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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO: 13-0681

IN THE SUPREME COUNTY 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 REPLY

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COPY

I. **TABLE OF CONTENTS**

II. TABLE OF AUTHORITIES.....iii

A. Cases.....iii

B. Statues and Other Authorities.....iii

III. STATEMENT REGARDING ORAL ARGUMENT.....1

IV. ARGUMENT.....1

A. The opinion recently issued by this Court in *Bowden v. Monroe County Commission* sets forth the proper analysis for political subdivision immunity under the West Virginia Governmental Tort Claims and Insurance Reform Act and reinforces Petitioner's argument that it is immune for unintentional misrepresentations pursuant to W.Va. Code § 29-12A-5(a)(12).....2

i. W.Va. Code § 29-12A-5(a)(12) is applicable and provides immunity to Petitioner.....3

ii. Whether Petitioner was entitled to immunity pursuant to W.Va. Code § 29-12A-5(a)(12) for unintentional misrepresentations is a question of law.....3

iii. Respondent's remaining arguments concerning the immunity provided by W.Va. Code § 29-12A-5(a)(12) for unintentional misrepresentations are meritless based upon *Bowden*.....8

B. Even if immunity pursuant to W.Va. Code § 29-12A-5(a)(12) for unintentional misrepresentations presented a question of fact for the jury, the Circuit Court's exclusion of Petitioner's special interrogatory on unintentional misrepresentations on the verdict form was contrary to law.....9

C. W.Va. Code § 24-6-8 does not fall under § W.Va. Code § 29-12A-4(c)(5) as an exception to political subdivision immunity.....12

D. The Circuit Court abused its discretion in allow Respondent to use "reckless" in closing arguments without giving Petitioner the opportunity to object.....16

V. CONCLUSION.....18

II. TABLE OF AUTHORITIES

A. Cases

Bowden v. Monroe County Commission, 2013 WL 5433537, No. 12-0614 (W.Va. Sept. 27, 2013).....2, 3, 5, 9, 10, 14

Calabrese v. City of Charleston, 204 W.Va. 650, 515 S.E.2d 814 (1999).....12

Ewing v. Board of Educ. of County of Summers, 202 W.Va. 228, 503 S.E.2d 541 (1998).....1

Findley v. State Farm Mut. Auto Ins. Co., 213 W.Va. 80, 570 S.E.2d 807 (2002).....1

Fisk v. Lemons, 201 W.Va. 362, 497 S.E.2d 339 (1997).....14

Holsten v. Massey, 200 W.Va. 775, 490 S.E.2d 864 (1997).....5, 6

Hutchison v. City of Huntington, 198 W.Va. 139, 479 S.E.2d 649 (1996).....4

Kubican v. The Tavern, LLC, 2013 WL 5976095, No. 12-0507, (W.Va. Nov. 6, 2013).....15

Marlin v. Bill Rich Const., Inc., 198 W.Va. 635, 482 S.E.2d 620 (1996).....12

Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676 (1999).....13, 14

Perrine v. E.I. du Pont de Nemours and Co., 225 W.Va. 482, 694 S.E.2d 815 (2010).....16, 17

Randall v. Fairmont City Police Dept., 186 W.Va. 336, 412 S.E.2d 737 (1991).....10

Reed v. Bord, 206 W.Va. 568, 526 S.E.2d 534 (1999).....6

Sergent v. City of Charleston, 209 W.Va. 437, 549 S.E.2d 311 (2001).....6

Skaggs v. Elk Run Coal Co., Inc., 198 W.Va. 51, 63, 479 S.E.2d 561, 573 (1996).....2, 10

Smith v. State Workmen's Compensation Commissioner, 159 W.Va. 108, 219 S.E.2d 361 (1975).....12

State v. Epperly, 135 W.Va. 877, 65 S.E.2d 361 (1975).....12

State v. General Daniel Morgan Post, 548, V.F.W., 144 W.Va. 137, 107 S.E.2d 353 (1959).....12, 13, 14

Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995).....1

Travis v. Alcon Labs, Inc., 202 W.Va. 369, 504 S.E.2d 419 (1998).....4

Upchurch v. McDowell County 911, 2013 WL 5814113, No. 12-0824

(W.Va. Oct. 24, 2013).....15

White v. Hall, 118 W.Va. 85, 188 S.E.2d 768 (1936).....17

Wriston v. Raleigh County Emergency Services Authority, 205 W.Va. 409, 518 S.E.2d

