

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HOWARD WRENN and SANDRA  
BELCHER, as Natural Parents  
and Co-Administrators of the  
ESTATE OF MATTHEW WRENN,  
and ANGELIA HARPER, as Natural  
Mother and Administrator of  
the ESTATE OF JUSTIN JANES,

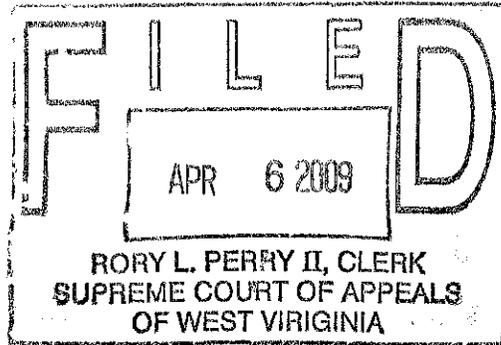
Appellants,

v.

No. 34717

THE WEST VIRGINIA DEPARTMENT  
OF TRANSPORTATION, DIVISION  
OF HIGHWAYS,

Appellee.



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APPELLEE'S BRIEF

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## STATEMENT OF THE CASE

The Appellants' Statement of Facts provides a considerable amount of background information, but the only relevant fact, reflected in the dismissal order at issue here, is that the Appellants have never alleged that DOH employees were present at the scene of the accident upon which their claims are based, and the Appellants effectively admit that DOH employees were not present. The only relevant facts are those relevant to the trial court's determination of its own jurisdiction. A substantial portion of the information provided in the Appellants' Statement of Facts is neither relevant, nor is it, strictly speaking, fact. To the contrary, as might be suggested by the lack of references to the record, the information consists of factual allegations, and is not based upon the development of a record at the trial court level.<sup>1</sup>

Although the Appellants plainly state that the trial court determined that it lacked subject matter jurisdiction (Brief of Appellants at 1, "Kind of Proceeding and Nature of the Ruling in the Lower Tribunal"), they fail to note that the motion to dismiss at issue was filed pursuant to Rule 12(b)(1). Subsequently (Brief of Appellants at 9, "Discussion of Law"), the Appellants include a short section on the standard of review that they contend is applicable to this appeal. This section refers to case law pertaining to motions to dismiss for failure to state a claim under Rule 12(b)(6). Several cases cited by the Appellants, including *Forshey v. Jackson*, 671 S.E.2d 748 (W.Va. 2008); *Murphy v. Smallridge*, 196 W.Va. 35, 468 S.E.2d 167 (1996); and *John W. Lodge Distrib. Co., Inc. V. Texaco, Inc.*,

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<sup>1</sup>If, however, the factual allegations set forth as background information are assumed to be true and accurate, the Appellants would be free to file a complaint in the West Virginia Court of Claims, as that forum is available in the absence of insurance coverage.

161 W.Va. 603, 245 S.E.2d 157 (1978), relate solely to Rule 12(b)(6) and have no application to this appeal. The language attributed to those cases does not apply, such as the language indicating that motions to dismiss are viewed with disfavor, that such motions should only be granted where it is clear that relief cannot be granted under any set of facts consistent with the allegations in the complaint, and that the complaint's factual allegations are presumed to be true for purposes of review. The trial court did not perform a Rule 12(b)(6) analysis because it was not faced with a Rule 12(b)(6) motion.

In general, this Court will apply a *de novo* standard of review to a circuit court's order granting a motion to dismiss. Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). See also, *Elmore v. Triad Hospitals, Inc.*, 220 W.Va. 154, 157-58, 640 S.E.2d 217, 220-21 (2006) (*per curiam*) (noting applicability of *de novo* standard of review to dismissal pursuant to Rule 12(b)(1) and 12(b)(6)); *Johnson v. C.J. Mahan Const. Co.*, 210 W.Va. 438, 441, 557 S.E.2d 845, 848 (2001) (*per curiam*) (noting applicability of *de novo* standard of review to motion filed pursuant to Rule 12(b)(1)).

