

**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

BRENDA ALBERT, Plaintiff Below,  
Petitioner,

v.

THE CITY OF WHEELING, Defendant Below,  
Respondent.

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

FEB 25 2016

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**PETITIONER BRENDA ALBERT'S  
REPLY BRIEF**

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### **III. STATEMENT OF THE CASE**

The Petitioner's claim is NOT for inadequate fire protection from the Respondent as stated in the Respondent's Brief at page 3. Petitioner's Complaint makes no allegations whatsoever that any member of the Fire Department did anything wrong. See Appendix at 9 to 12.

Petitioner alleges that on February 14, 2013, a fire broke out in the dining room of her home. The Wheeling Fire Department was notified and responded to the scene. See Appendix 9 at paragraphs 3 & 4.

Respondent states at page 3 of its Brief that, "Petitioner goes on to allege that the Wheeling Fire Department failed to put out this fire quick enough, and proximately caused her to lose her home." No where in the Complaint does that allegation occur. See Appendix 9 to 12.

The allegations of negligence are against the City of Wheeling employees as being "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)," negligent failure 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)," and negligent failure to keep the "waterworks and fire site hydrant system an 'aqueduct,' open, in repair and free from nuisances required by West Virginia Code, § 29-12A-4(c)(3)." See Appendix at 9 to 10, paragraphs 5, 6, 7, and 8.

Factually, the City of Wheeling Fire Department responded and extinguished the fire on the first floor and then went to the basement, but the hoses filled up with rocks losing water pressure and the flames continued to burn the house to a total loss. See Appendix at 16.

#### **IV. SUMMARY OF ARGUMENT**

Petitioner did not allege the public duty doctrine or any special duty by the City. Dismissal by the Circuit Court of a claim that was not pled has no affect on the statutory claims that were pled, i.e., negligent maintenance, negligent inspection and failure to keep an “aqueduct” open, in repair and free from nuisance. See Appendix at 9 to 10, paragraphs 5, 6, 7, and 8.

The immunity relied upon by Respondent in West Virginia Code, § 29-12A-5 relates to the “method of providing police, law enforcement or fire protection” which refers to the “decision-making or planning process in developing a governmental policy, including how that policy is to be performed.” See Syl. Pt. 4, Smith v. Burdette, 211 W.Va. 477, 466 S.E.2d 614 (2002).

There were no allegations in the Complaint regarding the decision making or planning process in developing of a governmental policy or allegations regarding how that policy was to be performed. See Appendix at 9 to 12.

Negligent policy making or negligent performance of policy was not alleged. Negligent fire protection was not pled.

What was alleged was negligent maintenance, negligent inspection and failure to keep the aqueduct “open, in repair or free from nuisance,” all of which are statutory allegations making the City of Wheeling liable pursuant to West Virginia Code, § 29-12A-4(c)(2) & (3).

#### **V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner believes that oral argument will be beneficial to the Court.

#### **VI. ARGUMENT**

**A. Petitioner has not appealed the Circuit Court’s dismissal pursuant to the public duty doctrine.**

The public duty doctrine or that there was a special relationship between Petitioner and

Respondent was not pled in the Complaint. See Appendix at 9 to 12.

In this case, Petitioner asserted negligence against the City of Wheeling expressly citing statutory claims under the Governmental Tort Claims Act, West Virginia Code, § 29-12A-4(c)(2) & (3). See Appendix 9 to 10, at paragraphs 5, 6, 7 and 8.

Accordingly, the dismissal of a non-theory of liability is a non-issue and moot. Respondent's first argument is a red herring and should be completely disregarded. Dismissal of something that never existed should be disregarded as plain error.

"The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, Chapman v. Kane Transfer Co., 160 W.Va. 530, 236 S.E.2d 207 (1977); Syl. Pt. 2, Roth v. DeFelice Care, Inc., 226 W.Va. 214, 700 S.E.2d 183 (2010).

**B. Petitioner's Complaint may be an artful pleading as it properly alleges facts and related statutory theories of liability, but it does not circumvent statutory immunity.**

Petitioner's Complaint expressly alleged 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).

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).

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).

