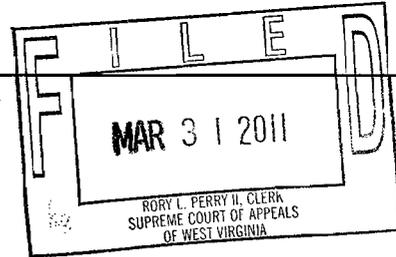


IN THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0565



STEVEN M. POSEY and  
MICHELLE E. POSEY

Petitioners (Plaintiffs below),

v.

Upshur County Circuit Court  
Civil Action No.: 09-C-123  
Judge Thomas H. Keadle

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

Respondent (Defendant below).

UPSHUR COUNTY, W. VA.  
FILED  
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**PETITION FOR APPEAL**  
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## KIND OF PROCEEDING and NATURE OF THE RULING BELOW

Your petitioner, Steven M. Posey (hereinafter "Mr. Posey"), was seriously and permanently injured when he fell eighteen feet down the sides of an empty, unprotected, improperly signed, unmanned, and unsafe open metal pit at a solid waste transfer station owned and operated by the City of Buckhannon, West Virginia (hereinafter "the City"). Mr. Posey's complaint against the City was filed pursuant to the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 et seq. The Circuit Court of Upshur County dismissed the complaint by granting the City's W. Va. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. The court ruled that Mr. Posey's claim came within the immunity provisions of the Act, which specifies "dumps, sanitary landfills, and facilities," but which does not specify "transfer stations." W. Va. Code § 29-12A-5(a)(16). An appeal is sought from the court's dismissal of the complaint.

## **STATEMENT OF THE FACTS**

On January 4, 2008, Mr. Posey and his wife, Michelle E. Posey (hereinafter "Mrs. Posey"), cleaned and cleared refuse materials from the basement of Mr. Posey's mother's Lewis County, West Virginia, home.<sup>1</sup> Mr. and Mrs. Posey loaded their pick-up truck and traveled to a solid waste transfer station owned and operated by the City in adjoining Upshur County, West Virginia. While unloading, Mr. Posey fell from the tailgate of his truck and slid eighteen feet into an open metal pit where the City's compactor is located. The City's safety violations included: no spotting for customers in

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<sup>1</sup>Reference to facts stated herein may be made to Mr. and Mrs. Posey's complaint filed with the circuit court on November 30, 2009.

the pit area; no staging, guiding, and positioning of trucks; lack of safe methods of unloading materials; lack of proper signs and direction for unloading; failure to have employees assist customers in such a dangerous area; lack of distance references; failure to follow state safety regulations regarding transfer stations; failure to follow national safety regulations regarding open pits; failure to have protection at the exposed sides of the pit; and lack of maintenance and management.

Mr. Posey's fall resulted in fractures of his right ankle in four places, his fibia, his left ankle in eight places, and his tibia. He also received compression deformities of the end plates of the T12 and L1 vertebrae in his spine. Over a period of fifteen days at West Virginia University Hospitals, Mr. Posey had multiple surgeries to install various pins, plates, and screws in his lower legs and ankles, as well as related care, and he had to have four staples placed in his skull for a laceration. As a result of his injuries, Mr. Posey was required to undergo extensive physical therapy. At the time of the filing of his complaint, his related health care invoices exceeded \$112,000.00.

After Mr. and Mrs. Posey exhausted their attempts to resolve their claim with the insurer for the City, their complaint was filed on November 30, 2009. The complaint cites W. Va. Code § 29-12A-4(c)(2), (3), and (4) which includes municipal liability generally for acts or omissions of employees and for negligence. The complaint also states that the City "has not operated any dump, sanitary landfill, or associated facilities that are located on and operated in connection with said dump or said sanitary landfill." Complaint, ¶ 70. This paragraph relates specifically to the West Virginia Supreme Court of Appeals ruling that the word "facilities" in W. Va. Code § 29-12A-

5(a)(16) only applies to “facilities” which are “located on and operated in connection with” a dump or landfill. Calabrese v. City of Charleston, 204 W.Va. 650, 660, 515 S.E.2d 814, 824 (1999). Complaint, ¶ 75. The complaint contends that under W. Va. Code § 29-12A-5, the City “does not have any specific immunity from the present cause of action brought by Mr. and Mrs. Posey.” Complaint, ¶ 71.

In February 2010, the City served and filed its motion to dismiss per W. Va. R. Civ. P. 12(b)(6). In April 2010, Mr. and Mrs. Posey served their response to the motion and filed the same by mail. A hearing was held on the motion on July 26, 2010, at which time the court made the determination that governmental immunity existed for the City per the statute. On July 27, 2010, Mr. and Mrs. Posey received the City’s reply to their response. By order entered November 30, 2010, the circuit court granted the motion to dismiss.

