

IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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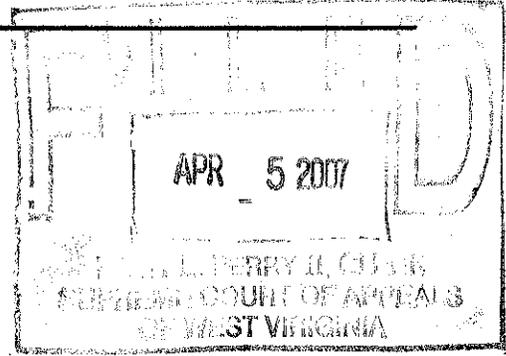
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CHARLESTON

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CHARLES B. ZIRKLE,

Appellant (Plaintiff Below)



VS.

No. 33307  
Civil Action No. 05-C-81

THE ELKINS ROAD PUBLIC  
SERVICE DISTRICT.

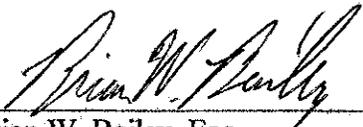
Appellee (Defendant Below)

FROM THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

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APPELLANT'S BRIEF

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Brian W. Bailey, Esq.  
W.V. State Bar ID #9816  
P.O. Box 2  
Horner, WV 26372  
Phone: (304) 473-1002  
Fax: (304) 473-1002  
Counsel for Appellant Charles B. Zirkle

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**THE ELKINS ROAD PUBLIC  
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Appellee (Defendant Below)

**FROM THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA**

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**APPELLANT'S BRIEF**

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

**A. Kind of Proceeding and Nature of  
Ruling in Lower Tribunal**

The Appellant, Charles B. Zirkle (hereinafter Mr. Zirkle), sought an appeal of an Order entered by the Circuit Court of Upshur County, West Virginia, entered on the 31<sup>st</sup> day of May, 2006, dismissing the case with prejudice with regard to any and all claims

involving the Defendant Upshur County Commission, and the Defendant Elkins Road Public Service District (hereinafter Elkins Road PSD).

On February 13, 2007, Mr. Zirkle's counsel, Brian W. Bailey, appeared on Motion Day before the West Virginia Supreme Court of Appeals. After hearing argument from counsel, the West Virginia Supreme Court of Appeals granted the petition for appeal as to Assignment of Error No. 2 only, in other words the claim against the Elkins Road Public Service District. It is that claim that argument in the following brief follows.

### **B. Statement of the Facts**

The Appellant, Mr. Zirkle, is a citizen of Barbour County, West Virginia. The former Appellee, the Upshur County Commission, is a governmental body serving the citizens of Upshur County, West Virginia, with its principal place of business in Upshur County, West Virginia. The present Appellee, the Elkins Road Public Service District, is a public utility, with its principal place of business in Upshur County, West Virginia.

Mr. Zirkle is alleging the Elkins Road PSD is responsible for providing water service to the qualified applicants, pursuant to *W.Va. Code §16-13A-1*, et seq., with no strings attached.

Mr. Zirkle resided in Barbour County, West Virginia, with his long-time girlfriend Kimberly Ann Kowalkoski, and later, also their infant daughter, for a period of approximately four years and utilized well water as his primary source of water. On or about March 15, 2004, Mr. Zirkle discovered bacteria in his well water, and was advised his well water was no longer safe for ordinary residential use. On or about March 25, 2004, Mr. Zirkle contacted the Elkins Road PSD, which was the public service district serving his locality, regarding the costs and requirements of obtaining service to his home, and was informed by Connie Williams, the Manager of the PSD, that he would require approximately \$132,000 for parts, equipment, and installation costs to receive

water service from the Elkins Road PSD, although no written estimate was ever provided to Mr. Zirkle.

On or about June 1, 2004, Mr. Zirkle attended a public monthly meeting of the Elkins Road PSD board. At this meeting he orally requested water service. He was advised that the Elkins Road PSD had no duty to provide water to him, that he must apply in writing, and that the matter would be addressed at the monthly Elkins Road PSD meeting in July. After this meeting, Mr. Zirkle contacted the West Virginia Public Service Commission (hereinafter Public Service Commission), and was advised to fill out a complaint against the Elkins Road PSD. On or about June 16, 2004, Mr. Zirkle formally requested water service from the Elkins Road PSD in writing by completing an Application for Service.

