FILED
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SUPREME COURT OF APPEALS

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel.
TOWN OF PRATT, a West Virginia Municipal
Corporation,

Petitioner/Defendant Below,

v. No. 12-0442

THE HONORABLE JAMES C. STUCKEY,
Judge of the 13th Judicial Circuit, and
and ROGER PAUL CRIST, et al.,

Respondents/Plaintiffs Below.

PETITION FOR WRIT OF PROHIBITION
FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
Civil Action No. 11-C-1217

NOW COMES the Petitioner, the Town of Pratt, a West Virginia Municipal Corporation, by and through counsel, Johnnie E. Brown, Jill M. Harlan and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, pursuant to the provisions of West Virginia Code § 56-1-1, *et seq.* and Rule 16 of the Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia, and respectfully requests that this Honorable Court issue an order directing Respondents to show cause why a writ of prohibition should not be issued (1) staying the proceedings in the Circuit Court until presentation and resolution of this petition for writ of prohibition; (2) vacating the Circuit Court's Order denying the *"Defendant Town of Pratt's Motion to Dismiss or Alternatively for Summary Judgment;"* directing the Circuit Court of Kanawha County to grant Defendant, the Town of Pratt's Motion to Dismiss or Alternatively for Summary Judgment. In support hereof, the Petitioner states as follows:

I. QUESTIONS PRESENTED

A. Whether the Town of Pratt is entitled to immunity under *W. Va. Code* § 29-12A-5(a)(9) where the allegations against the Town are that it failed to issue a permit or that it improperly permitted the co-defendants' fill activities that took place on property adjacent to the Plaintiff's property.

B. Whether the Town of Pratt is entitled to immunity under *W. Va. Code* § 29-12A-5(a)(10) where the allegations against the Town are that it failed to correct or to direct others to correct the damage caused by the co-defendants' fill activities that took place on the co-defendants' property.

II. STATEMENT OF THE CASE

The Circuit Court denied the Town of Pratt's request for summary disposition of this matter and instead directed that discovery proceed unnecessarily. (See Appendix **"Exhibit 1"**). As of this date of filing this Petition, the Court's order has not yet been entered.

This action arises from modifications made to real property that is adjacent to the property of Plaintiffs Roger and Roxanna Crist. The modifications allegedly caused a change in the normal water flow on the Plaintiffs property and resulted in property damage. The Plaintiffs filed their Complaint on July 22, 2011, naming the Town of Pratt, Helen B. Berry, Administratrix of the Estate of John Billo, and William M. Perry and Rosella Perry as Defendants. (*See* Appendix "**Exhibit 2**").

The matter was assigned to the Honorable Judge James C. Stuckey in the Circuit Court of Kanawha County, West Virginia. A Scheduling Order was entered on November 29, 2011, establishing a discovery completion deadline of June 15, 2012, a deadline for the filing of dispositive motions of July 13, 2012, and a Trial date of September 10, 2012. (*See* Appendix **"Exhibit 3"**).

The Town filed a Motion to Dismiss or Alternatively for Summary Judgment on December 12, 2011. (*See* Appendix **"Exhibit 4"**). In the motion, the Town asserted that it was entitled to be dismissed based upon two of the immunity provisions contained in *W. Va. Code* § 29-12A-5.

On February 6, 2012, the Plaintiffs filed a response to the Town's Motion to Dismiss or Alternatively for Summary Judgment. (*See* Appendix **"Exhibit 5"**).

The Town's motion was noticed and argued before the Honorable James C. Stuckey February 7, 2012. The Honorable Judge Stuckey denied the Town's Motion as premature since no discovery had been conducted. (*See* Appendix **"Exhibits 1 and 6"**).

In their Complaint, the Plaintiffs allege that the real property located adjacent to theirs has undergone modifications since approximately 2003 (*See* Appendix **"Exhibit 2", ¶ 4, 6).** The Plaintiffs claim that these modifications (referred to as "landfill") have raised the surface of the neighboring property above the Plaintiffs' property and has caused a drastic change in the normal flow of drainage. *Id* at ¶ 7. These activities have allegedly caused flooding to the Plaintiffs' property, standing water on the Plaintiffs' property, created a habitat for mosquito breeding and has left the Plaintiffs' property uninhabitable other than the area immediately surrounding their home. *Id.*

The landfill activity began on the property when it was owned by Defendant Helen Berry's decedent, John Billo until his death. *Id* at ¶ 4. Subsequently the Defendants, William Perry and Rosella Perry purchased the property from the estate of Mr. Billo. *Id* at ¶ 5. The Perry's allegedly continued the landfill activities following their purchase of the property. *Id* at ¶ 8.

