

11-0565

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

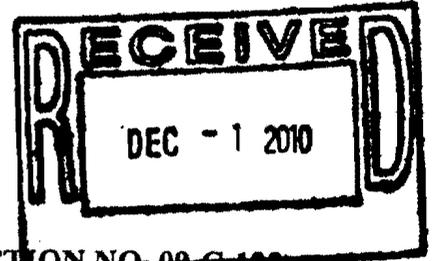
STEVEN M. POSEY and
MICHELLE E. POSEY,

Plaintiffs,

v.

CITY OF BUCKHANNON,
WEST VIRGINIA, A West
Virginia Statutory Municipal
Corporation,

Defendant.



CIVIL ACTION NO. 09-C-123
(Judge Thomas H. Keadle)

ORDER GRANTING THE CITY OF BUCKHANNON'S
MOTION TO DISMISS COMPLAINT

On July 26, 2010, came the parties, Plaintiffs Steven M. Posey and Michelle E. Posey, in person and by their counsel, Bader C. Giggenbach and the law firm of Brewer & Giggenbach, PLLC, and also came Defendant The City of Buckhannon, by its counsel, Tamara J. DeFazio Jennifer L. Tampoya, and the law firm of Shuman, McCuskey & Slicer, PLLC, all pursuant to The City of Buckhannon's Motion to Dismiss Complaint and the Notice of Hearing which was timely filed pursuant to said Motion.

After giving due consideration to the representations of counsel and the Memoranda filed in regard to said Motion, this Court is of the opinion to and does hereby ORDER that The City of Buckhannon's Motion to Dismiss Complaint be granted and this Court does further ORDER that plaintiff's Complaint be dismissed with prejudice.

In so doing, this Court hereby makes the following findings of fact and conclusions of law:

1. Plaintiffs' claim results from Plaintiff Steven M. Posey's fall from his pickup truck while unloading garbage bags and other material into The City of Buckhannon's transfer station which is part and parcel of The City of Buckhannon's Solid Waste Disposal Complex.
2. The City of Buckhannon owns and operates the Solid Waste Disposal Complex and the transfer station located thereon which is at issue in Plaintiffs' Complaint.
3. The City of Buckhannon's transfer station receives trash and other waste and subsequently transfers all trash and waste received to an out-of-county dump or landfill.
4. The City of Buckhannon is a political subdivision within the meaning of that term as it is employed in Section 29-12A-3(c) of the West Virginia Governmental Tort Claims and Insurance Reform Act (hereinafter "Tort Claims Act").
5. Plaintiffs' claim sounds exclusively in negligence theory.
6. Under West Virginia law, the City of Buckhannon is immunized from liability if:

a loss or claim results from:

* * *

[t]he operation of dumps, sanitary landfills, and facilities where conducted directly by a political subdivision

W. Va. Code § 29-12A-5(a)(16).

7. The provisions of the Tort Claims Act must be applied as written and not in such a way as to render any provision of the Act a superfluous nullity. *Brooks v. City of Weirton*, 503 S.E.2d 814, 824 (W. Va. 1998). Thus, the Legislature's use of the phrase "and facilities" in West Virginia Code Section 29-12A-5(a)(16), must not be considered to be synonymous with "dumps" and "sanitary landfills." Rather, it is clear that the Legislature intended the phrase "and facilities" to include a landfill- related and/or dump-related facility such as the transfer station at issue in this action.
8. The transfer station located within The City of Buckhannon's Solid Waste Disposal Complex is included among the "facilities" referenced in West Virginia Code Section 29-12A-5(a)(16) and plaintiffs' claim therefore falls squarely within the purview of a political subdivision's immunity from liability set forth in West Virginia Code Section 29-12A-5(a)(16).
9. West Virginia Code Section 29-12A-4(c)(2), (3) and (4) does not, as a matter of law, provide a sufficient basis for asserting liability against The City of Buckhannon because Section 29-12A-4(c) is expressly made subject to the immunity provisions set forth in Section 29-12A-5.
10. In *Calabrese v. City of Charleston*, 515 S.E.2d 814, 824 (W. Va. 1999), the Supreme Court of Appeals of West Virginia acknowledged the immunity of "landfill- and dump-related facilities" and stated:

[W]e view the immunity that is created by [Section] 29-12A-5(a)(16) as relating to sanitary landfills and dumps that are operated by political subdivisions -- and to associated facilities that are located on and

operated in connection with the dump or sanitary landfill.

