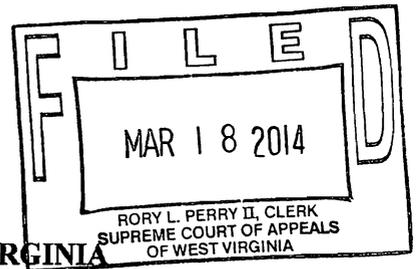


No. 14-0273



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA, ex rel.,
CITY OF BRIDGEPORT, a West Virginia Municipal Corporation;
THE BRIDGEPORT POLICE DEPARTMENT;
JOHN WALKER; and A. KIM HAWS,**

PETITIONERS,

v.

**THE HONORABLE JOHN LEWIS MARKS, JR.,
Judge of the Circuit Court of Harrison County;
DOUG'S TOWING, LLC; and DAN RIGGS TOWING,**

RESPONDENTS.

PETITION FOR WRIT OF PROHIBITION

In Case No. 11-C-91-1
In the Circuit Court of Harrison County, West Virginia

Counsel for Petitioners:

Tamara J. DeFazio, Esquire
W.Va. State Bar Id. No. 5130
J. Robert Russell, Esquire
W.Va. State Bar Id. No. 7788
Shuman, McCuskey & Slicer, PLLC
1445 Stewartstown Road, Suite 200
Morgantown, WV 26505
Telephone No.: (304) 291-2702

Counsel for Respondents:

Edward R. Kohout, Esquire
W.Va. State Bar Id. No. 4837
235 High Street, Suite 307
Morgantown, WV 26505
Telephone No.: (304) 777-4087
Counsel for Doug's Towing, LLC

Daniel C. Cooper, Esquire
W.Va. State Bar Id. No. 5476
Jamison H. Cooper, Esquire
W.Va. State Bar Id. No. 8043
Cooper Law Offices, PLLC
240 West Main Street
Bridgeport, WV 26330
Telephone No.: (304) 842-0505
Counsel for Dan Riggs Towing

TABLE OF CONTENTS

I. QUESTIONS PRESENTED1

II. STATEMENT OF THE CASE.....2

 A. PROCEDURAL HISTORY2

 B. STATEMENT OF RELEVANT FACTS6

III. SUMMARY OF ARGUMENT.....8

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....9

V. ARGUMENT10

 A. LEGAL STANDARD FOR ISSUANCE OF A WRIT OF PROHIBITION10

 B. THE TRIAL COURT EXCEEDED ITS LEGITIMATE POWERS BY ERRONEOUSLY RULING THAT THE INSTANT ACTION MAY PROCEED TO TRIAL AND BY DENYING THE BRIDGEPORT DEFENDANTS THE STATUTORY IMMUNITY THEY ARE ENTITLED TO UNDER WEST VIRGINIA CODE SECTION 29-12A-5 OF THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT11

 1. THE CITY OF BRIDGEPORT AND THE BRIDGEPORT POLICE DEPARTMENT ARE STATUTORILY IMMUNE FROM LIABILITY UNDER WEST VIRGINIA CODE SECTION 29-12A-5(a)(4) FOR THE CLAIMS ASSERTED AGAINST THEM BY DOUG’S TOWING BECAUSE THOSE CLAIMS RESULT FROM THEIR FAILURE TO ADOPT A WRITTEN POLICY.....12

 2. THE CITY OF BRIDGEPORT AND THE BRIDGEPORT POLICE DEPARTMENT ARE STATUTORILY IMMUNE FROM LIABILITY UNDER WEST VIRGINIA CODE SECTION 29-12A-5(a)(5) FOR THE CLAIMS ASSERTED AGAINST THEM BY DOUG’S TOWING BECAUSE THOSE CLAIMS RESULT FROM THEIR METHOD OF PROVIDING POLICE AND LAW ENFORCEMENT PROTECTION13

