



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 12-0632

**JOSEPH E. JACKSON AND WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,**

Petitioners and
Defendants below,

Appeal from the Circuit Court of Mingo County,
The Honorable Michael Thornsbery
Civil Action No. 11-C-333

v.

JOSEPH WAYNE BELCHER,

Respondent and
Plaintiff below.

**PETITIONERS JOSEPH E. JACKSON AND WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS' BRIEF**

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ASSIGNMENTS OF ERROR

1. **The Circuit Court of Mingo County erred when it denied Petitioners' Motion for Summary Judgment and Motion to Alter or Amend Judgment because Petitioners Joseph E. Jackson and The West Virginia Department of Transportation are both entitled to statutory immunity as a matter of law because the Plaintiff has attempted to bring a claim that is barred by West Virginia Code § 15-5-11 (2011).**
2. **The Circuit Court of Mingo County erred when it ruled, and subsequently upheld its ruling, that "the decision in Pittsburgh Elevator [Pittsburgh Elevator Company v. West Virginia Board of Regents, 172 W. Va. 743, 310 S.E.2d 675 (1983)] would qualify as an exception to the statutory immunity of [*W. Va. Code § 15-5-11(a)*] under the "any other law" exception.**

STATEMENT OF THE CASE

This interlocutory appeal arises from the entry of a March 7, 2012 Order Denying Petitioners' Motion for Summary Judgment and an April 13, 2012 Order Denying Petitioner's Motion to Alter or Amend Judgment. Both Orders are orders that are predicated on statutory immunity, and, as such, are subject to immediate appeal.¹

This Court has specifically recognized that "[a] circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine." Syl. Pt. 2, *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009). The Court observed in *Robinson* that allowing interlocutory appeal of a qualified immunity ruling is the only way to preserve the intended goal of an immunity ruling: to afford public officers more than a defense to liability by providing them with "the right not to be subject to the burden of trial." *Id.* at 833, 679 S.E.2d at 665 (citation omitted).

City of St. Albans v. Botkins, 719 S.E.2d 863 (W. Va. 2011).

On May 3, 2009, heavy rains and severe storms caused flooding, mudslides, landslides,

¹ Petitioners assert that their immunity is statutory, derived from W. Va. Code § 15-5-11. It is the position of the Petitioners that the term "qualified immunity" can be interchanged with "statutory immunity," and thus, the holdings cited throughout this brief dealing with "qualified immunity" apply to "statutory immunity" issues in this case. This Court, as well as the Southern and Northern District of West Virginia Federal courts, have used the two terms interchangeably. See Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996) ("The 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.") See Also, *McCoy 6 Apts., LLC v. City of Morgantown*, 2011 U.S. Dist. LEXIS 95770 (N.D. W. Va. Aug. 26, 2011), *Webb v. Raleigh County Sheriff's Dep't*, 761 F. Supp. 2d 378, 393 (S.D. W. Va. 2010), *Woods v. Town of Danville*, 712 F. Supp. 2d 502, 513 (S.D. W. Va.

stream blockages and disrupted transportation which caused damages to public and private property in several West Virginia Counties. Then Governor Joe Manchin issued Executive Order No. 12-09. *See* Appendix p. 1, Former Governor Joe Manchin's Executive Order No. 12-09 (6/10/09). On May 9, 2009, Governor Joe Manchin, III declared a state of emergency for Boone, Logan, McDowell, Mingo, Raleigh, and Wyoming Counties until June 10, 2009. *Id.* By proclamation dated June, 10, 2009, the state of emergency was extended through July 10, 2009. *Id.*

