IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0589

Chad Edwards and Matthew Maxwell,
Defendants Below, Petitioners,

vs.

Rhonda Stark, Individually and as
Administratrix of the Estate of
Robert E. Stark,
Plaintiff Below, Respondent.

Appeal from an order of the
Circuit Court of Harrison County
(Case No. 20-C-267-3)

BRIEF OF PETITIONERS CHAD EDWARDS AND MATTHEW MAXWELL

Frank E. Simmerman, Jr. (WVSB # 3403)
Chad L. Taylor (WVSB # 10564)
Frank E. Simmerman, III (WVSB # 11589)
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
fes@simmermanlaw.com
clt@simmermanlaw.com
trey@simmermanlaw.com
Counsel for Petitioners Chad Edwards and Matthew Maxwell

TABLE OF CONTENTS

page(s)

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PETITIONERS' MOTION TO DISMISS AS THE RESPONDENT'S HEIGHTENED DELIBERATE INTENT CLAIM ASSERTED PURSUANT TO W.VA. CODE § 23-4-2(D)(2)(A) IS BARRED BY THE PLAIN LANGUAGE OF THE GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT, W. VA. CODE § 29-12A-5, ET SEQ., GIVEN THAT NO EXCEPTION WITHIN W.VA. CODE § 29-12A-5(B) PERMITS SUCH A CLAIM TO BE ASSERTED AGAINST PUBLIC CO-EMPLOYEES AND/OR SUPERVISORS

B. THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PETITIONERS' MOTION TO DISMISS AS THE RESPONDENT'S CLAIMS, BY THEIR VERY NATURE, CANNOT SATISFY ANY OF THE THREE (3) ELEMENTS/EXCEPTIONS TO CO-EMPLOYEE/SUPERVISOR IMMUNITY SET FORTH WITHIN W.VA. CODE § 29-12A-5(b)

C. THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PETITIONERS' MOTION TO DISMISS AS THE RESPONDENT'S HEIGHTENED DELIBERATE INTENT CLAIM/INTENTIONAL AND RECKLESS CONDUCT CLAIM AGAINST THE PETITIONERS ARE BARRED PURSUANT TO THE FRAMEWORK OF THE WEST VIRGINIA WORKERS' COMPENSATION SYSTEM

D. THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PETITIONERS' MOTION TO DISMISS AS RESPONDENT'S CLAIMS AGAINST THE PETITIONERS ARE BARRED BECAUSE THE POLICY OF THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT WOULD BE ABROGATED IF LITIGATION AGAINST MUNICIPAL CO-EMPLOYEES WAS PERMISSIBLE WHEN SUCH CLAIMS ARE CLEARLY BARRED AS A MATTER OF LAW

II. STATEMENT OF THE CASE

November 19, 2020, Rhonda Stark, individually and as the Administratrix of the Estate of Robert E. Stark, ("Respondent"), filed her First Amended Complaint in the Circuit Court of Harrison County, West Virginia, asserting therein two claims against Petitioners Chad Edwards and Matthew Maxwell, (collectively "the Petitioners"): (1) deliberate intent pursuant to W.Va. Code § 23-4-2(d)(2); and (2) intentional and reckless conduct. (Appx. 18-42). This case was assigned to The Honorable James A. Matish.

Concerning the First Amended Complaint, Defendant Chad Edwards was solely sued in his capacity as the City Manager at the City of Shinnston, as the First Amended Complaint plainly states that at all relevant times Defendant Chad Edwards "was the City Manager for the City of Shinnston . . . responsible for the day to day operations of all aspects of the City, which included, but were not limited to, operation of the Public Works and Utilities Division of the City of Shinnston." (Appx. 20).

Similarly, Defendant Matthew Maxwell was solely sued in his capacity as the Public Works Supervisor at the City of Shinnston, West Virginia, as the First Amended Complaint plainly states that at all relevant times "Robert Stark's boss was Defendant Edwards and his immediate supervisor was Defendant Maxwell." Id.