*Savarese v. Allstate Ins. Co.*, 672 S.E.2d 255, 259-60 (W.Va. 2008). "Whether a court has subject matter jurisdiction over an issue is a question of law." *Snider v. Snider*, 209 W.Va. 771, 777, 551 S.E.2d 693, 699 (2001). "Where the issue on an appeal from the circuit court is clearly a question of law we apply a *de novo* standard of review." Syl. pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)." *State ex rel. Orlofske*, 212 W.Va 538, 542, 575 S.E.2d 148, 152 (2002).

### **RESPONSE TO ASSIGNMENTS OF ERROR**

The Circuit Court was correct in granting the DOH's motion to dismiss for lack of subject matter jurisdiction, based upon its determination that the provisions of Endorsement No. 7 to the State's insurance policy exclude coverage for the accident at

issue. The Appellants admit that there were no DOH employees present at the time and site of the accident. Their argument is simply that the exclusionary endorsement at issue does not apply to their claim, or, if it does, it should be void as against public policy.

Although the Appellants attempt to distinguish their claim by denoting it as a "failure to inspect and make reasonably safe" and also as a "failure to inspect" and a "failure to make reasonably safe," the claim clearly falls within the exclusion set forth in Endorsement No. 7. Even if the Appellants' characterization of their claims is adopted, a claim based upon "DOH's negligent failure to inspect and make safe its roads and bridges" is a claim that results from the DOH's "ownership, design, selection, installation, construction, maintenance, location, use, or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warnings, markers, markings, guardrails, fences, or related or similar activities or things" and it is therefore excluded from coverage.

The Appellants' contention that endorsement No. 7 should be void as against public policy ignores both the State's constitutional immunity and the statutory language that expressly authorizes the Board of Risk and Insurance Management (BRIM) to utilize its discretion in establishing and maintaining "reasonably broad protection . . . against liability . . . on account of state activities and responsibilities by proper, adequate, available and affordable insurance coverage[.]" West Virginia Code § 29-12-5 (2006). Appellants' interpretation of the applicable statutes would negate the discretion afforded BRIM, and would require BRIM and the DOH to effectively guarantee the safety of the entire road system at all times regardless of cost.

## POINTS AND AUTHORITIES RELIED UPON

**I. The Circuit Court was correct to conclude that the incident at issue was not covered by the State's insurance policy.**

*Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714 (1970)

*Louk v. Isuzu Motors, Inc.*, 198 W.Va. 250, 479 S.E.2d 911 (1996)

*Russell v. State Auto. Mut. Ins. Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992)

*Shrader v. Holland*, 186 W. Va. 687, 414 S.E.2d 448 (1992)

**II. Endorsement No. 7 is not contrary to public policy but consistent with it, as W. Va. Code §29-12-5 vests authority and discretion in BRIM to fix the scope of coverage and exclusions.**

*Banker v. Banker*, 196 W. Va. 535, 474 S.E.2d 465 (1996)

*Consumer Advocate Div. v. Public Serv. Comm'n*,  
182 W. Va. 152, 386 S.E.2d 650 (1989)

*Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 479 S.E.2d 911 (1996)

*Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999)

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

*Shrader v. Holland*, 186 W. Va. 687, 414 S.E.2d 448 (1992)

*Smith v. State Workmen's Compensation Comm'r*,  
159 W. Va. 108, 219 S.E.2d 361 (1975)

*State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)

*State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908)

*State ex rel. Adkins v. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947)

*State ex rel. Blankenship v. Richardson*,  
196 W. Va. 726, 474 S.E.2d 906 (1996)

*State ex rel. Simpkins v. Harvey*,  
172 W. Va. 312, 305 S.E.2d 268 (1983)

*Subcarrier Communications, Inc. v. Nield*,  
218 W. Va. 292, 299, 624 S.E.2d 729 (2005)

W. Va. Code § 29-12-5

## ARGUMENT

**I. The Circuit Court was correct to conclude that the incident at issue was not covered by the State's insurance policy.**

