

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34717

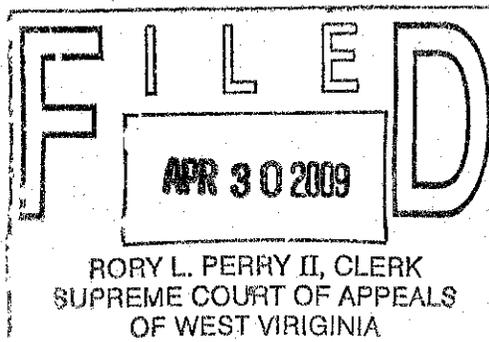
HOWARD WRENN and SANDRA BELCHER,  
as Natural Parents and  
Co-Administrators of the ESTATE  
OF MATTHEW WRENN, and ANGELIA  
HARPER, as Natural Mother and  
Administrator of the ESTATE OF  
JUSTIN JANES,

Appellants,

v.

THE WEST VIRGINIA DEPARTMENT  
OF TRANSPORTATION, DIVISION  
OF HIGHWAYS,

Appellee.



---

REPLY BRIEF OF APPELLANTS

---

Submitted by:

Mark W. Kelley, Esq.  
(WV Bar No. 5768)  
Keith B. Walker, Esq.  
(WV Bar No. 10912)  
RAY, WINTON & KELLEY, PLLC  
109 Capitol Street, Suite 700  
Charleston, WV 25301  
Telephone: (304) 342-1141  
Fax: (304) 342-0691

**TABLE OF CONTENTS**

I. INTRODUCTION . . . . . 1

II. POINTS AND AUTHORITIES RELIED UPON . . . . . 2

III. DISCUSSION OF LAW . . . . . 4

    A. A claim resulting from the DOH's failure to "inspect" and failure to "make safe" is covered under the State's insurance policy since they are activities that are separate and distinct from the activities excluded from coverage by Endorsement No. 7 . . . . . 4

    B. BRIM abused its discretion when it made Endorsement No. 7 so restrictive as to be contrary to West Virginia law and against public policy . . . . . 12

    C. Appellee's assertions are contrary to the State's goal of protecting its financial structure . . . . . 18

IV. RELIEF PRAYED FOR. . . . . 22

## I. INTRODUCTION

Appellee asserts two arguments in defense of Appellants' appeal.

First, Appellee argues that no coverage exists for Appellants' claims against the West Virginia Department of Transportation, Division of Highways' ("DOH") for its negligent "failure to inspect" and "failure to make safe" its rights-of-way because of the restrictive language found in Endorsement No. 7 to the State's insurance policy. Appellee alleges that it has no such duties, and if it did, such duties are covered by language in Endorsement No. 7 that result from "its ownership, supervision, maintenance, or control of roads or rights-of-way." (Appellee's Brief at 7).

Second, Appellee argues that Endorsement No. 7 is not contrary to public policy, but consistent with it, since W. Va. Code § 29-12-5 vests the West Virginia Board of Risk and Management ("BRIM") with authority and discretion to fix the scope of coverage and exclusions.

Contrary to Appellee's positions, in this Reply Appellants provide further support establishing that the DOH does have a duty to inspect and to make safe its rights-of-way, that such duties are separate and distinct from the activities excluded from coverage by Endorsement No. 7 and, as such, coverage exists for the claims set forth in the Appellant's

*Complaint.* Furthermore, although BRIM has discretion and authority to fix the scope of coverage and exclusions to the State's insurance program, such discretion must be exercised in a manner consistent with the intent and purpose of the insurance program enacted by the Legislature. In drafting Endorsement No. 7, BRIM has exceeded its authority and abused its discretion by limiting the scope of coverage and making it more restrictive than the statute's mandate. As such, Endorsement No. 7 to the State's insurance policy is void as contrary to West Virginia law and thus, against public policy. Therefore, since insurance coverage exists relevant to the Appellants' claims, the Circuit Court has subject matter jurisdiction and erred by dismissing this action for lack of such.