Following Mr. Zirkle's contact with the Public Service Commission, the Elkins Road PSD refused to provide water service to Mr. Zirkle, informing him that he was outside the jurisdiction of the Elkins Road PSD, as he was a resident of Barbour County. Upon information and belief, at the time the Elkins Road PSD refused service to Mr. Zirkle's residence in Barbour County, the Elkins Road PSD was providing service to at least one Barbour County resident nearby. When confronted with this information, the Elkins Road PSD acknowledged providing service to other Barbour County residents, and then required Mr. Zirkle to provide a letter from the Century-Volga Public Service District indicating it could not provide service to Mr. Zirkle, before the Elkins Road PSD would agree to provide service to him.

On or about June 21, 2004, Mr. Zirkle provided the requested letter from the Century-Volga Public Service District to the Elkins Road PSD. Contemporaneously with the requirement of a letter from the Century-Volga Public Service District, the Elkins Road PSD warned Mr. Zirkle that he would likely have water pressure problems, recommended that he install a pump, and required him to serve a pressure waiver. Mr. Zirkle voluntarily agreed to sign the pressure waiver on or about June 14, 2004, and

further indicated to the Elkins Road PSD that he would be willing to pay whatever was necessary in order to receive water.

On or about June 15, 2004, Mr. Zirkle requested in writing a pressure test of his water line leading from his property to the proposed location for the meter. This written request was delivered to Sharon Burr, secretary for the PSD, as Mrs. Williams was not available. After submitting the requested information, Mr. Zirkle contacted the Elkins Road PSD regarding the status of his application, whereupon Elkins Road PSD board member Darren Dean informed Mr. Zirkle, "this can take a long time, and we can make it take longer. You've done pissed us off."

On July 12, 2004, the Elkins Road PSD provided the results of the pressure reading, and demanded additional information from Mr. Zirkle, including engineering specifications that were ultimately never used by the Elkins Road PSD. At the regular monthly meeting of the Elkins Road PSD in August, Mr. Zirkle provided all additional information demanded of him. Mr. Zirkle tried to submit the additional information prior to the start of the meeting, but Connie Williams, the manager of the Elkins Road PSD at the time, declined to review the documents, as she "did not have her glasses." During the August meeting, the Elkins Road PSD reviewed the information submitted by Mr. Zirkle and then demanded Right of Way Agreements of him, although these had been previously submitted to the Elkins Road PSD. Mr. Zirkle left this August meeting before its conclusion, and was followed to his car by Elkins Road PSD board member Carrie Wagoner, who verbally harassed and insulted Mr. Zirkle.

On or about August 18, 2004, Mr. Zirkle secured a Right of Way Agreement from Bud Lantz, an adjoining land owner. On or about the same day, Mr. Zirkle contacted Coastal Lumber regarding a new Right of Way Agreement, whereupon Coastal Lumber representative Ed Kraynock indicated the existing Right of Way Agreements secured by Mr. Zirkle and previously submitted to the Elkins Road PSD were sufficient in every manner, as they were documents that Coastal Lumber had been using for several years.

Before the September meeting, Mr. Zirkle submitted the Right of Way Agreements to the Elkins Road PSD. However, at the September meeting, the Elkins Road PSD demanded a new Right of Way Agreement from the Boy Scout Camp, another adjoining land owner. Upshur County Commissioner Kenneth Davidson attended the September meeting, and contacted Mr. Zirkle over the telephone during the meeting, and volunteered to obtain a Right of Way Agreement from the Boy Scout Camp on behalf of Mr. Zirkle. The Commissioner subsequently failed to obtain this Right of Way. About or around this time, upon information and belief, Commissioner Steve Ables told the local media he wasn't sure if water was required to be provided for this customer.

Upon information and belief, at some point before Mr. Zirkle filed a complaint against the Elkins Road PSD, his land-service line was put in. He required 120 pounds of pressure, and was initially getting just 50 pounds. When the land-service line was put in, he received 125 pounds of pressure, but the hook-up had so many gadgets on it that, even at this point, he did not receive water.

