

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**BRENDA ALBERT, Plaintiff Below,**  
**Petitioner,**

**V.**

**CASE NO. 15-0879**  
**(Ohio County Civil Action No. 15-C-43)**

**THE CITY OF WHEELING, Defendant Below,**  
**Respondent.**

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**Respondent's Brief**

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## I. TABLE OF CONTENTS

I. Table of Contents	Page 2
II. Table of Authorities	Page 2-3
III. Statement of the Case	Page 3
IV. Summary of Argument	Page 4
V. Statement Regarding Oral Argument	Page 5
VI. Argument	Page 6
VII. Conclusion	Page 19

## II. TABLE OF AUTHORITIES

Case	Page
<i>Benson v. Kutsch</i> , 181 W.Va. 1, 380 (1989) (Syl. Pt. 3)	6, 8
<i>Columbus v. McIlwain</i> , 205 Miss. 473(Miss. 1949)	18
<i>Danner v. City of Charles Town</i> , 2015 W. Va. LEXIS 1130 (2015)	6
<i>Gans Tire Sales Co. v. Chelsea</i> , 16 Mass. App. Ct. 947 (Mass, 1983)	17
<i>Grace v. Sparks</i> , 2015 U.S. Dist. LEXIS 156323 (S. D. WV. 2015)	10
<i>Hose v. Berkeley County Planning Comm'n</i> , 194 W. Va. 515 (1995)	13, 14
<i>J. H. v. W. Va. Div. of Rehab. Servs.</i> , 224 W. Va. 147, 158 (2009)	6,7
<i>Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak</i> , 132 S. Ct. 2199 (2012)	10
<i>OBB Personenverkehr AG v. Sachs</i> , 136 S. Ct. 390 (2015)	10
<i>O'Dell v. Town of Gauley Bridge</i> , 188 W. Va. 596, 425 S.E.2d 551 (1992)	14
<i>Randall v. Fairmont City Police Dept.</i> , 186 W. Va. 336, 412 S.E.2d 737 (1991)	7,8,9,14

<i>Rivet v. Regions Bank</i> , 522 U.S. 470 (1998)	10
<i>Ross v. Houston</i> , 807 S.W.2d 336 (Tx, App. 1st Dist. 1990)	18
<i>Shirvinski v. United States Coast Guard</i> , 673 F.3d 308 (4th Cir. 2012)	10
<i>Shockey v. City of Okla. City</i> , 1981 OK 94 (Ok, 1981)	18
<i>Travelers Excess &amp; Surplus Lines Co. v. City of Atlanta</i> , 297 Ga. App. 326 (GA 4th Div. 2009)	17
<i>Wallace v. Baltimore</i> , 123 Md. 638 (Md. 1914)	17
<i>Wolfe v. City of Wheeling</i> , 182 W.Va. 253, 256, 387 S.E.2d 307, 310 (1989)	8, 9
West Virginia Code Section 29-12A-5(a)(5)	4,11,12,14,16
West Virginia Code Section 29-12A-1	5, 16
West Virginia Code Section 29-12A-4(c)	5,7,12,13,19
West Virginia Code Section 29-12A-4(c)(2)	12,13
West Virginia Code Section 29-12A-5	5,6,11,12,15,16,17,19
West Virginia Code Section 29-12A-5(a)(9)	13,14
West Virginia Code Section 29-12A-6	13

### III. STATEMENT OF THE CASE

The Petitioner's claim is for inadequate fire protection from the Respondent. The Petitioner alleges that on or about February 14, 2013, a fire broke out in the dining room of her home. The Wheeling Fire Department was notified and responded to the scene. The Wheeling Fire Department followed established methods and policies at the scene and "extinguished the fire." Petitioner goes on to allege that the Wheeling Fire Department failed to put out this fire quick enough, and proximately caused her to lose her home. Specifically, Plaintiff alleges that the Fire Department hoses became clogged by rocks obtained from the Fire Department's fire hydrant system.

However, in an effort to avoid the statutory immunity of the Governmental Insurance Claims and Tort Reform Act, Petitioner recast her negligent fire protection claim by alleging that the City “negligently maintained” the water lines and fire hydrants, which were used in the course of fighting this fire. The City moved to dismiss this claim based on statutory immunity as well as common law immunity. The Circuit Court disallowed Petitioner’s attempt to circumvent the City’s well established immunities, and in turn, dismissed Petitioner’s claim based on both the common law public duty doctrine as well as the immunity described in West Virginia Code Section 29-12A-5(a)(5). Petitioner has appealed the Circuit Court’s ruling with regard to West Virginia Code Section 29-12A-5(a)(5) immunity but has not raised any issue on appeal with regard to the dismissal based on common law immunity.