**II. POINTS AND AUTHORITIES RELIED UPON**

W. Va. Const. Art. VI, § 35. . . . . 21

W. Va. Code § 29-12-5 . . . . . 5, 14, 20

W. Va. Code § 17-2A-8(36) . . . . . 8, 9

W. Va. Code § 29-12A-5 . . . . . 9

W. Va. Code § 29-12-1 . . . . . 10, 13, 14, 16, 17

W. Va. Code § 29-12-5(a)(2). . . . . 13, 14, 17

W. Va. Code § 29-12-3 . . . . . 14

W. Va. Code § 29-12-5(a)(1). . . . . 14, 15

W. Va. Code § 29-12-1 *et. seq.* . . . . . 16, 17

W. Va. Code § 29B-1-1, *et. seq.* . . . . . 19

W. Va. Code § 29-12-5(a)(4) . . . . .	20
<u>Russell v. Bush &amp; Burchett, Inc.</u> , 210 W. Va. 699, 706, 559 S.E.2d 36, 43 (2001) . . . . .	5, 6, 7, 11, 12, 17, 18, 20, 21
<u>National Mut. Ins. Co. v. McMahon &amp; Sons, Inc.</u> , 177 W. Va. 734, 356 S.E.2d 488 (1987) . . . . .	6
<u>Marlin v. Bill Rich Const., Inc.</u> , 198 W. Va. 635, 482 S.E.2d 620 (1996) . . . . .	6
<u>Werfele v. Kelly Paving, Inc., et. al.</u> , Consol. Civil Action Nos. 07-C-58M and 05-C-306M (Marshall County, W. Va., Cir. Ct. Jan. 3, 2008) . . . . .	8
<u>Calabrese v. City of Charleston</u> , 204 W. Va. 650, 659, 515 S.E.2d 814, 823 (1999) . . . . .	10
<u>Johnson v. C.J. Mahan Construction Co.</u> , 210 W. Va. 438, 557 S.E.2d 845 fn. 1 (2001) . . . . .	12
<u>Blessing v. National Engineering and Contracting Co.</u> , 222 W. Va. 267, 664 S.E.2d 152 (2008) . . . . .	12
<u>Adkins v. Meador</u> , 201 W. Va. 148, 153, 494 S.E.2d 915, 920 (1997) . . . . .	13
<u>Gibson v. Northfield Ins.</u> , 631 S.E.2d 598 (W. Va. 2005) . . . . .	13, 18
Syl. pt. 2, <u>Universal Underwriters Ins. Co. v. Taylor</u> , 185 W. Va. 606, 408 S.E.2d 358 (1991) . . . . .	13
<u>Smith v. State Workmen's Compensation Commissioner</u> , 159 W. Va. 108, 115, 219 S.E.2d 361, 365 (1975) . . . . .	16, 17
<u>Pittsburgh Elevator v. West Virginia Board of Regents</u> , 172 W. Va. 743, 756, 310 S.E.2d 675, 689 (1983) . . . . .	19, 20

### III. DISCUSSION OF LAW

- A. A claim resulting from the DOH's failure to "inspect" and failure to "make safe" is covered under the State's insurance policy since they are activities that are separate and distinct from the activities excluded from coverage by Endorsement No. 7.

Endorsement No. 7 to the State's insurance policy lists a number of activities and states that if a claim results from one of those specific activities it will not be covered unless a State employee is physically present at the time of the incident. In other words, under the State's insurance policy and the endorsements thereto, any activities that are not specifically listed in the restrictive endorsements will be covered, regardless of whether employees are present, as long as that activity, or rather the failure to perform that activity, constitutes a wrongful act.

Endorsement No. 7 at issue in this case provides as follows:

It is agreed that the insurance afforded under this policy does not apply to any claim resulting from the ownership, design, installation, maintenance, location, supervision, operation, construction, use, or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warning 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.

Notably, the activities of inspection and making safe, which are separate and distinct, are not specifically included within the exclusionary language of the Endorsement. Thus, coverage exists for the wrongful act of negligently failing to perform those activities, regardless of whether employees were present at the time of the incident.

The Appellee's Brief begins by focusing on the fact that employees were not present at the time of the accident. This, however, is not a determinative fact of this case, nor an issue in Appellants' claim. The determinative fact is that the State's insurance policy does not specifically exclude from coverage any claim resulting from failure to perform its inspection duty and its failure to make safe its rights-of-way.

"The principles of interpretation, construction, and application that this Court brings to exclusionary language in insurance policies are well-settled[.]" Russell v. Bush & Burchett, Inc., 210 W. Va. 699, 705, 559 S.E.2d 36, 42 (2001)<sup>1</sup>.