Plaintiff, Joseph Wayne Belcher, has filed this suit in the Circuit Court of Mingo County for injuries he allegedly sustained during a June 23, 2009 automobile accident in Gilbert, West Virginia, with Defendant Joseph Jackson, an employee of the West Virginia Division of Highways. *See* Appendix p. 4, Plaintiff's Complaint ¶¶ 6-7. Defendant Jackson was operating a 2004 Mack dump truck near U.S. Route 52/2, Browning Fork Road performing flood clean up work pursuant to Governor Manchin's Executive Order No. 12-09 when he struck the front and side of Plaintiff's vehicle. *Id.* At the time of the automobile accident, Defendant was backing up Browning Fork Road, close to the work zone. *See* Appendix p.10, Accident Report 09A-378. Defendant Jackson was not able to see Plaintiff's vehicle, which was positioned in his blind side, at the time the accident occurred. *Id.* Plaintiff alleges that Defendant Jackson is guilty of negligence including, but not limited to, improper backing and other required obedience to traffic laws. *See* Appendix p. 4, Plaintiff's Complaint ¶¶ 9. As a result of Defendant Jackson's alleged negligent behavior, Plaintiff alleges he suffered injury to his back and neck. *Id.* at ¶8. Plaintiff alleges that the West Virginia Department of Transportation Division, of Highways ("DOH") is, "guilty of negligence which was a proximate cause of Plaintiff's injuries and damages. The Defendant DOH's negligence includes but is not necessarily limited to negligent entrustment of the 2004 Mack 700C dump truck to the

2010) Givens v. Main St. Bank, 2010 U.S. Dist. LEXIS 74106 (N.D. W. Va. July 22, 2010).

Defendant, Joseph Jackson.” *Id.* at ¶11. Plaintiff also alleges that the DOH is vicariously liable as Defendant Jackson was serving as an employee or agent of the DOH at the time of the accident. *Id.* at ¶12.

At the time of the accident in question, Defendant Jackson was working as an emergency service worker pursuant to Governor Manchin’s June 10, 2009 proclamation in an effort to remedy effects of the May 3, 2009 flood. *See* Appendix p.22, Affidavit of Edward F. Armbruster. As a result of Defendants’ alleged negligence, Plaintiff seeks damages including past and future economic loss, non-economic loss, punitive damages, attorney fees, costs, and interest. *See* Appendix p. 4, Plaintiff’s Complaint, generally.

On November 7, 2011, Petitioners and Defendants below filed their Motion for Summary Judgment and Supporting Memorandum, alleging they were statutorily immune from Plaintiff’s claims pursuant to *W.Va. Code* § 15-5-11, on the basis that at the time of the alleged accident, Defendant Jackson was working under a declared state of emergency and both Defendant Jackson and the West Virginia Division of Highways were statutorily immune from suit. In pertinent part, the code’s immunity and exemptions state as follows:

All functions hereunder and all other activities relating to emergency services are hereby declared to be governmental functions. **Neither the State nor any political subdivision nor any agency of the State or political subdivision nor, except in cases of willful misconduct, any duly qualified emergency service worker** complying with or reasonably attempting to comply with this article or any order, rule, regulation or ordinance promulgated pursuant to this article, **shall be liable for the death of or injury to any person or for damage to any property as a result of such activity.** This section does not affect the right of any person to receive benefits or compensation to which he or she would otherwise be entitled under this article, chapter twenty-three of this code [§§ 23-1-1 et seq.], any Act of Congress or any other law.

W.Va. Code § 15-5-11(a) (emphasis added).

See Appendix p. 24, Defendants' Motion For Summary Judgment and Defendants' Memorandum of Law in Support of their Motion For Summary Judgment.

On November 9, 2011, Respondent and Plaintiff below filed his Response in opposition to Defendant's Motion for Summary Judgment. The Plaintiff does not dispute that the Defendant was operating under a declared state of emergency and that *W.Va. Code* § 15-5-11 was applicable, but argued that there was an exception contained within *W.Va. Code* § 15-5-11 which applied to this case. The Plaintiff argued that the facts in this case fell under the exception contained in subparagraph (a) of *W.Va. Code* § 15-5-11 which provides in pertinent part:

This section does not affect the right of any person to receive benefits or compensation to which he or she would otherwise be entitled under this Article, Chapter Twenty-Three of this Code, and any Act of Congress or any other law.

