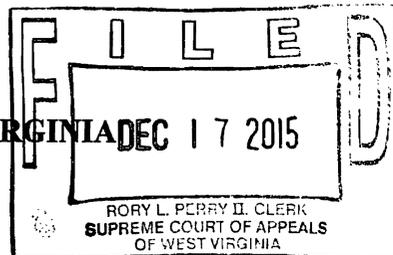


SUPREME COURT OF APPEALS OF WEST VIRGINIA



BRENDA ALBERT, Plaintiff Below,
Petitioner,

:
:

v.

: Case No. 15-0879
: (Ohio County Civil Action No. 15-C-43)

THE CITY OF WHEELING, Defendant Below,
Respondent.

:
:
:

**BRIEF OF PETITIONER
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

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2. THE CIRCUIT COURT ERRED IN GRANTING THE CITY OF WHEELING’S MOTION TO DISMISS AS BRENDA ALBERT ALLEGED THAT THE CITY OF WHEELING NEGLIGENTLY FAILED TO KEEP ITS WATERWORKS AND FIRE HYDRANT SYSTEM, AND “AQUEDUCT,” OPEN, IN REPAIR OR FREE FROM NUISANCES ESTABLISHING LIABILITY PURSUANT TO WEST VIRGINIA CODE, § 29-12A-4(c)(3).

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ASSIGNMENTS OF ERROR

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STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On February 5, 2013, Petitioner, Brenda Albert filed a real estate fire damage Complaint against the City of Wheeling in the Circuit Court of Ohio County, West Virginia. Appendix at 9.

On April 3, 2015, Respondent filed Defendant's Motion to Dismiss with supporting Memorandum. Appendix at 42 & 76.

On April 6, 2015, Petitioner, Brenda Albert served Interrogatories, Requests for Production of Documents and Requests for Admission upon Respondent. Appendix at 76.

On May 12, 2015, Respondent served Answers to the Interrogatories and Responses to the Requests for Production of Documents and Requests for Admission. Appendix at 76.

On July 13, Petitioner, Brenda Albert served Respondent with Plaintiff's Response to

Defendant's Motion to Dismiss and Affidavit. Appendix at 54 & 76.

On July 17, 2015, a hearing on said Motion was held on Defendant's Motion to Dismiss before Ohio County Circuit Judge Martin J. Gaughan. Appendix at 3.

On August 18, 2015, an Order by Ohio County Circuit Judge Jason A. Cuomo (who succeeded retired Judge Martin J. Gaughan) was entered granting the Respondent's Motion to Dismiss. Appendix at 3-6.

Petitioner timely filed his Notice of Appeal with this Honorable Supreme Court's Clerk on September 10, 2015. Appendix at 64.

II. STATEMENT OF FACTS

On February 14, 2013, Brenda Albert resided in the uninsured home that she owned at 289 Warden Run Road, Wheeling, Ohio County, West Virginia. That day a fire broke out in Brenda Albert's home. Brenda Albert, a disabled widow, resided in the home with her daughter. Appendix at 4 & 9.

The Wheeling Fire Department was notified and responded to fire. After arriving at the scene and putting out the fire on the first floor then proceeding to the basement, water from two (2) hoses attached to fire hydrants lost pressure due to having "the nozzle plugged with rocks" and "rocks in the line" from the City's water system. See Wheeling Fire Department Incident Report 13825, Engine 10 Notes and C-2 Notes, attached to the Complaint as Exhibit 1. Appendix at 9, 16, 17.

Brenda's Albert's Complaint did not allege that the City of Wheeling was negligent in providing fire protection for her home or that any City policy caused her damages. Appendix 9-12. Her Complaint alleged negligence relating to City of Wheeling employees' acts and failure to reasonably inspect its waterworks and fire hydrant system pursuant to West Virginia Code, § 29-

12A-4(c)(2) and the City of Wheeling's failure to keep its waterworks and fire hydrant system, an "aqueduct... open, in repair or free from nuisance" as required by West Virginia Code, § 29-12A-4(c)(3). The Complaint expressly alleges as follows:

