

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EDWARD W. CANTLEY, SR. and
JUDITH K. CANTLEY, LISA BRAGG and
JAMES BRAGG, CHARLES FLOWERS, TRACY
FLOWERS, BETTY E. FLOWERS, SABRINA
MAYNARD, LAURA GOFF, JAMES STOWERS,
JOHN CUMMINGS and AMANDA CUMMINGS,
BRENDA PRICE and RICKY A. PRICE,
EARL SOWARDS and MAVIS SOWARDS,
LISA ADKINS and TOMMY ADKINS, and
JENNIFER LAWRENCE, Individually and on
Behalf of All Others Similarly Situated,

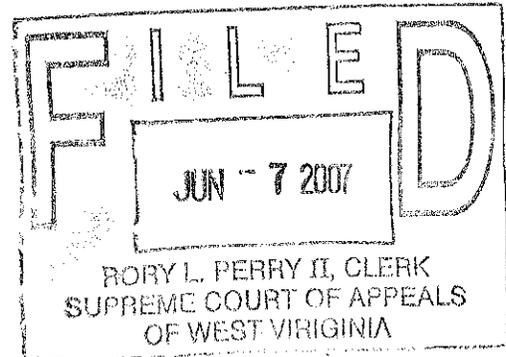
Appellants,

v.

NO.: 33345
(Civil Action No. 05-C-166
Circuit Court of Lincoln County)

LINCOLN COUNTY COMMISSION,

Appellee.



LINCOLN COUNTY COMMISSION'S RESPONSE TO
APPELLANTS' BRIEF

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KIND OF PROCEEDING AND NATURE OF RULING IN THE
CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

Appellants, as putative class members, instituted this action against the Lincoln County Commission in the Circuit Court of Lincoln County, West Virginia, contending that they sustained property damage due to flooding of the Middle Fork of the Mud River in Griffithsville and Yawkey in Lincoln County during November 2003. They claimed that the Lincoln County Commission, "operating as the Middle Fork Drainage, Levee and Reclamation District of Lincoln County", breached an agreement with the United States Army Corps of Engineers ["Corps of Engineers"] by allegedly failing to maintain the Middle Fork of the Mud River which resulted in flooding and the alleged damages of which appellants complained. (Compl., ¶¶ 3, 6, 8).

The complaint filed by appellants was notable for its failure to name the correct defendant and, concomitantly, its attempt to merge the Lincoln County Commission and the Middle Fork Drainage, Levee and Reclamation District of Lincoln County ["Drainage District"] into a single entity. The Lincoln County Commission does not operate the Drainage District.

The Drainage District is an entirely separate entity, neither created by nor governed by the Lincoln County Commission. Despite the fact that the allegations of their complaint focused upon the Drainage District and its interactions with the

Corps of Engineers appellants failed to sue the correct defendant -- the Drainage District.

Accordingly, because the appellants sued the wrong defendant, the Lincoln County Commission moved to dismiss the complaint against it pursuant to Rule of Civil Procedure 12(b)(6). After the Lincoln County Commission filed its Motion to Dismiss, appellants then sought leave to amend their complaint to name the correct defendant, the Drainage District. By Order Dismissing the Complaint Against the Lincoln County Commission and Allowing Amendment to Add Middle Fork Drainage, Levee and Reclamation District of Lincoln County as Defendant ["Dismissal Order"], entered August 28, 2006, the Circuit Court of Lincoln County granted the Lincoln County Commission's Motion to Dismiss, while simultaneously granting the motion by the appellants to amend the complaint to add the Drainage District as a defendant.¹

The lower court properly dismissed appellants' action against the Lincoln County Commission and, at the same time, gave appellants the opportunity to amend their complaint and pursue their action against the proper defendant. The lower court's Dismissal Order should be affirmed by this Court.

¹The lower court entered two identical orders, one of which was signed on August 24, 2006, and entered by the Clerk on August 25, 2006, and the second of which appeared to have been signed originally on August 21, 2006, but that date was over-written and the second order was entered on August 28, 2006.

STATEMENT OF FACTS

In a transparent effort to locate a deep pocket, appellants ignored the proper defendant. Instead, they sued to the Lincoln County Commission, despite actual knowledge of the existence of the Drainage District and despite actual knowledge that the factual allegations of their complaint pertained to alleged conduct on the part of the Drainage District, not the Lincoln County Commission.

On November 18, 1965, Judge K. K. Hall of the Circuit Court of Lincoln County entered an Order granting a petition filed pursuant to W. Va. Code §19-21-3 and established the Drainage District. (Compl., ¶ 3; Mot. to Dismiss, Ex. C). Judge Hall specifically noted that the establishment of the Drainage District "will be to the advantage of the owners of real property within said drainage district and that the creation and establishment of said drainage district will be conducive to the public health, utility, convenience and public welfare of the citizens of said drainage district." (Mot. to Dismiss, Ex. C).