On or about September 17, 2004, Mr. Zirkle filed a complaint with the Public Service Commission regarding the conduct of the Elkins Road PSD. Around the time the complaint was filed, upon information and belief, Commissioner Donny Tenney voluntarily came to the residence of Mr. Zirkle and went through the paperwork with him, and reportedly told Mr. Zirkle, "We're in trouble. You'll end up owning this county." On October 8, 2004, the Public Service Commission issued an Initial Joint Staff Memorandum wherein the Public Service Commission opines, "the [Elkins Road Public Service] District's actions with regard to this Complainant and his request for water service could be considered unreasonable, unjust, insufficient, or unjustly discriminatory practices or acts pursuant to *W.Va. Code §24-2-7*." The Memorandum further states "[w]e are of the opinion that the District has not interacted with this Complainant [Appellant] in a reasonable, professional, or timely manner."

On April 24, 2005, the Public Service District issued a Final Order directing the Elkins Road PSD to provide water service to Mr. Zirkle. The Elkins Road PSD declined to exercise their option to appeal. A further eight days after the appeals period lapsed, following phone calls from both the Public Service Commission and Mr. I. Franklin Hartman, III, the prior attorney for Mr. Zirkle, water was at last provided to Mr. Zirkle and his family, and within a matter of a couple of hours.

I. Procedural History in the Circuit Court  
of Upshur County, West Virginia

On September 6, 2005, the Appellant filed a Complaint in the Circuit Court of Upshur County, West Virginia, alleging the following theories of recovery: breach of contract, negligence, fraud, civil conspiracy, intentional infliction of emotional distress, and outrage. On September 19, 2005, the Appellee's responded by filing a Motion to Dismiss for Failure to State a Claim Upon Which Relief Could be Granted, pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*. A hearing was held on October 31, 2005, on Defendant Upshur County Commission's Motion to Dismiss. Following this hearing, on November 8, 2005, the Circuit Court of Upshur County issued an ORDER denying Defendant Upshur County Commission's Motion to Dismiss. As part of that ORDER, the Court order that pursuant to Rule 7(a) of the *West Virginia Rules of Civil Procedure*, the Court exercised its authority to require that the Plaintiff file a short and plain statement specifically tailored to the defense of qualified or statutory immunity of both Defendants.

Following this ORDER, in November 2005, I. Franklin Hartman III, Attorney for the Plaintiff at the time, accepted a new position with the state government in Charleston, West Virginia. Pursuant to an ORDER issued on November 30, 2005, the Circuit Court of Upshur County granted Mr. Hartman's Motion to Withdraw from the case, as he was relocating from Buckhannon to Charleston. Shortly thereafter, on or about December 9,

2005, an ORDER was issued dismissing the case with prejudice from the docket, prior to Mr. Zirkle having the opportunity to retain new counsel to represent him, and furthermore, prior to him having an opportunity to file a short and plain statement showing why statutory immunity should not apply to both defendants.

Thereafter, Mr. Zirkle retained his present counsel, Brian W. Bailey, to represent him on this matter on a contingency basis. Mr. Bailey filed a Motion to Reinstate the Case on the Docket. Both defendants also opposed this motion. On April 20, 2006, a hearing was held on this Motion before the Circuit Court of Upshur County. At the conclusion of said hearing, the Court ORDERED the case reinstated on the docket, by an ORDER signed on April 25, 2006, with a view to allowing the Appellant 20 days to file a short and plain statement showing why statutory immunity should not apply to both Appellees, and allowing the Appellees 20 days to file a response to the short and plain statement. Following this process, all the parties filed briefs with the Circuit Court of Upshur County outlining their positions.

After reviewing those briefs, the Circuit Court of Upshur County issued an ORDER dismissing the case with prejudice with regard to any and all claims involving Defendant Upshur County Commission and Defendant Elkins Road PSD on May 31, 2006, ruling that the Appellant failed to state any cognizable claims against the Appellees. It is from that ORDER which appellant is seeking an appeal.

## II. Legal Reasoning Underlying the Circuit Court of Upshur County's ORDER Dismissing the Case From the Docket

First, the Circuit Court of Upshur County found that Defendant Upshur County Commission and Defendant Elkins Road PSD are both political subdivisions as defined under W.Va. Code §29-12A-3(c). Mr. Zirkle argued that the *West Virginia Tort Claims and Insurance Reform Act*, W.Va. Code §29-12A-1 *et seq.* (1986) did not afford Defendant Elkins Road PSD immunity from suit because a more specific statutory

provision governed in this instance, namely W.Va. Code §16-13A-3 (2002). W.Va. Code §16-13A-3, states in pertinent part as follows:

...Each [public service] district may acquire, own and hold property, both real and personal, in its corporate name, and *may sue, may be sued*, may adopt an official seal and may enter into contracts necessary or incidental to its purpose, including contracts with any city, incorporated town or other municipal corporation located within or without its boundaries for furnishing wholesale supply of water for the distribution system of the city, town or other municipal corporation, or for furnishing stormwater services for the city, town or other municipal corporation, and contract for the operation, maintenance, servicing, repair and extension of any properties owned by it or for the operation and improvement or extension by the district of all or any part of the existing municipally owned public service properties of any city, incorporated town or other municipal corporation included within the district...