5. The City of Wheeling's employees were negligent in the maintenance and operation of the City's waterworks and fire hydrant system making the City liable pursuant to West Virginia Code, § 29-12A-4(c)(2). Appendix at 9.
6. The City of Wheeling's employees negligently failed to reasonably inspect the City's waterworks and fire hydrant system making the City liable pursuant to West Virginia Code, § 29-12A-4(c)(2). Appendix at 9-10.
7. The City of Wheeling's waterworks and fire hydrant system is an "aqueduct" as contemplated by West Virginia Code, § 29-12A-4(c)(3). See also Calbrese v. The City of Charleston, 204 W.Va. 651, 515 S.E.2d 814, 822 (1999). Appendix at 10.
8. The City of Wheeling failed to keep its waterworks and fire hydrant system, an "aqueduct," open, in repair or free from nuisance as required by West Virginia Code, § 29-12A-4(c)(3). Appendix at 10.
9. As a result of the negligent acts of the City of Wheeling, the fire at Brenda Albert's home could not be contained and the house became a total loss. Appendix at 10.

Brenda's Albert's home was a total loss due to the loss of water pressure caused by the rocks in the City of Wheeling's water supply system. Appendix at 10. The house was condemned to be razed by the City of Wheeling on February 21, 2013. Appendix at 34-36.

SUMMARY OF ARGUMENT

West Virginia Code, § 29-12A-4(c)(2) makes the City of Wheeling, a political subdivision, liable for property damage caused by negligent acts of its employees.

West Virginia Code, § 29-12A-4(c)(3) makes the City of Wheeling, a political subdivision,

liable for property damage caused by negligent failure to keep its waterworks and fire hydrant system, its “aqueducts...open, in repair or free from nuisance.”

West Virginia Code, § 29-12A-5(a)(5) provides immunity to political subdivisions for “failure to provide, or the method of providing, police, law enforcement, or fire protection.”

The Complaint alleges liability for negligent failure to inspect and maintain the City of Wheeling’s aqueduct system which led to no water pressure to put out a fire. There are no allegations of negligent fire protection. There are no allegations of negligence resulting from the manner or method in which a formulated policy regarding fire protection was implemented.

The Circuit Court erred by finding that the City of Wheeling was statutorily immune.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner, Brenda Albert, by counsel, believes that the decisional process would be significantly aided by oral argument. Petitioner’s counsel requests oral argument pursuant to Rule 19(a)(1) as this case involves assignments of error in the application of settled law.

ARGUMENT

STANDARDS OF REVIEW

Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.

Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995); Syl. Pt. 1, RK v. St. Mary’s Medical Center, 229 W.Va. 712, 735 S.E.2d 715 (2012); Syl. Pt. 1, Kirby v. Lion Enterprises, Inc., 233 W.Va. 159, 756 S.E.2d 493 (2014); Syl. Pt. 1, Posey v. City of Buchannon, 228 W.Va. 612, 723 S.E.2d 842 (2012); Syl. Pt. 1, Appalachian Regional Healthcare v. West Virginia Dept. of Health & Human Resources, 232 W.Va. 388, 752 S.E.2d 419 (2013).

Where an issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.

Syl. Pt. 2, Posey v. City of Buchannon, 228 W.Va. 612, 723 S.E.2d 842 (2012). See also State ex rel. City of Bridgeport v. Marks, 233 W.Va. 449, 759 S.E.2d 192, 195 (2014).

The phrase “the method of providing police, law enforcement or fire protection” contained in W. Va. Code, § 29-12A-5(a)(5) refers to the formulation and implementation of policy related to how police, law enforcement or fire protection is to be provided.

Syl. Pt. 3, Beckley v. Crabtree, 189 W.Va. 94, 428 S.E.2d 317 (1993); Syl. Pt. 2, Smith v. Burdette, 211 W.Va. 477, 466 S.E.2d 614 (2002).

The phrase “the method of providing police, law enforcement or fire protection” contained in W. Va. Code, § 29-12A-5(a)(5)(1986) refers to the decision-making or planning process in developing governmental policy, including how the policy is to be performed, to the extent that the holding of the Court is inconsistent with the language of *Beckley v. Crabtree*, 189 W.Va. 94, 428 S.E.2d 317 (1993) and its progeny, the holdings in those cases are hereby modified.

Syl. Pt. 4, Smith v. Burdette, 211 W.Va. 477, 466 S.E.2d 614 (2002).