#### **IV. SUMMARY OF ARGUMENT**

The Circuit Court dismissed Petitioner’s claim based upon statutory immunity as well as the common law public duty doctrine. However, Petitioner has understandably not appealed the dismissal with regard to the public duty doctrine, as there is no error to appeal. Even if this issue had been appealed, it is clear that the public duty doctrine precludes Petitioner’s negligence claim. Specifically, the parties appear to be in agreement that the City did not owe a special duty to Petitioner with regard to any aspect of fire service including the maintenance of its fire hydrants. With this in mind, the public duty doctrine dictates that Petitioner was not, personally, owed a duty, and any negligence claim must fail as a matter of law.

With respect to the statutory immunity, it is also clear that Petitioner has attempted to use artful pleadings in an effort to circumvent the City’s immunity in connection with fire protection. These types of tactics are routinely denied by courts. Petitioner’s claim has clearly been asserted in connection with the implementation of fire protection. Thus, regardless of how Petitioner wishes to characterize her claim, there is no question that the City is entitled to immunity from

this type of suit.

It is also clear that Petitioner's claim is barred pursuant to the clear statutory language of West Virginia Code Section 29-12A-1 *et. seq.* In this case, Petitioner has attempted to circumvent the City's immunity by casting her claim in the language of West Virginia Code Section 29-12A-4(c). However, even if this type of pleading were permissible, the very language of West Virginia Code Section 29-12A-4(c) states that this section is subject to the immunities contained in West Virginia Code Section 29-12A-5. Thus, Petitioner cannot overcome the City's immunity with regard to fire protection by relying on West Virginia Code Section 29-12A-4(c).

Finally, it is clear that Petitioner's claim was properly dismissed pursuant to the clear intent of the Governmental Insurance Claims and Tort Reform Act and the well-established public policy of the State of West Virginia. Should claims, such as Petitioner's, be permitted, the fire protection immunity, provided by Section 29-12A-5 will effectively be worthless. Moreover, the vast majority of the immunities described by Section 29-12A-5 will provide no protection, whatsoever, to political subdivision if these types of claims are permitted. This will, in turn, drive up the cost of liability insurance with regard to fire protection as well as many other traditional government services. Other jurisdictions have recognized this very problem. Simply stated, claims such as Petitioner's, should they be permitted, will effectively revoke any and all immunities provided by statute. Thus, these claims are not permitted pursuant to Governmental Insurance Claims and Tort Reform Act and the public policy of the State of West Virginia.

#### **V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondent believes that Oral Argument will be beneficial.

## VI. ARGUMENT

**a. PETITIONER HAS NOT APPEALED THE CIRCUIT COURT'S DISMISSAL PURSUANT TO THE PUBLIC DUTY DOCTRINE, BUT REGARDLESS, THERE IS NO QUESTIONS THAT THIS COMMON LAW DOCTRINE SOUNDLY PRECLUDES PETITIONER'S CLAIM.**

In this case, Petitioner asserted a negligence claim against the City of Wheeling. The Circuit Court dismissed this claim based on two separate theories: statutory immunity and common law public duty doctrine. *See*: Appx. 6-7. This Court has repeatedly recognized that, although the immunities described in West Virginia Code Section 29-12A-5 and the public duty doctrine frequently involve similar analysis, they are, in fact, two, separate and distinct legal theories. In this regard, this Court has specifically stated, “[t]he public duty doctrine is a principle independent of the doctrine of governmental immunity, although in practice it achieves much the same result.” *J. H. v. W. Va. Div. of Rehab. Servs.*, 224 W. Va. 147, 158 (2009) *citing Benson v. Kutsch*, 181 W. Va. 1, 2, 380 S.E.2d 36, 37 (1989); *see also, Danner v. City of Charles Town*, 2015 W. Va. LEXIS 1130 (2015).