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).

See Appendix at 9 to 10, paragraphs 5, 6, 7 and 8.

Nowhere in the Complaint are there any allegations relating to negligence in the decision-making or the planning process in developing a governmental policy, including how that policy is to be performed. Appendix 9 to 12.

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 the planning process in developing a governmental policy, including how that policy is to be performed**. To the extent that the holding of the Court is inconsistent with the language in Beckley v. Crabtree, 198 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, 566 S.E.2d 614 (2002)(Emphasis added).

As Petitioner has alleged no negligence by the Wheeling Fire Department, the negligence therefore relates expressly to the “aqueduct,” i.e. water supply, by the City of Wheeling through its Water Department.

Petitioner’s counsel, Ron Kasserman, wrote the Complaint and was mindful of the immunity in West Virginia Code, § 29-12A-5(a)(5). The immunity for “fire protection” was simply inapplicable as none of the firemen did anything wrong. If the firemen had done something wrong then an “artful pleading” would have noted the firefighters’ negligence and expressly alleged that there was negligence in carrying out the City’s policy, as opposed to negligence in the “decision-making or the planning process in developing a governmental policy, including how the policy was to be performed.” See Syl. Pt. 4, Smith v. Burdette, 211 W.Va. 477, 566 S.E.2d 614 (2002).

There was no need for an artful pleading as the facts of the case point to the “aqueduct.” You

simply don't have rocks in a waterline unless the person inspecting, maintaining and having the duty to keep it "open, in repair or free from nuisance" has been negligent or is subject to liability due to *res ipsa loquiter*. Though not considered by the trial court in its Order granting Respondent's Motion to Dismiss, Respondent's Answer to Interrogatory No. 3 suggests the applicability of *res ipsa loquiter*.

The objects that caused some restriction to the flow of water at the time of the subject fire are believed to have been rocks. These rocks would have come through the water supply system. **How the rocks got into the water supply system is not specifically known. It is possible that foreign material can get into the water system if there is a break in the water line.** Appendix at 57-58. (Emphasis added).

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

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 their employment.

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

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 for maintenance or inspecting the bridge. (Emphasis added.)

Petitioner's Complaint is not an "artful pleading," as noted in the case law, as it is a factual pleading with express citations to the two statutes above. Appendix at 9-10, at paragraphs 5, 6, 7 and 8.

However, Respondent's Motion to Dismiss and its Brief are both artful pleadings, first referring to the public duty doctrine and then suggesting it was "fire protection" that caused the loss,

where in reality the loss was caused by rocks in the City's waterline.

**C. The clear language of the Governmental Tort Claims and Insurance Reform Act does not preclude Petitioner's claim.**

West Virginia Code, § 29-12A-5(a)(5) (1986) makes a political subdivision immune from liability if a loss or claim results from:

Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection. (Emphasis added.)

This "method" of providing fire protection "refers to the decision-making or the planning process in developing a governmental policy, including how that policy is to be performed." See Syl. Pt. 4, Smith v. Burdette, 211 W.Va. 477, 566 S.E.2d 614 (2002).

Respondent has cited no policy of the City of Wheeling to have or permit rocks in its waterlines at all, let alone rocks to the extent that they would cause loss of water pressure to users, whether they be residents or the Fire Department.

The Complaint does not allege any negligent policy or negligent implementation of any policy. See Appendix 9 to 12.

Explaining this requirement as it relates to policy, the West Virginia Supreme Court of Appeals stated as follows:

Therefore, while a City may not be held liable for failure to install enough fire hydrants, based on the City's policy decision as to 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**. In the same way, while the City of St. Albans maybe immune from liability for negligence in creating a policy of permitting police officers to drive through red-lighted intersections in emergencies, the City may be held liable if the police officer negligently carries out that policy.

Smith v. Burdette, 566 S.E.2d at 617-618. (Emphasis added).

In the case at bar, Petitioner Brenda Albert did not allege that any fire fighter negligently carried out any policy. The fire fighters did their job and had the blaze under control, effectively extinguishing the entire first floor, but when going to the basement the nozzles of their hoses clogged with rocks. The fire fighters did nothing wrong. There was no policy that was violated.