Contrary to the appellants' argument, the trial court did not rush to a judgment that Endorsement No. 7 excludes insurance coverage for all claims of negligence where DOH employees are not present at the time and place the claims arise. The trial court simply refused to adopt the Appellants' carefully crafted characterization of their claims. The trial court did "allow the suit to move forward to determine if the State's insurance coverage [was] applicable[.]" (Brief of Appellants at 10, "Discussion of Law"). It simply determined, correctly, that the coverage was not applicable. Endorsement No. 7 of the State's insurance policy applicable to this matter reads in pertinent part as follows:

It is agreed that the insurance afforded under this policy does not apply to any claim resulting from the ownership, design, selection, installation, construction, maintenance, location, supervision, operation, use, or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warnings, markers, markings, guardrails, fences, or related or similar activities or things but 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) and (2) to claims of "bodily injury" or

"property damage" which arise out of the maintenance or use of sidewalks which abut buildings covered by the policy.

(Endorsement No. 7, Policy No. RMGL 159-52-62)

Subject matter jurisdiction at the trial court level depends upon the existence of insurance coverage for the claims alleged against the DOH. Pursuant to the exclusionary language set forth in Endorsement No. 7 of the applicable policy, for coverage to exist, DOH employees must be present at the site of the incident from which a claim results, at the time the incident occurs, and those employees must be engaged in construction, repair, maintenance, or cleaning activities. The clear intention of the endorsement is to permit insurance coverage when DOH personnel are themselves working in the field and performing construction, maintenance, repair and cleaning, but to exclude coverage when such work is being performed by a contractor, or when no DOH personnel are present.

Appellants appear to argue that the phrases "failure to inspect"<sup>2</sup> and "failure to make reasonably safe" must be included in the exclusion for it to apply under the circumstances of this case. This is a bald attempt to create an impression of confusion and ambiguity where none exists. Why would the DOH inspect a road, bridge, or right of way that it did

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<sup>2</sup>To some extent, the Appellants appear to argue that a mere "failure to inspect," without more, constitutes a "Wrongful Act" covered by the relevant insurance policy. ("Brief of Appellants" at 12-13.) Based upon the Appellants' own factual allegations, this analysis is flawed, as a particular instance of a "failure to inspect" has no causative connection to the improvements Appellants claim were needed to "make safe" the road, bridge, or right of way they allege to have been unsafe. What if an inspection had been made on a particular date, but improvements were never made for reasons unknown to the Appellants? What if routine maintenance had addressed the purportedly faulty condition of the road without a specific visit to the site solely for the purpose of inspection? Whether an inspection was made or not, under the Appellants' theory, the failure to maintain is the causative link, and the Appellants' claim must be based on a lack of maintenance.

not own, supervise, or control? On what basis could the DOH effect any improvement in a road, bridge, or right of way that it did not own, supervise, or control? How could the DOH "make reasonably safe" a road, bridge, or right of way, without performing maintenance or construction, or installing culverts, storm sewers, signs, warnings, or guardrails, or related or similar improvements?

Assuming, for the sake of argument, that the DOH had a duty to inspect the road and right of way described by the Appellants, the only possible source of that duty is the DOH's ownership, supervision, maintenance, or control of roads, bridges, guardrail, signs, warnings, and rights-of-way. There is simply no other basis for such a duty. The claim at issue therefore is one "resulting from" the DOH's ownership, supervision, maintenance, or control of roads or rights-of-way, and the exclusionary endorsement applies.

Under the circumstances of this case, the act of "inspection" is purposeless except to the extent that it is the initial step in a process of maintenance, construction, or installation of improvements, and the DOH only maintains and improves what it owns, supervises, or controls. Neither the DOH, nor BRIM, nor the State's insurer, can be reasonably expected to list, in Endorsement No. 7, every single different task that might conceivably be necessary in order to further road or right-of-way maintenance, or that might be appropriate only because the DOH owns, supervises, or controls a system of roads and rights-of-way. In similar fashion, they cannot be expected to provide an exhaustive list of alternative phrases and characterizations for the exclusions expressly stated in the Endorsement. Yet this requirement would follow from the Appellants' position, which amounts to the argument that all claims are covered, as long as they can be

characterized by a phrase that omits most of the substantive words found in Endorsement No. 7.