650 (1999).....6

Zirkle v. Elkins Road Public Service Dist., 221 W.Va. 409, 655 S.E.2d 155 (2007).....12

B. Statues and Other Authorities

Rule 20, West Virginia Rules of Appellate Procedure.....1

W.Va. Code § 24-6-8.....3, 5, 8, 9, 10, 12, 13, 14

W.Va. Code § 29-12A-4.....3, 12

W.Va. Code § 29-12A-4(c).....7

W.Va. Code § 29-12A-4(c)(5).....3, 12, 13, 14, 15

W.Va. Code § 29-12A-5.....12

W.Va. Code § 29-12A-5(a).....4

W.Va. Code § 29-12A-5(a)(3).....14

W.Va. Code § 29-12A-5(a)(12).....2, 3, 4, 5, 7, 8, 9, 10

W.Va. Code § 29-12A-5(a)(13).....14

W.Va. Code § 29-12A-5(b).....6, 15

W.Va. Code § 62-11A-3(b).....14

III. STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests that it be permitted to present oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

VI. ARGUMENT

Standard of Review

The standard of review applicable to the Circuit Court's denial of 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 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 opinion recently issued by this Court in *Bowden v. Monroe County Commission* sets forth the proper analysis for political subdivision immunity under the West Virginia Governmental Tort Claims and Insurance Reform Act and reinforces Petitioner's argument that it is immune for unintentional misrepresentations pursuant to W.Va. Code § 29-12A-5(a)(12).

In *Bowden v. Monroe County Commission*, 2013 WL 5433537, No.12-0614 (W.Va., Sept. 27, 2013), this Court rendered an opinion which sets forth, in detail, the proper way to analyze political subdivision immunity pursuant to the West Virginia Governmental Tort Claims and Insurance Reform Act (the "Act"). Specifically, this Court stated the following:

> The immunity of political subdivisions and their employees...is governed exclusively by the [Act]. West Virginia Code § 29-12A-4(b) establishes the baseline principle that a political subdivision is not liable for 'governmental or proprietary function[s]' except as set forth in subsection (c). Subsection (c) sets forth five general categories of negligence-based acts or functions for which a political subdivision is not entitled to immunity and may be held liable...**Irrespective** of whether a case falls into one of the five categories set forth in subsection (c), stripping the political subdivision of its general immunity, the [Act] goes on to enumerate seventeen categories of specific functions for which a political subdivision is **nonetheless still immune**. W.Va. Code § 29-12A-5(a)(1)-(17). (Emphasis added).

Id. at *3. The Court's explanation regarding the proper application of the immunities contained in the Act provides clarification and guidance in this case and renders Respondent's arguments concerning immunity for unintentional misrepresentation irrelevant or contrary to law.

Specifically, the Court's analysis in *Bowden* supports Petitioner's argument that the Circuit Court erred in denying its Second Motion to Dismiss or, in the Alternative, Second Motion for Summary Judgment because Petitioner is immune for claims resulting from unintentional misrepresentations pursuant to W.V. Code § 29-12A-5(a)(12).

i. W.Va. Code § 29-12A-5(a)(12) is applicable and provides immunity to Petitioner.

Respondent's assertion that W.Va. Code § 29-12A-5(a)(12) is inapplicable to this case simply because her claim was brought pursuant to W.Va. Code § 24-6-8 is inaccurate. The Respondent argues that W.Va. Code § 24-6-8 falls under an exception to political subdivision immunity pursuant to W. Va. Code § 29-12A-4(c)(5), and therefore, the immunities set forth in W. Va. Code § 29-12A-5(a)(1)-(17) do not apply. However, it is clear from the opinion in *Bowden* that the Respondent's interpretation of the Act's application is flawed.

In *Bowden* this Court made it crystal clear: "**[i]rrespective** of whether a case falls into one of the five categories set forth in subsection (c) [of W. Va. Code § 29-12A-4] , stripping the political subdivision of its general immunity, the [Act] goes on to enumerate seventeen categories of specific functions which a political subdivision **is nonetheless still immune.**" *Id.* (Emphasis added).

