

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON**

**Appeal No. 33307**

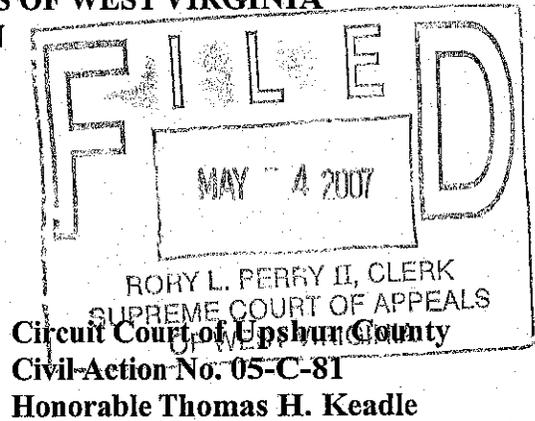
**CHARLES B. ZIRKLE,**

**Appellant/Plaintiff,**

**v.**

**ELKINS ROAD PUBLIC SERVICE  
DISTRICT,**

**Appellee/Defendant.**



---

**ELKINS ROAD PUBLIC SERVICE DISTRICT'S  
RESPONSE IN OPPOSITION TO APPEAL**

---

Teresa J. Dumire (WVSB # 8032)  
Kay Casto & Chaney PLLC  
5000 Hampton Center, Suite 3  
Morgantown, WV 26505  
(304) 225-0970

Thomas H. Ewing (WVSB # 9655)  
Kay Casto & Chaney PLLC  
P.O. Box 2031  
Charleston, WV 25327  
(304) 345-8900

**TABLE OF CONTENTS**

**I. TABLE OF AUTHORITIES ..... 3**

**II. KIND OF PROCEEDING AND NATURE OF RULING IN THE  
CIRCUIT COURT ..... 5**

**III. STATEMENT OF FACTS..... 7**

**III. ASSIGNMENTS OF ERROR PRESENTED BY THE APPELLANT ..... 9**

**IV. STANDARD OF REVIEW ..... 9**

**V. DISCUSSION OF LAW ..... 10**

THE CIRCUIT COURT CORRECTLY HELD THAT THE ELKINS ROAD PSD WAS  
ENTITLED TO STATUTORY IMMUNITY FROM THE APPELLANT’S CLAIMS  
UNDER WEST VIRGINIA’S GOVERNMENTAL TORT CLAIMS AND INSURANCE  
REFORM ACT, W. VA. CODE §§ 29-12A-1 TO W. VA. CODE §§ 29-12A-18..... 10

A. The Circuit Court Was Correct in Holding that the Grant of Immunity Under  
the Governmental Tort Claims and Insurance Reform Act Controlled the  
Resolution of this Case Rather than W. Va. Code § 16-13A-3 ..... 11

B. The Circuit Court Was Correct in Holding that the Elkins Road PSD Was  
Entitled to Immunity Under W. Va. Code § 29-12A-5(a)(9) ..... 14

1. The Immunity Granted Under § 29-12A-5(a)(9) Applies to Acts  
Associated With a Political Subdivision’s Permitting and Licensing  
Functions..... 15

2. The Immunity Granted the Elkins Road PSD Under § 29-12A-4(b) and  
-5(a)(9) Shields the Elkins Road PSD from Liability for Losses or  
Damage Regardless of Whether the Losses or Damages Were Caused  
By Intentional Acts of Its Employees or Were Caused By Negligence of  
Its Employees Acting Within the Scope of Employment ..... 16

THE APPELLANT IS BARRED FROM RAISING FOR THE FIRST TIME ON  
APPEAL THAT THE SPECIAL RELATIONSHIP EXCEPTION TO THE PUBLIC  
DUTY DOCTRINE APPLIES. .... 19

**VI. CONCLUSION ..... 21**

**VII. RELIEF REQUESTED..... 21**

**TABLE OF AUTHORITIES**

**CASES**

**WEST VIRGINIA**

Hose v. Berkeley County Planning Comm'n, 460 S.E.2d 761 (W. Va. 1995) .....15, 16, 17,  
18, 19, 20

Hutchison v. City of Huntington, 479 S.E.2d 649 (W. Va. 1996).....10, 21

Mallamo v. Town of Rivesville, 477 S.E.2d 525 (W. Va. 1996) .....16, 18

Marlin v. Bill Rich Construction, 438 S.E.2d 620 (W. Va. 1996) .....13

McCormick v. Wal-Mart Stores, 600 S.E.2d 576 (W. Va. 2004) (per curiam).....10, 15