Liability is due to the City of Wheeling's failure to keep its "aqueducts," i.e. its waterlines "open, in repair or free from nuisance" as required by West Virginia Code, § 29-12A-4(c)(3).

**D. Public policy of the State of West Virginia requires reinstatement and remand of Petitioner's claim.**

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); Randall v. Fairmont City Police Dept., 186 W.Va. 336, 347, 412 S.E.2d 739, 748 (1991) and Memorandum Decision in City of Princeton v. Holcomb, No. 13-0468 (November 22, 2013)(Emphasis added to each).

Respondent argues at page 15 of its Brief that every time a "Fire Department responds to a fire, the City will, essentially, be subject to a civil suit." Respondent cites examples of using a four inch hose rather than a six inch hose or having five fire fighters rather than six fire fighters would lead to liability. Those are issues of policy regarding purchase of materials and how many men to send on a one, two or three alarm fire. For policy decisions there is an immunity. In those instances suggested by Respondent none of the firefighters did anything wrong. This case would not stand as precedent to make firefighters liable personally or for the City This is not a case suggesting the

negligence in the implementation of fire fighting policy, but rather, a case regarding liability for failure to keep water lines “open, in repair or free from nuisance” as required by West Virginia Code, § 29-12A-4(c)(3).

In support of its argument regarding the public policy against “negligent maintenance” types of claims, Respondent cites Travelers Excess & Surplus Lines Co. v. City of Atlanta, 297 Ga. App. 326, 667 S.E.2d 388 (Ga. App. 2009), Wallace v. Mayor and City Council of Baltimore, 123 Md. 638, 91A. 687 (1914), Gans Tire Sales Co. v. City of Chelsea, 16 Mass. App. Ct. 947, 450 N.E.2d 668 (1983) and Columbus v. McIlwain, 205 Miss. 473, 38 So. 2d 921 (1949). Those cases are not applicable as they are under the common law without any statutory violations. See Respondent’s Brief at pages 17 and 18.

Respondent also cites two (2) cases on page 18 of its Brief where there are similar statutes to our West Virginia statute, which are distinguishable from Petitioner’s case.

In Shockley v. City of Oklahoma City, 1981 Ok. 94, 632 P.2d 406 (1981), the Supreme Court of Oklahoma upheld a dismissal of a claim against the City where the “Fire Department did timely arrive on the scene but its efforts were completely thwarted by the inoperability of the fire hydrant which was completely dry.” Shockley, 632 P.2d at 406.

In Petitioner Brenda Albert’s case the fire hydrant was not completely dry as the fire fighters were able to extinguish the fire on the first floor of her home and then when they went into the basement the rocks from the City’s waterlines went through the fire hydrant, into the hoses and stopped up the nozzles causing a loss of water pressure which resulted in the loss of the home. The cases are factually and significantly different. The Oklahoma Government Tort Claims Act makes political subdivisions “liable for loss resulting from its tort or the torts of its employees acting within the scope of their employment . . .,” however, there is no express statute like that in West Virginia

requiring that aqueducts be kept “open, in repair or free from nuisance.” See 51 Okla. Stat. §153(A) and W.Va. Code, 29-12A-4(c)(3).

Respondent cites Ross v. City of Houston, 807 S.W. 2d 336 (Tex. App. 1st Dis. 1990) where the Court of Appeals affirmed the grant of summary judgment to the City of Houston finding that the City’s policy of inspecting fire hydrants was directly connected with the City’s method of providing fire protection. However, in Ross the statute providing liability, Tex. Civ. Prac. & Rem. Code. Ann., § 101.21 relates to liability only for injuries arising from the operation or use of a motor driven vehicle or caused by a condition or use of tangible personal or real property if the government unit would, if it were a private person, be liable under Texas law. There is no express requirement like West Virginia’s law requiring aqueducts to be open, in repair or free from nuisance.

Though not mentioned by Respondent, Georgia also has a statute that gives immunity for “the method of providing, law enforcement, police or fire protection.” See OCGA § 50-21-24(6) and Georgia Forest Commission v. Canady, 280 Ga. 825, 632 S.E.2d 105 (2006).

