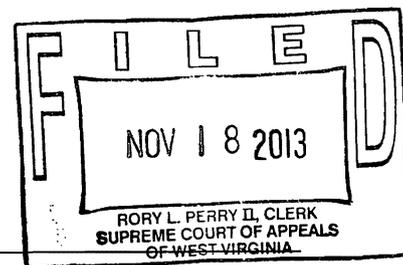


NO: 13-0681



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

vs.

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

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

RESPONDENT JUDITH L. JOHNSON'S RESPONSE TO PETITIONER'S BRIEF

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RESPONDENT JUDITH L. JOHNSON'S RESPONSE TO PETITIONER'S BRIEF

I. STATEMENT OF THE CASE

A. Factual Background

At the underlying trial in this matter, the jury found that Joseph B. Johnson died as a result of the willful or wanton misconduct of Petitioner, the Monongalia County Commission.¹ App. Vol I, pp. 305-306. Petitioner was held liable for the events that transpired on May 11, 2008, when Joseph B. Johnson began having trouble breathing, and his wife, Judith Johnson, called 911. Ultimately, Mrs. Johnson made three separate calls to 911 that morning. App. Vol I, pp. 312-316; App. Vol V. Respondent presented evidence at trial, which is set forth in greater detail below, outlining the severe misconduct, gross inaction, damaging misstatements, and numerous violations of applicable procedures and policies committed by Petitioner's employees, which the jury found caused Mr. Johnson's untimely death. The specific circumstances giving rise to the jury's verdict are as follows:

On May 11, 2008, Joseph B. Johnson and his wife, Judith Johnson, were reading the newspaper, and drinking coffee and tea, at their home in Star City, Monongalia County, West Virginia. App. Vol. IV, p.117.² The day began as a typical Sunday morning in the Johnson household. App. Vol. IV, p.117. Later that morning, Mr. Johnson began having trouble breathing. App. Vol. IV, pp. 120-121. Mrs. Johnson called 911 because her husband could not "get his breath." App. Vol. IV, p. 121. 911 calls in Monongalia County, West Virginia, are

¹ It is undisputed that Petitioner, and Defendant below, the Monongalia County Commission, operates the 911 call center in Monongalia County, West Virginia. Likewise, it is undisputed that Petitioner, the Monongalia County Commission, is responsible for the actions and inactions of all 911 employees or agents at issue.

² Volume IV of the Appendix is a condensed version of the trial transcript. The trial transcript contains a total of seven hundred seventy-three (773) pages. The condensed version contains four (4) transcript pages on each printed page. The page numbers cited herein are the transcript page numbers.

answered by the Monongalia Emergency Centralized Communications Agency.³ Mrs. Johnson's first call to 911 was made at approximately 11:34:20 a.m.⁴ App. Vol. I, p. 312; App. Vol. IV, p. 191. During the first 911 call, Mrs. Johnson spoke with MECCA 911 employee Kenneth Goodwin. App. Vol. IV, p. 172. Mrs. Johnson immediately informed Mr. Goodwin that her "husband can't get his breath." App. Vol. I, p. 312; App. Vol. V. Shortness of breath is a priority one call. Priority one calls indicate that a patient needs immediate medical assistance. App. Vol. IV, p. 183. Shortness of breath is a serious complaint, one from which serious injury or death can result. App. Vol. IV, p. 497. Petitioner's 911 expert, Randy Lowe, confirmed that a 911 dispatcher should realize that serious injury or death could result from a 911 call regarding shortness of breath. App. Vol. IV, p. 672.

During the first 911 call, Mr. Kenneth Goodwin, admittedly, violated a number of duties that he, as a MECCA 911 operator, owed to the public. App. Vol. IV, p. 272. For example, Mr. Goodwin failed to ask Mrs. Johnson a number of questions that he is required to ask a 911 caller pursuant to MECCA 911 procedures and rules regarding a shortness of breath complaint. App. Vol. IV, pp. 202-203. MECCA 911 policies further require employees to read, verbatim, from "flip cards" which Mr. Goodwin also admittedly failed to do during Mrs. Johnson's first 911 call on May 11, 2008. App. Vol. IV, p. 203.

At the conclusion of Mr. Johnson's first call, MECCA 911 operator Kenneth Goodwin states that "we've got an ambulance on the way." App. Vol. I, p. 313; App. Vol. V. Stating that

³ For clarity, the Monongalia Emergency Centralized Communications Agency shall, at times, be referred to herein as "MECCA 911."

⁴ The times noted herein are from the "phone clock." There are multiple clocks which are utilized by MECCA 911. Although the clocks are not synchronized, the duration of the 911 calls placed by Mrs. Johnson on May 11, 2008 is the same regardless of which clock is being utilized. App. Vol. IV, pp. 190-191.

“we’ve got an ambulance on the way” is a direct violation of MECAA 911's policies and procedures. App. Vol. IV, p. 213. When Mr. Goodwin stated that “we’ve got an ambulance on the way[,]” he had not actually heard that an ambulance was responding to Mrs. Johnson’s 911 call. App. Vol. IV, p. 195. In fact, Mr. Goodwin admitted that his statement was not true and that there was “no factual basis” for his statement. App. Vol. IV, p. 209, 279. Mr. Goodwin further admitted that nobody forced him to inform Mrs. Johnson that “we’ve got an ambulance on the way”; and that his statement was a voluntary act. App. Vol. IV, p. 237. Mr. Goodwin also admitted that there is a “big difference” between attempting to get an ambulance and an ambulance actually being on the way. App. Vol. IV, pp. 208-209. Mrs. Johnson’s first call to 911 lasted one minute and forty-one seconds. App. Vol. IV, p. 128. At the end of the first call, at approximately 11:36 a.m., Mr. Goodwin knew that he had inaccurately informed Mrs. Johnson that an ambulance was “on the way[,]” and that Mrs. Johnson was going to wait, with her husband, on an ambulance. App. Vol. IV, p. 195. Accordingly, after the first 911 call, and based on Mr. Goodwin’s actions and violations of MECCA 911's policies and procedures, Mrs. Johnson waited with Mr. Johnson at their home.

During Mrs. Johnson’s first 911 call, Amanda Sanders, another MECCA 911 employee, was attempting to contact Monongalia Emergency Medical Services (“MEMS”), Monongalia County’s primary ambulance provider. App. Vol. IV, p. 225. At approximately 11:35 a.m., during Mrs. Johnson’s first 911 call, MEMS contacts MECCA 911 and indicates that MEMS is unavailable and that MECCA 911 should “go ahead and check on the next [due] for that [call].” App. Vol. I, p. 317; App. Vol. IV, p.225. Jan-Care is the backup emergency services provider in Monongalia County. App. Vol. IV, p. 227. At 11:36 a.m., Amanda Sanders attempted to contact

Jan-Care. App. Vol. IV, p. 225. Jan-Care never, at any point on May 11, 2008, communicated with MECCA 911 regarding the emergency calls placed by Mrs. Johnson. App. Vol. IV, p. 226.

On May 11, 2008, the Johnsons lived at 1335 Cain Street in Star City, West Virginia, which is about a quarter of a mile from the Star City Volunteer Fire Department (“Star City VFD”). App. Vol. IV, pp. 94-95, 377. One of the means that the Star City VFD utilizes to notify its volunteers that they are needed to appear at the fire department is via the Star City whistle/siren. App. Vol. IV, pp. 372-373. The Star City whistle is set off by MECCA 911. Specifically, MECCA 911 drops tones which make the Star City whistle blow. App. Vol. IV, p. 373. The Star City whistle is loud; loud enough to be heard by residents of Star City. App. Vol. IV, pp. 374, 382-383. In May 2008, the Star City VFD did not have ambulances. App. Vol. IV, p. 376. However, the Star City VFD had trucks with oxygen, and had volunteers trained to administer the oxygen in those trucks. App. Vol. IV, p. 376. Jeff Quinn, the Chief of the Star City Volunteer Fire Department in May 2008, confirmed that his department keeps records which memorialize when the whistle blows and that there was no evidence that the Star City whistle blew on May 11, 2008. App. Vol. IV, pp. 375-376. In fact, MECCA 911 operator Kenneth Goodwin even conceded that there is no evidence in the recordings to suggest that the Star City VFD was ever contacted on May 11, 2008 by MECCA 911. App. Vol. IV, p. 228.

After the conclusion of the first 911 call, Mr. and Mrs. Johnson waited for an ambulance. As they waited, precious minutes were lost, and Mr. Johnson’s condition began to worsen. App. Vol. IV, p. 131. Approximately five (5) minutes after MEMS notified MECCA 911 that MEMS was unavailable to respond to Mrs. Johnson’s 911 call, Mrs. Johnson called 911 a second time at approximately 11:40:19 a.m. App. Vol. I, p. 314; App. Vol. IV, pp. 129-130. Even though MECCA 911 knew, for approximately five (5) minutes that MEMS was unavailable, nobody at

MECCA 911 contacted Mrs. Johnson. Mrs. Johnson's second 911 call was initially answered by MECAA 911 employee Angela Inskeep. App. Vol. IV, p. 282. Almost immediately after calling 911, Mrs. Johnson is placed on hold. App. Vol. I, p. 314; App. Vol. IV, p. 132; App. Vol. V. Mrs. Johnson was placed on hold for a total of fifty-seven seconds. App. Vol. IV, p. 449. Finally, after waiting for fifty-seven seconds, MECCA 911 employee Amanda Sanders picked up the call and began talking with Mrs. Johnson. App. Vol. I, p. 314.

