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Common Law Tort Immunity for State Officials in West Virginia after the Parkulo v. West Virginia Board of Probation Decision

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COMMON LAW TORT IMMUNITY FOR STATE OFFICIALS IN WEST VIRGINIA AFTER THE PARKULO V. WEST VIRGINIA BOARD OF PROBATION DECISION

I. INTRODUCTION ................................................................. 261

II. HISTORICAL EVOLUTION OF SOVEREIGN IMMUNITY .... 263
    A. Common Law Immunity for Municipalities and Municipal Officers .......... 263
    B. Common Law Immunity for States and State Officers ............ 266

III. THE PARKULO DECISION ........................................ 269
    A. Facts ................................................................. 269
    B. Procedural History ............................................. 270
    C. Issues ............................................................. 272
    D. Holding ......................................................... 272
    E. Reasoning ....................................................... 274

IV. JUDICIAL IMMUNITY ................................................ 275
    A. Historical Evolution ........................................... 275
    B. Effect of the Parkulo Decision .................................. 278

V. QUALIFIED IMMUNITY ................................................. 279
    A. Historical Evolution ........................................... 279
    B. Effect of the Parkulo Decision .................................. 283

VI. PUBLIC DUTY DOCTRINE ........................................ 284
    A. Historical Evolution ........................................... 284
    B. Effect of the Parkulo Decision .................................. 286

VII. CONCLUSION: WHAT LIES BEYOND PARKULO? ............ 287

I. INTRODUCTION

Common law tort immunity for state officials is a relatively new phenomenon in West Virginia because the state has long enjoyed constitutional immunity from suits.¹ There are two general forms of common law immunity: judicial immunity and qualified immunity.² Judicial immunity refers to absolute immunity for judges and legislators based on their official acts.³ Generally, qualified immunity protects public officials for certain discretionary acts performed

³ See id.
as part of their duties. In addition, the public duty doctrine (although not a form of common law immunity in the strict sense) serves the same function by immunizing a public officer from suit based on his breach of a general duty owed to the public at large. However, a public officer does have a duty under the public duty doctrine if there is a "special relationship" between the public official and the person harmed by the official's negligence.

The standards for common law immunity for state officers find their genesis in two basic sources. Primarily, the standards evolved from common law immunity cases concerning municipal public officials. Other standards evolved from federal immunity law in response to suits arising under 42 U.S.C. § 1983. However, the law of immunities in its common law form remained discordant in terms of its application to state officers in West Virginia until Parkulo v. West Virginia Board of Probation. Parkulo is a 1996 decision by the West Virginia Supreme Court of Appeals that addresses a suit by a rape victim against the West Virginia Board of Probation and Parole and the West Virginia Division of Corrections. Finding that the Board of Probation and Parole could claim quasi-judicial immunity and that the Division of Corrections could claim immunity under the public duty doctrine, the decision recognized common law protection for the state and state employees in actions brought under West Virginia Code § 29-12-5. Although Parkulo went a long way toward clarifying common law immunities in West Virginia, the decision left several avenues open to further expansion and litigation.

Section II of this comment traces common law immunity in West Virginia through its evolution on the state and municipal level in order to demonstrate both the geneeses of the various standards and the interplay between the two. Section III discusses the Parkulo decision itself. In sections IV through VI, this comment traces the origins of judicial immunity, qualified immunity, and the public duty doctrine and discusses how these doctrines were incorporated into West Virginia law and how the Parkulo decision applies each of these doctrines to state officials. Finally, section VII discusses the current state of common law immunity for state officials and what lies ahead in future litigation.

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4 See id.
6 See id.
7 See Parkulo, 483 S.E.2d at 517.
8 See id. at 521.
10 See id. at 511.
11 See id. at 511-25.
II. HISTORICAL BACKGROUND

A. Common Law Immunity for Municipalities and Municipal Officers

The evolution of common law immunity for state officers is interwoven with the evolution of sovereign immunity and the evolution of common law immunity for municipalities. Therefore, it is necessary to examine the evolution of municipal common law immunity in order to track the development of the common law immunity standards in this state. The very notion of sovereign immunity finds its roots in the ancient doctrine of "the divine right of the King who could do no wrong."12 In its purest form, sovereign immunity "protects governments at all levels from legal action."13 The doctrine was extended to municipalities in England through the decision of Russell v. Men of Devon.14 The decision of Mower v. Leicester15 adopted the English common law rule of sovereign immunity in this country.16 Thus, the state, as well as its subdivisions, was immune from suit based on the doctrine of sovereign immunity.17

In West Virginia, the initial grant of sovereign immunity stems from the West Virginia Constitution.18 Article VI, § 35 of the West Virginia Constitution states:

The State of West Virginia shall never be made defendant in any court of law or equity, except that the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee, thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.19

The protections afforded to the states were also applied to political subdivisions in a series of cases dating back to 1890.20 In addition, West Virginia courts applied the

13 KEETON ET AL., supra note 2, at 1033.
14 See Long, 214 S.E.2d at 851 (citing Russell v. Men of Devon, 100 Eng. Rep. 359 (1788) and holding that an individual could not maintain an action against a political subdivision of the state for injury resulting from negligence in the performance of any governmental function).
15 9 Mass. 247 (1812).
16 See Long, 214 S.E.2d at 853.
17 See id.
18 See id. at 850.
19 W. VA. CONST. art. VI, § 35.
20 See Long, 214 S.E.2d at 850. See also Hayes v. Cedar Grove, 37 S.E.2d 450 (W. Va. 1946); Hayes v. Cedar Grove, 30 S.E.2d 726 (W. Va. 1944); Brown's Adm'r v. Guyandotte, 12 S.E. 707 (W. Va. 1890).
rule that a municipality or other local entity could be held liable if it negligently performed a proprietary act.\textsuperscript{21} However, beginning with the decision in \textit{Higginbotham v. City of Charleston}\textsuperscript{22} the West Virginia Supreme Court of Appeals began to make sweeping changes in the law of immunities in West Virginia.

