

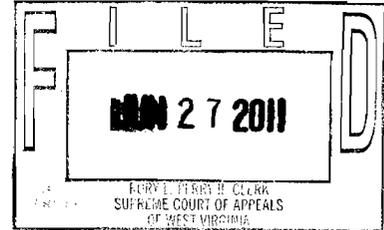
No. 11-0565

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STEVEN M. POSEY and  
MICHELLE E. POSEY,**  
*Petitioners and Plaintiffs Below,*

vs.

**THE CITY OF BUCKHANNON,  
WEST VIRGINIA, A West  
Virginia Statutory Municipal  
Corporation,**  
*Respondent and Defendant Below.*



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*Response to Petition for Appeal from  
Order Granting The City of Buckhannon's  
Motion to Dismiss Complaint  
Entered November 30, 2010*

*In Civil Action No. 09-C-123  
In the Circuit Court of Upshur County, West Virginia  
The Honorable Thomas H. Keadle, Circuit Judge*

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**RESPONSE OF THE CITY OF BUCKHANNON  
TO PETITION FOR APPEAL**

*Brief of Respondent*

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**Exhibits**

Exhibit 1 – Complaint.

Exhibit 2 – Order Granting The City of Buckhannon's Motion to Dismiss Complaint, entered November 30, 2010.

Exhibit 3 – Transcript of July 26, 2010, hearing held pursuant to the City of Buckhannon's Motion to Dismiss.

**RESPONSE OF THE CITY OF BUCKHANNON**  
**TO PETITION FOR APPEAL**

The City of Buckhannon (hereinafter “the City”), by its counsel, Tamara J. DeFazio, Kristen D. Antolini and the law firm of Shuman, McCuskey & Slicer, PLLC, respectfully submits the following Response to the Petition for Appeal filed by Steven M. Posey and Michelle E. Posey, Petitioners and plaintiffs below.<sup>1</sup>

**I. INTRODUCTION**

In their Petition for Appeal, the plaintiffs Posey seek review of the Circuit Court’s dismissal of their Complaint based upon the immunity afforded to political subdivisions pursuant to West Virginia Code Section 29-12A-5(a)(16) of the West Virginia Governmental Tort Claims and Insurance Reform Act [“Tort Claims Act”].

The Petition for Appeal is replete with factual references from sources outside of the record made in the Circuit Court below, none of which are relevant to the issue presented by the Petition for Appeal. The facts relevant to the Petition and the ruling below are as follows:

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’s Solid Waste Disposal Complex. *Exhibit 1 - Complaint, paras. 7, 9, 17, 19.* 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. *Exhibit 1- Complaint, paras. 9, 10; Exhibit 2 - Circuit Ct. Order dated Nov. 30, 2010, at para. 2.* The City

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<sup>1</sup> Although the Petition, in some instances, references Steven M. Posey as the sole Petitioner and, in other instances, references both Steven M. Posey and Michelle E. Posey as Petitioners, The City of Buckhannon assumes, for the purpose of this Response, that both of the Posey plaintiffs are seeking review of the Circuit Court’s November 30, 2010, Dismissal Order. It should also be noted that Judge Thomas Keadle entered the Order on November 29, 2010, and the same was stamped by the Circuit Clerk on November 30, 2010.

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. *Exhibit 2 - Circuit Ct. Order dated Nov. 30, 2010, at para. 3, Exhibit 1- Complaint, para. 32.* Finally, it is undisputed that The City of Buckhannon is a political subdivision pursuant to the definition set forth in West Virginia Code Section 29-12A-3(c) of the Tort Claims Act. *Exhibit 1- Complaint, para. 3.*

While the City is certainly not insensitive to the injuries sustained by Mr. Posey, the focal point of the Petition is purely an issue of law.

That issue<sup>2</sup> is whether the transfer station operated by The City of Buckhannon falls within the purview of the immunity set forth in West Virginia Code Section 29-12A-5(a)(16). Because the Circuit Court properly concluded that the transfer station at issue fell squarely within the parameters of that immunity, the Petition for Appeal should be denied.

## II. DISCUSSION & ANALYSIS

### A. The Standard for Review.

If this Court were to grant the pending Petition for Appeal, the November 30, 2010, Circuit Court Order granting The City of Buckhannon's Motion to Dismiss would be subject to *de novo* review. *Abadir v. Dellinger*, No. 35593, Supreme Court of Appeals of West Virginia, 2011 W.Va. Lexis 27, quoting Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyah Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W.Va. 1995). However, this Court has also stated that it may affirm a circuit court's order under independently sufficient grounds. See, *W.Va. Human Rights Comm'n v. Garretson*, 468 S.E.2d 733, 738 (W.Va. 1996) (noting that "we may affirm a circuit court's dismissal order under any independently sufficient grounds.").