**ASSIGNMENTS OF ERROR and DECISION OF LOWER TRIBUNAL  
and  
POINTS AND AUTHORITIES and DISCUSSION OF LAW**

Mr. and Mrs. Posey assert that the circuit court erred in its grant of the Rule 12(b)(6) motion to dismiss the complaint, and it erred in its statutory construction, because statutory immunity does not exist for the City. A transfer station is similar to a trash truck or a dumpster/trash can, because these are places where refuse is temporarily stored.<sup>2</sup> A dump or landfill is an area where refuse is permanently stored. “Appellate review of a circuit court's order granting a motion to dismiss a complaint is

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<sup>2</sup> The City of Buckhannon is required to control and to dispose of its garbage. “Any state agency or political subdivision that owns, operates or otherwise controls any public area . . . shall procure and place litter receptacles at its own expense upon its premises and shall remove and dispose of litter collected in the litter receptacles.” W. Va. Code § 22-15A-4(g).

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). On appeal, Rule 12(b)(6) motions to dismiss are reviewed de novo. Longwell v. Board of Educ. of the County of Marshall, 213 W.Va. 486, 488, 583 S.E.2d 109, 111 (2003). W. Va. R. Civ. P. 12(b)(6) provides a defense for "failure to state a claim upon which relief can be granted."

The purpose of a Rule 12(b)(6) motion is "to test the formal sufficiency of the complaint." Fass v. Newsco Well Service, Ltd., 177 W.Va. 50, 51, 350 S.E.2d 562, 563 (1986) and John W. Lodge Distributing Co. v. Texaco, Inc., 161 W. Va. 603, 604-05, 245 S.E.2d 157, 158 (1978). "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 the 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)(citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)(overruled in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007))(Twombly's overruling of Conley not recognized in Highmark West Virginia, Inc. v. Jamie, 221 W. Va. 487, 655 S.E.2d 509, n. 4 (2007)). "For the purposes of the motion to dismiss, the complaint is to be construed in the light most favorable to [the] plaintiff." Chapman, 160 W. Va. at 528, 236 S.E.2d at 212.

"[A]ll that the pleader is required to do is to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist." State ex rel. Arrow Concrete Co. v. Hill, 194 W.Va. 239, 245, 460 S.E.2d 54, 61, n.6 (1995)(citing Lodge, 161 W. Va. at 605, 245 S.E.2d at 159 (1978)). These inferences must

reasonably be drawn “in favor of the plaintiff.” Conrad v. ARA Szabo, 198 W.Va. 362, 369, 480 S.E.2d 801, 808 (1996). The allegations contained in the complaint are to be viewed liberally in favor of the plaintiff. Bowers v. Wurzburg, 205 W.Va. 450, 462, 519 S.E.2d 148, 160 (1999) and Lodge, 161 W. Va. at 605, S.E.2d at 158. The “complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist.” Fass, 177 W.Va. at 52, 350 S.E.2d at 564 (1986). “[A] defendant may not succeed on Rule 12(b)(6) motion if there are allegations in the pleadings which, if proved, will provide a basis for recovery.” Kopelman and Associates, L.C. v. Collins, 196 W. Va. 489, 493, 473 S.E.2d 910, 914, n. 4 (1996). In light of the foregoing well settled case law, Mr. and Mrs. Posey’s complaint should not have been dismissed.

W. Va. Code § 29-12A-5(a)(16) provides that the City is “immune from liability if a loss or claim results from . . . [t]he operation of dumps, sanitary landfills, and facilities.” Mr. and Mrs. Posey’s claim for losses involves injuries occurring upon the City’s transfer station and not upon any “dumps, sanitary, landfills, and facilities.” A transfer station is neither a dump nor a landfill, and the West Virginia Supreme Court of Appeals has ruled that the “facilities” portion of W. Va. Code § 29-12A-5(a)(16) only applies to “facilities” which are “located on and operated in connection with” a dump or landfill. Calabrese, 204 W.Va. at 660, 515 S.E.2d at 824. “[W]e view the immunity that is created by W. Va. Code, 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. (emphasis added).

Any issues regarding the plain meaning of section 5(a)(16) has been resolved by the Supreme Court in Calabrese. In order for a governmental entity to benefit from immunity regarding the associated facilities of dumps and landfills, the associated facilities must be "on and operated in connection" with the dump or landfill. The City's transfer station was not "on and operated in connection" with a dump or landfill. If the City's transfer station had been located "on and operated in connection" with a dump or landfill, then immunity would exist, just as the hypothetical "sewers . . . located on and a part of the operation of a dump or sanitary landfill" were in Calabrese, 204 W.Va. at 660, 515 S.E.2d at 824.