\textit{Higginbotham v. City of Charleston} held that the grant of sovereign immunity to the state under Article VI, § 35 of the West Virginia Constitution did not apply to municipalities.\textsuperscript{23} Following the \textit{Higginbotham} decision came the landmark 1975 decision of \textit{Long v. City of Weirton}.\textsuperscript{24} \textit{Long} held, in part, that "[t]he rule of municipal governmental immunity is now abolished in this State."\textsuperscript{25} In reaching its decision, the court in \textit{Long} examined the history of municipal government immunity in West Virginia.\textsuperscript{26} Essentially, the \textit{Long} decision traced the rule of municipal government immunity from the \textit{Men of Devon} decision through 1975.\textsuperscript{27} The court concluded that the traditional analysis of municipal government immunity in this state was erroneous because the State of Virginia had not adopted the common law rule supplying municipalities with immunity until after 1867.\textsuperscript{28} Therefore, West Virginia's constitutional incorporation clause\textsuperscript{29} did not include the common law doctrine of municipal governmental immunity because that doctrine was not part of Virginia common law at the time the state was created.\textsuperscript{30} Thus, the court abolished the rule of governmental immunity as it applied to municipalities.\textsuperscript{31}

Following \textit{Long}, the West Virginia Supreme Court of Appeals applied the same basic reasoning to the abolition of common law immunity for county commissions\textsuperscript{32} and county boards of education,\textsuperscript{33} effectively stripping these political subdivisions of the immunity they had enjoyed for so long.\textsuperscript{34} As a result,

\begin{enumerate}
\item See Benson v. Kutsch, 380 S.E.2d 36, 42 (W. Va. 1989).
\item See \textit{Higginbotham}, 204 S.E.2d at syl. pt. 4.
\item 214 S.E.2d 832 (W. Va. 1975).
\item \textit{Long}, 214 S.E.2d at syl. pt. 10.
\item See \textit{id.} at 850-59.
\item See \textit{id}.
\item See \textit{Parkulo}, 483 S.E.2d at 517.
\item See W. Va. Const. art. VIII, § 13.
\item See \textit{Parkulo}, 483 S.E.2d at 517.
\item See \textit{id}.
\item See \textit{Gooden v. Webster County Comm'n}, 298 S.E.2d 103 (W. Va. 1982) (abolishing sovereign immunity for county commissions).
\item See \textit{Ohio Valley Contractors v. Wetzel County Bd. of Educ.}, 293 S.E.2d 437 (W.Va. 1982) (abolishing sovereign immunity for county boards of education).
\item See \textit{Parkulo}, 483 S.E.2d at 518.
\end{enumerate}
local officials bought liability insurance to protect their funds against lawsuits.\footnote{See John M. Knisely, II, Comment, Tort Reform: The Reemergence of Local Governmental Immunity, 89 W. Va. L. Rev. 466, 466 (1987).} However, insurance companies began raising premiums and canceling policies based upon “the ‘litigiousness’ of our society and a perceived uncertainty regarding the regulatory authority these subdivisions possess.”\footnote{Id.} In response, the West Virginia Legislature passed the Governmental Tort Claims and Insurance Reform Act.\footnote{W. VA. CODE § 29-12A-1 (1999).} The Act’s stated purpose is “to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability.”\footnote{W. VA. CODE § 29-12A-5 (1999).} 

Section 29-12A-5 establishes the statutory basis of tort immunity for political subdivisions.\footnote{Randall v. Fairmont City Police Dep’t, 412 S.E.2d 737, 747 (W. Va. 1991).} However, the West Virginia Supreme Court of Appeals has applied the common law public duty doctrine in cases where there is an “alleged failure of a local governmental entity to provide any, or sufficient, fire or police protection to a particular individual.”\footnote{Id. (citing Wolfe v. City of Wheeling, 387 S.E.2d 307, 310 (W. Va. 1989)).} The public duty doctrine states that “a local governmental entity’s liability for nondiscretionary (or ‘ministerial’ or ‘operational’) functions may not be predicated upon the breach of a general duty owed to the public as a whole; instead, only the breach of a duty owed to the particular person injured is actionable.”\footnote{W. VA. CODE § 29-12A-5 (1999).} In this context, “non-discretionary functions” are those imposed by regulatory or penal statutes that do not vest a public officer with the discretion to enforce or not enforce them.\footnote{See Benson v. Kutsch, 380 S.E.2d 36, 38 (W. Va. 1989).} Section 29-12A-5 governs tort actions for damages proximately caused by “the negligent performance of acts by their employees while acting within the scope of employment.”\footnote{W. VA. CODE § 29-12A-4(o)(2) (1999).} Therefore, while the qualified immunity provisions for public employees under section 29-12A-5 are predicated upon a theory of immunity, the public duty doctrine is formulated upon the premise of negligence.\footnote{See Benson, 380 S.E.2d at 37.} Thus, the notion of the public duty doctrine was first enunciated in West Virginia in 1989 in order to plug one of the holes in section 29-12A-5. The West Virginia Supreme Court of Appeals grafted the standards of these cases onto the jurisprudence governing the common law immunity of state officers in similar situations. Municipal employees are also frequently subject to suit under the federal
civil rights statute 42 U.S.C. § 1983. These suits are not within the purview of state municipal immunity doctrine because they refer to federal standards. However, these same standards have been used to generate the foundation of qualified immunity for state officials.45 The most notable of these cases is Bennett v. Coffman,46 a 1987 decision by the West Virginia Supreme Court of Appeals. Bennett is a case brought under 42 U.S.C. § 1983 against a police officer for civil rights violations.47 In deciding the case, the court applied the federal qualified immunity standard enunciated in Harlow v. Fitzgerald.48 The court restates the test as: "[g]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."49 Therefore, the Supreme Court of Appeals, for the first time, endorsed the federal test for qualified immunity embodied by Harlow. This endorsement is important in terms of the evolution of state official immunity doctrine, as discussed below.

The evolution of municipal government tort immunity is important for this discussion because, as indicated above, the municipal standards determined many of the current standards for state officials.50 However, the evolution of judicial immunity is not closely linked to a similar evolution because it is a far older and more ingrained doctrine. As such, it will be treated at length later in this comment.

B. Common Law Immunity for States and State Officers

The basic grant of sovereign immunity stems from the West Virginia Constitution, which provides that the State should never be made a defendant in any court of law or equity.51 Likewise, the State and its agencies performing statewide functions are entitled to absolute immunity from suit.52 The only exception to the constitutional grant of absolute immunity is garnishment or attachment proceedings.53 The essential policy basis for this severe bar against litigants seeking to sue the State is to protect public money from diversion from

47 See id. at 465.
48 See id. at 467 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
49 Id. at 465.
51 See W. VA. CONST. art. VI, § 35.
"legislatively appropriated purposes." However, this broad ban against suits has never fully protected state officials. 