Furthermore, in addition to granting the Drainage District the power to construct and improve levees, dams, ditches, drains and other needed or incidental improvements, the Order establishing the Drainage District granted the Drainage District the authority to acquire and convey property, to levy

and collect taxes and to enter into contracts. (Mot. to Dismiss, Ex. C). The Order also provided that the Drainage District "shall have the power, right and authority to sue and be sued in its name of Middle Fork Drainage, Levee and Reclamation District of Lincoln County." (Mot. to Dismiss, Ex. C).

Thereafter, on January 10, 1966, the Drainage District adopted a resolution and order establishing a flood protection project for the Middle Fork of the Mud River at and in the vicinity of Griffithsville and Yawkey and assuring the United States of America of cooperation with the Project. (Compl., ¶ 25). The Corps of Engineers undertook the Project and notified the Drainage District in November 1968 that the Project was complete. (Compl., ¶ 26). The Corps of Engineers requested that the Drainage District provide a "Letter of Acceptance", accepting maintenance responsibility for the Project and the Drainage District did so. (Compl., ¶¶ 26, 27). In subsequent years, the Corps of Engineers inspected the Project and sent annual reports to the Drainage District regarding the condition of and recommended maintenance for the Project. (Compl., ¶¶ 29-41).

Appellants' selective version of the facts necessitates correction. They fail to advise this Court that the "warnings" issued by the Corps of Engineers regarding maintenance of the Project were sent to the Drainage District, not the

Lincoln County Commission. (Appellants' Br., pp. 5-6). Instead, appellants try to create the impression that the Lincoln County Commission was responsible for the maintenance and upkeep of the Project and that the Corps of Engineers repeatedly communicated with the Lincoln County Commission regarding upkeep of the Project. This is not correct.

Appellants neglected to advise this Court that when they filed the complaint, they had actual knowledge that the Drainage District, not the Lincoln County Commission, accepted responsibility for the Project from the Corps of Engineers and that the Corps of Engineers issued its recommendations to the Drainage District, not the Lincoln County Commission.

Despite this knowledge, appellants consciously chose to sue the wrong defendant. As they explain in their brief, appellants obtained documents from Corps of Engineers pursuant to a Freedom of Information Act request. (Appellants' Br., p. 2). These documents, which counsel for appellants provided to counsel for the Lincoln County Commission, reveal that the Drainage District, not the Lincoln County Commission, entered into an agreement with the Corps of Engineers relating to the Middle Fork of the Mud River. They further show that the Corps of Engineers turned over responsibility for the upkeep of the Middle Fork of the Mud River to the Drainage District once the Corps of Engineers completed the Project.

Thus, appellants' attempts to have this Court believe that documents obtained from the Corps of Engineers reflect correspondence from the Corps of Engineers to the Lincoln County Commission constitute a blatant misrepresentation. With the exception of one letter, written to the Lincoln County Court prior to the undertaking of the Project, each and every piece of correspondence referenced in the appellants' complaint was directed to the Drainage District, not the Lincoln County Commission.² Appellants knew this prior to filing their complaint and they also knew that the correspondence that they characterize as "warnings" was not sent to the Lincoln County Commission, but was sent to the Drainage District.

Although the Drainage District accepted control of the Project once it was completed by the Corps of Engineers and the Drainage District assumed responsibility for maintenance of the

²On November 8, 1962, the Lincoln County Court adopted an Order indicating that the County Court was willing to furnish the federal government with assurance of local cooperation for a channel improvement project on the Middle Fork of the Mud river. (Compl., ¶ 21; Pls.' Br. in Opp'n to Def. Lincoln County Commission's Mot. to Dismiss, Ex. 1). Thereafter, by correspondence of November 27, 1964, the Corps of Engineers advised the County Court what its cooperation would entail and that a form "Resolution of Local Cooperation" would be supplied at a later date for adoption by the County Court. (Compl., ¶ 23; Pls.' Br. in Opp'n to Def. Lincoln County Commission's Mot. to Dismiss, Ex. 2). The County Court never did so, and all subsequent arrangements were between the Drainage District and the Corps of Engineers, including the Drainage District's assurance of local cooperation and its acceptance of the completed Project from the Corps of Engineers. (Compl., ¶¶ 25-28).

Project, appellants erroneously contended that the Lincoln County Commission was responsible for the flooding which allegedly occurred on or about November 23, 2003, due to the Lincoln County Commission's purported failure to maintain the Middle Fork of the Mud River. However, as the Circuit Court correctly found, the Lincoln County Commission never assumed control of the Drainage District and lacked authority to assume control of the Drainage District. (Dismissal Order, p. 3).