During the second 911 call Mrs. Johnson explained that the situation was worse and stated that: “[Mr. Johnson had] been choking and gasping for his breath. He can’t get it”; “he needs oxygen bad.”; and “Oh my God, you’ve got to hurry!” App. Vol. I, pp. 314-315; App. Vol. V. At no point during the second 911 call was Mrs. Johnson informed that MEMS was unavailable. App. Vol. IV, pp. 293-294. At no point during the second 911 call was Mrs. Johnson informed that Jan-Care, the county’s backup ambulance provider was not even communicating with MECCA 911. App. Vol. IV, pp. 294. Ms. Inskeep confirmed that it would have been reasonable to inform Mrs. Johnson that MEMS was unavailable. App. Vol. IV, p. 322. Ms. Inskeep further admitted that it would have been reasonable to inform Mrs. Johnson that Jan-Care was not responding. App. Vol. IV, pp. 322-323. However, neither Ms. Inskeep nor Ms. Sanders conveyed accurate information to Mrs. Johnson. App. Vol. I, pp. 314-315.

During the second 911 call, Ms. Sanders confirms the directions to the Johnson home. App. Vol. I, p. 315; App. Vol. V. By confirming the directions to the Johnson household, Mrs. Johnson believed that an ambulance was still coming to provide care for Mr. Johnson. App. Vol. IV, p. 135. Near the conclusion of the second 911 call, Ms. Sanders once again assures Mrs. Johnson that “we’re trying to get someone one there.” App. Vol. I, p. 315; App. Vol. V. Unfortunately, based upon the inaccurate and incomplete information conveyed to Mrs. Johnson

during the second 911 call, Mrs. Johnson still thought an ambulance was coming to her home at the end of the second 911 call. App. Vol. IV, p. 134. Furthermore, at the end of the second 911 call, even Ms. Sanders believed that Mrs. Johnson was going to stay with Mr. Johnson and wait. App. Vol. IV, pp. 321-322. Accordingly, MECCA 911 was fully aware that at the end of the second call, Mrs. Johnson was still waiting at her home. MECAA 911 was also fully aware that no ambulance was en route or even available to go to the Johnson household, yet MECCA 911 failed to convey this information to Mrs. Johnson. App. Vol. IV, pp. 225; 321-322. More precious minutes were lost.

After receiving no word from anyone regarding the needed ambulance, Mrs. Johnson calls 911 a third time at 11:46:13 a.m. App. Vol. IV, p. 138. During this third call, Mrs. Johnson states that she cannot wait any longer, that she is going to take her husband to the emergency room , and that “he is not breathing.” App. Vol. I, p. 316; App. Vol. V. Then, only *after* Mrs. Johnson informs Mr. Goodwin that she will take her husband to the hospital, does MECCA 911 finally inform Mrs. Johnson, for the first time, that no ambulances were available. App. Vol. I, p. 316; App. Vol. IV, p. 144; App. Vol. V. If MECCA 911 had simply communicated accurate information to Mrs. Johnson during the first two (2) calls, then she would have taken Mr. Johnson to the hospital herself sooner, and not wasted precious minutes. App. Vol. IV, pp. 137, 552. In other words, based on the jury’s verdict, it’s clear that if MECCA 911 had simply told Mrs. Johnson the truth, she would have taken Mr. Johnson to the hospital sooner and saved Mr. Johnson’s life.⁵ App. Vol. I, p. 305.

⁵ See below for facts supporting jury’s determination that Mr. Johnson would have lived had he simply been able to receive medical treatment minutes earlier.

During the third 911 call, Mrs. Johnson also requests that MECCA 911 operator Kenneth Goodwin call Ruby Memorial Hospital to inform the hospital that the Johnsons are on the way. App. Vol. IV, pp. 145-146. Kenneth Goodwin agrees to make the call and informs Mrs. Johnson, “yeah, we can tell ‘em.” App. Vol. I, p. 316; App. Vol. V. The third 911 call lasted approximately thirty-eight seconds. App. Vol. I, p. 316; App. Vol. V. After the conclusion of Mrs. Johnson’s third 911 call, approximately four (4) minutes elapsed before another emergency call was answered by MECCA 911, during which time period Mr. Goodwin could have called Ruby Memorial Hospital. App. Vol. IV, p. 269. Calling a hospital to notify the hospital of a patient’s arrival is a reasonable request for a 911 caller to make, which saves time and may ultimately save a patient’s life. App. Vol. IV, pp. 364, 673. Obviously, if Mr. Goodwin would have called Ruby Memorial Hospital during the four (4) minute period immediately after Mrs. Johnson’s third 911 call, during which time he did not receive any additional 911 calls, then the medical personnel at Ruby could have been awaiting Mr. Johnson’s arrival and Mr. Johnson would have received the care he so desperately needed sooner.

Immediately after the third 911 call was concluded, Mrs. Johnson transported Mr. Johnson to Ruby Memorial Hospital. App. Vol. IV, p. 146. Mrs. Johnson arrived at Ruby Memorial Hospital, but there were no emergency medical personnel at the front door of the emergency room. App. Vol. IV, p. 149. It was apparent that MECCA 911 operator Kenneth Goodwin had not contacted Ruby Memorial Hospital prior to the Johnsons’ arrival. App. Vol. IV, pp. 149-150. Ryan Thorn, the Director of MECCA 911 in May 2008, confirmed that he was unable to locate any evidence that MECCA 911 operator Kenneth Goodwin ever called Ruby Memorial Hospital on behalf of the Johnsons. App. Vol. IV, p. 361. Furthermore, even Randy Lowe, the Monongalia County Commission’s 911 expert, confirmed that he was unable to locate

any evidence which would indicate that a MECCA 911 employee made a call to Ruby Memorial Hospital on behalf of the Johnsons. App. Vol. IV, p. 673. Given the jury's verdict, it appears certain that the jury determined that Mr. Goodwin broke his promise to Mrs. Johnson and failed to call Ruby Memorial Hospital.

Shortly after arriving at Ruby Memorial Hospital, Mrs. Johnson attempted to locate medical personnel, but was told she had to move her vehicle. App. Vol. IV, p. 149. When Mrs. Johnson returned to her vehicle, Mr. Johnson collapsed. App. Vol. IV, p. 149. As a direct result of the actions and inactions of the Monongalia County Commission, more minutes were wasted, and tragically, Mr. Johnson passed away on May 12, 2008. App. Vol. IV, p. 153. Ultimately, the actions and inactions of MECCA 911's employees on May 11, 2008 were egregious and were extreme breaches of the applicable rules and of 911 protocol. App. Vol. IV, p. 474.

Dr. Roger Abrahams, M.D., opined that Mr. Johnson died as a result of a delay in medical care. App. Vol. IV, p. 551. Dr. Abrahams opined that Mr. Johnson suddenly became short of breath at home due to a pneumothorax, or collapsed lung. Mr. Johnson only had one (1) lung on May 11, 2008, stemming from his exposure to agent orange while serving in the United States army in Vietnam. App. Vol. IV, p. 107, 502. As Mr. Johnson's only lung was collapsed, he was unable to get enough oxygen, which caused damage to his heart. Mr. Johnson died approximately twenty-four (24) hours later of heart failure. App. Vol. IV, p. 494. Dr. Abrahams testified that Mr. Johnson needed two types of care. First, the most immediate need, was oxygen. Second, the collapsed lung needed to be corrected. App. Vol. IV, p. 495. Ultimately, Dr. Abrahams opined that Mr. Johnson would have lived had he received medical care (i.e. oxygen) five (5) or ten (10) minutes sooner. App. Vol. IV, p. 552. In fact, on cross examination, Dr.

Abrahams confirmed that Mr. Johnson would have lived had he received treatment even three (3) minutes sooner. App. Vol. IV, p. 554.

B. Procedural Background

Petitioner initially filed a Motion for Summary Judgment, wherein Petitioner specifically stated that Petitioner “could *only be liable* for willful or wanton conduct” under West Virginia Code § 24-6-8. App. Vol. I, p. 87 (emphasis added). Respondent agreed with Petitioner as to the “willful or wanton” standard, and the Circuit Court subsequently denied Petitioner’s Motion for Summary Judgment and stated specifically that “the parties agree and the Court finds that West Virginia Code § 24-6-8 is applicable” and that Respondent was required to show that Petitioner engaged in “willful or wanton misconduct.” App. Vol. I, pp. 129, 138-139.