Michael v. Marion County Bd. of Educ., 482 S.E.2d 140 (W. Va. 1996) .....17

O'Dell v. Town of Gauley Bridge, 425 S.E.2d 551 (W. Va. 1992) .....12

Proudfoot v. Proudfoot, 591 S.E.2d 767 (W. Va. 2003) .....20

Thomas v. Firestone Tire & Rubber Co., 266 S.E.2d 905 (W. Va. 1980) .....16

**FEDERAL**

Chapman v. Jarrell, No. 2:04-0605, 2005 U.S. Dist. LEXIS 31132 (S.D. W. Va. Nov. 17, 2005).....18

**STATUTES**

W. Va. Code § 29-12A-1.....12

W. Va. Code § 29-12A-3(c) .....12, 14

W. Va. Code § 29-12A-4(c) .....15

W. Va. Code § 29-12A-4(b)(1) .....14  
15, 16, 18, 19, 21

W. Va. Code § 29-12A-4(c)(2).....16, 17, 18,  
19

W. Va. Code § 29-12A-4(c)(5).....12, 13, 14

W. Va. Code, 29-12A-5(a) .....10, 14, 18,  
21

W. Va. Code § 29-12A-5(a)(9).....*passim*

W. Va. Code § 29-12A-5(a)(11).....17

W. Va. Code §16-13A-3 ..... 11, 12, 13,  
14

**RULES OF CIVIL PROCEDURE**

West Virginia Rule of Civil Procedure 12(b)(6) ..... 10

## I. KIND OF PROCEEDING AND NATURE OF RULING

This matter comes before the Court following the Circuit Court of Upshur County's order dismissing, with prejudice, Appellant Charles B. Zirkle's Complaint against both the Upshur County Commission ("the Commission") and the Elkins Road Public Service District ("Elkins Road PSD"). In dismissing the Complaint, the Circuit Court found that the Defendants were entitled to statutory immunity from the claims stated under West Virginia's Governmental Tort Claims and Insurance Reform Act, W. Va. Code §§ 29-12A-1 to W. Va. Code §§ 29-12A-18 (the "Tort Claims Act").

Although the underlying action was dismissed at the pleading stage, the case has a rather lengthy and unusual procedural history. On August 19, 2005, Appellant filed a Complaint naming the Commission and the Elkins Road PSD as Defendants and asserting claims for breach of contract, negligence, fraud, civil conspiracy, intentional infliction of emotion distress, and outrage arising out of his application for water service from the Elkins Road PSD. In response to the Complaint, the Elkins Road PSD filed an Answer which raised failure to state a claim upon which relief can be granted as a defense. The Commission filed a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted ("Motion to Dismiss"), arguing in part that it was immune from liability for the claims asserted under W. Va. Code § 29-12A-5(a)(9).

Following a hearing on the Motion to Dismiss on October 31, 2006, the Circuit Court entered an order on November 8, 2005, which denied the Motion to Dismiss, but ordered the Appellant to "file a short and plain statement specifically tailored to the defense of qualified or statutory immunity of both Defendants." (Order Denying Defendant Upshur County Commission's Motion to Dismiss). Appellant failed to file the "short and plain statement" as ordered by the Circuit Court. Therefore, on December 9, 2005, the Circuit Court entered an

order dismissing the Appellant's case with prejudice. (See Order Dismissing Case With Prejudice).

More than three months after the Circuit Court's dismissal, the Appellant, by new counsel, filed a motion seeking to reinstate the case and requesting additional time to comply with the Order Denying Defendant Upshur County Commission's Motion to Dismiss because he had difficulty finding new counsel after his previous attorney withdrew without filing a short and plain statement. The County Commission and the Elkins Road PSD filed a joint objection to the Appellant's motion, and the Circuit Court entertained arguments of counsel on this issue on April 20, 2006.

By order entered on April 25, 2006, the Circuit Court reinstated the Appellant's case and provided him twenty days to file a short and plain statement showing why the Defendants were not entitled to governmental immunity. (See Order). The Appellant timely filed his Short and Plain Statement Showing Why Governmental Immunity Does Not Apply to the Defendants ("Short and Plain Statement"). The Elkins Road PSD and the County Commission filed separate responses to the Appellant's Short and Plain Statement. The Circuit Court considered the parties' respective briefs and entered the Order Dismissing Case on May 31, 2006. In its Order Dismissing Case, the Circuit Court correctly concluded that the Elkins Road PSD was entitled to statutory immunity to the claims presented and that the Appellant had failed to meet the heightened pleading requirements to show that immunity should not apply to the Elkins Road PSD.

It is from this Order Dismissing Case that the Appellant has appealed. The Court denied the Appellant's Petition for Appeal as it related to the County Commission and therefore the instant appeal is concerned only with the Circuit Court's decision to dismiss the claims asserted against the Elkins Road PSD.