The Plaintiff argued in his response to Plaintiff's Motion for Summary Judgment that: "By asserting or 'any other law' into this section, the West Virginia Legislature clearly contemplated permitting claims such as that of the Plaintiff in the instant case which arise under the exception to the state's constitutional immunity as set forth in Pittsburgh Elevator Company v. West Virginia Board of Regents, 172 W. Va. 743, 310 S.E.2d 675 (1983)." The Plaintiff argued that his claims arise under the Pittsburgh Elevator exception to the state's constitutional immunity under the Doctrine of Sovereign Immunity. The Plaintiff claimed, without any supporting authority, that the "any other law" exception to *W.Va. Code* § 15-5-11(a) is the Pittsburgh Elevator exception.

See Appendix p. 36, Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment.

On November 11, 2011, Petitioners and Defendants below filed their Reply to Plaintiff's response in opposition to Defendants' Motion for Summary Judgment. See Appendix p. 44,

Defendants' Reply to Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment.

On November 14, 2011, the Circuit Court heard oral argument on Defendants' motion for summary judgment. *See* Appendix p. 49, Transcript of November 14, 2011 MSJ hearing, p. 3.

On December 1, 2011, the Circuit Court entered an Order Directing Parties to Submit an Agreed Order Certifying a Question, and finding that the case is appropriate for submission of a certified question.² *See* Appendix p. 64, Order Directing Parties to Submit an Agreed Order Certifying Question.

On March 7, 2012, the Circuit Court entered an Order Denying Defendants' Motion for Summary Judgment. *See* Appendix p. 65, Order Denying Motion for Summary Judgment. In its Order, the Court agreed with Plaintiff's argument, and stated that "The Court FINDS that the decision in Pittsburgh Elevator would qualify as an exception to the statutory immunity of the above-cited statute under the "any other law" exception." Based on that rationale, the Court denied Defendants' Motion for Summary Judgment, but cited no authority which stated that the "any other law" exception included Pittsburgh Elevator. The Circuit Court also stated in its March 7, 2012 Order that "after reviewing the authorities and the case for purposes of this Order, the Court no longer feels it necessary to certify the question. Thus, the Court's previous Order directing the parties to agree upon [a] certified question is rescinded and set aside." *Id.* at ¶ 19.

² At the oral argument held on Defendants' Motion for Summary Judgment, this Court agreed to certify question(s) to the West Virginia Supreme Court on this issue, and in its Order entered December 1, 2011 the Court found this case was appropriate for submission of a certified question, and directed the parties to confer and submit to the Court an Order Certifying Question(s) to the Supreme Court. However, in its March 7, 2012 Order, the Court stated it no longer feels it is necessary to certify the question and rescinded its previous Order.

On March 16, 2012, Defendants filed their Motion to Alter or Amend Judgment relating to the Courts Order Denying Defendants' Motion for Summary Judgment. See Appendix p. 72, Defendants' Motion to Alter or Amend Judgment.

On April 2, 2012, the Circuit Court heard oral argument on Defendants' Motion to Alter or Amend Judgment relating to the Court's Order Denying Defendants' Motion for Summary Judgment. See Appendix p. 49, Transcript of the April 2, 2012 Motion to Alter or Amend Hearing, p. 9.

On April 13, 2012, the Circuit Court entered an Order Denying the Defendants' Motion to Alter or Amend Judgment. In its Order, the Circuit Court upheld its prior ruling, as follows:

The Court FINDS that the decision in Pittsburgh Elevator would qualify as an exception to the statutory immunity of the above-cited statute under the "any other law" exception. While the case of Pittsburgh Elevator dealt with constitutional immunity, it is logical to assume that the West Virginia Supreme Court of Appeal would extend it to statutory immunity. Additionally, by the language of West Virginia Code § 15-5-11, in which it carves out the possibility of exceptions, it does not appear that the statute intended to close the door on all suits against the State.

See Appendix p. 78, Order Denying Motion to Alter or Amend Judgment.