Even though all the actions that have allegedly caused damage to the Plaintiff's property were due to the acts of the adjacent property owners, the Plaintiffs alleged that the Town is responsible for the damages because (1) the Town issued a permit to Defendant Perry on August 31, 2007; (2) the Town does not have documentation of prior permits issued prior to that date; (3) the Town has failed to take action to correct the damage; and (4) the Town has failed to direct any other responsible party to correct the damage. *Id* at ¶ 9, 10.

III. SUMMARY OF ARGUMENT

The Petitioner contends that the Circuit Court of Kanawha County abused its discretion in denying "Defendant, the Town of Pratt's Motion to Dismiss or Alternatively for Summary Judgment." The Town's relied upon the immunity provisions of *W. Va. Code* § 29-12A-5. Specifically, the Town is immune for claims resulting from its licensing or permitting powers and for claims resulting from its inspection powers or functions.

The determination of whether statutory immunity bars the Plaintiffs' claims is a question of law. Assuming the facts asserted in the complaint are true, the Plaintiffs' allegations fall within the parameters of the immunity provisions cited by the Town and are ripe for summary disposition.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the Rules of Appellate Procedure, the Petitioner submits that oral argument is unnecessary as the record below is clear, the question presented has been authoritatively decided by this Court, and the facts and legal arguments on behalf of the Petitioners have been adequately presented in this Petition for Writ of Prohibition and the record below. The Petitioner believes that the decisional process of this Court would not be significantly aided by oral argument, but leaves this within the discretion of the Court pursuant to Rules 19 and 20 of the Rules of Appellate Procedure.

V. ARGUMENT

A. Standards of Review

1. Writ of Prohibition

West Virginia Code § 53-1-1 provides that a writ of prohibition "shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." "When a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right regardless of the existence of other remedies." Syllabus Pt. 2, *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 584 S.E.2d 517 (2003).

2. Motion to Dismiss

The purpose of a motion under subdivision (b)(6) of Rule 12 of the *West Virginia Rules of Civil Procedure* is to test the formal sufficiency of the complaint. *Mandolidis v. Elkins Industries, Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978)(modified on other grounds by *Handley v. Union Carbide Corp.*, 804 F.2d 265 (4th Cir. 1986)). A motion to dismiss under Rule 12(b)(6)

enables a court to weed out unfounded suits. *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996). The trial court, in appraising the sufficiency of a complaint on a motion under 12(b)(6) should dismiss the complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Owen v. Board of Education*, 190 W. Va. 677, 441 S.E.2d 398 (1994).

The trial court exceeded its judicial authority by misapplying the standard of review for Rule 12(b)(6) motions to dismiss as well as the summary judgment standard under Rule 56. Furthermore, although there are no disputes regarding the material facts at issue the Circuit Court denied the Town of Pratt's Motion to Dismiss or Alternatively for Summary Judgment simply based on the fact that the parties had not engaged in discovery.

The Town has no other adequate means for relief and will be damaged and/or prejudiced in a way not correctable on appeal by way of the lower Court's erroneous application of law if it is required to defend a lawsuit in which it is clearly entitled to statutory immunity.

B. The Town of Pratt is Statutorily Immune From Liability Under *W. Va. Code* §29-12A-5 and Therefore Should Be Dismissed.

The purposes of the *West Virginia Governmental Tort Claims and Insurance Reform Act*, *W. Va. Code* §29-12A-1 et seq. ("The Act'), "are to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability." It is undisputed that the Town is a political subdivision for purposes of The Act. *W. Va. Code* § 29-12A-3(c) defines a political subdivision as "any county commission, *municipality* and county board of education . . . ." *Id.*. (emphasis added).

As a political subdivision, the Town is entitled to immunity for the claims asserted by the Plaintiffs under at least two provisions of *W. Va. Code* §29-12A-5.

1. **<u>The Town is immune from claims resulting from licensing or permitting authority.</u>**

The question presented to the Circuit Court was whether the Town is immune from liability for the claims asserted by the Plaintiffs. The Plaintiffs' alleged that the Town either improperly permitted the fill activities that took place on the co-defendants' property or failed to properly issue permits for the fill activities. (Appendix **"Exhibit 3, ¶ 9"**). However, the Town is immune from liability for claims that result from permitting or licensing activities, including the issuance or failure to issue a permit or license. *W. Va. Code §29-12A-5(a)(9),* provides immunity to political subdivisions if a loss or claim results from:

> Licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority.