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<sup>2</sup> Although Petitioners cite a long list of regulations in their Petition, none are germane to the issue presented by the Petition itself which issue is related exclusively to the immunity set forth in West Virginia Code Section 29-12A-5(a)(16), and its applicability to the transfer station owned and operated by The City of Buckhannon.

**B. The Circuit Court's Dismissal Of The Complaint Filed By Petitioners Was Proper Based Upon The Immunity Afforded To Political Subdivisions Pursuant To West Virginia Code Section 29-12A-5(a)(16) of the West Virginia Governmental Tort Claims and Insurance Reform Act.**

Plaintiffs filed the civil action below in the Circuit Court of Upshur County, West Virginia, as a result of a fall sustained by plaintiff Steven M. Posey 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." *Exhibit 2 - Cir. Ct. Order entered Nov. 30, 2010, at para. 1.*

After plaintiffs conducted limited discovery, the Circuit Court made the following findings of fact, based upon the record before it:

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.

*Exhibit 2 - Circuit Ct. Order dated Nov. 30, 2010, at paras. 1, 2, 3, 4 and 5. See also Exhibit 1 - Complaint, paras. 3, 7, 9, 10, 17, 19, 32.* These findings were not disputed by plaintiffs in the lower court.

The circumstances giving rise to immunity from liability for political subdivisions are enumerated in Section 29-12A-5(a) of the Tort Claims Act. Particularly relevant to the instant action is the immunity set forth in Section 29-12A-5(a)(16) which states:

A political subdivision is **immune 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). [Emphasis added].*

Because 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's Solid Waste Disposal Complex,<sup>3</sup> this claim falls squarely within the immunity set forth in Section 29-12A-5(a)(16). For this reason, the Circuit Court properly dismissed plaintiffs' Complaint with prejudice.

Although Section 29-12A-5(a)(16) has not been the subject of extensive litigation in this State, this Court was presented with certified questions regarding this immunity provision in *Calabrese v. City of Charleston*, a case in which the City of Charleston sought to have the Court apply the provision to its entire sewer system. *Calabrese v. City of Charleston*, 515 S.E.2d 814, 823-24 (W.Va. 1999).

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<sup>3</sup> *Exhibit 1 - Complaint, paras. 7, 9, 17, 19.*

In that case, this Court declined to adopt the City of Charleston's position regarding the application of this immunity provision to its sewer system in its entirety, but held that the City was immunized from liability for negligently caused conditions arising out of the City's sewers that were "located on and a part of the operation of a dump or sanitary landfill by the subdivision." *Calabrese*, *id.* at 824. [*Emphasis in original*].

Given the foregoing, Section 29-12A-5(a)(16) immunizes a city from liability for claims resulting from its operation of a dump, from its operation of a sanitary landfill, and from its operation of a facility associated with either of these waste collection sites. The plain language employed in Section 29-12A-5(a)(16) demonstrates that the words "dumps," "landfills," and "facilities" are not merely used as synonyms of each other, but rather are separate bases for the immunity established by Section 29-12A-5(a)(16). Thus, the word "facilities" necessarily refers to those facilities which are logically associated<sup>4</sup> with dumps or landfills. *Calabrese v. City of Charleston*, 515 S.E.2d 814, 824 (W. Va. 1999). Accordingly, Section 29-12A-5(a)(16) clearly immunizes a city from liability for a claim or loss which results from the City's operation of a facility, such as a transfer station, which is logically associated with a dump or sanitary landfill.

Applying the foregoing precepts to the undisputed facts developed in the lower court, it is clear that the City is statutorily immunized from liability for Plaintiffs' claim because Plaintiffs' claim results from the City's operation of its Waste Disposal Complex and the transfer station located thereon, which, by their very nature, are facilities used not only for dumping solid waste, but are likewise associated with a sanitary landfill.

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<sup>4</sup> The adjective "associated" is defined as: "connected, joined, or related, esp. as a companion or colleague; . . . allied, concomitant." *Webster's Encyclopedic Dictionary of the English Language* 126 (Random House Value Publishing, Inc. 1996).

Even though the Plaintiffs-Petitioners contend that the City is not statutorily immune from liability, by their own admission, they concede the existence of the elements essential to the statutory immunity embodied within Section 29-12A-5(a)(16). In so doing, Petitioners admit: (1) that the City is a municipal corporation and therefore a political subdivision under the Tort Claims Act, (2) that the City owns and operates the Waste Disposal Complex on which the transfer station where Plaintiff Steven Posey was injured while dumping garbage from his truck is located (3) that the Waste Disposal Complex is used for dumping waste, and (4) that such waste is ultimately hauled to an associated landfill. *See Exhibit 1 - Complaint, paras. 3, 7, 8, 9, 10, 16, 17, 19, 32.*

It is noteworthy that Petitioners rely extensively upon Section 29-12A-4(c) (2), (3), and (4) as a basis for the claimed liability of The City of Buckhannon. A review of Section 29-12A-4(c) in its entirety reveals the fallacy underlying Petitioners' theory. This is true because Section 29-12A-4(c) is expressly made subject to the immunities set forth in Section 29-12A-5(a). Specifically, Section 29-12A-4(c) begins with this phrase:

(c) Subject to sections five and six of this article, . . .