In this regard, "an injunction to restrain or require a state officer to perform a ministerial duty is not prohibited." Similarly, the West Virginia Supreme Court of Appeals has held that "suits against officers acting, or threatening to act, under alleged unconstitutional statutes, have been held not to be suits against the State." In addition, the court has held that "mandamus has been permitted to require the state road commission to institute proper condemnation proceedings upon the taking or damaging of land for public purposes." Finally, the court has held that "mandamus may be employed to compel state officers who have acted arbitrarily, capriciously, or outside the law, to perform their lawful duties." Thus, the West Virginia Supreme Court has never enforced the sort of absolute ban against suit applicable to the state and its agencies to state officers. However, the types of actions listed above pertain to injunctive and declaratory relief. The issue of pursuing suits against state officials for their malfeasance for monetary damages is a different issue.

At the onset of this discussion it is important to state that the suits seeking monetary damages against the state are regulated initially by the state's liability insurance provisions. For state liability insurance, the statute that controls such issues is section 29-12-5. Section 29-12-5 states in pertinent part that:

The board shall have general supervision and control over the insurance of all state property, activities and responsibilities, including the acquisition and cancellation thereof; determination of amount and kind of coverage, including, but not limited to, deductible forms of insurance coverage, inspections or examinations relating thereto, reinsurance, and any and all matters, factors and considerations entering into negotiations for advantageous rates on and coverage of all such state property, activities and responsibilities. Any policy of insurance purchased or contracted for by the board shall provide that the insurer shall be barred and estopped from relying upon the constitutional

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56 Id.
57 Id.
58 Id.
59 Id.
60 See W. VA. CODE § 29-12-1 to 18.
immunity of the state of West Virginia against claims or suits: Provided, That nothing herein shall bar the insurer of political subdivisions from relying upon any statutory immunity granted such political subdivisions against claims or suits. The board may enter into any contracts necessary to the execution of the powers granted to it by this article. It shall endeavor to secure the maximum of protection against loss, damage or liability to state property and on account of state activities and responsibilities by proper and adequate insurance coverage through the introduction and employment of sound and accepted methods of protection and principles of insurance.\(^{62}\)

Essentially for this discussion, this provision "authorizes the State Board of Insurance to procure liability insurance on behalf of the State..."\(^{63}\)

In 1983, the West Virginia Supreme Court of Appeals decided *Pittsburgh Elevator v. West Virginia Board of Regents*.\(^{64}\) The case, in part, discussed the interplay between the state's immunity from tort and insurance purchased by the state to insure against tort liability.\(^{65}\) In this regard, the court held that "[s]uits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State."\(^{66}\) The court further expanded this proposition in *Eggleston v. W. Va. Dept. of Highways*,\(^ {67}\) which held that:

W.Va. Code, 29-12-5(a) (1986), provides an exception for the State's constitutional immunity found in Section 35 of Article VI of the West Virginia Constitution. It requires the State Board of Risk and Insurance Management to purchase or contract for insurance and requires that such insurance policy "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."\(^ {68}\)

Finally, the court explained its position in the decision of *State ex rel. W.Va. Dept. of...* .

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\(^{62}\) W. VA. CODE § 29-12-5 (1999).

\(^{63}\) *Pittsburgh Elevator*, 310 S.E.2d at 680.

\(^{64}\) 310 S.E.2d 675 (W. Va. 1983).

\(^{65}\) See *Parkulo*, 483 S.E.2d at 514.

\(^{66}\) *Pittsburgh Elevator*, 310 S.E.2d at syl. pt. 2.

\(^{67}\) 429 S.E.2d 636 (W. Va. 1993).

\(^{68}\) *Eggleston*, 429 S.E.2d at syl. pt. 1.
of Transportation, Highways Division v. Madden" where the court said that "these cases stand for the proposition that coverage for such liability accruing from alleged negligent acts by the State is covered by the limits of the State's liability insurance coverage and not state funds." Therefore, in essence, these cases carved out a broad exception to immunity for states and state officials in that the State is required to purchase liability insurance where necessary under section 29-12-5 to protect against suits based on negligent acts by the State. As a result, the primary justification for state immunity (i.e. protection of public funds from diversion from legislatively appropriated purposes) is no longer applicable where the state has an available insurance policy.

The evolution of liability insurance for the state is of crucial importance to this discussion because it is clear that "the Legislature has enacted W.Va. Code § 29-12-5 to provide some level of redress in the courts to those allegedly injured by the actions of the State." On the other hand, although section 29-12-5 indicates that municipalities are still vested with statutory immunity, the section does not mention common law immunity nor does it mention what protections are available to the state. As a result, a broad reading of section 29-12-5 indicates that where there is liability insurance, no immunity is available for the state or state officials. This prospective analysis paved the way for the 1992 decision of State v. Chase Securities, Inc. which applied qualified immunity to state officials acting within the scope of their authority and the later decision of Parkulo v. West Virginia Board of Probation which applies all common law immunities and the public duty doctrine to state officials. These two decisions, in turn, are the crux of common law immunities for state officials in West Virginia.

III. THE PARKULO DECISION

A. Facts

The decision in Parkulo v. West Virginia Board of Probation stems from

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69 453 S.E.2d 331 (W. Va. 1994) (per curiam).
70 Madden, 453 S.E.2d at 334.
72 Parkulo, 483 S.E.2d 507, 516.
73 Id.
75 Id. at syl. pt. 1.
77 Id. at 521-26.
the beating and rape of Chandra Parkulo by Dawson McCrary, Jr. McCrary, a convicted criminal who had recently been paroled from prison, hit Parkulo with his car while she was walking across the campus of Marshall University in Huntington, West Virginia. He then “struck appellant in the head with a blunt object and dragged her into the vehicle . . . .” McCrary left the scene and later, “repeatedly raped appellant, sexually assaulted [Parkulo] with a screwdriver, beat her, and eventually left her nude beside the roadway near the West Virginia-Kentucky state line.” A motorist discovered Parkulo by the road and took her to the hospital for treatment.

McCrary was later arrested in Kentucky, tried and convicted for his crimes involving Parkulo, and sentenced to prison where he subsequently died. Parkulo alleged that at the time he committed the crimes against her “he had been released from prison by the West Virginia Board of Probation and Parole and was then under parole supervision by the West Virginia Department of Corrections.”

B. Procedural History

Parkulo brought an action in January of 1994 naming the West Virginia Board of Probation and Parole and the West Virginia Division of Corrections as defendants. The complaint “sought recovery from the two public bodies, as entities, and did not seek recovery against their respective officers or employees.” Parkulo’s complaint alleged that:

[T]he Board, in granting McCrary parole, and the Division of Corrections, in supervising McCrary while he was on parole, violated their respective statutory duties, acted outside the scope of their respective official responsibilities, and, through their respective employees, acted negligently, in bad faith, and in a wanton and reckless manner. As a proximate result, the complaint alleged, appellant was injured, for which she sought damages.