Resolution of the issue of whether a loss or claim occurs as a result of “the method of providing police, law enforcement or fire protection” requires determining whether the allegedly negligent act resulted from the manner in which a formulated policy regarding such protection was implemented.

Syl. Pt. 4, Beckley v. Crabtree, 189 W.Va. 94, 428 S.E.2d 317 (1993).

W. Va. Code, § 29-12A-5(a)(5)(1986) does not provide immunity to a political subdivision for the negligent acts of the political subdivision’s employee performing acts in furtherance of a method of providing police, law enforcement or fire protection.

Syl. Pt. 5, Smith v. Burdette, 211 W.Va. 477, 566 S.E.2d 614 (2002).

The general rule of construction in governmental tort legislation cases favors liability, not immunity, unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail.

Syl. Pt. 2, Marlin v. Bill Rich Const. Inc., 198 W.Va. 635, 482 S.E.2d 620 (1996); Syl. Pt. 5, Smith v. Burdette, 211 W.Va. 477, 566 S.E.2d 614 (2002); Syl. Pt. 4, Wrenn v. West Virginia Dept. of Trans., 224 W.Va. 424, 686 S.E.2d 75 (2009).

ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN GRANTING THE CITY OF WHEELING'S MOTION TO DISMISS AS BRENDA ALBERT'S CLAIM RELATES TO THE NEGLIGENT INSPECTION, MAINTENANCE AND OPERATION OF THE CITY'S WATERWORKS BY CITY EMPLOYEES ESTABLISHING LIABILITY PURSUANT TO WEST VIRGINIA CODE, § 29-12A-4(c)(2).

Brenda's Albert's Complaint at paragraph 4 alleges that the "City of Wheeling's hoses lost pressure due to having 'the nozzle plugged with rocks' and 'rocks in the line' from the City's waterworks and fire hydrant system." Appendix at 9.

Brenda's Albert's Complaint at paragraph 5 alleges that the "City of Wheeling's employees were negligent in the maintenance and operation of the City's waterworks and fire hydrant system making the City liable pursuant to West Virginia Code, § 29-12A-4(c)(2)." Appendix at 9.

Brenda's Albert's Complaint at paragraph 6 alleges that the "City of Wheeling's employees negligently failed to reasonably inspect the City's waterworks and fire hydrant system making the City liable pursuant to West Virginia Code, § 29-12A-4(c)(2)." Appendix at 9-10.

West Virginia Code, § 29-12A-4(c)(2) states:

(2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment.

Brenda's Albert's Complaint at paragraph 9 alleges that "As a result of the negligent acts of the City of Wheeling, the fire at Brenda Albert's home could not be contained and the house became a total loss." Appendix at 10.

Brenda's Albert's Complaint does not allege that "the allegedly negligent act resulted from

the manner in which a formulated policy regarding such (*fire*) protection was implemented.” See Syl. Pt. 4, Beckley v. Crabtree, 189 W.Va. 94, 428 S.E.2d 317 (1993) (Emphasis added).

The Complaint and record is void of any evidence or argument relating to “formulation and implementation of policy related to how police, law enforcement or fire protection is to be provided” by the City of Wheeling related to the City’s waterworks and fire hydrant system. See Syl. Pt. 3, Beckley v. Crabtree, 189 W.Va. 94, 428 S.E.2d 317 (1993)(Emphasis added).

Regarding immunity West Virginia Code, § 29-12A-5(a)(5) states:

A political subdivision is immune from liability if a loss or claim results from: . . . (5) Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection.

However, the West Virginia Supreme Court of Appeals has held that the immunity in West Virginia Code, §29-12A-5(a)(5) relates to policies that may be negligent, but not to the negligent acts of political subdivision employees acting on those policies.

W. Va. Code, § 29-12A-5(a)(5)(1986) does not provide immunity to a political subdivision for the negligent acts of the political subdivision’s employee performing acts in furtherance of a method of providing police, law enforcement or fire protection.

Syl. Pt. 5, Smith v. Burdette, 211 W.Va. 477, 566 S.E.2d 614 (2002) (Emphasis added).

In Smith v. Burdette, Supra, the West Virginia Supreme Court of Appeals explained how the City of St. Albans did not have immunity for a police officer’s actions that were not related to the formulation of policy by referring to an analogous situation regarding fire hydrants, just like your Petitioner, Brenda Albert’s claim regarding fire hydrants.