## II. STATEMENT OF FACTS

The Appellant has alleged in his Complaint and in his Short and Plain Statement the following facts. The Elkins Road PSD reserves the right to contest the truth of these facts and merely restates them as they were alleged by the Appellant.

The Elkins Road PSD is a public service utility located in Upshur County, West Virginia. Appellant, Mr. Charles B. Zirkle, a citizen of Barbour County, West Virginia, alleges that he completed a written application for water service with the Elkins Road PSD in June 2004. He alleges that the Elkins Road PSD initially refused to provide service to him because he resided outside of the Elkins Road PSD's coverage area. The Appellant alleges that he thereafter furnished information to the Elkins Road PSD that it was providing service to other Barbour County residents. However, before the Elkins Road PSD would agree to provide the Appellant with service, it required him to provide a letter from the Century-Volga Public Service District showing that it could not provide him with service. In late June 2001, the Appellant states that he provided the requested letter.

Contemporaneously with the requirement of a letter from the Century-Volga Public Service District, the Appellant states that the Elkins Road PSD warned the Appellant that he would likely have water pressure problems, recommended that he install a pump, and required that he sign a pressure waiver. The Appellant purports to have signed a pressure waiver as requested and further states that he indicated to the Elkins Road PSD that he was willing to pay whatever charges were necessary to receive water service.

Appellant further alleges that in mid-June 2004 he also requested in writing that a pressure test be performed on his water line leading from his property to the proposed location of

the meter. The request allegedly was delivered to Sharon Burr, secretary for the Elkins Road PSD.

After submitting the requested information, the Appellant states that he contacted the Elkins Road PSD to check the status of his application. Whereupon, board member Darren Dean allegedly informed him that "this can take a long time, and we can make it take longer. You've done pissed us off."

In mid-July 2004, the Elkins Road PSD provided the Appellant with the results of the pressure reading and requested additional information from the Appellant, including engineering specifications that the Appellant alleges never were used. The Appellant alleges to have provided this additional information at the Elkins Road PSD's August monthly meeting. He alleges that he tried to submit the information to Connie Williams, the Elkins Road PSD's office manager, prior to the start of the meeting, but Ms. Williams told him that she "did not have her glasses." During the August meeting, the Appellant alleges that the Elkins Road PSD reviewed the additional requested information and then demanded right-of-way agreements, although such agreements had previously been provided to the Elkins Road PSD. The Appellant alleges that he left the meeting before it was over and was followed to his car by board member Carrie Wagoner, who verbally harassed and insulted him.

The Appellant states that he was able to secure a right-of-way agreement from an adjoining landowner. However, when he contacted Coastal Lumber regarding a new right-of-way agreement with it, representatives at Coastal Lumber allegedly told him that the existing agreements that he had secured and submitted to the Elkins Road PSD were sufficient.

The Appellant alleges that he submitted the requested right-of-way agreements before the September 2004 meeting. He alleges that at the meeting, however, the Elkins Road PSD demanded a new right-of-way agreement from another adjoining landowner, the Boy Scout

Camp. The Appellant further alleges that during this meeting Upshur County Commissioner Kenneth Davidson volunteered to obtain the agreement for the Appellant, but that he failed to do so. At around this same time, another Commissioner, Steve Ables, allegedly told the local media that he was not sure if water was required to be provided to the Appellant.

Eventually, the Appellant's land-service line was installed. He alleges that he required 120 pounds of pressure, but was initially getting 50 pounds. However, he also alleges that when the line was installed, he received 125 pounds of pressure, but the hook-up had so many gadgets on it that he did not receive water.

In September 2004, the Appellant filed a complaint with the West Virginia Public Service Commission regarding the Elkins Road PSD. On April 24, 2005, the West Virginia Public Service Commission issued a Final Order directing the Elkins Road PSD to provide water to the Appellant. The Elkins Road PSD did not appeal. The Appellant alleges that eight days after the lapse of the appeal period, following calls from the West Virginia Public Service Commission and Appellant's former counsel, he was provided water.

### **III. ASSIGNMENT OF ERROR PRESENTED BY THE PETITIONER**

The Appellant maintains that the Circuit Court erred by dismissing the action with prejudice with regard to any and all claims against the Elkins Road PSD. The specific issue presented in this matter is whether the Circuit Court of Upshur County was correct in holding that the Elkins Road PSD was entitled to immunity for the claims pled by the Appellant in his Complaint and in his Short and Plain Statement under The Governmental Tort Claims and Insurance Reform Act, W. Va. Code §§ 29-12A-1 to - 18.

