



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**IN RE: YEAGER AIRPORT LITIGATION**

**Civil Action No. 16-C-7000**

**THIS DOCUMENT APPLIES TO:**

**BROTHERHOOD MUTUAL  
INSURANCE COMPANY**

**v.**

**CENTRAL WEST VIRGINIA REGIONAL  
AIRPORT AUTHORITY, INC., et al.**

**Civil Action No. 16-C-293 KAN**

**ORDER GRANTING MOTION TO DISMISS DEFENDANT  
CENTRAL WEST VIRGINIA REGIONAL AIRPORT AUTHORITY, INC.**

The Presiding Judges have reviewed and maturely considered Defendant Central Regional West Virginia Airport Authority, Inc.'s *Motion to Dismiss Complaint* for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure (Transaction ID 60206089), Brotherhood Mutual Insurance Company's *Response* (Transaction ID 60324511), and the Airport Authority's *Reply* (Transaction ID 60354839). The Panel FINDS that the facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument.

Having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously GRANT the Airport Authority's motion to dismiss Brotherhood Mutual Insurance Company's Complaint against the Airport Authority for the following reasons.

1. The Airport Authority is a political subdivision of the State of West Virginia, as defined in West Virginia Code § 29-12A-3(c).<sup>1</sup>

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<sup>1</sup> West Virginia Code § 29-12A-3(c) defines a "political subdivision" as

any county commission, municipality and county board of education; any separate corporation or instrumentality established by one or more counties or municipalities, as permitted by law; any instrumentality supported in most part by municipalities; any public body charged by law with the performance of a government function and whose jurisdiction is coextensive with one or more

2. Brotherhood admits the Airport Authority is a political subdivision of the State of West Virginia in paragraph 5 of its Complaint. Complt. at ¶ 5.
3. Brotherhood's complaint arises out of the March 12, 2015, failure of the mechanically stabilized earth retention structure (MSE) located at Yeager Airport in Charleston, West Virginia. Complt. at ¶ 35.
4. As a result of the failure of the MSE, The Keystone Apostolic Church f/k/a The Pentecostal Assembly of Jesus Christ (Keystone) allegedly incurred damages. Complt. at ¶¶ 35-39.
5. At the time of the failure of the MSE, Keystone had insurance coverage through Brotherhood Mutual Insurance Company (Policy #47M5A0262792), for the policy period of January 12, 2014 to January 12, 2017. Complt. at ¶40.
6. Throughout the course of adjustment of the claims resulting from the March 12, 2015 failure of the MSE, Brotherhood paid a total of \$1,376,800.00 to Keystone. Complt. at ¶41.
7. Brotherhood asserts that it is "subrogated to the rights of its insured, Keystone. As the insurer for Keystone, Brotherhood is entitled to recover from the defendants all monies it paid to or on behalf of the insured for the damages proximately resulting from the March 12, 2015 incident." Complt. at ¶ 53. See also ¶¶ 58, 66 and the prayer for relief.
8. West Virginia Code § 29-12A-13(c) states that, "[a]ll actions filed against a political subdivision shall be filed in the name of the real party or parties in interest and in no

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counties, cities or towns; a combined city-county health department created pursuant to article two, chapter sixteen of this code; public service districts; and other instrumentalities including, but not limited to, volunteer fire departments and emergency service organizations as recognized by an appropriate public body and authorized by law to perform a government function: **Provided,** That hospitals of a political subdivision and their employees are expressly excluded from the provisions of this article.

event may any claim be presented or recovery be had under the right of subrogation.”

W.Va. Code § 29-12A-13(c)(2016).<sup>2</sup> On its face, W. Va. Code § 29-12A-13(c) prohibits the sort of subrogation claim that Brotherhood seeks to prosecute against the Airport Authority.

9. Nonetheless, Brotherhood argues that complete prohibition of subrogation rights against a governmental entity, as contained within the Governmental Tort Claims and Insurance Reform Act of 1986, W.Va. Code, 29-12A-1 to 29-12A-18 (the Act) is a violation of Brotherhood’s due process and equal protections rights, “as it effectively places the Airport’s insurer’s rights over and above Brotherhood’s rights, simply because Brotherhood insured a private entity, that being Keystone Apostolic Church, as opposed to a public entity.” Resp. p. 2
10. Brotherhood also argues that “dismissal of a subrogation claim asserted by one insurance company that will be paid by another insurance company does not further the purpose” of the Act. *Id.*
11. Although Brotherhood concedes and acknowledges the authority from the West Virginia Supreme Court of Appeals in *Foster v. City of Keyser*, 202 W.Va. 1, 501, S.E.2d 165 (1997); *Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E. 2d 737 (1991); and *Pritchard v. Arvon*, 186 W.Va. 445, 413 S.E.2d 100 (1991), which discuss the applicability of W. Va. Code § 29-12A-13, it asserts there is a good faith basis for a change in the existing case law. Resp. p. 2, FN 1 Having reviewed the Act and each of these cases, the Presiding Judges find Brotherhood’s argument for a change in the existing law unpersuasive.