The Petitioners assert that the Court erred with the entry of the above-referenced ruling, which forms the basis of this Appeal.

SUMMARY OF ARGUMENT

First, the West Virginia Department of Transportation, Division of Highways and Joseph Jackson are Entitled to Statutory Immunity, as Plaintiff's Claims are Barred by the West Virginia Code § 15-5-11.

The Circuit Court of Mingo County erred when it denied Petitioners' Motion for Summary Judgment and Motion to Alter or Amend Judgment because Petitioners Joseph E. Jackson and the West Virginia Department of Transportation are both entitled to statutory immunity as a matter of

law because the Plaintiff has attempted to bring a claim against them that is barred by West Virginia Code § 15-5-11 (2011).

Second, the Supreme Court's ruling in Pittsburgh Elevator does not preclude state agencies and political subdivisions from asserting the statutory immunity granted under *W.Va. Code § 15-5-11(a)*.

The Circuit Court erred when it ruled, and subsequently upheld its ruling, that "the decision in Pittsburgh Elevator Company v. West Virginia Board of Regents, 117 W. Va. 743, 310 S.E.2d, 675 (1983) would qualify as an exception to the statutory immunity of [*W.Va. Code § 15-5-11(a)*] under the "any other law" exception and further held that "[w]hile the case of Pittsburgh Elevator dealt with constitutional immunity, it is logical to assume that the West Virginia Supreme Court of Appeals would extend it to statutory immunity." See Appendix p. 65, 78, Order Denying Motion for Summary Judgment (3/7/12), Order Denying Motion to Alter or Amend Judgment (4/13/12) at ¶ 7.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral Argument is necessary pursuant to the criteria in Rev. R.A.P. 18(a). Pursuant to Rev. R.A.P. 19, this case is suitable for, and the Petitioner specifically requests, oral argument to be held regarding this Petition and disposition by memorandum decision. This case is suitable for Rule 19 argument because it involves assignments of error in the application of settled law.

ARGUMENT

- 1. The West Virginia Department of Transportation, Division of Highways and Joseph Jackson are Entitled to Statutory Immunity, as Plaintiff's Claims are Barred by the West Virginia Code § 15-5-11.**

The Circuit Court of Mingo County erred when it denied Petitioners' Motion for Summary Judgment and Motion to Alter or Amend Judgment because Petitioners Joseph E. Jackson and the West Virginia Department of Transportation are both entitled to statutory immunity as a matter of

law because the Plaintiff has attempted to bring a claim against them that is barred by West Virginia Code § 15-5-11 (2011) and Governor Joe Manchin's Executive Order No. 12-09

Plaintiff's action for negligence is barred and should be dismissed as a matter of law pursuant to *W.Va. Code* § 15-5-11 (2011). West Virginia Code Article 5, Division of Homeland Security and Emergency Management, was drafted so that the most effective preparation and use may be made of the nation's and West Virginia's manpower, resources and facilities for dealing with any disaster that may occur. *W.Va. Code* § 15-5-1. In pertinent part, the code's immunity and exemptions state as follows:

All functions hereunder and all other activities relating to emergency services are hereby declared to be governmental functions. **Neither the State nor any political subdivision nor any agency of the State or political subdivision nor, except in cases of willful misconduct, any duly qualified emergency service worker** complying with or reasonably attempting to comply with this article or any order, rule, regulation or ordinance promulgated pursuant to this article, **shall be liable for the death of or injury to any person or for damage to any property as a result of such activity.** This section does not affect the right of any person to receive benefits or compensation to which he or she would otherwise be entitled under this article, chapter twenty-three of this code [§§ 23-1-1 et seq.], any Act of Congress or any other law.

W.Va. Code § 15-5-11(a) (emphasis added).

The code further describes an emergency service worker in the following manner:

(1) Any duly qualified full or part-time paid, volunteer or auxiliary employee of this State, or any other state, territory, possession or the District of Columbia, of the federal government, of any neighboring country or political subdivision thereof or of any agency or organization performing emergency services in this State subject to the order or control of or pursuant to the request of the State or any political subdivision thereof.