As a predicate for the Respondent's claims, in these respective, public employment positions, the First Amended Complaint further states that as the City Manager and Public Works Supervisor, the Petitioners were "subject to and responsible for compliance with all applicable regulations, statutes, and safety standards for workplace safety and training" applicable to work done by public employees at the City of Shinnston, West Virginia. (Appx. 20-21).

Turning to the workplace incident at issue, "at all times relevant, Robert E. Stark was employed by the City of Shinnston, Harrison County, West Virginia in the Public Works and Utilities Division" – Mr. Stark had served in this position from 2016 through 2019. (Appx. 21-22).

The First Amended Complaint alleges generally that in the Spring of 2019 the Petitioners, in their roles as municipal employees/supervisors, directed municipal public works employees, including Mr. Stark, to complete a municipal public works project generally known as the Van Rufus Drive drain project at the City of Shinnston, West Virginia, ("the Project"), despite the Petitioners' alleged actual knowledge of existing safety concerns. (Appx. 22-24).

The First Amended Complaint additionally alleges that, relevant to the Project, the Petitioners were the public employees and public supervisors responsible for ensuring the safety of City of Shinnston, West Virginia employees, including Mr. Stark. (Appx. 24-25).

As more specifically alleged by the Respondent, on June 14, 2019, Robert Stark, while working as a City of Shinnston municipal employee within the framework of the Project, entered a trench along Van Rufus Drive, and the trench subsequently collapsed injuring Respondent and ultimately leading to Respondent Robert E. Stark's untimely passing. (Appx. 29-31). Following this unfortunate event, Rhonda Stark filed for, and received dependent's benefits under the West Virginia workers' compensation system/benefits. (Appx. 53).

Within this factual framework, Respondent subsequently asserted two (2) claims against the Petitioners.

First, in Count I, Respondent asserted a "heightened" deliberate intent claim against the Petitioners, alleging therein that "Defendant Edwards and Defendant Maxwell violated the deliberate intent standard set forth within W.Va. Code § 23-4-2(d)(2)(A) insofar as they "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of death to Robert Stark." (Appx. 31).

Additionally, within Count I, Respondent initially asserted a standard five (5) factor deliberate intent claim pursuant to W.Va. Code § 23-4-2(d)(2)(B) against the Petitioners, alleging therein that: (1) a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death; (2) the Petitioners had actual knowledge of the existence of the specific unsafe working condition and of the high and the strong probability of serious injury or death presented by the specific unsafe working condition; (3) the specific unsafe working condition was a violation of a commonly accepted and well-known safety

standard within the industry of business of the Petitioners; (4) notwithstanding the foregoing, the Petitioners nevertheless intentionally exposed Robert Stark to the specific unsafe working conditions; and (5) Mr. Stark suffered serious, compensable injury and death. (Appx. 31-32).[1]

Second, Respondent asserted a claim in the context of this unfortunate workplace injury labeled "intentional and reckless conduct" – which fundamentally sounds in negligence.

Specifically, Respondent alleges in Count II that the Petitioners, in their roles as City Manager and Public Works Supervisor for the City of Shinnston, West Virginia, had "a duty of reasonable and ordinary care to provide a safe workplace, safe work environment, safe equipment, to adopt and implement safe work practices and procedures, and to ensure that employees of the Public Works Utilities Division were adequately trained to perform their assigned work tasks." (Appx. 33). Respondent has further alleged that the Petitioners intentionally and recklessly breached the foregoing duties, and that as a direct and proximate result of their breaches, Mr. Stark suffered injury and damages, including death. (Appx. 33-34).

On December 23, 2020, the Petitioners filed a combined Motion to Dismiss and Memorandum in Support of Motion to Dismiss, arguing that: (1) Respondent's traditional deliberate intent claim against the Petitioners was barred because existing West Virginia jurisprudence clearly indicates that Respondents have no viable W.Va. Code 23-4-2(d)(2) deliberate intent claim(s) against supervisors/co-employees; (2) Respondent's claims against the Petitioners are barred because the workers' compensation system is the sole/exclusive remedy available to Respondent for a public workplace injury; and (3) Respondent's claims against the Petitioners are barred because the actual Defendant the Respondent seeks recovery from, The City

[1] This claim was ultimately surrendered/waived by the Respondent given the Court's holding in Young v. Apogee Coal Co., LLC, 232 W.Va. 554 (2013), as the Respondent conceded that a standard five (5) factor claim cannot be brought against a co-employee/supervisor, such as Petitioners Edwards and Maxwell. (Appx. 63-65).

of Shinnston, West Virginia, is immune from suit pursuant to the West Virginia Governmental Tort Claims Act – and the Respondent cannot subvert the West Virginia Governmental Tort Claims Act by directly suing municipal employees (Appx. 43-31).