---

<sup>1</sup>Appellee claims in a footnote that Ayersman and Russell predate the Legislature's amendment to W. Va. Code § 29-12-5, and this somehow makes them inapplicable. (Appellee's Brief p. 12, fn. 4). However, as discussed in section "B", *infra*, of this Reply, the language added by the Legislature would have had no effect on this Court's ruling in those cases, nor the case *sub judice*.

"Where 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). Id. citing, syl. pt. 5, National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 740, 356 S.E.2d 488, 494 (1987).

Furthermore, "the general rule of construction in governmental tort legislation cases favors liability, not immunity. Unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail." [Emphasis added]. Id. citing, Marlin v. Bill Rich Const., Inc., 198 W. Va. 635, 643, 482 S.E.2d 620, 628 (1996).

In Russell, Mr. Russell was working for a contractor hired by the DOH on a bridge project for the State. While working, Mr. Russell was injured by a crane on the project and suffered serious and permanent injuries. The Russells brought an action against the DOH on the theory that the DOH was negligent in selecting and retaining the bridge contractor because the contractor allegedly had a history of injuries to workers and operating unsafely. The DOH argued that the suit was barred because the exclusionary language found in the restrictive endorsement bars claims relating to bridges, and the bidding process and selection of a contractor through that process is related to bridge construction. Furthermore, the DOH disputed

the fact that it had a duty to select and retain a contractor that does not expose workers on a state-funded project to unreasonable dangers and risks.

In determining whether sovereign immunity applied and the claim was barred, this Court agreed with the circuit court that the claim was not barred as a result of the exclusionary language. This Court, in applying the foregoing principles of interpretation regarding insurance policies, stated that:

Any negligence in the DOH's bidder selection process was separate and remote in time and place from and anterior to any bridge construction. While bidder selection and retention could be arguably said to be "related" to bridge construction, such a "relatedness" connection could also be made to the most distant and tenuous activities. Applying the principles of law that narrowly construe exclusionary language, that favor liability over immunity, and that favor state accountability, we cannot read the DOH policy language as categorically excluding the Russells' claim.

Id. at 706, 43.

In the case at bar, the DOH is making a similar "relatedness" argument as it did in Russell. The DOH argues in its Brief that its duty to make reasonably safe its roadways is contained within its maintenance and construction functions. It further argues that it has no duty to inspect, and if it did, it "is one 'resulting from' its ownership, supervision, maintenance, or control of roads or rights-of-way." (Appellee's Brief at 7). As in Russell, the DOH's arguments fail here in every respect.

First, the safety function of the DOH is one of its primary functions. The DOH is not only responsible for establishing an infrastructure of roadways for public travel, but it also has the responsibility to ensure that those roadways are safe for the motoring public. This specific activity is separate and distinct from the activities excluded from coverage by Endorsement No. 7 as was recognized by the Circuit Court of Marshall County. In Werfele v. Kelly Paving, Inc., et. al., Marshall County Consol. Civil Action Nos. 07-C-58M and 05-C-306M, the Court, in deciding the validity of an unsigned Endorsement No. 7, strictly construed the language of the endorsement and held that "[e]ven if Endorsement No. 7 was signed, it does not exclude coverage for the plaintiff's claims ... that the D.O.H. failed to secure, attend to, and make safe the D.O.H.'s hillside property ...." A copy of that case is attached as Exhibit A to Appellant's *Petition for Appeal*. Indeed, nowhere in Endorsement No. 7 is safety even mentioned. Thus, the exclusionary language of Endorsement No. 7, strictly construed, does not exclude from coverage the DOH's failure to make safe its property.

In addition to its inherent duty to make safe, the DOH has a specific duty to investigate and inspect its roads, highways, and rights-of-way to ensure that such are safe for the motoring public. Under W. Va. Code § 17-2A-8, "Powers, duties and responsibilities of commissioner", it specifically lists that

one of the DOH's duties is to "[i]nvestigate road conditions[.]" W. Va. Code § 17-2A-8(36). Additionally, as discussed in Appellants' Brief, The West Virginia Department of Highways Maintenance Manual § 01.03, specifically states that "[i]t is the established policy of the Department to investigate and make personal contact for all citizens' requests for assistance ...", that there is a "detailed procedure for handling the Citizens' Requests for Assistance ...", and that "[a]ll Maintenance Supervisory personnel must be aware of this very important portion of the Maintenance Program ...." (Appellant's Brief at 12). These specific provisions expressly establish that the DOH has a duty to inspect its rights-of-way to ensure road conditions are safe for the motoring public.

