

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 Thornsby
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' REPLY BRIEF**

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West Virginia Department of Transportation**

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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.**

SUMMARY OF ARGUMENT

For their reply, Petitioners herein reincorporate all assignments of error and arguments set forth in their Petitioners' brief, including, but not limited to, their arguments that Petitioners are entitled to statutory immunity, as Plaintiff's claims are barred by the West Virginia Code § 15-5-11, and that 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)*.

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

- A. **Petitioners are entitled to statutory immunity as a matter of law pursuant to § 15-5-11 (2011).**

In addition to the arguments set forth in Petitioners' Brief, Petitioners assert the following.

On Page 6 of Respondent's Response Brief, Respondent agrees that “it is uncontested that at the time

of the vehicular accident that injured Belcher, Jackson was employed by the West Virginia Department of Highways and was acting within the scope of his employment when he struck Belcher's car. It is also uncontested that on the date of the accident, Jackson met the definition of an emergency service worker pursuant to Governor Manchin's June 10, 2009 Executive Order to immediately address the severe weather and flooding in Mingo County during the spring of 2009." See Response Brief, P. 6.

As such, a clear reading of §15-5-11(a) indicates that Plaintiffs are statutorily immune from liability for their alleged negligence:

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).

B. The Supreme Court's ruling in Pittsburgh Elevator is not an exception to the statutory immunity granted under *W.Va. Code* § 15-5-11(a).

In addition to the arguments set forth in Petitioners' Brief, Petitioners assert the following.

In the case at bar, Petitioners assert the protection of statutory immunity pursuant to *W.Va. Code* § 15-5-11(a), which clearly grants statutory 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. 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. 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 such, Respondent’s argument that the facts in this case fall under the “any other law” exception contained in subparagraph (a) of *W.Va. Code* § 15-5-11 must fail.

It is undisputed 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.

Further, on Page 13 of Respondent’s brief, Respondent attempts to argue that the City of St. Albans v. Botkins, 719 S.E.2d 863 (W. Va. 2011) “is not relevant to the issues in this case.” The Botkins case is absolutely relevant, as it shows an instance wherein the West Virginia Supreme Court of Appeals 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). *See* Response Brief, P. 13.

In addition, Respondent has cited no authority in his Brief citing any authority showing that the “any other law” language in *W.Va. Code* § 15-5-11 incorporates Pittsburgh Elevator and abrogates the statutory immunity set forth in *W.Va. Code* § 15-5-11.

Above all, 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.

In his Brief, Respondent argues on pages 9 and 10 that there is no distinction between immunity derived from the State Constitution and immunity derived from state statutes. *See* Response Brief, P. 9, 10. Petitioner respectfully disagrees with this position. In *State v. Chase Securities, Inc.*, 188 W.Va. 356, 361, 424 S.E.2d 591, 596 (1992), the Court 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.

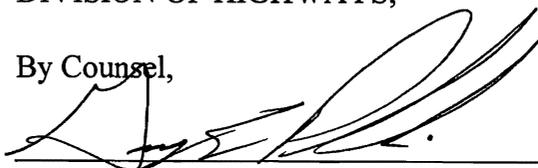
Therefore, Petitioners assert that *W. Va. Code* § 15-5-11(a) grants statutory immunity which is not barred by the Court's ruling in Pittsburgh Elevator Company v. West Virginia Board of Regents, 172 W. Va. 743, 310 S.E.2d 675 (1983), and Petitioners assert that the Circuit Court erred in ruling that it was.

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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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 18th day of October, 2012, that a true copy of the foregoing "**Petitioner Joseph E. Jackson and West Virginia Department of Transportation, Division of Highways' Reply Brief**" 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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