 3. CHIEF WALKER AND CITY MANAGER HAWS ARE IMMUNE FROM LIABILITY UNDER WEST VIRGINIA CODE SECTION 29-12A-5(b) FOR THE CLAIMS ASSERTED AGAINST THEM BY DOUG’S TOWING BECAUSE DOUG’S TOWING HAS FAILED TO PRODUCE EVIDENCE SUFFICIENT TO SATISFY ANY EXCEPTION TO THAT IMMUNITY15

C. THE BRIDGEPORT DEFENDANTS HAVE NO OTHER ADEQUATE MEANS TO OBTAIN THE DESIRED RELIEF AND WILL BE IRREPARABLY DAMAGED IN A MANNER NOT CORRECTABLE ON APPEAL IF A WRIT DOES NOT ISSUE BECAUSE THE BRIDGEPORT DEFENDANTS ARE ENTITLED TO STATUTORY IMMUNITY AS A MATTER OF LAW20

D. THE TRIAL COURT EXCEEDED ITS LEGITIMATE POWERS BY FAILING TO GRANT THE CITY OF BRIDGEPORT’S DISPOSITIVE MOTION WITH RESPECT TO THE PUNITIVE DAMAGES CLAIM ASSERTED BY DOUG’S TOWING25

VI. RELIEF REQUESTED26

VERIFICATION OF COUNSEL28

TABLE OF AUTHORITIES

Cases

City of St. Albans v. Botkins, 228 W. Va. 393, 719 S.E.2d 863 (2011).....21, 22

Hechler v. Casey, 175 W. Va. 434, 333 S.E.2d 799 (1985)23

Holsten v. Massey, 200 W. Va. 775, 490 S.E.2d 864 (1997).....17

Hutchison v. City of Huntington, 198 W. Va. 139, 479 S.E.2d 649 (1996)..... 21-22, 24

M&J Garage and Towing, Inc. v. The West Virginia State Police, 227 W. Va. 344, 709 S.E.2d 194 (2010) 3-4

Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)21

O'Dell v. Town of Gauley Bridge, 188 W. Va. 596, 425 S.E.2d 551 (1992).....11

Pearson v. Dodd, 159 W. Va. 254, 221 S.E.2d 171 (1975).....24

Smith v. Burdette, 211 W. Va. 477, 566 S.E.2d 614 (2002)13

Standard Distributing, Inc. v. City of Charleston, 218 W. Va. 543, 625 S.E.2d 305 (2005) (per curiam)14

State ex rel. Charles Town v. Sanders, 224 W. Va. 630, 687 S.E.2d 568 (2009) (per curiam)..... 23-24

State ex rel. City of Huntington v. Lombardo, 149 W. Va. 671, 143 S.E.2d 535 (1965)23

State ex rel. City of Martinsburg v. Sanders, 219 W. Va. 228, 632 S.E.2d 914 (2006)10

State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).....10

Sweeney v. Security Trust Co., 116 W. Va. 344, 180 S.E. 897 (1935).....24

Williams v. Precision Coil, 194 W. Va. 52, 459 S.E.2d 329 (1995).....18

Work v. Rogerson, 149 W. Va. 493, 142 S.E.2d 188 (1965).....24

Wriston v. Raleigh County Emergency Services, 205 W. Va. 409, 518 S.E.2d 650 (1999).... 19-20

