

NO. 34749

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

KEITH WEST and SUSAN WEST,

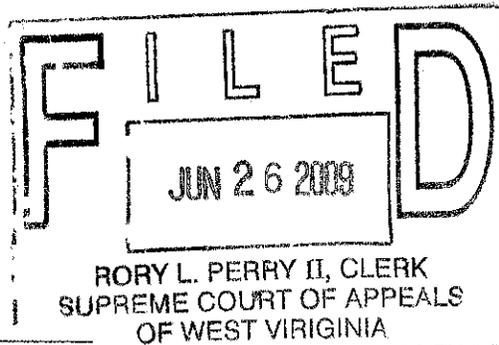
Appellees/Plaintiffs below,

v.

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, a department or agency
of the State of West Virginia;
PAUL A. MATTOX, in his capacity as
the commissioner of highways,

Appellant/Defendant below.

Civil Action No. 06-C-61
Circuit Court of Brooke County
Hon. James P. Mazzone



Appeal from Circuit Court of Brooke County
Honorable James P. Mazzone
Civil Action No. 06-C-61

APPELLEE'S BRIEF IN RESPONSE TO APPELLANT'S BRIEF

June 25, 2009

Jason A. Cuomo, Esq. (BIN 7151)
1511 Commerce St.
Wellsburg, WV 26070
(304) 737-3737
Counsel for Appellees West

TABLE OF CONTENTS

TABLE OF AUTHORITIES i-ii

I. STATEMENT OF THE FACTS 1

II. PERTINENT TRIAL WITNESS' TESTIMONY 6

III. DISCUSSION OF LAW & ARGUMENT 13

 A. THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT HAD NO CONSTITUTIONAL IMMUNITY WHERE INSURANCE OF AT LEAST \$1M APPLIES AND WHERE THE ISSUE OF WHETHER AN ADDITIONAL \$20M IN APPLICABLE INSURANCE COVERAGE HAS BEEN DEFERRED PENDING THE OUTCOME OF A DECLARATORY JUDGMENT ACTION 13

 (i) ENDORSEMENT # 7 WAS NOT SIGNED BY ANY AUTHORIZED REPRESENTATIVES OF THE INSURER NOR APPELLANT AND, THEREFORE, THERE WAS NO MUTUAL ASSENT OR MEETING OF THE MINDS AND THE ENDORSEMENT IS NOT A VALID PART OF THE INSURANCE CONTRACT 14

 (ii) ASSUMING, ARGUENDO, THIS COURT FINDS ENDORSEMENT # 7 TO BE VALID DESPITE ITS UNSIGNED NATURE, THEN THIS COURT SHOULD FIND THAT OTHER INSURANCE MIGHT APPLY TO COVER THE JUDGMENT AGAINST APPELLANT AND, THEREFORE, NO CONSTITUTIONAL IMMUNITY APPLIES 20

 (iii) ASSUMING, ARGUENDO, THAT THIS COURT DOES NOT FIND THE UNSIGNED NATURE OF ENDORSEMENT # 7 TO BE FATAL, ENDORSEMENT # 7 SHOULD BE DECLARED NULL AND VOID AS BEING UNCONSCIONABLE AND IN VIOLATION OF PUBLIC POLICY 20

 (iv) THE TRIAL COURT DID NOT ERR IN FINDING ENDORSEMENT # 7 TO BE INAPPLICABLE TO FAILURE TO INSPECT CLAIMS GIVEN THAT IT DOES NOT SPECIFICALLY EXCLUDE SUCH A DUTY 24

B. THE TRIAL COURT DID NOT ERR IN FAILING TO REMIT THE JUDGMENT TO \$1 MILLION BECAUSE IT DEFERRED RULING ON THIS ISSUE AND, THEREFORE, THE ISSUE IS NOT RIPE FOR THIS COURT’S CONSIDERATION 27

C. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT AS A MATTER OF LAW ON APPELLANT’S NEGLIGENCE WHERE APPELLANT DID NOT CONTEST THE SAME AT TRIAL AND WHERE NO REASONABLE JURY COULD HAVE CONCLUDED OTHERWISE 29

D. THE TRIAL COURT DID NOT ERR IN REFUSING TO LET THE JURY ASSESS THE NEGLIGENCE OF A NON-PARTY (I.E., THE DRIVER) BECAUSE APPELLEE’S COMPARATIVE NEGLIGENCE WAS NOT AN ISSUE AND APPELLANT DID NOT ATTEMPT TO ARGUE, NOR DID IT PRESENT EVIDENCE, OF INTERVENING CAUSE 33

E. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW APPELLANT TO ARGUE THAT APPELLEE DID NOT HAVE HIS SEAT BELT ON IN LIGHT OF THE REQUIREMENTS OF W.VA. CODE § 17C-15-49(d) AND ESTABLISHED CASE LAW 38

F. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT DISCLOSING TO THE JURY ANY PRE-TRIAL SETTLEMENT BETWEEN PENN LINE AND APPELLEES WHERE APPELLANT NEVER ASKED THE TRIAL COURT TO INFORM THE JURY OF THE SAME AND, THEREFORE, WAIVED ANY RIGHT TO NOW COMPLAIN ON SUCH GROUNDS TO THIS COURT 42

IV. RELIEF PRAYED FOR 46

TABLE OF AUTHORITIES

Cases

<u>Adkins v. Meador</u> , 201 W.Va. 148, 494 S.E.2d 915 (1997)	23
<u>Bell v. State Farm Mut. Auto. Ins. Co.</u> , 157 W.Va. 623, 207 S.E.2d 147 (1974)	23
<u>Blessing v. Nat'l Eng. & Contracting Co.</u> , 664 S.E.2d 152 (W. Va. 2008)	18, 19, 29
<u>Bowman v. Barnes</u> , 168 W.Va. 111, 282 S.E.2d 613 (1981)	33, 34
<u>Doe v. Wal-Mart Stores, Inc.</u> , 210 W. Va. 664, 558, S.E.2d 663 (2001)	34, 36
<u>Estate of Postlewait ex rel. Postlewait v. Ohio Valley Med. Ctr., Inc.</u> , 214 W.Va. 668, 591 S.E.2d 226 (2003)	36
<u>Gibson v. Northfield Ins.</u> , 219 W. Va. 40, 631 S.E.2d 598 (2005)	23
<u>Green v. Charleston Area Medical Center, Inc.</u> , 215W. Va. 628, 600 S.E. 340 (2004)	36
<u>Groves v. Compton</u> , 167 W. Va. 873, 879, 280 S.E. 2d. 708, 712 (1991)	36
<u>Johnson v. C. J. Mahan Constr. Co.</u> , 210 W. Va. 438, 557 S.E.2d 845 (2001)	21, 44
<u>Johnson v. Continental Casualty Co.</u> , 157 W.Va. 572, 201 S.E.2d 292 (1973)	23
<u>Lester v. Rose</u> , 147 W.Va. 575, 130 S.E.2d 80 (1963)	36
<u>Miller v. Monongahela Power Co.</u> , 184 W.Va. 663, 403 S.E.2d 406 (1991)	33
<u>O'Neal v. Transportation Co.</u> , 99 W.Va. 456, 465, 129 S.E.2d 478, 481 (1925)	15, 18
<u>Parkulo v. West Virginia Bd. of Probation and Parole</u> , 199 W.Va. 161, 483 S.E.2d 507 (1996)	17
<u>Pittsburgh Elevator Co. v. West Virginia Board of Regents</u> , 172 W. Va. 743, 310 S.E.2d 675 (1983)	27
<u>Rowe v. The Pallottine Missionary Society</u> , 211 W.Va. 16, 560 S.E.2d 491 (2001)	34-35
<u>Sitzes v. Anchor Motor Freight Inc.</u> , 169 W.Va. 698, 289 S.E.2d 679 (1982)	33

Sprout v. The Board of Education of the County of Harrison, 215 W.Va. 341,
599 S.E.2d 764 (2004) 16

State Ex. Rel. West Virginia Dept. of Transportation, Division of Highways v. Madden,
192 W. Va. 497, 453 S.E.2d 331 (1994) 21

Sydenstricker v. Mohan, 217 W.Va. 552, 559, 618 S.E.2d 561,568 (2005) 35-36

Titchnell v. The West Virginia Department of Transportation, Division of Highways,
Circuit Court of Wayne County, Civil Action No. 03-C-266 25-26

Triad Energy Corp. of West Virginia Inc. v. Renner, 215 W.Va. 573,
600 S.E.2d 285 (2004) 16

Universal Underwriters Ins. Co. v. Taylor, 185 W.Va. 606, 408 S.E.2d 358 (1991) 23

Werfele v. Kelly Paving, Inc., et al., Circuit Court of Marshall County,
Consolidated Case Nos. 07-C-58M and OS-C-306M 15, 17-19

Wheeling Downs Racing Association v. West Virginia Sportservice, Inc., 157 W.Va. 93,
199 S.E.2d 308 (1973) 16

Statutes

W. Va. Code § 17-2A-8(1) 1

W. Va. Code §17C-15-49(d) 38-42

W. Va. Code § 29-12-1 21-23

W. Va. Code § 29-12-5(a) 17, 20, 22-23

NOW COME appellees, by counsel, and, in response to appellant West Virginia Department of Transportation (hereinafter "DOT"), Division of Highway's Petition for Appeal, hereby requests this Court to deny the same in as much as the trial court committed no abuses of discretion or reversible error. The underlying jury verdict was fair, just and appropriate in light of the facts of the case.

I. STATEMENT OF THE FACTS

Pursuant to W. Va. Code §17-2A-8(1), appellant WVDOT is charged with "Exercis[ing] general supervision over the state road program and the construction, reconstruction, repair and maintenance of state roads and highways," -- which, as all parties admit, includes guardrails.

February 1, 2004 – while traveling at a high rate of speed and in excess of the posted speed limit of 55 mph on WV State Route 7 in or near Morgantown, WV (Blacksville), a vehicle owned by John Hamilton went through a sharp left turn in the road, crashed into and through a section of guardrail and then over an approximately 100 ft. embankment. (See T. Tr., Vol. I, at pgs. 205-10). As a result, an approximately 17-foot section of guardrail was bent nearly 180 degrees backward (T. Tr., Vol. IV, pgs. 75-79), which left said 100 ft. embankment completely unsecured for the traveling public thereafter. (T. Tr., Vol. I, at pg. 212)

November 8, 2004 – over nine (9) months later, appellant WVDOT, by and through its County Highway Administrator Kathy Westbrook, claimed to have first received notice of the aforementioned accident and missing guardrail -- despite the fact that appellant's service station was less than 3 miles away on the same road. (T. Tr., Vol. I, at pgs. 213-18; T. Tr., Vol. II, at pgs. 154-55) On this date, appellant determined that said damaged guardrail was in a "non-functional" state and constituted an "emergency situation" on a "first priority" road. (T. Tr., Vol. I, at pgs. 215-22; T.

