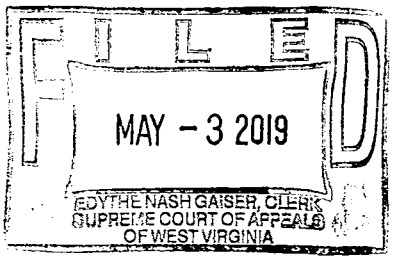
No. 19-0103

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



WEST VIRGINIA COUNTIES GROUP
SELF-INSURANCE RISK POOL,

Petitioner,

v.

GREAT CACAPON VOLUNTEER
FIRE DEPARTMENT,

Respondent.

FROM THE CIRCUIT COURT
OF MORGAN COUNTY

PETITION FOR APPEAL

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PETITION FOR APPEAL

TO THE HONORABLE JUSTICES OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by dismissing the claim against the Respondent as a claim of subrogation prohibited by W. Va. Code §29-12A-13(c).
2. The Circuit Court erred by dismissing the Petitioner's claim against the Respondent by finding that the Governmental Tort Claims and Insurance Reform Act is not an insurance law of the State of West Virginia and, thus, applies to the Petitioner's claims.

II. STATEMENT OF THE RECORD BELOW

This appeal arises from a dispute regarding the recovery rights of a risk pool formed pursuant to W. Va. CSR § 114-65-2.10 against an insured political subdivision. The Petitioner, West Virginia Counties Group Self-Insurance Risk Pool ("WVCoRP") appeals from the Circuit Court of Morgan County's Order granting the Great Cacapon Volunteer Fire Department's (the "VFD") Motion to Dismiss the Amended Complaint filed by WVCoRP and its member, the Morgan County Commission ("Commission") in the matter below. See Joint Appendix ("JA") at 13-27. The Amended Complaint stems from a fire originating in the electrical components of one of the VFD's vehicles while it was parked inside a building owned by the Commission. See JA at 8-9. The Commission owned real property located at 129 Spring Street, Great Cacapon, Morgan County, West Virginia (hereinafter the "Fire Hall"). See JA at 8. This property was utilized by the VFD as its Fire Hall. See *id.* Contained in that Fire Hall was a 1985 Chevrolet Brush Truck which was utilized by the VFD as a firefighting vehicle. See *id.* This vehicle, which had a history of electrical

malfunctioning, had recently been converted from 24 volt battery usage to 12 volt battery usage by Emergency Vehicle Specialist, Inc. ("EVS"), a co-defendant in the matter below. See *id.*

The Commission entered into a Coverage Contract with WVCoRP, whereby the Commission became a member of WVCoRP's self-insurance risk pool with other member political subdivisions. See JA at 9. This Coverage Contract provided for group self-insurance coverage of the property at issue. See *id.* The Coverage Contract also provides for a right of "subrogation," allowing WVCoRP to file a law suit to recover amounts paid out of the fund to compensate the covered losses of its members. See JA at 9, 11. However, as will be discussed in greater depth herein, this use of the term "subrogation" in the Coverage Contract is either shorthand for a process without commonly-utilized legal terminology, or is simply inartfully applied, as a law suit by a self-insurance risk pool administrator to recover monies paid out of a group fund to cover a member's loss does not meet the definition of that legal term of art. See JA at 63-66.

The Amended Complaint asserts the fire that completely destroyed the fire hall was started by the combined negligence of EVS's personnel in performing the battery usage conversion and of the VFD's personnel in leaving a vehicle with a history of electrical malfunctioning unattended while its battery was charging. See JA at 8-9. As a result, a payment was made to the Commission out of the fund administered by WVCoRP to cover this loss, as provided for in the Coverage Contract. See JA at 11.

Based on the foregoing, WVCoRP filed the instant law suit, seeking to recover the funds expended from the risk pool for the claim at issue. See JA at 7-11. In response, the VFD filed a Motion to Dismiss. See JA at 13-27. The VFD's Motion asserted that the claim was barred by W.

Va. Code § 29-12A-13(c), because the West Virginia Governmental Tort Claims and Insurance Reform Act (the "Act") disallows claims against political subdivisions under a right of subrogation. See JA at 22-25.