Statutes

W. VA. CODE § 15-2-12(a).....3

W. VA. CODE § 24-1-1-1a.....4

W. VA. CODE § 24-6-1a4

W. VA. CODE § 24-6-122, 3, 4, 6, 7, 13, 19

W. VA. CODE § 29-12A-111

W. VA. CODE § 29-12A-211, 15

W. VA. CODE § 29-12A-3(a).....11

W. VA. CODE § 29-12A-3(b).....11

W. VA. CODE § 22-12A-3(c).....11

W. VA. CODE § 29-12A-51, 2, 5, 11

W. VA. CODE § 29-12A-5(a).....11, 22

W. VA. CODE § 29-12A-5(a)(4)1, 8, 10, 12, 13, 14

W. VA. CODE § 29-12A-5(a)(5)1, 8, 10, 13, 14

W. VA. CODE § 29-12A-5(a)(6)23

W. VA. CODE § 29-12A-5(a)(9)14

W. VA. CODE § 29-12A-5(b).....1, 8, 9, 10, 15, 18, 20

W. VA. CODE § 29-12A-725

W. VA. CODE § 29-12A-7(a).....9, 25

W. VA. CODE § 60-4-1814

Rules

W.Va.R.Civ.P. 12(b)(6)2, 21

Secondary Sources

W. Prosser, HANDBOOK OF THE LAW OF TORTS 185 (4th ed.1971)17

PETITION FOR WRIT OF PROHIBITION

I. QUESTIONS PRESENTED.

- A. WHETHER THE TRIAL COURT EXCEEDED ITS LEGITIMATE POWERS BY ERRONEOUSLY RULING THAT THE INSTANT ACTION MAY PROCEED TO TRIAL AND BY DENYING THE BRIDGEPORT DEFENDANTS THE STATUTORY IMMUNITY THEY ARE ENTITLED TO UNDER WEST VIRGINIA CODE SECTION 29-12A-5 OF THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT?
- B. WHETHER THE CITY OF BRIDGEPORT AND THE BRIDGEPORT POLICE DEPARTMENT ARE STATUTORILY IMMUNE FROM LIABILITY UNDER WEST VIRGINIA CODE SECTION 29-12A-5(a)(4) FOR THE CLAIMS ASSERTED AGAINST THEM BY DOUG'S TOWING BECAUSE THOSE CLAIMS RESULT FROM THEIR FAILURE TO ADOPT A WRITTEN POLICY?
- C. WHETHER THE CITY OF BRIDGEPORT AND THE BRIDGEPORT POLICE DEPARTMENT ARE STATUTORILY IMMUNE FROM LIABILITY UNDER WEST VIRGINIA CODE SECTION 29-12A-5(a)(5) FOR THE CLAIMS ASSERTED AGAINST THEM BY DOUG'S TOWING BECAUSE THOSE CLAIMS RESULT FROM THEIR METHOD OF PROVIDING POLICE AND LAW ENFORCEMENT PROTECTION?
- D. WHETHER CHIEF WALKER AND CITY MANAGER HAWS ARE IMMUNE FROM LIABILITY UNDER WEST VIRGINIA CODE SECTION 29-12A-5(b) FOR THE CLAIMS ASSERTED AGAINST THEM BY DOUG'S TOWING BECAUSE DOUG'S TOWING HAS FAILED TO PRODUCE EVIDENCE SUFFICIENT TO SATISFY ANY EXCEPTION TO THAT IMMUNITY?
- E. WHETHER THE BRIDGEPORT DEFENDANTS HAVE NO OTHER ADEQUATE MEANS TO OBTAIN THE DESIRED RELIEF AND WILL BE IRREPARABLY DAMAGED IN A MANNER NOT CORRECTABLE ON APPEAL IF A WRIT DOES NOT ISSUE WHERE THE BRIDGEPORT DEFENDANTS ARE ENTITLED TO STATUTORY IMMUNITY AS A MATTER OF LAW?
- F. WHETHER THE TRIAL COURT EXCEEDED ITS LEGITIMATE POWERS BY FAILING TO GRANT THE BRIDGEPORT DEFENDANTS' DISPOSITIVE MOTION WITH RESPECT TO THE PUNITIVE DAMAGE CLAIM ASSERTED BY DOUG'S TOWING?