The Calabrese opinion makes it clear that the terms dump and landfill are interchangeable. "[T]he phrase 'sanitary landfill' is a term of art, denoting what was 'formerly known by its more prosaic name as a garbage dump. . . .' " Id., n. 9 (citing Mountaineer Disposal Service, Inc. v. Dyer, 156 W.Va. 766, 769, 197 S.E.2d 111, 113 (1973)). Mr. and Mrs. Posey's use of the term "dump" in their complaint is as a verb. The mere usage of this term does not convert the City's transfer station into a dump. At no time have Mr. and Mrs. Posey asserted that the City operates a dump. The City is licensed by the State of West Virginia to operate a "transfer station" and is not licensed to operate "sanitary landfills and dumps . . . [and] associated facilities that are located on and operated in connection with the dump or sanitary landfill." Calabrese, 204 W.Va. at 660, 515 S.E.2d at 824 (emphasis added).

Further evidence that a "transfer station" is not a "dump or sanitary landfill"

may be found in the statutory definition of “landfill.” “‘Landfill’ means any solid waste facility for the disposal of solid waste on or in the land for the purpose of permanent disposal.”<sup>3</sup> W. Va. Code § 22-15-2(17). Chapter 22, Article 15, is the Solid Waste Management Act. No “permanent disposal” takes place at the City’s transfer station, because any such “permanent disposal” would violate the regulations regarding transfer stations. W.Va. C.S.R. §§ 33-1-5.2.i.2, 5.2.k.5, 5.2.k.13, and 5.2.k.17. “Legislative rules have ‘the force of law [.]’” Appalachian Power Co. v. State Tax Department, 195 W.Va. 573, 583, 466 S.E.2d 424, 434 (1995)(citing W.Va. Code § 29A-1-(2)(d)(1982)). The City must have a solid waste transfer station permit issued by the West Virginia Department of Environmental Protection, Division of Water and Waste Management, and this permit requires transportation of the solid waste to other approved solid waste facilities, such as dumps or landfills. W. Va. C.S.R. §§ 33-1-5.2.a.1 and 5.2.k.13.

“Landfill” is defined in W. Va. Code § 22-16-2(4) as including “transfer stations.” However, Chapter 22, Article 16, is the Solid Waste Landfill Closure Assistance Program. This broadened definition of “landfill” is only for this Article 16. The West Virginia Legislature has specifically recognized that there is a difference between a “transfer station” and “landfills and other solid waste facilities” in its rules regarding disbursement of grants to solid waste authorities. W. Va. C.S.R. §§ 54-5-7.1.5 and 7.1.6. “Solid waste facility” and “solid waste disposal facility” may be defined as including “transfer stations” in various other areas of the W. Va. Code regarding environmental

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<sup>3</sup> This same definition for “landfill” is also found at W. Va. C.S.R. § 33-2-2.27 (sewage sludge rule) and W. Va. C.S.R. § 54-3-2.4 (litter and solid waste rule).

resources. W. Va. Code §§ 22-15-2(34)(Solid Waste Management Act), 22-15-11(d)(regarding assessment fees), and 22C-3-3(12)(dealing with the Solid Waste Management Board).<sup>4</sup> However, the Governmental Tort Claims Act does not provide immunity for either a "solid waste facility" or a "solid waste disposal facility." The immunity is for "dumps, sanitary landfills, and facilities." W. Va. Code § 29-12A-5(a)(16). Calabrese defines "facilities" as those which are "located on and operated in connection with" a dump or landfill. Id., 204 W.Va. at 660, 515 S.E.2d at 824. Inasmuch as the City did not operate its transfer station on and in connection with a landfill, it has no immunity for Mr. and Mrs. Posey's claim.

The West Virginia Supreme Court of Appeals has cleared up any ambiguity regarding "facilities" in W.Va. Code § 29-12A-5(a)(16) by virtue of the Calabrese decision. As such, the circuit court should have applied the statute as opposed to interpreting or construing the same. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 5, State v. General Daniel Morgan Post 548, V.F.W., 144 W.Va. 137, 107 S.E.2d 353 (1959). The plain meaning of the statute is that "facilities" only includes those "facilities" which are "on and operated in connection with" a dump or landfill. The Calabrese decision was rendered in May 1999. The West Virginia Legislature has now had twelve regular sessions and numerous special and extended sessions within which it could have taken issue with the Supreme Court's interpretation of this statute. The Legislature's silence

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<sup>4</sup>A "solid waste facility" is also defined in W. Va. Department of Environmental Protection waste management rules as including "transfer stations." W. Va. C.S.R. § 33-1-2.123.

on the issue is deafening in the present case, especially considering that the Calabrese case involved the City of Charleston.