Accordingly, even if W.Va. Code § 24-6-8 falls under W. Va. Code § 29-12A-4(c)(5) as an exception to the Petitioner's general immunity,[1] the immunities provided by W. Va. Code § 29-12A-5(a)(1)-(17), including § 29-12A-5(a)(12) for unintentional misrepresentations, applies providing immunity to Petitioner.

ii. Whether Petitioner was entitled to immunity pursuant to W.Va. Code § 29-12A-5(a)(12) for unintentional misrepresentations is a question of law.

Respondent argues that the issue of whether Petitioner's conduct consisted of unintentional misrepresentations pursuant to W.Va. Code § 29-12A-5(a)(12), is a question of fact for the jury. In support of her position, Respondent focuses her attention on the nuances between

[1] Petitioner does not concede that § 24-6-8 falls under W. Va. Code § 29-12A-4(c)(5) as an exception to the Petitioner's general immunity for the reasons more fully articulated in section C.

"intent to harm" and "intent to deceive"[2] and relies upon *Travis v. Alcon Labs, Inc.*, 202 W.Va. 369, 504 S.E.2d 419 (1998), for the proposition that issues of intent *usually* present a factual question.[3] However, Respondent fails to address that fact that whether W.Va. Code § 29-12A-5(a)(12) applies in this case is a question of immunity law.

"Public officials and local government 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." *Hutchison v. City of Huntington*, 198 W.Va. 139, 148, 479 S.E.2d 649, 658 (1996). Accordingly, "the need for early resolution in cases ripe for summary disposition is particularly acute when the defense is in the nature of an immunity." *Id.* 198 W.Va. at 147, 479 S.E.2d at 657. "Immunities 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.* "In this vein, unless expressly limited by statute, the sweep of these immunities is necessarily broad. They protect 'all but the plainly incompetent or those who knowingly violate the law." *Id.* (*quoting Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986)).

Petitioner appropriately brought the issue of immunity, pursuant to W.Va. Code § 29-12A-5(a)(12), before the Circuit Court in its Second Motion to Dismiss, or in the Alternative, Second Motion for Summary Judgment. **(Appx. pp. 140-188).** The Circuit summarily denied Petitioner's Motion based upon the fact that it previously determined "that [Respondent] must

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[2] Respondent incorrectly represents that Petitioner never submitted the definition of "unintentional misrepresentations" included in its Appellate Brief to the Circuit Court in any prior pleading. The same definition of "unintentional misrepresentations" was included in Petitioner's Second Motion to Dismiss, or in the Alternative, Second Motion for Summary Judgment, which the Circuit Court summarily denied. **(Appx. p 149).**

[3] Respondent's reliance on this case is misplaced. In *Travis* the issue revolved around the elements of a cause of action for intentional or reckless infliction of emotional distress by outrageous conduct. *Travis*, 202 W.Va. at 376, 504 S.E.2d at 423.The Court in *Travis* never discusses or addresses political subdivision immunity. *Id.*

prove that 'willful or wanton' misconduct occurred in order for [Petitioner] to be liable to [Respondent] pursuant to W.Va. Code § 24-6-8. As such, if [Respondent] fails to prove that 'willful or wanton' misconduct occurred, then [Petitioner] cannot be liable to [Respondent]." **(Appx. pp. 222-223).** A review of the Circuit Court's reasoning denying Petitioner's Motion makes clear that the Circuit Court improperly applied the immunities provided by the Act to the case at hand.

Rather than summarily denying the issue of Petitioner's immunity pursuant to W.Va. Code § 29-12A-5(a)(12) simply because it previously ruled that W.Va. Code § 24-6-8 applied, the Circuit Court should have specifically addressed and made a determination regarding Petitioner's immunity for unintentional misrepresentation pursuant to W.Va. Code § 29-12A-5(a)(12), as the immunity applies "[**i**]**rrespective** of whether a case falls into one of the five categories set forth in subsection (c)" of W.Va. Code § 29-12A-4. *Bowden*, 2013 WL 5433537 at *3. (Emphasis added).