Tr., Vol. II, at pgs. 157-59; and see also the February 20, 2008 hearing transcript, at pgs. 18-19, previously attached to Appellee's Response to Petition for Appeal as Exhibit G)

Also on this same date, appellant claimed to **prepared**, but produced no evidence that it actually **delivered**, a "Guardrail Installation Request" for this particular "emergency situation" guardrail to be repaired by its subcontractor Penn Line. (T. Tr., Vol. I, at pgs. 215-18; T. Tr., Vol. II, at pg. 155) As trial testimony also revealed, appellant's own "Guardrail Repair Policy" required appellant to "place appropriate warning devices the next scheduled workday, and schedule repairs by contract as soon as practical – within a 60 day maximum guideline." (T. Tr., Vol. I, at pgs. 215-22; T. Tr., Vol. II, at pgs. 162-64)

January 20, 2005 – nearly two and a half (2 ½) months (or 72 days) later, appellant had still **not**: (a) delivered the Request to its subcontractor, Penn Line; (b) responded to said Request in any fashion; (c) repaired the damaged guardrail; (d) inspected the location in question in any fashion; (e) placed any markers, cones, barrels or other warning devices at the scene; and (f) otherwise made safe or secured the dangerous embankment the damaged, non-functional guardrail. (T. Tr., Vol. I, at pgs. 213, 222, 224; T. Tr., Vol. II, at pgs. 162-64, 179)

On this date, with bad weather, appellee Keith West (only 34 years old at the time, married, with two young children and in self-owned custom cabinet making business) was riding as a passenger in a vehicle being driven by his father Rich West. While traveling only 30-35 mph (where the posted speed was 55 mph [T. Tr., Vol. 1, pgs. 206-07, 228, 302]), the West vehicle traveled over some slush on the road and lost control. While the West vehicle was able to slow down to between 8-15 mph [T. Tr., Vol. IV, pgs. 64-65], it was not able to stop and it slid through said sharp left turn, and through the area where the 17 ft. section of guardrail should have been repaired by appellant and

over the 100 ft. embankment. (T. Tr., Vol I, pgs. 225-28)

Trial evidence demonstrated that the entire purpose of the missing guardrail was to “re-direct” vehicles along the guardrail path and away from the 100 ft. embankment behind it, especially when vehicles were traveling at certain speeds like appellee’s vehicle. In fact, testimony further revealed that, at the speed and angle which appellee’s vehicle was traveling, said vehicle would have been prevented from going over the embankment and appellee would not have suffered the injuries in question. (T. Tr., Vol. I, pgs. 199, 203, 214, 219-20, 236-37, 254-55, 257-59, 266-68, 272, 285, 290-91, 294, 297 and 302)

Amazingly, appellant maintained as an affirmative defense in its Answer to the Complaint that, because appellee’s vehicle was moving so slowly as it went through the area where the guardrail would have been had appellant timely repaired it, appellant was not responsible for appellee’s injuries because appellee failed to **jump out of the vehicle** before the vehicle went over the 100 ft. embankment. (T. Tr., Vol. II, pgs. 168-73; Answer of WVDOT, filed on or about 6/5/07) Nevertheless, as a result of going over the unprotected 100 ft embankment, 34 year-old appellee Keith West sustained devastating, serious and permanent physical injuries, as well as past and future financial losses as follows:

- (1) Comminuted right humerus fracture (i.e., shattered right upper arm), which required internal fixation with foot long rod and many screws, with foot long scarring on back of right arm (T. Tr., Vol. II, pg. 218, 220, 223);
- (2) Crushed left acetabular (i.e., crushed left hip socket), which required internal fixation with plates and screws (T. Tr., Vol. II, pg. 218, 223-24);
- (3) Subsequent traction with a steel rod through his knee to keep his femur out of his hip socket, while the socket healed (T. Tr., Vol. II, pg. 217, 224);

- (4) Infection to the hip, which required a second (2nd) surgery to debride the wound (T. Tr., Vol. II, pg. 221);
- (5) A third (3rd) hip surgery -- which was now a total left hip replacement -- new socket, new femur head, etc. (T. Tr., Vol. II, pgs. 226-27);
- (6) Over one (1) feet of scaring on his left hip/buttocks area (T. Tr., Vol. II, pg. 223);
- (7) A “pic line” was placed into his left arm for several months, even after his hospital discharge, in order to run drugs directly into his heart to prevent infection (T. Tr., Vol. II, pg. 224-25);
- (8) \$304,160.33 in past medical bills (See Judgement Order);
- (9) \$750,000.00 in future medical bills, primarily for more hip replacements, multiple daily medications, therapy, etc. (See Judgment Order);
- (10) \$168,863.00 in past lost wages/income. (See Judgment Order)
- (11) \$14,492.00 in past lost household services (See Judgment Order);
- (12) \$1,200,000.00 in future lost wages/diminished earning capacity (See Judgment Order);
- (13) \$117,783.00 in future loss of household services (See Judgment Order);
- (14) Appellee lost his home, due to his injuries and inability to earn a living and pay his mortgage (T. Tr., Vol. II, pgs. 124, 212; Vol. III, pgs. 15-16);
- (15) Appellee lost his business, due to his injuries and inability to perform the functions of his job (T. Tr., Vol. II, pgs. 124, 212, 227-29; Vol. III, pgs. 15-16);
- (16) Appellee lost his vehicles, due to his injuries and inability to earn a living and make his car payments (T. Tr., Vol. II, pg. 124);

January 28, 2005 – 80 days following the **preparation** of the Guardrail Repair Request by appellant (and nearly a year following the original damage to the guardrail), appellant had **still not**:
(a) delivered the Request to its subcontractor Penn Line; (b) “responded” to the Request in any fashion; (c) repaired the damaged guardrail in any fashion; (d) inspected the location in any fashion;

(e) placed any markers, cones, barrels or other warning devices at the scene; and (f) otherwise made safe or secured the dangerous embankment created by the damaged, “non-functional” guardrail. (T. Tr., Vol. I, pgs. 213, 222, 224, 227)

On this same date, another vehicle being driven by Francis Price had an accident in an almost identical fashion to that of appellee, where, in bad weather, he lost control of his vehicle, went through the sharp turn to the left, through the 17-ft. section of **still missing** and over the 75-100 ft. hillside/embankment. (T. Tr., Vol I, pgs. 228-30)

February 5/6, 2005 -- now nearly 90 days following the **preparation** of the Guardrail Repair Request by appellant, and well beyond the 60 day maximum guideline required by appellant’s own Policy, appellant for the **first time** made its subcontractor Penn Line aware of the need to repair this guardrail. (T. Tr., Vol. I, pgs. 230-34) Appellant presented no evidence at trial contrary to this fact.

February 7, 2005 – now over 90 days following the preparation of the Guardrail Repair Request (and over a year following the original damage to the guardrail), appellant finally repaired the damaged guardrail and thereby secured the 100 ft. embankment. Sadly, evidence revealed that it only took less than 1 hour and \$891.00 to complete this repair. (T. Tr., Vol. I, pgs. 234-35)

Subsequent to the guardrail’s repair on February 7, 2005 and prior to trial in March 2008, trial evidence demonstrated that the now repaired guardrail in question had been struck **on at least two (2) more occasions** -- at the same or likely greater speeds than that of the appellee’s vehicle -- and neither vehicle broke the guardrail, nor where they caused to go over the embankment. (T. Tr., Vol. 1, pgs. 260-67; T. Tr., Vol. IV, pgs. 86-88; see also Trial Exhibits 9-12) Interestingly, appellant’s own engineering expert, Ricky Stansifer, opined that one of these additional impacts which did not break the guardrail after it was repaired was actually caused by a **tractor-trailer**. (T.

II. PERTINENT TRIAL WITNESS' TESTIMONY

Appellant's own county highway administrator, Kathy Westbrook, and the only WVDOT employee to testify at trial, admitted, for all intents and purposes, to appellant's negligence when she testified to the following:

1. The WVDOT substation is just a few miles away from the site in question and on the same road (T. Tr., Vol II, pg. 154);
2. Between the time the guardrail became "non-functional" on 2/1/04 and the time appellant had notice of the same on 11/8/04, appellant put up no barrels, cones or other warning devices at the site (T. Tr., Vol II, pgs. 154-55);
3. Appellant did not issue any repair orders for the "non-functional" guardrail during the 9-month period between 2/1/04 and 11/8/04 (T. Tr., Vol II, pg. 155);
4. On 11/8/04, Ms. Westbrook actually saw the damaged guardrail, took a picture of it and prepared a "Guardrail Repair Request form" (T. Tr., Vol II, pg. 155);
5. Ms. Westbrook's responsibility, once she prepared the Guardrail Repair Request form, was to "see that the repair got done" (T. Tr., Vol II, pgs. 156-57);
6. From 11/8/04 forward, Ms. Westbrook deemed and considered the damaged guardrail to be "non-functioning" and an "emergency situation" (T. Tr., Vol II, pgs. 157-59; and see February 20, 2008 hearing transcript, at pgs. 18-19, previously attached to Appellee's Response to Petition for Appeal as Exhibit G);
7. Once the guardrail is deemed "non-functioning," appellant has a duty to repair it "as soon as possible" (T. Tr., Vol II, pgs. 157-59);
8. This road, with the now "non-functional guardrail" and unsecured 100 ft. embankment, was a "first priority" for appellant (T. Tr., Vol II, pg. 159);
9. In her 10+ years as the Monongalia County highway administrator/supervisor, Ms. Westbrook had never seen repairs take place 3-4 months following the issuance of a request to repair a "non-functional" damaged guardrail on "first priority" roads (T. Tr., Vol II, pg. 159);

10. Ms. Westbrook **did not know and could not tell the jury** that appellant ever communicated to its subcontractor Penn Line that this damaged and “non-functional” guardrail and unprotected 100 ft. embankment was an “emergency situation” and “first priority”(T. Tr., Vol II, pgs. 159-60);
11. She **never** sent the Request directly to subcontractor Penn Line (T. Tr., Vol II, pg. 160);
12. She called appellant’s substation on 11/8/04 and told them to put up barrels and cones and other warning markers to warn the public of the situation, but she could not tell the jury whether appellant ever put up any cones, barrels or other warning markers (T. Tr., Vol II, pgs. 160-61);
13. If anyone at appellant’s substation ever put up any barrels or cones or other warning devices at the site it would have been noted in writing on a “DOT-12 form.” She looked for that form and could not find it. Furthermore, no one who worked for appellant ever remembered putting up any cones, barrels or other markers (T. Tr., Vol II, pgs. 161-62);
14. Appellant’s own Guardrail Repair Policy was not complied with in terms of placing cones barrels and other warning devices up at the site on the next scheduled workday (T. Tr., Vol II, pgs. 162-64);
15. Appellant’s own Guardrail Repair Policy was not complied with in terms of repairing the guardrail “as soon as practicable” and within a maximum 60-day guideline (T. Tr., Vol II, pgs. 162-64);
16. She never followed up with appellant’s substation to see if they ever put up the cones and barrels (T. Tr., Vol II, pgs. 164-65);
17. She did not know why she did not follow up and check with anyone on whether cones and barrels were ever put up at the site in question (T. Tr., Vol II, pg. 165);
18. Between 11/8/04, when Ms. Westbrook prepared the “Guardrail Repair Request,” and early February 2005, when the guardrail was eventually repaired, Ms. Westbrook never followed up with anyone as to whether repairs were “scheduled,” whether the subcontractor Penn Line was made aware of the situation or whether the guardrail was even repaired (T. Tr., Vol II, pg. 165);
19. She did **not** have an excuse for the jury as to why she did not follow up on the above issues (T. Tr., Vol II, pg. 165);

20. A third (3rd) accident occurred on 1/28/05, involving a Mr. Price. Mr. Price's mother called Ms. Westbrook and conveyed to Ms. Westbrook that she was upset and concerned about the unsafe and dangerous condition that the unrepaired guardrail was causing with the open 100 ft. embankment (T. Tr., Vol II, pgs. 165-66);
21. Ms. Westbrook told Mrs. Price in late January/early February 2005 that she, Kathy Westbrook, had assumed that the guardrail had been repaired (T. Tr., Vol II, pg. 166);
22. Ms. Westbrook thereafter looked through her file to find a repair completion notation, but she could not find any such notation (T. Tr., Vol II, pgs. 166-68);
23. Ms. Westbrook testified that she then called the local WVDOT office and spoke with WVDOT employee Brenda Fortney and asked Ms. Fortney if she still had the Guardrail Repair Request form in her file. Ms. Fortney advised that she did still have the Repair Request in her file, which indicated that the guardrail had **not** been repaired (T. Tr., Vol II, pg. 167);
23. Ms. Westbrook then asked Ms. Fortney to "get the request in to the subcontractor to get repaired." The repair was thereafter completed on 2/7/05 (T. Tr., Vol II, pg. 168);
24. She was **not** claiming as an excuse, for this untimely repair, that appellant had too many other jobs or that appellant was "too busy." (T. Tr., Vol II, pg. 160-61);
25. Neither she nor anyone else at the WVDOT, as far as she knew, could testify that appellant ever gave its subcontractor any notice to repair this guardrail prior to February of 2005 (T. Tr., Vol II, pg. 179);