Next, the circuit court engaged in statutory construction by making the determination that the City's transfer station fell under the term "facilities." The court stated in the dismissal order that the "transfer station . . . is included among the 'facilities' referenced in" section 5(a)(16) of the Governmental Tort Claims Act. "Order Granting the City of Buckhannon's Motion to Dismiss Complaint," November 30, 2010, p. 3. If the circuit court was correct in its decision to engage in interpretation of the Act, due to any perceived ambiguity in the term "facilities," then the court violated the familiar statutory construction rule of "*expressio unius est exclusio alterius*, or the express mention of one thing implies the exclusion of another." Phillips v. Larry's Drive-In Pharmacy, Inc., 220 W.Va. 484, 491, 647 S.E.2d 920, 927 (2007).<sup>5</sup> The West Virginia Legislature knows the difference between a transfer station and a landfill. See W. Va. C.S.R. §§ 54-5-7.1.5 and 7.1.6 (rule regarding disbursement of grants to solid waste authorities), W. Va. C.S.R. § 33-1-5.2 (requirements for transfer stations), W. Va. C.S.R. § 33-1-3.16.a (requirements for landfills), W. Va. Code § 22-15-17(f)(dealing with closure deadlines and "the construction of a transfer station or to any solid waste landfill"), and W. Va. Code § 22C-4-24(a)(1), (2), and (3)(solid waste siting plan statute noting that

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<sup>5</sup>*Expressio unius est exclusio alterius* is also recognized in Manchin v. Dunfee, 174 W.Va. 532, 535, 327 S.E.2d 710, 713 (1985). This case contains an excellent discussion regarding the rule of *in pari materia*, which is in contrast to arguments in the "City of Buckhannon's Memorandum in Reply to Plaintiffs' Response to Motion to Dismiss Complaint," filed July 22, 2010, p. 4. Additionally, the court's reliance on Brooks v. City of Weirton, 202 W.Va. 246, 256, 503 S.E.2d 814, 824 (1998), is misplaced, because Mr. and Mrs. Posey's claim of liability for transfer stations in no way turns the entire Governmental Tort Claims Act into a "superfluous nullity." Id.

some facilities “accept” waste (landfills) and transfer stations are involved in “processing” waste).

Additionally, “ ‘[i]nclusio unius est exclusio alterius,’ the expression that ‘one is the exclusion of the others,’ has force in this case. This doctrine informs courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language.” Bevins v. West Virginia Office of Ins. Com’r, \_\_\_, W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2010 WL 4025603 (citing State ex rel. Roy Allen S. v. Stone, 196 W. Va. 624, 630 n. 11, 474 S.E.2d 554, 560 n. 11 (1996)). See also Wrenn v. West Virginia Dept. of Transp., Div. of Highways, 224 W.Va. 424, 436, 686 S.E.2d 75, 87 (2009))(Davis, J., dissenting)(discussing the *inclusio unius* maxim and how the Division of Highways should be responsible for violations of the highway safety statute). The inclusion of the words “dumps [and] sanitary landfills” in the Governmental Tort Claims Act, is the exclusion of “transfer stations.”

Had the West Virginia Legislature intended to provide governmental tort claim immunity to transfer stations, it would have specified “transfer stations” in W.Va. Code § 29-12A-5(16). The Legislature could have also used the term “solid waste facility” found in W.Va. Code § 22-15-2(34) in order to include “transfer stations” in the immunity statute, but the Legislature did not do so. The circuit court and the City cannot create immunity where none exists and where the Legislature has not clearly provided for 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.” Smith v. Burdette and City of St. Albans, 211 W.Va. 477, 479, 566 S.E.2d 614, 616 (2002)(citing Syl. pt. 2, Marlin v. Bill Rich Const., Inc. 198 W.Va. 635, 482 S.E.2d 620 (1996)). This public policy, which favors compensation where negligence exists, is especially important in the present case, because Mr. and Mrs. Posey have medical bills in excess of \$112,000.00, and they have no medical insurance for these bills. “Plaintiff’s Response to City of Buckhannon’s Motion to Dismiss Complaint,” April 29, 2010, p. 6, n. 2. The Legislature has clearly provided immunity for governmental dumps and landfills, but the Legislature has not clearly provided immunity for governmental transfer stations - which are not on and associated with dumps and landfills - as is the case with the City of Buckhannon.

“The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature.” Syl. pt. 2, Phillips (citing Syl. pt. 8, Vest v. Cobb, 138 W.Va. 660, 76 S.E.2d 885 (1953)).

“It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.” Banker v. Banker, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) (citing Bullman v. D & R Lumber Company, 195 W.Va. 129, 464 S.E.2d 771 (1995); Donley v. Bracken, 192 W.Va. 383, 452 S.E.2d 699 (1994)). See also, State ex rel. Frazier v. Meadows, 193 W.Va. 20, 24, 454 S.E.2d 65, 69 (1994) (“Courts are not free to read into the language what is not there, but rather should apply the statute as written.”). Moreover, “[a] statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.” Syllabus Point 1, Consumer Advocate Division v. Public Service Commission, 182 W.Va. 152, 386 S.E.2d 650 (1989).