On January 22, 2021, Respondent filed a Memorandum Contra Petitioners' Motion to Dismiss, arguing therein that: (1) Respondent's Complaint states a claim upon which relief can be granted pursuant to W.Va. Code § 23-4-2(d)(2)(A); and (2) Respondent's Complaint states a claim upon which relief can be granted pursuant to W.Va. Code § 29-12A-5(b).

On February 2, 2021, the Petitioners filed their Reply Brief in Support of Motion to Dismiss, arguing that: (1) Respondent's lone remaining claim against the Petitioners is barred because the plain language of the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-5, et seq., grants the Petitioners, public employees, immunity from all claims covered by "any workers' compensation law or any employer's liability law"; and (2) Respondent's lone remaining claim against the Petitioners is barred because the policy of the Governmental Tort Claims and Insurance Reform Act would be abrogated if litigation against municipal employees was permissible when such claims are clearly covered by any workers' compensation law or any employer's liability law. (Appx. 68-74).

The Petitioners brought their Motion to Dismiss on for hearing before the Honorable James A. Matish on May 5, 2021. (Appx. 94). After hearing the arguments of counsel, and having considered the filings of counsel, including supplemental briefs on issues specified by the Court at the May 5, 2021 hearing, the Circuit Court denied the Petitioners' Motion to Dismiss, in its entirety, by Order entered June 30, 2021, thereby allowing both Respondent's W.Va. Code § 23-4-2(d)(2)(A) and common law tort claim to proceed in the context of a public employer workplace injury claim. (Appx. 94-102).

III. SUMMARY OF ARGUMENT

Each year, this Court faces difficult legal questions that require it to review complex issues and decide between two reasonably plausible interpretations of West Virginia statutes in rendering its decision. Often this Court must balance powerful interests and legal theories and analysis in doing so. The matter at bar before the Court, however, does not present such a challenge.

First, the West Virginia legislature has firmly spoken and has not created an exception within W.Va. Code § 29-12A-5(b) to the broad immunity granted to public employees/supervisors, which would allow the Respondent to conceivably pursue an action against the Petitioners pursuant to W.Va. Code § 23-4-2(d)(2)(A), nor does such a claim align with the statutory scheme set forth within the West Virginia Tort Claims and Insurance Reform Act.

Second, the Respondents, under any plausible analysis of the facts before this Court and the Legislative framework, have not, and cannot, plead a claim which falls within any of the three (3) exceptions to municipal actor/co-employee immunity, set forth within W.Va. Code § 29-12A-5(b).

Third, the Circuit Court's ruling contains plain error on its face as the Circuit Court's ruling violates long-standing principles of West Virginia law in allowing a common law claim, titled as an intentional and reckless conduct claim, asserted outside of the deliberate intent statutory framework, to proceed in workplace litigation against municipal employees.

And fourth, the Circuit Court's ruling contains error insofar as it fundamentally erodes the spirit and intent of the West Virginia Tort Claims and Insurance Reform Act.

The foregoing, as will be discussed in more detail below, amply demonstrate that the Circuit Court committed error in denying the Petitioners' Motion to Dismiss. Accordingly, this Court should reverse the Circuit Court's denial and declare that a deliberate intent claim, and a tag

along common law claim, cannot be asserted against public co-employees stemming from a public employee workplace injury.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in West Virginia Rule of Appellate Procedure 18(a)(4), oral argument is not necessary in this case. Indeed, the facts and arguments are adequately presented in this Brief, such that the decisional process will not be significantly aided by oral argument.