Petitioner seemingly reversed its position in its Second Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, and asserted that Petitioner could not be liable for “willful or wanton” misconduct under West Virginia Code Sec. § 29-12A-4(b)(1). App. Vol. I, pp. 140-154. Petitioner additionally argued that it was entitled to summary judgment on the immunity contained in West Virginia Code Sec. § 29-12A-5(a)(12) for “unintentional misrepresentations.” App. Vol. I, pp. 140-154. The Circuit Court denied Petitioner’s Motion and found that West Virginia Code § 24-6-8 expressly imposed liability on Petitioner for “willful or wanton” misconduct, and, as such, that West Virginia Code § 29-12A-4(c)(5) expressly permitted Respondent to assert claims pursuant to West Virginia Code § 24-6-8 against Petitioner. App. Vol. I, pp. 221-222. In fact, the Circuit Court previously found, in its Order Denying Defendant Monongalia County Commission’s Motion for Summary Judgment, which was incorporated into the Circuit Court’s Order Regarding Pre-Trial Motions and Rescheduling Trial, that the following questions of material fact existed:

The Court finds that these are questions for the jury as to whether these actions and inactions amount to willful or wanton misconduct. The following questions constitute genuine issues of material fact: is it willful or wanton for a 911 operator to tell a caller that an ambulance is on the way, when the caller knows that the statement is untrue?; is it willful or wanton to violate strict and mandatory policies of the 911 agency?; is it willful or wanton to let a caller believe that an ambulance is coming, by confirming the caller's address location a second time, when the truth is that no ambulance is available?; is it willful or wanton to fail to specifically tell a caller the plain and perhaps painful truth that no units are responding to the request for help?; is it willful or wanton for a 911 operator to promise to call the hospital for a caller, so as to expedite care, and then fail to call the hospital?; is it willful or wanton to fail to alert a fire department with "first-responders" to a breathing difficulty call, where the fire department is only ½ of one mile from the caller's location?; is it willful or wanton to incompletely fill out a CAD sheet for a caller, where other 911 operators must rely on that information?; is it willful or wanton to commit such actions and inactions where it is known that death could result from shortness of breath?; and does the cumulative effect of each of the claimed acts of willfulness and wantonness amount to willfulness and wantonness? The answers to each of these questions involve factual determinations which must be made by a jury in this case.

App. Vol I, pp. 138-139.

At trial, the parties called witnesses and presented evidence. App. Vol. IV. At the conclusion of trial, the Court instructed the jury that Petitioner was "only liable for willful or wanton misconduct." App. Vol. I, p. 300. The Court further instructed the jury on the meaning of willful or wanton conduct and that Petitioner could not be held liable for misrepresentations, if unintentional. App. Vol. I, pp. 300-301. The jury found that Respondent established by a preponderance of the evidence that the conduct of Petitioner, through its employees, on May 11, 2008, amounted to willful or wanton misconduct, and that such conduct was a proximate cause of the injury or damages to Respondent. App. Vol. I, p. 305. The jury awarded Respondent five hundred twenty-five thousand dollars (\$525,000.00) for economic damages,⁶ one hundred seventy-five thousand dollars (\$175,000.00) for the pain and suffering of Decedent, Joseph B.

⁶Prior to trial, the parties stipulated that, as a result of the death of Joseph B. Johnson, his estate suffered an economic loss in the amount of five hundred twenty-five thousand dollars (\$525,000.00). App. Vol. I, p. 291.

Johnson, one hundred seventy-five thousand dollars (\$175,000.00) for losses of the survivors of the Decedent, Joseph B. Johnson, and ten thousand dollars (\$10,000.00) in reasonable funeral expenses.⁷ App. Vol. I, p. 306.

Petitioner subsequently filed an appeal with this Court. Petitioner claims that the Circuit Court erred, both prior to trial and during trial. Respondent submits this brief in response to Petitioner's brief. Respondent further submits that Petitioner's alleged "errors" are completely without merit, and that this Court should affirm the jury's verdict.

II. STANDARD OF REVIEW

Petitioner's first three assignments of error ("A", "B", and "C"), regarding the Court's denial of petitioner's Second Motion to Dismiss or, in the Alternative Second Motion for Summary Judgment, are to be reviewed *de novo*. The West Virginia Supreme Court of Appeals "reviews *de novo* the denial of a motion for summary judgment." Syl. Pt. 1. Findley v. State Farm Mut. Auto Ins. Co., 213 W.Va. 80, 570 S.E.2d 807 (2002).

However, Petitioner's fourth alleged assignment of error ("D") regarding the Circuit Court's modification of Petitioner's proposed jury instruction No. 9 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). Likewise, the standard of review regarding a Circuit Court's decision whether to include special interrogatories, is an abuse of discretion. Syl. Pt. 4, Spence v. Browning Motor Freight Lines, Inc., 138 W. Va. 748, 77 S.E.2d 806, 807 (1953) (citing Lovett v. Lisago, 100 W.Va. 154, 130 S.E. 125 (1925)). Respondent is somewhat unclear as to the exact

⁷Petitioner was entitled to an offset, in the amount of seventy-five thousand dollars (\$75,000.00), based upon Respondent's prior settlement with Jan-Care. Accordingly, judgment was entered against the Monongalia County Commission in the amount of eight hundred ten thousand dollars (\$810,000.00), plus interest. App. Vol. I, pp. 309-310.

nature of Petitioner's fifth alleged assignment of error ("E"). However, as it appears Petitioner is claiming that the Circuit Court should not have allowed the word "reckless" to ever be heard by the jury in this matter, the ruling is evidentiary and is to be reviewed under an abuse of discretion standard. Syl. Pt. 1. McDougal v. McCammon, 193 W. Va. 229, 232, 455 S.E.2d 788, 791 (1995).

III. REQUEST FOR ORAL ARGUMENT

Respondent hereby requests that she be permitted to present Oral Argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

IV. SUMMARY OF THE ARGUMENT

Petitioner contends that the Circuit Court made several errors. Specifically, Petitioner argues that the Court: (a) erred in interpreting West Virginia Code § 29-12A-4(c)(5) and West Virginia Code § 24-6-8 such that Petitioner was not entitled to immunity under West Virginia Code § 29-12A-4(b)(1); (b) erred in failing to dismiss the Respondent's claims, prior to trial, pursuant to West Virginia Code § 29-12A-5-(a)(12); (c) erred in making an overly broad ruling by holding that "all immunities" under § 29-12A-4 were inapplicable; (d) improperly instructed the jury and erred by failing to submit a special interrogatory on unintentional misrepresentations to the jury; and (e) erred by including the word "reckless" in the jury instructions defining "willful or wanton" misconduct. As set forth herein, each of these alleged errors is without merit.

The Petitioner's first argument, that Respondent cannot assert a cause of action against Petitioner under § 24-6-8, is flawed for several reasons. It is perfectly clear that the West Virginia legislature both contemplated and imposed liability for political subdivisions for the willful or wanton misconduct of 911 emergency call-centers, under § 24-6-8. Even though § 24-

6-8 is titled a “limitation” of liability, a plain reading of the statute clearly dictates when public agencies who operate 911 call centers are liable. Furthermore, much of § 24-6-8 would be rendered totally meaningless under Petitioner’s flawed interpretation of West Virginia law. Finally, and perhaps most importantly, Petitioner’s interpretation of both § 24-6-8 and § 29-12A-4(c)(5) necessitates the absurd conclusion that political subdivisions can never be held liable for the conduct of emergency call centers under any circumstances. This construction flies in the face of both the language and purpose of § 24-6-8. In short, Petitioner’s first assignment of error is completely and wholly without merit.

Petitioner’s second assignment of error, that it is entitled to immunity, as a matter of law, under § 29-12A-5(a)(12), is similarly flawed. First, as set forth above, Respondent asserted a cause of action against Petitioner pursuant to § 24-6-8, which is outside of the purview of § 29-12A-1, et. seq and its relevant immunities. Second, whether any misrepresentations were “unintentional” was clearly a question of fact for the jury. In an attempt to sidestep the factual issues, Petitioner completely misapplies the concept of “unintentional misrepresentations” to the facts of this case. Furthermore, willful or wanton misconduct cannot be unintentional misrepresentations, and the jury was explicitly and specifically instructed that Petitioner was not liable for unintentional misrepresentations. Finally, a reasonable jury could have determined that Petitioner committed some unintentional misrepresentations, yet still found Petitioner engaged in “willful or wanton” misconduct.

Petitioner’s third assignment of error, that the Circuit Court made an overly broad ruling regarding the immunity contained in § 29-12A-4 is also without merit. Petitioner fails to explain exactly what immunity it is entitled to under § 29-12A-4 and fails to explain exactly how the Circuit Court’s “overly broad” ruling prejudiced Petitioner in any way. Furthermore the issue

has been waived, as Petitioner never objected to the allegedly overly broad ruling which was contained in a pre-trial Order prior to filing this appeal.

Petitioner's fourth assignment of error alleges that the Circuit Court's failure to include both its proposed jury instruction No. 9, verbatim, and its proposed special interrogatory regarding unintentional representations is reversible error. However, as this Court will readily recognize, the Circuit Court modified Petitioner's proposed instruction, and properly instructed the jury regarding unintentional misrepresentations. Furthermore, and very importantly, Petitioner's proposed jury instruction No. 9 and Petitioner's proposed special interrogatory regarding unintentional misrepresentations are both incorrect statements of the law, as they imply that the jury was not permitted to find Petitioner liable for conduct other than overt misrepresentations. Petitioner also fails to give due deference to the substantial discretion given to trial courts regarding jury instructions and special interrogatories.

Finally, Petitioner alleges that it was reversible error for the Court to include the word "reckless" in the portion of the jury charge defining "willful or wanton." However, such claim is clearly without merit as this Court has adopted the exact definition which was ultimately read to the jury by the Circuit Court.

Accordingly, all of the alleged errors set forth in Petitioner's brief are without merit, and this Court should affirm the Circuit Court's prior rulings and the jury's verdict in favor of Respondent.

