy for Mr. Bender's claims against Mr. Glendenning.

Id., 632 S.E.2d at 338 (emphasis added).

Justices Benjamin and Maynard filed separate dissenting opinions in *Bender*. Both dissents opined that the clear and unambiguous language in Section 29-12A-16(d) should have controlled. For example, Justice Benjamin reasoned as follows:

While the majority acknowledges (albeit in a "*but see*" parenthetical) the presence of [Section 29-12A-16(d)], I must disagree with its description of the same. The majority states this provision provides "purchase of an insurance policy does not *automatically* waive immunity provided by the Act." (Emphasis added). Contrary to this suggestion by the majority, the plain language of the statute unambiguously provides that the terms of the insurance policy *does not* operate to *wave* statutory immunity. I find no equivocation whatsoever in the language

chosen by the Legislature. The statute does not provide that the policy must specifically preserve statutory immunity as the majority deems is required. Similarly, W. Va. Code § 29-12A-5(a)(4) (2004), which authorizes the State Board of Risk and Insurance Management to procure insurance on behalf of the state and its political subdivisions, unambiguously states “[t]hat nothing herein shall bar the insurer of political subdivisions from relying on any *statutory immunity* granted such political subdivisions against claims or suits” and does not require a specific preservation of the same in the policy itself. (Emphasis added).

Bender, 632 S.E.2d at 340-41 (Benjamin, J., dissenting) (footnotes omitted).⁷

Additionally, Justice Maynard reasoned:

The majority, however, reads W. Va. Code § 29-12A-9(a) to indicate that when a policy of insurance provides coverage for a political subdivision, the terms of such insurance contract determine the rights and responsibilities of the insurer and its insureds. I believe that this interpretation of W. Va. Code § 29-12A-9(a) is wrong. Significantly, it conflicts with W. Va. Code § 29-12A-16(d) (2003) which provides that “[t]he purchase of liability insurance . . . by a political subdivision does not constitute a waiver of any immunity it may have pursuant to the [Tort Claims Act] or any defense of the political subdivision or its employees.” Further I do not believe that we should read W. Va. Code § in a manner that effectively voids all other provisions of the Tort Claims Act because to do so violates this Court’s rules of construction.

Id., 632 S.E.2d at 344 (Maynard, J., dissenting).

In this action, the Circuit Court properly held that the City of Elkins preserved its statutory immunity to the extent it was required to do so under *Bender*, reasoning as follows:

Here, the National Union policy contained a Certificate of Liability Insurance that clearly states, “*IT IS A CONDITION PRECEDENT OF COVERAGE UNDER THE POLICIES THAT THE ADDITIONAL INSURED DOES NOT WAIVE ANY STATUTORY OR COMMON LAW IMMUNITY CONFERRED UPON IT.*” The Plaintiffs argue the City’s insurance policy did not contain appropriate language and/or exclusion which specifically preserved its statutory immunity. *The West Virginia Supreme Court of Appeals has recently recognized that it is irrelevant that the above language appears in the Certificate of Liability Insurance, as*

⁷ Justice Benjamin further explained that the majority opinion improperly avoided discussion of the applicable statutes by citing to *Parkulo v. West Virginia Board of Probation & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996), which held in Syllabus Point 5 that the terms of an insurance contract control where they grant greater or lesser immunities than those found in case law. Justice Benjamin found *Parkulo* to be inapplicable: “As we recognized in *Parkulo*, legislative direction – such as that found in our statutes – trumps arguably contrary provisions found in the insurance policy at issue. The majority decision now brings this accepted principle into question. . . . To my knowledge, we have never held that the terms of an insurance policy may negate statutory law.” *Bender*, 632 S.E.2d at 341-42.

opposed to the body of the insurance policy. See Hess v. W. Va. Dept. of Corrections, 227 W. Va. 15, 705 S.E.2d 125 (2010).³

³In *Hess*, the West Virginia Supreme Court of Appeals stated,

In analyzing whether qualified immunity bars the instant negligence complaint, the first determination that must be made is whether the relevant insurance policy waives the defense of qualified immunity. . . . In the instant case, the insurance policy at issue . . . does not waive the Appellant's qualified immunity. Rather, the Certificate of Liability Insurance to the policy expressly provides that the additional insured [Division of Corrections] does not waive any statutory or common law immunities conferred upon it.