The Circuit Court of Upshur County found Mr. Zirkle's reliance on Section 16-13A-3 misplaced because the *West Virginia Tort Claims and Insurance Reform Act* states the contrary. The Court cited Section 29-12A-4(c)(5), which sets forth that "liability shall not be construed to exist under another section of this code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued." The Court therefore held that W.Va. Code §29-12A-1 *et seq.* specifically controls whether governmental immunity attaches in this case, not W.Va. Code §16-13A-3.

Of the seventeen instances in which political subdivisions are granted immunity from liability under the *West Virginia Tort Claims and Insurance Reform Act*, the Court held that only one applied in this case. W.Va. Code §29-12A-5(a)(9) holds as follows:

A political subdivision is immune from liability if a loss or claim results from...licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority.

Mr. Zirkle argued below that the immunities provided to political subdivisions under W.Va. Code §29-12A-5(a)(9) did not apply in this case because that provision of the code applies only to “bureaucratic-type functions such as issuing a permit, denying a permit, suspending one, etc.” Mr. Zirkle argued that it was not the fact that he was granted a permit to have water service that was at issue, but rather that he was strung along for close to 15 months without water, and was effectively denied water service by the measures put into place on the ground. “For example, his land-service line was given to him with so many gadgets in place that he was unable to actually get his water once the land-service line was put in.” The Circuit Court of Upshur County rejected this argument, and held that the allegations against the Defendants to involve the exercise of licensing powers or functions as contemplated by W.Va. Code §29-12A-5(a)(9), and that the Defendant’s conduct, therefore, fell squarely within the governmental immunity provisions. Therefore, the Court ORDERED the case be DISMISSED with prejudice with regard to any and all claims against the Upshur County Commission.

Next, Mr. Zirkle had argued that the actions of the members of the Elkins Road PSD were so outrageous that they rose to the level of being malicious and intentional, beyond that of mere negligence, and that therefore “they should fall out of the exception allowing immunity for even negligently acting employees of a political subdivision.” Defendant Elkins Road PSD countered by responding that the *West Virginia Tort Claims and Insurance Reform Act* contain no distinguishing language for intentional or unintentional torts, and that the Court should refuse to impose a statutory exception when such limiting language does not appear within the statute.

The Court then went on to outline that W.Va. Code §29-12A-4(c)(2) provides that political subdivisions are liable in damages in a civil action for injury, death, or loss to persons or property caused by the *negligent* performance of acts by their employees while acting in the scope of their employment, subject to Sections 29-12A-5 and 29-12A-6. The Court then went on to hold that pursuant to the *West Virginia Tort Claims and Insurance Reform Act*, Plaintiff's cause of action cannot be brought against either Defendant because the Plaintiff is alleging that acts or omissions committed by the Defendant's were done with malicious purpose, in bad faith, or in a wanton or reckless manner. Therefore, the Court ORDERED the case be DISMISSED with prejudice with regard to any and all claims involving Defendant Elkins Road PSD.

As a result of the Court's ruling, the present appeal was taken by Mr. Zirkle to the West Virginia Supreme Court of Appeals.

### III. Procedural History in the West Virginia Supreme Court of Appeals

On September 20, 2006, Mr. Zirkle filed his Petition for Appeal with the West Virginia Supreme Court of Appeals. In his Petition, Mr. Zirkle essentially raised the following claims: The Circuit Court of Upshur County erred by dismissing the case with prejudice with regard to any and all claims against the Upshur County Commission because they exercised effective control over the malicious actions of the Elkins Road PSD; and that the Circuit Court of Upshur County erred by dismissing the case with prejudice with regard to any and all claims against the Elkins Road PSD, because they maliciously denied water service to the appellant for over 15 months by their actions.

On October 17, 2006, the Upshur County Commission filed its Response to the Petition filed by Mr. Zirkle, essentially arguing the Circuit Court of Upshur County ruled correctly. On October 20, 2006, the Elkins Road PSD followed suit in filing its Response to the Petition filed by Mr. Zirkle.