### **IV. STANDARD OF REVIEW**

The Circuit Court of Upshur County dismissed the Appellant's case against the Elkins Road PSD, with prejudice, for failing to state a cognizable claim upon which relief could be

granted. Normally, when a motion is made pursuant to West Virginia Rule of Civil Procedure 12(b)(6), the liberal rules of notice pleading govern whether a plaintiff's claim states a claim upon which relief can be granted. However, in cases in which statutory immunity under the Tort Claims Act is raised as a defense, this Court has previously stated that a heightened pleading is required and early resolution by summary disposition is encouraged. See Hutchison v. City of Huntington, 479 S.E.2d 649, 657-58 (W. Va. 1996). "[C]laims of immunities, where ripe for disposition, should be summarily decided before trial. Public officials and local government units should be entitled . . . statutory immunity under W. Va. Code, 29-12A-5(a), unless it is shown by specific allegations that the immunity does not apply." Id. Therefore, in the Circuit Court, the Appellant had the burden of specifically pleading facts showing that the Elkins Road PSD was not entitled to immunity under the Tort Claims Act. Nevertheless, this Court's review of the Circuit Court's order dismissing a complaint under Rule 12(b)(6) is *de novo*. Syl. Pt. 1, McCormick v. Wal-Mart Stores, 600 S.E.2d 576 (W. Va. 2004) (per curiam).

## V. DISCUSSION OF LAW

**THE CIRCUIT COURT CORRECTLY HELD THAT THE ELKINS ROAD PSD WAS ENTITLED TO STATUTORY IMMUNITY FROM THE APPELLANT'S CLAIMS UNDER WEST VIRGINIA'S GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT, W. VA. CODE §§ 29-12A-1 TO W. VA. CODE §§ 29-12A-18.**

The Appellant maintains that the Elkins Road PSD is liable for various claims arising from his attempt to secure water service from the Elkins Road PSD. However, the Circuit Court of Upshur County dismissed the Appellant's claims against the Elkins Road PSD, with prejudice, because the court found that the Elkins Road PSD was immune under the Tort Claims Act. Specifically, the Circuit Court held that W. Va. Code § 29-12A-5(a)(9),<sup>1</sup> which provides

---

<sup>1</sup> § 29-12A-5(a)(9), which states that

a political subdivision is immune from liability if a loss or claim results from . . . (9) licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of

immunity for loss or damage resulting from a political subdivision's licensing powers or functions, cloaked the Elkins Road PSD with immunity for the claims alleged in the Complaint and in the Short and Plain Statement.

In his appeal brief, the Appellant claims that the Circuit Court erred by dismissing the claims against the Elkins Road PSD. First, the Appellant asserts that the Elkins Road PSD, as a public service district, was subject to suit under W. Va. Code §16-13A-3, which provides that the PSD "may sue" and "may be sued." *Id.* Second, the Appellant alleges that political subdivisions should be liable for intentional and negligent acts of their employer under the Tort Claims Act. Third, the Appellant, raising an issue not before the Circuit Court, now claims that a special relationship existed between the Appellant and the Elkins Road PSD, which the Elkins Road PSD allegedly breached. As demonstrated below, the Circuit Court correctly rejected the Appellant's arguments by finding that the Elkins Road PSD was entitled to immunity under the Tort Claims Act.

**A. The Circuit Court Was Correct in Holding that the Grant of Immunity Under the Governmental Tort Claims and Insurance Reform Act Controlled the Resolution of this Case Rather than W. Va. Code § 16-13A-3.**

The Appellant argues that W. Va. Code § 16-13A-3, which addresses certain powers and responsibilities of public service districts ("PSDs") generally, should have controlled the resolution of this case rather than the Tort Claims Act. In support for this argument, the Appellant argues that W. Va. Code § 16-13A-3 is the more specific statute and it states that the PSDs "may sue" or "may be sued," thereby plainly eliminating immunity for the Elkins Road

---

or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority.

PSD since the general rule of construction in governmental tort legislation favors liability, not immunity.

However, as the Circuit Court correctly held, the Appellant's reliance on W. Va. Code § 16-13A-3 is misplaced and the provisions of the Tort Claims Act govern this case. First, despite the fact that W. Va. Code § 16-13A-3 governs the duties and responsibilities of PSDs in general, the legislature specifically included PSDs within the coverage of the Tort Claims Act by including them in the definition of "political subdivisions." See W. Va. Code § 29-12A-3(c). Second, and more importantly, the Legislature, obviously anticipating such an argument, included the following specific language in W. Va. Code § 29-12A-4(c)(5) that unequivocally undermines the Appellant's argument: "[l]iability 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 the general authorization that a political subdivision "*may be sued or be sued.*" W. Va. Code § 29-12A-4(c)(5) (emphasis added). Therefore, the clear language of the Tort Claims Act shows that the Legislature intended to extend statutory immunity to PSDs, such as the Elkins Road PSD, regardless of the general authorization to sue or be sued in W. Va. Code § 16-13A-3 or any other similar statute. To accept the Appellant's argument would undermine the general purposes of the Tort Claims Act and contravene the statute's express directive. See W. Va. Code § 29-12A-1; O'Dell v. Town of Gauley Bridge, 425 S.E.2d 551, 555 (W. Va. 1992) (stating that the Tort Claims Act "grants broad, but not total, immunity from tort liability to political subdivisions of the State. The stated purposes of the Tort Claims Act 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.'). Accordingly, the Circuit Court was correct in rejecting the Appellant's argument

and finding that the viability of the Appellant's claim hinged on the applicability of the Tort Claims Act.