To allow this abuse of language is to render meaningless the clear and unambiguous terms used in the Endorsement, such as "maintenance." Each such term could be broken down endlessly into more specific tasks, e.g., inspecting the asphalt paving, removing the asphalt paving, patching the asphalt paving, inspecting the roadside ditches, clearing the roadside ditches, hauling away the debris removed from the roadside ditches, inspecting the rights-of-way, scheduling the mowing of the rights-of-way, mowing the rights-of-way, none of which tasks are "specifically" included in Endorsement No. 7. By this route, Endorsement No. 7 is rendered meaningless. Endorsement No. 7 is a provision negotiated by BRIM on behalf of the DOH with the State's insurer. An interpretation that overtly or effectively negates Endorsement No. 7 is plainly wrong.<sup>3</sup>

In *Louk v. Isuzu Motors*, 198 W.Va. 250, 479 S.E.2d 911 (1996), the appellant had characterized the DOH's allegedly "wrongful acts" as the "failure to properly administer the laws of the State", the "failure to administer the policies and procedures adopted by the [DOH]", and the "failure to properly implement the [applicable traffic control] procedures." The appellant further asserted that the DOH had violated a duty to "prudently review" a highway access permit. 198 W.Va. at 257, 479 S.E.2d at 918. In *Louk*, the appellant's specific characterizations of its claims were not listed in the exclusionary endorsement, just as the phrases "failure to inspect" and "failure to make reasonably safe" are not listed. The *Louk* endorsement did include many of the terms found in Endorsement No. 7 that are

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<sup>3</sup>The Appellants cite orders entered in three circuit court cases in which judges found that Endorsement No. 7 did not exclude claims based upon the DOH's purported "failure to inspect" or "failure to make safe." It is the DOH's position that these rulings constituted clear error.

relevant to the Appellants' argument here, i.e., insurance coverage did not apply to the "[o]wnership, design, maintenance, supervision, operation, use or control of streets, including sidewalks, highways or other public thoroughfares, bridges, tunnels, dams, culverts, storm or sanitary sewers[.] *Id.* This Court reasoned as follows:

'Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.' Syllabus, *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714 (1970)." Syllabus point 1, *Russell v. State Automobile Mutual Insurance Company*, 188 W.Va. 81, 422 S.E.2d 803 (1992). **There is no ambiguity here; the endorsement modifies all five coverages, including the wrongful act coverage. Since there was no construction, maintenance, or repair work underway at the time and place of the collision, the policy provides no coverage against the alleged wrongful acts of the DOH. *Shrader v. Holland*, 186 W.Va. 687, 414 S.E.2d 448 (1992).** Accordingly, the circuit court correctly dismissed the Commissioner and the Division of Highways from this action with prejudice.

*Id.* Were the *Louk* endorsement applicable here, coverage would still be excluded as there was no construction, maintenance, or repair work underway at the time and place of the accident at issue. The *Louk* decision thus stands in stark contrast to the Appellants' contention that the specific phrases "failure to inspect" and "failure to make reasonably safe" must be included in the exclusionary endorsement for the exclusion to apply to Appellants' claims here.

In *Louk*, this Court clearly believed that the theory of liability against DOH was reasonable. The appellant in *Louk* contended that DOH had negligently reviewed and approved a permit for an access road joining a public highway, and that this negligence was a proximate and intervening cause. 198 W.Va. at 261-63, 479 S.E.2d at 922-24. This Court found that an instruction on intervening cause was justified, and that DOH's role might fairly be considered the sole proximate cause. 198 W.Va. at 263, 479 S.E.2d at 924.

Regardless of the merits of the theory of liability, however, this Court also found that the DOH insurance policy did not provide coverage, and that DOH was properly dismissed from the case. 198 W.Va. at 256-57, 479 S.E.2d at 917-18. Here, as in the *Louk* case, there is no insurance coverage, and the dismissal of the claims against the DOH should be affirmed.