227 W. Va. at 5, 705 S.E.2d at 130. Moreover, the West Virginia Supreme Court of Appeals has noted that "[a]s a general rule, legally valid principles of law set out in an opinion as dicta of the Supreme Court should not be disregarded by a trial court without a compelling reason." *West Virginia Dept. of Transp. v. Parkersburg Inn, Inc.*, 671 S.E.2d 693 (W. Va. 2008).

Furthermore, an endorsement is present within the National Union policy that incorporates the Certificate of Liability Insurance into the original policy, thereby confirming that the immunities under the Act were preserved. On July 1, 2008, Endorsement No. 10 of the National Union policy became effective and formed a part of Policy No. RMCA 160-76-18. This endorsement explicitly modified the original policy,

It is agreed that the insurance afforded by this insurance to each West Virginia Political Subdivision, charitable or public service organization or emergency services agency covered by Certificates of Liability Insurance on file with the company, applies subject to the following provisions: . . . 2. *It is agreed that provisions of the Certificate of Liability Insurance issued to each West Virginia Political Subdivision, charitable or public service organization, or emergency services agency are incorporated into this policy.*

Based on this amendment, the language contained within the Certificate of Liability Insurance was irrevocably incorporated into the policy as if it has existed at the date of the policy's inception. *Therefore, this Court is of the opinion that this clause is "sufficiently 'conspicuous, plain, and clear' so as to clearly identify the precise limitation of liability it is intended to impart."* *Id.* at 182, 632 S.E.2d at 338 (quoting Syl. Pt. 10, in part, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734 (1987)).

A.R. at 601-03 (emphasis added).

Petitioners' attempt to distinguish *Hess v. West Virginia Department of Corrections*, 227 W. Va. 15, 705 S.E.2d 125 (2010), which was cited by the Circuit Court in support of its holding, is unavailing. Incredibly, they argue on page 22 of Petitioners' Brief that *Hess* is inapplicable because Syllabus Point 4 of *Hess* quoted from Syllabus Point 6 of *Parkulo v. West Virginia Board of Probation & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996), which states:

Unless the applicable insurance policy otherwise expressly provides, a State agency or instrumentality, as an entity, is immune under common-law principles from tort liability in W. Va. Code § 29-12-5 actions for acts or omissions in the exercise of a legislative or judicial function and for the exercise of an administrative function involving the determination of fundamental governmental policy.

Id.

Apparently, Petitioners do not believe that the holdings in *Parkulo* should apply to this action, which involves the question of whether a political subdivision is immune from liability. The problem with Petitioners' argument is that in *Bender*, which Petitioners argue does apply, this Court quoted also quoted a Syllabus Point from *Parkulo*. Thus, Syllabus Point 4 in *Bender* states:

“If the terms of the applicable insurance coverage and contractual exceptions thereto acquired under W. Va. Code § 29-12-5 expressly grant the State greater or lesser immunities or defenses than those found in the case law, the insurance contract should be applied according to its terms and the parties to any suit should have the benefit of the terms of the insurance contract.” Syllabus point 5, *Parkulo v. West Virginia Board of Probation & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).

As noted above, Justice Benjamin's dissent reasoned that *Parkulo* should not have been applied in *Bender* either. To the extent that the majority in *Bender* relied on *Parkulo*, however, it is disingenuous for Petitioners to argue that *Parkulo* – and by extension *Hess* – does not apply in this action. Stated otherwise, if the Syllabus Points in *Parkulo* support the Court's holding in

Bender, and if the Syllabus Points in *Parkulo* support the Court's holding in *Hess*, then the Syllabus Points in *Parkulo* and *Hess* must support the Circuit Court's holding in this action.

In any event, as discussed above, the Circuit Court further held that Endorsement No. 10 expressly incorporated the Certificate of Liability Insurance into the insurance policy itself. Accordingly, the Court did not limit its discussion to a consideration of the Certificate of Liability Insurance as Petitioners argue.