Upon receipt of the petitions of the various parties, the Supreme Court of Appeals agreed to hear the Petitioner's Motion for Appeal. On February 13, 2007, Brian W. Bailey, Counsel for Mr. Zirkle, appeared before the West Virginia Supreme Court of Appeals on motion day. Following the Motion of Mr. Zirkle, the Supreme Court of Appeals DENIED Mr. Zirkle's motion with respect to Assignment of Error #1, or the claim against the Upshur County Commission. However, the Supreme Court of Appeals GRANTED Mr. Zirkle's motion with respect to Assignment of Error #2, or the claim against the Elkins Road PSD.

On February 22, 2007, pursuant to Rule 8 of the *West Virginia Rules of Appellate Procedure*, the Petitioner designated the entire record to be sent to the Supreme Court of Appeals, because the entire record had not been previously designated. The Elkins Road PSD did not indicate an object to this procedure to counsel. Following receipt of the record, the Clerk of the West Virginia Supreme Court of Appeals sent a letter to Counsel indicating an ORDER was entered on March 6, 2007. In that letter, notice was given to counsel that the appellant had 30 days to file an original and nine copies of the brief from the date of that order, allowing the appellee 30 days to respond with briefs of their own, and a further 15 days for any reply brief deemed necessary by the appellant. It is the initial brief in that tripartite procedure for which the subsequent brief follows.

**C. Assignments of Error Relied Upon on Appeal and the Manner in Which They Were Decided in the Lower Tribunal**

- I. The Circuit Court erred by dismissing the case with prejudice with regard to any and all claims against the Defendant Elkins Road Public Service District.

i. Public Service Districts and *W.Va. Code §16-13A-1* et seq... Why It Applies And Why §29-12A-4(c)(5) Does Not Deny Liability In All Cases Relating to Political Subdivisions

The rules governing the creation, maintenance, jurisdiction, and general purpose of public service districts are laid out in *W.Va. Code §16-13A-1* et seq. The purpose of public service districts is to provide utility services to the areas of the state which would have been unable to obtain them. *W.Va. Code* section 16-13A-1 (1986). In this case, Mr. Zirkle is a resident of Barbour County, which adjoins Upshur County near the county line, and in fact also borders the Randolph County line, so that his property therefore falls under the intended audience of the statute, being in a very rural area.

Generally speaking, jurisdiction over the public service districts is exercised by both the public service commission (*W.Va. Code* section 16-13A-1a), and by the various county commissions (*W.Va. Code* section 16-13A-2). Once a public service district is created, it is deemed to be a public corporation and a political subdivision. *W.Va. Code* section 16-13A-3 (1986). Once created, *W.Va. Code §16-13A-3* spells out the powers and obligations of public service districts:

“From and after the date of the adoption of the order creating any public service district, it is a public corporation and political subdivision of the state, but without any power to levy or collect ad valorem taxes. *Each district may sue, may be sued, may adapt an official seal and may enter into contracts necessary or incidental to its purposes, including contracts with any city, incorporated town or other municipal corporation located within or without its boundaries for furnishing wholesale supply of water for the distribution system of the city, town, or other municipal corporation...*”

*Id.*

The Elkins Road PSD argued successfully below that as a political subdivision, it is subject to immunity from liability for the same reason that the Upshur County

Commission was, that is to say under the *West Virginia Tort Claims and Insurance Reform Act*, under *W.Va. Code* §29-12A-5(a)(9), relating to its licensing functions. In doing so, the Court rejected the plain language of *W.Va. Code* §16-13A-3, and allowed immunity from suit to stand for the Elkins Road PSD. In doing so, the Court rejected a crucial principal of our governmental tort legislation cases: “The general rule of construction in governmental tort legislation cases favors liability, not immunity. Unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail.” Syllabus point 2, *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E. 2d 620 (1996); Syllabus point 2, *Smith v. Burdette*, 211 W.Va. 477, 566 S.E. 2d 614 (2002).

Appellee counters that the legislature obviously anticipated such an argument, thus the provisions of *W.Va. Code* §29-12A-4(c)(5):

“In addition to the circumstances described in subsection (c)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a provision of this code. Liability shall not be construed to exist under another section of this code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue or be sued.”

*W.Va. Code* §29-12A-4(c)(5) (1986).