V. ARGUMENT

- A. West Virginia Code § 29-12A-4(c)(5) specifically authorizes Respondent to assert claims against Petitioner pursuant to West Virginia Code § 24-6-8.**

Respondent agrees, and the Circuit Court specifically Ordered, almost two (2) years ago in its Order Denying Defendant Monongalia County Commission's Motion for Summary Judgment, that Respondent was required to prove that "willful or wanton" misconduct occurred in order for Petitioner to be liable to Respondent pursuant to W. Va. Code § 24-6-8. App. Vol I, pp. 129-130. As set forth herein, W. Va. Code § 29-12A-4(c)(5) specifically authorizes Respondent to assert claims against Petitioner pursuant to W. Va. Code § 24-6-8. Furthermore, Petitioner's misinterpretation of the West Virginia Code would mandate that public agencies, like Petitioner, could **never** be liable for any acts, whether intentional or unintentional, of employees of 911 agencies.

i. West Virginia Code § 24-6-8 expressly imposes liability upon Petitioner.

Petitioner asserts that it is immune from liability pursuant to the West Virginia Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 et. seq. (at times, hereinafter referred to as the "GTCA"). Specifically, Petitioner asserts that it is immune from liability pursuant to W. Va. Code § 29-12A-4(b)(1). In interpreting the GTCA, "[t]he general rule of construction in governmental tort legislation cases favors liability, not immunity. Unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail." Syl. Pt. 2, Marlin v. Bill Rich Const., Inc., 198 W. Va. 635, 638, 482 S.E.2d 620 (1996). Furthermore, the liability-creating provisions of W. Va. Code § 29-12A-4 are to be broadly construed, and the immunity creating provisions of W. Va. Code § 29-12A-5 are to be narrowly construed. Calabrese v. City of Charleston, 204 W. Va. 650, 656 n.7, 515 S.E.2d 814, 820 n.7 (1999), citing Marlin, *supra*. As such, West Virginia law dictates that when interpreting W. Va. Code § 29-12A-4, Courts should err on the side of liability, not immunity.

In support of Petitioner's position, it cites W. Va. Code § 29-12A-4(c)(2), which provides that "[p]olitical subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment." *Id.* See Petitioner's Brief, p. 9. Essentially, Petitioner's argument is that political subdivisions are immune from claims for intentional acts of its employees, and, that, consequently, Petitioner is immune from Respondent's claims. See Petitioner's Brief, p. 12.

Unfortunately, Petitioner's entire argument is based upon a complete misinterpretation of the GTCA. Although Petitioner goes to great lengths to argue that Respondent cannot recover under W. Va. Code § 29-12A-4(c)(2), Petitioner fails to properly interpret W. Va. Code § 29-12A-4(c)(5), which specifically permits Respondent to file suit against Petitioner under W. Va. Code § 24-6-8. W. Va. Code § 29-12A-4(c)(2) is simply not relevant to the present case.

This Court has made clear that a party can file suit against public subdivision, such as Petitioner in this case, so long as "the acts complained of come within the specific liability provisions of *W.Va.Code*, 29-12A-4 (c)." Zirkle v. Elkins Road Public Service Dist. 221 W.Va. 409, 414, 655 S.E.2d 155, 160 (W.Va.,2007). W. Va. Code § 29-12A-4(c) contains five (5) specific subsections. Accordingly, if W. Va. Code § 29-12A-4(c)(5) is applicable to Respondent's claims against Petitioner, then Petitioner is not entitled to the general immunity contained in W. Va. Code § 29-12A-4(b). As this Court will readily recognize, the plain language of subsection (c)(5) is clear, and Respondent can assert claims against Petitioner pursuant W. Va. Code § 24-6-8.

W. Va. Code § 29-12A-4(c)(5) provides that, in addition to the circumstances set forth in W. Va. Code § 29-12A-4(c)(1) thru W. Va. Code § 29-12A-4(c)(4), a political subdivision, such

as Petitioner, is liable when liability is imposed upon such political subdivision by another provision of the West Virginia Code:

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

W. Va. Code § 29-12A-4(c)(5) (emphasis added).

W. Va. Code § 24-6-8 is exactly the type of statute contemplated by W. Va. Code § 29-12A-4(c)(5). W. Va. Code § 24-6-8 specifically provides that a public agency, such as Petitioner, which has established an enhanced emergency telephone system is not liable for damages in a civil action, except for willful or wanton misconduct:

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

W. Va. Code § 24-6-8 (emphasis added)

Although W. Va. Code § 24-6-8 specifically states when a public agency is not liable, Respondent asserts and the Circuit Court previously held that the only logical interpretation of W. Va. Code § 24-6-8 is that a public agency, such as Petitioner, is liable under W. Va. Code § 24-6-8, for willful or wanton misconduct of any employees of its enhanced emergency telephone system (i.e. the County's 9-1-1 center). *See App., Vol I, p. 222.* Accordingly, W. Va. Code § 24-

6-8 explicitly imposes liability on Petitioner, and Petitioner's assertion that it is immune from Respondent's claims, as a result of W. Va. Code § 29-12A-4, is completely without merit.

Justice Davis explained the correct analysis for whether a statute, namely W. Va. Code § 62-11A-3(b), expressly imposes liability under W. Va. Code § 29-12A-4(c)(5) in her dissenting opinion in Fisk v. Lemons, 201 W. Va. 362, 497 S.E.2d 339 (1997). In Fisk, the underlying plaintiff failed to properly assert that W. Va. Code § 62-11A-3(b) expressly imposed liability on the underlying defendants pursuant to W. Va. Code § 29-12A-4(c)(5). 201 W. Va. at 367. The majority ruled against the underlying plaintiff as W. Va. Code § 62-11A-3(b) had not been "properly invoked" by the plaintiff at the Circuit Court level. Id. As such, the majority never reached the issue, of interpreting the meaning of W. Va. Code § 29-12A-4(c)(5).

Specifically, W. Va. Code § 62-11A-3(b) reads as follows:

(b) Neither the sheriff, the county commission or community service agency to which the person is assigned shall be liable for injury or damage to third parties intentionally committed by the person so sentenced or for any action on behalf of the person so sentenced except in the case of gross negligence on the part of the sheriff, county commission or community service agency or the supervisor of the person so sentenced: Provided, That nothing herein shall bar a claim by a third party for injury or damage resulting from the negligent act of the person so sentenced committed outside the confines of a county jail and within the scope of the work required by the alternative sentence.

W. Va. Code § 62-11A-3(b).

In her dissenting opinion, Justice Davis examined whether W. Va. Code § 62-11A-3 expressly imposed liability under W. Va. Code § 29-12A-4(c)(5). Fisk, 201 W. Va. at 368-371, 497 S.E.2d at 345-348 (Davis, dissenting). W. Va. Code § 62-11A-3, similar to W. Va. Code § 24-6-8, is titled as a "limitation on liability of public officials and county and community service work agencies." W. Va. Code § 62-11A-3. Even though W. Va. Code § 62-11A-3(b) is titled as a "limitation" on liability, and even though the statute does not specifically mention "imposing"

liability, Justice Davis found that “[c]learly, W.Va.Code, § 62–11A–3(b) authorizes a cause of action against a county commission and sheriff department when their gross negligence permits an inmate, released for work under chapter 62, article 11A, to intentionally or otherwise harm a third party.” Fisk, 201 W. Va. at 370, 497 S.E.2d at 347 (Davis, dissenting). Ultimately, as Justice Davis makes clear, a statute which “limits” liability must also, in turn, “impose” liability for actions or inactions which are not subject to such limitation.

Recent cases decided by this Court further confirm the same. For example, in Kubican v. The Tavern, LLC, 2013 WL 5976095 (No. 12-0507) (W.Va.,2013), this Court examined W. Va. Code, § 31b-3-303, which provides that “A member or manager is not personally liable for a debt, obligation or liability of the company solely by reason of being or acting as a member or manager.” W. Va. Code, § 31b-3-303. Even though this statutory section only mentions “limits” of one’s liability, this Court held that “the Legislature implicitly has left intact the prospect of 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, 4. In other words this Court confirmed, and common sense dictates, that a statute which “limits” liability, must also impose liability for actions or inactions which are outside of the scope of such limitation.

Even more importantly, this Court, in Upchurch v. McDowell County 911, 2013 WL 5814113, n.17 (No. 12-0824) confirmed that a public agency may be liable under W. Va. Code § 24-6-8! In Upchurch, the Circuit Court dismissed the plaintiff’s claims against McDowell County 911. Although it appears that the Circuit Court did not address W. Va. Code § 24-6-8, this Court noted that the underlying defendants were immune from Ms. UpChurch’s claims pursuant to W. Va. Code § 24-6-8 as “Ms. Upchurch has not proven that either McDowell County 911 or Ms. Heffner exhibited ‘willful or wanton misconduct,’ id., in response to

[plaintiff's] call for emergency assistance.” Upchurch, 2013 WL 5814113, n.17. Accordingly, this Court recognized that McDowell County 911 would have been liable for willful or wanton misconduct pursuant to W. Va. Code § 24-6-8. As such, it is clear that Respondent was permitted to assert claims against Petitioner pursuant to W. Va. Code § 24-6-8.