Because, the Circuit Court clearly dismissed Petitioner's negligence claim pursuant to both West Virginia Code Section 29-12A-5 and pursuant to the public duty doctrine, it is clear that analysis of the dismissal on both grounds must be considered prior to any remand of this case. However, after reviewing Petitioner's Brief, it is abundantly clear that no issue has been raised with regard to the Circuit Court's dismissal based upon the common law public duty doctrine. Rather, the entirety of Petitioner's Brief focuses solely on the Circuit Court's application of West Virginia Code Sections 29-12A-4 and 29-12A-5. Thus, Petitioner has chosen not to appeal one of the two grounds for dismissal in this case, and this appeal should therefore be rendered moot on its face.

Moreover, after reviewing this Court's previous analysis of the public duty doctrine, it is clear that the lower Court's dismissal based on the public duty doctrine was proper, and it

therefore becomes clear that Petitioner's choice not to address this doctrine was likely strategic. Based on Petitioner's Complaint and also based on her Appeal Brief, it is clear that, through the use of crafty pleadings, she has attempted to limit the basis of her claim strictly to the language of West Virginia Code Section 29-12A-4(c). *See*: Appx. 9-11. The question therefore becomes whether this code section is subject to the public duty doctrine, and this question is answered relatively easily with a review of this Court's previous precedent.

Specifically, this issue was raised and addressed in *Randall v. Fairmont City Police Dep't*. In *Randall*, the plaintiff attempted to assert a negligence claim against a police officer. *Randall v. Fairmont City Police Dep't*, 186 W. Va. 336 (1991). Like in the case at bar, the plaintiff referred to West Virginia Code Section 29-12A-4(c) and asserted that this language permitted the claim. *Id.* When reviewing the circuit court's decision to dismiss, this Court held that West Virginia Code Section 29-12A-4(c) does allow for negligence claims to be asserted against employees of political subdivisions. *Id.* However, in order for a negligence claim to be viable, there must first be a "duty" owed specifically to the plaintiff who is asserting the claim. *Id.* This Court explained that in order to determine whether a "duty" is owed in this regard, the claim must be analyzed pursuant to the public use doctrine. *Id.* This is because the public use doctrine generally governs what claims are available against political subdivisions by describing what duties are owed by said political subdivision. To this effect, this Court has stated:

[the public duty doctrine] rests on the principle that recovery may be had for negligence only if a duty has been breached which was owed to the particular person seeking recovery. The public duty doctrine states that a governmental entity's liability for nondiscretionary governmental functions may not be predicated upon the breach of a general duty owed to the public as a whole; instead, only the breach of a duty owed to the particular person injured is actionable. The linchpin of the public duty doctrine is that some governmental acts create duties owed to the public as a whole and not to the particular private person or private citizen who may be harmed by such acts.

*J. H. v. W. Va. Div. of Rehab. Servs.*, 224 W. Va. 147, 158. Thus, in the case at bar, even if

Petitioner's narrowly construed negligence claim is somehow acknowledged, it is clear that said claim will only be viable if a duty is owed specifically to Petitioner pursuant to the public duty doctrine.

With this in mind, the precise nature of Petitioner's claim must be considered. In her Appeal Brief, Petitioner argues that her claim of inadequate fire protection is based on the negligent "maintenance and operation of the City's waterworks and fire hydrant system."<sup>1</sup> Assuming *arguendo* that this claim is not barred by statutory immunity, it is clear that the nature of this claim must be viewed with the public use doctrine in mind. This Court has repeatedly stated:

The public duty doctrine is that a local governmental entity's liability . . . may not be predicated upon the breach of a general duty owed to the public as a whole; instead, only the breach of a duty owed to the particular person injured is actionable. As a specific example of the public duty doctrine, the duty to fight fires or to provide police protection runs ordinarily to all citizens and is to protect the safety and well-being of the public at large; therefore, absent a special duty to the plaintiff(s), no liability attaches to a municipal fire or police department's failure to provide adequate fire or police protection.

*Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 346-47, 412 S.E.2d 737, 747-48 (1991)(citing *Wolfe v. City of Wheeling*, 182 W.Va. 253, 256, 387 S.E.2d 307, 310 (1989).

Further, the only exception to this doctrine is if there is in cases involving a special relationship or duty established between the plaintiff and the political subdivision. *Id. See also*: Circuit Court's Order, Appx. 7, citing *Benson v. Kutsch*, 181 W.Va. 1, 380 (1989) (Syl. Pt. 3)).