Appellant presented **no** expert or lay testimony to contradict its negligent failure to inspect the guardrail; its negligent failure to warn the public of the "emergency" situation; or its negligent failure to timely repair the guardrail. In fact, appellant's only expert, engineer and accident reconstructionist Ricky Stansifer, **admitted** that:

- (1) He was **not asked** by appellant to analyze, and **was not offering** to the jury any opinion on, whether appellant properly inspected this site at any time relevant to the litigation; (T. Tr., Vol. IV, pg. 19)
- (2) He was **not asked** by appellant to analyze, and **was not offering** to the jury any opinion on, whether appellant properly warned the public of this site at any time relevant to the litigation; (T. Tr., Vol. IV, pgs. 19-20)

- (3) He was **not asked** by appellant to analyze, and **was not offering** to the jury any opinion on, whether appellant timely repaired the guardrail at any time relevant to the litigation; (T. Tr., Vol. IV, pg. 20)
- (4) He was **not asked** by appellant to analyze, and was not offering to the jury any opinion on, whether appellant ever gave notice to its subcontractor, Penn Line, to repair this guardrail prior to February of 2005; (T. Tr., Vol. IV, pg. 20)
- (5) He was **not asked** by appellant to analyze, and was not offering to the jury any opinion on, whether appellant's subcontractor, Penn Line, was negligent in any fashion; (T. Tr., Vol. IV, pg. 20)
- (6) He was **not asked** by appellant to analyze, and **was not offering** to the jury any opinion, on whether the driver of appellee's vehicle was negligent in any fashion. (T. Tr., Vol. IV, pg. 21)
- (7) He initially opined that appellee's vehicle would **not** have hit the guardrail even if appellant had repaired the same prior to the incident in question. However, also admitted that this opinion was based upon an *incorrect assumption* that the repaired section would have only resulted in about 12 feet of additional guardrail being present, instead of 17 feet of additional guardrail. He agreed, based upon the WVDOT's own engineering specifications for that guardrail, that 17 feet was ultimately correct. Thus, appellant's own expert's testimony established that appellee's vehicle would have hit some portion of the guardrail had it been repaired by appellant prior to the accident in question. (T. Tr., Vol. IV, pgs. 75-79)

The only witness to testify at trial on behalf of appellant's subcontractor Penn Line was Penn Line's foreman, Randy McCarty, who testified that:

- (1) Appellant never made Penn Line aware of the damaged guardrail situation until the day or so before February 7, 2005. (T. Tr., Vol. II, pg. 184);
- (2) In his decades of experience as a guardrail repair foreman, and in working for years with appellant, appellant, not Penn Line, is the entity to determine which sites to repair and when to repair them. (T. Tr., Vol. II, pg. 185);
- (3) Had Penn Line received the Guardrail Repair Request order from appellant at any time in November of 2004 when it the Order was allegedly written by appellant, and had Penn Line been told by appellant that the guardrail was "non-functional" and an "emergency situation" on a "first priority" road, Penn Line would have gone out and easily have fixed it right away. (T. Tr., Vol. II, pgs. 187 and 189);

- (4) He had no idea why appellant waited over four (4) months to give Penn Line the Repair Request for a “non-functional” guardrail, which appellant deemed an “emergency situation” on a “first priority” road. (T. Tr., Vol. II, pg. 187);
- (5) Penn Line was in Monongalia County (i.e., the County in which the guardrail in question was located) between November 8, 2004 and the time of this accident on January 20, 2005, on eight different days working on 15 different sites. Penn Line could have repaired the guardrail and secured the 100 ft. embankment on anyone of those dates had appellant told Penn Line about the situation. (T. Tr., Vol. II, pg. 189)

After all of the evidence was presented, the trial court found and ruled as follows, **without**

objection or response from appellant:

Well, having heard all of the evidence in the case, and the Court having yesterday taken under advisement the plaintiffs' motion concerning duty breach, what I've been referring to as negligence. I'm going to make the following findings. I believe that this record, with respect to the issue of negligence, clearly establishes the following: That the subject section of the guardrail was damaged; that the Division of Highways knew it was damaged months before this accident; that the Division of Highways knew that before this accident that this was a priority road; the Division of Highways knew that the damaged guardrail constituted an emergency condition; they also knew that the damaged guardrail to be a non-functional portion of the guardrail that had been damaged, pursuant to their own policies and Ms. Westbrook's testimony; that the Division of Highways' policies under these circumstances required warnings and a fix of a non-functional portion of the guardrail, which was not accomplished or scheduled pursuant to the evidence per those policies as corroborated by Mr. -- well, the Penn Line witness who testified.

The evidence also clearly establishes that the Division of Highways maintained an office a short distance. I think it's been referenced from a low of two up to possibly five miles from the damaged area of the guardrail. The record, the Court believes, also establishes, without rebuttal, that manpower was available to make this fix, that the fix was rather simple. The evidence would indicate that it ultimately took approximately \$1,000 or a little or little less and approximately one hour of labor. The Court also believes that the guardrail could have been fixed approximately one day following notice to the DOH contractor, that being Penn Line.

Furthermore, the Court finds that the record establishes that there's been no expert testimony to rebut had offered by Mr. Ramisch or other evidence concerning duty and alleged breach of duty, and, furthermore, the Court would find that the evidence in the record clearly establishes that no warnings by way of cones, barrels, were set up following the notice of the damaged guardrail pursuant to DOH policies.

Accordingly, it -- after careful review of the record and hearing the testimony, the Court is going to grant the motion inasmuch as the Court believes that there is no way any reasonable trier of fact could ever conclude that the Division of Highways' conduct was anything but negligent under these circumstances.

The Court makes no findings with respect to proximate cause of the accident or -- of course, as we discussed yesterday, proximate cause concerning the extent of the damages. Now, I will within the charge make the jury aware that as matter of law, the Division of Highways is negligent and advise them that the issues of proximate cause are still theirs to decide, and if so, what damages, if any.

.

I went back and reviewed the records and indeed failure to inspect was alleged and is part of the evidence unrebutted, in particular, Ms. Westbrook and Mr. Ramisch's testimony.

(T. Tr., Vol. IV, pgs 99-101 and 106-07)

Later that day, a six person Brooke County jury specifically found that appellant's negligence was a proximate cause of the appellee's injuries and returned a verdict for appellee.¹

¹ The Judgment Order, entered on the 19th day of March, 2008, reads as follows:

[P]ursuant to a jury of six (6) Brooke County, West Virginia citizens, duly sworn, duly empaneled and duly qualified to try the case, the jury reported their verdict to the trial court and did reach and unanimously agree on its verdict FINDING for the plaintiffs as follows:

1. Do you find from a preponderance of the evidence that the defendant Department of Highways' negligence was a proximate contributing factor in causing injuries and damages to plaintiffs Keith and Susan West?

ANSWER: YES (Yes or No)

If the answer to 1 is "No," then do not answer the questions below.

If the answer to 1 is "Yes," then complete the damages for below as well.

2. If you have answered "YES" to No.1, then please complete the following amounts of damages:

PAST DAMAGES - PLAINTIFF KEITH WEST:

A.	Medical and treatment expenses incurred to date	\$ 304,160.33
B.	Pain and suffering to date	\$ 175,000.00
C.	Loss of enjoyment of life, ability to function as a whole person and pursue activities, scarring and disfigurement to date	\$ 500,000.00
D.	Loss of income to date	\$ 168,863.00
E.	Loss of household services to date	\$ 14,492.00

FUTURE DAMAGES - PLAINTIFF KEITH WEST:

F.	Future medical and treatment expenses	\$ 750,000.00
G.	Future pain and suffering	\$1,800,000.00
H.	Future loss of enjoyment of life, ability to function as a whole person and pursue activities, scarring and disfigurement	\$2,000,000.00
I.	Future diminished earning capacity and lost income	\$1,200,000.00

Pursuant to a hearing conducted on May 30, 2008, the trial court denied appellant's post-trial

motions and, in doing so, found and held as follows:

I do appreciate the briefs that were filed in advance of today's hearing, and I had an opportunity to review them carefully, as well as all the decisions that are raised within those briefs, motion and the response to the motion. I am not going to alter any of the previous rulings made by the Court or make any finding that those rulings under the law constitute a basis for a new trial or altering anything that the jury did. I believe that the record clearly supports the jury's findings that were made.

Additionally, I believe the record clearly supports the rulings that were made, both pre-trial and during the trial. The trial record, frankly, zeroing in on only one part of the issues that you raise, Dana. *The trial record, I believe, clearly established negligence of the Division of Highways. And, frankly, one of the clearest cases of negligence I've seen in seven and-a-half years. Some could even argue gross negligence. And that conclusion can arguably be reached just based on what the DOH rep said at trial.* Notwithstanding the expert testimony insofar as their own policies and procedures and conduct with respect to this roadway guardrail, et cetera. So I'm not going to order a new trial or make any findings that anything occurred during trial constitutes the granting of a new trial or in any way disturbing the jury's findings. . . .

. . . .

What I am going to do is *defer ruling on the Division of Highways' request to reduce the verdict until some discovery can occur and information can be submitted to me so that I can properly determine exactly how much insurance coverage there is out there*, because I believe a real question exists as to whether or not it is limited only to the million or whether or not there is more insurance coverage than that. And because of that question, I don't believe I can properly reduce the jury's verdict to the one million, because I would -- that presupposes me being convinced that there's only a million. It would have to be reduced to the amount

J.	Future loss of household services	\$ 117,783.00
	TOTAL VERDICT FOR PLAINTIFF KEITH WEST	\$7,030,298.33
	PAST & FUTURE DAMAGES - PLAINTIFF SUSAN WEST:	
K.	Loss of spousal consortium, society, comfort and companionship to date	\$ 200,000.00
L.	Future loss of spousal consortium, society, comfort and companionship	\$ 800,000.00
	TOTAL VERDICT FOR PLAINTIFF SUSAN WEST	\$1,000,000.00
	TOTAL VERDICT FOR PLAINTIFFS KEITH AND SUSAN WEST	\$8,030,298.33

available that -- to the Division of Highways and that I just don't know based on this record. We know there's at least a million, but because of the other issues that we've discussed today, I don't know what it's capped at. So that part of your motion, Dana, I am going to defer until there is additional discovery. Discovery, I would envision, would include discovery directed at the Division of Highways inasmuch as they are listed on this liability of insurance, but while I'm not ordering it, I think it would be difficult to conduct comprehensive discovery without also obtaining discovery from the other insurance company, AIG or Zurich, whoever generated this certificate of liability insurance that lists the Division of Highways as an additional insured under this policy.

So where this is like -- the direction this is going is a declaratory judgment action of some sort.

(emphasis added) (May 30, 2008 Transcript, pgs. 36-38)

III. DISCUSSION OF LAW AND ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT HAD NO CONSTITUTIONAL IMMUNITY WHERE INSURANCE OF AT LEAST \$1M APPLIED AND WHERE THE ISSUE OF WHETHER AN ADDITIONAL \$20M IN APPLICABLE INSURANCE COVERAGE HAS BEEN DEFERRED PENDING THE OUTCOME OF A DECLARATORY JUDGMENT ACTION

In this case there is no dispute that the Comprehensive Liability Coverage under the insurance policy issued by National Union to appellant, if unmodified by Endorsement # 7, provides coverage for the Judgment. (See trial court's February 26, 2008 Order, at pgs. 5-6). What appellant argues (apparently on behalf of its insurer, BRIM and/or National Union--who are not parties to this appeal and have never been parties or filed appearances in this litigation) is that an unsigned Endorsement #7 excludes coverage and without such coverage, constitutional immunity exists. This argument must fail for several reasons.