Petitioner's reliance on Zirkle v. Elkins Road Public Service Dist., 221 W.Va. 409, 411, 655 S.E.2d 155, 157 (W.Va.,2007), and Harrison v. City of Charleston, No. 11-0598, (memorandum decision) is misplaced. In Zirkle, the underlying Plaintiff, Mr. Zirkle sued the Elkins Road Public Service District (the “PSD”), alleging that the PSD's employees had committed intentional torts against Mr. Zirkle. The Zirkle Court analyzed W. Va. Code § 29-12A-4(c)(5) which contains a limitation providing that “[l]iability shall not be construed to exist under another section of this code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.” W. Va. Code § 29-12A-4(c)(5). At issue in Zirkle was W. Va. Code § 16-13A-3, which provides that a PSD “may sue, may be sued[.]” Id. Accordingly W. Va. Code § 16-13A is a “general authorization” to sue or be sued and is specifically excepted from the scope of W. Va. Code § 29-12A-4(c)(5).

As such, the Zirkle Court correctly held that W. Va. Code § 16-13A-3 did not expressly impose liability upon the PSD and, W. Va. Code § 29-12A-4(c)(5) was inapplicable. Id., 221 W.Va. at 413, 655 S.E.2d at 159. As there was no specific statute which imposed liability on the PSD (unlike in the case *sub judice*), this Court held that, pursuant to the GTCA, “claims of intentional and malicious acts are included in the general grant of immunity in *W.Va.Code*, 29-12A-4(b)(1).” Id. 221 W.Va. at 414, 655 S.E.2d at 160.

This Court's ultimate holding in Zirkle was wholly based upon the plain language of W. Va. Code § 16-13A-3 which, by its plain language, was clearly "a general authorization that a political subdivision may sue and be sued" and not a statute in which "liability is expressly imposed upon the political subdivision[.]" Clearly, the Zirkle holding is distinguishable from this case because W. Va. Code § 24-6-8, unlike W. Va. Code § 16-13A-3, expressly provides that a public agency, such as Petitioner, is liable for "willful or wanton" misconduct. As such, Zirkle does not bar Respondent's claims against Petitioner.

Likewise, this Court's ultimate holding in Harrison v. City of Charleston 2011 WL 8193583, (memorandum decision W.Va., 2011) has no bearing on Respondent's claims against Petitioner in this matter. In Harrison, like in Zirkle, there was no statute which expressly imposed liability on the underlying defendant. In fact, in Harrison, this Court did not even discuss any other statutes which may impose liability on the underlying Petitioner, nor did this Court even discuss W. Va. Code § 29-12A-4(c)(5). The Harrison Court simply held that, absent another statute which imposes liability upon a public entity (like W. Va. Code § 24-6-8 in this case), then a party may not sue a public entity for any intentional and malicious acts. Harrison, pp. 2-3. As such, Zirkle and Harrison are completely distinguishable from this case, and neither holding bars Respondent's claims against Petitioner.

- ii. Pursuant to Petitioner's theory, public agencies, such as Petitioner, could NEVER be held liable, under any circumstances, for any acts, whether intentional or unintentional, of employees of 9-1-1 agencies.**

Perhaps the most important point regarding the first assignment of error alleged by Petitioner is that it is predicated on the notion that a 911 call center established by public agency can never be held liable, under any circumstances. Petitioner initially argues that Respondent must show that Petitioner engaged in "willful or wanton" misconduct pursuant to West Virginia

Code § 24-6-8. However, Petitioner also argues that it is immune for “willful or wanton” misconduct pursuant to the GTCA. As such, under Petitioner’s interpretation of West Virginia law, Petitioner would be completely immune from **all** claims in the State of West Virginia. This interpretation is not only contrary to reason, it is contrary to the express language of West Virginia Code § 24-6-8, sound principles of statutory construction, and the clear intent of the West Virginia Legislature in enacting both West Virginia Code § 24-6-8 and West Virginia Code § 29-12A-1, et. seq.

The law is clear, “[s]tatutes relating to the same subject matter, whether enacted at the same time or at different times, and regardless of whether the later statute refers to the former statute, are to be read and applied together as a single statute [.]” Syl. Pt. 1, in part, Owens–Illinois Glass Co. v. Battle, 151 W.Va. 655, 154 S.E.2d 854 (1967). “Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.” Syl Pt. 3, Smith v. State Workmen's Compensation Com'r., 159 W.Va. 108, 219 S.E.2d 361 (1975). “It is always presumed that the legislature will not enact a meaningless or useless statute.” Syl. Pt. 4, State ex rel Hardesty v. Aracoma–Chief Logan No. 4523, Veterans of Foreign Wars of the United States, Inc., 147 W.Va. 645, 129 S.E.2d 921 (1963). Finally, “[i]t is axiomatic that a court must whenever possible read statutes dealing with the same subject matter in pari materia so that the statutes are harmonious and congruent, giving meaning to each word of the statutes, and avoiding readings which would result in a conflict in the mandates of different statutory provisions.” Mangus v. Ashley, 199 W.Va. 651, 656, 487 S.E.2d 309, 314 (1997).

W. Va. Code § 24-6-8 provides that public agencies “are 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[.]” *Id.* If the West Virginia Legislature wanted to completely **eliminate** liability of public agencies, such as Petitioner, which operate 911 call centers, then W. Va. Code § 24-6-8 would not have contained the words “except willful or wanton misconduct.” Petitioner urges this Court to rule that the phrase “except willful or wanton misconduct” is completely superfluous. Ultimately, the phrase “except willful or wanton misconduct” must mean that Petitioner is liable for “willful or wanton” misconduct.⁸ To hold otherwise would render W. Va. Code § 24-6-8 completely meaningless, and would dictate that all public agencies, such as Petitioner, could NEVER be held liable, under any circumstances, for any acts, whether intentional or unintentional, of employees of 9-1-1 agencies. Clearly, Petitioner’s interpretation of West Virginia law flies in the face of the rules of statutory construction, and common sense.

Ultimately, the West Virginia legislature has specifically stated, in W. Va. Code § 29-12A-4(c)(5), that liability may be imposed on a public entity, such as Petitioner, whenever a statute, such as W. Va. Code § 24-6-8, expresses imposes liability upon the subdivision. Accordingly, Petitioner is not entitled to immunity under W. Va. Code § 29-12A-4(b)(1), and Respondent is specifically authorized to bring suit against Petitioner pursuant to W. Va. Code § 24-6-8, so the Circuit Court property denied Petitioner’s Second Motion for Summary Judgment.

B. The Circuit Court correctly determined that Petitioner was not entitled to summary judgment pursuant to W. Va. Code § 29-12A-5(a)(12), and the Circuit Court correctly instructed the jury and permitted the jury to determine whether Petitioner engaged in willful or wanton misconduct.

Petitioner also asserts that it is entitled to immunity under W. Va. Code § 29-12A-5(a)(12). This argument fails for several reasons. First, W. Va. Code § 29-12A-5(a)(12) is inapplicable, as the Respondent’s claims were brought pursuant to § 24-6-8. Second, whether

⁸Furthermore, even Petitioner has previously admitted that W. Va. Code § 24-6-8 is clear and unambiguous. App. Vol I, p. 89.

any actions constituted “unintentional misrepresentation” was clearly a question of fact for the jury and, accordingly, summary judgment would have been inappropriate. Third, Respondent readily concedes that “unintentional misrepresentations” are not “willful or wanton” misconduct and, as noted above, that Petitioner can only be liable for “willful or wanton” misconduct. Fourth, Petitioner has not been prejudiced in any manner as the jury was specifically instructed that Petitioner was NOT liable for unintentional misrepresentations. App. Vol I., p. 301. Finally, and perhaps most importantly, despite Petitioner’s assertions, Respondent’s claims were not “based entirely”⁹ on statements made to Mrs. Johnson, so a reasonable jury could have found that Petitioner made some “unintentional misrepresentations,” yet still engaged in “willful or wanton” misconduct that caused Mr. Johnson’s death.

i. Respondent’s claims are asserted pursuant to West Virginia Code § 24-6-8, so W. Va. Code § 29-12A-5(a)(12) is inapplicable to this case.

First, the Circuit Court was correct in holding that § 29-12A-5(a)(12) does not bar Respondent’s claims against Petitioner. As noted in greater detail, *supra*, W. Va. Code § 29-12A-4(c)(5) specifically directs litigants outside the scope of W. Va. Code § 29-12A-1, et. seq. when liability is imposed elsewhere. As such, the immunities contained in the GTCA, such as W. Va. Code § 29-12A-5(a)(12), are “nonexistent as a result of the immunity exception contained in W.Va.Code, § 29–12A–4(c)(5)[.]” Fisk, 201 W. Va. 362, 370, 497 S.E.2d 339, 347 (Davis, dissenting). Furthermore, and even more importantly, even if this Court determines that § 29-12A-5(a)(12) is applicable to this action, then there are *several* additional reasons why Petitioner’s argument fails, detailed *infra*.

⁹See Petitioner’s brief, at p. 15.

ii. Whether Petitioner’s conduct constituted “willful or wanton misconduct” or “unintentional misrepresentations” was a question of fact for the jury.