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<sup>2</sup> Keystone, the real party in interest, filed an unopposed motion to intervene in this case, which was granted on February 21, 2017. *Order Granting Motion to Intervene* (Transaction ID 60235411).

12. The Supreme Court has analyzed the immunity provisions in the Act and determined they do not violate equal protection principles. In Syllabus Point 5 of *Randall* and Syllabus Point 4 of *Pritchard*, the Supreme Court specifically held that, “[t]he qualified tort immunity provisions of the West Virginia Governmental Tort Claims and Insurance Reform Act of 1986, *W.Va. Code*, 29-12A-1 to 29-12A-18, do not violate the equal protection principles of article III, section 10 of the *Constitution of West Virginia*.”
13. In *Randall*, the Supreme Court recognized that the purposes of the Act “are to *limit* [tort] liability of political subdivisions *and* [to] provide [tort] *immunity* to political subdivisions in *certain* instances *and* to *regulate* the costs and coverage of *insurance* available to political subdivisions for such liability.” *W.Va. Code*, 29-12A-1 [1986] (emphasis in original) 186 W.Va. at 342, 412 S.E.2d at 743.
14. The Supreme Court analyzed the governmental tort immunity provisions of the Act using the rational basis test for equal protection analysis and determined that, “the qualified tort immunity provisions of the Act are rationally based and reasonably relate to a proper governmental purpose, specifically, . . . to stabilize the political subdivisions’ ability to obtain affordable liability insurance coverage by defining the risks to be covered.” *Id.* 186 W.Va. at 346, 412 S.E.2d at 747. Accordingly, the Court held that the qualified tort immunity provisions of the Act do not violate the equal protection principles of article III, section 10 of the *Constitution of West Virginia*. *Id.*
15. Brotherhood also argues that, “dismissal at this stage is inappropriate, as it is unknown whether the Airport’s policy has any endorsements or coverage items that may specifically apply to this claim, meaning that the Airport paid a premium to be insured

against this type of claim but is now asserting that it cannot be paid due to the Airport's status as a political subdivision." Resp. p. 4

16. However, the fact that the Airport may or may not have insurance coverage applicable to this claim is irrelevant. The Act explicitly provides that "[t]he purchase of liability insurance . . . by a political subdivision does not constitute a waiver of any immunity it may have pursuant to this article or any defense of the political subdivision . . . . W.Va. Code § 29-12A-16(d).

17. Furthermore, as stated in Syllabus Point 7 of *Pritchard*:

*W.Va. Code*, 29-12A-16(d) [1986], which provides that the purchase of liability insurance or the establishment of an insurance program by a political subdivision does not constitute a waiver of any immunity or defense of the political subdivision or its employees, does not violate equal protection principles as set forth in *W.Va. Const.* art. III, § 10.

18. The Presiding Judges find that the West Virginia Supreme Court's opinion in *Foster v. City of Keyser*, 202 W.Va. 1, 501, S.E.2d 165 (1997) is directly on point. In *Foster*, the Supreme Court explained that:

It is clear that the language in *W.Va. Code*, 29-12A-13(c) [1986], "in no event may any claim be presented or recovery be had under the right of subrogation" bars claims brought directly in the name of parties that are subrogated to an injured person's claims against a political subdivision.

Additionally, construction of *W.Va. Code*, 29-12A-13(c) [1986] to the effect that a plaintiff's recovery against a political subdivision must be reduced by the amount of any first-party insurance proceeds that the plaintiff receives for the same injuries and damages for which the claim is made against the subdivision, is reasonably narrow and certain and is consistent with the overall statutory purpose of the Governmental Tort Claims and Insurance Reform Act, by relieving a political subdivision from paying for damages to the extent that the injured party has been compensated by the party's insurance.

202 W.Va. at 22, 501, S.E.2d 186.

Accordingly, as set forth in Syllabus Point 5 of *Foster*:

*W.Va. Code*, 29-12A-13(c) [1986] bars a direct claim against and recovery from a political subdivision by a party claiming under a right of subrogation to the claim of another party against the subdivision; and also requires that there be an offset of any recovery by an injured plaintiff from a political subdivision in the amount of first-party insurance proceeds received by the plaintiff as compensation for their injuries or damages.

Because W.Va. Code § 29-12A-13(c) prohibits a subrogation claim against a political subdivision, Brotherhood Mutual Insurance Company's Complaint against Defendant Central West Virginia Regional Airport Authority, Inc. is hereby **DISMISSED**, with prejudice.

It is so **ORDERED**.

**ENTER:** March 31, 2017.

/s/ John A. Hutchison  
Lead Presiding Judge  
Yeager Airport Litigation