To further evidence the fact that such a duty exists, and that the failure to perform that duty is a basis for governmental liability, the inspection function is also expressly recognized to apply to the State's political subdivisions. Under W. Va. Code § 29-12A-5, the "Governmental Tort Claims and Insurance Reform Act",

(a) A political subdivision is immune from liability if a loss or claim results from:

(10) Inspection powers or functions, including failure to make an inspection, or making an inadequate inspection, of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety[.]

This particular provision, however, "does not immunize a political subdivision from liability arising out of negligently-caused dangerous, injurious, or harmful conditions on the subdivision's own property." Calabrese v. City of Charleston, 204 W. Va. 650, 659, 515 S.E.2d 814, 823 (1999). In reaching this conclusion, this Court reasoned that:

[T]o give this language the broad reading that the City suggests, a political subdivision would be immunized from liability arising out of any injurious conditions on any of its property (public roads, bridges, etc.)-regardless of the subdivision's negligence in creating or tolerating those conditions-if the subdivision had at some previous time failed to properly inspect its own property, or to properly follow up on an inspection and correct a problem on the subdivision's own property.

Id. This Court went on to reason that "[g]iven the explicit legislative creation and recognition of subdivision liability for such conditions, we doubt that eviscerating such liability was the legislative intent-in providing for 'inspection' immunity."

Id.

This Court's reasoning and conclusion in Calabrese is, likewise, applicable to the instant action. To hold otherwise would go against the general rule of construction in governmental tort legislation cases which favors liability, not immunity. Moreover, eviscerating such liability for the DOH would be contrary to W. Va. Code § 29-12-1, which, as applicable to the State, "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). Russell, 210 W. Va at 706.

The DOH goes on to argue in its Brief that the duty to inspect is one "'resulting from' the DOH's ownership, supervision, maintenance, or control of roads or rights-of-way," and that it is "purposeless except to the extent that it is the initial step in a process of maintenance, construction, or installation of improvements[.]" (Appellee's Brief at 7). Appellee argues that the duty to inspect is not a separate activity, but one that is ancillary to the activities listed in restrictive Endorsement No. 7. This argument fails as it did in Russell. As discussed *supra*, the DOH **does** have a duty to inspect and that duty is set forth in the West Virginia Code, through case law, and in the DOH's own Maintenance Manual. Furthermore, the duty to inspect is recognized as being separate, distinct, and **anterior** to other functions, both statutorily and in case law such as Calabrese. While the inspection function may be a prelude to other activities, any negligence in that function was separate and remote in time and place from and anterior to any other activities. Thus, applying the principles of law that narrowly construe exclusionary language, that favor liability over immunity, and that favor state accountability, the DOH

policy language cannot be read as categorically excluding the Appellants' claim.

The duty to inspect and the duty to make safe are separate and distinct from the activities excluded by restrictive Endorsement No. 7 to the State's insurance policy. On its face, the language of restrictive Endorsement No. 7 does not specifically exclude coverage for the activity of inspection, nor does it exclude, or even mention, its safety function. Moreover, the DOH's negligent failure to respond, investigate, and inspect its rights-of-way, and its negligent "failure to make reasonably safe" its rights of way, which includes the waterways within its rights of way, constitutes a wrongful act. Accordingly, coverage exists under the State's liability policy for such omissions and/or commissions on the part of the DOH and, in particular, exists relative to the claims that were set forth in Appellants' *Complaint*. Thus, jurisdiction was proper in the circuit court.

**B. BRIM abused its discretion when it made Endorsement No. 7 so restrictive as to be contrary to West Virginia law and against public policy.<sup>2</sup>**

---

<sup>2</sup>In prior cases involving the scope of the State's insurance coverage, this Court has determined that it was appropriate to make BRIM a party to the action since BRIM determines the scope of coverage. See, e.g., Russell, 210 W. Va. At 704, fn. 7, and Johnson v. C.J. Mahan Construction Co., 210 W. Va. 438, 441 fn. 1 (2001). However, this Court has also considered coverage issues without BRIM's participation. See, e.g., Blessing v. National Engineering and Contracting Co., 222 W. Va. 267, 664 S.E.2d 152 (2008).