II. STATEMENT OF THE CASE.

A. PROCEDURAL HISTORY.

This Petition For Writ of Prohibition is filed on behalf of The City of Bridgeport, West Virginia, The Bridgeport Police Department, Police Chief John Walker, and City Manager A. Kim Haws (“The City of Bridgeport Defendants”) pursuant to the Circuit Court’s ruling denying The City Defendants’ Motion for Summary Judgment. In so doing, The City of Bridgeport Defendants seek a Writ prohibiting the Honorable John Lewis Marks, Jr. from conducting the jury trial scheduled to begin on March 31, 2014. *See, Appx. 0013:46 (Transcript of Hearing, March 5, 2014); Appx. 0028 (Pretrial and Scheduling Order, p. 6).*

The instant civil action was filed by Respondent Doug’s Towing in March 7, 2011, against Dan Riggs Towing¹ and The City of Bridgeport Defendants². *Appx. 0032-0042 (Summons and Complaint).*

The gravamen of Plaintiff’s Complaint is the allegation that the Bridgeport Defendants “maliciously and/or negligently failed or refused to use the county’s towing rotation list, instead they have established a policy of having their [police] officers contact defendant Dan Riggs’

¹ Defendant/Respondent Riggs, a competitor of Doug’s Towing, has been sued for receiving and responding to calls made by or on behalf of the Bridgeport Defendants for towing services within the municipal limits of The City of Bridgeport.

² Based upon the plain language of West Virginia Code Section 24-6-12 and the statutory immunity afforded to The City Defendants under Section 29-12A-5 of the Tort Claims Act, The City Defendants previously filed their W.V.A.R.CIV.P. 12(b)(6) Motion to Dismiss the Complaint. *Appx. 0043-0045.* By Order entered January 23, 2012, the Circuit Court summarily denied the Motion to Dismiss stating as follows:

After reviewing the parties’ briefs, studying the sufficiency of the Plaintiff’s complaint, and considering the West Virginia precedent setting forth the standard of decision on the instant Rule 12(b)(6) motion, the Court finds and concludes that the Bridgeport Defendants’ motion to dismiss should be denied because the Plaintiff’s complaint does state claims upon which relief can be granted.

Appx. 0003 (Order Denying Motion to Dismiss).

Towing via their [police] officers' cell phones to request towing services, in violation of Code 24-6-12."³ *Appx. 0037 (Complaint ¶ 6)*.

³ Although not the subject of the instant Petition, Doug's Towing's contention that West Virginia Code Section 24-6-12 has been violated is not supported by the plain language of that Code Section which states:

(a) Every three years, *the county commission of each county or the municipality operating an emergency telephone system or an enhanced emergency telephone system shall*, in consultation with all public safety units, public agencies and all available towing services registered as common carriers pursuant to the provisions chapter twenty-four-a of this code, *establish a policy that provides for the most prompt, fair, equitable and effective response to requests or dispatches for emergency towing services.*

(b) *For each incident where towing services are required, the public agency procuring towing services shall maintain a public record of the name of the towing service utilized.*

W. VA. CODE § 24-6-12 (Repl. Vol. 2013) [Emphasis added].

Nor is its contention supported by this Court's analysis undertaken in a case substantially similar to this filed against the West Virginia State Police. *See, M&J Garage and Towing, Inc. v. The West Virginia State Police*, 227 W. Va. 344, 709 S.E.2d 194 (2010). The lines of analysis employed by this Court in *M&J* are inconsistent with the ruling of the Circuit Court below.

Specifically, in *M&J Garage and Towing*, the plaintiff wrecker service sought injunctive, declaratory and monetary relief against the West Virginia State Police because it was removed from a list of approved towing companies by the State Police. *Id.*, 227 W. Va. at 345, 709 S.E.2d at 195. *M&J* alleged that the State Police was not permitted to maintain its own towing company list. *Id.* The parties cited West Virginia Code Section 24-6-12 and its requirement that a rotational list be established by county commissions as authority. *Id.*, 227 W. Va. at 347-48, 709 S.E.2d at 197-98. After reviewing the general authorization for the State Police to maintain the laws and safety of the highways and the cited statutes on rotational towing lists, this Court concluded that:

In the numerous and unpredictable circumstances faced by the State Police where wrecker services are to be called, a degree of reasonable discretion is warranted. For example, if the victim or the suspect in a criminal matter is related to the owners of a particular wrecker company, the State Police, in that instance, would be justified in calling a different wrecker service The WVSP is entitled to reliable wrecker services in fulfilling its statutory mission of statewide enforcement of criminal and traffic laws and in maintaining the safety of public streets, roads and highways.