*W.Va. Code* §29-12A-4(c). Thus, Petitioners' reliance on Section 29-12A-4(c)(2), (3) and (4) as a basis for the sufficiency of their claim is misplaced.

In the final analysis, although Petitioners' Complaint is replete with countless allegations, when distilled to its essence, it is a claim resulting from The City of Buckhannon's operation of a facility necessarily associated with a landfill where waste is temporarily dumped. As such, the Circuit Court's ruling that The City of Buckhannon is immunized from liability for Petitioners' claim was entirely proper.

For Petitioners to suggest that the transfer station operated by The City of Buckhannon is not a facility within the meaning of that term as it appears in Section 29-12A-5(a)(16) strains credulity. The absurdity of such an approach is obvious because, if, as Petitioners suggest, the phrase “and facilities” meant only facilities located on dumps or landfills, the inclusion of the phrase “and facilities” in the immunity provision would be superfluous. The significance of the phrase “and facilities” is underscored by the rationale underlying this Court’s opinion in Brooks v. City of Weirton, 503 S.E.2d 814 (W.Va. 1998) in which it is stated that, in the context of the Tort Claims Act, “[i]t would be difficult to support a construction that would make. . . provisions of [the Tort Claims Act] into a superfluous nullity.” *Id.* at 824. Certainly, in this case, it is much more reasonable to conclude that the phrase “and facilities” means those facilities, such as the transfer station at issue, which are necessarily associated with sanitary landfills or dumps, but which are not necessarily present on them.

While this Court’s analysis in Calabrese v. City of Charleston, 515 S.E.2d 814 (W. Va. 1999) is instructive in applying the immunity embodied in Section 29-12A-5(a)(16) to the transfer station at issue, the analysis set forth therein need not be applied literally in its entirety to this case because sewer lines, not a transfer station, were at issue in Calabrese.

In Calabrese, with regard to Section 29-12A-5(a)(16), it was held that a claim resulting from a subdivision’s blocked sewer line would not be barred by this immunity provision “except insofar as the sewers are located on and a part of the operation of a dump or sanitary landfill by the subdivision.” *Id.* at 824. In so doing, this Court declined to adopt the City of Charleston’s argument that the word “facilities” must be modified with the word “sanitary” so that the City’s entire sewer system would qualify as a facility under Section 29-12A-5(a)(16). *Id.* Instead, this Court explained that “there is a simpler, narrower and more logical reading of the statute, if the

logically implied word ‘associated’ is inserted before the word ‘facilities.’” *Id.* In so doing, this Court stated:

We decline to adopt such a broad reading. Rather, we 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 ....

*Id.* Furthermore, this 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.* This Court likewise acknowledged the immunity of “landfill- and dump-related facilities.” *Id.* In this case, the waste material deposited in the transfer station must necessarily be taken to a dump or landfill. There is no dispute on this point. *Exhibit 1- Complaint, para. 32.* It is therefore clear that the transfer station<sup>5</sup> is a landfill - related and dump- related facility that should be immunized.

Not only is this analytical framework reasonable and logical, but it is also entirely consistent with the definition of a solid waste facility subsequently utilized by the West Virginia Legislature in Code Section 22-15-2(34) which expressly states that the term solid waste facility means “any system, facility, . . . or methods used for processing, recycling or disposing of solid waste, **including landfills, transfer stations**, . . . and other such facilities not herein specified . . . .” W. Va. Code § 22-15-2(34) (formerly codified at § 20-5F-2(o)).<sup>6</sup> [*Emphasis added*].

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<sup>5</sup> Petitioners attempt to bolster their position by suggesting that “trash trucks” and a “dumpster/trash can” are similar to transfer stations. *Petition for Appeal at p. 3.* In reality, the mobility of these items, when compared to the stationary transfer station, negates the validity of the suggestion. Further, neither “trash trucks,” nor “dumpsters/trash cans”, are facilities. Thus, Petitioners’ suggestion that these items would fall within the immunity under the Circuit Court’s analysis is erroneous.

<sup>6</sup> Moreover, the Solid Waste Landfill Closure Assistance Program, under which The City of Buckhannon’s former landfill was closed, declares that “‘Landfill’ means any solid waste facility for the disposal of solid waste on land, and also means any system, facility, land, contiguous land, improvements on the land, structures or other appurtenances or methods used for processing, recycling or disposing of solid waste, including landfills, transfer stations, resource recovery facilities and other such facilities not herein specified.” *Id.* at § 22-16-2(4).