Appellee's Brief misconstrues Appellants' assertions, as well as misinterprets the applicable statutes that mandate adequate insurance coverage. Appellee's Brief argues that the Appellants are contending that BRIM and the DOH are required to provide "unlimited insurance coverage" (Appellee's Brief at 10), and that Appellants' public policy assertions seek to require the State to insure its entire road system and guarantee its absolute safety. (Appellee's Brief at 16). Appellants simply maintain that restrictive Endorsement No. 7, as drafted, does not provide "reasonably broad" protection as mandated by W. Va. Code § 29-12-5(a)(2), and thus is contrary to the Legislative intent set forth in W. Va. Code § 29-12-1, as it attempts to exclude the DOH from all liability for its primary functions.

"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., 631 S.E.2d 598 (W. Va. 2005), citing syl. pt. 2, Universal Underwriters Ins. Co. v. Taylor, 185 W. Va. 606, 408 S.E.2d 358 (1991).

The applicable statute in this matter, W. Va. Code § 29-12-1, provides in pertinent part that:

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). To manage the State's insurance program, W. Va. Code § 29-12-3 created BRIM and set forth its powers and duties in W. Va. Code § 29-12-5.

W. Va. Code § 29-12-5(a)(1) states that "[t]he 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[.]" (Emphasis added). Moreover, when exercising such discretion, W. Va. Code § 29-12-5(a)(2) provides that:

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.*

(Emphasis added).

Appellee misinterprets the State's insurance statutes and would have this Court focus its attention and place emphasis on the particular clause in W. Va Code § 29-12-5(a)(1), "without limitation and in its discretion". Appellee argues that the "without limitation and discretion" clause gives BRIM virtually unlimited power to exclude as much coverage as it deems appropriate to make such coverage affordable<sup>3</sup>, and that doing so is consistent with public policy. This is not the correct interpretation of W. Va Code § 29-12-5(a)(1) as it does not effectuate the intent of the Legislature. The determinative clause where emphasis should be placed in that particular Code section is "**for the benefit of the insurance program**", which follows and qualifies the phrase "without limitation and in its discretion". In other words, BRIM is to exercise its discretion for the **benefit** of the insurance program.

Appellee's Brief states that "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 the cost." (Appellee's Brief at 3). This argument is disingenuous, as BRIM's discretion is not the primary

---

<sup>3</sup>Appellee makes repeated references to the cost of the insurance coverage. However, the record is devoid of any support for its allegations that allowing Appellants' claim would increase the cost of the coverage or that providing such coverage would not be affordable.

intent of the statutes. To accept Appellee's argument as having merit would truly be contrary to public policy because, allowing BRIM to have unfettered discretion to limit insurance coverage, as it has done in restrictive Endorsement No. 7, negates the intent and purpose of the insurance program as set forth in W. Va. Code § 29-12-1. While negotiating to obtain the best cost for adequate coverage is also a duty of BRIM, it is not the primary duty that furthers the goal of the program. BRIM's discretion is only a means to an end, with the end being to further the Legislative intent of providing a sound and adequate insurance program. Under W. Va. Code § 29-12-1, the intent and object of the insurance program is to provide "sound and adequate" insurance coverage for liabilities resulting from governmental activities. To read otherwise, or to permit BRIM to limit the coverage as Appellee argues, would be contrary to W. Va. Code § 29-12-1, et seq., and thus, contrary to the intent of Legislature.

As cited in the Appellee's Brief at p. 12, "[t]he primary object in construing a statute is to ascertain and give effect to the intent of Legislature." Smith v. State Workmen's Compensation Commissioner, 159 W. Va. 108, 219 S.E.2d 361 (1975).

This Court recognizes that W. Va. Code § 29-12-1:

*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. That remedial purpose*

must be given substantial weight--along with the foregoing principles that *narrowly construe* exclusionary policy language and *favor governmental tort liability* -- in examining, applying, and interpreting the exclusionary language in the DOH policy.