WVCoRP opposed dismissal on two primary grounds. First, the claim is not barred by the Act's prohibition on subrogation against a political subdivision, because a claim by the administrator of a self-insurance risk pool is not a subrogation claim as contemplated under the Act. See JA at 63-66. Second, even if such a cause of action constituted a subrogation claim, it would nonetheless not be barred by the Act, because the regulations enabling and governing governmental self-insurance risk pools in West Virginia expressly exempt risk pools from the application of "insurance laws of the State." See JA at 66-67.

The Circuit Court ruled in favor of the VFD on both accounts. See JA at 83-91. First, it held that the claim was one for subrogation, because "[t]hough WVCoRP is a risk pool and not an insurance company subject to the insurance rules and regulations of West Virginia, WVCoRP nonetheless functions as an insurance company by providing coverage for damages incurred by the members of the risk pool." See JA at 88-89. Second, it held that WVCoRP was subject to the Act's prohibition on subrogation claims against political subdivisions, because, according to the Court, the Act is not an "insurance law of the State." See JA at 89. This appeal challenges both of those holdings as legally in error.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner requests oral argument pursuant to Rule 20 of the *West Virginia Rules of Appellate Procedure*, because the recovery rights of a group self-insurance risk pool administrator

from an insured political subdivision are novel issues of first impression that may also be of public importance regarding the disbursement and recovery of publicly allocated funds.

IV. SUMMARY OF THE ARGUMENT

This Appeal challenges two rulings by the Circuit Court of Morgan County, West Virginia, in the proceeding below. First, WVCoRP contends that the Circuit Court erred in holding that WVCoRP's law suit against the VFD is a subrogation suit against a political subdivision, which would be prohibited by the West Virginia Tort Claims and Insurance Reform Act (the "Act"). Second, WVCoRP challenges the Circuit Court's ruling that the Act is not an "insurance law of the State," from which WVCoRP would be exempt from the application as a governmental self-insurance risk pool created pursuant to Insurance Commissioner regulations.

WVCoRP's claim against the VFD is not a subrogation claim under the Act because it does not have the characteristics of any recognized definition of that term. The pertinent authorities provide two potentially-applicable definitions of subrogation: (a) "The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy;" and (b) "The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor." Definition (a) is inapplicable, because the relevant Insurance Commissioner regulations specify that a governmental self-insurance risk pool is not an insurance company, and that their operation does not constitute the conduct of insurance. Further, WVCoRP does not function as an insurer of its member political subdivisions, because it does not assume the risk of its members' losses, which is a definitional

requirement of an insurance company. Rather, WVCoRP merely administers the pooled self-insurance funds of its members, and pays those members' own pooled funds on their behalf. Definition (b) is equally inapplicable. Because, WVCoRP does not expend any of its own funds to cover its members' losses, it does not "pay the debt of another." Because subrogation is definitionally a right acquired by paying another's debt, WVCoRP's suit is not filed under a right of subrogation. Because WVCoRP's claim does not fit under any recognized definition of subrogation, it should be unaffected by the Act's prohibition on subrogation claims against political subdivisions.

However, even in the event that the WVCoRP's claims at issue could be considered subrogation claims, they are not barred by the Act, because self-insurance risk pools, like WVCoRP, are exempt from its application. The Insurance Commissioner regulations which authorize governmental self-insurance risk pools specify that they are not subject to the "insurance laws of this State." The Act's expressed goal and purpose is to regulate the cost of insurance available to political subdivisions. In addition, its provisions include direct limitations on the extent to which, and conditions under which, insurance companies may raise or lower the premiums of insurance policies issued to political subdivisions. It also grants the Insurance Commissioner increased oversight and regulatory powers over insurance contracts between insurers and political subdivisions. The Act has all the hallmarks of an "insurance law of this State," leading to the inevitable conclusion that it does not control the conduct of WVCoRP.

On top of the legal reasons for the reversal of the Circuit Court's rulings, all relevant equitable considerations caution against the Circuit Court's reading of the relevant legal provisions. The stated purpose of the Act is to regulate the cost of insurance available to political subdivisions in order to conserve public funds. That goal would be undermined by an interpretation which prohibits

a risk pool administrator from recovering expended pool funds from a responsible party, because risk pool funds are derived 100% from public money. The stated aims of the Act are therefore instead served by minimizing the amount of risk borne by risk pools. In the case of a risk pool, the application of the Act to bar a claim like WVCoRP's in this case would have the perverse effect of causing *more* public funds to be expended than if WVCoRP were permitted to recover against a privately-insured political subdivision, like the VFD.