The Appellant further argues that the Court's decision in Marlin v. Bill Rich Construction, 438 S.E.2d 620 (W. Va. 1996), supports his contention that the "sue or be sued" language in W. Va. Code § 16-13A-3 controls the disposition of this case, not the Tort Claims Act. The Appellant claims that W. Va. Code § 29-12A-5(c)(5) sends a "mixed message" and thus does not clearly provide for immunity as required by Marlin. The Appellant's argument, however, is confused and unfounded. The Appellant has confused which code section should be analyzed in light of Marlin. It is W. Va. Code § 29-12A-5(a)(9), not § 29-12A-4(c)(5) as offered by the Appellant, that is to be analyzed under Marlin. In this instance, W. Va. Code § 29-12A-5(a)(9) expressly and unequivocally grants broad immunity to the Elkins Road PSD. There is no doubt, and it is unreasonable to argue, that W. Va. Code § 29-12A-5(a)(9) is not a clear legislative provision of immunity envisioned in Marlin.

Next, the Appellant maintains that W. Va. Code § 29-12A-4(c)(5) is somehow internally inconsistent, which simply is not the case when the section is read in its entirety. Section 29-12A-4(c)(5) states that in addition to those exceptions that are set forth in (c)(1) to (c)(4), "a political subdivision is liable . . . when *liability* is expressly imposed upon the political subdivision by a provision of this code." (emphasis added). In other words, if another statute imposes liability, then such a statute is an additional exception to the immunity provided under the Tort Claims Act. However, W. Va. Code § 16-13A-3 does not expressly impose liability on PSDs; it simply states in general that PSDs "may be sued." The general authorization to be sued is drastically different than specifically imposing liability on PSDs for certain actions or inactions. Indeed, to eliminate any argument that the authorization to be sued creates an exception to the Tort Claims Act, the Legislature added the second sentence in § 29-12A-4(c)(5),

which unambiguously states that the general authorization to “sue or be sued” that may be found in various places throughout the West Virginia Code does not “impose liability” as contemplated by the first sentence of § 29-12A-4(c)(5). Simply put, the Appellant’s argument as to the applicability of W. Va. Code § 16-13A-3 is foreclosed by the unambiguous language of W. Va. Code § 29-12A-4(c)(5).

**B. The Circuit Court Was Correct in Holding that the Elkins Road PSD Was Entitled to Immunity Under W. Va. Code § 29-12A-5(a)(9).**

The Tort Claims Act generally states that “a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function” except as otherwise provided in the statute. W. Va. Code § 29-12A-4(b)(1). The Tort Claims Act further lists seventeen specific instances in which a political subdivision is entitled to immunity from any liability. See W. Va. Code § 29-12A-5(a).

The Circuit Court concluded that the Elkins Road PSD is a “political subdivision” covered under the Tort Claims Act, and the Appellant has not disputed this conclusion. See W. Va. Code § 29-12A-3(c) (including public service districts in definition of political subdivision). Additionally, the Circuit Court in its May 31, 2006, Order Dismissing Case held that the only specific instance applicable in this case was the immunity granted in W. Va. Code § 29-12A-5(a)(9), which states that

a political subdivision is immune from liability if a loss or claim results from . . .  
(9) 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.

Upon reviewing the Appellant’s Complaint and his Short and Plain Statement, the Circuit Court found that the allegations therein involved the exercise of licensing powers or functions as

contemplated by this subsection and that the Elkins Road PSD was entitled to immunity under the Tort Claims Act based on the Appellant's allegations.