Moreover, the Circuit Court correctly concluded that the provisions of W. Va. Code §7-1-3u were permissive, did not abrogate W. Va. Code §19-21-1 *et seq.* and did not authorize the Lincoln County Commission to usurp the jurisdiction of the Drainage District. Accordingly, the lower court granted the Lincoln County Commission's Motion to Dismiss and, pursuant to Rule of Civil Procedure 54(b), certified its Dismissal Order as final. Concomitantly, the Circuit Court permitted appellants to amend their complaint to name the proper defendant, the Drainage District.³

³Appellants claim that they were unable to serve the Drainage District through the Secretary of State. (Appellants' Br., p. 4). Why they would attempt service through the Secretary of State instead of pursuant to the provisions of Rule of Civil Procedure 4(d) is puzzling, but it is not the Lincoln County Commission's obligation to see that appellants serve the proper party. Furthermore, although appellants' contention that they do not know if individual members of the Drainage District are still alive is of no concern to the Lincoln County Commission, it reflects that appellants have failed to examine the records at the Lincoln County courthouse relating to the Drain-

ASSIGNMENT OF ERROR

The Circuit Court of Lincoln County committed no error when it properly dismissed the complaint against the Lincoln County Commission.

STANDARD OF REVIEW

A lower court's order granting a motion to dismiss is subject to *de novo* review by this Court. *Collins v. Heaster*, 217 W. Va. 652, 619 S.E.2d 165 (2005); *King v. Heffernan*, 214 W. Va. 835, 591 S.E.2d 761 (2003); *Williamson v. Harden*, 214 W. Va. 77, 585 S.E.2d 369 (2003). Moreover, when the issue concerns a question of law or is one of statutory interpretation, the standard of review also is *de novo*. *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004).

age District. Finally, they assert that a search of the Secretary of State's website revealed the Drainage District no longer exists. Although this also is immaterial to the lower court's proper dismissal of the Lincoln County Commission, the Lincoln County Commission believes that appellants are referring not to the Drainage District, but to the Middle Fork Watershed Association, Inc. which, at least according to the Secretary of State's website, has ceased to exist. The Middle Fork Watershed Association is not the same entity as the Drainage District. See W. Va. Code §19-21B-1 et seq.

ANALYSIS

I. The lower court correctly based its decision to grant the Lincoln County Commission's Motion to Dismiss upon the undisputed facts and the relevant law and, therefore, discovery was unnecessary.

A. Appellants did not request that the lower court delay ruling upon the Motion to Dismiss so that they could undertake discovery.

Before this Court, appellants contend that the lower court deprived them of an opportunity to conduct discovery in an attempt to find support for their claims against the Lincoln County Commission. Putting aside the fact that no amount of discovery will create a claim against the Lincoln County Commission where none exists, appellants' contention is fatally flawed for another reason -- they did not ask the lower court to delay ruling upon the Motion to Dismiss until they had an opportunity to conduct discovery.

Their failure undermines their argument that the lower court erred in dismissing this action without permitting the opportunity for discovery. This Court made it abundantly clear in *Harrison v. Davis*, 197 W. Va. 651, ___, 478 S.E.2d 104, 115-16 (1996), that when a plaintiff claims discovery will assist in opposing a motion to dismiss, then the plaintiff should follow the same procedure that a party would utilize to seek additional discovery to oppose a motion for summary judgment under Rule of Civil Procedure 56(f):

In order to obtain such a discovery continuance, the plaintiff must, at a minimum, "(1) articulate some plausible basis for the [plaintiff's] belief that specified 'discoverable' material facts likely exist which have not yet become accessible to the [plaintiff]; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier." Syl. Pt. 1, in part, *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., supra.* [Emphasis supplied].

See also *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 543 S.E.2d 338 (2000) (If a party does not follow the formal requirements of Rule 56(f), then the party opposing a summary judgment motion must satisfy the four requirements articulated in *Powderidge Unit Owners Ass'n, supra.*).

The appellants ignored the *Harrison* Court's directive and did not seek, either formally or informally, a continuance from the lower court to conduct discovery. Appellants' current attempt to claim that the lower court should have given them an opportunity to conduct discovery is unavailing as they "neither requested a discovery continuance nor demonstrated good cause for [their] failure to earlier conduct discovery. Accordingly, the circuit court properly granted the defendants' motions to dismiss despite the fact that plaintiff had not yet conducted discovery." *Id.*

B. The issues upon which appellants claim to need discovery will not alter the fact that the Lincoln County Commission is not, as a matter of law, the correct defendant.