What's more, incentives against risky behavior are compromised any time a person or entity is insulated from responsibility for losses they cause. The Act justifies that increased risk, because it is balanced by an interest in protecting public funds. However, where the risk pool member and the entity responsible for the loss are both political subdivisions, protecting the responsible entity by barring the risk pool from recovering the expended funds destroys this balance; thus creating only the increased risk with no countervailing benefit. Accordingly, the demands of justice and the interests of the accountability of public servants compel the conclusion that governmental self-insurance risk pools should be permitted to recover their losses when those losses are caused by other political subdivisions or entities.

V. ARGUMENT

A. Standard of Review

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 1, *Albright v. White*, 202 W. Va. 292, 503 S.E.2d 860 (1998) (quoting Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995)).

"The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syllabus, *John W. Lodge Distrib. Co. v. Texaco*, 161 W. Va. 603, 245 S.E.2d 157 (1978) (hereinafter "*John W. Lodge*"). In reviewing a motion under Rule 12, a Court should "read a pleading liberally and accept as true the well-pleaded allegations of the complaint and the inferences that reasonably may be drawn from the allegations." *Kopelman & Associates, L.C. v. Collins*, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996). "[A]lthough the plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleadings, a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted." *Id.*

This Court, and the federal courts covering this jurisdiction, have elaborated on this position with particular clarity as follows:

> In view of the liberal policy of the rules of pleading with regard to the construction of plaintiff's complaint, and in view of the policy of the rules favoring the determination of actions on the merits, the motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. The standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff's burden in resisting a motion to dismiss is a relatively light one.

John W. Lodge at 606 (citing *Williams v. Wheeling Steel Corp.*, 266 F. Supp. 651, 654 (N.D. W.Va. 1967) (hereinafter "*Williams*"). "[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Pleadings are to be liberally construed. Mere vagueness or lack of

detail is not ground for a motion to dismiss, but should be attacked by a motion for a more definite statement." See *Williams* at 654.

B. The Circuit Court erred in holding that WVCoRP's law suit at issue in the case at bar is an action for subrogation.

The analysis of the first Assignment of Error in this matter turns on the definition of an action for subrogation, and whether the claim asserted by WVCoRP falls into that definition. According to the definition which has been utilized by this Court in the past, as well as the historical development of the law on subrogation, the answer must be unequivocally in the negative.

Black's Law Dictionary defines "subrogation," in relevant part, as follows:

> 1. The ***substitution of one party for another whose debt the party pays***, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor. • For example, a surety who has paid a debt is, by subrogation, entitled to any security for the debt held by the creditor and the benefit of any judgment the creditor has against the debtor, and may proceed against the debtor as the creditor would. Subrogation most commonly arises in relation to insurance policies... 3. The ***principle under which an insurer that has paid a loss under an insurance policy*** is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.

Black's Law Dictionary, pg. 1563-1564 (9th Ed. 2009) (Emphasis added).

The third definition of subrogation, stated above is inapplicable to the present case, because WVCoRP is not an insurer, and its Coverage Contract with the Commission is not an insurance policy, as established in the Insurance Commissioner's regulations governing governmental self-insurance risk pools. While the Circuit Court held that "WVCoRP... functions as an insurance company by providing coverage for damages incurred by the members of the risk pool," this is an inaccurate assessment of the functioning of a self-insurance risk pool. See JA at 89.

It is more precisely stated that WVCoRP, rather than providing coverage for member political subdivisions, administers the mechanism by which members provide their own self-insurance coverage. A pool is formed by two (2) or more political subdivisions for the purpose of allowing member subdivisions to pool their resources and meet their liability obligations. See W. Va. CSR § 114-65-2.10. The amount of funding that each member contributes to the pool is governed by the terms of a member agreement. See W. Va. CSR § 114-65-2.7. These contributions are distinct from an insurance premium because the member contributions are the sole source of funding for the pool, and all liability obligations paid from the pool are derived from member contributions. See W. Va. CSR § 114-65-2.4. Further, contributions above what is necessary to maintain adequate reserves in the pool to meet anticipated liability obligations are returned to the members, giving members a de facto vested property interest in their attributed share of the pool. See W. Va. CSR § 114-65-12. WVCoRP serves as the administrator of the pool, meaning that it is "authorized to serve as a representative of a pool and its members in carrying out the policies of the board of directors and managing the pool's activities." W. Va. CSR § 114-65-2.1. The funds in the pool are not WVCoRP's property; rather, WVCoRP is merely authorized to oversee its operation and carry out the policies of the pool's Board of Directors. See W. Va. CSR § 114-65-7.3.b.