(Emphasis added). Russell, 210 W. Va. at 706, 559 S.E.2d at 43. The remedial intent of the Legislature to provide adequate coverage is further exemplified in W. Va. Code § 29-12-5(a)(2), where it requires BRIM to "secure reasonably broad protection against loss, damage or liability to state property and on account of state activities and responsibilities ...." As asserted in a string of cites in Appellee's Brief, "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." Smith v. State Workmen's Compensation Commissioner, 159 W. Va. 108, 115, 219 S.E.2d 361, 365 (1975). Indeed, when read and applied together, W. Va. Code § 29-12-1, et seq. manifestly evidence the Legislature's intent to assure that the State is financially responsible and accountable for injuries occasioned by culpable State action, and requires BRIM to secure reasonably broad insurance coverage for the benefit of a sound and adequate insurance program to provide protection for such culpable State action. Restrictive Endorsement No. 7, as drafted, does not further this intent as it is not "reasonably broad."

In drafting Endorsement No. 7 to the State's insurance policy, BRIM abused its discretion by making it more restrictive than, and contrary to, the language, purpose and intent of the applicable statutes. As held in Gibson, *supra*, "[p]rovisions in an insurance policy that are more restrictive than statutory requirements are void and ineffective as against public policy." Accordingly, the trial court erred by not recognizing the restrictive language of Endorsement No. 7 as void.

**C. Appellee's assertions are contrary to the State's goal of protecting its financial structure.**

This case presents yet another instance where the DOH is asserting that it does not have coverage under the BRIM policy, which is antithetical to the typical situation where a defendant against whom a claim has been asserted wants and expects an insurance company to step forward and protect the defendant against claims for which the insurance coverage was purchased. See, e.g., Russell v. Bush & Burchett, Inc., 210 W. Va. 699, 559 S.E.2d 36 (2001).

Appellee's Brief alleges that there is "no coverage" and suggests that Appellants' remedy for the DOH's negligence lies in a suit before the West Virginia Court of Claims. (Appellee's Brief at 1, n.1). Aside from the perversity,<sup>4</sup> Appellants are now perplexed by this Argument. When this case

---

<sup>4</sup>See Russell, 210 W. Va. at 705, 559 S.E.2d at 42, n.8.

was before the circuit court, the DOH was represented by an attorney directly employed by the DOH. After this Court accepted Appellants' appeal, Appellee's current counsel appeared on behalf of the DOH. In response, Appellants' counsel filed a request under the West Virginia Freedom of Information Act<sup>5</sup> ("FOIA") requesting information regarding the DOH's retention of its current counsel. See Exhibit A attached hereto. To Appellants' surprise, the Director of DOH's Legal Division responded to the FOIA request by stating that "We ... [have] no documents responsive to your [request]. **Because there is insurance coverage for the legal matter to which you refer,<sup>6</sup> counsel for the DOH was engaged by DOH's insurer, American International Group, Inc.**" A copy of this letter is attached as Exhibit B. Thus, the DOH's current counsel is employed by the very insurance company which will benefit if the circuit court's ruling is affirmed. Appellee's position ultimately serves to attack, rather than preserve, the State's financial structure, which is inapposite to "the paramount justification underlying the constitutional grant of immunity to protect the financial structure of the State." Pittsburgh Elevator, 172 W. Va. at 756, 310 S.E.2d at 688.

---

<sup>5</sup>See W. Va. Code § 29B-1-1, et seq.

<sup>6</sup>This position is contrary to the DOH's position asserted in the circuit court below and in this appeal that no coverage exists.

In the case at bar, this Court is confronted with a situation where the State's counsel is employed by the State's insurer for the purpose of arguing that there is no insurance coverage for Appellants' claim, and that therefore Appellants' remedy is to file an action directly against the State in the West Virginia Court of Claims, whose awards are paid from the State's treasury. The insurance company is attempting to "ride the coattails" of the State's sovereign immunity to avoid paying a claim against its insured, which is an action that is prohibited by statute.<sup>7</sup>

"In determining the validity of a claim of constitutional immunity **this Court has in the past looked behind the formal parties in a suit in order to assess the suit's impact on the State.**" *Id.* [Emphasis added]. "The paramount justification underlying the constitutional grant of immunity is to protect the financial structure of the State. *Id.*

The Legislature has not, by enactment of W. Va. Code § 29-12-5, sought to waive the State's constitutional immunity from suit. Rather, we read the statute as the

---

<sup>7</sup>W. Va. Code § 29-12-5(a)(4) provides that "the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits." The principle behind allowing suits to go forward, when recovery is only sought from the State's insurer and not from the State's treasury, is consistent with "[t]he general rule of construction in governmental tort legislation cases which favors liability, not immunity," *see, Russell v. Bush & Burchett, Inc.*, 210 W. Va. 699, 705, 559 S.E.2d 36, 42 (2001), as well as the State's goal of protecting its financial structure. *See, Pittsburgh Elevator*, 172 W. Va. at 756, 310 S.E.2d at 688.