**II. Endorsement No. 7 is not contrary to public policy but consistent with it, as W. Va. Code §29-12-5 vests authority and discretion in BRIM to fix the scope of coverage and exclusions.**

Appellants essentially argue that BRIM and the DOH are required, by statute or case law, to provide, for all practical purposes, unlimited insurance coverage for accidents that are road-related. This is simply wrong. This Court has considered the exception to sovereign immunity resulting from the State's insurance program in cases such as *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996); *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 479 S.E.2d 911 (1996); *Shrader v. Holland*, 186 W. Va. 687, 414 S.E.2d 448 (1992); and *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983). In these decisions, this Court has held that BRIM is not required to purchase unlimited insurance coverage, or particular types and amounts of coverage, but, on the contrary, has been granted broad discretion.

The Legislature may direct such limitation or expansion of the insurance coverages 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 (Risk and Insurance Management) 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.

If the terms of the applicable insurance coverage and contractual exceptions thereto acquired under W.Va.Code § 29-12-5 expressly grant the State greater or lesser immunities or defenses than those found in the case law, the insurance contract should be applied according to its terms and the

parties to any suit should have the benefit of the terms of the insurance contract.

*Parkulo*, 199 W. Va. at 163, 483 S.E.2d at 509, Syl. pts. 4 and 5.

The relevant statutes were amended by the Legislature in 2004, removing any doubt as to BRIM's authority. W. Va. Code §29-12-5 reads, in pertinent part, as follows:

29-12-5. Powers and duties of board

(a)(1) **The board has, without limitation and in its discretion** as it seems necessary **for the benefit of the insurance program, general supervision and control over the insurance of state property, activities and responsibilities, including:**

- (A) The acquisition and cancellation of state insurance;
- (B) **Determination of the kind or kinds of coverage;**
- (C) Determination of the amount or limits for each kind of coverage;
- (D) **Determination of the conditions, limitations, exclusions, endorsements,** amendments and deductible forms of insurance coverage;
- (E) Inspections or examinations relating to insurance coverage of state property, activities and responsibilities;
- (F) Reinsurance; and
- (G) **Any and all matters, factors and considerations entering into negotiations for advantageous rates** on and coverage of such state property, activities and responsibilities.

(2) The board shall **endeavor** to secure **reasonably** broad protection against loss, damage or liability to state property and on account of state activities and responsibilities by proper, adequate, available **and affordable** insurance coverage and through the introduction and employment of sound and accepted principles of insurance, methods of protection and principles of loss control and risk.

(3) **The board is not required to provide insurance for every state property, activity or responsibility.**<sup>4</sup>

(4) 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: *Provided*, That **nothing herein shall bar a state agency or state instrumentality from relying on the constitutional immunity granted the State of West Virginia against claims or suits arising from or out of any state property, activity or responsibility not covered by a policy or policies of insurance:** *Provided, however*, That nothing herein shall bar the insurer of political subdivisions from relying upon any statutory immunity granted such political subdivisions against claims or suits.

W. Va. Code § 29-12-5 (2006) (emphasis added).

The principles applicable to the application and interpretation of statutes have been noted in prior cases before this Court. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) Syl. pt 2. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975) Syl. pt 1. "A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999) Syl. pt 3. "It is not the province of the courts to make or

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<sup>4</sup>To the extent that Appellants rely upon Footnote 2 of *Ayersman v. Div. of Env'tl. Protection*, 208 W.Va. 544, 542 S.E.2d 58 (2000), and *Russell v. Bush & Burchett, Inc.*, 210 W.Va. 699, 559 S.E.2d 36 (2001), to support the argument that certain coverages might be required, that decision predates the Legislature's amendment to § 29-12-5, stating expressly that BRIM has, "without limitation and in its discretion," control over the State's insurance program, including the determination of exclusions and endorsements, and is not required to provide insurance for every State activity or responsibility.

supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]” *Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 299 n. 10, 624 S.E.2d 729, 736 n. 10 (2005) (alteration in original) (alteration, internal quotations and citations omitted). See also *Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) (“It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.” (citing *Bullman v. D & R Lumber Company*, 195 W. Va. 129, 464 S.E.2d 771 (1995); *Donley v. Bracken*, 192 W. Va. 383, 452 S.E.2d 699 (1994)); *Consumer Advocate Div. v. Public Serv. Comm’n*, 182 W. Va. 152, 386 S.E.2d 650 (1989), Syl. pt. 1 (“A statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.”). Further, “the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.” *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 735, 474 S.E.2d 906, 915 (1996) (quoting *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 692, 408 S.E.2d 634, 642 (1991)).