Despite the fact that courts favor the application of immunities under the Act at the summary judgment stage, Respondent argues that all cases which involve some level of intent must be a question of fact for the jury. However, that is not the case. In *Holsten v. Massey*, 200 W.Va. 775, 490 S.E.2d 864 (1997), this Court addressed a similar issue when it affirmed the circuit court's entry of summary judgment on the basis of immunity provided by the Act. In *Holsten,* the administrator of the estate of a motorist who suffered fatal injuries in a collision with a drunk driver sued the county and deputy sheriff alleging that the accident would not have occurred had the deputy property investigated a prior accident in which the same drunk driver was involved and arrested or incarcerated the drunk driver. *Id.* On appeal one of the issues was

whether the deputy was immune from liability pursuant to W.Va. Code § 29-12A-5(b) which provides the following:

> An employee of a political subdivision is immune from liability unless one of the following applies:
> (1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities:
> (2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or
> (3) Liability is expressly imposed upon the employee by a provision of this code.

Id. 200 W.Va. at 787, 490 S.E.2d at 876; W.Va. Code § 29-12A-5(b). The focus of the analysis was whether the deputy's acts or omissions were in a wanton or reckless manner under subsection (2). *Id.* This Court affirmed the circuit court's entry of summary judgment and found that the deputy was entitled to immunity despite plaintiff's attempt to characterize the deputy's conduct as wanton or reckless because there was no evidence on the record that the deputy *intentionally* did not pursue his investigation of the prior accident. *Id.* 200 W.Va. at 788, 490 S.E.2d at 877. *See also Sergent v. City of Charleston*, 209 W.Va. 437, 549 S.E.2d 311 (2001) (affirmed circuit court's finding that the appellee officers were immune from liability, pursuant to the Act at summary judgment stage, because their actions or omissions were not negligent, wanton, or reckless in their pursuit of the suspects); *Reed v. Bord*, 206 W.Va. 568, 526 S.E.2d 534 (1999) (affirmed circuit court's finding that employee of political subdivision was immune from liability, pursuant to the Act at summary judgment stage, because the appellee did not act with malice, in bad faith, wantonly or recklessly toward the appellant); *Wriston v. Raleigh County Emergency Services Authority*, 205 W.Va. 409, 518 S.E.2d 650 (1999) (affirmed circuit court's finding that supervisor was immune from liability, pursuant to the Act at summary judgment stage, because appellant failed to prove that the actions of his supervisor were malicious, in bad faith, or in a wanton or reckless manner).

Similarly, in this case, Respondent attempts to characterize certain actions or omissions of the MECCA-911 employees as *intentional* misrepresentations with the intent to deceive, and therefore, claims that the application of W.Va. Code § 29-12A-5(a)(12) is a question of fact. In support of her argument, Respondent points to the following: 1) the Circuit Court's ruling that the issue of willful and wanton is a question of fact; 2) the portion of the 911 transcript wherein the dispatcher stated "OK we've got an ambulance on the way..."; 3) Respondent's trial testimony wherein she states that no one was waiting for her at the ER when she arrived; and 4) MECCA-911 dispatcher, Kenny Goodwin's, trial testimony wherein he stated that there was no factual basis for stating "OK we've got an ambulance on the way."

First, the Circuit Court's ruling concerning the issue of willful or wanton is of no consequence to the issue of whether immunity for unintentional misrepresentation is a question of law or fact. As argued above, the immunities provided by W.Va. Code § 29-12A-5a (1)-(17) of apply irrespective of whether the claim falls under an exception to immunity pursuant to W.Va. Code § 29-12A-4(c). Second, Respondent's second, third and fourth points do not by themselves show any *intentional* misrepresentation. In fact, Respondent never directly questioned the MECCA-911 employees regarding whether any of their actions or omissions were done to intentionally misrepresent information to the Respondent. However, when MECCA-911 employee, Kenny Goodwin, was question by Petitioner as to whether his statement, "OK we've got an ambulance on the way" was made with the purpose of misleading Respondent in anyway, Mr. Goodwin responded, "[n]o, I did not." **(Appx. Vol. IV. p. 261).** Third, and perhaps most important, Respondent's second, third and fourth points are not factually disputed! In fact, there are no material issues of fact with regard to the events that took place on May 11, 2010. All of the conversations between Respondent and the MECCA-911 dispatchers are recorded. What was

said during those calls is not in dispute. The fact that some of the statements made by the dispatchers were not verbatim from the 911 flip cards is not in dispute. Furthermore, the fact that there was no one waiting for Respondent once she arrived at the ER is not in dispute.