**1. The Immunity Granted Under § 29-12A-5(a)(9) Applies to Acts Associated With a Political Subdivision's Permitting and Licensing Functions.**

In the Circuit Court, the Appellant argued that W. Va. Code § 29-12A-5(a)(9) did not apply because the "provision of the code applies only to 'bureaucratic-type functions.'" (See Appeal at 13). However, the Circuit Court correctly found that the allegations in the Complaint and in the Short and Plain Statement involved licensing powers and functions. "As a matter of law, acts associated with a political subdivision's permitting, zoning, licensing, and inspection functions are acts afforded express immunity under W. Va. Code § 29-12A-5(a)(9)." McCormick v. Wal-Mart Stores, 600 S.E.2d 576, 582 (W. Va. 2004) (per curiam) (Maynard, C.J., dissenting); see Hose v. Berkeley County Planning Comm'n, 460 S.E.2d 761 (W. Va. 1995). The acts described in the Appellant's Complaint and in his Short and Plain Statement are clearly associated with, related to, and result from the Elkins Road PSD's licensing and permitting functions. In essence, the Appellant's Complaint concerns the acts or omissions of members or employees of the Elkins Road PSD, not the official acts of the Elkins Road PSD. The only actions the Elkins Road PSD undertook were the approval and issuance of the water permit. Therefore, even if the Court found that the Elkins Road PSD was not entitled to immunity under W. Va. Code § 29-12A-5(a)(9), it could still only be held liable if the Appellant alleged facts triggering the exceptions set forth in W. Va. Code § 29-12A-4(c) for vicarious liability. See W. Va. Code § 29-12A-4(b)(1). The Appellant's Complaint and Short and Plain Statement involve allegations of intentional misconduct. As set forth below, political subdivisions, such as the Elkins Road PSD, are not liable for intentional acts of their members or employees. See Mallamo v. Town of Rivesville, 477 S.E.2d 525 (W. Va. 1996); see also W. Va.

Code § 29-12A-4(b)(1). Moreover, to the extent the Appellant's claims are based on negligence of the Elkins Road PSD's employees, the immunity under § 29-12A-5(a)(9) applies "*regardless* of whether such loss or claim is caused by the *negligent* performance of acts by the political subdivision's employees while acting in the scope of employment." Syl. Pt. 4, Hose, 460 S.E.2d 761 (emphasis added).

**2. The Immunity Granted the Elkins Road PSD Under W. Va. Code § 29-12A-4(b)(1) and § 29-12A-5(a)(9) Shields the Elkins Road PSD from Liability for Losses or Damage Regardless of Whether the Losses or Damages Were Caused By Intentional Acts of Its Employees or Were Caused By Negligence of Its Employees Acting within the Scope of Employment.**

In his appeal brief, the Appellant argues at length that the Circuit Court applied "bizarre logic" in finding that because the Appellant alleged that the actions of the members of the Elkins Road PSD were malicious and intentional, rather than simply negligent, he could not recover under W. Va. Code § 29-12A-4(c)(2). As stated above, under the Tort Claims Act, political subdivisions are entitled to immunity for "*any* act or omission" of the political subdivision or employee thereof in connection with a governmental or proprietary function. W. Va. Code § 29-12A-4(b)(1) (emphasis added). In creating the general grant of immunity in this section, the Legislature did not distinguish between intentional and unintentional acts, but instead used the term "any" as an adjective modifying act or omission. As this Court has previously held, "[t]he word 'any', when used in a statute, should be construed to mean any." Syl. Pt. 2, Thomas v. Firestone Tire & Rubber Co., 266 S.E.2d 905 (W. Va. 1980); see also Hose, 460 S.E.2d at 765. Although W. Va. Code § 29-12A-4(c)(2) creates an exception to W. Va. Code § 29-12A-4(b)(1), this exception does not apply to intentional acts. See Mallamo, 477 S.E.2d 525.

Additionally, the fact that the Appellant may have asserted negligence claims based on the allegations of employee negligence does not otherwise remove the cloak of immunity provided to the Elkins Road PSD under W. Va. Code § 29-12A-5(a)(9). As this Court has

previously held, W. Va. Code § 29-12A-5(a)(9) “clearly contemplates immunity for political subdivisions from tort liability for *any* loss or claim resulting from licensing powers or functions such as 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 . . . . Syl. Pt. 5, Hose, 460 S.E.2d 761 (emphasis added).

In Hose, the Court held that a political subdivision is immune from liability under W. Va. Code § 29-12A-5(a)(9) “*regardless* of whether such loss or claim is caused by the *negligent* performance of acts by the political subdivision’s employees while acting within the scope of employment.” Id. at 767 (emphasis added). The rationale for the Court’s holding in Hose was that W. Va. Code § 29-12A-4(c)(2) is expressly limited by its reference to W. Va. Code § 29-12A-5 and therefore does not restrict the extent of W. Va. Code § 29-12A-5’s immunity. The key is that W. Va. Code § 29-12A-5(a)(9) is couched only in terms of liability and does not differentiate in any manner between intentional and unintentional acts. Cf. Michael v. Marion County Bd. of Educ., 482 S.E.2d 140, 144 (W. Va. 1996) (holding that W. Va. Code § 29-12A-5(a)(11) “contain[ed] no language limiting its provisions to negligence actions. The statutory language at issue is couched solely in terms of liability; there is no attempt to separate or distinguish the immunity provided by reference to whether or not the tort involved is intentional or unintentional.”). Therefore, if the political subdivision is exercising a licensing power or function, then the political subdivision is immune from any and all liability regardless of whether the claim at issue is based on negligent or intentional acts of the political subdivision’s employee.