The provisions of the statutes pertaining to the State’s insurance program should be construed and applied consistently with one another, and with the constitutional immunity of the State. See *State ex rel. Simpkins v. Harvey*, 172 W. Va. 312, 305 S.E.2d 268 (1983), Syl. pt. 1 (“A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all

existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purposes and design thereof, if its terms are consistent therewith.' Syllabus Point 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908)."), *superseded by statute on other grounds as stated in State ex rel. Hagg v. Spillers*, 181 W. Va. 387, 382 S.E.2d 581 (1989), *superseded by statute on other grounds as stated in State v. Yoak*, 202 W. Va. 331, 504 S.E.2d 158 (1998); *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975), Syl. pt. 3 ("Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments."); *State v. Epperly*, 135 W. Va. 877, 881, 65 S.E.2d 488, 491 (1951) ("[A]ll statutes which deal with the same subject, or which have the same general purpose, should be read in connection with it, as together constituting one law, even though such statutes were enacted at different times[.]" (citation omitted)).

The Legislature was clearly concerned that the State's insurance program should be managed in a manner that would provide adequate coverage but that would also ensure its continued financial viability. Reference to § 29-12-5 plainly shows that BRIM is to try to secure reasonably broad but affordable insurance coverage, that it has the authority and discretion to determine coverages and exclusions, and to negotiate for advantageous rates. It is expressly stated that BRIM is not required to provide insurance for every activity and responsibility of the State, and the existence and application of constitutional immunity

is explicitly confirmed.<sup>5</sup> There is no basis to conclude that Endorsement No. 7 is not entirely consistent with this statute and the public policy it reflects.

Although the Appellants cite *Marlin v. Bill Rich Constr.*, 198 W.Va. 635, 482 S.E.2d 620 (1996) for the proposition that “the general rule of construction in tort legislation cases favors liability, and not immunity[,]” that case is distinguishable as relating to a local government agency, and not a State agency with constitutional immunity. The starting point for the analysis here is constitutional immunity, and the Legislature’s concerns that an insurance program provide adequate coverage, while granting the BRIM the discretion to control and administer the insurance program in a fiscally responsible manner that ensures its continued survival.

The road program is developed at the discretion of the road commissioner, and his agents and employees, and is necessarily limited by the money available for that purpose. Improvements made at one point lessen the probability that another point will be so improved. There never has been sufficient money available to make the highways absolutely safe, even if money available for construction and repair could do so.

This being the situation, and so well known that everyone is supposed to be acquainted with it, we do not mean to be heartless or cynical when we say that every user of the highways travels thereon at his own risk. The State does not, and cannot, assure him a safe journey. It has taken the money provided by the people, and built for them the best and safest highways their tax contributions will permit, and it can go no farther.

*State ex rel. Adkins v. Sims*, 130 W. Va. 645, 659-60, 46 S.E.2d 81, 88 (1947). Since the *Sims* case, the seeming harshness of this Court’s observations has been substantially mitigated by the proceedings of the West Virginia Court of Claims in its present form and

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<sup>5</sup>To the extent Appellants focus on Justice Starcher’s concurrence in *Blessing v. Nat’l Eng’g & Contracting Co.*, 222 W.Va. 267, 664 S.E.2d 152 (2008), it must be noted that the concurrence is, in substance, a dissent to and criticism of the doctrine of sovereign immunity, and includes repeated citations to a law review article. The concurrence is not representative of the actual law as constitutional immunity is the rule.