Phillips, 220 W.Va. at 491, 647 S.E.2d at 927.

Additionally and importantly, it is a well accepted principle of law that the

“general rule of construction in governmental tort legislation cases favors liability, not immunity.” See Calabrese 204 W. Va. At 660, 515 S.E.2d at 824. W. Va. Code 29-12A-5(a)(16) does not immunize a political subdivision from liability arising out of negligently-caused dangerous, injurious, or harmful conditions in or arising out of the subdivision's sewer system, except insofar as the sewers are located on and a part of the operation of a dump or sanitary landfill by the subdivision.); Bender v. Glendenning, 219 W.Va. 174, 179-180, 632 S.E.2d 330, 335 - 336 (2006) (Immunity inapplicable to insured teacher sued based on sexual misconduct); Russell v. Bush & Burchett, Inc. 210 W.Va. 699, 559 S.E.2d 36 (2001) (State not immune to plaintiffs’ negligence suit resulting from a crane accident while plaintiff was working on bridge connecting West Virginia to foreign state.); Randall v. Fairmont City Police Dept., 186 W.Va. 336, 412 S.E.2d 737 (1991) (Immunity inapplicable to Plaintiffs’ wrongful death/negligence claim against police department and employees.); Pingley v. Huttonsville Public Service Dist., 225 W.Va. 205, 691 S.E.2d 531, (2010) (Reversing Circuit Court’s Order granting summary judgment in favor of municipality, and holding that Public Service District’s lack of knowledge of problem with plaintiffs’ sewer line did not immunize it from liability.) Accordingly, the circuit court failed to follow the accepted rule of construing the statute to favor liability.

In the Phillips case, the Supreme Court applied the doctrine of *expressio unius est exclusio alterius* in its decision to interpret the Medical Professional Liability Act as excluding pharmacies. “The *expressio unius* maxim is premised upon an assumption

that omissions from a statute by the legislature are intentional.” Phillips, 220 W.Va. at 492, 647 S.E.2d at 928. “If the legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the legislature intended the limited rule would not apply to any other situation.” Id. (citing State ex rel. Riffle v. Ranson, 195 W. Va. 121, 128 464 S.E.2d 763, 770 (1995)).

Inasmuch as the Legislature knows the difference between a landfill and a transfer station, and given the well accepted rules regarding statutory construction, the circuit court erred in its finding that the word “facilities” in the Governmental Tort Claims Act included “transfer stations.” The West Virginia Legislature has used the specific words “transfer station(s)” numerous times throughout the West Virginia Code and the related Codification of State Regulations. The Legislature has not been bashful about using the words “transfer station” when it needed to do so. Had the Legislature intended to use the words “transfer station” in the Governmental Tort Claims Act, it would have done so.

Mr. and Mrs. Posey’s claim relates in part to the failures of the City employees to do that which they are required to do under the law. The safety regulations regarding transfer stations require that the “operator must also prevent and eliminate conditions . . . that are harmful to the environment or public health, or which create safety hazards . . . .” W. Va. C.S.R. § 33-1-5.2.k.1. The failure to operate the facility in a safe manner is a negligent act of the employees of the city. This negligence is covered by W. Va. Code

§ 29-12A-4.

Our public policy is to maintain the beauty of the State of West Virginia through the proper disposal of litter and solid waste.

The Legislature finds that litter is a public nuisance and distracts from the beauty of the state and its natural resources. It is therefore necessary to establish and implement a litter control program to coordinate public and private litter control efforts; to establish penalties for littering; to provide for litter pickup programs; to create education programs; and to provide assistance to local solid waste authority litter control efforts. The Legislature further finds that the improper management of commercial and residential solid waste and the unlawful disposal of such waste creates open dumps that adversely impacts the state's natural resources, public water supplies and the public health, safety and welfare of the citizens of the state. It is therefore necessary to establish a program to promote pollution prevention and to eliminate and remediate open dumps.

W. Va. Code § 22-15A-1(a) and (b). The goal of this environmental statute is to eliminate the all too common eyesores such as open dumps and visible trash strewn about. "Litter means all waste material, including, but not limited to, any garbage, refuse, [and] trash." W. Va. Code § 22-15A-2(8). It is a crime to dump or throw litter "in or upon any public or private highway, road, street or alley; any private property; any public property; or the waters of the state or within one hundred feet of the waters of this state, except in a proper litter or other solid waste receptacle." W. Va. Code § 22-15A-4(a)(1). Depending on the amount that a person dumps or litters, the penalties can range from \$100 to \$25,000, or from community service (cleaning up litter) up to a year in jail, or both. W. Va. Code § 22-15A-4(a)(4)-(6).