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79 See id. at 511.
80 See id.
81 Id.
82 Id.
83 See Parkulo, 483 S.E.2d at 511.
84 See id.
85 Id.
86 See id.
87 Id.
88 Parkulo, 483 S.E.2d at 511.
There was also apparently a motion to amend the complaint, but according to the court the record "does not reflect the proposed amendments."\footnote{89}

Thereafter, the West Virginia Board of Probation and Parole filed a motion to dismiss on March 1, 1994.\footnote{90} In its motion, the Board of Probation asserted that "it was immune from suit because its function in granting or denying parole is judicial or quasi-judicial in nature and asserted that the employees of the Board were acting in the scope of their authority."\footnote{91} The Division of Corrections served its answer nine days later on March 10, 1994.\footnote{92} In its answer, the Division of Corrections denied many of allegations contained in the complaint and also "raised several affirmative defenses, including the doctrine of sovereign immunity, the doctrine of qualified immunity, the doctrine of quasi-judicial immunity, lack of duty owed to the plaintiff, and lack of subject matter jurisdiction."\footnote{93}

In a letter dated February 1, 1995, the circuit judge announced that the motion to dismiss would be granted.\footnote{94} The judge stated that "I am of the opinion that the act of granting parole is a judicial or quasi-judicial function and that there is absolute immunity from liability as to each of these defendants."\footnote{95} Subsequently, the court entered an order granting the Board of Probation's motion to dismiss with prejudice on April 12, 1995 on the theory that the suit was barred by judicial or quasi-judicial immunity.\footnote{96} However, as the opinion letter indicates, the judge dismissed the complaint against both defendants despite the fact that the Division of Corrections had not moved for dismissal.\footnote{97} As a result, on April 24, 1995 the appellant served a motion on the court to reconsider its dismissal order.\footnote{98} In response, the Division of Corrections filed a motion for summary judgment on August 14, 1995 alleging that the Division owed no duty to Parkulo based on the public duty doctrine.\footnote{99} After a hearing, the court, by an order dated September 15, 1995, denied the appellant's motions and granted the Division's motion for summary judgment.\footnote{100} The court found that the appellant could not meet the requirements of the "special relationship doctrine," thus barring her claims against

\footnote{89} Id.
\footnote{90} See id.
\footnote{91} Id.
\footnote{92} See id.
\footnote{93} Parkulo, 483 S.E.2d at 511.
\footnote{94} See id.
\footnote{95} Id. at 512. (emphasis in original).
\footnote{96} See id.
\footnote{97} See id.
\footnote{98} See Parkulo, 483 S.E.2d at 512.
\footnote{99} See id.
\footnote{100} See id.
the Division under the public duty doctrine. Parkulo's appeal was based on the order of September 15, 1995.

C. Issues

Essentially, Parkulo made two assignments of error. First, she contended that the trial court erred in dismissing the claim against the Board of Probation because the Board does not enjoy judicial immunity. Second, she claimed that the trial court erred in dismissing the claim against the Division of Corrections because the Division does not enjoy immunity under the public duty doctrine. The court acknowledged two legal concepts for review:

(1) That the Appellees, as instruments of the State, are entitled to claim some form of governmental immunity arising from the common law independently of the sovereign immunity granted the State by our Constitution, and
(2) That the Appellant can not maintain an action in negligence for any breach of Appellee's duties to enforce regulatory and penal statutes, because such duty is owed to the public generally and not to a particular person harmed by any such breach.

The court used these two questions as a springboard to examine the general law of common law immunities in West Virginia and their applicability to the State and its officials.

D. Holding

Initially, the court discusses the grounds and procedure for suits made against the state or state officials. The court begins by reaffirming the holding in Pittsburgh Elevator v. West Virginia Board of Regents, holding that suits against the State's liability insurance, under its limits, are not barred by traditional notions of sovereign immunity. The court also reaffirms the holding in Eggleston v. West

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101 See id.
102 See id.
103 See Parkulo, 483 S.E.2d at 513.
104 See id.
105 See id.
106 Id.
108 See Parkulo, 483 S.E.2d at syl. pt. 1, (citing Pittsburgh Elevator v. West Virginia Bd. of Regents, 310 S.E.2d 675, syl. pt. 2 (W. Va. 1983)).
Virginia Dept. of Highways,\textsuperscript{108} which held that W. Va. Code § 29-12A-5(a) provides an exception to the state’s constitutional immunity under Article VI, § 35 of the West Virginia Constitution where the State has bought liability insurance pursuant to section 29-12A-5.\textsuperscript{110} Parkulo then holds that the West Virginia Supreme Court of Appeals will not address suits brought under W. Va. Code § 29-12-5 unless “it is alleged that the recovery sought is limited to the applicable insurance coverage and the scope of the coverage and its exceptions are apparent from the record.”\textsuperscript{111} The court also holds that:

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.\textsuperscript{112}

Finally in this regard, the court holds that:

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.\textsuperscript{113}

Thus, the court discusses the interplay between the State’s insurance policies and case law, and establishes the procedure for suits under W. Va. Code § 29-12-5. Following this procedural background the court discusses common law immunities as they apply to the state and state officials. The court holds that:

Unless the applicable insurance policy otherwise expressly provides, a State agency or instrumentality, as an entity, is immune under common-law principles from tort liability in W.Va. Code § 29-12-5 actions for acts or omissions in the exercise of a legislative or judicial function and for the exercise of an

\textsuperscript{108} 429 S.E.2d 636 (W. Va. 1993).
\textsuperscript{111} Parkulo, 483 S.E.2d at syl. pt. 3.
\textsuperscript{112} Id. at syl. pt. 4.
\textsuperscript{113} Id. at syl. pt. 5 (emphasis in original).
administrative function involving the determination of an administrative function involving the determination of fundamental governmental policy.\textsuperscript{114}

In addition, the court extends common law immunity to state officials performing "judicial, legislative, and executive (or administrative) policy-making acts and omissions."\textsuperscript{115} The court also extends this coverage to public officials who are "acting within the scope of [their] authority."\textsuperscript{116} Finally, the court applies the public duty doctrine to "the State and its instrumentalities, unless the doctrine is expressly waived or altered by the terms of the applicable insurance contract."\textsuperscript{117} Therefore, in essence, the court applies all common law immunities to state officials in actions under W. Va. Code § 29-12-5.