Even if W. Va. Code § 29-12A-5(a)(12) applies to Respondent’s claims against Petitioner, a reasonable jury clearly could have found that Petitioner’s actions were not “unintentional misrepresentations” and, instead, that Petitioner committed “willful or wanton” misconduct. W. Va. Code § 29-12A-5(a)(12) provides that a political subdivision is immune from liability if a loss or claim results from “[m]isrepresentation, if unintentional[.]” However, and most importantly, Petitioner fails to recognize that whether Petitioner’s conduct consisted of solely “unintentional misrepresentations” is a question of fact for the jury. *See Travis v. Alcon Labs., Inc.*, 202 W. Va. 369, 379, 504 S.E.2d 419, 429 (1998) (“[T]he element of intent usually presents a disputed factual question...” (internal citations omitted)).

In its Brief, Petitioner has completely mischaracterized the evidence in this matter in order to attempt to support its position that no issue of material fact existed and that any and all actions and inactions at issue in this case were undisputably “unintentional misrepresentations.” Petitioner argues that all the statements made by the MECCA 911 operators constitute “unintentional misrepresentations” and not “willful or wanton” misconduct. *See* Petitioner’s Brief 15-18. Such is a tenuous position, especially considering that the jury was ultimately instructed that Petitioner was NOT liable for unintentional misrepresentations, yet still found that Petitioner engaged in willful or wanton misconduct. *See* Argument Section B, iii-iv *infra*. Furthermore, even a cursory analysis evidences that Petitioner completely misunderstands the term “unintentional misrepresentation” as Petitioner has attempted to frame a factual dispute as a question of law.

Petitioner incorrectly asserts that it must have acted with the intent to inflict harm. One can utilize Petitioner's own definition of "unintentional misrepresentation" cited in its Brief, and clearly see the error in Petitioner's analysis. As noted in Petitioner's Brief, Black's Law Dictionary (9th ed. 2009) defines, in part, an "unintentional misrepresentation" as:

1. "The act of making a false or misleading assertion about something, usu[ually] with the **intent to deceive**"; and
2. "The assertion so made; an assertion that does not accord with the facts."

See Petitioner's Brief, pp. 14-15. (emphasis added).

It is noteworthy that Petitioner never submitted the above quoted definition of "unintentional misrepresentations" to the Circuit Court in any prior pleading, nor in its proposed jury instructions. App. Vol. I, p. 224. Yet, under *Petitioner's* own definition, the intent which must be analyzed is an **intent to deceive**, and not an intent to harm. As such, any assertion that Petitioner must have **intended to harm** Mr. Johnson in order to be liable is completely without merit. Furthermore, there is ample evidence in the record to support a finding that Petitioner intended to deceive Respondent. App. Vol. I, pp. 138-139, 313; App. Vol. IV, pp. 149-150, 279.

In summary, under the facts of this case, Petitioner's actions and omissions were sufficient to constitute "willful or wanton" misconduct, even if Petitioner's employees or agents did not act with the specific intent to cause harm to Mr. Johnson. Unfortunately, Petitioner's Brief spends roughly four (4) pages analyzing an intent to harm, which is not even an issue in this case. Accordingly, it is clear that the existence of any "unintentional misrepresentations" is a question of fact for the jury, and that the Circuit Court did not err in failing to dismiss the Respondent's claims prior to trial.

- iii. “Willful or wanton” misconduct cannot be an “unintentional misrepresentation,” and there was ample evidence in the record for a jury to find that Petitioner engaged in “willful or wanton” misconduct.**

As noted above, Respondent was required to prove that “willful or wanton” misconduct occurred in order for Petitioner to be liable to Respondent pursuant to W. Va. Code § 24-6-8. Respondent acknowledged and accepted this heightened burden. App. Vol. I., pp. 195-196. As such, Respondent conceded at the outset, that Petitioner could only be liable for “willful or wanton” misconduct, and could not be liable for other conduct, such as unintentional misrepresentations, negligence, etc. The Circuit Court agreed and, at trial, Petitioner was permitted to argue that Petitioner’s actions and inactions were “unintentional misrepresentations” and not “willful or wanton” misconduct. App. Vol. I, pp. 222-223. Furthermore, and as detailed in Section C.iv. *infra*, the jury was correctly instructed that Petitioner could not be held liable for “unintentional misrepresentations.” App. Vol. I., p. 301.

Ultimately, “willful or wanton” misconduct, is simply **not** the type of conduct described in W. Va. Code § 29-12A-5(a)(12). Put differently, “willful or wanton” misconduct and “unintentional misrepresentation” are mutually exclusive, and the jury was properly instructed in this regard. App. Vol. I., p. 301. If Petitioner had only engaged in “unintentional misrepresentations” then the jury would have found in Petitioner’s favor. Unfortunately for Petitioner, the jury completely disagreed, and found that Petitioner engaged in willful or wanton misconduct, a finding that Petitioner seems completely unable to accept.

- iv. The jury was explicitly and specifically instructed that Petitioner was not liable for “unintentional misrepresentations.”**

Perhaps the most important point related to Petitioner’s Second Assignment of Error is that the issue is entirely immaterial, as the jury was instructed that Petitioner was immune from

liability for unintentional misrepresentations, as set forth in W. Va. Code § 29-12A-5(a)(12). Specifically, the Court instructed the jury that: **“A political subdivision is immune from liability if a loss or claim results from misrepresentation, if unintentional.** However, a political subdivision is not immune from liability if a loss or claim results from acts or omissions that are willful or wanton.” App. Vol. I. p. 301, ¶ 4 (emphasis added).

Given that the jury was ultimately instructed on the exact immunity contained in W. Va. Code § 29-12A-5(a)(12), it is difficult to see how Petitioner believes it was prejudiced by the Circuit Court’s ruling. Petitioner’s Brief attempts to create some legal error with the Circuit Court’s decision to deny Petitioner summary judgment, however, in actuality, Petitioner simply disagrees with the jury’s decision. Ultimately, the Circuit Court was correct in ruling that “whether ‘willful or wanton’ misconduct occurred in this matter is a material question of fact for the jury which precludes the entry of summary judgment in this matter.” App. Vol I, p. 223.

- v. **A reasonable jury could have determined that Petitioner committed some “unintentional misrepresentations” yet still found that Petitioner engaged “willful or wanton” misconduct.**

Petitioner also fails to recognize that Petitioner’s employees’ “misrepresentations” were not the only source of willful or wanton misconduct in this matter. For example, at trial, Respondent set forth evidence that the inactions of Petitioner’s employees constituted willful or wanton misconduct that directly and proximately caused Respondent’s death.¹⁰ App. Vol. IV, p. 228, 361. These inactions were not misrepresentations but could still amount to “willful or wanton” misconduct to a reasonable fact-finder. Such is further evidence that Petitioner was not

¹⁰Such examples include, but are not limited to, Petitioner’s failure to call the Star City Fire Department and Petitioner’s failure to call Ruby Memorial to let them know Mrs. Johnson was on her way to the hospital. App. Vol. IV, p. 228, 361.

entitled to Summary Judgment, as the facts of this case clearly dictated that a reasonable jury could clearly find that, notwithstanding any “misrepresentations,” Petitioner engaged in willful or wanton misconduct.

C. The Circuit Court correctly ruled that the additional immunities in W. Va. Code § 29-12A-4 are inapplicable to this matter, and, regardless, Petitioner was not harmed by such ruling and Petitioner has waived any objection to such ruling.

Petitioner also alleges that the Circuit Court made an overly broad ruling regarding the immunities provided in W. Va. Code § 29-12A-4 in its Order Regarding Pre-Trial Motions and Rescheduling Trial. *See App.*, Vol I., pp. 220-235. Said Order denied Petitioner’s Second Motion to Dismiss and/or Second Motion for Summary Judgment. *See App.*, Vol I., pp. 223. As part of said Order, the Circuit Court found that “Defendant [Petitioner] is not immune from Plaintiff’s [Respondent’s] claims, pursuant to W. Va. Code § 29-12A-4” as any immunity contained therein is “inapplicable to Plaintiff’s [Respondent’s] claims against Defendant [Petitioner][.]” *See App.*, Vol I., pp. 222. First and foremost, the Circuit Court was correct in its ruling. Second, it appears that Petitioner has simply regurgitated its first assignment of error, but, in the event that Petitioner is attempting to assert that additional errors exist, then Petitioner has clearly waived its right to assert the same, as Petitioner has never made any additional, separate assertions, as to how such ruling was made in error.

i. The Circuit Court correctly ruled that the immunity provision contained in W. Va. Code § 29-12A-4 is inapplicable to this cause of action.

W. Va. Code § 29-12A-4(b)(1) provides that a political subdivision, such as Petitioner, is not liable “except as provided in subsection (c) of this section.” *Id.* As such, W. Va. Code § 29-12A-4(b)(1) is a general immunity clause which mandates that liability only exists under W. Va. Code § 29-12A-4(c). As set forth in greater detail, *supra*, liability exists against Petitioner in this

matter pursuant to W. Va. Code § 29-12A-4(c)(5), as W. Va. Code § 24-6-8 expressly imposes liability on Petitioner. Therefore, based upon the plain language of the statute, the general immunity provided for in W. Va. Code § 29-12A-4(b)(1) is completely inapplicable to Respondent's claims against Petitioner in this matter. As such, the Circuit Court's ruling that Petitioner was not immune from Respondent's claims pursuant to W. Va. Code § 29-12A-4 is clearly correct.

ii. Petitioner was not harmed by the Circuit Court's ruling that Petitioner was not immune from Respondent's claims pursuant to W. Va. Code § 29-12A-4 and Petitioner has waived any objection to this ruling.