W.Va. Code § 15-5-11(c)(1).

Upon a plain reading of the statute, Defendant Jackson clearly meets the definition of “emergency service worker.” Plaintiff alleges that Defendant Jackson is liable for negligence as an employee and Defendant DOH is liable as employer and owner of the vehicle Defendant Jackson was driving at the time of the accident. *See* Appendix p. 4, Plaintiff’s Complaint ¶ 10. On June 23, 2009, Defendant Jackson was “performing emergency services in this State subject to the order or control of or pursuant to the request of the State” by cleaning up flood debris upon executive order of Governor Joe Manchin. *See* Appendix p. 22, Affidavit of Edward F. Armbruster. Therefore, Defendant Jackson qualifies for immunity under *W.Va. Code* § 15-5-11(a) as a result of his employment.

Defendant Jackson was performing a governmental function at the time of the automobile accident, which grants him and Defendant DOH immunity from negligence actions. Plaintiff does not dispute that at the time of the June 23, 2009 automobile accident, Defendant Jackson was working on behalf of the State in order to clean up debris from flooding, which began in Mingo County on May 3, 2009. *See* Appendix p. 22, Affidavit of Edward F. Armbruster. Plaintiff nevertheless alleges that Defendant Jackson is liable for his negligent actions during these cleanup efforts conducted pursuant to Governor Manchin’s June 10, 2009 executive order No. 12-09. *See* Appendix p. 1, Former Governor Joe Manchin’s Executive Order No. 12-09 (6/10/09). Since Defendants were working under this order, *W.Va. Code* § 15-5-11(a) deems they were performing a governmental function. This governmental function is subject to immunity under *W.Va. Code* § 15-5-11(a). Therefore, any claims Plaintiff may have are barred by *W.Va. Code* § 15-5-11(a), and the Circuit Court erred when it refused to grant Petitioners’ Motion for Summary Judgment.

Plaintiff’s Complaint clearly makes allegations of negligence, which are not sustainable against the Defendants pursuant to immunity granted by *W.Va. Code* § 15-5-11(a). Plaintiff has not

made any allegations of willful misconduct against Defendant Jackson or Defendant DOH which could take away Defendants' statutory immunity. Therefore, since Plaintiff has not alleged that Defendant Jackson and Defendant DOH have engaged in willful misconduct, his claim is barred by *W.Va. Code* § 15-5-11(a).

2. The Supreme Court's ruling in Pittsburgh Elevator does not preclude state agencies and political subdivisions from asserting the statutory immunity granted under *W.Va. Code* § 15-5-11(a).

The Circuit Court erred when it ruled, and subsequently upheld its ruling, that "the decision in Pittsburgh Elevator Company v. West Virginia Board of Regents, 117 W. Va. 743, 310 S.E.2d, 675 (1983) would qualify as an exception to the statutory immunity of [*W.Va. Code* § 15-5-11(a)] under the "any other law" exception. See Appendix p. 65, 78, Order Denying Motion for Summary Judgment (3/7/12), Order Denying Motion to Alter or Amend Judgment (4/13/12).

Although the State may not claim constitutional or sovereign immunity in the case at bar, statutory immunity under *W.Va. Code* § 15-5-11(a) is still available to the Defendants. In Clark v. Dunn, 195 W. Va. 272, 465 S.E.2d 374 (1995), the Supreme Court of Appeals of West Virginia concluded that, "the doctrine of Qualified or Official Immunity" bars a claim of mere negligence against the Department of Natural Resources, a state agency **not** within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, *W.Va.*, § 29-12A-1, *et seq.*, and against Officer Dunn, an officer of that department acting within the scope of his employment, with respect to the discretionary judgments, decisions, and actions of its public officers." Clark v. Dunn, 365 S.E.2d 374, 380.