Accordingly, despite Respondent's attempts to turn the application of the immunity provided by W.Va. Code § 29-12A-5(a)(12) for unintentional misrepresentations into a factual dispute, it is clear that there are no material issues of fact regarding the events that took place on May 11, 2010. Consequently, the Circuit Court erred in summarily denying Petitioner's Second Motion to Dismiss, or in the Alternative, Second Motion for Summary Judgment, and should have specifically addressed and applied immunity for unintentional misrepresentations at the summary judgment stage.

iii. Respondent's remaining arguments concerning the immunity provided by W.Va. Code § 29-12A-5(a)(12) for unintentional misrepresentations are meritless based upon *Bowden*.

Respondent argues that "willful and wanton" misconduct and "unintentional misrepresentations" are mutually exclusive, and therefore, the determination of whether Petitioner was entitled to immunity pursuant to W.Va. Code § 29-12A-5(a)(12) for unintentional misrepresentations, was essentially of no consequence. However, Respondent's argument falls flat based upon the proper application of the immunities provided to Petitioner under the Act.

The issue of whether the acts or omissions of the MECCA-911 employees were "willful or wanton" is based upon W.Va. Code § 24-6-8, which Respondent claims falls under an exception to political subdivision immunity via subsection 4(c)(5) of the Act. However, "irrespective of whether the claim falls under an exception to immunity pursuant to subsection (c), stripping the political subdivision of its general immunity, the [Act] goes on to enumerate seventeen categories of specific functions for which a political subdivision is nonetheless still

immune," including W.Va. Code § 29-12A-5(a)(12). *Bowden*, 2013 WL 5433537 at *3. Consequently, even if W.Va. Code § 24-6-8 is found to be an exception to political subdivision immunity under subsection 4(c), Petitioner is nonetheless entitled to a specific determination of the immunity for unintentional misrepresentations pursuant to W.Va. Code § 29-12A-5(a)(12) before the issue of willful or wanton is addressed.

Furthermore, the Respondent argues that the jury was explicitly and specifically instructed that Petitioner was not liable for "unintentional misrepresentations" and a reasonable jury could have determined that Petitioner committed some "unintentional misrepresentation" yet still found that Petitioner engaged in "willful or wanton" misconduct. However, as argued above, the issue of immunity for unintentional misrepresentation pursuant to W.Va. Code § 29-12A-5(a)(12) is a question of immunity law and the Circuit Court erred in summarily denying Petitioner's Section Motion to Dismiss, or in the Alternative, Second Motion for Summary Judgment on the basis that W.Va. Code § 29-12A-5(a)(12) did not apply to the case at hand.

B. Even if immunity pursuant to W.Va. Code § 29-12A-5(a)(12) for unintentional misrepresentations presented a question of fact for the jury, the Circuit Court's exclusion of Petitioner's special interrogatory on unintentional misrepresentations on the verdict form was contrary to law.[4]

Respondent argues that the Circuit Court's exclusion of Petitioner's special interrogatory on unintentional misrepresentations was proper because it would have placed a heightened burden on Respondent. However, even if it would have created a heightened burden, Petitioner was entitled to have the jury make the initial determination as to whether immunity, pursuant to

[4] Petitioner does not concede its argument that the Circuit Court erred in refusing to give Petitioner's jury instruction on unintentional misrepresentations. Petitioner's Proposed Jury Instruction No. 9 should have been included in its entirety because Petitioner was entitled to have the jury make the initial determination as to whether immunity, pursuant to W.Va. Code § 29-12A-5(a)(12) for unintentional misrepresentations, applied before it determined if any actions or omissions constituted "willful or wanton" misconduct pursuant to § 24-6-8 as immunity for unintentional misrepresentations applies irrespective of whether § 24-6-8 applies. *Bowden*, 2013 WL 5433537 at *3. Because the arguments concerning the exclusion of Petitioner's Proposed Jury Instruction No. 9 and Petitioner's Proposed Special Interrogatory No. 1 parallel each other, Petitioner focuses on exclusion of Petitioner's Special Interrogatory in this Reply for brevity.

W.Va. Code § 29-12A-5(a)(12) for unintentional misrepresentations, applied before it determined if any actions or omissions constituted "willful or wanton" misconduct pursuant to § 24-6-8, as immunity for unintentional misrepresentations applies irrespective of whether § 24-6-8 applies. *See Bowden* 2013 WL 5433537 at *3.