The Insurance Commissioner's regulations take great pains to differentiate the operation of such a risk pool from the conduct of the business of insurance, providing that:

> ***A pool is not an insurance company, its operation does not constitute the transaction of insurance***, and it is not subject to the insurance laws of this State unless otherwise specifically stated herein.

W. Va. CSR § 114-65-3.3 (Emphasis added). Further, "[t]he phrase 'self-insurance' means, generally, ***the assumption of one's own risk*** and, typically, involves the setting aside of a special

fund to meet losses and pay valid claims, ***instead of insuring against such losses and claims through an insurance policy***." Syl. Pt. 1, *Jackson v. Donahue*, 193 W. Va. 587, 457 S.E.2d 524 (1995) (Emphasis added). Entities participating in a self-insurance risk pool are deemed to be self-insured. "A risk pool is another form of self-insurance, but on a group basis. The members of the group share the risks." *Beckner v. Nicholson*, Civil Action No. 12-C-2356, ¶ 36 (W. Va. JC 13, May 7, 2014) (quoting *City of West Branch v. Miller*, 546 N.W.2d 598, 603 (Iowa 1996) (Attached).

This is markedly distinct from the conduct of insurance. Black's Law Dictionary defines "insurance" as follows:

> 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.

Black's Law Dictionary, pg. 870 (9th Ed. 2009). This definition is echoed in substance by state law in the context of the Unfair Trade Practices Act ("UTPA"), which defines insurance as "a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies." W.Va. Code § 33-1-1.

That definition is not met by a self-insurance risk pool conducted as set forth in the Insurance Commissioner's regulations cited *supra*, because a risk pool member does not pay premiums; rather, the risk pool members make pro rata contributions to the members' pooled reserves. Further, WVCoRP does not assume any risk of loss, as would an insurer; the risk of loss is collectively borne by the member political subdivisions. WVCoRP does not indemnify the members in the event of a covered loss as would an insurer, but instead causes the members' pooled assets to be paid. The risk

pool bears none of the hallmarks of an insurance contract, and the Circuit Court erred in holding otherwise.

The first definition, employed in substance by this Court in *dicta* of *Kittle v. Icard*, 185 W.Va. 126, 130, 405 S.E.2d 456, 460 (1991) (defining subrogation as a remedy "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") (Emphasis added), is also inapplicable because, as discussed above, expenditures from a governmental self-insurance risk pool are not payments by one party of the debt of another, as contemplated by Black's and this Court's opinion in *Kittle*. Rather, payments from risk pools are expended from the member political subdivisions' own pooled self-insurance retention funds by an administrator. In making such an expenditure, WVCoRP does not "pay the debt of another," because it does not expend any of its own funds to cover losses, but instead expends the pooled funds of members on their own behalf. By pursuing the instant law suit, WVCoRP is not attempting to recover its own funds expended to pay the debt of another, but to recover the members' own pooled self-insurance retention funds which were expended on their behalf. See JA at 10-11.

Accordingly, this suit can meet neither definition of a subrogation claim. Because this claim is not one for subrogation, the Act's prohibition on subrogation does not act to bar WVCoRP's suit against the VFD. As a result, WVCoRP prays this Honorable Court will reverse the Circuit Court's ruling below dismissing this cause of action.

C. The Circuit Court erred in holding that the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.*, is not an "insurance law of this State."

Even if WVCoRP's claims against the VFD in this matter could be considered a claim for subrogation, the claim should nonetheless proceedbecause the regulations authorizing governmental self-insurance risk pools expressly exempt such risk pools from the application of West Virginia's insurance laws. Because the express purpose of the Act is to regulate and control the cost of insurance coverage available to political subdivisions, the conclusion is inescapable that the Act is, in fact, an "insurance law of the State," to which WVCoRP is not subject.