The need to control litter and solid waste is so important that "[a]ll

law-enforcement agencies, officers and environmental inspectors shall enforce compliance with this section.” W. Va. Code § 22-15A-4(a)(10). There are even civil penalties which are imposed upon those who are convicted, in amounts between \$200 to \$1,000 “as costs for clean up, investigation and prosecution of the case.” W. Va. Code § 22-15A-4(c). Many of us are also familiar with the state signs along primary and secondary roads, which list the maximum penalties. W. Va. Code § 22-15A-4(f).

This litter and solid waste statute obviously encourages citizens to use transfer stations such as the one owned by the City of Buckhannon. It is common sense to require that such transfer stations operate safely, and when one of our citizens is injured as a result of negligence in the operation of the transfer station, then the public policy of our State requires that the injured person be compensated. It is inconsistent for government on the one hand to beckon people to a public transfer station, and on the other hand to claim immunity for negligent acts at the transfer station, especially where the immunity is not specified in the West Virginia Code.

Lastly, Mr. and Mrs. Posey desire to address the court’s statement at the Rule 12(b)(6) hearing that the court did not “see any kind of a practicality of having a transfer station located on the dump.” Tr., July 26, 2010, p. 15. First, the circuit court misses the point that the Legislature specifically did not use the words “transfer station” when it could have easily done so. Second, there are transfer stations which are located at dumps or landfills, and there are cities which own both. In the case of Payne v. City of St. Joseph, 135 S.W.3d 444, 446 (2004), a transfer station is located at the landfill.

When members of the public use the landfill, they dispose of their trash at a "transfer station," which is designed for people to back their trucks or other vehicles on a concrete pad, and then, while standing either on the pad or in the back of the truck, to manually throw their trash into dumpsters located below the pad.

Id., 135 S.W.3d 447. This is a perfect example of a landfill which has a transfer station.

Similarly, as is outlined in Mr. and Mrs. Posey's response to the motion to dismiss (served April 29, 2010), the safe manner in which the transfer station near Morgantown, West Virginia, operates its facility, is in stark contrast to the operation of the City of Buckhannon facility. Upon arrival at the Suburban Transfer Station near the IHOP restaurant at Easton Hill in Monongalia County, there is a transfer station employee who is posted at the end of the scales who sets the staging area for trucks. Then there is another employee who guides the trucks into the area where the dumping for the pit takes place - for transfer to the larger trucks for removal to the landfill. This second spotter at the open pit area guides trucks backing into the landing area near the pit. Trucks are not allowed to back up beyond a certain point. People who unload are required to unload the material onto a platform, and from this point a small skid steer or small excavator pushes the material over into the pit so that customers of the transfer station are not put in danger. The City of Buckhannon had no such spotters at its transfer station. Moreover, the only sign at the City's transfer station, which guides customers with respect to dumping into the pit, is a sign merely stating that the garbage must stay below the three feet level of the floor and that children must stay in the vehicle while unloading. Complaint, ¶ 36. There is no reference to the distance within

which people may come to the pit. Complaint, ¶ 37. The court was made aware that Mr. and Mrs. Posey had a nationally recognized and leading expert in the area of transfer stations which would state that the Morgantown facility met the safety standards, but that the Buckhannon facility did not. "Plaintiffs' Response to City of Buckhannon's Motion to Dismiss Complaint," April 29, 2010, pp. 7-8 and Tr., July 26, 2010, pp. 9-10.

Additionally, the City of Greensboro, North Carolina, operates a landfill and a transfer station. The difference between Greensboro and St. Joseph, Missouri, is that the Greensboro landfill facility permanently stores yard waste and construction debris, and its residential and commercial trash is taken from its transfer station to a different landfill. Available at <http://www.greensboro-nc.gov/departments/environmental/disposal/>. As such, there are certainly instances where a transfer station and a landfill may be at the same facility or a city may own both. The court was incorrect in its view that there was no such "practicality." Tr., July 26, 2010, p. 15. Another example of a "facility" which could be included on a landfill would be an incinerator. Had Mr. Posey been injured in or by an incinerator located on a landfill owned by a governmental entity, then that entity would be immune.

Taking the circuit court's view of this matter, the question is begged as to how far the immunity extends. For example, if the immunity extends to a transfer station, then under the circuit court's view, the immunity would extend to city trash trucks on their way to the transfer station. For that matter, the statutory construction taken by the

circuit court could also mean that the immunity extends to the public garbage dumpsters or containers in which citizens in the City of Buckhannon place their garbage. The salient point is that there is a difference between a landfill and a transfer station. The examples of the dumpster/trash can, the trash truck, and the transfer station, all involve items where trash is temporarily stored. Thinking about the four items of a dumpster/trash can, a trash truck, a transfer station, and a landfill, one is reminded of the popular public television Sesame Street skit, "One of these things is not like the other things." Available at <http://www.youtube.com/watch?v=0WhuikFY1Pg>. A landfill is not like the other things, because it is the only one of the four in which trash is permanently placed.