Appellee argues this clearly indicates that the Circuit Court was correct in rejecting Petitioner’s argument and finding that the viability of the Petitioner’s claim depended upon the applicability of the Tort Claims Act. However, this very argument is undercut by *Marlin*. It cannot be said that this statutory provision *clearly* has provided for immunity under the circumstances, because the first half of the section indicates *liability* exists when it is expressly imposed on a political subdivision by a provision of

this code. Indeed, this very section sends a mixed message regarding liability and immunity, and thus, it cannot be said that it *clearly* provides for immunity as required by *Marlin*.

Furthermore, as a matter of statutory construction, to accept the premise that a throwaway line in the last sentence of a lengthy statute entitled, after all, “Governmental and proprietary functions of political subdivisions, *liability* for damages”, and which statute outlines five separate ways in which political subdivisions can be held liable for damages, does violence to the premise of *Marlin* that “the general rule of construction in governmental tort legislation cases favors liability, not immunity.”

Additionally, as a matter of statutory construction, it hardly seems logical that this line contained in §29-12A-4(c)(5), which is a precise statute of rather specific Chapter 29, Article 12A, can be read to negate the *entire* West Virginia Code’s various authorizations to sue and to be sued. Surely the legislature could have sought to excise authorizations to sue and to be sued in precise areas of the Code where they intended to do so. After all, they do this every year in various other areas of the West Virginia Code, with various amendments and revised statutes. One only has to look to our ever changing, and toughening, of the areas of criminal law of driving under the influence and sexual assault to realize this basic function of the legislature. The point is that the legislature could have revised §16-13A-3 by deleting the offending language of “Each district may sue, may be sued” should they have been fit to do so.

- ii. The Circuit Court Erred Below In Holding That Mr. Zirkle Could Not Sue Because He Alleged the Actions of the Elkins Road PSD Were Malicious and Intentional, Rather than Simply Negligent

Even if the Court were to find that §29-12A-4(c)(5) disallowed liability under

another section of this code on the general authorization that a political subdivision "may sue or be sued," the Court should find that Mr. Zirkle can bring suit because of the various actions of the members of the Elkins Road PSD.

In sum, the Circuit Court of Upshur County found as follows: since Mr. Zirkle argued the actions of the Elkins Road PSD were not merely negligent, but also malicious and intentional, he could not recover because W.Va. Code §29-12A-4(c)(2) provides that political subdivisions are liable in damages in a civil action for injury, death, or loss to persons or property caused by the *negligent* performance of acts by their employees while acting in the scope of their employment, subject to Sections 29-12A-5 and 29-12A-6. Therefore, because *one of the claims* that Mr. Zirkle brought forth alleged that the acts or omissions committed by the Defendants were done with malicious purpose, in bad, or in a wanton or reckless manner, he could not recover.

There are two fundamental problems with this analysis. First of all, Mr. Zirkle brought forth several different types of claims. He alleged six different theories of recovery in his complaint: 1) breach of contract, 2) *negligence*, 3) fraud, 4) civil conspiracy, 5) intentional infliction of emotional distress, and 6) outrage. As pointed out, one of the types of claims brought forth in the complaint was for negligence. Dismissing this case, therefore, fundamentally flew in the face of the provisions of W.Va. Code §29-12A-4(c)(2): "Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting in the scope of their employment." Since one of the six theories asserted by Mr. Zirkle was for negligence, on that basis alone, the case should not have been dismissed by the Circuit Court.

Secondly, the implication of the Circuit Court of Upshur County's ruling was that since Mr. Zirkle emphasized his claims of intentional torts on his short and plain statement, rather than on negligence, he could not recover because W.Va. Code §29-12A-4(c)(2) holds that political subdivisions are liable in damages in a civil action for injury,

death, or loss to persons or property caused by the *negligent* performance of acts by their employees while acting in the scope of their employment. West Virginia's jurisprudence need not reach such an illogical result. If I am driving the state road truck while working night shift, and carelessly avert my eyes from the road to switch CDs in the CD player, and subsequently hit John Doe, the Department of Highways would presumably be liable, according to W.Va. Code §29-12A-4(c)(1), which reads: "Except as otherwise provided in this article, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any vehicle by their employees when the employees are engaged within the scope of their employment and authority."