It appears that Petitioner, in Section C of its Brief, has simply attempted to repackage the argument contained in Section A of its Brief. Petitioner claims that the Circuit Court erred in finding that Petitioner was not immune pursuant to W. Va. Code § 29-12A-4, but Petitioner does not set forth any additional arguments as to how it is immune pursuant to such statutory section. As the only "immunity" set forth in W. Va. Code § 29-12A-4 is found in section (b)(1), it appears that Petitioner is simply reasserting that the Circuit Court erred in finding that Petitioner was not immune pursuant to W. Va. Code § 29-12A-4. Nowhere in Section C of Petitioner's Brief does Petitioner indicate how exactly the allegedly "overly broad" ruling by the Circuit Court prejudiced Petitioner in any way. To this point, Petitioner has only alleged that it is entitled to immunity under the GTCA pursuant to W. Va. Code § 29-12A-4(b)(1) and W. Va. Code § 29-12A-5(a)(12). As set forth above, Petitioner's claims in regards to both statutory sections are completely without merit. However, to the extent that Petitioner is now, for the first time, attempting to allege that it is entitled to immunity pursuant to additional provisions of the GTCA, which it has not previously asserted at any point in time, then Petitioner has clearly waived its right to assert the same.

Finally, despite Petitioner's claims to the contrary, Respondent does not claim, nor did the Circuit Court find, that § 24-6-8 supercedes W. Va. Code § 29-12A-1, et. seq. *See* Petitioner's Brief, p. 19. In actuality, it is *Petitioner* who argues that certain sections of W. Va. Code § 29-12A-1, et. seq. effectively supercede and render W. Va. Code § 24-6-8 completely meaningless. On the contrary, Respondent asserts, and the Circuit Court found, that the two (2) statutes should be read in harmony, and that **pursuant to** W. Va. Code § 29-12A-4(c)(5) Respondent is permitted to assert claims under W. Va. Code § 24-6-8 against Petitioner. Accordingly, Petitioner's claims that the Circuit Court's ruling was "overly broad" is without merit.

D. The Circuit Court did not err in modifying Petitioner's proposed jury instruction regarding "unintentional misrepresentations", nor did the Circuit Court err in refusing to include Petitioner's special interrogatory regarding unintentional misrepresentations.

Petitioner also alleges that the Circuit Court erred by modifying Petitioner's proposed jury instruction regarding "unintentional misrepresentations" and that the Circuit Court erred by failing to submit Petitioner's proposed special interrogatory regarding "unintentional misrepresentations" to the jury. *See* Petitioner's Brief, pp. 19-23. Petitioner's claims are without merit, as the jury *was* instructed that Petitioner is not liable for unintentional misrepresentations. Furthermore, Petitioner completely mischaracterizes the Circuit Court's rationale for modifying Petitioner's proposed jury instruction and refusing Petitioner's proposed special interrogatory. Additionally, Petitioner's proposed jury instruction and proposed special interrogatory are incorrect statements of the law. Finally, the law is clear that the inclusion or modification of jury instructions and special interrogatories is within the sound discretion of the Circuit Court, and Petitioner has failed to establish that the Circuit Court abused its discretion.

i. The jury was instructed that Petitioner is immune from liability for “unintentional misrepresentations”

The Circuit Court modified the Petitioner’s proposed jury instruction regarding “unintentional misrepresentations.” The modified instruction, which was read to the jury, is as follows:

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

App. Vol I, p. 301. (emphasis added).

Accordingly, and as set forth in more detail in Section B, iv. *supra*, the jury was instructed regarding the specific immunity contained in § 29-12A-5(a)(12). Likewise, the jury was instructed that the “Monongalia County Commission is only liable for the acts or omissions of its officers, agents, and employees, at the Monongalia Emergency Centralized Agency (MECCA 9-1-1), if such acts or omissions constitute willful or wanton misconduct.” App. Vol I, p. 300. Accordingly, the jury was properly instructed, and it is clear that the jury completely rejected Petitioner’s **factual** argument that Petitioner’s conduct solely consisted of “unintentional misrepresentations” by finding that Petitioner engaged in willful or wanton misconduct. App. Vol I, p. 305.

Petitioner fails to articulate how the actual instruction the jury received regarding “unintentional misrepresentations” was, in any way, confusing, ambiguous, or insufficient. Petitioner’s Brief repeatedly states that it was error for the trial court not to include its proposed jury instruction on unintentional misrepresentations verbatim and/or include a special interrogatory on unintentional misrepresentations. However, rather than explaining why Petitioner was entitled to have its proposed instruction read verbatim and its special interrogatory

submitted to the jury, Petitioner spends a large portion of its brief attacking the purported rationale of the Circuit Court. *See* Petitioner's Brief, pp. 21-23. Petitioner attempts to cite a portion of the Court's purported rationale for its ruling regarding Petitioner's proposed jury instruction No. 9. *See* Petitioner's Brief, pp. 21-22. However, later in the proceedings, after a bench conference with counsel for both parties, the Circuit Court modified Petitioner's proposed jury instruction No. 9, and explained its rationale for including said modified instruction. Curiously, Petitioner's Brief fails to cite, or even acknowledge, the Circuit Court's clarification and final ruling regarding Petitioner's proposed jury instruction No. 9. Specifically, the Court's modification of Petitioner's proposed jury instruction No. 9, and its rationale for the same, was as follows:

THE COURT: All right. Pursuant to discussion with counsel again, particularly with regard to the jury verdict form, the Court on its own initiative revisited Defendant's proposed jury instruction number 9. And the reason for the Court's denial of Defendant's jury instruction 9 in addition to what it has already said, is that the first sentence of that instruction is not a complete statement of the law. But I believe that the -- I believe the second sentence of that instruction is a proper instruction for the jury.¹¹ Therefore, the Court on its own, will amend the jury charge to include an instruction that will be in place of Defendant's proposed jury instruction 9, and it will read as follows: "A political subdivision -- pursuant to West Virginia statutory law" -- go ahead.

...

THE COURT: Okay. "A political subdivision is not immune from liability if a claim -- if a loss or a claim results from acts or omissions that are wanton -- willful or wanton." Now, I understand the defense does not have an objection to that instruction although you're not giving up your objection of the Court not giving Defendant's proposed jury instruction number 9?

MR. WARNER: That's right.

¹¹It seems that the Circuit Court incorrectly stated that it believed that the second sentence of Respondent's proposed jury instruction No.9 was a proper instruction, as the Court's modification of the proposed instruction did not include the second sentence. However, any ambiguity was certainly cleared up by the Court's modification of Respondent's proposed jury instruction No. 9, which is set forth above.

App., Vol II, pp. 11-12.

Similarly, Petitioner's Brief also failed to include the Circuit Court's final rationale for refusing to submit Petitioner's special interrogatory regarding "unintentional misrepresentations" to the jury. The Circuit Court's rationale was as follows:

THE COURT: All right. It will be given without objection. And the jury verdict form will be used over the objection of the Defendant because the Defendant believes that interrogatory number 1 -- that there should be an interrogatory relative to immunity for unintentional misrepresentation.

MR. SLAVEY: And just for the record, Judge, we obviously disagree with having such an interrogatory. And the basis for that was it puts an additional burden on the Plaintiff. And the question here is clear. Is there willful or wanton misconduct? If it's yes, you may rule for the Plaintiff. If it's no, you can't.

THE COURT: Yeah. And I agree. I think the interrogatory number 1 on the jury verdict form simplifies the question to the jury. The defense can argue that it was not wanton -- willful or wanton, that it was un -- if anything, it was unintentional. So I think you can argue it to the end of time. That's the issue in this case

App. Vol II, pp. 17.

Accordingly, despite Petitioner's claims to the contrary, the Circuit Court explained its rationale for modifying Petitioner's proposed jury instruction No. 9, and for refusing to include Petitioner's proposed special interrogatory regarding "unintentional misrepresentations."

Specifically, Petitioner's proposals placed a heightened burden on Respondent, and the ultimate instruction given "simplified the question" for the jury.

Additionally, as this Court is well aware, an incorrect rationale is not in and of itself the basis for reversal on appeal. Specifically, this Court has held 'where the trial court reaches the correct result based upon the wrong reason, this [C]ourt will affirm the trial court.' ” Cadle Co. v. Citizens Nat. Bank, 200 W.Va. 515, 518, 490 S.E.2d 334, 337 (1997) (quoting State v. Shehan, 242 Kan. 127, 131, 744 P.2d 824 (1987))(internal citations omitted). Accordingly, even if the

Circuit Court incorrectly explained its rationale for modifying Petitioner's proposed jury instruction No. 9, the fact remains that the jury WAS correctly instructed regarding "unintentional misrepresentations." As such, no error can be found in the Circuit Court's ultimate charge to the jury.

ii. The Circuit Court had to modify Petitioner's proposed jury instruction No. 9 and refuse Petitioner's special interrogatory regarding unintentional misrepresentations because they were incorrect statements of law.