The Legislature has only seen fit to immunize governmental landfills where trash is permanently stored. If tomorrow, a City owned trash dumpster falls over and kills a child on the grounds of a City building, as a result of the negligence of the City, per W. Va. Code § 29-12A-4(c)(4), such as in the form of the dumpster's legs being in severe disrepair, then per the circuit court's interpretation of the Act, the City would be immune. By way of another example, if a City trash truck negligently crosses left of the center line and hits another vehicle head on, thereby killing someone, in order to accept the circuit court's view, the City in that instance would be immune, because the trash truck falls within the term "facilities." The victims of such a tragedy are supposed to be able to make a recovery against the City pursuant to W. Va. Code § 29-12A-4(c)(1).

**CONCLUSION**

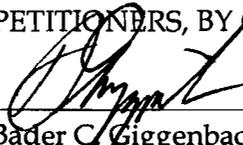
The circuit court erred in its dismissal of Mr. and Mrs. Posey's complaint, because the complaint did state a claim upon which relief may be granted. The circuit court erred in its decision to interpret the Governmental Tort Claims Act and in its construction of the statute. Mr. and Mrs. Posey request: that the circuit court be reversed; that this matter be remanded; that they be permitted to proceed with their serious injuries claim; that the public policy of compensating individuals injured as a result of negligence be maintained; and that the rule of construction which favors liability in Governmental Tort Claims also be maintained.

**PRAYER FOR RELIEF**

For the foregoing reasons, your Petitioners, Steven M. Posey and Michelle E. Posey, by counsel, respectfully request that the West Virginia Supreme Court of Appeals grant this petition for appeal.

BREWER  
&  
GIGGENBACH  
Attorneys at Law, PLLC  
Of Counsel

RESPECTFULLY SUBMITTED,  
PETITIONERS, BY COUNSEL.

  
\_\_\_\_\_  
Bader C. Gigenbach, Esq.  
Counsel for Petitioners  
WV State Bar No. 6596  
P.O. Box 4206  
Morgantown, WV 26504  
(304) 291-5800

SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKETING STATEMENT

CASE NO. \_\_\_\_\_

STEVEN M. POSEY  
MICHELLE E. POSEY,  
Petitioner (Plaintiff below),

FILED MAR 31 2011 RORY L. PERRY II, CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA
---

Type of Action

Civil  
 Criminal

VS.

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

Respondent (Defendant below).

Petitioner(s)

Plaintiff(s)  
 Defendant(s)

Circuit: 26

County: UPSHUR

Judge(s): JUDGE THOMAS H. KEADLE

Circuit Number: 09-C-123

A. Timeliness of Appeal

1. Date of entry of judgment or order appealed from: November 30, 2010, Order Granting Motion to Dismiss.
2. Filing date of any post-judgment motion filed by any party pursuant to R. Civ. P. 50(b), 52(b), or 59: N/A
3. Date of entry of order deciding post-judgment motion: N/A
4. Date of filing of petition for appeal: March 29, 2011
5. Date of entry of order extending appeal period: N/A
6. Time extended to: N/A

B. Finality of Order or Judgment

1. Is the order or judgment appealed from a final decision on the merits as to all issues and parties? Yes  No

UPSHUR COUNTY, W. VA.  
FILED  
2011 MAR 29 AM 11:36  
CLERK OF COURT

2. If no, was the order or judgment entered pursuant to R. Civ. P. 54(b)?

Yes \_ No \_ N/A

3. Has the Defendant been convicted? N/A

4. Has a sentence been imposed? N/A

5. Is the defendant incarcerated? N/A

C. Has this case previously been appealed? Yes \_ No X

If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

D. Are there any related cases currently pending in the Supreme Court of Appeals or Circuit Court? Yes \_ No X

If yes, cite the case and the manner in which it is related on a separate sheet.

E. State the nature of the suit, the relief sought, and the outcome below. [Attach an additional sheet, if necessary]

Petitioners' suit for injuries caused by Respondent's negligence was dismissed by the circuit court per W. Va. R. Civ. P. 12(b)(6). The Petitioners request that the circuit court be reversed and that this matter be remanded so that their claim for serious injuries may proceed and so that the public policy of compensating individuals injured as a result of negligence is maintained, as well as the rule of construction which favors liability in Governmental Tort Claims matters.

F. Issues to be raised on appeal. [Attach an additional sheet, if necessary].

Petitioners assert the circuit court erred by: its dismissal of Petitioners' complaint, because the complaint did state a claim upon which relief may be granted; and in its interpretation of the Governmental Tort Claims Act.