D'Annunzio v. Security-Connecticut Life Insurance Co., 186 W. Va. 39, 410 S.E.2d 275 (1991), and *Romano v. New England Mutual Life Insurance Co.*, 178 W. Va. 523, 362 S.E.2d 334 (1987), which are cited on pages 21 and 22 of Petitioners' Brief, are readily distinguishable. For example, in *D'Annunzio*, the Court resolved conflicting dates in the "Policy Data Page" and the policy itself regarding the "issue date" against the insurance carrier. *D'Annunzio*, 410 S.E.2d at 279. In *Romano*, the Court held that the insurance carrier could not surprise the beneficiary by relying on an "actively-at-work" condition to deny coverage where that condition was not contained in the promotional materials that induced the insured to purchase the policy shortly before his death. *Romano*, 362 S.E.2d at 340. Unlike in *D'Annunzio* and *Romano*, in this action there is no conflict between the language in the insurance policy and Certificate of Liability Insurance. Indeed, as the Court properly found based on Endorsement No. 10, the language contained within the Certificate of Liability Insurance was irrevocably incorporated into the policy as if it had existed at the date of the policy's inception. Accordingly, the Court's conclusion that this clause is "sufficiently 'conspicuous, plain, and clear' so as to clearly identify the precise limitation of liability it is intended to impart" is unassailable.

Finally, the argument on page 23 of Petitioners' Brief that the Circuit Court prematurely dismissed their claims without permitting a sufficient inquiry into whether any claimed coverage

exclusion was of the free will and volition of the City of Elkins is specious. This argument was never presented to the Circuit Court for consideration, and, therefore, it is waived. *See Mayhew v. Mayhew*, 205 W. Va. 490, 519 S.E.2d 188, 204 (1999) (holding that, as a general rule, this Court will not pass upon an issue raised for the first time on appeal); *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535, 544 (1996) (absent most extraordinary circumstances, legal theories not raised properly in lower court cannot be raised for first time on appeal).

Moreover, if Petitioners believed that discovery was necessary to respond to the Motions for Summary Judgment, despite the fact that Petitioners' themselves filed such motions, then they could have filed an affidavit pursuant to West Virginia Rule of Civil Procedure 56(f). Rule 56(f) provides that a party opposing a motion for summary judgment may file an affidavit stating reasons he cannot present by affidavit facts essential to justify his opposition, and the court may order a continuance to permit affidavits to be obtained or discovery to be had. No Rule 56(f) affidavit was filed. In fact, other than producing certified copies of insurance policies at the Court's request, the parties did not engage in meaningful discovery in this action until after the Circuit Court entered its Order. *See* A.R. at 1-5(a).

In any event, the Circuit Court properly held that the only case cited by Petitioners in support of the argument that limiting terms and conditions in a policy must be of the free will and volition of the political subdivision, *Gibson v. Northfield Insurance Co.*, 219 W. Va. 40, 631 S.E.2d 598 (2005), is inapposite. *Gibson* involved the question whether a political subdivision's insurance policy was a custom-designed insurance policy within the meaning of West Virginia Code Section 29-12A-16(a). The Court held:

“West Virginia Code § 29-12A-16(a) (1992) conveys broad discretion to both the West Virginia State Board of Risk and Insurance Management, as well as governmental entities, with regard to the type and amount of insurance to obtain. Consequently, when an insurer issues a custom-designed insurance policy to a

governmental entity pursuant to the Governmental Tort Claims and Insurance Reform Act, West Virginia Code §§ 29-12A-1 to -18 (1992), that entity may incorporate language absolutely limiting liability under the policy, even if such language would otherwise violate the provisions of West Virginia Code § 33-6-31(b) (1996).” Syllabus Point 1, *Trent v. Cook*, 198 W. Va. 601, 482 S.E.2d 218 (1996).

An insurance company may incorporate limiting terms and conditions that violate W. Va. Code, 33-6-31 into a governmental entity’s insurance policy. However, to be permissible under W. Va. Code, 29-12A-16(a) [2003], the limiting terms and conditions in the insurance policy must clearly be “determined by the political subdivision in its discretion.” The limiting terms and conditions must therefore, be the result of some choice, judgment, volition, wish or inclination as a result of investigation or reasoning by the governmental entity. The terms and conditions are not enforceable merely because they are different from those found in the typical insurance policy. To the extent that *Trent v. Cook*, 198 W. Va. 601, 482 S.E.2d 218 (1996) says otherwise, it is modified.

Id. at Syl. Pt. 4 and 5. *Cf. Reed v. Orme*, 221 W. Va. 337, 655 S.E.2d 83 (2007) (per curiam) (holding that policy issued to school board was custom-designed policy that was not required to comply with statute governing inclusion of uninsured motorist coverage).⁸

In contrast to *Gibson*, this action does not involve the question whether National Union’s insurance policy is a custom-designed policy within the meaning of Section 29-12A-16(a). Manifestly, the terms and conditions at issue in this action preserve immunity in conformity with Section 29-12A-5(a) – they do not violate any statutory provisions. The City of Elkins’s discretion is simply not at issue as the Circuit Court properly held.