In a case directly on point, *Hose v. Berkeley County Planning Commission,* 195 W. Va. 515, 460 S.E.2d 761 (1995), this Court held that the Berkeley County Planning Commission (BCPC) was immune from liability in accordance with the above referenced section after it approved construction of a warehouse building, rental office and car wash which ultimately resulted in water damage to the Hoses' property.

In addition to reviewing and approving construction plans for the facility, the BCPC had even requested a change in the site plans that had been submitted. The developer was required to either remove fill dirt that was previously placed on the property or install a drainage pipe in order to return the flow of water from other land owners' property. The

developer chose to install the drainage pipe. The Hoses alleged that the flow of water from the installation of the drainage pipe caused their damages.

Notwithstanding the affirmative actions taken by the BCPC, in reviewing, approving and requiring changes to the construction plans, this Court held that the plain language of the statute provided immunity to the BCPC.

> Pursuant to *W. Va. Code §29-12A-4(c)(2)[1986]* and *W Va. §Code 29-12A-5(a)(9)[1986]*, a political subdivision is immune from liability if a loss or claim results from licensing powers or functions such as the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority, regardless of whether such loss or claim is caused by the negligent performance of acts by the political subdivision's employees while acting within the scope of employment.

Syl. Pt. 4, Hose v. Berkeley County Planning Commission

This Court has specifically stated that "[t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition." Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996). Furthermore, this Court has noted that "[i]mmunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case." *Id.* at 148, 658.

These principals were recently avowed by this Court in *Posey v. City of Buckhannon*, No. 11-0565 (W. Va. filed Jan. 27, 2012). In *Posey*, this Court affirmed the circuit court's order granting the City of Buckhannon's motion to dismiss based upon the immunity provided

in the Act for "the operation of dumps, sanitary landfills, and facilities where conducted directly by a political subdivision." The Court stated: "[i]n this action, the issue of the City's immunity under the *West Virginia Governmental Tort Claims and Insurance Reform Act* from liability to the Posey's is **purely a question of law and was ripe for summary disposition at the circuit court level through the motion to dismiss."** *Posey,* No 11-0565, slip op. at 8. (emphasis added).

In the case at hand, the Circuit Court denied the Town's Motion to Dismiss or Alternatively for Summary Judgment because there had been no discovery conducted in the case. However, the foundational facts for the immunity issues are not in dispute. The Plaintiffs' ability to conduct discovery will not change the outcome of the immunity question. Assuming the allegations in the Plaintiffs' complaint are accurate, in accordance with this Court's holding in *Hose*, the Town is entitled to the statutory immunity set forth in *W. Va. Code §29-12A-5(a)(9).*

In response to the Town's Motion, the Plaintiffs argued that a special duty relationship had been created with the Town and that special relationship defeated the immunity provisions of the Act. (*See* Appendix **"Exhibit 5"** and Appendix **"Exhibit 6, p. 7-9"**). However, that argument was made by the plaintiffs in *Hose* and was specifically rejected by this Court.

> *W. Va. Code §29-12A-5(a)(9)*, clearly contemplates immunity for political subdivisions from tort liability for any loss or claim resulting from licensing powers or functions such as the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority, *regardless of the existence of a special duty relationship.*

Syl. Pt. 5, Hose v. Berkeley County Planning Commission (emphasis added).

Given that clear statement of law by this Court, undertaking discovery in an effort to support the existence of a special duty relationship is futile.

2. The Town is immune from claims resulting from inspection powers or functions.

The Plaintiffs alleged further that the Town was negligent because it failed to take action to correct, or to direct others to correct, the problems caused by the fill activities that took place on the do-defendant's property even though the Town had received complaints from the Plaintiffs. (Appendix **"Exhibit 2, ¶ 10"**). The Town is immune from such claims as well. *W. Va. Code §29-12A-5(a)(10)* provides immunity to the Town where a loss or claim results from:

> Inspection powers or functions, including failure to make an inspection, or making an inadequate inspection, of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety.