G. Do you wish to make an oral presentation of the petition?

Yes X No \_

H. Has the entire or only portions of the record been designated?

Entire X Portion \_

I. If the appeal is granted, do you desire reproduction of the record or that the case be heard on the original record?

Reproduced \_ Original X

J. List each adverse party to the appeal. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.

1. Adverse party City of Buckhannon  
Attorney Tamara J. DeFazio  
Firm Shuman, McCuskey, & Slicer, PLLC  
Address 1445 Stewartstown Road, Suite 200  
Telephone (304) 291-2840

K. Petitioner(s) name: Steven M. Posey and Michelle E. Posey  
If incarcerated, give institutional address

Address P.O. Box 736, Weston, West Virginia 26452

Telephone (304) 269-9799

L. Attorney or pro se litigant filing Docketing Statement.

Will you be handling the appeal? (In criminal cases, counsel below will handle the appeal unless relieved by the court).

Yes  No

Name Bader C. Giggenbach  
Attorney  Pro Se

Firm Brewer & Giggenbach, PLLC

Address P.O. Box 4206, Morgantown, West Virginia, 26504

Telephone (304) 291-5800

If this is a joint statement by multiple petitioners, add the names and addresses of the other petitioners and counsel joining in this Docketing Statement on an additional sheet accompanied by certification that all petitioners concur in this filing.

BREWER  
&  
GIGGENBACH  
Attorneys at Law, PLLC  
Of Counsel

  
Bader C. Giggenbach, Esq.  
Counsel for Petitioners  
WV State Bar No. 6596  
P.O. Box 4206  
Morgantown, WV 26504  
(304) 291-5800

Date March 28, 2011

**SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKETING STATEMENT**

CASE NO. \_\_\_\_\_

STEVEN M. POSEY  
MICHELLE E. POSEY,  
Petitioners (Plaintiffs below),

VS.

UPSHUR COUNTY CIRCUIT COURT  
CIVIL ACTION NO.: 09-C-123  
Judge Thomas H. Keadle

CITY OF BUCKHANNON, WEST VIRGINIA,  
a West Virginia Statutory  
Municipal Corporation  
Respondent (Defendant below).

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that he served a true copy of the within  
**DOCKETING STATEMENT and PETITION FOR APPEAL**, by placing a true copy of  
the same in the United States Mail, postage prepaid, on the 28<sup>th</sup> day of March, 2011,  
upon the following:

Tamara J. DeFazio  
Shuman, McCuskey & Slicer, PLLC  
1445 Stewartstown Road, Suite 200  
Morgantown, WV 26505  
(304) 291-2840

BREWER  
&  
GIGGENBACH  
Attorneys at Law, PLLC  
Of Counsel

  
\_\_\_\_\_  
Bader C. Giggenbach, Esq.  
Counsel for Plaintiffs  
WV State Bar No. 6596  
P.O. Box 4206  
Morgantown, WV 26505  
(304) 291-5800

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

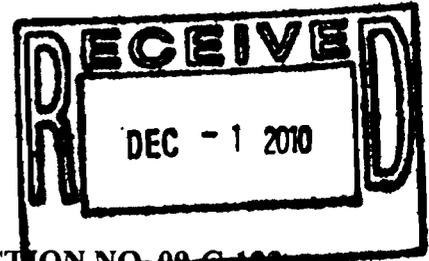
STEVEN M. POSEY and  
MICHELLE E. POSEY,

Plaintiffs,

v.

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

Defendant.



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

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**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.

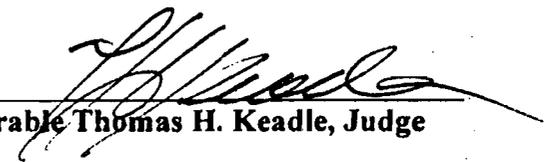
The Court further concludes that, based upon all of the foregoing, Plaintiffs have failed to state a claim against the City of Buckhannon upon which relief may be granted and their Complaint should therefore be dismissed with prejudice.

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~~ <sup>November</sup>, 2010.

11/30/10  
T. DeFazio  
P. Giffenbach

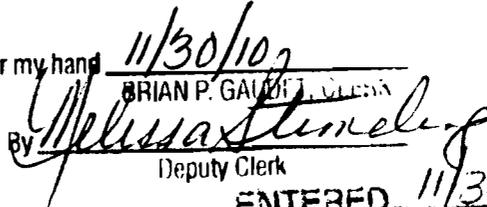
  
Honorable Thomas H. Keadle, Judge

Prepared by:

  
Tamara J. DeFazio, Esq.  
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Jennifer Tampoya, Esq.  
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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. GAUBERT, CLERK  
By   
Deputy Clerk

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CLERK

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**Approved As to Form Only:**

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