Id., 227 W. Va. at 350, 709 S.E.2d at 200. Consequently, this Court held that:

[I]n fulfilling its statutory mission, expressed in W.Va. Code, 15-2-12(a) [2007], to enforce criminal and traffic laws in West Virginia and to maintain the safety of public streets, roads and highways, State Police detachments may exercise reasonable discretion in dispatching or utilizing an appropriate towing or wrecker service registered as a common carrier with the West Virginia Public Service Commission.

Id.

As part and parcel of its claim, Doug's Towing seeks declaratory relief in the form of an order compelling the Bridgeport Defendants to adopt the towing rotation list of the Harrison County Office of Emergency Management and E-9-1-1 Center. *Appx. 0028-0029*. Doug's Towing further seeks compensatory and punitive damages against the Bridgeport Defendants and Respondent Riggs Towing for alleged negligence, civil conspiracy, tortious interference with a business relationship and antitrust violations, each of which stems from the allegation set forth in the preceding paragraph. *Appx. 0039-0043*.

In so doing, this Court likewise noted that the State Police shall have input regarding a county commission's policy concerning the dispatching of wrecker services. *Id.*, 227 W. Va. at 349, 709 S.E.2d at 199.

Like the West Virginia State Police in *M&J Garage and Towing*, The City of Bridgeport, through its Police Department, is charged with the enforcement of criminal and traffic laws applicable to those travelling within its boundaries and The City is likewise accountable for maintaining the safety of the streets within its corporate limits. Thus, it logically follows that it is entitled to exercise its discretion in the utilization of appropriate towing or wrecker services within its boundaries as long as they are common carriers registered with the West Virginia Public Service Commission.

Despite the foregoing, the Circuit Court answered the following proposed certified questions as follows:

WHETHER UNDER W.VA. CODE §§ 24-6-1a AND 24-6-12 BRIDGEPORT, OR ANY POLITICAL SUBDIVISION, MUST FOLLOW THE COUNTY'S TOWING POLICY AND ROTATION LIST?

YES NO

WHETHER A VIOLATION OF W.VA. CODE §§ 24-6-1a AND 24-6-12 PROVIDES A PRIVATE CAUSE OF ACTION TO ANY TOWING OPERATOR WHO WISHES TO CHALLENGE ANY DEVIATIONS FROM OR DISPUTES OVER THE COUNTY'S TOWING POLICY.

YES NO

Appx. 0009. Contrary to the answers to the preceding questions, the plain language of West Virginia Code Sections 24-6-1a and 24-6-12 does not require a municipality, such as the City of Bridgeport, to follow the county's towing policy and rotation list. Where, as here, the county has adopted an emergency telephone system, Section 24-6-1a merely prohibits a municipality within that county, such as the City of Bridgeport, from adopting a different emergency telephone system without the county's approval. W. VA. CODE § 24-1-1a (2001).

Pursuant to the agreement of the parties, the Court subsequently issued an Order Certifying Questions. With regard to the immunities asserted by the Bridgeport Defendants under the Tort Claims Act, the question and the Circuit Court's answer were as follows:

WHETHER THE CITY DEFENDANTS ARE IMMUNE FROM SUIT IN THIS CASE UNDER THE GOVERNMENTAL TORT CLAIMS ACT, W.VA. CODE § 29-12A-5?