Alternatively, should the Court deem this case suitable for Rule 20 oral argument because it involves an issue of fundamental public importance, to wit, the application of the Governmental Tort Claims and Insurance Reform Act or on the belief that this case involves fundamental issues of application of the Governmental Tort Claims and Insurance Reform Act to public co-employees/supervisors sued in the context of heightened deliberate intent litigation asserted pursuant to W.Va. Code § 23-4-2(d)(2)(A), Petitioners are prepared to present oral argument to the Court.

V. STANDARD OF REVIEW

"Where the issue on an appeal from the circuit court's ruling is clearly a question of law. . . we apply a *de novo* standard of review." Syl. Pt. 1 Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995). When reviewing a lower court's decision under a *de novo* standard, no deference is afforded to the lower court's ruling. As stated by this Honorable Court: "[w]hen employing the *de novo* standard of review, we review anew the findings and conclusions of the circuit court, affording no deference to the lower court's ruling." Blake v. Charleston Area Med. Ctr., Inc., 201 W.Va. 469, 475, 498 S.E.2d 41, 47 (1997), citing West Virginia Div. of Env. Protection v. Kingwood Coal Co., 200 W.Va. 734, 745, 490 S.E.2d 823, 834 (1997).

Further, appeal of this matter is proper pursuant to the "collateral order" doctrine, as recently set forth by this Honorable Court in Syl. Pt. 5, State of W.Va. ex rel. Grant County Commission v. Honorable Lynn A. Nelson, et el., 2021 W.Va. LEXIS 134 (W.V.S.C., March 23, 2021) (stating that "[u]nder Rule 12 of the West Virginia Rules of Civil Procedure, a circuit court's denial of a motion to dismiss a complaint that is predicated on the statutory immunity conferred by the Governmental Tort Claims and Insurance Reform Act is an interlocutory ruling that is subject to immediate appeal under the "collateral order" doctrine.")

VI. ARGUMENT

A. THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PETITIONERS' MOTION TO DISMISS AS THE RESPONDENT'S HEIGHTENED DELIBERATE INTENT CLAIM ASSERTED PURSUANT TO W.VA. CODE § 23-4-2(D)(2)(A) IS BARRED BY THE PLAIN LANGUAGE OF THE GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT, W. VA. CODE § 29-12A-5, ET SEQ., GIVEN THAT NO EXCEPTION WITHIN W.VA. CODE § 29-12A-5(b) PERMITS SUCH A CLAIM TO BE ASSERTED AGAINST PUBLIC CO-EMPLOYEES AND/OR SUPERVISORS.

At the Circuit Court level, Respondent, after asserting a traditional five (5) factor deliberate intent claim against co-employees Edwards and Maxwell which was barred by Young v. Apogee Coal Co., LLC, 232 W.Va. 554 (2013), pivoted and plead a deliberate intent claim within the framework of W.Va. Code § 23-4-2(d)(2)(A), which provides as follows:

> **(2)** The immunity from suit provided under this section and under sections six and six-a [§ *23-2-6* and § *23-2-6a*], article two of this chapter may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention". This requirement may be satisfied only if:
>
> **(A)** It is proved that the employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (i) conduct which produces a result that was not specifically intended; (ii) conduct which constitutes negligence, no matter how gross or aggravated; or (iii) willful, wanton or reckless misconduct; or . . . . (emphasis added).

The fundamental problem with this approach is that West Virginia law is clear, that both political subdivisions and political subdivision employees are immune from liability if a loss or claim results from "any claim covered by any workers' compensation law", such as the present W.Va. Code § 23-4-2(d)(2)(a) deliberate intent claim, when no exception has been crafted by the Legislature to such civil immunity for public employees in the context of a W.Va. Code § 23-4-2(d)(2)(A) deliberate claim. See W.Va. Code § 29-12A-5 (a) (11) (stating that (a) A political subdivision is immune from liability if a loss or claim results from ... (11) Any claim covered by any workers' compensation law or any employer's liability law . . . .).