As stated in the Insurance Commissioner's regulations governing the conduct of governmental self-insurance risk pools, "[a] pool is not an insurance company, its operation does not constitute the transaction of insurance, and it is not subject to the insurance laws of this State unless otherwise specifically stated herein." W. Va. CSR § 114-65-3.3. The operative question, then, is whether the Act is an "insurance law of this State." If that question is in the affirmative, then WVCoRP is unaffected by the Act's prohibition on subrogation claims against political subdivisions. The Order of the Circuit Court in this matter erroneously takes an exceedingly narrow view of what constitutes an "insurance law of the State," which is contrary to West Virginia's jurisprudence on the topic. See JA at 89. While there does not appear to be an authoritative definition of what constitutes an "insurance law of this State" for purposes of this statute, in *Beckner v. Nicholson*, Civil Action No. 12-C-2356 (W. Va. JC 13, May 7, 2014), the Circuit Court of Kanawha County held that the Unfair Trade Practices Act ("UTPA") fell into that category, and thus WVCoRP was exempted from its application where the stated purpose of the UTPA was to "regulate trade practices in the business of insurance." See *Beckner* at ¶ 26.

This Court provided further guidance on the issue in *State ex rel. Clark v. Blue Cross Blue Shield, Inc.*, 203 W. Va. 690, 510 S.E.2d 764 (1998), in which it took a broad view of what

constituted a law "enacted... for the purpose of regulating the business of insurance" for purposes of determining whether a state law was exempt from federal pre-emption under the McCann-Ferguson Act.[1] The question therein was whether the former W. Va. Code § 33-24-27, which altered the order of priority of claims made against insolvent insurance companies undergoing liquidation fell into that category. In holding that that statute was enacted for the purpose of regulating the business of insurance, this Court relied heavily on the reasoning of the U.S. Court of Appeals for the Second Circuit in *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995). Therein, the Second Circuit, holding that a similar Kentucky law which also governed the liquidation of insolvent insurers was an insurance law, reasoned as follows:

> The Kentucky Liquidation Act has the "end, intention, or aim of adjusting, managing or controlling the business of insurance," in that it regulates the winding up of an insolvent insurance company. The Liquidation Act "protects" policyholders . . . by assuring that an insolvent insurer will be liquidated in an orderly and predictable manner and the anti-arbitration provision is simply one piece of that mechanism.

Id. at 45; see also *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289, 291 (8th Cir. 1996) (deciding that the portion of a Missouri insurers' insolvency act staying certain actions against insolvent insurers was "a law regulating the business of insurance," on the basis that it "protects policyholders because it preserves the assets of the insolvent insurer's estate, thereby enhancing the ability of an insolvent insurance company to perform its contractual obligations").

Likewise, the stated purpose of the Act is to "***regulate the costs and coverage of insurance*** available to political subdivisions[.]" See W. Va. Code § 29-12A-1 (Emphasis added). In effect, the

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1 The McCarran–Ferguson Act, 15 U.S.C. §§ 1011-1015, is a United States federal law that exempts state laws regulating "the business of insurance" from federal pre-emption.

Act also places express limitations on the amount and conditions by which an insurance company may increase or decrease the rates of insurance contracts with political subdivisions. See W. Va. Code § 29-12A-17(a).[2] It also grants the Insurance Commissioner increased oversight and regulatory power over the terms of insurance contracts entered into between insurance companies and political subdivisions. See W. Va. Code § 29-12A-17(b).[3] As was dispositive in the case of the UTPA at issue in *Beckner*, the stated purpose of the Act pertains to regulation of particular aspects of the insurance industry. Also in line with this Court's holding in *Clark*, the expressed intent of the Act is to protect policyholders in their relationship with their insurers; i.e., to regulate the cost of the premiums they must pay to their insurers. See W. Va. Code § 29-12A-1. This case fits well within that lineage of cases in West Virginia regarding what constitutes an insurance law of this State.

Given the breadth and variety of laws that have been found to be insurance laws by the Courts of this state, it is difficult to arrive at any other conclusion than that a law enacted by the Legislature with the stated goal of regulating the cost of insurance is an "insurance law of this State." Reaching that conclusion, one must also reach the companion conclusion that WVCoRP, as administrator of a governmental self-insurance risk pool exempt from the insurance laws of this

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2 "Liability insurance coverage for political subdivisions in effect on the effective date of this article shall not be reduced without the written consent of the insured and the policy premiums for such coverage shall not be increased by more than ten percent per annum. Such coverage shall not be cancelled except for:
(1) Failure to make premium payments in accordance with the policy requirements;
(2) Fraud or substantial misrepresentation by the insured in the procurement of the policy; or
(3) Substantial increase in the risk of loss to which the insurer is exposed under the policy."