This is but a brief overview of the effect of Parkulo upon the doctrine of common law immunities. A longer more exhaustive analysis of the evolution and the current state of judicial immunity, qualified immunity, and the public duty doctrine follows this analysis of the Parkulo decision.

E. Reasoning

In establishing a broad base of common law immunity for the state and state officials the court is mindful of the "slippery slope" of limiting the state's liability in tort actions.\textsuperscript{118} However, the court concludes that:

\begin{quote}
[I]t is deceptively inviting to conclude that no common-law immunities apply which are not expressly set out in the State's insurance policies, and that a private action should therefore lie for the breach of any duty by any agency or instrumentality of the State. Under that analysis, in the absence of immunities and other defenses unique to the status of a prospective defendant as an instrument of government, a private suit might lie against the Legislature—if not legislators—for any number of real or imagined deficiencies in legislation, appropriations, or other actions, or against the courts—if not judges and other quasi-judicial officers—for any negligence alleged in judicial processes and against a variety of public offices, agencies, or instrumentalities, so long as the alleged wrong is covered by insurance and not expressly excluded by the terms of the policy or
\end{quote}

\textsuperscript{114} Id. at 509-10, syl. pt. 6.
\textsuperscript{115} Id. at 510, syl. pt. 7.
\textsuperscript{116} Id. at 510, syl. pt. 7.
\textsuperscript{117} Parkulo, 483 S.E.2d at syl. pt. 8.
\textsuperscript{118} Id. at syl. pt. 10.
Therefore, the court reasons that common law immunities are necessary to shield the State and State officials from suits based on any number of pretexts simply because the State has liability insurance covering that officer, instrumentality, or agency. Thus, the court applies common law immunities to the State and State officials in order to protect against the erroneous and inequitable notion of a suit against a legislator (judge, state official, agency, or instrumentality) for a perceived or actual injury to a particular citizen or citizens, at least under certain circumstances discussed later in this comment.

IV. JUDICIAL IMMUNITY

A. Historical Evolution

The doctrine of absolute judicial immunity is "as old as the law." Floyd v. Barker is a 1607 decision which contains one of the earliest formulations of the doctrine of judicial immunity. In Floyd, Lord Coke, holding that judges were immune from suit, stated that:

[T]he reason and cause why a Judge, for any thing done by him as Judge, by the authority which the King hath committed to him, and as sitting in the seat of the King (concerning his justice) shall not be drawn in question before any other Judge, for any surmise of corruption, except before the King himself, is for this; the King himself is de jure to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath.

Thus, Lord Coke determined that judges were immune from suit because implicit in their grant of authority to do the King's justice is an extension of the King's own absolute immunity from suit.

The United States Supreme Court addressed judicial immunity in two early cases: Randall v. Brigham and Bradley v. Fisher. The Supreme Court in

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119 Id.
120 Id.
124 74 U.S. (7 Wall.) 523 (1868).
125 80 U.S. (13 Wall.) 335 (1871).
Randall applied judicial immunity to a justice of the Massachusetts Superior Court. The Court stated that "[judges] are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly." The Supreme Court further discussed the doctrine of judicial immunity in Bradley where the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." It should be noted that these decisions, with few exceptions, render a judge completely immune from suit based on his judicial acts. As a result, judicial immunity is sometimes referred to as "absolute."

The earliest formulation of judicial immunity in West Virginia is Fausler v. Parsons. In an 1873 decision which cites Bradley, the West Virginia Supreme Court of Appeals held that "[It seems, therefore, settled that where the subject matter and the person are within the jurisdiction of the courts, the judge, whether of a superior or inferior court, is not subject to a civil action for any matter done by him in the exercise of his judicial functions." Thus, the court's decision is very much in keeping with the broad and sweeping doctrine enunciated by the United States Supreme Court in Bradley and Randall. In fact, as the Supreme Court of Appeals states so eloquently, Fausler "began an unbroken line of cases committing this State to the common law rule that shields a judge from liability for any act taken in the exercise of a judicial duty."

Beginning in the late 1960's, the United States Supreme Court discussed the limitations and expansions of the ancient doctrine of judicial immunity in four important decisions. First, the Court held in the 1967 decision of Pierson v. Ray that a judge is immune from damages for false conviction even if the judge is accused of acting maliciously and corruptly. Second, in Imbler v. Pachtman, a 1976 decision, the Court held that prosecutors are entitled to judicial immunity for damages in a civil suit brought under 42 U.S.C. § 1983. Third, in Stump v.

127 Id. at 536.
128 Bradley, 80 U.S. (13 Wall.) at 351.
129 6 W. Va. 486 (1873).
130 Id. at 491.
131 Roush, 475 S.E.2d at 303.
133 386 U.S. 547 (1967).
134 See id. at 554.
136 See id. at 431.
Sparkman, a 1978 decision, the Court held that a judge is immune from damages resulting from an ex parte sterilization order. Finally, in Pulliam v. Allen, a 1984 decision, the Court acknowledged that there are exceptions to a judge’s absolute immunity under 42 U.S.C. § 1983.

These four United States Supreme Court cases set the stage for a triad of West Virginia Supreme Court of Appeals cases: Pritchard v. Crouser, Carey v. Dostert, and Roush v. Hey. Pritchard, decided in 1985, analyzed judicial immunity based upon a combination of West Virginia and federal law. The court in Pritchard first reaffirmed the standard for judicial immunity, holding that “[w]hen acting in his judicial capacity a judge is immune from civil liability for any and all official acts.” The court then laid out the policy reasons for judicial immunity that it had gleaned from the federal cases listed above. The court identified the three main policy reasons for shielding judges from civil liability as follows: “(1) the preservation of judicial independence; (2) the need for finality in lawsuits; and, (3) the existence of another remedy against judicial excess in the form of appellate review.” Thus, the court reaffirmed the doctrine of judicial immunity and laid out a framework for the reasoning behind the doctrine.

In Carey, a 1991 decision, the court held that:

A judge acting in his judicial capacity who provides the public with information contained in the public record, whether through the press or otherwise, or distributes copies of pleadings or other official court documents which are a part of the public record does not thereby give up the protection of judicial immunity.

Thus, the court applies the absolute doctrine to prohibit suit against a judge for distributing court documents to the public prior to filing it with the clerk.