Turning to the exceptions to the general rule of governmental employee immunity, there are only three instances specified by the Legislature when a co-employee may be liable within the framework of the West Virginia Governmental Tort Claims and Insurance Reform Act, as follows:

> (b) An employee of a political subdivision is immune from liability unless one of the following applies:
>
> (1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities;
>
> (2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or
>
> (3) Liability is expressly imposed upon the employee by a provision of this code.

W.Va. Code § 29-12A-5.

The analysis of West Virginia Code § 29-12A-5(b) is "fairly straightforward" because an employee "is immune from personal tort liability unless his [or her] actions fall within one of the three statutory exceptions." Reed v. Orme, 206 W.Va. 568, 526 S.E.2d 534 (1999) (emphasis added); see also, Wriston v. Raleigh County Emergency Services Authority, 205 W.Va. 409, 518 S.E.2d 350 (1999) (affirming dismissal of personal liability claim against an employee because the Respondent "failed to articulate any action that [the employee] took towards her maliciously,

in bad faith, or in a wanton or reckless manner."); Moore v. Wood County Bd. of Educ., 200 W.Va. 247, 489 S.E.2d 1 (1997) (affirming dismissal of personal tort liability claim against school principal because there were no allegations or support for claims that the principal acted with a malicious purpose, in bad faith, or in a reckless manner); Holstein v. Massey, 200 W.Va. 775, 787, 490 S.E.2d 864 (1997) (application of West Virginia Code § 29-12A-5(b) focuses on the defendant's conduct).

Speaking further, "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975). In analyzing statutory language generally, words are given their common usage, and "courts are not free to read into the language what is not there, but rather should apply the statute as written." State ex rel. Frazier v. Meadows, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994). Indeed, "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." Syl. Pt. 5, State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W. Va. 137, 107 S.E.2d 353 (1959); see also Lewis v. Canaan Valley Resorts, Inc., 185 W. Va. 684, 692, 408 S.E.2d 634, 642 (1991) (internal citation omitted) (stating that the Court "may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.").

Here, as plainly set forth above within W.Va. Code § 29-12A-5(b), the Legislature has not created an exception to immunity for workplace injury claims against municipal employees in the context of a W.Va. Code § 23-4-2(d)(2)(A) deliberate intent claim based on conscious, subjective and "deliberately formed intention" – as such language is plainly absent from the exceptions to the

general rule of immunity set forth within W.Va. Code § 29-12A-5(b). Thus, despite the harsh nature of such a result, the Respondent's heightened deliberate intent claim must fail.

Further, it should be noted that statutes must be read in context, and "two [related] statutes must be read in a fashion to give effect to all of their terms, if possible. Indeed, '[n]o part of a statute is to be treated as meaningless and we must give significance and effect to every section, clause, word or part of a statute[.]' " Savilla v. Speedway Superamerica, LLC, 219 W. Va. 758, 763, 639 S.E.2d 850, 855 (2006) (citations omitted). And, it should also be noted that "statutes must be read in *pari materia* to ensure that legislative intent is being effected. 'Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in pari materia to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.' " (internal citations omitted) Community Antenna Services, Inc. v. Charter Communications VI, LLC, 227 W. Va. 595, 604, 712 S.E.2d 504, 514 (2011).

With this statutory and legal framework, had the West Virginia Legislature intended to narrow governmental employee immunity and broaden municipal employee liability under W.Va. Code § 29-12A-5(b), to include liability for W.Va. Code § 23-4-2(d)(2)(A) deliberate claims, it would have explicitly included the terms "consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee" within the terms of the West Virginia Governmental Tort and Insurance Reform Act. Additionally, the limited exceptions to co-employee/supervisor liability set forth within W.Va. Code § 29-12A-5(b) must be read to harmonize with the general intent of the Legislature contained in the West Virginia Tort Claims and Insurance Reform Act, to grant immunity for municipal actors for any claim covered by any

workers' compensation law or any employer's liability law, which bars the present co-employee/supervisor deliberate intent claim.

Stated differently, by giving meaning to the plain language of West Virginia Code § 29-12A-5(b) and West Virginia Code § 29-12A-5 (a) (11), (stating that (a) A political subdivision is immune from liability if a loss or claim results from ... (11) Any claim covered by any workers' compensation law or any employer's liability law . . . .), there can be no claim asserted against the Petitioners as the Legislature has granted broad immunity from all deliberate intent claims and did not incorporate the "heightened" deliberate intent standard within the public employee exceptions to the broad immunity contained within W.Va. Code § 29-12A-5(b).