Despite the cogent analysis undertaken by the lower court, Petitioners contend that this State's public policy of compensating injured parties is a sufficient basis for questioning the Circuit Court's dismissal of their claim. Although the City does not take issue with Petitioners' contention that it is a policy of this State to compensate injured parties, it must be noted that the application of this policy has not and should never lead to the nullification of a portion of the immunity set forth in Section 29-12A-5(a)(16) as advocated by Petitioners.

Finally, Petitioners question the Circuit Court's wisdom in pointing out the impractical and illogical reasoning inherent in their position by referring to the case of *Payne v. City of St. Joseph*, 135 S.W.3d 444 (Mo. 2004), a case decided by a Missouri intermediate appellate court which did not have before it any provision similar to Section 29-12A-5(a)(16). In so doing, Petitioners make much of the apparent location of a transfer station at a landfill. Once again, Petitioners' reference misses the point of the Circuit Court's astute observation regarding the fact that garbage is taken to this "transfer" station so that the City can take it to a dump or landfill. *Exhibit 3 – See Transcript of July 26, 2010, hearing held before The Honorable Thomas Keadle at p. 15.* It therefore logically follows that this transfer station is a facility necessarily associated with, or related to, a dump or landfill as contemplated by this Court in *Calabrese. Id.* at 824.

The Petitioners next seek to undermine The City of Buckhannon's immunity by contending that, had the West Virginia Legislature intended to immunize political subdivisions from liability for the operation of transfer stations, it would have used the term transfer station or solid waste facility in the text of Section 29-12A-5(a)(16). The Posey Plaintiffs' supposition in this regard is fundamentally flawed because these terms actually appear in a statute enacted in 1994, eight (8) years after the Tort Claims Act was enacted in 1986. Thus, there is little

evidence to support their contention. Indeed, it may be fairly stated and is reasonable to conclude that a Legislature, acting in 1986, seeking to include other waste management facilities operated directly by political subdivisions in the immunity provision may well have included the phrase “and facilities” to signal the inclusion of other associated facilities, such as this transfer station, within the purview of the immunity set forth in 29-12A-5(a)(16).

The Circuit Court’s analysis is further buttressed by this Court’s opinion in *Hutchison v. The City of Huntington*, 479 S.E.2d 649 (W.Va. 1996).

In *Hutchison*, a landowner sued the City of Huntington for additional costs incurred as a result of the City’s initial refusal to issue a building permit to the plaintiff. *Id.* at 655-57. The trial court denied the City’s Motion to Dismiss which was based, in part, on the immunity provisions of the West Virginia Governmental Tort Claims and Insurance Reform Act and the case proceeded to trial. *Id.* at 657. After a \$25,000 verdict was rendered against the City, it appealed based, in part, upon the lower court’s denial of its Motion to Dismiss made pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and the statutory immunity set forth in Section 29-12A-5(a)(9). *Id.* at 657.

In *Hutchison*, this Court reversed and dismissed the action after it had been tried by a jury. *Id.* at 668. In so doing, this Court commented, “[h]ad the circuit court properly applied W.Va. Code, 29-12A-5(a)(9), to this action, it would have dismissed all state law claims as a matter of law.” *Id.* at 661. In Footnote 10 of its opinion, this Honorable Court stated, in regard to the statutory immunities set forth in Code Section 29-12A-5(a), “[i]n absolute statutory immunity cases, the lower court has little discretion, and the case must be dismissed if one or more of the provisions imposing absolute immunity applies.” *Id.* at 658.<sup>7</sup>

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<sup>7</sup> It should likewise be noted that the Circuit Court’s Dismissal Order entered in this case is entirely consistent with the purpose of the Tort Claims Act which is to “limit liability of political subdivisions and provide immunity to

As the foregoing analysis demonstrates, Petitioners' contention that The City of Buckhannon is not immunized from liability for the accident that serves as the subject of their Complaint is neither logically, nor legally sound. Thus, the Circuit Court correctly dismissed their civil action with prejudice and their Petition for Appeal should therefore be denied.

### III. CONCLUSION

For all of the foregoing reasons, it is respectfully requested by The City of Buckhannon that the Petition for Appeal filed herein be denied.

**RESPONDENT/DEFENDANT  
THE CITY OF BUCKHANNON  
BY COUNSEL**



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**Of Counsel For Respondent/Defendant  
The City of Buckhannon**

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political subdivisions in certain instances", thereby regulating the costs and coverage of insurance available to them.  
*See W. Va. Code § 29-12A-1.*

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing **“Response of The City of Buckhannon to Plaintiffs’ Petition for Appeal”** on the 27th day of June, 2011, by Facsimile and by mailing a true copy thereof, by Federal Express Overnight mail, postage prepaid, to the following named parties or their respective counsel of record:

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**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**