However, if I am driving the state road truck, and come upon John Doe, who is carrying on an affair with my wife, and deliberately speed towards him, so that I strike him and run him over and kill him, according to the logic of the Circuit Court, the Department of Highways would no longer be liable, because now my actions were intentional, and so the Department would fall out of the provision for liability provided in W.Va. Code §29-12A-4(c)(1). This hardly seems like a just result.

In this case, Mr. Zirkle complied with every demand, and obstacle, which was thrown his way by the Elkins Road PSD. The only results he got until his case was taken in front of the West Virginia Public Service Commission was to have more demands and obstacles thrown in his way. It hardly seems fair to deny him an opportunity to recover simply because the Elkins Road PSD acted wantonly and maliciously towards him, whereas if they had been merely careless, he would have the opportunity to recover a judgment.

iii. Mr. Zirkle's Interactions with the Elkins Road PSD Gave Rise to a Special Relationship Between Them, and the Elkin Road PSD Breached that Special Relationship

Finally, it can be argued that Mr. Zirkle's interactions with the Elkins Road PSD gave rise to a special relationship between them, and that the Elkins Road PSD continually breached that special relationship.

Since the passage of the West Virginia Governmental Tort Claims and Insurance Reform Act, this court's litigation has been bountiful on the issue of the public duty doctrine and its special relationship exception. "The 'public duty doctrine,' simply stated, is that a governmental entity is not liable because of its failure to enforce regulatory or penal statutes." *Rhodes v. Putnam County Sheriff's Dept.*, 530 S.E. 2d 452, 207 W.Va. 191 (W.Va. 1999). Furthermore, our case law has pointed out the rational underlying the public duty doctrine:

"Public duty doctrine rests on principle that recovery may be had for negligence only if duty has been breached which was owed to particular person seeking recovery; linchpin of doctrine is that some governmental acts create duties owed to public as a whole and not to particular private person or private citizen who may be harmed by such acts."

*Parkulo v. West Virginia Bd. of Probation and Parole*, 483 S.E. 2d 507, 199 W.Va. 161 (W.Va. 1996).

However, our Supreme Court has also allowed in certain exceptions for liability to be found. The rule formulated was the "special relationship exception."

"Under special relationship exception to public duty doctrine, given certain circumstances, courts may find that special relationship has been created between public body and particular private citizen so that public body may be said to owe duty to that particular private person, in addition to and apart from any duty owed public in general."

*Id.*

Furthermore, our jurisprudence has outlined the four requirements which arise in order to determine when a special relationship to the public duty doctrine exists.

“In order to establish special relationship between plaintiff and political subdivision, as will allow imposition of liability under exception to tort immunity which is created by West Virginia statute, plaintiff must show (1) an assumption by local governmental entity, through promises or actions, of an affirmative duty to act on behalf of party who was injured, (2) knowledge on part of local governmental entity’s agents that inaction could lead to harm, (3) some form of direct contact between local governmental entity’s agents and the injured party, and (4) that party’s justifiable reliance on local governmental entity’s affirmative undertaking.”

*Semple v. City of Moundsville*, 963 F. Supp. 1416 (4<sup>th</sup> Cir. 1997); *Rhodes v. Putnam County Sheriff’s Dept.*, 530 S.E. 2d 452, 207 W.Va. 191 (W.Va. 1999).

As applied to the case at hand, while the Elkins Road PSD at first tried to deny it had to grant service to Mr. Zirkle, when it directed him towards the Volga-Century PSD, when Mr. Zirkle brought forth evidence that he was indeed in the Elkins Road PSD, they stopped contesting the fact that they didn’t owe him service, and effectively undertook the assumption outlined in element number one. Secondly, Mr. Zirkle repeatedly informed the Elkins Road PSD that his family was suffering because of the lack of water service. After all, when it was all said and done, and not before dragging the Elkins Road PSD through a knock-down, drag-out fight, he was granted water service, after nearly 15 months. As for the third element, Mr. Zirkle appeared at at least two monthly meetings of the Elkins Road PDS to bring his family’s plight to their attention. He alleges harassment from board members Darren Dean and Carrie Wagoner, with Mrs. Wagoner’s harassment coming during a regularly scheduled monthly meeting. Obviously there was

direct contact between the two. And fourthly, Mr. Zirkle racked up several expenses during his ordeal, both tangible and intangible.

