

15-0879

IN THE CIRCUIT COURT OF OHIO COUNTY WEST VIRGINIA

BRENDA ALBERT,

Plaintiff,

v.

CIVIL ACTION NO. 15-C-43

CITY OF WHEELING,

Defendant.

ORDER GRANTING DEFENDANT CITY OF WHEELING'S MOTION TO DISMISS

On the 13th day of March, 2015, the plaintiff filed her Complaint against the defendant, City of Wheeling. The defendant, City of Wheeling, filed its Motion to Dismiss with supporting Memorandum on April 2, 2015. Plaintiff thereafter filed Interrogatories and Requests for Production of Documents, as well as Requests for Admissions directed to the defendant, City of Wheeling. The discovery was responded to by the City of Wheeling by May 12, 2015. Plaintiff filed her response to the defendant's Motion to Dismiss with supporting documents on July 13, 2015.

The matter was set by this Court for a hearing for July 17, 2015, at 10:15 a.m. Thereupon, the Court having reviewed the pleadings in this matter did entertain oral argument of counsel for all parties and the Court ordered that the defendant's Motion to Dismiss be granted for the following reasons:

I. FINDINGS OF FACT

In evaluating the Motion to Dismiss, this Court construes the plaintiff's Complaint in the light most favorable to the plaintiff, meaning that it has accepted as true the well pled factual allegations contained therein and has drawn all reasonable inferences therefrom to the plaintiff's

advantage. See: *Conrad v. ARA Szabo*, 198 W.Va. 362, 369-70, 480 S.E.2d 801, 808-09 (1996), citing with approval, *Murphy v. Smalbridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996).

On February 14, 2013, a fire broke out in the dining room of her home.¹ The Wheeling Fire Department was notified and responded to the scene.² The Wheeling Fire Department arrived at the scene and “starting to put out the fire.”³ The Fire Department hoses became clogged by rocks in the Fire Department’s fire hydrant system.⁴ Plaintiff alleges that the defendant was negligent in its “maintenance and operation of the City’s waterworks and fire hydrant system.”⁵ Plaintiff further alleges that due to the negligence of the defendant the fire protection was unsuccessful and “the fire at Brenda Albert’s home could not be contained and the house became a total loss.”⁶

Plaintiff also alleges that she had difficulty raising funds to tear down the remaining portions of her home subsequent to the fire.⁷ She states that a Raze or Repair Order was issued.⁸

Plaintiff mentions an arrest warrant was issued for allegedly not complying with the Raze or Repair Order quick enough. In plaintiff’s response brief, plaintiff specifically states “there is no allegation regarding liability related to the issuance of the arrest warrant for plaintiff for not being able to raze the building because she is a disabled widow raising her orphan daughter. Those allegations relate to her damages for annoyance and inconvenience related to the loss of property because the City of Wheeling failed to properly keep its waterworks and fire hydrant system ‘open, in repair, or free of nuisance.’”⁹

¹ Plaintiff’s Complaint at Paragraph 3.

² *Id.* At Paragraph 4.

³ *Id.*

⁴ *Id.*

⁵ *Id.* At Paragraph 5.

⁶ *Id.* At Paragraph 9.

⁷ *Id.* Paragraphs 10 through 16.

⁸ *Id.* Paragraph 17.

⁹ Plaintiff’s response to Defendant’s Motion to Dismiss at Page 3.

II. CONCLUSIONS OF LAW

“Dismissal for failure to state a claim is proper where it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations.” *Kessel v. Leavitt*, 204 W.Va. 95, 119, 511 S.E.2d 720, 744 (1998). A complaint should not be deemed insufficient under Rule 12(b)(6), and thereby dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syl. Pt. 3, *Chatman v. Kane Transfer, Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977).

The West Virginia Supreme Court of Appeals “has previously stated that the purpose of a Motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the Complaint...Courts presented with a Motion to Dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff taking all allegations as true.” *Roth v. DeFelice Care, Inc.*, 226 W.Va. 214, 219, 700 S.E.2d 183, 188 (2010). The West Virginia Supreme Court of Appeals has stated that the Motion to Dismiss “enables a Circuit Court to weed out unfounded suits.” *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995).

There is no dispute by any party that the defendant, City of Wheeling, is a political subdivision. As a political subdivision, West Virginia Code §29-12A-5 provides certain specific and numerated immunities. Subsection 5 of that code provides for complete immunity for claims arising out of providing fire protection.¹⁰

¹⁰ West Virginia Code §29-12A-5(5).

West Virginia Code §29-12A-5(5) provides that a political subdivision is immune from liability if a loss or claim results from “the failure to provide, or the method of providing, police, law enforcement, or fire protection.” Under this statutory immunity, the City of Wheeling as a political subdivision has immunity for all claims arising out of or related in any way to fire protection. *See generally, Upchurch v. McDowell County 911*, 232 W.Va. 91, 750 S.E.2d 644 (2013) (Syl. Pt. 2).

Common law immunity for providing fire protection services has long been established in the public duty doctrine. It is well settled law that “as a specific example of the public duty doctrine, the duty to fight fires or to provide police protection runs to all citizens and is to protect the safety and well-being of the public at large; therefore, absent a special duty to the plaintiff, no private liability attaches to the municipal fire department’s failure to provide adequate fire protection to an individual.” *Wolfe v. City of Wheeling*, 182 W.Va. 253, 378 S.E.2d 307 (1989) (and the authorities cited therein).