The purpose of the Act is to "limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the cost 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). Accordingly, based upon the proper application of immunities provided by subsection 5(a) of the Act as set forth in *Bowden*, and upon the importance of immunities provided to political subdivisions, Petitioner contends that the Circuit Court presented the jury with a verdict form contrary to law because it failed to require the jury to make an initial regarding determination immunity for unintentional misrepresentation.

"Ordinarily, a 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)). Here, the Circuit Court's exclusion of Petitioner's special interrogatory on unintentional misrepresentations was based upon the flawed legal premise that its inclusion would create a heightened burden upon the Respondent. Based upon that flawed legal premise, the result was a misguided jury and a verdict form contrary to law.

Further, Respondent argues that Petitioner's Jury Instruction No. 9 and Proposed Special Interrogatory on "unintentional misrepresentations" were incorrect statements of law because it was possible that the jury could find that certain inactions of the Petitioner were not representations and constituted "willful or wanton" misconduct. Respondent relies on two inactions which Respondent contends the jury could have determined were not representations and constituted "willful or wanton" misconduct: 1) the failure to call Ruby Memorial Hospital, and 2) the failure to call the Star City Fire Department. However, a closer look at the two issues relied upon by Respondent show that they do not support Respondent's position.

First, Respondent's claim against Petitioner for the alleged failure to call Ruby Memorial Hospital was not based upon inaction. Rather, the focus of Respondent's claim was on the fact that the MECCA-911 dispatcher, Kenny Goodwin, represented that he would call Ruby Memorial Hospital and that Petitioner relied on that representation. **(Appx., p. 8 ; Appx. Vol. IV. pp. 146, 457).** Second, the Petitioner had no duty whatsoever to call or notify the Star City Fire Department. The MECCA-911 EMS Procedures, which were introduced into evidence as Respondent's Exhibit 13, state that Monongalia Emergency Medical Services (MEMS) is the primary EMS responder for Monongalia County and JanCare is the backup EMS responder agency for Monongalia County. Nowhere in MECCA-911 EMS Procedures does it require a dispatcher to notify the Star City Fire Department. The proper procedure for contacting the primary and back up responders was discussed several times throughout the trial. **(Appx. Vol. IV, pp. 316, 451, 452, 663-664).** Furthermore, despite the fact that it was not required, MECCA-911 dispatcher, Amanda Sanders, actually toned out to the Star City Fire Department in an attempt to help Respondent! **(Appx. Vol. IV, pp. 324, 325, 333, 334).**

Accordingly, Respondent's reliance on the two alleged inactions in an attempt to portray Petitioner's Jury Instruction No. 9 and Proposed Special Interrogatory on "unintentional misrepresentations" as incorrect statements of law is misplaced and the Circuit Court's exclusion of Petitioner's special interrogatory on unintentional misrepresentations on the verdict form was contrary to law.

C. W.Va. Code § 24-6-8 does not fall under § W.Va. Code § 29-12A-4(c)(5) as an exception to political subdivision immunity.

Respondent argues that *Marlin v. Bill Rich Const., Inc.,* 198 W.Va. 635, 482 S.E.2d 620 (1996) and *Calabrese v. City of Charleston,* 204 W.Va. 650, 515 S.E.2d 814 (1999) support her position that W.Va. Code § 24-6-8 should be interpreted to expressly impose liability upon the Petitioner because the liability-creating provisions of W.Va. Code § 29-12A-4 are broadly construed, and the immunity creating provisions of § 29-12A-5 are to be narrowly construed.

This Court has also held, however, that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State Workmen's Compensation Commissioner,* 159 W.Va. 108, 219 S.E.2d 361 (1975). It is not necessary for this Court to construe or interpret plainly-expressed language of a statute. *Zirkle v. Elkins Rd. Pub. Serv. Dist.*, 221 W. Va. 409, 413, 655 S.E.2d 155, 159 (2007).

This Court's holding in Syl. Pt. 2, *State v. Epperly,* 135 W.Va. 877, 65 S.E.2d 488 (1951) makes this principle clear:

> A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.

This Court further refined this principle in Syllabus Points 4 and 5 of *State v. General Daniel Morgan Post 548, V.F.W.,* 144 W.Va. 137, 107 S.E.2d 353 (1959):

> Generally the 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. When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.