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138 See id. at 364.
140 See id. at 544.
141 332 S.E2d 611 (W. Va. 1985).
144 See Pritchard, 332 S.E.2d at 614-17.
145 Id. at 614.
146 Id. at 615.
147 Id.
148 Carey, 406 S.E.2d at syl. pt. 2 (emphasis in original).
149 Id. at 679.
However, in *Roush*, a 1996 decision, the court first reformulated the test for judicial immunity by holding that "[t]o determine when absolute judicial immunity protects a judge from civil liability, we apply a two-part test: absolute judicial immunity applies (1) to all judicial act [sic]; unless (2) those acts fall clearly outside the judge's subject matter jurisdiction."\(^{150}\) The court further holds that:

There is a two-factor test for determining whether a judge's act is a 'judicial' one. The first factor is whether the act was a function normally performed by a judge. This turns on the nature of the act itself and not on the identity of the actor. The second factor is whether the parties dealt with the judge in his judicial capacity; this factor looks to the expectation of the parties.\(^{151}\)

*Roush* streamlines and clarifies the analysis of judicial immunity in West Virginia. However, the striking thing about the case is that the court finds that Judge Hey was not entitled to judicial immunity for his appearance on CNN's "Crossfire," during which he discussed a case still pending in his court.\(^{152}\) Therefore, by 1996, the law of judicial immunity was very well developed and, in essence, was still very much true in substance to Lord Coke's opinion in *Floyd v. Barker*,\(^{153}\) which was handed down almost four hundred years ago.

### B. The Effect of the Parkulo Decision

In terms of pure judicial immunity as it applies only to judges, the court in Parkulo merely states that "we do not disturb our holding in *Roush v. Hey*, 197 W.Va. 207, 475 S.E.2d 299 (1996), allowing an action to be brought where a judge's alleged actions were determined to be non-judicial acts and, therefore, were not cloaked with judicial immunity."\(^{154}\) Therefore, in terms of judicial immunity as it applies to judges, *Roush v. Hey* is still the leading case describing the analysis and the application of judicial immunity.

The court concludes that the West Virginia Board of Probation and Parole is immune from Parkulo's suit because it determines that the Board of Probation and Parole is a "quasi-judicial body."\(^{155}\) The court holds, as an initial proposition, that:

Unless the applicable insurance policy otherwise expressly provides, a State agency or instrumentality, as an entity, is

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\(^{150}\) *Roush*, 475 S.E.2d at syl pt. 4.

\(^{151}\) *Id.* at syl. pt. 5.

\(^{152}\) See *id.* at 301-307.

\(^{153}\) 77 Eng. Rep. 1305 (Star Chamber 1607).

\(^{154}\) *Parkulo*, 483 S.E.2d at 524.

\(^{155}\) *Id.* at 525.
immune under common law principles from tort liability in W.Va. Code § 29-12-5 actions for acts or omissions in the exercise of a legislative or judicial function and for the exercise of an administrative function involving the determination of fundamental governmental policy.  

The court further holds that:

The common law immunity of the State in suits brought under the authority of W.Va. Code § 29-12-5 (1996) with respect to judicial, legislative, and executive (or administrative) policy-making acts and omissions is absolute and extends to judicial, legislative, and executive (or administrative) officials when performing those functions.

In stating that judicial, executive, and legislative agencies and officials are "absolutely" immune from suit under common law principles, the court essentially states that those agencies or officers are entitled to absolute judicial immunity. The major point here is that now so long as an agency or official is performing a judicial, legislative, or executive act, they are entitled to absolute judicial or "quasi-judicial" immunity under the principles invoked in *Roush v. Hey*. The effect here is extraordinary in the sense that for the first time in this state, certain officials who are not judges, legislators, or prosecutors are entitled to absolute immunity for suit. Therefore, the court clearly indicates that quasi-judicial immunity extends beyond the judiciary to agencies and officials of the executive branch performing quasi-judicial functions. This is a severe bar against suits directed at these officials and agencies because absolute immunity implies that these officials and agencies do not even have to defend the merits of the case.

The ramifications of this aspect of the decision are quite broad. At the time of writing, no case has fully discussed the ramifications of *Parkulo* in this regard. Thus, because quasi-judicial immunity is so broad and sweeping in this format, there is no precise estimate as to how far the new protection extends. As a result, suits against officials or agencies under the State's liability insurance contracts must be carefully pleaded so as not to invoke the quasi-judicial immunity protections.

V. QUALIFIED IMMUNITY

A. Historical Background

The doctrine of qualified immunity, unlike judicial immunity, does not trace its roots from ancient precedent. In fact, as the West Virginia Supreme Court

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156 *Id.* at syl. pt. 6.
157 *Id.* at syl. pt. 7.
of Appeals notes in State v. Chase Securities, Inc.\textsuperscript{158} "our law with regard to public official immunity is meager."\textsuperscript{159} However, prior to the Parkulo decision, Chase Securities was the leading case concerning qualified immunity for state officials.\textsuperscript{160} Therefore, Chase Securities is perhaps the best focus for a discussion of qualified immunity for state officials. In that case, the defendant was sued by the State for damages because of its alleged complicity in the loss of approximately $7.1 million from the Consolidated Fund.\textsuperscript{161} The defendant, Chase Securities, Inc., then filed a third party complaint against Arch A. Moore, Jr., A. James Manchin, and and Glen B. Gainer, Jr. who were, at the time, the Governor, the Treasurer, and Auditor respectively.\textsuperscript{162} The third party defendants (Moore, Manchin, and Gainer) put forth a defense predicated upon qualified immunity.\textsuperscript{163} As previously noted, state officials prior to the Pittsburgh Elevator\textsuperscript{164} decision were immune from most suits based on sovereign immunity. The third party defendants relied on State ex rel. Boone National Bank of Madison v. Manns\textsuperscript{165} for their qualified immunity defense. In Manns, members of the Lincoln county commission were sued because they had expended funds in excess of the year's levy.\textsuperscript{166} In that case the West Virginia Supreme Court of Appeals held that:

No public officer is liable to one dealing with him for the ill-performance of an official act, if he is legally vested with discretion, or must use his own judgment, as to the manner or method of performing such act. Judicial and legislative officers are, accordingly, ordinarily immune from such liability, and are not even required to give bond. Other officers in performing acts which involve personal discretion likewise incur no personal liability in the absence of fraud.\textsuperscript{167}

Therefore, the Court in Manns essentially says that public officers are not liable in tort for discretionary acts. This dichotomy, more precisely the dichotomy between discretionary and ministerial acts, is at the core of the doctrine of qualified

\textsuperscript{158} 424 S.E.2d 591 (W. Va. 1992).
\textsuperscript{159} \textit{Id.} at 593.
\textsuperscript{160} \textit{See Parkulo}, 483 S.E.2d at 520.
\textsuperscript{161} \textit{See Chase Securities}, 424 S.E.2d at 592-93.
\textsuperscript{162} \textit{Id.} at 592.
\textsuperscript{163} \textit{Id.} at 593.
\textsuperscript{164} 310 S.E.2d 675 (W. Va. 1983).
\textsuperscript{165} 29 S.E.2d 621 (W. Va. 1944).
\textsuperscript{166} \textit{See id.} at 622-23.
\textsuperscript{167} \textit{Id.} at 623-24.
The dichotomy between ministerial acts and discretionary acts is defined as follows:

It is usually said that the immunity protects acts within the scope of the officer's duty only if the acts are "discretionary." This means, more or less, that the acts involve some fairly high level of policymaking. Acts that do not qualify as "discretionary" acts are usually called "ministerial," and for purely ministerial acts of executive officers or employees there is no immunity. Acts that create direct personal risks to others and acts involving ordinary considerations of physical safety are usually in this category where there are no serious governmental concerns.