Thus, the Court must determine whether there are any allegations that "a special relationship exists that is the basis for a special duty of care owed" to Petitioner with regard to the alleged inadequate fire protection even if it results from maintenance of the City's water lines and fire hydrants. This analysis can be completed rather succinctly. Petitioner's Complaint does

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<sup>1</sup> Respondent maintains that Petitioner has merely attempted to circumvent statutory immunity and this claim is barred on its face by West Virginia Code Section 29-12A-5. *See*: Discussion below.

not mention any special relationship or allege any facts that could even remotely be construed as a special relationship. Further, in its Order, the Circuit Court stated, “the plaintiff has not claimed a special relationship in this case. Therefore, the special relationship doctrine is not at issue herein.” Appx. 7. Finally, this ruling of the Circuit Court was not appealed or even mentioned in Petitioner’s Appeal Brief. Thus, it seems that the lack of a “special relationship” or “special duty” is not at issue.

Further, even if Petitioner was somehow attempting to argue that a special relationship or special duty existed, it is clear that said argument would fail. Petitioner has not alleged in this case that any employee of the City made any promises or took any affirmative action specifically towards her, which would, in some way, give her assurance regarding fire protection and the maintenance of the City’s water lines or fire hydrants. *Randall*, 186 W. Va. 336, 347. *Wolfe v. Wheeling*, 387 S.E.2d 307 (1989). Likewise, there is not any allegation that an agent or employee of the City had any direct contact with Petitioner regarding fire protection and the maintenance of the water lines or fire hydrants prior to the subject fire. Thus, there is clearly no special relationship or special duty between the City and Petitioner with regard to fire protection and the maintenance of these water lines or fire hydrants. Therefore there is no applicable exception to the public duty doctrine, and it is clear any duty to maintain waterlines or fire hydrants for fire protection is owed to public in general and not specifically to Petitioner. Thus, because there is no duty owed to Petitioner, she cannot succeed with regard to a “negligence maintenance” claim. This claim is precluded by the public duty doctrine.

Overall, there is no question that the Circuit Court dismissed Petitioner’s claim on two independent grounds, one of which was the common law public duty doctrine. Petitioner has not appealed the dismissal with regard to the public duty doctrine, so it appears this appeal is moot. To be viable, Petitioner’s said claims must be analyzed pursuant to the public duty doctrine, and under this doctrine, it must be determined there was a special duty owed specifically to the

plaintiff rather than just a broad duty owed to the public in general. In this case there is no claim of any special duty owed to Petitioner with regard to the maintenance of these water lines or fire hydrants and the suppression of the fire in her home. Therefore, it is clear that Petitioner has attempted to assert a claim against the City based on a duty owed to the public in general. This is the precise type of claim that is precluded by the public duty doctrine, and it is therefore clear that the Circuit Court's dismissal of Petitioner's negligence claim was proper.

**b. PETITIONER CANNOT CIRCUMVENT THE STATUTORY AND COMMON LAW IMMUNITIES THROUGH THE USE OF ARTFUL PLEADINGS.**

In her Appeal Brief, Petitioner repeatedly attempts to convince this Court that her claim is not based upon negligent fire protection, but rather that this claim solely deals with "negligent maintenance" of water lines and fire hydrants. When drafting Petitioner's Complaint and when making this argument on appeal, it is clear that Petitioner's counsel was very aware of the immunity associated with a city's provision of fire protection. But for the performance of fire protection, this case would never have been filed. The simple reality is Petitioner is suing because the fire department failed to save her home from fire. Further it is clear that Petitioner's counsel has, in a rather creative manner, attempted to avoid this immunity through artful pleadings. However, courts have frequently and uniformly held that a party cannot avoid statutory immunity through the use of artful pleadings. *Grace v. Sparks*, 2015 U.S. Dist. LEXIS 156323 (S. D. WV. 2015)(*stating*: "prosecutorial immunity would be rendered meaningless if a plaintiff's artful pleading were allowed to circumvent a prosecutor's protection from suit."); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015)(U.S. Supreme Court held that plaintiff could not circumvent the Foreign Sovereign Immunities Act through the use of "artful pleadings"); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012)(U.S. Supreme Court held that plaintiff could not circumvent the Quiet Title Act through the use of "artful pleadings"); *Rivet v. Regions Bank*, 522 U.S. 470 (1998) (Plaintiffs

cannot avoid federal question jurisdiction through the use of “artful pleadings.”); *Shirvinski v. United States Coast Guard*, 673 F.3d 308 (4<sup>th</sup> Cir. 2012).