The Appellant appears to be relying on an unrecognized construction of W. Va. Code § 29-12A-4(c)(2) as support for his position that the Elkins Road PSD was not entitled to immunity in this case. West Virginia Code § 29-12A-4(c)(2) stands as an exception to the

general grant of immunity for governmental and proprietary functions under W. Va. Code § 29-12A-4(b)(1) and makes political subdivisions vicariously liable for “injury, death, or loss to persons or property caused by the *negligent* performance of acts by their employees while acting within the scope of employment.” (emphasis added).

However, as is stated above, W. Va. Code § 29-12A-4(c)(2) has no applicability when immunity exists under W. Va. Code § 29-12A-5(a). See Hose, 460 S.E.2d at 767. Additionally, because the Appellant alleged that the Elkins Road PSD’s acts were “done with malicious purpose, in bad faith, or in a wanton or reckless manner,” the Circuit Court determined that the Appellant’s claims were based on intentional acts. The Circuit Court then found that political subdivisions, such as the Elkins Road PSD, are not vicariously liable under W. Va. Code § 29-12A-4(c)(2) for *intentional* acts of their employees. Although the Appellant asserts that this is “bizarre logic” and argues that the Legislature could not have envisioned such a result, the Circuit Court’s interpretation is consistent with the plain, unambiguous language of the statute as this Court previously recognized in Mallamo. See 477 S.E.2d 525.

In Mallamo, this Court held that the Town of Rivesville was entitled to immunity even though the plaintiff had alleged that one of the Town’s police officers conspired to conceal facts concerning a shooting that occurred while the officers were serving an execution on the plaintiff. Id. at 533. The Court held that, “even if plaintiff were able to establish a conspiracy to cover up the incident, a plain reading of W. Va. Code, 29-12A-4(c)(2) [1986] would, nevertheless, not impose liability on the Town of Rivesville . . . In that conspiracy is an intentional act, not a negligent one, the Town of Rivesville *would not be liable for any intentional malfeasance* on the part of the” officer. Id. (emphasis added); see also Chapman v. Jarrell, No. 2:04-0605, 2005 U.S. Dist. LEXIS 31132, \*\* 25-26 (S.D. W. Va. Nov. 17, 2005) (relying on Mallamo and stating that “[b]ecause the defendants’ contention that West Virginia law envisions vicarious liability on

political subdivisions only for employees' negligent acts, the defendants are entitled to summary judgment on this claim.”).

In sum, the Circuit Court found that the Appellant's allegations were couched in terms of intentional misconduct. Neither the grant of general immunity under W. Va. Code § 29-12A-4(b)(1), nor the grant of specific immunity under W. Va. Code § 29-12A-5(a)(9), nor the exception to the general grant of immunity in W. Va. Code § 29-12A-4(c)(2) envision a political subdivision's liability for intentional acts of its employees. Moreover, although the Appellant may have pled a negligence claim in the Complaint, the Court's holding in Hose unambiguously provides immunity to the Elkins Road PSD even for employee negligence within the scope of employment. Therefore, the Circuit Court was correct in holding that the Appellant's allegations failed to remove the cloak of immunity shielding the Elkins Road PSD from liability in this instance.

**THE APPELLANT IS BARRED FROM RAISING FOR THE FIRST TIME ON APPEAL THAT THE SPECIAL RELATIONSHIP EXCEPTION TO THE PUBLIC DUTY DOCTRINE APPLIES.**

In the appeal brief, the Appellant raised for the first time in the history of this civil action that the special relationship exception to the public duty doctrine applies to the facts of the case. The Appellant argues that a special relationship existed between himself and the Elkins Road PSD, thereby creating a private duty which the Elkins Road PSD breached. Nevertheless, the Appellant did not raise this issue or make this argument in any pleading or document filed in the Circuit Court. In fact, the Appellant did not even raise the issue in his Petition for Appeal, but rather only alleged that a special relationship might exist for the first time in the appeal brief. As such, the special relationship issue and the Appellant's argument in support thereof were not before the Circuit Court to consider and is not in any way part of the record presently before this Court.

