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Reducing Recovery: Avoiding Subrogation Claims and Invoking Immunity Under the West Virginia Governmental Tort Claims and Insurance Reform Act

Sarah A. Walling, Jenkins Fenstermaker, PLLC
P.O. Box 2688
Huntington, WV 25726
(304) 523-2100
saw@jenkinsfenstermaker.com

In the early 1980s, the rising costs of liability insurance and an increase in the number of tort claims against governmental entities created a budget crisis for counties, cities, and municipalities across the state. In 1986, the West Virginia Legislature addressed this issue by enacting the West Virginia Governmental Tort Claims and Insurance Reform Act ("the Act").[1] Noting the "high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services,"[2] the Legislature included provisions establishing immunity from suit and limitations on liability of political subdivisions and their employees. The Act also regulated insurance carriers issuing liability policies to these entities.

As part of its limitations on liability and damages, the Act requires the real party or parties in interest in a suit to file an action against a political subdivision.[3] The Act also bars claims filed or recovery made under a right of subrogation, and immunizes political subdivisions from suits for any claim covered by worker's compensation or employment liability law.[4] This article describes relevant definitions contained in the Act, describes the impact on an adverse verdict against a political subdivision, and explores the evidentiary issues created by the provisions affecting subrogation rights.

I. Relevant definitions and provisions contained in the Act

Section 29-12A-3 of the Act defines a "political subdivision" as:

> any county commission, municipality and county board of education; any separate corporation or instrumentality established by one or more counties or municipalities, as permitted by law; any instrumentality supported in most part by municipalities; any

[1] W.Va. Code §29-12A-1, *et seq.*
[2] W.Va. Code §29-12A-2.
[3] W.Va. Code §29-12A-13(c)
[4] *Id.*

> public body charged by law with the performance of a government function and whose jurisdiction is coextensive with one or more counties, cities or towns; a combined city-county health department created pursuant to article two, chapter sixteen of this code; public service districts; and other instrumentalities including, but not limited to, volunteer fire departments and emergency service organizations as recognized by an appropriate public body and authorized by law to perform a government function.

The Act expressly excludes hospitals of a political subdivision and their employees from this definition.[5]

The Act requires that "[a]ll actions filed against a political subdivision shall be filed in the name of the real party or parties in interest."[6] Furthermore, "in no event may any claim be presented or recovery be had under the right of subrogation."[7] The term "subrogation" as used in the Act refers to "an equitable remedy . . . for the benefit of one secondarily liable who has paid the debt of another and to whom in equity and good conscience should be assigned the rights and remedies of the original creditor."[8] Subrogation therefore "gives the payor a right to collect what it has paid from the party who caused the damage. However, because this right to collect is an equitable remedy, it is subject to equitable principles."[9] In the context of the Act and for purposes of this article, subrogation applies to injured parties who have filed a claim and received first-party insurance benefits.

II. Prohibition of subrogation claims

A. The Act requires an offset of any recovery for amounts previously paid as first-party insurance benefits.

[5] W.Va. Code §29-12A-3(c).
[6] W.Va. Code §29-12A-13(c)
[7] *Id*.
[8] *Foster v. City of Keyser, et al,* 501 S.E.2d 165 (W.Va. 1997).
[9] *Id*. at 186 (citing *Kittle v. Icard,* 405 S.E.2d 456, 460 (W.Va. 1991)).

The West Virginia Supreme Court explored the implications of §29-12A-13(c) in *Foster v. City of Keyser, et al*.[10] *Keyser* arose from the performance of construction work by Parks Excavating around a pipeline owned by Mountaineer Gas. While working on a sewer line owned by the City of Keyser, Parks uncovered and then backfilled around Mountaineer's gas transmission line.[11] This excavation work caused movement and strain on the gas transmission line, which contributed to the failure of a compression coupling that joined two sections of the gas line. Natural gas subsequently escaped from the failed pipeline and flowed through a sewer line into a residence owned by one of the plaintiffs. The gas ignited and exploded, and the plaintiffs subsequently filed suit against Mountaineer Gas Company, the City of Keyser, and the excavating company that performed repairs on the line, alleging damages for injuries and property loss. All the plaintiffs received some compensation from their insurance carriers prior to filing their lawsuit.

The City of Keyser moved the Circuit Court for summary judgment under the Act, arguing that all claims against it constituted subrogation claims at least in part.[12] In considering Keyser's motion, the Circuit Court examined the West Virginia Supreme Court's opinion in *O'Dell v. Town of Gauley Bridge*.[13] *O'Dell* addressed the issue of a political subdivision's immunity when a plaintiff had received partial compensation for his or her injuries under the workers' compensation system. The Circuit Court extended *O'Dell*'s reasoning to the *Keyser* facts and held that each plaintiff's partial compensation by insurance barred their claims against

[10] *Id*. at 185.
[11] *Id*. at 170.
[12] *Id*. at 171.
[13] 425 S.E.2d 551 (W.Va. 1992).

the City of Keyser in their entirety.[14] The plaintiffs appealed this decision to the West Virginia Supreme Court of Appeals.