_____ YES ✓ NO

Appx. 0009 (Order Certifying Questions, p. 5). By Order entered September 24, 2013, this Court refused to docket the Certified Questions. *Appx. 0012 (Order, September 24, 2013).*

After discovery concluded, the Circuit Court held a hearing on the Motion for Summary Judgment filed by Respondent Riggs Towing. *Appx. 0013 (Hearing Transcript, March 5, 2014).* During that hearing, the Court announced its intent to deny the pending Motion for Summary Judgment filed by the Bridgeport Defendants. *Appx. 0013:46.*⁴ The Circuit Court, indicating that it would deny the Bridgeport Defendants' Rule 56 Motion for the same reasons stated in the Order Certifying Questions and further that the jury trial would proceed on March 31, 2014, stated during the March 5, 2014, hearing:

Well, here's what I intend to do. I intend to -- *I'm not going to change the way I answered those questions. I may be wrong, but I'm not going to change that.*

If that's the basis for your [Bridgeport Defendants'] summary judgment motion, then, you know, the Court's addressed that and I'm going to answer those questions the same way.

Now, I don't know where that puts us, but the trial is still set for the week of March 31st.

If she files a writ in the Supreme Court, and the Supreme Court issues a writ and stays the proceedings here, then I have no control over that.

Appx. 0013:46 (3/5/14 Hearing Trans. p. 46). [Emphasis added]. The Circuit Court then read the Order Certifying Questions into the record and reiterated its intent to make the same rulings

⁴ The Rule 56 Motion filed by the Bridgeport Defendants was referenced by the Circuit Court on March 17, 2014, at which time the Circuit Court reaffirmed its intent to deny the Bridgeport Defendants' Motion for Summary Judgment and stated that it would issue an Order doing so. Due to the impending trial date, counsel felt it necessary to file this Petition before the Order became available.

with respect to the Bridgeport Defendant's Rule 56 Motion as it did in the Agreed Order of Certification. *Appx. 0013:52 (3/5/14 Hearing Trans. p. 52)*.

At the hearing on the Petitioners' Motion for Summary Judgment, on March 17, 2014, the Circuit Court reaffirmed its prior statement and denied the Petitioners' Motion to Stay proceedings while the instant Petition is brought before this Honorable Court.⁵

If a writ does not issue in this case and it proceeds to trial on March 31, 2014, the damage to The City Defendants will be irreparable and not correctable through a subsequent appeal because the heart of the immunity defense is not having the burden of proceeding to trial.

Thus, the Bridgeport Defendants have no recourse but to file the instant Petition for Writ of Prohibition. The timing of the dispositive motions hearings in conjunction with the upcoming jury trial on March 31, 2013, affords the Bridgeport Defendants a small window in which to seek to enforce their rights to immunity from liability for the claims asserted by Respondent Doug's Towing. Otherwise, the Bridgeport Defendants will lose their right to be free from inquiry into the merits of the action from which they are immunized.

B. STATEMENT OF RELEVANT FACTS.

The focal point of Plaintiff's Complaint is The City of Bridgeport's failure to adopt and abide by the towing rotation list which is part and parcel of the Harrison/Taylor County Towing Policy and Regulations established by the Harrison County Commission pursuant to West Virginia Code Section 24-6-12.

Set forth on page 624 of that Policy is the following E 9-1-1 Policy on Dispatching Towing:

3. Law Enforcement and fire department personnel should abide by the normal E 9-1-1 rotation except in a situation that is deemed a threat to life or property. . . .

⁵ A transcript of the March 17, 2014 hearing was not available as of the filing of this Petition.

Appx. 0120 (Harrison/Taylor County Towing Policy and Regulations, at p. 624).

In that regard, Doug's Towing specifically alleges that:

The defendants have maliciously and/or negligently **failed or refused to use the county's towing rotation list**, instead they have **established a policy** of having their officers contact defendant Dan Riggs' Towing via their officers' cell phones to request towing services, in violation of Code 24-6-12.