In Clark, the plaintiff, a hunter, sued the Department of Natural Resources and Officer Dunn, a conservation officer, alleging that the officer negligently caused the discharge of another hunter's gun, thereby injuring the plaintiff. The Court noted that the State of West Virginia enjoys constitutional or

sovereign immunity as is expressed in Section 35, Article VI, of the West Virginia Constitution. However, an exception to this broad grant of immunity was created in Pittsburgh Elevator Company v. West Virginia Board of Regents, 172 W. Va. 743, 310 S.E.2d 675 (1983). The court interpreted *W. Va. Code*, § 29-12-5(a) to be a waiver of sovereign immunity to the extent that the State had purchased and that provides insurance coverage. Eggleston v. West Virginia Department of Highways, 189 W. Va. 230, 429 S.E.2d 636 (1993).

In the case at bar, Defendants assert the protection of statutory immunity pursuant to *W. Va. Code* § 15-5-11(a), which grants immunity to agencies of the state, political subdivisions and their employees when complying with or reasonably attempting to comply with *W. Va. Code* § 15-5-11 or any order, rule, regulation or ordinance promulgated pursuant to *W. Va. Code* § 15-5-11. At the time of the automobile accident in question, Plaintiff's car was located in Defendant Jackson's blind spot as he was working to clear debris after the extensive flooding in Mingo County. See Appendix p. 10, Accident Report 09A-378. If the government is held liable for its actions here, then the legislature's intent that emergency service workers should not be subject to claims for negligence when performing duties under declared states of emergency will not be realized. *W. Va. Code* § 15-5-1. Article 5 anticipates that litigation for acts of negligence in the course of attempting to deal with issues of emergency management or homeland security would be overly burdensome. Accordingly, the Code clearly states that only in cases of willful misconduct will government entities or their employees shoulder the burden of willful misconduct to provide plaintiff adequate protection for intentional wrongs. *W. Va. Code* § 15-5-11(a). Unlike the West Virginia Constitution's broad grant of immunity, the immunity provided under Article 5 Division of Homeland Security and Emergency Management is narrow and drafted specifically to protect government agencies and their employees

as they attempt to help citizens of the state recover from disasters which threaten the safety of the general public.

As set forth above, the Plaintiff argues that the facts in this case fall under the exception contained in subparagraph (a) of *W.Va. Code* § 15-5-11 which provides in pertinent part:

This section does not affect the right of any person to receive benefits or compensation to which he or she would otherwise be entitled under this Article, Chapter Twenty-Three of this Code, and any Act of Congress or any other law.

The Plaintiff argued in his response to Plaintiff's Motion for Summary Judgment that: "By asserting or 'any other law' into this section, the West Virginia Legislature clearly contemplated permitting claims such as that of the Plaintiff in the instant case which arise under the exception to the state's constitutional immunity as set forth in Pittsburgh Elevator Company v. West Virginia Board of Regents, 172 W. Va. 743, 310 S.E.2d 675 (1983)." The Plaintiff argued that his claims arise under the Pittsburgh Elevator exception to the state's constitutional immunity under the Doctrine of Sovereign Immunity. The Plaintiff claimed, without any supporting authority, that the "any other law" exception to *W.Va. Code* § 15-5-11(a) is the Pittsburgh Elevator exception. See Appendix p. 36, Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment.

The Plaintiff argued in his response in opposition to Defendants' Motion for Summary Judgment, and the Court agreed in its March 7, 2010 Order, that Pittsburgh Elevator was a case dealing with constitutional immunity and held that where recovery is sought from the state's liability insurance carrier that the constitutional immunity did not apply.

There is no dispute that Pittsburgh Elevator did not, in any way, address statutory immunities. Pittsburgh Elevator was decided in 1983 and yet many statutes conferring statutory immunity remain on the books today. Moreover, the West Virginia Supreme Court of Appeals recently upheld a grant

of qualified immunity to the City of Saint Albans in a case where insurance proceeds were available. City of St. Albans v. Botkins, 719 S.E.2d 863 (W. Va. 2011).