With this in mind, this Court should consider the nature of the facts which support Petitioner’s claim rather than the self-serving description, which Petitioner’s counsel uses to classify this claim. The facts of this case are simple. Petitioner’s home caught on fire. The City of Wheeling Fire Department was called and firefighters responded. While successful in extinguishing the blaze, the firefighters were unable to save the home, and Petitioner therefore sued the City as a result. If this claim is not about the adequacy of fire protection, then what is?

Overall, there is no question that Petitioner’s claim has been asserted against the City in connection with the provision of fire protection. The reality is Petitioner contends the firefighters failed to put the fire out quick enough to save her home. Further, there is no question that West Virginia Code Section 29-12A-5 provides not only immunity from liability but also immunity from suit in connection with claims involving negligent fire protection. West Virginia Code §29-12A-5(a)(5). However, Petitioner has attempted to circumvent this immunity through the use of artful pleadings. Should Petitioner be permitted to rely on these artful pleadings, she will have effectively subjected the City to a suit from which it has clear immunity, and more importantly she will have effectively disregarded the clear intent and purpose of the Governmental Insurance Claims and Tort Reform Act as it has been clearly delineated by the State Legislature. *See*: Discussion below. The Circuit Court acknowledged the “inventive” and “artful” nature of Petitioner’s Complaint but also recognized that Petitioner was attempting to circumvent the City’s immunity through the use of these “inventive” and “artful” pleadings. Appx. 5. Thus, the Circuit Court correctly applied the common law and statutory immunity standards to the factual nature of the claims rather than the artfully plead allegations. In doing so, the Circuit Court properly dismissed this claim, and Petitioner has not asserted any compelling argument to support any interference with this dismissal.

**c. REGARDLESS OF HOW PETITIONER WISHES TO CHARACTERIZE HER CLAIM, IT IS STILL PRECLUDED BY THE CLEAR STATUTORY LANGUAGE OF THE INSURANCE CLAIM AND TORT REFORM ACT.**

Petitioner is attempting to ignore the clear nature of her claim and instead, narrowly couch her claim within the purview of West Virginia Code Section 29-12A-4(c). Even if her blatant attempt to circumvent the City's immunity is ignored, it is still clear that this supposed "negligent maintenance" claim is precluded based on the statutory language. In her Appeal Brief, Petitioner argues that her claims are brought pursuant to the language of West Virginia Code Section 29-12A-4(c). Petitioner first argues that West Virginia Code Section 29-12A-4(c)(2) permits negligence claims against employees of political subdivision for negligent acts performed in the course of their employment. Likewise, she also relies on West Virginia Code Section 29-12A-4(c)(3) and argues that the statute permits negligence claims in connection with a political subdivision's maintenance of aqueducts. Petitioner then argues that these code sections apply to the maintenance of water lines and fire hydrants. However, in making these arguments, Petitioner seems to ignore the very language of the statute on which she relies.

Even if these assertions are considered in a light most favorable to Petitioner, it is certainly clear that, given the factual nature of this case, the Court must consider the language of these sections in conjunction with the language of West Virginia Code Section 29-12A-5(a)(5), which provides immunity for claims involving fire protection. With this in mind, Petitioner seemingly argues that West Virginia Code Section 29-12A-4(c) applies to the maintenance of water lines and fire hydrants, and the language of this section applies independently and irrespective of any immunity language contained in West Virginia Code Section 29-12A-5. In essence she has asserted that the negligence language in West Virginia Code Section 29-12A-4(c) takes precedence over the immunity language in West Virginia Code Section 29-12A-5. However, this argument is flawed on its face. West Virginia Code Section 29-12A-4(c)

specifically states:

(c) **Subject to sections five and six of this article**, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows...

W. Va. Code§29-12A-4(c) (emphasis added)<sup>2</sup>. Thus, any perceived conflicts between these two statutes can be resolved relatively easily by merely reviewing the language of said statutes.

Clearly, the immunity described in Section 5 takes precedent over and nullifies the language of Section 4 with regard to claims involving fire protection.