3 "Each casualty insurance rate filing relating to liability insurance for political subdivisions shall be accompanied by such information as the insurance commissioner requires to determine claims payouts, premium income, investment income, loss reserves, federal and state credits, administrative and operating expenses, profits, losses, and such other information deemed necessary by the commissioner to determine the profitability of such insurance business engaged in by the company. Based upon such information, the commissioner may approve or disapprove an increase in premiums charged to the political subdivisions for such coverage or may require that such premiums charged be decreased. The commissioner shall have authority to disapprove any casualty insurance rate filing which includes such coverage to political subdivisions for failure to provide the information prescribed herein."

State, is not subject to the Act's prohibition on subrogation claims against political subdivisions, necessitating the reversal of the Circuit Court's ruling to the contrary.

D. The public policy goals of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.*, do not support the Respondent's proposed characterization of WVCoRP's claim.

The Act was enacted with the express purpose of conserving public funds, in order to better enable political subdivisions to provide necessary services to their constituents, rather than expend those public funds on the legal liabilities from which the Act seeks to shield such subdivisions. See W. Va. Code § 29-12A-1, 2. However, the interpretation of the Act which the Respondent urges, and which the Circuit Court erroneously adopted, would have the perverse effect of causing *more* public funds to be expended than would be in the Act's absence. This is an outcome directly contrary to the expressed intent of the drafters of the Act, and therefore cannot be the correct interpretation.

In enacting the Act, the Legislature made express its intent under the heading of "Legislative Findings." See W. Va. Code § 29-12A-2. Therein, the Legislature states that the ultimate purpose of the Act's regime of immunizations from certain liabilities is intended to limit the amount of public funds expended on legal liabilities, to better enable political subdivisions to provide services to the public. See *id.*

In the instant matter, the Morgan County Commission, owner of the Fire Hall, self-insures with other political subdivisions by participating in the risk pool administered by WVCoRP. See JA at 11. The VFD is insured through a private insurance company. See JA at 80. In the event that the payment made from the risk pool to cover the loss of the Fire Hall cannot be recovered, the loss will have been covered solely by the expenditure of public funds, as all funds in the risk pool are the

contributions of member political subdivisions. See W. Va. CSR § 114-65-2.4. On the other hand, if WVCoRP is permitted to recover the expended risk pool funds from the VFD, and the VFD is found responsible for the loss, then the loss will be paid by private insurance funds. If the VFD is held responsible, the only adverse impact as far as the stated goals of the Act are concerned is the possibility of an increase in the VFD's insurance premiums. It is a matter of a *portion* of the loss coming from public funds in the event the VFD is held responsible, versus *the entirety* of the loss coming from public funds if WVCoRP's recovery is barred.

The goals of the Act's prohibition on subrogation against political subdivisions do not serve their intended purpose in situations like the one at present, where both parties are political subdivisions. Rather than preserving public funds, in a case such as this one, a prohibition on the recovery of expended funds from a political subdivision responsible for the loss merely reduce the incentives against risky behavior. Where one political subdivisions utilizes the property of another, such as a volunteer fire department operating out of real property belonging to a county government, the fire department's personnel have reduced incentives to exercise due care if the Act is interpreted so as to immunize their agency from responsibility for negligently-inflicted losses to another agency's property. Rather, where the cost of a loss will in any case be borne by a political subdivision, greater justice is done, and greater accountability encouraged, if the loss is borne by the entity responsible, rather than the entity who owns the damaged property.

Accordingly, both the explicit goals of the Act and the public interest in encouraging accountability for those who damage public property caution against the interpretation of the Act reached by the Circuit Court. Consistent with the intent of the Legislature, as well as notions of

greater justice, WVCoRP respectfully submits that the Circuit Court's decision in this matter be reversed in this matter.

VI. CONCLUSION

WHEREFORE, for the reasons stated herein, the West Virginia Counties Group Self-Insurance Risk Pool respectfully prays this Honorable Court REVERSE the rulings of the Circuit Court in this matter which are mad the subject of this Appeal, and direct the Circuit Court below to enter an order DENYING the Great Cacapon Volunteer Fire Department's Motion to Dismiss.

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