Therefore, while a city may not be held liable for failing to install enough fire hydrants, based on the city’s policy decision as the number of required hydrants, hypothetically, the same city could be

held liable if one of the fire hydrants, due to negligent maintenance, in some way injured a person.

Smith v. Burdette, 566 S.E.2d at 617(Emphasis added).

The circuit court's Order Granting Defendant City of Wheeling's Motion to Dismiss finds as follows:

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. Appendix at ____.

The circuit court made no findings relating to any policy by the City of Wheeling. Appendix at 3-8. The Complaint only relates to negligent acts of the City's employees, not negligent acts in formulating the City of Wheeling's policies. Appendix at 9-12. Accordingly, the circuit court erred granting the City of Wheeling's Motion to Dismiss.

2. THE CIRCUIT COURT ERRED IN GRANTING THE CITY OF WHEELING'S MOTION TO DISMISS AS BRENDA ALBERT ALLEGED THAT THE CITY OF WHEELING NEGLIGENTLY FAILED TO KEEP ITS WATERWORKS AND FIRE HYDRANT SYSTEM, AND "AQUEDUCT," OPEN, IN REPAIR OR FREE FROM NUISANCES ESTABLISHING LIABILITY PURSUANT TO WEST VIRGINIA CODE, § 29-12A-4(c)(3).

Brenda's Albert's Complaint at paragraph 7 alleges that the "City of Wheeling's waterworks and fire hydrant system is an 'aqueduct' as contemplated by West Virginia Code, § 29-12A-4(c)(3).

See also Calbrese v. The City of Charleston, 204 W.Va. 651, 515 S.E.2d 814, 822 (1999)."

Appendix at 10.

In Calbrese the West Virginia Supreme Court of Appeals noted that "the somewhat archaic

term “aqueduct” is used (mostly in older cases) to denote various sorts of conduits or channels for water—from ditches in earth to tunnels, canals, or pipes.” Calbrese, 515 S.E.2d at 821.

There has been no finding by the circuit court in this case that the City of Wheeling’s waterworks and fire hydrant system fails to meet the definition of being an aqueduct. Appendix at 3-8.

Brenda’s Albert’s Complaint at paragraph 8 alleges that the “City of Wheeling failed to keep its waterworks and fire hydrant system, an ‘aqueduct,’ open, in repair or free from nuisance as required by West Virginia Code, § 29-12A-4(c)(3).” (Emphasis added). Appendix at 8.

West Virginia Code, § 29-12A-4(c)(3) states:

(3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility to maintain or inspecting the bridge. (Emphasis added).

As the firefighters were able to put the fire out on the first floor after a period of time and the hoses only plugged with rocks when they moved to the basement which caused loss of water pressure, it is reasonable to assume the rocks came from the water source to which supplied the hydrants. Therefore, the rocks had to have come from the City of Wheeling’s water source which in and of itself makes a prima facie negligence case for failure to keep the “aqueduct... open, in repair or free from nuisance” as required by West Virginia Code, § 29-12A-4(c)(3).

The rocks may have come from a water line break that was negligently flushed after repair. They may have formed from solids in the water line combining over decades of time. Someone could

have secretly sabotaged the line with rocks for some untoward end. However, the negligence of the City of Wheeling is a factual issue that should be considered by the jury.

The Circuit Court erred in granting the City of Wheeling's Motion to Dismiss.

3. THE CIRCUIT COURT ERRED IN GRANTING THE CITY OF WHEELING'S MOTION TO DISMISS DUE TO IMMUNITY FOR PROVIDING FIRE PROTECTION PURSUANT TO WEST VIRGINIA CODE, § 29-12A-5(a)(5) AS BRENDA ALBERT'S COMPLAINT DID NOT ALLEGE ANY NEGLIGENT FIRE PROTECTION FACTS OR FORMULATION OF POLICY, LIMITING HER FACTS TO NEGLIGENCE RELATING TO THE WATERWORKS AND FIRE HYDRANT SYSTEM.

Brenda's Albert's Complaint at paragraph 9 generally alleges that, "As a result of the negligent acts of the City of Wheeling, the fire at Brenda Albert's home could not be contained and the house became a total loss." Appendix at 10.