On appeal, the Supreme Court distinguished W.Va. Code §29-12A-5, the provision providing statutory immunity in *O'Dell*, from §29-12A-13(c). The Court declined to read §29-12A-13(c) so broadly as to prohibit "injured parties who have any sort of subrogation relationship with a third party from under any circumstances bringing claims directly or indirectly against a political subdivision," which would create "a broad, nebulous and uncertain category of parties who would be entirely excluded from the use of the courts to pursue their claims."[15] Rather, the court interpreted the language of §29-12A-13(c) only to bar "claims brought directly in the name of parties that are subrogated to an injured person's claims against a political subdivision."[16]

The Supreme Court ultimately held in *Keyser* that "a plaintiff's recovery against a political subdivision must be reduced by the amount of any first-party insurance proceeds that the plaintiff receives for the same injuries and damages for which a claim is made against the subdivision."[17] The Court concluded that this interpretation "is consistent with the overall statutory purpose of the Governmental Tort Claims and Insurance Reform Act, by relieving a political subdivision from paying for damages to the extent that the injured party has been compensated by the party's insurance."[18] Furthermore, "the clear and sole purpose of the statute is to provide financial benefit to political subdivisions," and therefore, there must be "an offset of

[14] *Keyser*, 501 S.E.2d at 171.
[15] *Id*. (emphasis supplied).
[16] *Id*.
[17] *Id*.
[18] *Id*.

any recovery by an injured plaintiff from a political subdivision in the amount of first-party insurance proceeds received by the plaintiff as compensation for their injuries or damages."[19]

B. <u>The Act's provisions regarding subrogation claims are not preempted by Federal Medicaid or Medicare repayment requirements.</u>

Federal law requires states participating in the Medicaid program to:

- "[T]ake all reasonable measures to ascertain the legal liability of third parties (including health insurers, self-insured plans, group health plans (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1167(1)]), service benefit plans, managed care organizations, pharmacy benefit managers, or other parties that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service) to pay for care and services available under the plan"[20]; and

- To seek reimbursement "in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery."[21]

In cases where a third party bears a legal responsibility to make payment for medical assistance provided under West Virginia's Medicaid program, the State acquires a subrogation right "to payment by any other party for such health care items or services."[22] The federal Medicaid repayment statute contains no provision expressly preempting state law. Furthermore, the Act is not preempted by federal law under the "conflict preemption" analysis applied by the United States Supreme Court.

Although the West Virginia Supreme Court has yet to address this issue, at least one West Virginia Circuit Court has held that as a matter of law, the Act "can exist harmoniously"

[19] *Id.*
[20] 42 U.S.C.A. §1396a(a)(25)(A).
[21] 42 U.S.C.A. §1396a(a)(25)(B).
[22] 42 U.S.C.A. §1396a(a)(25)(H).

with federal statutes.[23] The United States Supreme Court has held that "state and federal law conflict where it is 'impossible for a private party to comply with both state and federal requirements.'"[24] 42 U.S.C.A. §1396a(a)(25)(B) requires the State to seek reimbursement in cases where a third party bears legal liability for the medical costs of a Medicaid recipient. The bar to subrogation claims under the Act simply removes this requisite liability from political subdivisions, therefore relieving the State of its right or obligation to seek repayment.

IV. Offset of recovery for expenses forgiven in exchange for payment from a third party and exclusion of evidence of amounts paid or forgiven

The Act further appears to prevent recovery for medical expenses forgiven in exchange for partial payments received from Medicaid or private insurers. The Legislature intended the Act to relieve "a political subdivision from paying for damages to the extent that the injured party has been compensated by the party's insurance."[25] Accordingly, under the Act a plaintiff may only recover to the extent that the bills have been paid by the plaintiff himself or remain outstanding. In cases where providers agree to reduce the total bill in consideration of receipt of partial payment, only a portion of a plaintiff's compensation consists of payment of the actual bill. An additional portion of this compensation is a reduction of the bills in exchange for payments received. If a plaintiff were to assert a claim for medical bills forgiven by the provider, a double recovery would result. Therefore, the goal and purpose of the statute is served only by excluding a claim for medical bills to the extent that they have been paid, directly or indirectly, by any first party insurer.