Under that analysis, a public officer is not liable in tort for his acts if they are discretionary but the same officer is liable for his acts if he fails to satisfy a ministerial duty that is imposed by law. In holding that the third party defendants in *State v. Chase Securities, Inc.* were immune under the doctrine of qualified immunity, the court does away with the dichotomy between ministerial and discretionary acts altogether.

The court in *Chase Securities* holds that:

[A] public executive official who is acting within the scope of his authority and is not covered by the provisions of W. Va. Code, 29-12A-1, *et seq.*, is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive. To the extent that *State ex rel. Boone National Bank of Madison v. Manns, supra*, is contrary, it is overruled.

Thus, in its decision the court establishes a standard for qualified immunity that is not contingent upon the dichotomy between ministerial and discretionary acts. In fact, earlier in the opinion the court decried the dichotomy as "highly arbitrary and

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168 See Keeton, et al., * supra* note 2, at 1060.
169 * Id.* at 1060.
170 * See id.*
172 * Id.* at 599-600.
173 * Id.*
174 * See id.*
difficult to apply.” However, the exact origin of this standard requires some elucidation.

As in the doctrine of judicial immunity, the West Virginia Supreme Court of Appeals relies heavily upon federal law for the evolution of its qualified immunity standard.176 As noted earlier, the source of many federal immunity standards is jurisprudence based on 42 U.S.C. § 1983 civil rights suits.177 The court in Chase Securities states that section 1983 litigation “has resulted in a substantial body of law regarding immunity for public officials.”178 Most notable among these decisions are three United States Supreme Court decisions cited by the West Virginia Supreme Court of Appeals in Chase Securities: Burns v. Reed,179 Westfall v. Erwin,180 and Harlow v. Fitzgerald.181 First, the Court noted in Burns that “[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.”182 In Westfall, the Court noted that

The purpose of such official immunity is not to protect an erring official, but to insulate the decision making process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties.183

Finally, the test upon which the Court bases its holding in Chase Securities was first announced in Harlow.184 In Harlow, the United States Supreme Court held that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”185 The West Virginia Supreme Court of Appeals first discussed this

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175 Id. at 599.
176 See generally Martin v. Mullins, 294 S.E.2d 161 (W. Va. 1982) (uses federal immunity law to create a right to indemnification for attorney’s fees, monetary judgments, and costs incurred by a public official in defending a civil action).
177 See infra. § II(A).
178 Chase Sec., 424 S.E.2d at 594.
182 Burns, 500 U.S. at 486-87.
183 Westfall, 484 U.S. at 295.
184 See Chase Sec., 424 S.E.2d at 597.
185 Harlow, 457 U.S. at 818.
standard, as noted above, in Bennett v. Coffman, a 1987 decision by the court which mirrored the United States Supreme Court’s holding in Harlow. Thus, the West Virginia Supreme Court of Appeals, for the first time, adopted the qualified immunity standard that prevails in federal 42 U.S.C. § 1983 jurisprudence.

The West Virginia Supreme Court of Appeals discussed qualified immunity again in Clark v. Dunn. According to the Parkulo court, that decision “appeared to resurrect the distinction between ‘discretionary’ and ‘non-discretionary’ governmental functions, although it clearly applied the Chase rule.” Thus, prior to Parkulo the dominant standard in qualified immunity jurisprudence in West Virginia was the Harlow rule as restated by the Court in Chase Securities.

B. Effect of the Parkulo Decision

From the outset, the court was not specifically asked to address the doctrine of qualified immunity for state officials. However, the court uses the broad nature of common law immunity, as well as the inherent interplay between each of the several doctrines, as a springboard to clarify the whole. In this regard, the court first endorses the Chase Securities standard quoted above as the applicable standard for qualified immunity which governs suits brought under W. Va. Code § 29-12-5. The court also holds that:

[W]e conclude that, in cases arising under W. Va. Code § 29-12-5, and in the absence of express provisions of the insurance contract to the contrary, the immunity of the State is coterminous with the qualified immunity of a public executive official whose acts or omissions give rise to the case. However, on occasion, the State will be entitled to immunity when the official is not entitled to the same immunity; in others the official will be entitled to immunity when the State is not. The existence of the State’s immunity of the State must be determined on a case-by-case basis.

The second part of the court’s holding with regard to the extent of the immunity of the state and the official is somewhat perplexing. However, the court suggests that the reason behind it is that ordinarily a state official’s qualified immunity is

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187 See id. at 465.
188 465 S.E.2d 374 (W. Va. 1995).
189 Parkulo, 483 S.E.2d at 521.
190 See also Goines v. James, 433 S.E.2d 572 (W. Va. 1993).
191 See Parkulo, 483 S.E.2d at 523, (citing Chase Sec., 424 S.E.2d at 591-592).
192 Id. at 524.
coterminal with the state’s except where vicarious liability will not be imputed to the state because an official acts “beyond the scope of his authority or by fraudulent, malicious, or otherwise oppressive conduct.” Thus, the court mandates a case-by-case analysis in order to determine whether an official’s conduct is covered under the Chase Securities standard that the court endorses.

Despite the fact that the court was not specifically asked to analyze qualified immunity for state officials, its decision goes a long way toward clarifying the law of qualified immunity in West Virginia. Because the court agrees with the Chase Securities standard, it effectively rids West Virginia qualified immunity jurisprudence of the troublesome dichotomy between ministerial and discretionary functions. The standard announced in Chase Securities and endorsed by Parkulo essentially defines covered conduct as that which “did not violate clearly established laws of which a reasonable official would have known.” Thus, the court effectively simplifies and clarifies the law of qualified immunity for state officials in West Virginia.