Brenda Albert did not make any other general claims of negligence, limiting her Complaint to the aforementioned specific statutory allegations of negligence relating to maintenance, inspection and keeping the waterworks and fire hydrant system open, in repair, or free from nuisance. Appendix at 9-12.

The circuit court found in the Order Granting Defendant City of Wheeling's Motion to Dismiss that:

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. Appendix at 7.

The circuit court erred in applying West Virginia Code, § 29-12A-5(a)(5) as it focused on negligence relating to fire hydrants which it considered as part of "fire protection". The statute does not provide immunity to City employees who negligently provide fire protection, but does provide immunity to the City in formulating and implementing policies concerning fire protection.

“W. Va. Code, § 29-12A-5(a)(5)(1986) does not provide immunity to a political subdivision for the negligent acts of the political subdivision’s in employee performing acts in furtherance of a method of providing police, law enforcement or fire protection.” Syl. Pt. 5, Smith v. Burdette, 211 W.Va. 477, 566 S.E.2d 614 (2002) (Emphasis added).

If the City is not immune for the negligent acts of its employee performing acts in furtherance of a method of fire protection, so too it may be liable for negligent maintenance or inspection of specific fire hydrants. Were the hydrants inspected by a “drive by” to see if they were still there? Were they activated with actual water flow, and if so, for how long of a period? These are issues of fact and it is conceded that possibly the hydrants were properly inspected and were not the culprit of the rocks clogging the firefighters’ hoses and nozzles.

The circuit court noted Brenda Albert’s “focus on the aqueducts supplying the fire hydrant system” for her claim. Appendix at 7. Indeed, negligence relating to the City’s “waterworks and fire hydrant system” are expressly alleged in paragraphs 5, 6, 7 and 8 of her Complaint. Appendix at 9-10.

If it was the City employees’ negligence relating to the waterworks, or negligence relating to keeping the “aqueduct...open, in repair or free from nuisance” as required by West Virginia Code, § 29-12A-4(c)(3), then again, “W. Va. Code, § 29-12A-5(a)(5)(1986) does not provide immunity to a political subdivision for the negligent acts of the political subdivision’s in employee performing acts in furtherance of a method of providing police, law enforcement or fire protection.” Syl. Pt. 5, Smith v. Burdette, 211 W.Va. 477, 566 S.E.2d 614 (2002) (Emphasis added). .

To accept the City of Wheeling’s position that it is immune as it was providing “fire protection” would lead to an absurd conclusion. Depending on who was using a hose to fight the fire

would determine immunity. If it was City firefighters then the City would have immunity. If Brenda Albert or any of her neighbors were using hoses connected to the City's water system that clogged up with rocks, she would have a case against the City to keep the waterworks and fire hydrant system "open, in repair, or free from nuisance."

The Circuit Court erred in granting the City of Wheeling's Motion to Dismiss.

CONCLUSION

As the Circuit Court of Ohio County erred in granting the City of Wheeling's Motion to Dismiss, Petitioner, Brenda Albert, requests that the Order Granting Defendant City of Wheeling's Motion to Dismiss be reversed and that this matter be remanded for further proceedings, including a trial on the merits.

Respectfully submitted,



RONALD WM. KASSERMAN

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

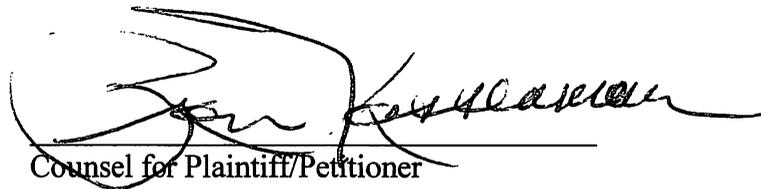
SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRENDA ALBERT, Plaintiff Below, :
Petitioner, :
v. : Case No. 15-0879
(Ohio County No. 15-C-43)
CITY OF WHEELING, Defendant Below, :
Respondent. :

CERTIFICATE OF SERVICE

Service of the foregoing Brief of Petitioner, Brenda Albert, was had upon the City of Wheeling herein by mailing a true and correct copy thereof properly addressed, this 16th day of December, 2015, as follows:

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


Counsel for Plaintiff/Petitioner

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