No amount of discovery will alter the fact that appellants' allegations are based entirely upon conduct involving the Drainage District, not the Lincoln County Commission. (Compl., ¶¶ 6, 8, 25-43). Nonetheless, examination of each of the subjects upon which appellants now claim discovery is needed reveals that the issues are essentially questions of law, not fact.

Initially, appellants contend that discovery is needed upon the interrelationship between the Lincoln County Commission and the Drainage District. This contention is without merit as a matter of law, for there is no "interrelationship" between the two.

The Drainage District was created under authority of W. Va. Code §19-21-1.⁴ It is an entity independent of the

⁴The claim that the statutory scheme for creation of a drainage district is unconstitutional must be disregarded. This issue was never raised in the lower court nor was it mentioned in the Petition for Appeal before this Court. Furthermore, if appellants desire to challenge the constitutionality of the Drainage District, they must do so against the Drainage District, not the Lincoln County Commission. Regardless, even if appellants successfully challenged the existence of the Drainage District on constitutional grounds that still would not make the Lincoln County Commission responsible for the conduct of the Drainage District.

Lincoln County Commission and is subject to a detailed statutory scheme relating to its inception, its duties and its governance.

There is a detailed statutory scheme for governance of a drainage district, as well as statutory enumeration of the powers and authority available to a drainage district. See W. Va. Code §§19-21-7 through 19-21-41. The Lincoln County Commission did not create the Drainage District nor does it appoint members to the Drainage District. Instead, supervisors are elected by the property owners whose property comprises the Drainage District. W. Va. Code §§19-21-6, 19-21-7. There is no "interrelationship" between the Drainage District and the Lincoln County Commission.

Moreover, the enactment of W. Va. Code §7-1-3u, which authorizes county commissions to engage in treatment of streams, did not alter the Drainage District's responsibility for the Middle Fork of the Mud River. It is well-settled that the Legislature is presumed to be familiar with all existing statutes when it enacts a new statute. *Longwell v. Bd. of Educ. of County of Marshall*, 213 W. Va. 486, 491, 583 S.E.2d 109, 114 (2003). Thus, it is presumed that when enacting W. Va. Code §7-1-3u, the legislators were cognizant of the existing provisions of W. Va. Code §19-21-1 et seq. By failing to repeal W. Va. Code §19-21-1 et seq. or to abrogate in any manner the authority of statutorily created drainage districts, it must be presumed

that the Legislature did not intend for the provisions of W. Va. Code §7-1-3u to usurp the authority of drainage districts created under W. Va. Code §19-21-1 *et seq.*⁵

Appellants also seem to complain that the Dismissal Order contained factual findings which they attribute to the Circuit Court's personal knowledge. Although it would be unrealistic to presume that judges in small communities do not have some knowledge of events occurring in the local area, nonetheless, the Circuit Court's finding that the Lincoln County Commission never assumed control of the Drainage District is correct as a matter of law for such control is not permitted under W. Va. Code §19-21-1 *et seq.* Regardless, even if the lower court relied on matters outside the pleadings, such as personal

⁵In fact, the Legislature has, repeatedly and recently, acknowledged the existence of drainage districts. See, e.g., W. Va. Code §16-13B-2(i) (1992) (Community Improvement Act defines "governmental agency" to include drainage district); W. Va. Code §16-13E-2(i) (2003) (Community Enhancement Act includes drainage district within definition of "governmental agency"); W. Va. Code §22-11-3(15) (1994) (Water Pollution Control Act's definition of "person", "persons" or "applicants" includes drainage district); W. Va. Code §22-13-3(7) (1994) (Natural Streams Preservation Act, same); W. Va. Code §22-14-3(h) (2002) (Dam Control and Safety Act defines "person" to include drainage district); W. Va. Code §22-15-2(25) (1988) (Solid Waste Management Act, same); W. Va. Code 22B-1-2(6) (1994) (General Policy and Purpose of Environmental Boards, same); W. Va. Code §§22C-1-3(8) and (12) (1994) (Water Development Authority Act includes drainage district in definition of "governmental agency" and definition of "person"); W. Va. Code §§22C-3-3(5) and (8) (1994) (Solid Waste Management Board Act, same); and, W. Va. Code §31-15A-2(i) (1998) (Infrastructure and Jobs Development Act defines "governmental agency" as including drainage district).

knowledge, this Court "will affirm the dismissal if the Rule 12(b)(6) standards are met without reference to the extrinsic materials." *Harrison v. Davis, supra*, at ___, 478 S.E.2d at 110.