Moreover, this very statutory scheme has been acknowledged and interpreted by this Court previously. In *Hose v. Berkeley County Planning Comm'n*, the plaintiff asserted a negligence claim against a county commission and a county engineer in connection with their approval of a building plan. *Hose v. Berkeley County Planning Comm'n*, 194 W. Va. 515 (1995). The plaintiff alleged that this building plan called for the installation of a 36 inch drainage pipe. *Id.* The plaintiff further alleged that this pipe was insufficient and as a result plaintiff's adjoining property was flooded with storm water runoff. *Id.* Therefore plaintiff brought a claim against the county alleging that by approving this building plan, its employees acted negligently in course of their employment. Like the Petitioner in the case at bar, plaintiff in *Hose v. Berkeley County Planning Comm'n* asserted that the County was not immune from liability based on the language of West Virginia Code Section 29-12A-4(c).

This Court denied the plaintiff's argument in this regard. Specifically, when addressing this argument, this Court stated:

The plain language of W. Va. Code, 29-12A-4(c)(2) [1986] expressly provides that the liability of a political subdivision for injury to property allegedly caused

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<sup>2</sup> Conveniently, this portion of the statute is not quoted or referenced in Petitioner's Brief.

by the negligent performance of acts by their employees is "subject to sections five and six [§§ 29-12A-5 and 29-12A-6] of this article." Thus, pursuant to W. Va. Code, 29-12A-4(c)(2) [1986] and W. Va. Code, 29-12A-5(a)(9) [1986], a political subdivision is immune from liability if a loss or claim results from licensing powers or functions such as the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority, regardless of whether such loss or claim is caused by the negligent performance of acts by the political subdivision's employees while acting within the scope of employment.<sup>3</sup>

*Id.* at 521. Thus, based on the clear language of the statutes and based on this Courts sound precedent, it is clear that any potential negligence claim described in Section 4 of this statute is subject to the immunities described in Section 5. Therefore, there is no question that the immunity described in West Virginia Code Section 29-12A-5(a)(5) is applicable to Petitioner's claim, and the Circuit Court properly dismissed said claims accordingly.

**d. THE STATED PURPOSE OF THE GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT AS WELL AS THE CLEAR PUBLIC POLICY OF THE STATE OF WEST VIRGINIA DICTATES THAT DISMISSAL OF PETITIONER'S CLAIM WAS NECESSARY AND APPROPRIATE.**

Even if the public duty doctrine didn't apply and even if the statutory language was not clear, Petitioner's claim would still be barred pursuant to the stated purpose of the Insurance Claim and Tort Reform Act as well as the general public policy of the State of West Virginia.

The stated purpose of the Governmental Tort Claims and Insurance Reform Act:

"[is] to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability." Upon finding that "political subdivisions of the State were unable to obtain affordable tort liability insurance coverage without reducing the quantity and quality of traditional governmental services, the West Virginia legislature "specified seventeen instances in which political subdivisions would have immunity from tort liability.

*Hose v. Berkeley County Planning Comm'n*, 194 W. Va. 515, 520 citing *O'Dell v. Town of*

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<sup>3</sup> The *Hose v. Berkeley County Planning Comm'n* opinion involved West Virginia Code Section 29-12A-5(a)(9) providing immunity for licensing power rather than 29-12A-5(a)(5) which provides immunity for fire protection. However, this distinction has no significance with regard to the statutory interpretation.

*Gauley Bridge*, 188 W. Va. 596, 425 S.E.2d 551 (1992); *Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E.2d 737 (1991). Thus, the immunities described in this Act serve two separate but related purposes. First they are designed to reduce liability in an effort to regulate the costs of insurance available to political subdivisions. Second, these immunities are designed to enable political subdivisions to maintain the quality and quantity of the governmental services which they have traditionally offered. Petitioner's attempt to circumvent this immunity presents a serious threat to both of these objectives.