by the State's insurance program under the control of BRIM. Pursuant to the exclusionary language set forth in Endorsement No. 7, for coverage to exist, DOH employees must be present at the site of the incident from which a claim results, at the time the incident occurs. The clear intention of the endorsement is to permit insurance coverage when DOH personnel are themselves working in the field engaged in any one of a variety of work activities, but to exclude coverage when such work is being performed by a contractor, or when DOH employees are simply not present. In consideration of the authority and discretion granted by the Legislature to BRIM and the DOH in their respective roles, it is at least reasonable to give significant weight to the fact that BRIM and the DOH have concluded that Endorsement No. 7 is needed in order to ensure reasonably broad but affordable liability insurance coverage for the DOH.

The DOH has literally thousands of employees, a substantial number of them working on roads, highways, bridges, and rights of way, and utilizing a variety of equipment to do so, on a routine basis. Under emergency conditions, operations may continue on a 24-hour-per-day basis. This is a significant level of insured risk, and Appellants' apparent contention that the DOH neither has nor needs any insurance coverage, as a result of Endorsement No. 7, is baseless. Where work is performed by contractors, the contractors do not share sovereign immunity, but are required to maintain reasonable insurance coverage, a requirement that is likely to be reflected in the price paid by the DOH. Thus, Appellants' vision of countless potential harms without remedy is simply wrong.

Put plainly, Appellants' public policy argument admits no apparent stopping point, but seeks to require the State's entire road system to be insured and its absolute safety guaranteed. Appellants' contention that the exclusion eliminates coverage is wrong.

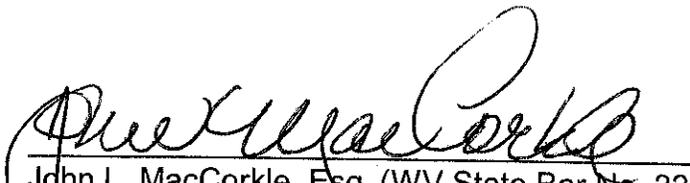
Coverage is restricted in order to be as reasonably broad as possible while remaining affordable. As reference to W. Va. Code § 29-12-5 shows, BRIM has broad discretion to supervise the insurance program, determine appropriate levels of coverage, and to negotiate coverages and exclusions in order to maintain a viable insurance program. Endorsement No. 7 is part of this effort and, far from being contrary to public policy, it is entirely consistent with the public policy reflected in the State's Constitution, and in the Legislature's statutory grant of authority and discretion to BRIM.

**RELIEF PRAYED FOR**

Based upon the foregoing, the Appellee, West Virginia Department of Transportation, Division of Highways, respectfully requests that the decision of the Circuit Court of Wyoming County be affirmed.

**THE WEST VIRGINIA DEPARTMENT  
OF TRANSPORTATION, DIVISION  
OF HIGHWAYS**

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HOWARD WRENN and SANDRA  
BELCHER, as Natural Parents  
and Co-Administrators of the  
ESTATE OF MATTHEW WRENN,  
and ANGELIA HARPER, as Natural  
Mother and Administrator of  
the ESTATE OF JUSTIN JANES,

Appellants,

v.

No. 34717

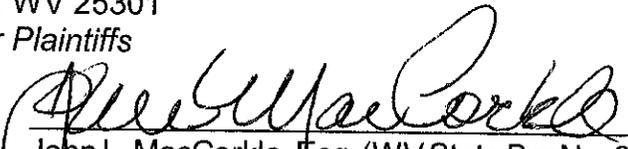
THE WEST VIRGINIA DEPARTMENT  
OF TRANSPORTATION, DIVISION  
OF HIGHWAYS,

Appellee.

CERTIFICATE OF SERVICE

I, John L. MacCorkle, counsel for Appellee/Defendant, The West Virginia Department of Transportation, Division of Highways, do hereby certify that on this 6<sup>th</sup> day of April, 2009, a true copy of the foregoing "**Appellee's Brief**" was served on the following counsel of record by depositing the same in the United States Mail, postage prepaid and addressed as follows:

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