Accordingly, consistent with the foregoing, this Court should reverse the Circuit Court's denial of the Petitioners' Motion to Dismiss, and thereby grant public employees the immunity conferred upon them by the Legislature, and enter judgment in favor of Petitioners.

B. THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PETITIONERS' MOTION TO DISMISS AS THE RESPONDENT'S CLAIMS, BY THEIR VERY NATURE, CANNOT SATISFY ANY OF THE THREE (3) ELEMENTS/EXCEPTIONS TO CO-EMPLOYEE/SUPERVISOR IMMUNITY SET FORTH WITHIN W.VA. CODE § 29-12A-5(b).

Subsection (b) of W.Va. Code § 29-12A-5 plainly provides that employees of political subdivisions are immune from personal tort liability unless: (1) their acts or omissions were manifestly outside the scope of employment or official responsibilities; (2) their acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (3) liability is expressly imposed upon the employee by a provision of this code. Moore By & Through Knight v. Wood County Bd. of Educ., 200 W. Va. 247, 489 S.E.2d 1 (W. Va. 1997).

Per the legislative history, W.Va. Code § 29-12A-5 was enacted in 1986, years after the enactment of the deliberate intent statutory framework in West Virginia. Indeed, "[t]he Legislature,

when it enacts legislation, is presumed to know its prior enactments." Syl. Pt. 5, in part, Pullano v. City of Bluefield, 176 W. Va. 198, 342 S.E.2d 164 (1986). And, "[i]t is always presumed that the legislature will not enact a meaningless or useless statute." Syl. Pt. 4, State ex rel. Hardesty v. Aracoma, 147 W. Va. 645, 129 S.E.2d 921 (1963).

First, exception (1) noted above plainly does not apply as Respondent has alleged in her Amended Complaint that, at all relevant times, Respondents were acting in their official capacities and scope of employment as public co-employees/supervisors. (Appx. 20-21).

Second, exception (2) noted above, by its very language, plainly does not apply as it does not parallel the language contained within W.Va. Code § 23-4-2(d)(2)(A), particularly given that the Legislature is treated as knowing its prior enactments, and thus the Legislature was expressly aware that to craft an exception to immunity for public employees in the context of a W.Va. Code § 23-4-2(d)(2)(A) cause of action the Legislature needed to incorporate such exception within W.Va. Code § 29-12A-5(b), as any other suggestion renders the Legislature's broad immunity meaningless.

And third, exception (3) noted above, similarly, by its language does not apply as no provision of the workers compensation code/deliberate intent statutory framework/Governmental Tort Claims and Insurance Reform Act expressly imposes liability on public co-employees/supervisors for W.Va. Code § 23-4-2(d)(2)(A), the necessary prerequisite to application of this exception.

Although simplistic, the Court need look no further than this pragmatic analysis, in reversing the Circuit Court's denial of the Petitioners' Motion to Dismiss, consistent with the Legislature's limited, enumerated exceptions, as described above.

C. THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PETITIONERS' MOTION TO DISMISS AS THE RESPONDENT'S HEIGHTENED DELIBERATE INTENT CLAIM/INTENTIONAL AND RECKLESS CONDUCT CLAIM AGAINST THE PETITIONERS ARE BARRED PURSUANT TO THE FRAMEWORK OF THE WEST VIRGINIA WORKERS' COMPENSATION SYSTEM.

The West Virginia workers' compensation system was created by the Legislature in 1913 "to provide a method of compensation for employees that may be injured, or the dependents of those killed in the course of their employment . . . and to define and fix the rights of employees and employers . . . ." Davis, Robin Jean & Palmer Jr., Louis J, Workers' Compensation Litigation in West Virginia: Assessing the Impact of the Rule of Liberality and the Need for Fiscal Reform, 107 W. Va. L. Rev. 43, 59 (2004) (quoting 1913 W. Va. Acts Ch. 10).