⁸ Although it should not be an issue because this action does not involve an issue regarding a custom-designed policy, it is worth noting that in *Salmons v. National Union Fire Insurance Co.*, No. 3:06-0288, 2007 WL 2900352, *4 (S.D.W. Va. Oct. 3, 2007), the court rejected the plaintiffs’ argument that only the political subdivision may limit UIM coverage through a custom-designed policy. The court reasoned that *Gibson* did not have to address whether BRIM also has authority to limit UIM coverage, that the language of West Virginia Code Section 29-12-5a gives such authority to BRIM, and that BRIM’S broad discretion and ability to limit coverage, even when it is contrary to Section 33-6-31(b), was recognized in *Trent v. Cook*, 198 W. Va. 601, 482 S.E.2d 218 (1996).

V. CONCLUSION

For all of the foregoing reasons, this Court should affirm the Circuit Court's grant of summary judgment to the Elkins Respondents in all respects.

Dated this 22nd day of November, 2011.

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their named insureds, or to provide coverage for the loss which is the subject matter of this litigation, and in support thereof states as follows:

STATEMENT OF PERTINENT FACTS

1. Plaintiff Jeffrey Jenkins (hereinafter "Plaintiff Jenkins") was involved in an automobile accident on October 27, 2008. See Complaint, ¶ 1.
2. Plaintiff Jenkins was struck by a vehicle driven by Stephen Stanton (hereinafter Defendant Stanton"), who was operating a vehicle owned by the City of Elkins (hereinafter "the City") during the course and scope of his employment with same. *Id.*
3. Plaintiff Jenkins was employed by Bombardier Aerospace WVAC (hereinafter "Bombardier") and was operating a Bombardier vehicle within the course and scope of his employment when the accident occurred.
4. The City is insured by National Union Fire Insurance Company. See the City's Notice of Filing, **Exhibit 1**.
5. Bombardier is self-insured, its third-party administrator being Gallagher Bassett. See Bombardier's Notice of Amended Filing, **Exhibit 2** (Notice of Amended Filing and accompanying policy attached thereto in pertinent part); see also **Exhibit 3**, Third-Party Defendant, Bombardier Aerospace Corporation and Its Third-Party Administrator, Gallagher Bassett Services, Inc.'s Response to Defendants City of Elkins' and Stephen R. Stanton's Motion to Dismiss.
6. Westfield had also issued a personal policy of insurance (policy WN 5047 09/07) (hereinafter used interchangeably as "Westfield Policy" or "Westfield's Policy") to Jeffrey Jenkins and M. Jean McNabb (hereinafter collectively referred to as

"Plaintiffs") which was in effect at the time of the accident. A copy of said policy is attached hereto as **Exhibit 4**.

7. Plaintiff Jenkins suffered bodily injuries as a result of the occurrence. See Complaint, ¶ 2.
8. Plaintiff McNabb claims a loss of consortium as a result thereof. *Id.*
9. It is well established in West Virginia that unless a policy distinguishes loss of consortium from bodily injury, a loss of consortium claim is a derivative action such that recovery is limited to that which the injured party can recover under a policy. *Davis v. Foley*, 193 W.Va. 595, 598, 457 S.E.2d 532, 535 (1995).
10. The City contends Plaintiffs' claims against both Defendant Stanton and The City are barred by the Governmental Tort Claims and Insurance Reform Act, W. Va. Code §§ 29-12A-1 *et seq.* (hereinafter "the Act"). See Defendants' Motion to Dismiss.
11. Defendant Stanton admitted fault and was cited for failure to yield the right-of-way. See **Exhibit 5**, State of West Virginia Uniform Traffic Crash Report.

STANDARD OF REVIEW

The summary judgment mechanism "plays an important role in litigation in this State" and is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if, in essence, there is no real dispute as to salient facts or if only a question of law is involved. *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994). Summary judgment should be granted where "it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2011, true and accurate copies of the foregoing "Brief of Respondents City of Elkins and Stephen P. Stanton" were deposited in the U.S. Mail contained in postage-paid envelopes addressed to all other parties to this appeal as follows:

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