Likewise, appellants' contention that discovery is necessary in order to determine what funding the Lincoln County Commission has received "through the years" for the Mud River is similarly unpersuasive. This contention ignores that pursuant to the authority of W. Va. Code §19-21-1, the Order of November 18, 1965, establishing the Drainage District, gave the Drainage District "full power and authority" to "construct, straighten, widen, change, alter deepen, strengthen and improve any levee, ditch, drain creek or water course" to, among other things, deter and prevent flooding of the area comprising the Drainage District, which includes the area of which appellants complain. Therefore, the lower court correctly held that jurisdiction over the Middle Fork of the Mud River rested with the Drainage District, not with the Lincoln County Commission.⁶

⁶Moreover, as the documents obtained by appellants from the Corps of Engineers also unequivocally demonstrate, the Corps of Engineers entered into an agreement with the Drainage District, not the Lincoln County Commission, for the Drainage District to accept the Project and to perform the suggested maintenance upon the same. (Compl., ¶¶ 26-28). For appellants, who base the allegations of their complaint upon these documents, to suggest otherwise is disingenuous.

Given this correct determination of a question of law by the Circuit Court, appellants' contention that discovery into funds which may have been received by the Lincoln County Commission is without merit. An example of the weakness of this position is demonstrated in appellants' claim that according to the Internet, the Lincoln County Commission received a grant from the United States Environmental Protection Agency's National Decentralized Wastewater Demonstration and that grant somehow might implicate flooding on the Mud River. (Appellants' Br., p. 8 n.5). Wastewater treatment is just what the name implies -- treatment of wastewater to prevent the discharge of bacteria and other effluents into the water supply, not treatment of streams to prevent flooding. See, e.g., 33 U.S.C. §1314; W. Va. Code §16-13D-1 et seq.; W. Va. Code §22-11-1 et seq.

In that same vein, appellants erroneously claim that they should have been permitted to undertake discovery into the Lincoln County Commission's actions with respect to the National Flood Insurance Act and the Middle Fork of the Mud River. This position demonstrates a misunderstanding of W. Va. Code §7-1-3v and the National Flood Insurance Act. The National Flood Insurance Act does not address flood control projects, but was enacted for the purpose of providing compensation for damages resulting from flooding.

W. Va. Code §7-1-3v authorizes county commissions to enact and enforce building codes in order to comply with the eligibility requirements of the National Flood Insurance Act:

(c) To the extent and only to the extent necessary to comply with the eligibility requirements of and otherwise fully and in all respects to comply with the requirements of such act, the county commission of each county is hereby authorized and empowered to (i) adopt, administer and enforce building codes for a specified area or areas within such county, which building codes may establish different requirements for different specified areas; (ii) require and issue building permits for all proposed construction or other improvements in such county: Provided, That nothing contained in this subdivision (ii) shall authorize a county commission to refuse to issue a building permit for any proposed construction or other improvement outside of a specified area or areas within such county; (iii) conduct inspections of construction and other improvements in a specified area or areas within such county and (iv) otherwise take such action and impose such requirements regarding land use and control measures in a specified area or areas within such county as shall be necessary under such act: Provided, That no such building code adopted by a county commission shall apply within nor any authority hereinabove granted exercised by a county commission within the corporate limits of any municipality which has taken appropriate action to comply with such act, unless and until such municipality so provides by ordinance. Any such building code adopted by a county commission and any other requirements imposed by a county commission under the provisions of this subsection (c) may be enforced by injunctive action in the circuit court of the county.

The National Flood Insurance Act, 42 U.S.C. §4001 *et seq.*, is not a flood control project, but is "directed at compensation for, rather than prevention of, flood damages ..."
Schell v. Nat'l Flood Insurers Ass'n, 520 F. Supp. 150, 154 (D. Colo. 1981). As one court explained:

Under the NFIP, the federal goal is providing subsidized flood insurance for *existing* structures in flood-prone areas, while simultaneously discouraging *future* unsafe construction in such areas. 42 U.S.C. §§ 4011-12. ... Minimizing future flooding hazards through sound flood-plain management is thus achieved through the enactment and enforcement of local ordinances. The policy has three basic purposes: (1) protection of individuals from danger, who would otherwise develop or occupy the flood-prone land; (2) protection of other landowners from damage resulting from flood-zone development and consequent obstruction of the flood flow; and (3) protection of the public from individual land-use decisions that later require public remedial expenditures for public works and disaster relief. ... Failure to enact and enforce these minimum measures requires that such non-complying communities be "suspended" from the NFIP. ... [Citations omitted, emphasis in original].

Adolph v. Fed. Emergency Mgmt. Agency of the U.S., 854 F.2d 732, 734 n.2 (5th Cir. 1988).

In keeping with the purpose of the National Flood Insurance Act, W. Va. Code §7-1-3v merely authorizes county commissions to enact and enforce building codes in flood-prone areas. W. Va. Code §7-1-3v is directed solely to land use management and in no manner touches upon flood control or prevention. Neither W. Va. Code §7-1-3v nor the National Flood Insurance Act pertain to flood prevention.