These governmental immunities are proper for resolution at the Motion to dismiss phase. The West Virginia Supreme Court of Appeals has repeatedly stated,

Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of a trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.

Hutchinson v. City of Huntington, 198 W.Va. 139, 149, 479 S.E.2d 649, 658 (1996); accord, *State ex rel., Corp. of Charlestown v. Sanders*, 224 W.Va. 630, 633, 687 S.E.2d 568, 571 (2009).

This Court finds that West Virginia law provides express statutory immunity to this defendant for claims that arise out of the provision of fire protection. This immunity should not be taken lightly, but rather, is an immunity from being sued over such matters as fire protection.

Plaintiff's case at its basis arises from the fire protection provisions by the City of Wheeling. For this act of fire suppression, there is clear immunity. This is immunity from liability. This is immunity from being party to this suit.

Common law immunity also is applicable in this case. The West Virginia Supreme Court of Appeals has held that no private liability attaches to the municipal fire department's failure to provide adequate fire protection to an individual. *Wolfe v. City of Wheeling*, 182 W.Va. 253, 378 S.E.2d 307 (1989). The statutory immunity has been held to be coextensive with the common law rule not recognizing any such cause of action. *Upchurch v. McDowell County 911*, 232 W.Va. 91, 750 S.E.2d 644 (2013) (Syl. Pt. 2). The only exception to this immunity is the special relationship doctrine. This doctrine holds that "if a special relation exists between a local government 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." *Benson v. Kutsch*, 181 W.Va. 1, 380 S.E.2d 36 (1989) (Syl. Pt. 3).

The plaintiff has not claimed a special relationship in this case. Therefore, the special relationship doctrine is not at issue herein.

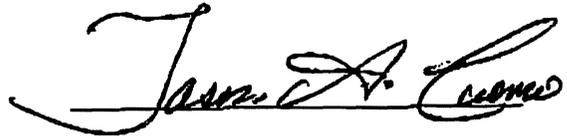
Both the statutory immunity and the common law immunity constitute a broad grant of immunity for fire departments. While plaintiff's pleadings were obviously well thought out and inventive, and their focus on the aqueducts supplying the fire hydrant system was artful, this Court finds these arguments are not sufficient to overcome the grant of immunity.

Accordingly, it is **ORDERED, ADJUDGED** and **DECREED** that both statutory immunity and common law immunity operate to bar plaintiff's claims in this matter and therefore, plaintiff's claims are hereby **DISMISSED WITH PREJUDICE**.

The plaintiff's exceptions and objections to this Order are preserved.

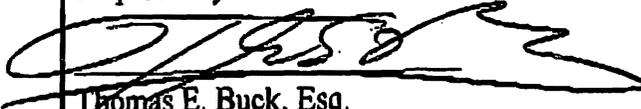
The Clerk is directed to send attested copies of this Order to all counsel of record.

Entered this 18th day of August 2015.



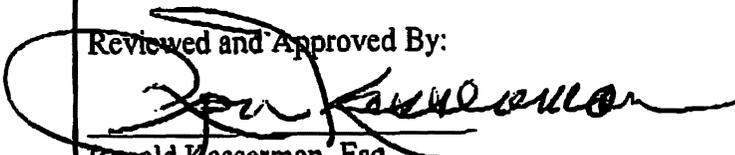
Honorable Judge ~~Martin J. Gaughan~~
Jason A. Curno

Prepared By:



Thomas E. Buck, Esq.
W. Va. Bar ID # 6167
Bailey & Wyant, P.L.L.C.
1219 Chapline St.
Wheeling, WV 26003
Ph. 304-233-3100
Fax: 304-233-0201
tbuck@bailcywyant.com

Reviewed and Approved By:



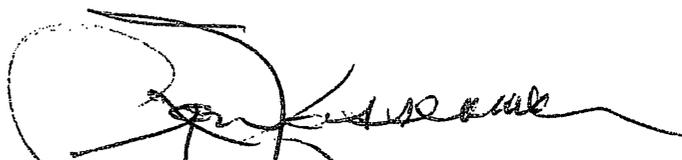
Ronald Kasserman, Esq.
Kasserman Law Offices
94 14th Street
Wheeling, WV 26003

CERTIFICATE OF SERVICE

Service of the foregoing Plaintiff, Brenda Albert's Notice of Appeal with attachments, was had upon the parties herein by mailing true and correct copies thereof by regular United States mail, postage prepaid and properly addressed, this 9th day of September, 2015, as follows:

Thomas E. Buck, Esquire
Bailey & Wyant, PLLC
1219 Chapline Street
Wheeling, WV 26003

Brenda Miller
Clerk of the Circuit Court
Ohio County Courthouse
1500 Chapline Street
Wheeling, WV 26003



Counsel for Brenda Albert

Ronald Wm Kasserman, Esquire (WVSB #1958)
Kasserman Law Offices, PLLC
94 - 14th Street
Wheeling, WV 26003
Telephone: (304) 218-2100
Fax: (304) 218-2102