

In the Circuit Court of Morgan County, West Virginia

West Virginia Counties Group Self-
Insurance Risk Pool, Inc., a/s/o the
Morgan Co,
Plaintiff,

vs.)

Great Cacapon Volunteer Fire
Department, Inc.,
Emergency Vehicle Specialist, Inc.,
NAPA, Inc.,
Schumacher Electric Corporation,
Defendants

Case No. CC-33-2018-C-24

**Order Granting in Part and Denying In Part The Great Cacapon Volunteer Fire
Department's Motion to Dismiss**

Pending before the Court is the Motion to Dismiss Plaintiffs' Complaint filed on behalf of Defendant Great Cacapon Volunteer Fire Department, Inc. The Motion has been fully briefed by the parties, the Court has dispensed with the need for oral argument, and the Motion is now ripe for ruling by the Court. After consideration of the parties' pleadings, a review of the Court file, and review of the applicable law, the Court hereby **GRANTS** the Motion in Part and **DENIES** the Motion in Part, based upon the following findings and conclusions.

I. STATEMENT OF THE CASE

The undisputed facts are as follows:

1. A fire occurred on July 5, 2016 located at 179 Spring Street, Great Cacapon, West Virginia. At the time of the fire, the building was owned by the Plaintiff, Morgan County Commission (hereinafter "the Commission"), and housed the Great Cacapon Volunteer Fire Department, Inc. (hereinafter "VFD").

2. Both the VFD and the Commission are political subdivisions subject to the

West Virginia Governmental Tort Claims and Insurance Reform Act. W.Va. Code § 29-12A-1, *et seq.*

3. The parties dispute the cause of the fire; however, the cause of the fire is not germane to the Motion to Dismiss.

4. Prior to the at issue fire, the Commission had entered into a Coverage Contract with the Plaintiff, West Virginia Counties Group Self-Insurance Risk Pool, Inc. (hereinafter "WVCoRP"), which provided loss coverage to the real property located at 179 Spring Street, Great Cacapon, West Virginia.

5. As a result of the fire, the Commission presented a claim to WVCoRP under its property damages coverage provided under the Coverage Contract.

6. Pursuant to WVCoRP's Coverage Contract with the Commission, WVCoRP made payments to the Commission for reimbursement for damages it sustained to the building as a result of the fire in the amount of \$613,179.27.

7. WVCoRP's Coverage Contract with the Commission provides WVCoRP with the right to subrogation for payments made by WVCoRP to the Commission as a result of the fire.

8. WVCoRP has requested compensation from the VFD for the monies it has paid to the Commission for the property damage arising from the fire.

9. The Commission also seeks damages for resultant diminution in value of the real property located at 179 Spring Street, Great Cacapon, West Virginia.

II. STANDARD OF REVIEW

10. West Virginia Rule of Civil Procedure 12(b)(6) requires dismissal of a Complaint for the failure to state a claim upon which relief can be granted." *Randall v. Fairmont City Police Dept.* 186 W.Va. 336, 412 S.E.2d 737, fn. 14 (1991).

11. A motion to dismiss “enables a court to weed out unfounded suits.” *Harrison v. Davis*, 478 S.E.2d 104, 111 (W.Va. 1996)(quoting, *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993).

12. A trial court should dismiss a Complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Chapman v. Kane Transfer Co.*, 236 S.E.2d 2017 (W.Va. 1997).

III. CONCLUSIONS OF LAW

13. The Governmental Tort Claims and Insurance Reform Act prohibits subrogation claims. “All actions filed against a political subdivision shall be filed in the name of the real part or parties in interest and **in no event may any claim be presented or recovery be had under the right of subrogation.**” W.Va. Code § 29-12A-13(c)(emphasis added).

14. West Virginia Code § 29-12A-13(c) “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...” *Foster v. Keyser*, 2012 W.Va. 1, at 22, 501 S.E.2d 165 at 185. Further, “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 damages for which a claim is made against the subdivision.” *Id.*

15. The *Foster* Court did not bar all claims by an injured party who has a subrogation relationship with a third party from bringing claim a claim directly against the political subdivision. 202 W.Va. at 22, 501 S.E.2d at 165.

16. “The general term ‘subrogation’ used in W.Va. Code § 29-12-13(c), implicates diverse circumstances whereby one party may acquire or exercise rights derived from another party’s rights—such as sureties, co-debtors, purchasers, persons

paying debts of strangers, creditors, and officers." *Foster v. Keyser*, 2012 W.Va. 1, at 21, 501 S.E.2d 165 at 185; *Citing* 18 Michie's Jurisprudence "Subrogation" sections II-6.