Just as the tip of the iceberg of his hardships, consider the following: For example, he agreed to pay the \$50 cost of putting his pressure regulator in; he paid his \$21.54 water bill for approximately 6-8 months while he was not obtaining enough pressure and therefore any water; he hurt his back carrying the 2 one gallon jugs he had to obtain every day from his mother's, which cost him roughly \$300-\$400 on a chiropractor; he had to travel a 30 mile round trip every day on U.S. Route 33 from the Upshur-Barbour-Randolph County border into Buckhannon to obtain that water every day from his mothers, which cost him untold amounts of fuel; and he had to pay the costs of laundry mats to keep his family's clothes clean, for which he kept receipts. Factor in the strains on the relationship with his girlfriend, and trying to raise a one-year-old infant at the time, and one begins to get a sense of what this man and his family endured. Obviously, it must be said that Mr. Zirkle justifiably relied on the Elkins Road PSD's *duty*, as imposed by statute, to provide him and his family water service.

Therefore, it must be asserted that a special relationship existed between Mr. Zirkle and the Elkins Road PSD. Because the Elkins Road PSD breached their duty to Mr. Zirkle, he should therefore be allowed to recover his damages caused by them.

- iv. The West Virginia Public Service Commission Found that the Elkins Road PSD Acted in a Manner that was Unjust, Unreasonable, Unprofessional, and Not Timely

If the foregoing arguments were not enough to impress on the Court the nature of Mr. Zirkle's grievance, it must be kept in mind that the Public Service Commission has already spoken on this matter. After all, many of Mr. Zirkle's issues arose once he contacted the Public Service Commission in the first place. Once he indicated he was seeking to file a complaint, the delaying tactics became more numerous and blatant. Nevertheless, it is thanks to the intervention of the Public Service Commission that Mr.

Zirkle was ultimately able to obtain water. Following a hearing conducted by Mr. Zirkle's previous attorney, I. Franklin Hartman III, the Public Service Commission issued its initial Memorandum on October 8, 2005. In it, it stated that "the [Elkins Road Public Service] District's actions with regard to this Complainant and his request for water service could be considered unreasonable, unjust, insufficient or unjustly discriminatory practices or acts pursuant to *W.Va. Code §24-2-7*. Furthermore, the Memorandum added: "We are of the opinion that the District has not interacted with the Complainant (Appellant) in a reasonable, professional or timely manner." The findings of the Public Service Commission speak for themselves about the conduct of the Elkins Road PSD in this case.

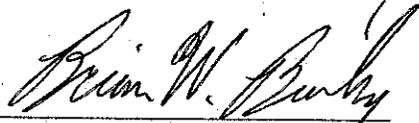
For all of the foregoing reasons, Mr. Zirkle continues to pray that the West Virginia Supreme Court of Appeals will correct the error of the Circuit Court of Upshur County in this case, and find that governmental immunity should not apply to the Elkins Road PSD in this case, and that therefore the general rule of allowing liability should apply.

#### **D. Relief Requested**

For all of the foregoing reasons, the Appellant, Charles B. Zirkle, prays that he be granted an ORDER reversing the judgment of the Circuit Court of Upshur County, and that the case be remanded below so that Mr. Zirkle can proceed on with his trial, and that all other necessary relief be granted that the Honorable Court deems necessary.

Furthermore, the Appellant respectfully prays for the opportunity to be heard for oral argument as well.

Respectfully submitted this 3<sup>rd</sup> day of April, 2007.



Brian W. Bailey, Esq.  
W.V. State Bar ID #9816

P.O. Box 2

Horner, WV 26372

Phone: (304) 473-1002

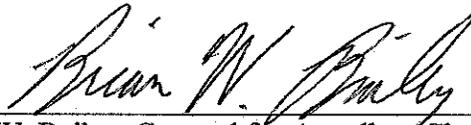
Fax: (304) 473-1002

Counsel for Appellant Charles B. Zirkle

**CERTIFICATE OF SERVICE**

I, Brian W. Bailey, hereby certify that on this 3<sup>rd</sup> day of April, 2007, I served a true copy of the foregoing "Appellant's Brief" upon the following person below, at the address listed below, by mailing a true copy thereof via U.S. mail, first class, postage prepaid.

Teresa J. Dumire (WV Bar ID #8032)  
DINSMORE & SHOHL LLP  
215 Don Knotts Blvd., Suite 310  
Morgantown, WV 26501  
Counsel for Appellee Elkins Road Public Service District



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Brian W. Bailey, Counsel for Appellant Charles B. Zirkle