In the case at bar, Petitioner failed to obtain homeowner's insurance and seeks to have the fire department pay for her home. As has been stated above, Petitioner has asserted her claim in connection with the Wheeling Fire Department being unable to extinguish a fire fast enough to save her home. Regardless of how Petitioner tries to characterize this claim, it is clear that this claim arises from fire protection and her criticism of the policies and methods of that fire protection. In order for a city to provide fire protection, it must utilize various tools and apparatuses. It must use water lines, fire hydrants, hoses, pumps, fire trucks, ladders, axes, etc. The very placement, maintenance and use of hydrants are the product of policy and implementation of policy. For any given fire, an issue may arise regarding the provision use and function of one or more of these tools, and said issue may affect a fire department's ability to fight the fire. Plaintiff is asserting that if one of these tools or apparatuses is used and the fire is not extinguished quick enough, then questions regarding selection, provision, use and performance gives rise to a claim. The outcome of such a finding is quite obvious. Every time a fire department responds to a fire, the city will, essentially, be subject to a civil suit. If a firefighter moves too slowly in plaintiff's opinion a claim arises. If a four inch hose is used rather than a six inch hose a claim arises. If five fighters arrive rather than six a suit arises. If plaintiff feels the truck should have got there sooner a suit arises. If plaintiff thinks more trucks should have been employed a claim arises. If a fire truck gets a flat tire, the city will be sued for

negligent maintenance of the truck. If a ladder breaks, the city will be sued for negligent maintenance of the ladder. If a pump malfunctions, the city will be sued for negligent maintenance of the pump. These types of claims, if permitted, will destroy the immunities expressly granted by West Virginia Code Section 29-12A-5. If a city is immune with regard to fire protection but is not immune from suits involving negligence during the course of fighting fires, then the city, in effect, has no immunity at all. West Virginia Code Section 29-12A-5(a)(5) will be rendered meaningless.

Further, with no meaningful immunity with regard to fire protection, the number of civil suits involving fire protection will sky rocket. As an obvious consequence, the cost of liability insurance coverage for fire departments will become outrageous. Cities will, in turn, be left with the choice of either paying these high insurance premiums or discontinuing fire protection services. This is the exact choice that the legislature intended for cities to avoid when it enacted West Virginia Code Section 29-12A-1 *et. seq.*

Moreover, allowing Petitioner to circumvent West Virginia Code Section 29-12A-5(a)(5) will not only destroy immunity with regard to fire protection, but it will also eliminate all immunities described in West Virginia Code Section 29-12A-5. If this “negligent maintenance” claim is permitted, then it will not be long before similarly pled complaints are filed in an effort to avoid other clearly delineated immunities. Plaintiffs will not allege negligent police protection, but rather will claim “negligent maintenance” of a police cruiser proximately caused a delay in police response. Courts will not see negligent snow removal claims, but they will instead see “negligent maintenance” of plows which led to insufficient snow removal. Political subdivisions will not be sued for negligent inspections, but they will be sued for “negligent maintenance” of the tools used by an inspector while conducting an inspection. Plaintiffs will not sue judges based on their decisions, but they will file “negligent maintenance” of audio/video equipment that was used during the course of a trial and led to the judge’s decision.

Overall, this “negligent maintenance” type pleading is an attack on all immunities, which have been specifically granted to the political subdivisions. Not only is it an attack on the immunities from liability, but it is, more importantly, an attack on the immunity from suit. There is no question that allowing a plaintiff to avoid a clear statutory immunity based on “negligent maintenance” type pleadings will lead to a drastic increase in suits against political subdivisions. Further, there is no question that these suits, regardless of outcome, will cause a substantial increase in litigation costs and insurance costs. In turn, based on financial constraints alone, these suits will lead to a reduction in the amount of services that are offered to the public. Furthermore, the mere time and resources expended by public officials defending these suits, will, as a matter of course, reduce the time and resources that can be focused on the provision of other public services. These are the exact outcomes, which the legislature has tried to prevent. Plaintiffs, such as Petitioner in this case, should not singlehandedly be allowed to circumvent statutes, ignore the state legislature, and reduce services provided to their neighbors, through artful pleadings and in reliance upon self-serving technicalities. Thus, there is no question that Petitioner’s claim must be dismissed in furtherance of the clear purpose of West Virginia Code Section 29-12A-5 and the well-established public policy of the State of West Virginia.