There are a couple of well-settled, overriding principles when it comes to insurance policy language, restrictive endorsements and claims of governmental immunity. First, "[w]here the policy language involved is exclusionary, it will be *strictly construed against the insurer* in order that the

purpose of providing indemnity not be defeated.” (Emphasis added). National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 740, 356 S.E.2d 488, 494 (1987). Second:

the general rule of construction in governmental tort legislation cases *favours 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.

(emphasis added). Marlin v. Bill Rich Const., Inc., 198 W. Va. 635, 643, 482 S.E.2d 620, 628 (1996).

- (i) **ENDORSEMENT # 7 WAS NOT SIGNED AND/OR COUNTERSIGNED BY ANY AUTHORIZED REPRESENTATIVES OF THE INSURER NOR APPELLANT AND, THEREFORE, THERE WAS NO MUTUAL ASSENT OR MEETING OF THE MINDS AND THE ENDORSEMENT IS NOT A VALID PART OF THE INSURANCE CONTRACT**

In this case, it is undisputed that both the contract of insurance held by the appellant DOH and Endorsement #7 were issued **prior to** December 31, 2004. As produced by appellant, Endorsement #7 has a signature line for an “authorized representative.” However, the signature line is blank and unsigned. (See copy of Endorsement #7 previously attached to Appellee’s Response to Petition for Appeal as Exhibit A)

In its February 26, 2008 Order, the trial court held as follows:

As a general matter, endorsements operate to modify a policy of insurance. ‘Where the terms of a contract are clear and unambiguous, they must be applied and not construed.’ Syl. pt. 2, Bass v. Coltelli-Rose, 207 W.Va. 730, 536 S.E.2d 494 (2000); quoting Syl. pt. 2, Orteza v. Monongalia County Gen. Hosp., 173 W.Va. 461, 318 S.E.2d 40 (1984). ‘It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.’ Syl. pt. 4, National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987). Therefore, the ambiguity must be resolved in favor of providing coverage. Accordingly, the Court hereby FINDS and CONCLUDES that Endorsement 7 is unsigned and is therefore not part of the insurance contract.

(emphasis added) (See trial court’s February 26, 2008 Order, pgs. 6-7)

At the February 20, 2008 hearing leading to the above Order, appellant's counsel admitted two (2) important facts. First, when asked by the trial court whether endorsements operate to amend an insurance policy, appellant stated: "Of course, Your Honor. I stand strongly -- I stand strongly behind that proposition." (See February 20, 2008 transcript, at pgs. 14-15, previously attached to Appellee's Response to Petition for Appeal as Exhibit G; see also appellant's appeal brief at pgs. 17-18) Second, when asked by the trial court whether it disputed the fact that Endorsement # 7 was unsigned, appellant admitted that it was not:

9 THE COURT: *But there's no dispute that*
10 *it was not signed?*

11 MR. EDDY: I don't think that -- *I would*
12 *say at the moment that I'd have to say that it was not*
13 *signed.*

(emphasis added) (See February 20, 2008 transcript, at pg. 11)

In O'Neal v. Transportation Co., 99 W.Va. 456, 465, 129 S.E.2d 478, 481 (1925), this Court found an unsigned Endorsement not to be a part of the insurance policy to which it was attached. In Werfele v. Kelly Paving, Inc., et al., Consolidated Case Nos. 07-C-58M and OS-C-306M, the Circuit Court of Marshall County was faced with the same issue (i.e., being asked by WVDOT to apply an **unsigned** Endorsement # 7 in order to exclude coverage). The trial court in this case, discussed Werfele, in its February 26, 2008 Order, as follows:

In a recent case in Marshall County, Judge Madden was faced with facts similar to the case at bar in deciding whether an unsigned Endorsement 7 was applicable to modify the State's Comprehensive Liability Insurance policy. See Werfele v. Kelly Paving, Inc., et al., Circuit Court of Marshall County, Consolidated Case Nos. 07-C-58M and OS-C-306M. Relying upon O'Neal v. Transportation Co., 99 W.Va. 456, 465, 129 S.E.2d 478, 481 (1925), Judge Madden found that Endorsement 7 was not part of the policy because the signature line was unsigned. Werfele v. Kelly Paving, Inc., et al., Circuit Court of Marshall County, Consolidated Case Nos. 07-C-58M and

O5-C-306M, Order entered January 3, 2008, at par. 11. This Court agrees with the conclusion reached by Judge Madden.

(See trial court's February 26, 2008 Order, pgs. 7-8)

It is well settled contract law that the modification of an insurance contract requires valuable consideration and "mutual assent" or a "meeting of the minds" of both parties to the contract. See syl. pts. 1 and 2, Wheeling Downs Racing Association v. West Virginia Sportservice, Inc., 157 W.Va. 93, 199 S.E.2d 308 (1973) ("A modification of a contract requires the assent of both parties to the contract and a mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract."); Wheeling Downs cited with approval in Triad Energy Corp. of West Virginia Inc. v. Renner, 215 W.Va. 573, 600 S.E.2d 285 (2004) and Sprout v. The Board of Education of the County of Harrison, 215 W.Va. 341, 599 S.E.2d 764 (2004). Clearly, Endorsement #7 in this case, and as admitted by appellant, served, or attempted to serve, to "modify" the National Union policy and to exclude certain coverage.

In the instant case, appellant simply avoids the "meeting of the minds" issue and the lack of signature(s) on Endorsement #7 by arguing that BRIM has the sole authority to determine coverage and exclusions from coverage and, because BRIM's alleged position is that this Endorsement #7 applies, this Court and the trial court should simply bow down and defer to BRIM. However, as mentioned, BRIM has never made an appearance in this case, is not represented by counsel and is certainly not a party to this litigation or this appeal. Furthermore, the trial court and this Court, as the judicial branch in our State, enjoy the sole and exclusive power to interpret the legality of contracts (and endorsements thereto) -- **not** BRIM.

In Parkulo v. West Virginia Bd. of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1996), this Court suggested that even BRIM needed to have a “meeting of the minds” or some “negotiation” with its insured regarding coverages and exclusions:

We note that the Legislature may direct such limitation or expansion of the insurance coverage and exceptions applicable to cases brought under W.Va. Code, 29-12-5, as, in its wisdom, may be appropriate. The Legislature has also vested in the State Board of Insurance considerable latitude to fix the scope of coverage and contractual exceptions to that coverage by regulation or *by negotiation of the terms* of particular applicable insurance policies.

(emphasis added) Parkulo v. West Virginia Bd. of Probation and Parole, 199 W.Va. 161, 175-176, 483 S.E.2d 507, 521-522 (1996).

What negotiation took place between the insurer and appellant over Endorsement #7 in this case? We know that no one signed or countersigned Endorsement #7. Appellant had plenty of opportunity to produce evidence to the trial court on this issue. However, appellant failed to produce any such evidence. There is no record before this Court regarding such things as: what premium adjustments were made, if any, for Endorsement #7?; who wrote Endorsement #7?; when was Endorsement #7 written?; why Endorsement #7 was written? etc.

Appellant was also given plenty of opportunity in the underlying litigation, as well as in other cases like Werfele in Marshall County before Judge Madden, to produce a validly signed and countersigned Endorsement #7 -- and yet it failed to produce the same. Without a signed Endorsement #7, how could this Court, or anyone else for that matter, be assured that fraud is not now being committed, has been committed in the past or will be committed in the future? Anyone could type an Endorsement and produce it to a trial court or to this Court and claim that it serves to exclude coverage under an insurance policy. Appellant cannot ignore an unsigned Endorsement, which seeks to modify a lawfully issued policy and exclude coverage thereunder, simply because a

non-party like BRIM (who has an interest in seeing that the Endorsement does apply) says that the Endorsement applies.

W. Va. Code, Chapter 33 (Insurance), Article 12 (Insurance Producers and Solicitors), section 11, entitled “countersignature,” states, in pertinent part:

No contract of insurance covering a subject of insurance, resident, located or to be performed in this state, shall be executed, issued or delivered by any insurer *unless the contract* or, in the case of an interstate risk, a countersignature endorsement carrying full information as to the West Virginia risk, *is signed or countersigned in writing by a licensed resident agent of the insurer*, except that excess line insurance shall be countersigned by a duly licensed excess line broker. . . . Provided, that the countersignature requirements of this section shall no longer be required for any contract of insurance executed, issued or delivered on or after the thirty-first day of December, two thousand four.

(emphasis added)

In Blessing v. Nat. Eng. & Cont. Co., 664 S.E.2d 152 (W. Va. 2008), this Court had occasion to specifically discuss the meaning of an unsigned Endorsement #7, to discuss O’Neal, and Werfele, as well as to mention the case at bar:

D. Unsigned Endorsement

During the oral argument of this matter, Appellant called to our attention (fn19) the fact that the signature line on Endorsement No. 7 to the National Union policy does not bear the signature of an authorized state representative.

Following oral argument, *Appellant asked this Court to take judicial notice of the fact that there are two recent circuit court rulings from West Virginia trial courts concluding that an unsigned endorsement is not part of an insurance policy*. Consequently, an unsigned endorsement cannot operate to modify the terms of coverage as intended by the insurer.

Citing language from O’Neal v. Pocahontas Transportation Co., 99 W.Va. 456, 129 S.E. 478 (1925), the Circuit Court of Marshall County (fn20) ruled that an unsigned endorsement (fn21) to an insurance policy issued by National Union Fire Insurance Company was not part of the insurance policy. See *id.* at 465, 129 S.E. at 481. Consequently, Appellant suggests that the language of Endorsement No. 7,

which seeks to limit coverage to liability arising from certain types of acts committed by the Department, would not be in effect as a means of excluding coverage were this same reasoning to be applied to this case.

Preferring to allow the lower court to rule upon this issue as an initial matter, we do wish to call this matter to the trial court's attention for purposes of remand. *Given both this issue of the unsigned endorsement--a matter that the Department will presumably seek to rectify in prompt fashion in both this case and others(fn22)--as well as the uncertainty of how the remaining issues will be decided, the parties may wish to pursue a more expeditious means of seeking finality in this case.(fn23)*

(emphasis added)

Demonstrating its concern over the unsigned nature of Endorsement #7, which appellant DOH had used in at least two "other" cases (Werfele and this one), this Court "suggested" that the appellant DOH "rectify in a prompt" fashion the Werfele case and the case at bar because the Endorsement was likely issued **prior** to the December 31, 2004 statutory amendment cutoff date requiring a countersignature. In footnote 22, the Blessing Court stated as follows:

During oral argument, Appellant referenced a statutory provision that requires the countersignature of a licensed resident agent of the insurer on every insurance contract to which the state is a party. See W.Va. Code § 33-12-11 (2004) (Repl. Vol. 2006). Although the 2004 amendments eliminated the countersignature requirements 'for any contract of insurance executed, issued or delivered on or after the thirty-first day of December, two thousand four,' *the countersignature requirements set forth in that provision were applicable because the insurance contract at issue in this case was executed before the effective date set forth in the amendment.*

(emphasis added)

Wherefore, on the basis of the foregoing, this Court should deny the appeal on these grounds.

- (ii) **ASSUMING, ARGUENDO, THIS COURT FINDS ENDORSEMENT # 7 TO BE VALID DESPITE ITS UNSIGNED NATURE, THEN THIS COURT SHOULD FIND THAT OTHER INSURANCE MIGHT APPLY TO COVER THE JUDGMENT AGAINST APPELLANT AND, THEREFORE, NO CONSTITUTIONAL IMMUNITY APPLIES**

Even if Endorsement # 7 did apply to exclude coverage in this case, despite its unsigned nature, other insurance may yet be determined to apply to cover the Judgment, through a Zurich and American Guarantee policy(ies) under which appellant was specifically listed as an “additional insured” for damages caused by its own negligence. As stated earlier, the trial court deferred ruling upon this coverage issue until the underlying Declaratory Judgment Action was completed. Therefore, the issue of appellant’s constitutional immunity, assuming, *arguendo*, that this Court found Endorsement # 7 to apply despite its unsigned nature, should be denied as not being ripe.