1. The West Virginia Supreme Court has discussed the meaning of the term subrogation:

Absent a clearly expressed legislative intent requiring otherwise, "subrogated" is to be given its usual, ordinary meaning. Whether legal or conventional, subrogation is an equitable remedy. The remedy is for the benefit of one secondarily liable who had paid the debt of another and to whom in equity and good conscience should be assigned the rights and remedies of the original creditor. "Subrogation" is a form of legal art which we assume would not be employed by the drafters of the statute unless they intended it to be construed in its normal sense. In its normal sense, subrogation gives the payor a right to collect what it has paid from the party who caused the damage. However, because this right to collect is an equitable remedy, it is subject to equitable principles.

Kittle v. Icard, 185 W.Va. 126, 130, 405 S.E.2d 456, 460 (1991) (citations omitted);

18. "When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus Point 1, *Cummins v. State Workmen's Compensation Com'r*, 152 W. Va. 781, 166 S.E.2d 562 (1969); Syllabus Point 2, *Zelenka v. City of Weirton*, 208 W. Va. 243, 244, 539 S.E.2d 750, 751 (2000).

19. Though WVCoRP is a risk pool and not an insurance company subject to the insurance rules and regulations of West Virginia, the WVCoRP nonetheless functions as an insurance company by providing coverage for damages incurred by the members of the risk pool. As defined by Black's Law Dictionary, insurance is:

1. A contract by which one party (the *insurer*) undertakes to indemnify another party (the *insured*) against risk of loss, damage or liability arising from the occurrence of some specified contingency, and usu. to defend the insured or to pay for a defense regardless of whether the insured is ultimately found liable. • An insured party usu. pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk. Although indemnification provisions are most

common in insurance policies, parties to any type of contract may agree on indemnification arrangements. 2. The amount for which someone or something is covered by such an agreement.

Black's Law Dictionary, pg. 870, (9th Ed. 2009).

20. The Governmental Tort Claims and Insurance Reform Act is not an insurance law of the state of West Virginia insofar as it does not regulate trade practices in the business of insurance, it does not dictate how claims are handled, when offers are made to resolve claims, or minimum amounts of coverage to be provided to political subdivisions. It does not regulate trade practices in the business of insurance as does the West Virginia Unfair Trade Practices Act, W.Va. Code § 33-11-1. Rather, the Governmental Tort Claims Act is designed to limit liability and damages recoverable against a political subdivision and provide political subdivisions with numerous options, including self-insurance and risk pools, to obtain adequate insurance coverage at an affordable price. Limiting liability of a political subdivision and providing discretion to a political subdivision to procure affordable insurance is not an insurance law. The Court **FINDS AND CONCLUDES** that the WVCoRP is subject to the West Virginia Governmental Tort Claims and Liability Act.

21. The WVCoRP agreed, through its Coverage Contract with the Commission, to indemnify the Commission against risk of loss of property damage and WVCoRP acquired rights pursuant to its Coverage Contract with the Commission to seek recovery of proceeds it paid on behalf of the County Commission for property damage caused by the fire. As such, this Court **FINDS AND CONCLUDES** that WVCoRP's claim against the VFD for recovery of the \$613,179.27 it paid to the Commission for property damage sustained by the fire is one for subrogation prohibited by W.Va. Code § 29-12A-13(c).

22. The Court also **FINDS and CONCLUDES** that the Commission can maintain a claim against the VFD for diminution in value of the property or any other damages for which it was not compensated through its Coverage Contract with WVCoRP, if any.

23. The Court further **FINDS AND CONCLUDES** that to the extent the Commission is maintaining a claim for diminution in value to the property or any other damages, the VFD is entitled to an offset in the amount of \$613,179.27 for any recovery the Commission receives at the trial of this matter. *Foster*, 2012 W.Va. at 22, 501 S.E.2d at 185.

IV. ORDER OF THE COURT

Based upon the foregoing, it is the **ORDER** of this Court that the Motion to Dismiss the Great Cacapon Volunteer Fire Department, Inc. is hereby **GRANTED IN PART and DENIED IN PART**. The claim of Plaintiff, West Virginia Counties Group Self-Insurance Risk Pool, Inc., against the Great Cacapon Volunteer Fire Department, Inc. is hereby **DISMISSED WITH PREJUDICE** as that claim is one for subrogation against a political subdivision and is thus expressly prohibited by WV Code §29-12A-13(c).

The Great Cacapon Volunteer Fire Department, Inc. Motion to Dismiss Plaintiff Morgan County Commission is **DENIED** insofar as Plaintiff Morgan County Commission is permitted to maintain a claim against the Volunteer Fire Department for diminution in property value and any other damages for which it was not fully compensated by its Coverage Contract through the West Virginia Counties Group Self Insurance Risk Pool, subject to the offset of payments made by the WVCoRP.

The Court further **ORDERS** that the Great Cacapon Volunteer Fire Department is entitled to an offset of \$613,179.27 for any recovery the Morgan County Commission

receives at the trial of this matter.

The parties' objections and exceptions to this decision are noted and preserved for the record.

The Clerk of the Circuit Court of Morgan County, West Virginia is hereby directed to send an attested copy of this Order to all counsel of record.

/s/ Steven Redding
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsww.gov/e-file/ for more details.