The Georgia Court noted that “Texas and West Virginia have provided complete protection of the policy-making decisions of the executive branches of government from judicial review.” Georgia Forest Commission v. Canady, 632 S.E.2d at 109-110.

The Georgia Court agreed with the West Virginia and Texas construction in providing the sovereign immunity that covers the acts or omissions of state employees in executing policy as well as in making policy. Georgia Forestry Commission v. Canady, 632 S.E.2d at 109.

Regarding policy, the Georgia Court noted that the making and executing of policy “accomplishes the balance between the inherently unfair and inequitable results from the strict application of sovereign immunity and the need to limit the state’s exposure to tort liability that the General Assembly expressed as its goal in OCGA § 50-21-21.” Georgia Forestry Commission v.

Canady, 632 S.E.2d at 110.

In Beckley v. Crabtree, 189 W.Va. 94, 428 S.E.2d 317 (1993), Trooper Beckley was injured while assisting the Sheriff of Wayne County, Bernie R. Crabtree, who had arrested Thomas Wayne Graham on charges of brandishing a weapon and discharge of a firearm. After Graham was placed in the back seat of the Sheriff's vehicle, Sheriff Crabtree attempted to place a shotgun in the trunk and the shot gun accidentally discharged, injuring Trooper Beckley.

The West Virginia Supreme Court found that the Wayne County Commission could be held liable for negligent injuries as the claim did not result from the method of providing police protections stating, "The methods employed by the law enforcement officers who detained and arrested the subject were complete before the gun discharged." Beckley v. Crabtree, 428 S.E.2d at 321.

In the case at bar, the negligence of the City of Wheeling in failing to keep its waterlines open and free of nuisance occurred long before any fire protection started. The rocks were in the waterlines long before the fire started and were not related to the formulation of policy in providing fire protection or the implementation of any policy regarding fire protection. The negligence in this case relates to the statutory duty to keep the waterline open, in repair or free from nuisance as required by West Virginia Code, § 29-12A-4(c)(3).

Though the legislative purpose of the West Virginia Governmental Tort Claims and Insurance Reform Act is "to regulate the costs and coverage of insurance available to political subdivisions" as stated in West Virginia Code, § 29-12A-1, that must be balanced by this Honorable West Virginia Supreme Court of Appeals with the public policy of compensating injured parties. It is part of our democratic system of checks and balances.

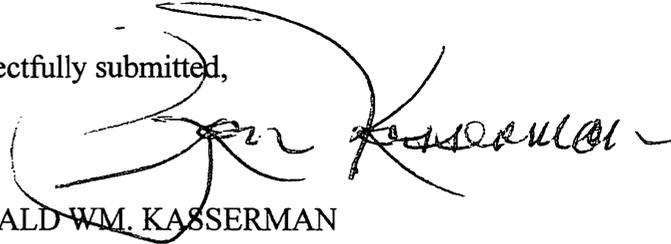
The "general common-law goal of compensating injured parties for damages caused by

negligent acts must prevail” as the public policy of West Virginia.

## VII. CONCLUSION

The trial court’s Order granting Respondent’s Motion for Summary Judgment should be reversed and this case remanded for trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ron Kasserman", written over a circular stamp or mark.

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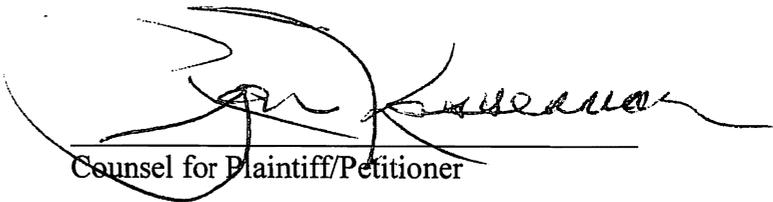
**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**CERTIFICATE OF SERVICE**

Service of the foregoing Reply Brief of Petitioner, Brenda Albert, was had upon the City of Wheeling herein by mailing a true and correct copy thereof properly addressed, this 24<sup>th</sup> day of February, 2016, as follows:

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