Furthermore, Petitioner's Proposed Jury Instruction No. 9, and its Proposed Special Interrogatory regarding "unintentional misrepresentations" were also flawed because they were inaccurate. Both the proposed instruction and special interrogatory are incorrect statements of the law as applied to the facts in this case. As explained in Section B, v, *supra*, it was possible that a jury could find that Petitioner's inactions, which could not in any way be characterized as misrepresentations, were sufficient to constitute "willful or wanton" misconduct. Said inactions include but are not limited to Petitioner's failure to call the Star City Fire Department and failure to call Ruby Memorial Hospital to inform them Mrs. Johnson was on her way. App. Vol. IV, pp. 228, 361.

As such, Petitioner's proposed jury instruction No 9, and Petitioner's proposed special interrogatory were improper as they both mandated that the jury rule in Petitioner's favor if Petitioner engaged in "unintentional misrepresentations," even though a reasonable jury still could have found that Petitioner engaged in other "willful or wanton" misconduct. Accordingly, the Circuit Court correctly ruled that Petitioner's proposed jury instruction No 9, and Petitioner's proposed special interrogatory were inaccurate statements of the law. Ultimately, the Circuit Court instructed the jury based on the exact language contained in W. Va. Code § 29-12A-

5(a)(12), and it is difficult to discern exactly how Petitioner can claim the jury was improperly instructed.

iii. The Circuit Court's decisions to modify Petitioner's proposed jury instruction No. 9 and to refuse Petitioner's special interrogatory regarding unintentional misrepresentations were well within its sound discretion.

Finally, and perhaps most importantly, Petitioner fails to give due deference to the standard of review regarding a Circuit Court's rulings on jury instructions and special interrogatories. As this Court is well aware, the standard of review for both the giving of a jury instruction and the inclusion of special interrogatories is reviewed under an abuse of discretion standard. Syl. Pt. 6, Tennant (1995); *See Also* Petitioner's Brief, p. 8. Likewise, the standard of review regarding a Circuit Court's decision whether to include special interrogatories, is an abuse of discretion. Syl. Pt. 4, Spence (1953) (internal citations omitted).

However, **nowhere** in "Section D" of Petitioner's Brief does Petitioner allege that the Circuit Court abused its discretion. Petitioner's Brief, p. 19-23. Instead, Petitioner simply makes general allegations of error. *See* Petitioner's Brief, p. 23. Petitioner fails to cite a single case wherein the failure to include a special interrogatory or jury instruction is grounds for reversal under the abuse of discretion standard. Notwithstanding this lack of support, Petitioner even goes so far as to argue that it is reversible error for the Court to have failed to adopt its Proposed Jury Instruction "**in its entirety.**" Petitioner's Brief, p. 23. Clearly, this Court has never adopted Petitioner's proposed lenient standard for overturning Circuit Court rulings regarding jury instructions and special interrogatories. Such a standard would force this Court to review, in detail, the specific vernacular of each and every instruction in a given case. Such is obviously not sound policy and, even more importantly, is clearly not the law in the State of West Virginia as this Court gives substantial deference to trial courts regarding such matters. *See* Syl. Pt. 6,

Tennant (1995); Syl Pt. 8., Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 480, 457 S.E.2d 152, 157 (1995); Syl. Pt. 4, Spence (1953) (internal citations omitted).

Accordingly, the Circuit Court's decision to modify Petitioner's proposed jury instruction No. 9 and its decision to refuse to submit Petitioner's special interrogatory regarding unintentional misrepresentations to the jury were both well within its sound discretion.

E. The Circuit Court correctly instructed the jury regarding the definition of “wanton” misconduct.

Petitioner's final assignment of error is perhaps the most difficult to reconcile with West Virginia law. Petitioner apparently alleges that the mere use of the term “reckless” in a jury instruction, or at any point during trial, is grounds for reversal. This argument is bordering on the absurd, given that the portion of the jury charge Petitioner objects to is a **direct quotation** from a recent ruling from this Court which specifically defines “wanton.” Ultimately, the jury was properly instructed that Petitioner was only liable for “willful or wanton misconduct” and the Court correctly defined said terms in its charge to the jury.

i. The Circuit Court properly defined “wanton” misconduct.

Petitioner goes to great lengths to attempt to find some way in which utilizing a jury instruction which contains a direct quote from a recent case decided by this Court can somehow constitute reversible error. In support of its argument, Petitioner states that, prior to trial, Respondent filed a Motion in Limine, which “made multiple references to the work ‘reckless[.]’” Petitioner's Brief, p. 24. First, for clarification, Respondent's Motion in Limine contained the word “reckless” exactly three (3) times. App., Vol I, pp. 211-213. Second, Respondent is unsure how the language contained in Respondent's Motion in Limine is germane to the issues before this Court, as much of the language contained in the Motion in Limine was not contained in the

jury charge. It appears that Petitioner would have this Court believe that Respondent's Motion in Limine was read, verbatim to the jury, which, obviously, is not the case. In actuality, the jury charge in this case contained the term "reckless" exactly one (1) time, and the term was simply part of the Court's much longer definition of "wanton misconduct."

The exact statement, as contained in the jury charge, is as follows: "Wanton misconduct refers to an 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 be the probable result." App., Vol I, p. 300. This portion of the jury charge was a direct quotation taken from perhaps this Court's most important recent case, 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)).

It is difficult to fathom how the inclusion of a direct quote from a recent case from this Court, which specifically defined "wanton" misconduct (the legal standard at issue in this case), is somehow error. Petitioner has never been so bold as to say that Perrine is bad law and should be overruled, but that is the only logical conclusion to draw from Petitioner's argument that the inclusion of a direct quotation from Perrine in the jury charge is someone reversible error. As the Circuit Court had absolutely no reason to believe that the definition of "wanton" used in Perrine was, in any way, incorrect, clearly the Circuit Court did not err in including said definition in the jury charge.

- ii. The jury was never instructed that the term "reckless" was synonymous with "wanton."**

Even though the word "reckless" appears in the Perrine Court's definition of "wanton" conduct, Petitioner seems to argue that any use of the word "reckless" throughout the course of

the trial is reversible error. Petitioner cites White v. Hall, 118 W.Va 85, 188 S.E. 768, 769 (1936) in support of this position. See Petitioner’s Brief, p. 25

Unfortunately, Petitioner fails to recognize that White does not conflict with the definition of “wanton” misconduct which is contained in Perrine. White does not mandate the conclusion that the term “reckless” can never be used in an instruction which defines “wanton” misconduct. Likewise, White does not mandate that counsel refrain from using the term “reckless” in closing argument when the applicable standard is “willful or wanton.” On the contrary, even the White Court held that “recklessness may include willfulness or wantonness”! 188 S.E. 768, 769 (1936). Thus it is clearly not error to include the term “reckless” as part of the definition of “wanton” misconduct.

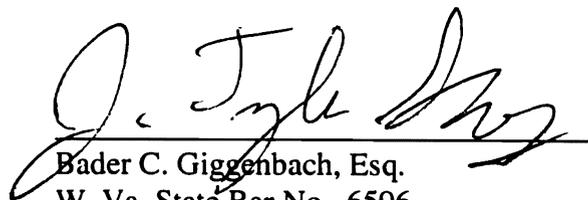
Most importantly, and contrary to Petitioner’s assertions, the jury was **never instructed** that the term “reckless” was, in and of itself, synonymous with the term “wanton.” Likewise, the jury was **never instructed** that the applicable legal standard in this case was “recklessness.” On the contrary, the jury was repeatedly instructed by the Court that “willful or wanton” was the applicable standard. App. Vol. I., pp. 300-302. Furthermore, the definition of “wanton” of which Petitioner now complains specifically indicates that “Wanton misconduct refers to an 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 be the probable result.**” This definition makes clear that mere “reckless” conduct is insufficient to constitute “wanton” misconduct. In fact, under this definition of “wanton,” Respondent was required to prove 1) Petitioner acted or failed to act, 2) Petitioner had a duty to do so, 3) In reckless disregard of another’s rights, and 4) Coupled with the knowledge that injury will be the probable result. Special Interrogatory No. 1 on the Verdict Form specifically asked the jury whether respondent “established by a

preponderance of the evidence that the conduct of the Defendant [Petitioner], through its employees, on May 11, 2008, amounted to willful or wanton misconduct?" App. Vol I, p. 305. The jury responded in the affirmative. Nowhere on the Verdict Form is the term "reckless" utilized. Unfortunately, once again, it appears Petitioner seeks to overturn the jury's factual finding by attempting to create legal error when none existed. Accordingly, Petitioner's assertion that the jury charge was a misstatement of the law is completely without merit.

VI. CONCLUSION

Accordingly, as set forth herein, all of the alleged errors set forth in Petitioner's brief are without merit, and this Court should affirm the Circuit Court's prior rulings and the jury's verdict in favor of Respondent.

RESPECTFULLY SUBMITTED,
RESPONDENT, JUDITH L. JOHNSON
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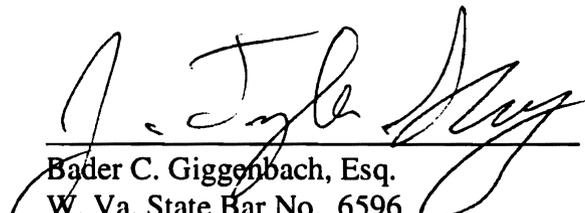
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2013, I served the foregoing
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