In short, not only did appellants fail to request time for discovery in order to oppose the Lincoln County Commission's Motion to Dismiss, but the issues that they now claim require discovery are not factual issues which would change the disposition of this matter. No amount of discovery would change the

fact the Lincoln County Commission was not involved in the Project, that the Drainage District took control of the Project from the Corps of Engineers, that the Corps of Engineers' recommendations were directed to the Drainage District and, most importantly, that the Lincoln County Commission had no involvement in the matters of which appellants complain.

II. W. Va. Code §7-1-3u does not impose any mandatory obligation upon the Lincoln County Commission.

A. Interpreting W. Va. Code §7-1-3u as imposing a mandatory obligation upon the Lincoln County Commission ignores the plain language of the statute.

The appellants' contention that W. Va. Code §7-1-3u created a mandatory duty upon the Lincoln County Commission to perform maintenance and/or upkeep upon the Middle Fork of the Mud River is supported neither by the plain language of the statute nor by cardinal rules of statutory construction. Appellants quote selectively from W. Va. Code 7-1-3u, which, in its entirety, provides:

To protect people and property from floods, counties and municipalities are hereby empowered to re-channel and dredge streams, remove accumulated debris, snags, sandbars, rocks and any other kinds of obstructions from streams; straighten stream channels; and carry out erosion and sedimentation control measures and programs.

For stream treatment to prevent floods as provided in this section, counties and municipalities are hereby further empowered to levy, within all constitutional and statutory limitations; acquire property by purchase; exercise of the right of eminent domain, lease, gift or grant; accept any and all benefits,

moneys, services and assistance which may be available from the federal and state government or any private source; issue and sell bonds within constitutional and statutory limitations prescribed by law for the issuance and sale of bonds by counties and municipalities for public purposes generally. Any such levy shall be equal and uniform throughout the county or municipality.

The power and authority granted in this section, may be exercised by any county or municipality in cooperation with each other or separately as provided in section three-i [§7-1-3i] of this article. Any county or municipality which exercises any power or authority set forth in this section shall comply with all applicable provisions of federal and state law and rules and regulations lawfully promulgated thereunder.

The term "stream" as used in this section means any watercourse, whether natural or man-made, distinguishable by banks and a bed, regardless of their size, through which water flows continually or intermittently, regardless of its volume. [Emphasis supplied].

Appellants' attempt to cast this language as imposing a mandatory duty upon the Lincoln County Commission to usurp the Drainage District's involvement in the Project is nonsensical, for the statute imposes no such duty. W. Va. Code §7-1-3u certainly gives a county commission authority to rechannel and dredge streams, but does not require that a county commission do so.

It is well-settled that "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.'" Syllabus Point 3, *State ex rel. Crist v. Cline*, 219 W. Va. 202, 632 S.E.2d 358 (2006), quoting *State v. General Daniel*

Morgan Post No. 548, Veterans of Foreign Wars, 144 W. Va. 137, 107 S.E.2d 353 (1959). *Accord United Bank, Inc. v. Blosser*, 218 W. Va. 378, 384, 624 S.E.2d 815, 821 (2005).

This Court recently recognized that a statute authorizing a governmental entity to take action did not require that the governmental entity do so. In *Jackson v. Putnam County Board of Education*, No. 33038 (W. Va. May 24, 2007), plaintiff asserted that the Board of Education was liable for the death of her son in an automobile accident because the Board of Education breached its duty to provide transportation to an extracurricular event. Her son rode home from an event with another student and was killed as a result of a single vehicle accident, when the fellow student lost control of the vehicle.

The *Jackson* Court noted that W. Va. Code §18-5-13(6)(a), now W. Va. Code §18-5-13(f)(1), provided that county boards of education "have authority" to provide transportation to extracurricular events. *Id.* at slip op. 7. The Court succinctly observed, however, that although the statute gave county school boards authority to transport students to events, "the Legislature has not mandated that school boards provide such transportation. See *State ex rel. Cooper v. Board of Education of Summers County*, 197 W. Va. 668, 671 n. 9, 478 S.E.2d 341, 344 n. 9 (1996), indicating that the provisions of W.Va. Code §18-5-13(6)(a) (1996) are not mandatory." *Id.*, slip op. at 7.

In that same vein, this Court in *Board of Education of County of Taylor v. Board of Education of County of Marion*, 213 W. Va. 182, 578 S.E.2d 376 (2003), applied well-established rules of statutory construction and refused to find a mandatory duty when the same was not imposed by statute. Noting that under W. Va. Code §18-5-13(f)(2), boards of education "have authority" to enter into agreements with one another to provide adequate means for transporting students across county lines, the Court rejected the Taylor County Board of Education's argument that the Court "read into this statute a mandatory duty" to reach an agreement before the transportation of students could take place. *Id.* at 188, 578 S.E.2d at 382.