- (iii) **ASSUMING, ARGUENDO, THAT THIS COURT DOES NOT FIND THE UNSIGNED NATURE OF ENDORSEMENT #7 TO BE FATAL, ENDORSEMENT #7 SHOULD BE DECLARED NULL AND VOID AS BEING UNCONSCIONABLE AND IN VIOLATION OF PUBLIC POLICY**

Appellant is typically constitutionally immune from suit unless the suit seeks funds from insurance coverage outside of the State’s Treasury. To that end, our Legislature has required, by statute, the State Board of Risk and Insurance Management (“BRIM”) to “secure the maximum of protection against loss, damage or liability to state property and on account of State activities and responsibilities by proper and adequate insurance coverage.” W. Va. Code § 29-12-5(a) states, in pertinent part, as follows:

The [state board of risk and insurance management] shall have general supervision and control over the insurance of all state property, activities and responsibilities, including the acquisition and cancellation thereof; determination of amount and kind of coverage . . . and coverage of all such state property, activities and responsibilities. Any policy of insurance purchased or contracted for by the board shall provide that the insurer shall be barred and estopped from relying upon the constitutional

immunity of the state of West Virginia against claims or suits It *shall* endeavor to secure the *maximum of protection against loss, damage or liability* to state property and on account of state activities and responsibilities by *proper and adequate insurance coverage*[.]

(emphasis added) State Ex. Rel. West Virginia Dept. of Transportation, Division of Highways v. Madden, 192 W. Va. 497, 500, 453 S.E.2d 331, 334 (1994).

Through W. Va. Code §29-12-1, the Legislature also expressed its strong desire for the State to maintain insurance coverage to protect those it injures through negligence:

Recognition is given to the fact that the state of West Virginia owns extensive properties of varied types and descriptions representing the investment of vast sums of money; that *the state and its officials, agents and employees engage in many governmental activities and services* and incur and undertake numerous governmental responsibilities and obligations; that such properties are subject to losses, damage, destruction, risks and hazards and such activities and responsibilities are subject to liabilities *which can and should be covered by a sound and adequate insurance program.*

(emphasis added)

In syllabus point 2 of Johnson v. C. J. Mahan Constr. Co., 210 W. Va. 438, 557 S.E.2d 845

(2001), this Court held:

W. Va. Code, 29-12-1 [1994] evidences a remedial legislative purpose that the State establish mechanisms that will *assure that the State is financially responsible and accountable for injuries occasioned by culpable State action.*

(emphasis added) Thus, despite any immunity conferred upon appellant by the Constitution, our Legislature has made clear that BRIM is required to procure proper and adequate insurance for appellant so that appellant has maximum protection to be financially responsible and accountable for injuries occasioned to its citizens by its culpable action.

In this case, however, BRIM's attempt to use the unsigned restrictive Endorsement #7 would amount to a failure on its part to meet its duties under W. Va. Code §§ 29-12-1 and 5(a). By its terms, restrictive Endorsement #7 provides no protection to appellant for any of its activities in maintaining the State's road systems or guardrails, let alone maximum protection. Restrictive Endorsement #7 provides, in pertinent part, as follows:

it is agreed that the insurance afforded under this policy does apply (1) to claims of 'bodily injury' or 'property damage' which both directly result from and occur while employees of the State of West Virginia are *physically present at the site* of the incident at which the 'Bodily injury' or 'property damage' occurred performing construction, maintenance, repair, or cleaning (but excluding inspection of work being performed or materials being used by others).

As Endorsement #7 suggests, appellant is only "financially responsible and accountable for injuries it causes to its own citizens" when appellant's employees are *physically present at the site when the injury happens*. Given the fact that appellant always uses independent contractors to do its guardrail installation and repair work, there will never, or at least rarely, be a State WVDOT employee *physically present* at the site of an incident when an injury happens as a result of "culpable State action." Thus, by the terms of Endorsement # 7, BRIM is attempting to violate its duties under W. Va. Code §§ 29-12-1 and 5(a) by providing no protection for the State, nor to its injured citizens.

Furthermore, even if we assume that appellant uses its own employees from time to time to do guardrail construction or maintenance, under the interpretation of restrictive Endorsement #7 offered by appellant the above statutes would still be violated. Hypothetical: a WVDOT employee goes to a construction site in the morning, digs a giant hole in the middle of the road, then leaves for lunch or for the entire evening and leaves the hole in the road unprotected and unmarked with warning signs. Then, while WVDOT employees are not present, a vehicle, at nighttime, falls into

the hole causing serious injuries or death to a WV citizen(s). Under this scenario, appellant would be entitled to claim, under Endorsement # 7, that it is not “financially responsible for its culpable conduct” because its employees were not “physically present” at the site when the injury actually occurred. Such an interpretation is ludicrous and in violation of W. Va. Code §§ 29-12-1 and 5(a).

“In construing any insurance policy, it is appropriate to begin by considering whether the policy language is in accord with West Virginia law.” Adkins v. Meador, 201 W.Va. 148, 153, 494 S.E.2d 915, 920 (1997). “The terms of the policy should be construed in light of the language, purpose and intent of the applicable statute. Provisions in an insurance policy that are more restrictive than statutory requirements are void and ineffective as against public policy.” Gibson v. Northfield Ins., 219 W. Va. 40, 631 S.E.2d 598 (2005), citing syllabus point 2, Universal Underwriters Ins. Co. v. Taylor, 185 W.Va. 606, 408 S.E.2d 358 (1991); syllabus point 1, Bell v. State Farm Mut. Auto. Ins. Co., 157 W.Va. 623, 207 S.E.2d 147 (1974); syllabus point 2, Johnson v. Continental Casualty Co., 157 W.Va. 572, 201 S.E.2d 292 (1973).

This Court has already opined, at least in *dicta*, that the failure to insure a state agency against negligence resulting from the agency's **primary function** is suspect. In Ayersman v. Division of Environmental Protection, 208 W. Va. 544, 542 S.E.2d 58 (2000), a landowner brought an action against the Department of Environmental Protection (DEP) to recover for damage from flooding allegedly caused by a negligent mine reclamation project. The DEP countered that it was immune from suit since its insurance policy provided no liability coverage. The circuit court agreed and the DEP was dismissed on summary judgment. The landowner appealed, and this Court ultimately reinstated the case on the ground that the lower court's order lacked sufficient findings of fact and conclusions of law to permit meaningful review. However, this Court took the opportunity to

comment on the DEP's argument regarding the insurance exclusion:

DEP is in the unique position that it is charged with the restoration of sites left abandoned by others; DEP does not operate plants, factories, or mines of its own that might result in a 'governmental direction or request . . . to clean up . . . pollutants.' To the contrary, DEP actually is a government entity that directs or requests others to clean up pollutants.

Thus, the exclusion at issue seems particularly ill-suited for a policy written for the DEP. While we do not find it necessary to make a detailed analysis of the policy to resolve this appeal, *we are skeptical of any policy language that purports to exclude a primary function of the insured.*

(emphasis added) 208 W. Va. at 546, 542 S.E.2d at 60, fn.2.

In this case at bar, the first duty and primary function assigned to the Commissioner of the Division of Highways is to "[e]xercise general supervision over the state road system and the construction, reconstruction, repair, and maintenance of state roads and highways." See W. Va. Code § 17-2A-8(1). By its terms, restrictive Endorsement # 7 seeks to eliminate coverage for the DOH's primary function (i.e., maintaining the State's road systems, guardrails, waterways, or rights of way) and thereby precludes the DOH from "maintaining reasonable protection" so that it can be "financially responsible and accountable for injuries occasioned to its citizens by culpable State action." Therefore, even if this Court were to find the unsigned nature of Endorsement # 7 to not be fatal, this Court should find it to be void or invalid as against the public policy of this State.

(iv) THE TRIAL COURT DID NOT ERR IN FINDING ENDORSEMENT # 7 TO BE INAPPLICABLE TO FAILURE TO INSPECT CLAIMS GIVEN THAT IT DOES NOT SPECIFICALLY EXCLUDE SUCH A DUTY

Again, there are a couple of well-settled, overriding principles when it comes to insurance policy language, restrictive endorsements and claims of governmental immunity. First, "[w]here the policy language involved is exclusionary, it will be *strictly construed against the insurer* in order

that the purpose of providing indemnity not be defeated.” (Emphasis added). National Mut. Ins. Co. v. McMahan & Sons, Inc., 177 W. Va. 734, 740, 356 S.E.2d 488, 494 (1987). Second:

the general rule of construction in governmental tort legislation cases *favours 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.

(emphasis added). Marlin v. Bill Rich Const., Inc., 198 W. Va. 635, 643, 482 S.E.2d 620, 628 (1996).

In this case, the trial court held in its February 26, 2008 Order as follows:

The Court further FINDS and CONCLUDES that even if Endorsement 7 did operate to modify the insurance contract in question, the language of the endorsement does not exclude from liability the Division of Highways alleged failure to inspect. The Court finds a similar Wayne County case to be persuasive. In Titchnell v. The West Virginia Department of Transportation, Division of Highways, Circuit Court of Wayne County, Civil Action No. 03-C-266, Judge Pratt was called upon to interpret Endorsement 7 to the State's Comprehensive Liability Insurance policy. Judge Pratt concluded that the plaintiffs' claim, which was premised on the State's failure to inspect certain property adjacent to a public road, was not specifically excluded by Endorsement 7. Titchnell v. The West Virginia Department of Transportation, Division of Highways, Circuit Court of Wayne County, Civil Action No. 03-C-266, order entered August 24, 2005, Conclusions of Law at par. 6. Like the plaintiffs in Titchnell, the Plaintiffs in this case are claiming that the Department of Transportation, Division of Highways was negligent in its duty to inspect. The Court believes genuine issues of fact exist as to this issue. Specifically, the Plaintiffs assert a failure to inspect the damaged guardrail between the time it was damaged on February 1, 2004, until the damage was discovered on November 8, 2004, a period of over nine (9) months. The Plaintiffs assert, and the record supports, a similar failure and/or delay in further inspection of the guardrail between November 8, 2004, and the date the repairs were completed on February 7, 2005.

(See trial court's 2/26/08 Order, at pgs. 8-9)

In Titchnell v. WV DOH, CAN 03-C-266, Judge Darrell Pratt of Wayne County was faced with this same issue and with the same Endorsement # 7 argument by appellant WVDOT. Judge Pratt ruled that Endorsement #7 did not exclude coverage for appellant's failure to inspect a

dangerous condition of which it knew, or should have known. Importantly, after appellant filed a Writ of Prohibition to this Court in Titchnell, this Court denied the same 5-0. (See Copy of Judge Pratt's Order and this Court's Order, previously attached to Appellee's Response to Petition for Appeal as Exhibits B and C respectively)

In Titchnell, the plaintiff was operating her car on Route 152 in Wayne County when a tree, which was overhanging the DOH's right-of-way and/or the roadway, either fell on her vehicle or fell into the roadway and, as a result, the plaintiff's vehicle collided with the tree. Before the tree fell, it was located on the property of Wayne and Thomas Halfhill. Prior to its fall, the DOH knew or should have known that the tree could be a danger to the traveling public. With regard to insurance coverage in Titchnell, the same insurance policy and the same Endorsement # 7, as applies in the case at bar, was at issue. The plaintiffs alleged that the DOH was negligent in failing to inspect the tree located on the Halfhill property.

After citing the guiding principle in tort law that favors liability over immunity, as well as common law principles that favor compensating person injured by the acts of negligence of others, the Wayne County Circuit Court held that: "Because the duty to inspect is not specifically excluded by the language of endorsement number 7, plaintiffs' claim is covered by State insurance." This ruling was appealed to this Court and this Court refused to hear the same 5-0.