In short, it is a "no-fault system of compensability for work-related injuries" designed to replace the then existing common-law system whereby injured employees could sue their employers for negligence, but were often stifled by the common-law defenses of assumption of the risk, contributory negligence, and the fellow-servant doctrine. Id. at 53-58. While the costs of the workers' compensation system are unilaterally born by employers, employees surrender their common-law rights to sue their employers for work-related injuries in exchange for the assured benefits. Lex K. Larson & Arthur K. Larson, Workers Compensation Law: Cases, Materials and Text §§ 1.01-.04 (3d Ed. 2000).

In exchange for the creation of the no-fault compensation system, the Legislature granted employers who participate in the system immunity from suits "in damages at common law or by statute for the injury or death of any employee, however occurring." 1913 W. Va. Acts Ch. 10 § 22; W. Va. Code § 23-2-6. That immunity, however, could be lost "[i]f injury or death result to an employee from the deliberate intention of his employer to produce such injury or death, the employee, the widow, widower, child or dependent of the employee shall have the privilege to

take under this act, and also have a cause of action against the employer as if this act had not been enacted, for any excess of damages over the amount received or receivable under this act." 1913 W. Va. Acts Ch. 10 § 28; see also Maynard v. Island Creek Coal Co., 115 W. Va. 249, 175 S.E. 70 (1934).

Section 23-2-6, the immunity it grants from a common-law suit for damages, and the provision for a statutory cause of action where the employer acts with deliberate intention, has remained virtually unchanged since the enactment of the statute. See e.g., McVey v. C & P Tel. Co., 103 W. Va. 519, 138 S.E. 97 (1927) (finding immunity from negligence suit of injured employee for employer who complied with provisions of the statute); Persinger v. Peabody Coal Co., 196 W. Va. 707, 474 S.E.2d 887 (1996) ("It is clear that workers compensation is the exclusive remedy when an employee is negligently injured in the workplace.").

In 1933, the Supreme Court of Appeals of West Virginia extended the immunity to employees of covered employers, so long as the employees were acting "in furtherance of the employer's business, under express authority of the employer, and not unlawfully, wantonly or maliciously." Hinkleman v. Wheeling Steel Corp., 114 W. Va. 269, 270, 171 S.E. 538, 539 (1933).

However, the Supreme Court of Appeals later overruled Hinkleman and allowed an injured employee to sue a co-employee for negligence. Tawney v. Kirkhart, 130 W. Va. 550,44 S.E.2d 634 (1947). In the very next legislative session, the Legislature abrogated the Tawney ruling by expressly extending immunity from suit to "every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention." 1949 W. Va. Acts Ch. 136; W. Va. Code § 23-2-6a. This statute has not been amended since its enactment.

In 1966, the Court interpreted that section to "extend the same immunity and to accord an immunity identical with that of the employer to additional persons, including fellow employees." Bennett v. Buckner, 150 W. Va. 648, 654, 149 S.E.2d 201, 205 (1966).

As of 1966 in West Virginia, the law provided: (1) immunity from suit for employers who subscribed to the workers' compensation fund and complied with the provisions of the act, per 23-2-6; (2) immunity from suit for employees of those employers when the employee was acting in furtherance of the employer's business and did not inflict an injury with deliberate intention, per 23-2-6a; and (3) with a statutory cause of action against employers and employees who acted with "deliberate intention," per 23-4-2.

This is the legal framework which Respondents' Amended Complaint and the Circuit Court failed to acknowledge. Put plainly, West Virginia is an exclusive remedy state for workplace injuries, but for the deliberate intent exception. Indeed, the provisions for employer and co-employee immunity contained in this section and § 23-2-6 are the exclusive remedy available to an employee for an injury that occurs within the course and scope of employment. Wisman v. William J. Rhodes & Shamblin Stone, Inc., 191 W. Va. 542, 447 S.E.2d 5, 1994 W. Va. LEXIS 123 (W. Va. 1994).