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[23] *See* Exhibit A, *Order Granting in Part Defendant's Motion for Partial Summary Judgment to Limit Plaintiff's Recoverable Medical Expenses*, *Totten v. City of Charleston*, C.A. No. 08-C-1828, Kanawha Circuit Court.
[24] *PLIVA, Inc. v. Messing*, 131 S.Ct. 2567, __ U.S. __ (2011)(quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).
[25] *Keyser*, 501 S.E.2d at 186

Accordingly, exclusion of evidence pertaining to medical bills forgiven or paid may be excluded as irrelevant at trial under the West Virginia Rules of Evidence. Pursuant to Rule 402, relevant evidence is generally admissible. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[26] The Act itself expressly precludes third parties from bringing claims against political subdivisions under a theory of subrogation. *Keyser* prohibits plaintiffs from recovering damages for compensation previously received from insurers. It therefore follows that evidence of medical expenses paid on behalf of plaintiffs is simply not relevant, as neither the plaintiff nor his or her insurer may recover for such expenditures.

However, even if a court determines that evidence of medical expenses paid or forgiven is relevant, exclusion of this evidence remains proper under Rule 403. Relevant evidence may nevertheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[27] If a plaintiff is permitted to introduce testimony or other evidence of medical expenses incurred for which he or she has already been compensated, the jury may be confused as to the status of these expenses or lead to believe these same medical bills will be paid out of any jury award to the plaintiff. The jury may then be inclined to award a higher verdict than it otherwise would under the facts of the case. Exclusion of any testimony or evidence regarding sums paid on behalf of the plaintiff or extinguished as a result of third-party payment avoids this unjust result.

V. Employment-related claims

[26] W.Va. R. Evid. 401.
[27] W.Va. R. Evid. 403.

Section 29-12A-5 of the Act provides that a political subdivision is immune from liability if a loss or claim results from "any claim covered by any workers' compensation law or any employer's liability law." W.Va. Code § 29-12A-5(a)(11). Consistent with "the general rule of construction in governmental tort legislation cases favoring liability, not immunity: unless the legislature has clearly provided for immunity under the circumstances," the West Virginia Supreme Court has construed the Act to grant absolute immunity from all claims which are covered by worker's compensation insurance even if worker's compensation payments are not paid by the political subdivision itself but the claim is covered by a private employer's worker's compensation policy. [28] This immunity extends to damages in excess of amounts paid by worker's compensation.

O'Dell v. Town of Gauley Bridge, briefly discussed above, addressed three negligence claims brought against political subdivisions by plaintiffs injured in the course of their employment.[29] The first plaintiff, Donna Sue O'Dell, was employed by the Fayette County Public Library. Mrs. O'Dell slipped and fell on her way into work while crossing a wooden walkway owned and maintained by the Town of Gauley Bridge. This walkway was located on property owned by the Gauley Bridge Volunteer Fire Department. Mrs. O'Dell received worker's compensation benefits related to injuries sustained in her fall. Mrs. O'Dell and her husband filed suit against the Town and the Fire Department, alleging that they negligently failed to construct, maintain and repair the walkway.

The Court also considered the claim of Leon France. Mr. France, a cement finisher, was repairing a bridge in Braxton County when a school bus struck his wheelbarrow which then struck Mr. France, knocking him from the bridge. Mr. France fell sixty feet and was totally and

[28] *Randall v. Fairmont City Police Department*, 412 S.E.2d 737 (W.Va. 1991).
[29] *O'Dell, supra* at Note 13.

permanently disabled from employment as a construction worker. Mr. France received worker's compensation benefits from his employer, an Ohio corporation. Mr. France, his wife, and his minor son sued the Board of Education of Braxton County, alleging that the school bus driver negligently operated the bus and proximately caused his injuries.

Thomas Pritchard, the third plaintiff, worked as a salesman for The Letter Shop, a private business located in Logan, West Virginia. Mr. Pritchard slipped and fell on a handicap access ramp on a public sidewalk owned and maintained by the City of Logan and received worker's compensation benefits for his injuries. Mr. Pritchard and his wife later filed a negligence claim against the City of Logan, alleging that the City failed to maintain and repair the sidewalk and caused the ramp to become slippery by applying paint to its sloped surface.

In all three cases, the circuit courts granted summary judgment in favor of the political subdivisions. Each court found that the Act conferred immunity for all claims covered under worker's compensation law regardless of the identity of the employer. The O'Dells and the Frances appealed the orders entered in their cases while the Logan County Circuit Court certified the question of the scope of immunity under the Act to the West Virginia Supreme Court.

The plaintiffs argued that the Act confers immunity only for suits brought by employees of political subdivisions and only to the extent that claims are covered by worker's compensation.[30] The Court noted, however, that unlike other immunity provisions of the Act, §29-12A-5(a)(11) did not include the term "employee" and therefore "clearly contemplates immunity for political subdivisions from tort liability in actions involving claims covered by worker's compensation even though the plaintiff was not employed by the defendant political subdivision at the time of the injury."[31]

[30] *Id*. at 562-63, 565.
[31] *Id*. at 564.