Moreover, a cardinal rule of statutory construction is that significance and effect must, if possible, be given to ***every*** section, clause, word or part of the statute. *Id.* 144 W.Va. at 147, 107 S.E.2d at 359; *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999). "It is the duty of the courts to give a statute the interpretation called for by its language when this can reasonably be done; and the general rule is that no intent may be imputed to the legislature other than that supported by the face of the statute itself. The courts may not speculate as to the probable intent of the legislature apart from the words employed." *General Daniel Morgan Post*, 144 W.Va. at 144, 107 S.E.2d at 358.

When applying these tenants of statutory construction to the language in W.Va. Code § 29-12A-4(c)(5), the legislative intent becomes clear; a political subdivision can be found liable pursuant to another provision in the code ***only if*** that code section ***expressly imposes liability*** upon the political subdivision.[5]

Despite Respondent's argument that W.Va. Code § 24-6-8 is the type of statute contemplated by W.Va. Code § 29-12A-4(c)(5), the plain language of W.Va. Code § 24-6-8 shows that it ***limits*** liability and sets forth one exception to that limitation.[6] Accordingly,

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[5] 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.

[6] W.Va. Code § 24-6-8 provides:

> A public agency or 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

Respondent's interpretation would require this Court to disregard the rules of statutory construction and improperly interpret the plainly expressed meaning of W.Va. Code § 29-12A-4(c)(5), rather than apply the statute as written. Respondent's argument is even more problematic because her interpretation would render the words "expressly imposed" contained in W.Va. Code § 29-12A-4(c)(5) completely meaningless.

In support for her position, Respondent hangs her hat on a dissenting opinion in *Fisk v. Lemons*, 201 W.Va. 362, 497 S.E.2d 339 (1997) wherein Justice Davis stated that the immunity alleged by the defendants under W.Va. Code §§ 29-12A-5(a)(3) and 29-12A-5(a)(13), is nonexistent as a result of the immunity exception contained in W.Va. Code § 29-12A-4(c)(5) and the right of action bestowed by W.Va. Code § 62-11A-3(b). In addition to the fact that a dissenting opinion does not create legal precedent, Petitioner respectfully disagrees with the dissenting opinion in *Fisk* as such an interpretation of would render the words "expressly imposed" contained in W.Va. Code § 62-11A-3(b) completely meaningless, contrary to the rules of statutory construction which gives significance and effect to every section, clause, word or part of the statute. *See General Daniel Morgan Post,* 144 W.Va. at 147, 107 S.E.2d at 359; *Meadows*, 207 W.Va. 203, 530 S.E.2d 676 (1999). Most importantly, the dissenting opinion that W.Va. Code § 29-12A-4(c)(5) "requires the Court to determine whether or not a specific provision exists in the Code which authorizes a cause of action against the defendants...notwithstanding W.Va. Code §§ 29-12A-5(a)(3) and 29-12A-5(a)(13)," is contrary to the proper application of the immunity provided by the Act as set forth in *Bowden*. Fisk, 201 W.Va. at 369, 497 S.E.2d at 346; *Bowden*, 2013 WL 5433537 at * 3.

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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.

Respondent also relies on *Kubican v. The Tavern, LLC*, 2013 WL 5976095, No. 12-0507, (W.Va., Nov. 6, 2013) and *Upchurch v. McDowell County 911*, 2013 WL 5814113, No. 12-0824, (W.Va., Oct. 24, 2013) in support of her position that W.Va. Code § 24-6-8 expressly imposes liability. However, *Kubican* is not helpful in that regard. In *Kubican*, the Court held that "[b]y proscribing liability on the *sole* basis of being a member of manager of an LLC, the Legislature ***implicitly*** has left intact the prospect that an LLC member or manager being liable on grounds that are not based solely on a person's status as a member or manager of an LLC." *Kubican*, 2013 WL 5976095 (Emphasis added). Therefore, although a statue which limits liability, may also ***implicitly*** impose liability for actions or inactions which are outside of the scope of such limitation, they certainly do not do so ***expressly***, as required by W.Va. Code § 29-12A-4(c)(5).

Petitioner does not dispute that a footnote in *Upchurch v. McDowell County 911* states that the plaintiff did not prove the defendants exhibited 'willful or wanton misconduct" in response to Mr. Mallory's call for emergency assistance. However, the issue of whether W.Va. Code § 24-6-8 expressly imposes liability pursuant to W.Va. § 29-12A-4(c)(5) was not brought before the *Upchurch* Court, and therefore, was not specifically considered. The issue presented here is a novel one, and for the reasons fully articulated above, Petitioner contends W.Va. Code § 24-6-8 does not expressly impose liability as required by W.Va. Code § 29-12A-4(c)(5).