Id. at 824. Furthermore, the Court emphasized that the word “facilities” must be read in the overall context of Section 29-12A-5(a)(16), such that “the provision immunizes ‘the operation of dumps, sanitary landfills, and associated facilities.’”

Id.

11. This Court rejects Plaintiffs’ argument that *Calabrese*, as applied to the facts underlying plaintiffs’ claim in this action, limits the immunity conferred by West Virginia Code Section 29-12A-5(a)(16) to only those facilities located on the site where a landfill is located or on a dump site. It is both impractical and illogical to read *Calabrese*, as applied to the facts underlying plaintiffs’ claim in this action, to unnecessarily restrict the immunity conferred by West Virginia Code Section 29-12A-5(a)(16) to facilities located on the site of a dump or landfill because the West Virginia Supreme Court recognized in *Calabrese* that “the provision immunizes ‘the operation of dumps, sanitary landfills, and *associated* facilities.’”. [Emphasis added].

12. Therefore, this Court concludes that the City of Buckhannon is immunized from liability for Plaintiffs’ claim under West Virginia Code Section 29-12A-5(a)(16) because Plaintiffs’ claim results from The City of Buckhannon’s operation of a transfer station which, in this case, is a landfill-related and/or dump-related facility because waste material deposited at the transfer station must necessarily be transferred to a dump or landfill. Thus, the transfer station which is the subject

of plaintiff's claim is a facility necessarily associated with a dump or sanitary landfill.

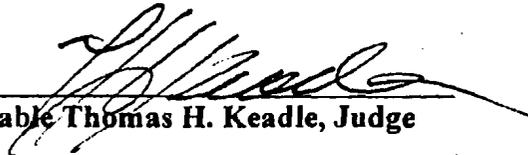
The Court further concludes that, based upon all of the foregoing, Plaintiffs have failed to state a claim against the City of Buckhannon upon which relief may be granted and their Complaint should therefore be dismissed with prejudice.

An exception is hereby reserved to plaintiffs.

The Clerk of the Circuit Court is directed to send certified copies of this Order to all counsel of record.

Entered this 29 day of ~~October~~ ^{November}, 2010.

*11/30/10
DeFazio
Giggenbach*


Honorable Thomas H. Keadle, Judge

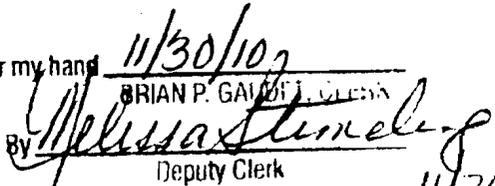
Prepared by:



Tamara J. DeFazio, Esq.
W.Va. State Bar Id. No.: 5130
Jennifer Tampoya, Esq.
W.Va. State Bar Id. No.: 11153
**Counsel for Defendant
City of Buckhannon**

Shuman, McCuskey & Slicer, PLLC
1445 Stewartstown Road, Suite 200
Morgantown, WV 26505
Telephone No.: 304-291-2702
Facsimile No.: 304-291-2840
**Of Counsel for Defendant
City of Buckhannon**

ATTEST: A true copy from the records located in the office of the Clerk of the Circuit Court of Upshur County, West Virginia.

Given under my hand 11/30/10
BRIAN P. GAINES, Clerk
By 
Deputy Clerk

ENTERED 11/30/10
CIVIL - BUCK 51
PAGE 453 - 458

2010 NOV 30 AM 9:22
CLERK

Approved As to Form Only:

Bader C. Giggenbach, Esquire
W. Va. State Bar Id. No.: 6596

Brewer & Giggenbach, PLLC
4th Floor Citizens Bank Building
P. O. Box 4206
Morgantown, WV 26504
Telephone No.: 304-291-5800
Facsimile No.: 304-291-5829
Counsel for Plaintiffs