Adhering to long-settled principles of statutory construction, the Court stated:

We are unable to adopt the Taylor County Board's interpretation of this statute, however, as we find nothing in the language of W. Va. Code § 18-5-13(f)(2) even remotely indicating a mandatory duty upon counties to enter such agreements. Indeed, due to the plainly expressed language of the foregoing statutes, we are bound to apply their terms without interpretation.

"Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970)." Syllabus Point 4, *Syncor International Corp. v. Palmer*, 208 W.Va. 658, 542 S.E.2d 479 (2001). Syl. pt. 4, *Charter Communications v. Community Antenna Serv., Inc.*, 211 W.Va. 71, 561 S.E.2d 793.

Id.

The same rule applies in the instant case. The plain language of the statute does not state that counties "shall" undertake the activities listed in W. Va. Code §7-1-3u. To the contrary, inclusion of the language "[a]ny county or municipality which exercises any power or authority set forth in this section" renders the statute permissive. By use of the phrase "[a]ny county or municipality which exercises any power or authority", the Legislature clearly contemplated that there would be some counties or municipalities which would not exercise any power or authority granted by W. Va. Code §7-1-3u.

If, as appellants urge, W. Va. Code §7-1-3u is mandatory, then that language relating to counties or municipalities "which exercise any power or authority" would be meaningless. All counties would be required to exercise power and authority under W. Va. Code §7-1-3u and there would be no reason to include the phrase "[a]ny county ... which exercise any power or authority".

This Court has shown that it is loathe to undertake a statutory construction which would essentially erase one portion of a statute, observing "[u]nderstandably, we have a deep reluctance to interpret a statutory provision so as to render superfluous other provisions of the same enactment." *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 312-13, 465 S.E.2d 399, 414-15 (1995). Grafting mandatory requirements onto W. Va.

Code §7-1-3u ignores the permissive nature of the statutory language and violates this Court's teachings on statutory construction.

B. Interpreting W. Va. Code §7-1-3u as imposing a mandatory duty upon the Lincoln County Commission leads to absurd results.

Adoption of appellants' position that the enactment of W. Va. Code §7-1-3u imposed a mandatory duty upon the Lincoln County Commission to begin treatment of all streams within Lincoln County produces an absurd result. If that position were accurate, the result would be that each county commission within the State would be required to engage in activities which previously they had the authority, but not the obligation to perform.

For example, under appellants' theory, every county commission in the state, because it is "authorized and empowered" to do so, would be required to adopt building and housing codes "establishing and regulating minimum building and housing standards for the purpose of improving the health, safety and well-being of its citizens." W. Va. Code §7-1-3n. Yet, we know this interpretation of W. Va. Code §7-1-3n is not correct for this Court has noted that W. Va. Code §7-1-3n gives counties the option of adopting the building code. *Maples v. West Virginia Dep't of Commerce, Div. of Parks and Recreation*, 197 W. Va. 318, 324-25, 475 S.E.2d 410, 416-17 (1996).

The absurdity of appellants' strained statutory construction is further demonstrated when one realizes that all county commissions, being authorized and empowered to construct transportation terminals, would have to construct such facilities under W. Va. Code §7-1-3o. Under appellants' interpretation, because they are authorized and empowered to do so, all counties would be required to establish a county beautification council pursuant to W. Va. Code §7-1-3w. Appellants would interpret W. Va. Code §7-1-3y to require that all counties make grants to nutritional programs operated by "nonprofit legal entities" because the statute authorizes and empowers them to do so.

County commissions throughout this State might be surprised to learn that, according to appellants, W. Va. Code §7-3-14, because it authorizes and empowers them to do so, now requires them to operate a public hospital, clinic, long-term care facility and other related facilities. These are just a few examples of the absurd results which would ensue if appellants' statutory interpretation is adopted.

A county commission is "empowered" but not required to engage in stream treatment. Then, a county "which exercises any power or authority" granted by W. Va. Code §7-1-3u must comply with all applicable federal and state laws and regulations. Obviously, if the compliance requirement applies only to a

county "which exercises" the power granted under W. Va. Code §7-1-3u, then the import is clear that a county commission has the option to, but is not required to, exercise the authority granted under W. Va. Code §7-1-3u.

The Legislature chose not to make the provisions of W. Va. Code §7-1-3u mandatory. By contrast, however, when the Legislature chose to require action on the part of a county, it did so explicitly. This is illustrated by the provisions of W. Va. Code §7-1-3q:

There is hereby established in each county a commission on intergovernmental relations. The commission shall be composed of the members of the county court [county commission] and such other members as may be designated by the county court. ...