Lastly, Respondent repeatedly argues if W.Va. Code § 24-6-8 is not found to be an exception to immunity pursuant to W.Va. Code § 29-12A-4(c)(5), that a 911 center established by a public agency can never be liable. What Respondent fails to acknowledge however, is that pursuant to W.Va. Code § 29-12A-5(b) an employee of a political subdivision can be held liable

in certain circumstances. Accordingly, Petitioner should not be punished in this case simply because Respondent failed to sue the proper parties.

D. The Circuit Court abused its decision in allowing Respondent to use "reckless" in closing arguments without giving Petitioner the opportunity to object.

Petitioner acknowledges that the jury charge which defined "wanton misconduct" was a quotation from *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, n.30, 694 S.E.2d 815, n. 30 (2010) (citing Black's Law Dictionary 1014 (7th ed. 1999). Petitioner further acknowledges that the jury was not specifically instructed that the term "reckless" was synonymous with "wanton." However, Petitioner contends the Circuit Court abused its discretion when it allowed Respondent describe Petitioner's conduct as "reckless" without any connection to "willful or wanton" during closing arguments.

The Circuit Court ruled in its February 2, 2012 Order that liability in this case may be imposed upon Petitioner only if the jury finds that the conduct of Petitioner rose to the level of "willful or wanton" misconduct. **(Appx. pp. 129-130).** The use of the term "reckless" became an issue in this case when Respondent submitted a Motion in Limine requesting the Circuit Court to adopt several lengthy quotations, which included the word "reckless" three times, for the burden of proof on liability. **(Appx. pp. 211-214).** Petitioner argued that the quotes provided by Respondent were improper, prejudicial and confusing and that Respondent should not be allowed to state or suggest that recklessness was the burden of proof. **(Appx. pp. 227-228).** The Circuit Court granted Respondent's Motion in Limine, in part, and adopted a shorter version of Respondent's Proposed Jury Instruction No. 2, over 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).

(Appx. p. 300).

Before the Circuit Court made its final rulings on the jury instructions the parties and the Circuit Court had a lengthy conference, off the record, regarding the use of the word "reckless" in this case. **(Appx. Vol. IV., p. 683).** During those discussions the Circuit Court informed Petitioner that it could not object to Respondent's use of the word "reckless" during closing arguments.

As such, during closing arguments, Respondent used the word "reckless" fifteen times. **(Appx. Vol. III, pp. 1-50).** At least five of those times the term "reckless" was used without any connection to the legal standard of "willful or wanton." For example, Respondent stated:

> This is someone that was reckless. This was an entity that had employees that were reckless.

(Appx. Vol. IV, p. 721). Respondent further stated:

> So was there reckless? You had better believe it was reckless. You hear the fact of this case, you immediately think reckless. What else it is? It's insane is what it is. It's egregious.

(Appx. Vol. IV, p.727).

Although *White v. Hall*, 118 W.Va. 85, 188 S.E.2d 768 (1936) does not mandate that counsel refrain from using the term "reckless" when the applicable standard is "willful or wanton," it clearly states that "[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*, 188 S.E. at 769. (Emphasis added). Consequently, the Respondent's use of the word reckless without any connection to "willful or wanton" in this case was improper and Petitioner contends the Circuit

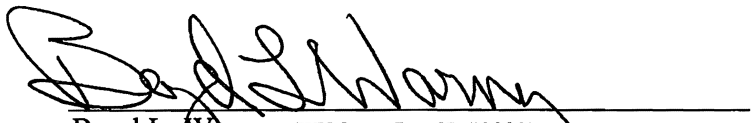
Court made a clear error of judgment when it refused to allow Petitioner to object to Respondent's mischaracterization of the legal burden of proof in this case

V. CONCLUSION

For all of the reasons stated herein, 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 4th day of December, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 2013, I served the foregoing "***PETITIONER'S REPLY***," upon the following via United States Mail, postage prepaid:

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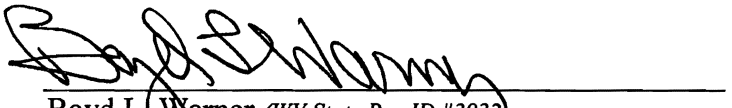

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