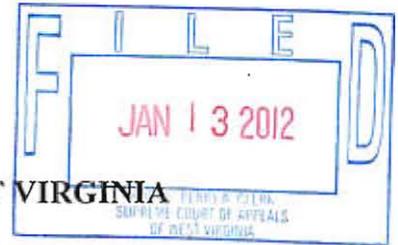


No. 11-1059



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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AT CHARLESTON

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JEFFREY JENKINS AND M. JEAN MCNABB,

Petitioners and  
Plaintiffs Below,

v.

CITY OF ELKINS, A MUNICIPAL CORPORATION,  
AND STEPHEN P. STANTON,

Respondents and  
Defendants Below,

And

WESTFIELD INSURANCE COMPANY,

Respondent and  
Third-Party Plaintiff Below,

v.

AIG INSURANCE a/k/a NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA,

Respondent and  
Third-Party Defendant Below,

And

BOMBARDIER AEROSPACE CORPORATION,

Respondent and  
Third-Party Defendant Below.

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RESPONSE ON BEHALF OF RESPONDENT NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH, PA. TO CROSS-ASSIGNMENT OF  
ERROR IN BRIEF OF WESTFIELD INSURANCE COMPANY

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## I. SUMMARY OF THE ARGUMENT

As set forth more fully in the Brief of Respondent National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”), the Circuit Court properly granted summary judgment to National Union because there are no genuine issues of material fact and as a matter of law National Union is not liable for any damages sustained by the Petitioners, Jeffrey Jenkins and M. Jean McNabb, based on the immunity of the City of Elkins and Stephen Stanton (“Elkins Defendants”) pursuant to the Governmental Tort Claims and Insurance Reform Act (“Tort Claims Act”). As is set forth in *Respondents City of Elkins’ and Stephen P Stanton’s Response to Cross-Assignment of Error in Brief of Westfield Insurance Company’s* (“Elkins’ Brief”) well articulated brief, Westfield Insurance Company (“Westfield”) lacks standing to raise the issue of the application of West Virginia Code Section 17D-4-12(b)(2) because it was not prejudiced by the Circuit Court’s holding on the issue, and Westfield’s argument fails because the Elkins Defendants are immune from liability such that Petitioners are unable to recover under the National Union policy. Additionally, the vehicle being driven by Stephen Stanton at the time of the accident was owned by the City of Elkins, a political subdivision; and, as such, according to W.Va. Code § 17D-2A-2, 3 and 17D-6-1 the government owned vehicles are excluded from the scope of the Motor Vehicle Safety Responsibility Law. Furthermore, one must go no further than the clear language of W.Va. Code § 17D-4-12(b)(2) to conclude that the statute does not apply to the Elkins Defendants to require the minimum amount of coverage under the National Union policy because there is no “liability imposed by law,” as the Elkins Defendants are completely immune from liability pursuant to the Tort Claims Act.

## II. ARGUMENT

It appears from Westfield's brief that it has joined Petitioners' argument that the National Union policy should provide coverage for the injuries sustained by Mr. Jenkins regardless of the immunity protection provided by the Tort Claims Act. To the extent Westfield joins this argument, National Union incorporates its previously filed Response to Petition for Appeal as if fully stated herein. Furthermore, the majority of Westfield's newly presented arguments were completely addressed in the Elkins' Brief. Therefore, in order to save this Court's valuable time, those same arguments are not repeated herein; although National Union is in agreement and joins in the arguments contained within the Elkins' Brief.

**A. The clear, unambiguous language of the Motor Vehicle Safety Responsibility Law provides that motor vehicles owned by a political subdivision are outside the scope of the statute.**

Although Westfield argues that W.Va. Code § 17D-4-12(b)(2) must apply to require National Union to provide the minimum statutorily required liability insurance coverage for Petitioners' claims, this argument is without merit. A closer reading of the Motor Vehicle Safety Responsibility Law reveals that vehicles owned by a political subdivision do not fall within the statute. Specifically, W.Va. Code § 17D-2A-2 (1982) provides as follows:

**Scope of article.** This article applies to the operation of all motor vehicles required to be registered to have proof of security pursuant to article three, chapter seventeen-A of this Code, with the exception of motor vehicles owned by the State, any of its political subdivisions or by the federal government.

This same exception is again noted in W.Va. Code § 17D-2A-3(e) (2006), which provides:

This article does not apply to any motor vehicle owned by the state or by a political subdivision of this state, nor to any motor vehicle owned by the federal government.

Lastly, this exact exception was noted in W.Va. Code § 17D-6-1 (1951), which provides:

This chapter shall not apply with respect to any vehicle owned by the United States, this State or any political subdivision of this State or any municipality therein.

Clearly, the Legislature left no doubt political subdivisions are not subject to the requirements of the Motor Vehicle Safety Responsibility Law.