Here, after elimination of the heightened deliberate intent claim as set forth above, Respondent's remaining claim, which sounds in negligence also must fail, as Respondent has plainly plead that this is a workplace injury claim – which thus fits squarely within the confines of the exclusive workers' compensation system, providing that general tort claims are not available avenues/remedies for Respondent's public employer/employee workplace injuries.

For these independent reasons, Respondent's claim(s) seeking to impose individual liability on Petitioners for workplace injuries under West Virginia common law are barred as a

matter of law – and this Court should accordingly reverse the Circuit Court's denial of the Petitioners' Motion to Dismiss, and enter judgment in favor of Petitioners.

D. THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PETITIONERS' MOTION TO DISMISS AS RESPONDENT'S CLAIMS AGAINST THE PETITIONERS ARE BARRED BECAUSE THE POLICY OF THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT WOULD BE ABROGATED IF LITIGATION AGAINST MUNICIPAL CO-EMPLOYEES WAS PERMISSIBLE WHEN SUCH CLAIMS ARE CLEARLY BARRED AS A MATTER OF LAW.

"The stated purposes of the Tort Claims Act[s] are '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.' W.Va. Code § 29-12A-1. The Tort Claims Act was the result of legislative findings 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. W.Va. Code § 29-12A-2. To remedy this situation, the legislature specified seventeen instances in which political subdivisions would have immunity from tort liability. W.Va. Code, 29-12-5(a)." O'Dell v. Town of Gauley Bridge, 188 W. Va. 596, 600, 425 S.E.2d 551, 555 (1992).

There are significant public policy concerns entangled with Respondent's shifting theory of liability that supported dismissing this action at the Circuit Court level.

For instance, if this litigation can proceed, the impact of litigation will undercut the Governmental Tort Claims and Insurance Reform Act's goal of fostering a more favorable insurance environment within West Virginia. Stated differently, if claims can proceed in the face of strict and plain immunity provisions insurers will have to price this factor into their rate making process – which will have a detrimental impact on municipal actors – whose insurance rates will increase due to the expansion of risk and reduced number of insurers who will participate in such

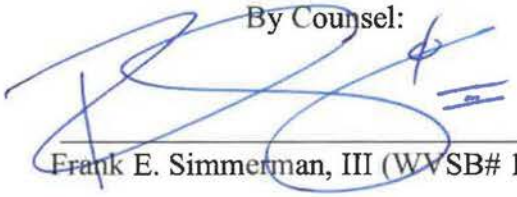
an insurance climate. This is particularly relevant in the present "intentional act" claim setting, as it is generally more difficult and expensive to purchase insurance for intentional acts, i.e. deliberate intent or stop gap coverage. A finding that broad immunity is not present in such actions will erode the stated purposes of the Tort Claims and Insurance Reform Act.

As the Legislature plainly did not intend for public employees/supervisors to be subject to such liability, consistent with the stated purpose of the Tort Claims and Insurance Reform Act, this Court should reverse the Circuit Court's denial of the Petitioners' Motion to Dismiss, and enter judgment in favor of Petitioners.

VII. CONCLUSION

Petitioners respectfully request that this Court reverse the denial of the Petitioners' Motion to Dismiss entered by the Circuit Court of Harrison County and in so doing, confirm and enforce the immunity provisions set forth within W.Va. Code § 29-12A-5, enter judgment in favor of the Petitioners, and award Petitioners such further relief which the Court deems appropriate.

Respectfully submitted,
Petitioners,
By Counsel:



Frank E. Simmerman, III (WVSB# 11589)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0589

Chad Edwards and Matthew Maxwell,
Defendants Below, Petitioners,

vs.

Appeal from an order of the
Circuit Court of Harrison County
(Case No. 20-C-267-3)

Rhonda Stark, Individually and as
Administratrix of the Estate of
Robert E. Stark,
Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "*Brief of Petitioners Chad Edwards and Matthew Maxwell*" was served upon the following counsel of record, by U.S. Mail, on October 27th, 2021:

Timothy R. Miley, Esq. Douglas R. Miley, Esq. The Miley Legal Group, PLLC 229 W. Main Street, Suite 400 Clarksburg, WV 26301 *Counsel for Respondents/Respondents*	

Frank E. Simmerman, III (WVSB# 11589)