This Court has recently explained:

Historically, this Court has refused to consider matters not first presented to the trial court. We have stated, "Our law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal." Mayhew v. Mayhew, 205 W.Va. 490, 506, 519 S.E.2d 188, 204 (1999). In Syllabus Point 2 of State v. Bosley, 159 W.Va. 67, 218 S.E.2d 894 (1975), this Court explained that "the appellate review of a ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not a part of that record." Also, we have held that, "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syllabus Point 2, Sands v. Security Trust Co., 143 W.Va. 522, 102 S.E.2d 733 (1958). Syl. pt. 2, Duquesne Light Co. v. State Tax Dept., 174 W.Va. 506, 327 S.E.2d 683 (1984), cert. denied, 471 U.S. 1029, 105 S. Ct. 2040, 85 L. Ed. 2d 322 (1985). Syllabus Point 2, Crain v. Lightner, 178 W.Va. 765, 364 S.E.2d 778 (1987).

Proudfoot v. Proudfoot, 591 S.E.2d 767, 771 (W. Va. 2003). A review of the record in this case demonstrates that in no instance did the Appellant assert in the Circuit Court that that a special relationship existed between the Appellant and the Elkins Road PSD. Accordingly, the Elkins Road PSD respectfully requests that the Court refuse to consider this issue raised for the first time on appeal.

More importantly, however, this Court specifically addressed the interplay between the special relationship exception and W. Va. Code § 29-12A-5(a)(9) in Hose by holding:

W. Va. Code § 29-12A-5(a)(9) [1986] clearly contemplates immunity for political subdivisions from tort liability for *any* loss or claim resulting from licensing powers or functions such as 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, *regardless of the existence of a special duty relationship*.

460 S.E.2d at 769 (emphasis added); id. at Syl. Pt. 5. Based on the Court's previous holding in Hose, even if a special relationship existed as the Appellant alleges, the Elkins Road PSD would still be entitled to immunity under W. Va. Code § 29-12A-5(a)(9).

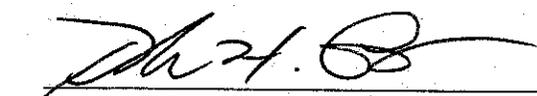
## VI. CONCLUSION

As this Court explained in Hutchison v. City of Huntington, in cases in which a statutory immunity defense is raised, a heightened pleading is required and early resolution by summary disposition is encouraged. See 479 S.E.2d at 657-58. Political subdivisions should be entitled to statutory immunity under W. Va. Code § 29-12A-5(a), unless a plaintiff shows “by specific allegations that the immunity does not apply.” Id. In the instant case, the Appellant was given ample opportunity to state facts sufficiently specific to support a claim against the Elkins Road PSD. However, the facts alleged demonstrated that the Elkins Road PSD was entitled to immunity under W. Va. Code § 29-12A-5(a)(9) and would not be liable under W. Va. Code § 29-12A-4(b)(1). Therefore, the Circuit Court was correct in holding that the Elkins Road PSD was immune under the Tort Claims Act, and that the Appellant had failed to show that immunity was not otherwise applicable. For these reasons, the Circuit Court’s decision was proper and should be affirmed on this appeal.

## VII. RELIEF REQUESTED

**WHEREFORE**, Appellee Elkins Road PSD respectfully requests that this Honorable Court deny the Appellant’s appeal and affirm the Circuit Court of Upshur County’s order dismissing the claims against it with prejudice and grant it such other further relief as the Court deems appropriate.

Respectfully Submitted,  
**ELKINS ROAD PUBLIC SERVICE DISTRICT,**  
By Counsel

  
Teresa J. Dumire (WVSB # 8032)  
Kay Casto & Chaney PLLC  
5000 Hampton Center, Suite 3  
Morgantown, WV 26505  
(304) 225-0970

Thomas H. Ewing (WVSB # 9655)  
Kay Casto & Chaney PLLC  
P.O. Box 2031  
Charleston, WV 25327  
(304)345-8900

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON

Appeal No. 33307

CHARLES B. ZIRKLE,

Appellant/Plaintiff,

v.

Circuit Court of Upshur County  
Civil Action No. 05-C-81  
Honorable Thomas H. Keadle

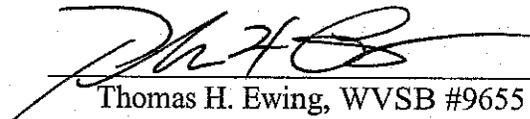
ELKINS ROAD PUBLIC SERVICE  
DISTRICT,

Appellee/Defendant.

**CERTIFICATE OF SERVICE**

I, Thomas H. Ewing, as counsel for the Appellee, Elkins Road Public Service District, hereby certify that on the 4<sup>th</sup> day of May, 2006, I personally served the foregoing **Elkins Road Public Service District's Response in Opposition to Appeal** upon the following counsel of record, by first-class mail at the following address:

Brian W. Bailey, Esq.  
P.O. Box 2  
Horner, WV 26732  
*Counsel for Appellant/Plaintiff*

  
Thomas H. Ewing, WWSB #9655