Finally, the Court construed the term "claim" broadly, as "a worker's compensation claim is not based on negligence," but rather "encompasses a variety of statutory monetary benefits, some of which are included in the normal tort claim."[32] Therefore, "W.Va. Code 29-12A-5(a)(11) provides immunity to a political subdivision for all damages arising from a tortious injury, not merely for those compensated by worker's compensation."[33]

Since *O'Dell*, the Court has applied this reasoning even to presently non-compensable situations such as employment-related medical monitoring claims.[34] In *State v. Sanders*, the plaintiffs, a group of firefighters, were exposed to diesel exhaust from emergency vehicles stored at the central fire station in Martinsburg. The plaintiffs sought medical monitoring damages from the City of Martinsburg due to an increased risk of cancer, respiratory difficulties, heart disease, and hearing loss from this exposure.[35] The City moved for summary judgment, invoking immunity under §29-12A-5(a)(11). The trial court denied the motion, applying the holding of *Marlin v. Bill Rich Construction, Inc.*[36] which allowed construction workers to recover medical monitoring expenses from a Board of Education as they could not maintain the claim under worker's compensation.

The Supreme Court found that a critical difference between *Sanders* and *Marlin* and found the trial court's reliance on *Marlin* "misplaced."[37] The workers in *Marlin* were independent contractors, while the plaintiffs in *Sanders* were employees of the City. Because *Marlin* did not "address a cause of action between an employer and employee," it was not controlling in *Sanders*.[38] Just as in *O'Dell*, the Court found that the plaintiffs urged "a narrow

[32] *Id*.
[33] *Id*.
[34] *State v. Sanders*, 632 S.E.2d 914, 920-21 (W.Va. 2006).
[35] *Id*. at 917.
[36] 482 S.E2d 620 (W.Va. 1996).
[37] *Sanders*, 632 S.E.2d at 918.
[38] *Id*.

reading of the term 'claim' by arguing that since there [was] no present injury, a Worker's Compensation claim may not be maintained."[39] The Court "again refuse[d] to assign such a limited meaning to the word 'claim' in light of the Legislature's expressed intention regarding employer immunity from suit" and held that medical monitoring claims, as part of the common-law remedies for which worker's compensation is the sole remedy, fell within the worker's compensation scheme. The City therefore enjoyed immunity from these claims even though no present injury existed and a worker's compensation claim could not be maintained.[40]

The West Virginia Supreme Court further extended this immunity to "deliberate intent" claims in *Michael v. The Marion County Board of Education*.[41] In *Michael*, the Court consolidated three deliberate intent cases for consideration. The first case, brought by Sandra Michael against a school board, involved the death of her husband from thyroid cancer allegedly resulting from massive chemical contamination of the school in which he taught. A former corrections officer filed the second case following a beating by an inmate who previously warned officers of his intent to commit violence. The final case arose from the electrical shock of a 911 radio dispatcher after contact with an exposed conduit. The circuit courts granted summary judgment in favor of each of the entities on the basis that the Act protected them from suits arising from claims covered under workers' compensation law, including deliberate intent actions. On appeal, the Court affirmed the circuit courts' grants of summary judgment in favor of the political entities.

[39] *Id*. at 920.
[40] *Id*. at 920-21.
[41] 482 S.E.2d 140 (W.Va. 1996).

The Court applied a four-factor test established in *O'Dell* to determine whether the group of "limited individuals that would be affected by the political subdivision immunity provision of the Tort Claims Act" included the *Michael* plaintiffs.[42] To fall within the scope of the statute:

> First, the plaintiff must have been injured by the negligence of an employee of a political subdivision. Second, the plaintiff must have received the injury in the course of and resulting from his or her employment. Third, the plaintiff's employer must have workers' compensation coverage. Fourth, the plaintiff must be eligible for such benefits.[43]

The appellants argued that use of the term "negligence" in the *O'Dell* opinion limited immunity to cases involving unintentional acts and therefore removed their deliberate intent claims from the scope of the Act. The Court rejected this assertion and noted the lack of limiting language in the immunity provision of the Act as well as the Legislature's failure to distinguish between intentional torts and negligence in the language of the statute. The Court thus adhered to the general rule "favoring liability, not immunity: *unless the legislature has clearly provided for immunity under the circumstances*."[44] Under the language of the Act and cited precedent, the Court held that "it seems beyond dispute that 'deliberate intent' actions, as part of this state's workers' compensation laws, are "covered" by such laws within the plain meaning of that term" and thus, immunity extends to such actions. *Id*. at 146.

[42] 482 S.E.2d at 144.
[43] *Id*. (citing *O'Dell*, 425 S.E.2d at 558).
[44] *Id*. at 145 (citing *Randall v. Fairmont City Police Department*, 412 S.E.2d 737 (W.Va. 1991))(emphasis original).