In the case at bar, not only should appellant have known about the dangerous condition of the site in question, it **actually knew** of the dangerous and emergent situation and labeled it as such months before appellee's accident. (T. Tr., Vol. I, at pgs. 215-22; T. Tr., Vol. II, at pgs. 157-59) Yet, between February 1, 2004 and February 7, 2005, appellant failed to conduct any inspection of this area, failed to secure the dangerous 100 ft embankment and failed to warn the public with any

barrels, warnings, etc. (T. Tr., Vol. I, at pgs. 213, 222, 224, 227; T. Tr., Vol. II, at pgs. 162-64, 179)

Thus, Endorsement No. 7, *strictly construed*, does not specifically exclude from coverage the failure to inspect claims proven by appellees at trial. Accordingly, this Court should determine that Endorsement #7 does not apply and uphold the trial court's determination that insurance is afforded to appellees under the policy in question.

B. THE TRIAL COURT DID NOT ERR IN FAILING TO REMIT THE JUDGMENT TO \$1 MILLION BECAUSE IT DEFERRED RULING ON THIS ISSUE AND, THEREFORE, THE ISSUE IS NOT RIPE FOR THIS COURT'S CONSIDERATION

Appellant argues that the trial court erred in failing to remit the Judgment to \$1 Million. However, appellant failed to advise this Court that the trial court *deferred* ruling upon this issue because, while appellant is covered by a liability insurance policy with limits of \$1 Million from National Union Fire Ins. Co., there is also evidence in this case that appellant is covered by *another* \$1 Million policy, as well as a \$20 Million excess liability insurance policy, held by its subcontractor, Penn Line. In fact, there is evidence currently before the trial court in a declaratory judgment action which demonstrates that appellant's subcontractor, Penn Line, specifically had appellant listed as an "additional insured" on its policies for said \$21 Million, thereby covering appellant for its own acts of negligence under said policies. For this Court to rule on this issue at the present time would be premature.

The law in this State under Pittsburgh Elevator Co. v. West Virginia Board of Regents, 172 W. Va. 743, 310 S.E.2d 675 (1983) provides that suits which seek no recovery from State funds, but rather funds up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State. This is precisely what appellees are seeking in this case (i.e., funds up to the limits of the State's liability insurance coverage.)

The appellees, contrary to appellant's blanket and unsupported assertions, admittedly cannot, are not and will not seek to collect funds from the State's Treasury. Rather, appellants seek only to collect what is due to them, as a result of appellant's arguably *gross* negligence from **any and all available liability and/or excess liability insurance proceeds**. As the trial court has clearly held:

What I am going to do is *defer ruling* on the Division of Highways' request to reduce the verdict *until some discovery can occur and information can be submitted to me so that I can properly determine exactly how much insurance coverage there is out there, because I believe a real question exists as to whether or not it is limited only to the million or whether or not there is more insurance coverage than that*. And because of that question, I don't believe I can properly reduce the jury's verdict to the one million, because I would -- that presupposes me being convinced that there's only a million. It would have to be reduced to the amount available that -- to the Division of Highways and that I just don't know based on this record. We know there's at least a million, but because of the other issues that we've discussed today, I don't know what it's capped at. So that part of your motion, Dana, *I am going to defer until there is additional discovery*. Discovery, I would envision, would include discovery directed at the Division of Highways inasmuch as they are listed on this liability of insurance, but while I'm not ordering it, I think it would be difficult to conduct comprehensive discovery without also obtaining discovery from the other insurance company, AIG or Zurich, whoever generated this certificate of liability insurance that lists the Division of Highways as an additional insured under this policy.

So where this is like -- the direction this is going is a declaratory judgment action of some sort.

(emphasis added) (May 30, 2008 Transcript, pgs. 36-38)

The trial court codified its oral rulings above in a June 24, 2008 Order as follows:

2. Defendant's Motion for Entry of an Order Modifying or Altering the Judgment - ***DEFERRED***. On the basis of the record presently before the court, ***it appears that there may be insurance which may apply to the payment of some or all of the Judgment in this case***. As such, before the court can make any final determination on this issue, the court hereby ORDERS the parties to undertake such discovery as is necessary to determine the full extent of insurance which may apply to the payment of any and/or all of the Judgment in this case.

(emphasis added) (See the trial court's 6/24/08 Order from its 5/30/08 hearing)

Appellant's citation of Blessing v. Nat'l Eng. & Contracting Co., 664 S.E.2d 152 (W. Va. 2008) for the proposition that the State's immunity applies only to the \$1M BRIM policy is misplaced. Blessing involved an analysis by this Court of whether a "hold harmless and indemnification" language in a contract between the State and one of its contractors constituted "insurance," over and above the BRIM policy, so as to remove the State's immunity. Clearly, "hold harmless and indemnification" language, in and of itself, is not "insurance."

In the case at bar, the parties are involved in a declaratory judgment action involving a specific insurance policy(ies) where appellant was specifically named as an "additional insured" for its own acts of negligence. Therefore, inasmuch as the trial court clearly *deferred* ruling upon this remittitur issue, this issue is not ripe for this Court's consideration and this Court should accordingly deny appellant's first assignment of error.

C. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT AS A MATTER OF LAW ON APPELLANT'S NEGLIGENCE WHERE APPELLANT DID NOT CONTEST THE SAME AT TRIAL AND WHERE NO REASONABLE JURY COULD HAVE CONCLUDED OTHERWISE

After the close of the evidence, the trial court ruled on the issue of appellant's negligence, without objection or response from appellant, as follows:

Well, having heard all of the evidence in the case, and the Court having yesterday taken under advisement the plaintiffs' motion concerning duty breach, what I've been referring to as negligence. I'm going to make the following findings. I believe that *this record, with respect to the issue of negligence, clearly establishes* the following: That the subject section of the guardrail was damaged; that the Division of Highways knew it was damaged months before this accident; that the Division of Highways knew that before this accident that this was a priority road; the Division of Highways knew that the damaged guardrail constituted an emergency condition; they also knew that the damaged guardrail to be a non-functional portion of the guardrail that had been damaged, pursuant to their own policies and Ms. Westbrook's testimony; that the Division of Highways' policies under these circumstances required warnings and a fix of a non-functional portion of the

guardrail, which was not accomplished or scheduled pursuant to the evidence per those policies as corroborated by Mr. -- well, the Penn Line witness who testified.

The evidence also clearly establishes that the Division of Highways maintained an office a short distance. I think it's been referenced from a low of two up to possibly five miles from the damaged area of the guardrail. The record, the Court believes, also establishes, *without rebuttal*, that manpower was available to make this fix, that the fix was rather simple. The evidence would indicate that it ultimately took approximately \$1,000 or a little or little less and approximately one hour of labor. The Court also believes that the guardrail could have been fixed approximately one day following notice to the DOH contractor, that being Penn Line.

Furthermore, the Court finds that the record establishes that *there's been no expert testimony to rebut had offered by Mr. Ramisch or other evidence concerning duty and alleged breach of duty*, and, furthermore, the Court would find that the evidence in the record clearly establishes that no warnings by way of cones, barrels, were set up following the notice of the damaged guardrail pursuant to DOH policies.

Accordingly, it -- after careful review of the record and hearing the testimony, the Court is going to grant the motion inasmuch as *the Court believes that there is no way any reasonable trier of fact could ever conclude that the Division of Highways' conduct was anything but negligent under these circumstances*.

The Court makes no findings with respect to proximate cause of the accident or -- of course, as we discussed yesterday, proximate cause concerning the extent of the damages. Now, I will within the charge make the jury aware that as matter of law, the Division of Highways is negligent and advise them that the issues of proximate cause are still theirs to decide, and if so, what damages, if any.

.....

I went back and reviewed the records and indeed failure to inspect was alleged and is part of the evidence *unrebutted*, in particular, Ms. Westbrook and Mr. Ramisch's testimony.

(emphasis added) (T. Tr., Vol. IV, pgs 99-101 and 106-07)

Clearly, the trial court did not rule on this issue without careful deliberation and a review of the evidence. The issue of appellant's negligence (i.e., its failure to warn, inspect or timely repair an admittedly known "emergency situation" caused by a "non-functional" guardrail on a "first

priority road”) was **uncontradicted and unrebutted**. Importantly, at a February 20, 2008 hearing, appellant admitted it was **undisputed** that this damaged guardrail presented an “emergency situation” to the public and that it failed to repair the guardrail in violation of its own policies, for at least over three (3) months. (See February 20, 2008 transcript, at pgs. 18-19, previously attached to Appellee’s Response to Petition for Appeal as Exhibit G)

In a post-trial hearing on May 30, 2008, the trial court further elucidated the gravity and extent of the appellant’s **uncontradicted and unrebutted** negligence:

I had an opportunity to review them carefully, as well as all the decisions that are raised within those briefs, motion and the response to the motion. I am not going to alter any of the previous rulings made by the Court or make any finding that those rulings under the law constitute a basis for a new trial or altering anything that the jury did. I believe that the record clearly supports the jury's findings that were made.

Additionally, I believe the record clearly supports the rulings that were made, both pre-trial and during the trial. The trial record, frankly, zeroing in on only one part of the issues that you raise, Dana. *The trial record, I believe, clearly established negligence of the Division of Highways. And, frankly, one of the clearest cases of negligence I've seen in seven and-a-half years. Some could even argue gross negligence. And that conclusion can arguably be reached just based on what the DOH rep said at trial.* Notwithstanding the expert testimony insofar as their own policies and procedures and conduct with respect to this roadway guardrail, et cetera.

(See May 30, 2008 Transcript, at pgs. 38-38)

Clearly, there was no question of fact for the jury on this issue. Furthermore, appellant waived any right to complain about this issue given that it **did not object or even respond** to the Court’s ruling at trial.

Nevertheless, now, before this Court, appellant argues that the trial court erred in taking negligence away from the jury because questions of fact existed in light of testimony from the driver of the vehicle, Richard West, and from appellee’s expert, Andrew Ramisch -- which, allegedly, was

of such nature to imply that the driver “intentionally” steered his vehicle so as to avoid hitting the existing end of the damaged guardrail prior to going over into what he believed was a “meadow.” Appellants argument is fatally flawed and must fail.

The trial court’s ruling on appellant’s negligence (i.e., failure to timely repair, inspect and warn) goes **not** to what happened with the driver and his vehicle on January 20, 2005 *vis-a-vis* the **existing** damaged and unrepaired guardrail, but rather it goes to what appellant failed to do to the damaged guardrail prior to the date of the incident on January 20, 2005. In other words, appellant’s negligence did **not** involve questions of whether the driver, Rich West, attempted to mitigate the severity of the accident by trying to steer his vehicle head first (instead of sideways) into what he believed was a “meadow.” The driver’s actions on January 20, 2005 go toward the *proximate cause* of appellee’s injuries and **not** appellant’s negligence in failing to repair the guardrail prior to that time. Would the driver, taking into considering his “steering,” have struck the **repaired** 17 ft. section of missing guardrail had it been installed/repared prior thereto by appellant? If so, would the vehicle have been prevented from going over the embankment? These were legitimate questions for the jury, but they were/are issues of *proximate cause* -- **not** negligence.

On these latter issues the trial court did **not** prevent appellant from presenting, and in fact appellant did present, evidence. These questions were properly submitted to the jury and the jury resolved them in favor of appellees. The appellant cannot now complain of the verdict simply because the jury decided against appellant. As such, this Court should deny this assignment of error.

D. THE TRIAL COURT DID NOT ERR IN REFUSING TO LET THE JURY ASSESS THE NEGLIGENCE OF A NON-PARTY (I.E., THE DRIVER) BECAUSE APPELLEE'S COMPARATIVE NEGLIGENCE WAS NOT AN ISSUE AND APPELLANT DID NOT ATTEMPT TO ARGUE, NOR DID IT PRESENT EVIDENCE, OF INTERVENING CAUSE

Appellant incorrectly cites Miller v. Monongahela Power Co., 184 W.Va. 663, 403 S.E.2d 406 (1991) and Bowman v. Barnes, 168 W.Va. 111, 282 S.E.2d 613 (1981), for the proposition that all tortfeasors should be included on a verdict form, whether a party or not. However, Miller and Bowman are inapplicable because the legal principle involved in those cases was how a jury should analyze the *comparative negligence of the plaintiff*, so that it might be determined whether a plaintiff would be barred from recovery where his/her negligence might be found to exceed the combined negligence of all persons involved.