VI. THE PUBLIC DUTY DOCTRINE

A. Historical Evolution

On a national level, the public duty doctrine is somewhat older than qualified immunity, but it is certainly still in its nascence compared to judicial immunity. As noted earlier, the public duty doctrine is not truly a form of governmental immunity. However, the doctrine “in practice achieves much the same result.” The origin of the doctrine in this country stems from South v. Maryland, an 1855 decision by the United States Supreme Court. In that case the Court applied English law to find that a sheriff had no duty to secure the release of a kidnapping victim, even though he knew that the victim had been kidnapped and where the victim was being held. The Court held that the sheriff’s duty was “a public duty, for neglect of which he is amendable to the public, and punishable by indictment only.”

As noted previously, the public duty doctrine was engrafted into the jurisprudence of this state under municipal immunity law. The first West Virginia decision addressing the public duty doctrine and its special relationship

193 Id. at 523.
194 See id.
195 Id. at 523, (citing State v. Chase Sec., Inc., 424 S.E.2d 591, 591-92 (W. Va. 1992)).
197 59 U.S. (18 How.) 396 (1855).
198 See South, 59 U.S. (18 How.) at 397-403.
199 South, 59 U.S. (18 How.) at 403.
200 See infra § II(A).
exception is Benson v. Kutsch. Benson was a suit arising out of an alleged negligent failure by the city to properly inspect a building, which allegedly led to injuries by the plaintiff that he sustained in a fire. Finding that the City of Wheeling was entitled to immunity under the public duty doctrine and relying solely on foreign authority, the court held that the public duty doctrine "simply stated, is that a governmental entity is not liable because of its failure to enforce regulatory or penal codes." In addition, the court held that "[i]f a special relationship exists between a local governmental entity and an individual which gives rise to a duty to such individual, and the duty is breached causing injuries, then a suit may be maintained against such entity." Thus, a governmental entity is not liable for a failure to enforce regulatory or penal statutes, unless a special relationship exists.

The court clarifies the notion of a "special relationship" in Wolfe v. City of Wheeling. Wolfe was a suit brought in Ohio County Circuit Court in which the plaintiffs alleged negligent breach of conduct for the fire department's failure to respond to a fire at their home. The court, remanding the case for the circuit court to decide whether a special relationship existed, establishes the four-part test for a "special relationship" as:

(1) An assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.

Again, in this decision the court relies on foreign authority, in this case New York and Ohio law, in order to determine its special relationship test. Therefore, to summarize the court's holding in Wolfe, in order for a cause of action to lie for a breach of the public duty doctrine, the government must create a duty separate from
its duty to the public with the injured party through its actions.\footnote{See id.}

The stage was set for the court’s next analysis of the public duty doctrine in \textit{Randall v. Fairmont City Police Department}.\footnote{412 S.E.2d 737 (W. Va. 1991).} The decision essentially limits the broad use of the public duty doctrine as formulated in \textit{Benson} and \textit{Wolfe}.\footnote{See id. at 747.} The court defines the public duty doctrine such that “a local governmental entity’s liability for nondiscretionary (or ‘ministerial’ or ‘operational functions’) may not be predicated upon the breach of a general duty owed to the public as a whole.”\footnote{Id. at 747.} Thus, the court states that the public duty doctrine is only applicable when the conduct, act, or omission in question is non-discretionary in nature.\footnote{See id.} As a result, the court limits the application of the public duty doctrine to situations in which the alleged conduct is a violation of an official’s duties that are mandatory by law.\footnote{See id.}

It is clear from the cases discussed above that the law with regard to the public duty doctrine and the special relationship exception was well developed prior to \textit{Parkulo} insofar as it was applied to municipalities. As we will see, the West Virginia Supreme Court of Appeals extends this coverage even further.

\subsection*{B. \textit{Effect of the Parkulo Decision}}

The court finds that nothing in the record indicated that the West Virginia Board of Probation and Parole owed any duty to Parkulo because the Board did not create a special relationship with her.\footnote{See Parkulo, 483 S.E.2d at 525.} The court also applies the public duty doctrine to the state and state officials holding that “[t]he public duty doctrine and its ‘special relationship’ exception apply to W. Va. Code § 29-12-5 actions against the State and its instrumentalities, unless the doctrine is expressly waived or altered by the terms of the applicable insurance contract.”\footnote{Id. at syl. pt. 10.} The court further holds that “[i]n cases arising under W. Va. Code § 29-12-5, the question of whether a special duty arises to protect an individual from a State governmental entity’s negligence is ordinarily a question of fact for the trier of facts.”\footnote{Id. at syl. pt. 11.} Finally, the court endorses the \textit{Wolfe} special relationship test quoted above as the special relationship test applicable to the state and its instrumentalities.\footnote{See id. at syl. pt. 12.} Thus, the court essentially engrafts the jurisprudence of the municipal public duty doctrine into the State’s
common law immunity jurisprudence.

The final result of the Parkulo decision in this regard is that the state and its instrumentalities are no longer liable for alleged negligent acts arising from a failure to enforce a discretionary regulatory or penal statute unless a special relationship exists. Therefore, the court supplies the state, its instrumentalities, and its officials with a very effective means to ward off suits based on their alleged negligence insofar as the alleged conduct is non-discretionary.

VII. CONCLUSION: WHAT LIES BEYOND PARKULO?

The Parkulo decision mandates a broad and sweeping grant of common law immunity for the state and state officials. This grant, in many respects, undermines the very function of W. Va. Code § 29-12-5, which supposedly supplies a means of redress for injured parties against the state.220 Therefore, the issue becomes whether the doctrine of common law immunity will continue to insulate the state and its officers to such a high degree, or whether the West Virginia Supreme Court of Appeals will abrogate these broad protections. The answer, of course, is unclear. The trend, as indicated in this comment, is to protect the state and its officers from most liability. However, this apparently defeats the valid public policy underlying W. Va. Code § 29-12-5 which is to provide a means of redress. Thus, the Parkulo decision serves to blockade the relief granted to injured parties by statute.

There are at least three possible courses. First, the West Virginia Legislature could enact statutory immunity for the state and state officials in section 29-12-5 actions much like they did in the Governmental Tort Claims and Insurance Reform Act.221 Second, the court itself could abrogate these immunities further as in Randall v. Fairmont City Police Department.222 Finally, the court may preserve the status quo and continue to endorse sweeping protections on the common law level for the State and state officials.223 Only time, and further litigation, will tell the tale.

Grant P.H. Shuman*

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220 See id. at 516.

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