Neither the Plaintiff's response in opposition to Defendants' Motion for Summary Judgment nor this Court's Order denying Defendants' Motion for Summary Judgment cited any authority that "any other law" incorporated Pittsburgh Elevator and thus abrogated the statutory immunity set forth in *W.Va. Code* § 15-5-11.

As the Court noted in its Order denying Defendants' Motion for Summary Judgment, the case of Pittsburgh Elevator dealt with constitutional immunity and not statutory immunity. Statutory immunity and constitutional immunity are two vastly different legal concepts. *W.Va. Code* § 15-5-11 deals with governmental agencies and governmental workers performing governmental functions under emergency conditions such as the declared state of emergency under which Defendant Jackson was working at the time of the accident alleged in this civil action.

If Pittsburgh Elevator constituted an exception to *W.Va. Code* § 15-5-11, there could never be a situation where the statutory immunity in *W.Va. Code* § 15-5-11 would apply. All state agencies such as the Division of Highways are insured through the West Virginia Board of Risk and Insurance Management, and if the law was that where there is insurance there can be no statutory immunity, there would be no basis for *W.Va. Code* § 15-5-11, and it would have been repealed by the Legislature years ago. Yet it remains on the books, and it has never been declared invalid or unconstitutional by the West Virginia Supreme Court.

This Court, in its Order denying Summary Judgment, acknowledges that there is no case law or statutory law which says statutory immunities are inapplicable any time there is insurance. However, the basis for the Court's finding is that "it is, logical to assume that the West Virginia Supreme Court of Appeals would extend it [constitutional immunity] to statutory immunity." Yet,

the Supreme Court in City of Saint Albans v. Botkins, supra, upheld a grant of qualified immunity where insurance proceeds were available. Therefore, it is not “logical” to assume that the Supreme Court would extend Pittsburgh Elevator to statutory immunity.

Moreover, the Court in State v. Chase Securities, Inc., 188 W.Va. 356, 361, 424 S.E.2d 591, 596 (1992) noted that “the purpose of such official immunity is not to protect an erring official, but to insulate the decision making process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits.” [Citations omitted].

The immunity granted by *W.Va. Code* § 15-5-11 allows government workers to perform the potentially dangerous job of cleaning up flood debris free from litigation for negligent acts. Submitting to litigation each time an accident occurred as a result of emergency clean-up efforts may be a deterrent to participating in these much needed services. As noted in Chase Securities, the threat of liability under these circumstances could make officials unduly timid in carrying out these duties which clearly benefit the State and its inhabitants. 424 S.E.2d at 596.

Therefore, Defendants assert that *W.Va. Code* § 15-5-11(a) grants statutory immunity which is not barred by the Court’s ruling in Pittsburgh Elevator Company v. West Virginia Board of Regents, 172 W. Va. 743, 310 S.E.2d 675 (1983), and Defendants assert that the Circuit Court erred in ruling that it was. Defendants are immune under *W.Va. Code* § 15-5-11, and they should not be required to defend this case.

CONCLUSION

For all of the foregoing reasons, Petitioners Joseph E. Jackson and the West Virginia Department of Transportation Division of Highways, respectfully requests that this Honorable Court grant Petitioners' Petition for Appeal and remand this case back to the Mingo County Circuit Court for dismissal with prejudice.

JOSEPH E. JACKSON and WEST VIRGINIA
DIVISION OF HIGHWAYS,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 12-0632

**JOSEPH E. JACKSON, and WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,**

**(Civil Action No. 11-C-333)
(Mingo County Circuit Court)**

*Defendant,
Plaintiff Below, Petitioner*

v.

JOSEPH WAYNE BELCHER

*Plaintiff Below,
Respondent*

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, Joseph E. Jackson, and West Virginia Department of Transportation, Division of Highways, does hereby certify on this 10th day of August, 2012, that a true copy of the foregoing "**Petitioner Joseph E. Jackson and West Virginia Department of Transportation, Division of Highways' Brief**" and **Appendix** was served upon counsel of record by depositing same to him in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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