In order to obtain a proper assessment of the total amount of the *plaintiff's contributory negligence* under our comparative negligence rule, it must be ascertained in relation to all of the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation.

(emphasis added) Syl. pt. 4, Miller v. Monongahela Power Co., 184 W.Va. 663, 403 S.E.2d 406 (1991) (citing syl. pt. 3, Bowman v. Barnes, 168 W.Va. 111, 282 S.E.2d 613 (1981)).

In Sitzes v. Anchor Motor Freight Inc., 169 W.Va. 698, 289 S.E.2d 679 (1982), this Court stated:

Bradley's concern was in the area of the plaintiffs contributory negligence and modified the common law rule that any contributory negligence of the plaintiff barred his recovery. In Bradley, we adopted a rule of comparative contributory negligence allowing recovery to the plaintiff so long as the plaintiffs degree of contributory negligence did not equal or exceed that of the primary negligence of the other parties to the accident.

Sitzes, 289 S.E.2d at 711.

The most recent case in which this Court has spoken on this issue is Rowe v. The Pallottine Missionary Society, 211 W.Va. 16, 560 S.E.2d 491 (2001), where this Court made clear the fallacy of appellant's argument in syllabus point 7:

7. Without some proof of negligence by the plaintiff, there is no requirement that the jury be instructed to ascertain or apportion fault between the defendant and a non-party tortfeasor.

In Rowe, a medical malpractice case against a hospital, the appellant hospital contended that the jury should have been instructed to consider the negligence of other non-party doctors and that the trial court erred by refusing to instruct the jury that it could apportion comparative negligence between these non-party tortfeasors and the appellant hospital. In rejecting the appellant hospital's argument and upholding the trial court, this Court cited and explained Bowman and held as follows:

In Bowman v. Barnes, 168 W.Va. 111, 282 S.E.2d 613 (1981), we held at Syllabus Point 3 that:

In order to obtain a proper assessment of the total amount of the plaintiff's contributory negligence under our comparative negligence rule, it must be ascertained in relation to all of the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation.

As Bowman v. Barnes makes clear, the comparative negligence doctrine applies only when a plaintiff has been contributorily negligent--the negligence of the plaintiff in causing his or her injury is ascertained in relation to all other tortfeasors.

Consequently, without some proof of negligence by the plaintiff, there is no requirement that the jury be instructed to ascertain or apportion fault between the defendant and a non-party tortfeasor. See Travelers Ins. Co. v. Ballinger, 312 So.2d 249, 251 (Fla.App.1975). More importantly, even if the plaintiff is guilty of some contributory negligence, in the absence of substantial evidence, an attorney cannot make an 'empty chair' argument and blame an absent tortfeasor for a plaintiff's injury. As we recently stated in Syllabus Point 2 of Doe v. Wal-Mart Stores, Inc., 210 W.Va. 664, 558 S.E.2d 663 (2001):

It is improper for counsel to make arguments to the jury regarding a party's omission from a lawsuit or suggesting that the absent party is solely responsible for the plaintiff's injury where the evidence establishing the absent party's liability has not been fully developed.

In the instant action, the only parties are the plaintiff-appellee, Mr. Rowe, and the defendant-appellant, St. Mary's Hospital--and as we indicated above, the appellant failed to establish a cognizable issue at trial as to whether the appellee was in any way contributorily negligent. Accordingly, the only issue at trial was whether the appellant was negligent, and whether the appellant's negligence proximately caused the appellee's damages. Without more, *the alleged negligence of other non-party tortfeasors would appear to be irrelevant, and argument or instructions regarding the liability of the non-party tortfeasors improper.*

(emphasis added) Rowe, 560 S.E.2d at 499-500.

In the case at bar, where there was no question of innocent-passenger appellee's comparative negligence, the only question as to other potential non-party tortfeasors was whether their alleged negligence constituted an *intervening cause* of appellee's injuries so as to absolve appellant of its culpability. In this regard, the trial court correctly ruled in its March 3, 2008 pre-trial Order (previously attached to Appellee's Response to Petition for Appeal as Exhibit D), as follows:

While it is true that Richard West was initially named as a Defendant, the Plaintiffs settled their claims with him.² None of the remaining Defendants challenged the settlement. As a result of the good faith settlement, Richard West was dismissed and is no longer a party to this lawsuit. The Court cannot allow a non-party to appear on the verdict form for the purposes of attributing fault. Richard West is not currently a party to this lawsuit, he will not be represented by counsel at the trial, and therefore he cannot be subject to a verdict assessing liability to him.

The DOH is correct that the defense of intervening cause permits a defendant to argue the negligence of a non-party, Sydenstricker v. Mohan, 217 W.Va. 552, 559, 618 S.E.2d 561, 568 (2005). However, the defense of intervening cause is a specific defense that operates to negate the element of proximate cause:

² Appellees settled with the driver's liability insurance carrier in and around March of 2005, several years before the trial in March of 2008, and even before appellees hired a lawyer.

Our law recognizes that “[a]n intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury.” Sydenstricker v. Mohan, 217 W.Va. 552, 559, 618 S.E.2d 561, 568 (2005); quoting Estate of Postlewait ex rel. Postlewait v. Ohio Valley Med. Ctr., Inc., 214 W.Va. 668, 674, 591 S.E.2d 226 (2003) (quoting Syl. pt. 16, Lester v. Rose, 147 W.Va. 575, 130 S.E.2d 80 (1963)).

If the DOH is asserting a true intervening cause defense, it is not necessary that the alleged ‘intervenor,’ or absent party, be included on the verdict form. If the jury finds in favor of the DOH on the theory of intervening cause, it simply finds that the DOH is not liable to the Plaintiffs. Accordingly, with respect to this issue, the Court will permit the parties to discuss the facts surrounding Richard West’s involvement in the accident. The parties may not argue or suggest that the jury is to allocate a percentage of fault to Richard West on the verdict form, and Richard West will not appear on the verdict form.

(emphasis added)

In this case, appellant’s attempts to blame the non-party driver for appellant’s own actions/inactions are nothing more than attempts to blame-shift and finger point at an “empty-chair” at trial, which this Court has consistently recognized as being improper. See Groves v. Compton, 167 W. Va. 873, 879, 280 S.E. 2d. 708, 712 (1991) (counsel may not argue why a party has not been brought into a lawsuit or that an absent party is responsible for the tort); Doe v. Wal-Mart Stores, Inc., 210 W. Va. 664, 558, S.E.2d 663 (2001) (an argument that absent parties were responsible for the plaintiff’s injuries were improper); Green v. Charleston Area Medical Center, Inc., 215 W. Va. 628, 600 S.E. 340 (2004) (Court held that counsel’s argument that an absent party caused the injuries/death of the plaintiff were improper because “evidence relating to [the absent party’s] liability was not fully developed,” and because “the argument was blame-shifting type of argument prohibited by Groves v. Compton.”)

In this case, the driver of the vehicle in question, Rich West, was only a party to the lawsuit for a brief time, as a third-party defendant brought into the case by subcontractor Penn Line, and was quickly dismissed from the case, **without objection by appellant**. Despite its contentions to this Court now, at **no time** during the underlying litigation or trial did appellant present as a defense that driver Rich West was an *intervening cause* to the injuries of appellee. In fact, appellant failed to present *any* evidence at trial of *any* negligence by the driver Rich West.

The trial evidence demonstrated that the driver was going well within the speed limit at the time his vehicle came into contact with some slush on the road (i.e., 30-35 mph in a 55 mph zone) and that he was able to bring his vehicle down to anywhere from 8-15 mph (according to appellant's own engineering expert Stansifer) as the vehicle went passed the area where the 17 ft of guardrail should have been repaired by appellant and then over the 100 ft. embankment. Interestingly, appellant DOH itself raised as an affirmative defense that the driver Rich West was going so slow at the time his vehicle went over the 100 ft. embankment that appellee Keith West could have jumped out of the vehicle and thereby avoided his injuries. (T. Tr., Vol. II, pgs. 168-73; Answer of WVDOT, filed on or about 6/5/07) The driver was not cited, nor found to have "contributed" to the incident, by the WV State trooper who investigated the accident.

In addition, appellant presented no expert testimony regarding the driver's alleged negligence. Appellant's only expert to testify at trial, engineer and accident reconstructionist Ricky Stansifer, testified that he was **not asked** by appellant to analyze, nor was he offering to the jury any opinion on, whether the driver Rich West was negligent in any fashion. (T. Tr., Vol. IV, pg. 21)

Despite having no lay or expert testimony before it tending to establish driver Rich West as an *intervening cause*, the trial court nevertheless permitted appellant to present any and all facts it desired surrounding the driver's involvement, how the accident happened, the speed of the vehicle, how the vehicle left the roadway, how the vehicle went over the embankment, etc. If the jury believed that the driver was the cause of the accident, instead of appellant DOH, then the jury could have found against appellee and for appellant on the issue of proximate cause. However, the jury instead found that appellant proximately caused appellee's injuries and appellant cannot now complain simply because it disagrees with this decision. Thus, this Court should deny this assignment of error.

E. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW APPELLANT TO ARGUE THAT APPELLEE DID NOT HAVE HIS SEAT BELT ON IN LIGHT OF W.VA. CODE § 17C-15-49(d) AND ESTABLISHED CASE LAW

W. Va. Code §17C-15-49(d) states, in pertinent part, as follows:

(a) Effective the first day of September, one thousand nine hundred ninety-three, a person may not operate a passenger vehicle on a public street or highway of this state unless the person, any passenger in the back seat under eighteen years of age, and any passenger in the front seat of such passenger vehicle is restrained by a safety belt meeting applicable federal motor vehicle safety standards.

.....

(d) A violation of this section is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages: Provided, That the court may, upon motion of the defendant, conduct an in camera hearing to determine whether an injured party's failure to wear a safety belt was a proximate cause of the injuries complained of. Upon such a finding by the court, the court may then, in a jury trial, by special interrogatory to the jury, determine (1) that the injured party failed to wear a safety belt and (2) that the failure to wear the safety belt constituted a failure to mitigate damages. The trier of fact may reduce the injured party's recovery for medical damages by an amount not to exceed five percent thereof. *In the event the plaintiff stipulates to the reduction of five percent of*

medical damages, the court shall make the calculations and the issue of mitigation of damages for failure to wear a safety belt shall not be presented to the jury. In all cases, the actual computation of the dollar amount reduction shall be determined by the court.

(emphasis added)

Although appellee maintained prior to trial that he was wearing his seat belt at the time of the incident, to the extent that some medical records existed which may have confused the issue appellee decided to take this issue off the table and let the jury focus on the main issues. Based upon the above statute, appellee stipulated to the reduction of five percent of his medical damages. Thereafter, pursuant to an Order entered on January 30, 2008, the trial court correctly held that in light of appellee's willingness to stipulate to a reduction of five percent of his medical bills pursuant to W. Va. Code §17C-15-49(d):

Plaintiffs' Motion to Exclude Seat Belt Evidence, which moved to exclude any and all evidence, reference or argument relating to seat belt restraint, usage or lack of usage, is hereby GRANTED. Furthermore, any relevance or probative value such evidence may have in regards to plaintiffs' 'credibility' is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

(See copy of trial court's January 30, 2008 Order, at pg. 4, previously attached to Appellee's Response to Petition for Appeal as Exhibit E)

Despite the above Order by the trial court, appellant argued that it should be permitted to show that appellee was "ejected" from the vehicle in order for their engineering expert, Sandra Metzler, to be able to opine on the "speed" of the vehicle before it went over the embankment. Unpersuaded by appellant's backdoor attempt to circumvent the statute, the trial court again, by Order dated February 14, 2008, found and held as follows:

The Court agrees with the Defendants that the issue of ejection is relevant to the determination of the speed of the vehicle. The Court notes that Sandra Metzler, D.Sc., who will present expert testimony on behalf of Defendant Penn Line Service,

Inc., relied, in part, upon Keith West's final resting position at the scene of the accident in arriving at her conclusion regarding the speed of the vehicle. She also relied on other factors, such as the nature and severity of Keith West's injuries.