Legislature's recognition of the fact that where recovery is sought against the State's liability insurance coverage, the doctrine of constitutional immunity, designed to protect the public purse, is simply inapplicable.

Id.

This Court confronted a similar situation in the Russell case. See Part III(A) *supra*. As in Russell, here the DOH is relying on the principle that a lawsuit based on State activity that is not covered by insurance is barred by W. Va. Const. Art. VI, § 35. This principle, "inadvertently creates an incentive ... to argue at every opportunity that a given activity is not covered ...." Russell, 210 W. Va. at 705, 559 S.E.2d at 42, n.8. "This sentiment, which is the perverse opposite of the desires of a normal insured party who wants maximum coverage in an accident, runs counter to the goals of risk spreading and protection from catastrophic loss that our law has come to favor." Id.

Appellants' claim seeks recovery only from the State's insurance provider and not from the State's treasury, which would not have such a perverse impact on the State. As such, Appellants' claims fall outside the traditional constitutional bar to suits against the State and should not have been dismissed.

#### IV. RELIEF PRAYED FOR

For the foregoing reasons, Appellants pray that this Court enter an order that:

1. Vacates the Wyoming County Circuit Court's grant of the DOH's *Motion to Dismiss*;

2. Vacates the Wyoming County Circuit Court's ruling that the DOH is entitled to sovereign immunity for the claims set forth in Plaintiffs' *Complaint*;

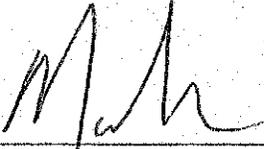
3. Decrees that Endorsement No. 7 to the State's liability insurance policy is to be strictly construed;

4. Decrees that Endorsement No. 7 to the State's liability insurance policy does not exclude coverage for the DOH's negligent "failure to inspect" and "failure to make safe" its rights of way and waterways within its rights of way; and

5. Decrees that Endorsement No. 7 to the State's liability insurance policy is null and void for being contrary to West Virginia law and for being against public policy.

Appellants further request all such other relief as this Court deems just and proper.

Respectfully submitted this 30<sup>th</sup> day of April, 2009.



---

Mark W. Kelley, Esq.  
(WV Bar No. 5768)  
Keith B. Walker, Esq.  
(WV Bar No. 10912)  
RAY, WINTON & KELLEY, PLLC  
109 Capitol Street, Suite 700  
Charleston, WV 25301  
Telephone: (304) 342-1141  
Fax: (304) 342-0691  
Counsel for Appellants  
2009-04-30\_Reply Brief.wpd

ATTACHMENTS:

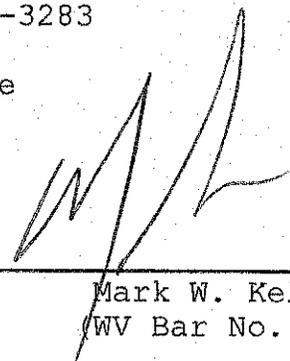
Exhibit A - Freedom of Information Act Request ("FOIA") to  
DOH

Exhibit B - Response to FOIA Request from the DOH's Legal  
Division Director

**CERTIFICATE OF SERVICE**

I, Mark W. Kelley, an attorney for the Appellants, hereby certify that on April 30, 2009, I served a true and correct copy of the foregoing "**REPLY BRIEF OF APPELLANTS**" on the parties hereto via U.S. Mail, first class, postage prepaid, addressed as follows:

John L. MacCorkle, Esq.  
MacCORKLE, LAVENDER & SWEENEY, PLLC  
300 Summers Street, Suite 800  
P.O. Box 3283  
Charleston, WV 25332-3283  
(304) 344-5600  
Counsel for Appellee



---

Mark W. Kelley  
(WV Bar No. 5768)

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**