W. Va. Code §7-1-3r contains a similar imposition of mandatory obligations upon a county commission:

... There is hereby established in each county a county commission on crime, delinquency and correction. The commission shall consist of the members of the county court [county commission] and such other members as may be designated by the county court. ...

Likewise, W. Va. Code §7-3-2 requires that a county commission "shall provide at the county seat thereof a suitable courthouse ..." County commissions also "shall", as commanded by W. Va. Code §7-3-2a, purchase and display the flags of the United States and the State of West Virginia.

As these statutory provisions demonstrate, the Legislature imposed mandatory requirements upon county commissions in

certain instances. In other instances, the Legislature authorized county commissions to take certain actions, if the county commission chose to do so, but did not require that county commissions do so. W. Va. Code §7-1-3u is a perfect illustration of that type of statute.

Finally, appellants' reliance upon *Carden v. Nicholas County Court*, 110 W. Va. 195, 157 S.E. 411 (1931), as support for the proposition that county commissions "historically" have been held liable for flood damage is puzzling. The sole issue before the *Carden* Court was whether the county court (now county commission) was liable to plaintiff for the damage done to her property as a result of the state road commission diverting a stream onto her land during construction of a highway for public use. *Id.* at 196, 157 S.E. at 411.

The *Carden* Court held that pursuant to statute, the county court was responsible for compensating landowners for property taken by the state road commission for highway construction, as well as for property damaged by the state road commission. *Id.* at 197, 157 S.E. at 411-12. In their discussion of *Carden*, appellants fail to mention that there was a specific statute requiring, through the use of the mandatory word "shall", county commissions to pay for land taken by the state road commission for the purpose of constructing roads.

The statute in question provided that the state road commission was "empowered" to condemn land under eminent domain for the purpose of constructing state roads. However, "the cost of all rights of way acquired for any state or county-district road, or roads, or for the purpose of widening, straightening, grading, or altering any such road or roads shall be paid by the county court of the county in which such road or roads shall lie." [Emphasis supplied]. *Id.* at 197, 157 S.E. at 411. Carden offers no support for appellants' argument that W. Va. Code §7-1-3u imposes a mandatory duty upon the Lincoln County Commission.

CONCLUSION

Appellants' allegations were directed toward the Drainage District and its control of the Project on the Middle Fork of the Mud River. Unfortunately, they had the mistaken belief that the Drainage District was an agency or subsidiary of the Lincoln County Commission and, therefore, incorrectly named the Lincoln County Commission as a defendant.

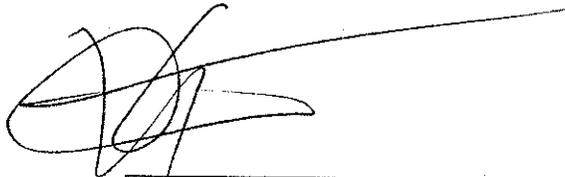
Furthermore, appellants erroneously ignore the plain language of W. Va. Code §7-1-3u and attempt to impose a mandatory duty upon the Lincoln County Commission which is not found in the statute. The provisions of W. Va. Code §7-1-3u are permissive, not mandatory, and the lower court correctly applied the plain language of the statute. The Circuit Court properly

granted the Lincoln County Commission's Motion to Dismiss, while at the same correctly permitting appellants to amend the complaint to sue the correct entity, the Drainage District.

RELIEF REQUESTED

Your appellee, the Lincoln County Commission, respectfully requests that this Court affirm the Order Dismissing the Complaint Against the Lincoln County Commission and Allowing Amendment to Add Middle Fork Drainage, Levee and Reclamation District of Lincoln County as Defendant.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EDWARD W. CANTLEY, SR. and
JUDITH K. CANTLEY, LISA BRAGG and
JAMES BRAGG, CHARLES FLOWERS, TRACY
FLOWERS, BETTY E. FLOWERS, SABRINA
MAYNARD, LAURA GOFF, JAMES STOWERS,
JOHN CUMMINGS and AMANDA CUMMINGS,
BRENDA PRICE and RICKY A. PRICE,
EARL SOWARDS and MAVIS SOWARDS,
LISA ADKINS and TOMMY ADKINS, and
JENNIFER LAWRENCE, Individually and on
Behalf of All Others Similarly Situated,

Appellants,

v.

NO.: 33345
(Civil Action No. 05-C-166
Circuit Court of Lincoln County)

LINCOLN COUNTY COMMISSION,

Appellee.

CERTIFICATE OF SERVICE

The undersigned, of counsel for appellee, Lincoln
County Commission, does hereby certify that the foregoing
Lincoln County Commission's Response to Appellants' Brief was
this day served upon the following by mailing a true copy of the
same this date, postage prepaid, to:

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Done this 6th day of June, 2007.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

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