This immunity provision was discussed in *Calabrese* v. *The City of Charleston*, 204 W. Va. 650, 515 S.E.2d 814 (1989). In *Calabrese*, the Plaintiffs claimed that the City of Charleston was negligent in the maintenance and operation of the City's sewer system and that the City's negligent operation of the sewer system resulted in water and sewage back-up into the Plaintiffs' basement on at least five (5) occasions. The City of Charleston argued that even if the allegations of negligence were correct, it was immune from liability pursuant to the provisions of *W. Va. Code §29-12A-5(a)(10)*.

In rejecting the City of Charleston's immunity claim, this Court determined that:

> *W. Va. Code §29-12A-(5)(10)* is intended to immunize a political subdivision from claims arising out of the subdivision's negligent inspection of the ***properties of third parties***, not from claims arising out of the subdivision's negligent inspection of the subdivision's own property. (Emphasis added).

Calabrese, 204 W. Va. at 659, 515 S.E.2d at 823.

In the instant matter, the Plaintiffs claim that the Town is liable for Plaintiffs' property damages for a failure to inspect the property of a third-party, not the Town's own property. The claim made by the Plaintiffs is precisely the type to which the immunity applies. There is no allegation that the Town negligently or improperly inspected, managed or maintained its own property. Accordingly, no factual development is necessary on that issue and this Court should find that the Circuit Court of Kanawha County abused its discretion in denying the Town's Motion to Dismiss or Alternatively for Summary Judgment.

VI. CONCLUSION

The Trial Court erred in denying the Defendant, Town of Pratt's Motion to Dismiss or Alternatively for Summary Judgment. In this matter, defendant/petitioner has no other adequate means to obtain the requested and desired relief. The petitioner will be damaged or prejudiced in a way that is not correctable on appeal if the lower tribunal's erroneous rulings are affirmed and if it is required to defend the merits of a lawsuit in which multiple statutory immunities apply. Absent relief from this Honorable Court, the Town will be forced to incur substantial expenses, costs, and inconvenience defending this matter.

WHEREFORE, for the foregoing reasons, the Petitioner, the Town of Pratt respectfully requests that this Honorable Court:

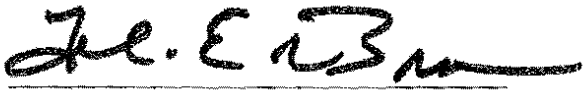
1. STAY any and all proceedings in the underlying action pending the Court's ruling on this Writ of Prohibition;
2. GRANT the Writ of Prohibition and REVERSE the Trial Court's denial of the Town's Motion to Dismiss or Alternatively for Summary Judgment; ORDER the

Circuit Court of Kanawha County to grant the Town's Motion to Dismiss or Alternatively for Summary Judgment.

3. And GRANT any other relief, whether legal or equitable, this Honorable Court deems appropriate.

Respectfully submitted,

THE TOWN OF PRATT



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No. _____

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TOWN OF PRATT, a West Virginia Municipal Corporation

Petitioner/Defendant Below,

v.

THE HONORABLE JAMES C. STUCKEY,
Judge of the 13th Judicial Circuit, and
and ROGER PAUL CRIST, et al.,

Respondents/Plaintiffs Below.

VERIFICATION
FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
Civil Action No. 11-C-1217

NOW COMES the Petitioner, the Town of Pratt, a West Virginia Municipal Corporation, by and through counsel, Johnnie E. Brown and Jill Harlan and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, pursuant to West Virginia Code § 53-1-3 and Rule 16 of the Revised Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia, and hereby verifies, under oath, that upon information and belief, the material facts as stated in the Petition for Writ of Prohibition are true and accurate.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TOWN OF PRATT, a West Virginia Municipal Corporation,

Petitioner/Defendant Below,

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v. No. _____

THE HONORABLE JAMES C. STUCKEY,
Judge of the 13th Judicial Circuit, and
and ROGER PAUL CRIST, et al.,

Respondents/Plaintiffs Below.

CERTIFICATE OF SERVICE

The undersigned, counsel for the Defendant, the Town of Pratt, does hereby certify on this 6th day of April, 2012, that a true copy of the foregoing ***"Writ of Prohibition"*** was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

The Honorable James C. Stuckey
Kanawha County Circuit Court
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Charleston, WV 25301

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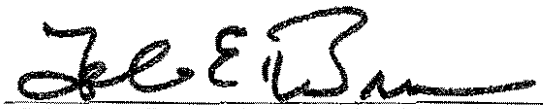

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