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FILED
OCT 9 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

October 7, 2013

Rory L. Perry II, Clerk of Court
Supreme Court of Appeals of West Virginia
State Capitol Room E-317
1900 Kanawha Boulevard East
Charleston, West Virginia 25305

Re: ***Lorraine M. Upchurch, et al. v. McDowell County 911, et al.***
Docket No. 12-C-0824
Appeal from final order of the Circuit Court of Kanawha County (10-C-72)

Dear Mr. Perry:

I submit this letter to you pursuant to Rule 10 (i) of the West Virginia Rules of Appellate Procedure. Specifically, this letter is presented to present (2) additional authorities that were not available in time to have been included in the parties" briefs and/or discovered by Respondent's substituted counsel after the filings of the parties' briefs.

1. Petitioner's Second Assignment of Error is premised upon the Court's consideration of a phone call between Trooper Keffer and Petitioner's decedent. Petitioner argues that such consideration was violative of and inadmissible pursuant to the Dead Man Statute. During the January 2013 term of court, the case of *State Farm Fire & Casualty Company v. Prinz* was decided. In that case, this Court held:

> . . . because the Dead Man's Statute is a heavily antiquated rule of evidentiary law, we believe West Virginia should, at least, join the majority of other jurisdictions throughout the United States. Consequently, we now find that because it addresses evidentiary matters that are reserved to and regulated by this Court pursuant to the Rule-Making Clause, Article VIII § 3 of the West Virginia Constitution, W.Va. Code § 57-3-1, commonly referred to as the Dead Man's Statue, is invalid, as it conflicts with the paramount authority of the West Virginia Rules of Evidence. In actions, suits or proceedings by or against the representative of a deceased persons, witness testimony and documentary evidence pertaining to any statement of the deceased, whether written or oral, shall not be excluded solely on the basis of competency.

Accordingly, this Assignment of Error is moot pursuant to the ruling in *Prinz.*

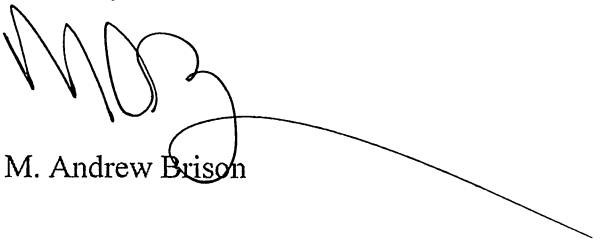
2. Summary Judgment was granted to Respondent pursuant to West Virginia Code § 29-12A-5. However, Respondent also enjoys statutory immunity explicitly provided by the Local Emergency Telephone System Act; specifically found in West Virginia Code § 24-6-8. This immunity providing statute states:

> **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.

(Emphasis provided). Thus, there are 2 statutes that provide immunity to the Respondent in the case at bar; one which may be subject to the special relationship/duty exception to the public duty doctrine (§ 29-12A-5) and one that is not (§ 24-6-8). "Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review" *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995). Because this appeal calls upon this Court to determine if Respondent enjoys immunity (a purely legal question), this additional immunity statute is submitted.

If the Court desires any further briefing or argument, it is my understanding that it will so instruct by order. Thank you, in advance, for your patience and attention in this regard. As always, I remain. . .

Sincerely,



M. Andrew Brison

MAB/mfc

cc: J. B. Akers, Esquire
Teresa VanDyke
Joseph G. Manoni, Claim No.: 410-100493 – **Document Label: LEGAL - APPEALS**
Robert Fisher