On the other hand, the issue of ejection is undoubtedly closely tied to the safety belt issue. The Court also shares the Plaintiffs' belief that *once the jury hears evidence that Keith West was ejected from the vehicle, it will conclude that he was not restrained, and potentially allow that fact to affect its verdict. Any mention that Keith West was ejected will be tantamount to a violation of W.Va. Code § 17C-15-49(d), because it will indirectly inject seat belt evidence into the case. Because comparative negligence is [not] an issue in this case, the Court cannot allow any party to present evidence indirectly that it is precluded from offering directly, particularly when the statute prohibiting safety belt evidence is clear.*

Moreover, the Court does not believe that a cautionary instruction would cure the prejudice to Plaintiff, inasmuch as any such instruction would likely draw even more attention to the seatbelt issue and result in an enhanced degree of prejudice.

Accordingly, the Court FINDS and CONCLUDES that the danger of unfair prejudice to the Plaintiffs outweighs the probative value of the ejection evidence. *In reaching this conclusion, the Court is not precluding Sandra Metzler, or any other qualified person, from testifying to conclusions reached regarding the speed of the vehicle, rather it is simply precluding reference to 'ejection' as one of the basis for any such conclusion(s).*

It is hereby

ORDERED that Plaintiffs' Motion to Exclude Any Reference to Keith West's Ejection from the Vehicle is GRANTED.

(emphasis added) (See copy of trial court's February 14, 2008 Order, at pgs. 3-4, previously attached to Appellee's Response to Petition for Appeal as Exhibit F)

Appellant cites no law to this Court which would demonstrate that the trial court improperly applied W. Va. Code §17C-15-49(d). Instead, the appellant argues to this Court, as it did before the trial court, that it should have been able to get in through the back door (i.e., to attack appellee's "credibility") what W. Va. Code §17C-15-49(d) prevented them from getting in through the front door.

This Court recently rejected a similar attempt by a defendant to circumvent the terms of W. Va. Code §17C-15-49(d). In Estep v. Ferrell Ford Lincoln-Mercury, 672 S.E.2d 345 (W. Va. 2008), a jury found against defendant Ford in a lawsuit brought by plaintiff Estep alleging that their 1999 Ford Ranger was defective because the vehicle's air bags failed to deploy and thereby failed to protect Ms. Estep during a single vehicle crash. Id. at 349. Ms. Estep was alone in the vehicle and was not wearing a safety belt at the time of the crash. Id. By order entered on January 27, 2006, and based upon a stipulation by the plaintiff Estep of a 5% reduction to the medical bills in the verdict, the lower court granted the Esteps' motion in limine to exclude safety belt evidence from presentation at trial based upon the provisions of West Virginia Code 17C-15-49 (1993). Id. at 350. Defendant Ford maintained on appeal to this Court that it did not want to offer the safety belt evidence for purposes of negligence or mitigation of damages, but instead wanted to use it to refute Ms. Estep's claim that Ford did not use reasonable care in designing the 1999 Ranger to restrain occupants in a crash such as this. Id. at 353.

In rejecting this argument, this Court stated:

Although couched in different terms, Ford's intended use of the evidence nevertheless does relate to negligence and mitigation of damages. It would allow Ford to show that Ms. Estep contributed to her enhanced injury by failing to wear her safety belt, which in turn could influence the issue of mitigation of damages. Without a proviso excluding crashworthiness cases, such use of this evidence is in derogation of the express terms of the safety belt statute.

.....

[T]he Legislature sought to promote public safety by protecting drivers and passengers traveling on our state highways. Protection of the citizenry is a legitimate state interest. Based upon the facts before us, *the evidentiary preclusion set forth in the mandatory safety belt law appears to be a reasonable extension of the concern of the Legislature for the protection of drivers and passengers by allowing them to stipulate to a fixed reduction in damages in order to seek recovery unimpeded by*

the safety belt defense when they are injured in an accident. Taken as a whole, West Virginia Code § 17C-15-49 represents a rational policy that punishes noncompliance with the safety belt mandate through fines if certain conditions are met, but *avoids a second ‘punishment’ of denying or severely limiting an injured plaintiff’s recovery in a related civil action. The public policy underlying the statute may also reflect legislative recognition that such evidence could prove highly prejudicial and confusing to the trier of fact. We additionally observe that the Legislature did not ignore the interests of defendants in such cases since it tempered the effect of the evidentiary preclusion by specifying a statutory method for mitigating damages. This legislative intent and purpose is furthered whether or not the evidence of safety belt use is limited or precluded under the terms of the statute.* Accordingly we find that West Virginia Code § 17C-15-49 (d) (1993) (Repl.Vol.2004), providing for the limitation or preclusion of the use of safety belt evidence in any civil action or proceeding for damages, has a reasonable and rational basis related to a legitimate state interest and does not violate the due process guarantee of Article III, section 10 of the West Virginia Constitution.

Id. at 353-55.

The trial court properly applied the terms of the W. Va. Code §17C-15-49(d) and, over and above the statute itself, properly exercised its discretion under Rule 403 of the West Virginia Rules of Civil Procedure. This Court should deny this assignment of error.

F. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT DISCLOSING TO THE JURY ANY PRE-TRIAL SETTLEMENT BETWEEN PENN LINE AND APPELLEES WHERE APPELLANT NEVER ASKED THE TRIAL COURT TO INFORM THE JURY OF THE SAME AND, THEREFORE, WAIVED ANY RIGHT TO NOW COMPLAIN ON SUCH GROUNDS TO THIS COURT

Appellant argues that the trial court abused its discretion in failing to disclose to the jury the facts surrounding the settlement reached prior to trial between appellees and the subcontractor Penn Line. However, what appellant fails to advise this Court is that appellant never requested that the trial court advise the jury of the same. The only discussion surrounding this issue occurred on the first day of trial as follows:

1 MR. EDDY: Just so we're clear, how are
2 we going to hand the issue of the settlements of the
3 other two parties?

4 THE COURT: In terms of?

5 MR. EDDY: I assume at some point the
6 jury is going to be informed that they -- that there
7 was a settlement.

8 MR. FRANK CUOMO: There doesn't have to
9 be.

10 THE COURT: Why would -- why would they
11 have to be informed of that?

12 MR. EDDY: All right. Well, that's my
13 answer.

14 THE COURT: Well, I mean, is there a
15 legal reason? I mean, I understand the setoff issues,
16 but those are post-trial -- those are post-trial
17 issues.

18 MR. EDDY: Well, I thought it was
19 traditionally accepted that -- in terms of what
20 appeared to be necessary parties, the jury could be
21 informed that there was a settlement, but the terms of
22 settlement did not necessarily have to be disclosed.

23 MR. JASON CUOMO: We -- yeah. I'm not
24 convinced that we don't necessarily want to do that
25 ourselves, as well. Can we wait to see how everything

10

1 comes out? I mean, I don't think it should be talked
2 about during the trial, but if somebody -- if the
3 Court wants to mention -- if we come to an agreement
4 at some point and the Court wants to instruct the jury
5 prior to their deliberation on something relating to
6 the settlement, maybe we can reserve the right to deal
7 with it.

1 MR. EDDY: *Well, it may be to my*
2 *advantage that we don't, so I agree with Jason, we'll*
3 *wait and see.*

4 THE COURT: Okay. Well, *we can defer*
5 *that and you guys can just let me know how you propose*
6 *to handle it and for what reason we would have to*
7 *inform them.* I'm not saying, you know, it's improper
8 or that it is proper, but we can defer it and see how
9 things shake out and to what extent they're told of
10 any resolution.

(emphasis added) (T. Tr., Vol. I, pgs. 9-12)

Clearly, not only did appellant's attorney advise the trial court that "it may be to [his client's] advantage" to not disclose the settlement to the jury, but the trial court gave appellant an opportunity to address the matter again by advising appellant to "let me know how you propose to handle it and for what reason we would have to inform them." Nevertheless, at no time thereafter did appellant ever object or request that the trial court inform the jury of any pre-trial settlement facts regarding subcontractor Penn Line.

Furthermore, appellant **failed to raise this argument in any post-trial motions or hearings** before the trial court. In fact, appellant has not cited any reference to this Court where such a request or objection by appellant might be located in the record. How can a trial court abuse its discretion on a issue it was never asked to address? Thus, appellees respectfully submit that this Court should deny this assignment of error by appellant on grounds of waiver and/or acquiescence.

It should be noted here that as to this ground for appeal, appellant wrongfully represents to this Court in its brief that "[t]he Appellees' Complaint, like the complaint in Johnson v. C. J. Mahan Construction Co., 210 W. Va. 438, 557 S.E.2d 845 (2001), centered upon DOH's alleged negligent

retention of Penn Line.” While this was part of the Complaint, appellees also alleged negligence against the appellant in paragraphs 32 and 33 for its failings in “repairing, maintaining and timely installation of damaged or destroyed guardrails,” as well as in failing to warn the public, including the appellees, of the dangerous condition created by the unrepaired guardrail and unsecured 100-ft embankment. (See Appellees’ Complaint)

Furthermore, plenty of evidence was presented to the jury on these issues and the trial court, **without objection by appellant**, permitted the appellees to amend their Complaint to conform to the evidence:

114

19 MR. JASON CUOMO: Well, maybe under the
20 Rules you do. *I would move -- if we have -- to the*
21 *extent you have to, that the complaint be amended to*
22 *conform to the evidence presented at trial on the*
23 *issues -- well, whatever the evidence showed.*

24 MR. EDDY: *I don't object. I don't think*
25 *it matters.*

115

. . . .

4 MR. FRANK CUOMO: I think once you allege
5 negligence in the complaint, which is simplified
6 pleadings, simple pleadings -- what do they call that
7 now?

8 MR. EDDY: Notice.

9 MR. FRANK CUOMO: Notice of pleading that
10 whatever Rules were violated, I think will come in
11 anyway. I don't think you have to amend your
12 complaint to include, but you can make the motions.

. . . .

21 THE COURT: Well, is there any -- let me
22 ask this: Is there any --

23 MR. EDDY: *No objection.*

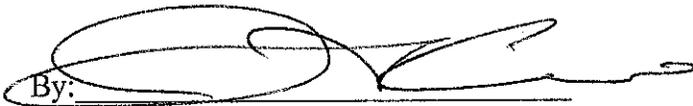
24 THE COURT: -- objection? Okay.
25 Motion granted.

(emphasis added) (T. Tr. Vol. III, pgs. 114-15)

IV. RELIEF PRAYED FOR

For all of the foregoing reasons, appellees respectfully requests that this Honorable Court enter an Order denying appellant's Appeal, uphold the trial court's rulings and, as a result, uphold the long awaited and deserving verdict of the appellees.

Appellees,

By: 

Jason A. Cuomo, Esq. (WV BIN 7151)

CERTIFICATE OF SERVICE

I do hereby certify that on the 25th day of June, 2009, I served the foregoing APPELLEES' BRIEF IN RESPONSE TO APPELLANT'S BRIEF upon the appellant by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Charles L. Woody, Esq.
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
P.O. Box 273
Charleston, WV 25321-0273
304-340-3800
Counsel for appellant West Virginia
Department of Transportation, Division of Highways,

Appellees,

By: 

Jason A. Cuomo, Esq. (BIN 7151)
CUOMO & CUOMO
Attorneys At Law
1511 Commerce St.
Wellsburg, WV 26070-1322