This public policy has not only been recognized in West Virginia, but has also been recognized by several other state courts. *Travelers Excess & Surplus Lines Co. v. City of Atlanta*, 297 Ga. App. 326 (GA 4<sup>th</sup> Div. 2009)(stating, ‘fire hydrants ‘are a part of the physical structure of the fire department,’ are ‘installed for the purpose of fire protection,’ and are a necessary component of the fire protection services offered to citizens by a municipality. As such, it is of no legal consequence that the negligence respecting the hydrant was committed by the water department rather than the fire department itself.”); *Wallace v. Baltimore*, 123 Md. 638 (Md. 1914) (stating, “Indeed, so practically unanimous have been the decisions denying the liability of the municipality for losses from fire through the alleged negligence in connection with the water

works, that it is impracticable to give all of the authorities so holding...); *Gans Tire Sales Co. v. Chelsea*, 16 Mass. App. Ct. 947 (Mass, 1983)(stating, “there is no municipal liability for injuries arising out of the negligent failure to furnish water for the extinguishment of fires. A municipality is not liable for damages caused by inadequacies in the system of fire protection.”); *Columbus v. McIlwain*, 205 Miss. 473(Miss. 1949)(stating, “it is well settled that a municipal corporation is not responsible for the destruction of property within its limits by a fire which it did not set out, merely because, through the negligence or other default of the corporation or its employees, the members of the fire department failed to extinguish the fire whether this failure is due to an insufficient supply of water, the interruption of the service during the course of a fire, the neglect or incompetence of the firemen, the defective condition of the fire apparatus, negligence in permitting fire hydrants to become clogged or defective, or the impassable condition of the streets preventing the fire apparatus from reaching the burning property. In such cases, it makes no difference that the municipality uses the same reservoirs and pipes for its fire service that it employs for the distribution of a public supply for domestic purposes, from which it derives a profit, since the two functions are clearly distinguishable. The cases cited fully sustain the announced rule.”); *Shockey v. City of Okla. City*, 1981 OK 94 (Ok, 1981)(stating, “Fire hydrants, as such, are a part of the physical structure of the fire department and their maintenance, including an adequate supply of water, and their repair are incidental to the operation of the fire department. The fire hydrants were installed for the purpose of fire protection. Although appellants' damages may have resulted from a failure of the water service, supplying water to the fire hydrants was just a part of appellee's overall operation in providing fire protection. Assuming, arguendo, appellee negligently failed to employ the proper methods in checking its water service for the proper operation of its fire hydrants, § 155(6) clearly exempts it from liability.”); *Ross v. Houston*, 807 S.W.2d 336 (Tx, App. 1<sup>st</sup> Dist. 1990)(stating, “We find as a matter of law that the City's policy of inspecting fire hydrants is directly connected to the

City's method of providing fire protection”).

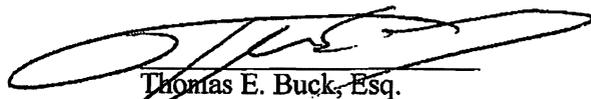
Accordingly, Petitioner is not the first person to urge such an expanse of liability premised upon artful interpretation of fire hydrant water flow. However, many jurisdictions have clearly rejected such an approach.

### CONCLUSION

Overall, Petitioner has not appealed the Circuit Court’s dismissal pursuant to the common law public duty doctrine, and this appeal is therefore moot. Further, it is clear that the public duty doctrine does, in fact, preclude Petitioner’s claim. Also, the factual nature of Petitioner’s claim reveals that the City of Wheeling is entitled to immunity pursuant to Section 29-12A-5, and Petitioner cannot be permitted to circumvent this immunity through the use of artful pleadings. Moreover, the clear language of Sections 29-12A-4(c) and 29-12A-5 dictate that the City of Wheeling is entitled to the immunity with regard to fire protection, and Petitioner’s arguments in this regard must fail. Finally, there is no question that Petitioner’s artfully pled claim runs afoul of the clear purpose of the Governmental Insurance Claims and Tort Reform Act and the public policy of the State of West Virginia, and this claim was therefore properly dismissed by the Circuit Court.

For these reasons, the City of Wheeling requests that this Court deny Petitioner’s Appeal on all grounds; uphold the dismissal entered by the Circuit Court, and for such other relief as the Court deems appropriate.

Signed:



Thomas E. Buck, Esq.

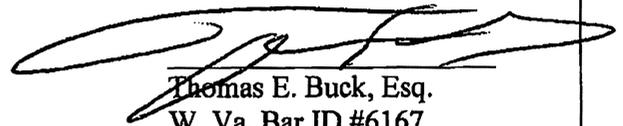
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of FEBRUARY, 2016, true and accurate copies of the foregoing **RESPONDENT'S BRIEF** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this Appeal as follows:

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