Certainly, it is undisputed that the City of Elkins is a political subdivision. This Court addressed the question of what constituted a political subdivision for purposes of the Motor Vehicle Safety Responsibility Law in the matter of Dotts v. Taressa J.A., 182 W.Va. 586, 390 S.E.2d 568 (1990). In Dotts, the Court concluded that a transit authority did not fall within the definition of “political subdivision” for purposes of exemption from the requirements of the Motor Vehicle Safety Responsibility Law. However, unlike Dotts, the present action involves a city of the State of West Virginia, specifically the City of Elkins. Clearly, a city falls within the definition of a “political subdivision.” In Kucera v. City of Wheeling, 153 W.Va. 531, 170 S.E.2d 217 (1969), this Court determined that the City of Wheeling was a political subdivision. This Court stated “in numerous jurisdictions throughout the land cities are held to be political subdivisions under various types of statutes and constitutional provisions . . . Such entities are considered to be an incorporation of inhabitants of specified area for purposes of local government.” Id. at 536-537 (citations omitted). It is evident that the City of Elkins is a political subdivision of the State of West Virginia, and as such is not subject to the requirements of the Motor Vehicle Safety Responsibility Law.

**B. If the Court determines that the City of Elkins is subject to the Motor Vehicle Safety Responsibility Law, Westfield’s argument still fails.**

As correctly noted in the Elkins’ Brief, Westfield’s principle cross-assignment of error is that if National Union is not required to pay the stated policy limits allowed under the policy, it still must pay the mandatory minimum limits provided by W.Va. Code § 17D-4-12(b)(2). The

Circuit Court correctly held that “[b]ecause Defendant Stanton and the City of Elkins are **immune from liability**, this Court is of the opinion that National Union is not required to pay for the Plaintiffs claims.” Joint Appendix at 562 (emphasis added). It is important to note that, as correctly stated by the Circuit Court, the Elkins Defendants are “immune from liability” pursuant to the Tort Claims Act, and as such W.Va. Code § 17d-4-12(b)(2) is inapplicable as it relates to the National Union policy. Westfield correctly quoted the pertinent statutory language contained in W.Va. Code § 17D-4-12(b)(2), but failed to recognize the operative language contained therein. W.Va. Code § 17D-4-12(b)(2) provides that a policy of insurance:

Shall insure the person named therein and any other person, as insured, using any such vehicle or vehicles with the express or implied permission of such named insured, **against loss from the liability imposed by law for damages** arising out of the ownership, operation, maintenance or use of such vehicle or vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such vehicle, as follows: Twenty thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, forty thousand dollars because of bodily injury to or death of two or more persons in any one accident , and ten thousand dollars because of injury to or destruction of property of others in any one accident.

(emphasis added). As is clear from the unambiguous language of the statute, in order for the minimum liability limits of W.Va. Code § 17D-4-12(b)(2) to apply, there must be “liability imposed by law for damages.” As is clear from the Tort Claims Act, the Elkins Defendants are entitled to complete immunity from Petitioners’ claims due to the fact that he received workers’ compensation benefits. Because the Elkins Defendants are completely immune, there is no “liability imposed by law,” and as such the minimum financial responsibility requirements of W.Va. Code § 17D-4-12(b)(2) do not apply.

No matter the way one might examine the facts of the case *sub judice*, there is not a question that the Elkins Defendants procured an insurance policy with liability limits that far exceeded the statutory minimums outlined by W.Va. Code § 17D-4-12(b)(2). This case was never about whether the Elkins Defendants had an insurance policy in place that might cover the loss. Quite simply, the clear, unambiguous language of the Tort Claims Act provides complete immunity to the Elkins Defendants such that they are not liable for the Petitioners' damages.

### **III. CONCLUSION**

Therefore, for all of the foregoing reasons, the reasons originally set forth in the Brief of Respondent National Union Fire Insurance Company of Pittsburgh, Pa. and for other reasons that may be apparent, the lower court's order granting summary judgment to both the Elkins Respondents and National Union should be affirmed.

**NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA**

**By: SPILMAN THOMAS & BATTLE, PLLC**



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**CERTIFICATE OF SERVICE**

I, Glen A. Murphy, counsel for National Union Fire Insurance Company of Pittsburgh, PA, do hereby certify that I have served a true copy of the foregoing **Response on Behalf of Respondent National Union Fire Insurance Company of Pittsburgh, Pa. to Cross-**

Assignment of Error in Brief of Westfield Insurance Company, upon the following, by placing the same in the United States mail, first class, postage prepaid, and addressed as follows on January 13, 2012:

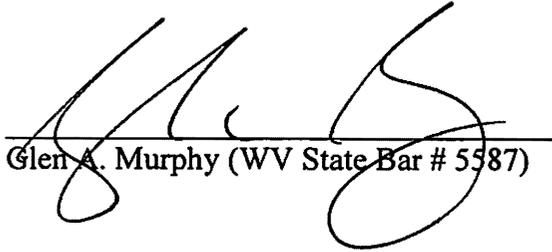
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