App. 0037 (Complaint, ¶ 6). (Emphasis added).

With respect to Plaintiff's allegations, the City of Bridgeport Defendants admit that The City of Bridgeport has not adopted, nor abided by, the Harrison/Taylor County Towing Policy and Regulations, including the E-9-1-1 policy on dispatching towing, but instead has established a police department policy of directing its police officers to use their cell phones to summon towing services. *App. 0087 (Answer ¶ 9). See also, Appx. 0140-0142 (Affidavit of Chief John Walker, ¶¶ 5-7).*

In the absence of an owner stated preference for a particular towing company, City officers summon Dan Riggs Towing, a towing service located within the municipal limits of Bridgeport, by cell phone to tow wrecked or otherwise disabled vehicles. Bridgeport Chief of Police John Walker attested to the following in his signed and sworn Affidavit with respect to The City of Bridgeport's discretion utilized in this context:

5. That the decision not to adopt or abide by the Harrison/Taylor County Towing Policy & Regulations was made through the exercise of reasonable discretion and in an effort to ensure the safety of the streets and roadways within The City of Bridgeport by facilitating the prompt removal of wrecked vehicles or vehicles otherwise disabled for any reason from the streets and roadways of The City of Bridgeport and to make the most efficient use of The City of Bridgeport's law enforcement resources, all with a view toward enhancing public safety and promoting the interests of the public;
6. That, when a vehicle owner involved in an accident on a roadway within The City of Bridgeport does not express a preference for using a particular

tow service, Bridgeport Police Officers call Dan Riggs Towing by cell phone to provide tow services in the first instance consistent with the policy of the Bridgeport Police Department and the utilization of reasonable discretion by The City of Bridgeport and its Police Department in providing police and law enforcement protection to the general public utilizing roadways within The City of Bridgeport;

7. That, Dan Riggs' Towing has historically been reliable and responsive in connection with towing service provided by it and its storage facility for disabled vehicles is located within The City of Bridgeport and can, when needed, be quickly accessed by law enforcement officers thereby minimizing the burdens on The City of Bridgeport's law enforcement resources; and
8. The fact that Michelle Riggs, the wife of Dan Riggs, worked for a period of time at The City of Bridgeport, was not a factor considered in making decisions regarding the utilization of towing services within the city limits of The City of Bridgeport.

Appx. 0140 (Affidavit of Bridgeport Chief of Police John Walker).

Respondent Doug's Towing also states claims of negligence, civil conspiracy, anti-trust violations and tortious interference with a business relationship as an outgrowth of its allegations that The City Defendants have not adopted the County towing Policy and Regulations, including the E-9-1-1 Policy on dispatching towing services.

III. SUMMARY OF ARGUMENT.

The claims made by Doug's Towing fall squarely within the purview of the absolute immunity afforded to The City of Bridgeport and the Bridgeport Police Department by West Virginia Code Sections 29-12A-5(a)(4) and 5(a)(5), respectively. Although Doug's Towing uses the rote statutory language of the exceptions to the general rule of immunity conferred upon political subdivision employees, Chief of Police Walker and City Manager Haws, the record is void of evidence sufficient to give rise to the exceptions to the immunity provided to them under Section 29-12A-5(b). Therefore, they are entitled to the immunity conferred upon them by of that Code Section.

The trial court exceeded its legitimate powers by failing to correctly apply the absolute immunities to the claims made against The City of Bridgeport and its Police Department. The trial Court has similarly failed to correctly apply Section 29-12A-5(b) to the claims made against Chief Walker and City Manager Haws. As such, a Rule to Show Cause and, ultimately, a Writ of Prohibition should be issued and all further proceedings should be the subject of a stay issued in an expedited fashion.

The failure of the trial court to apply these statutory immunities as written has deprived the Bridgeport Defendants of all other adequate means of enforcing their statutory rights. Because absolute immunity is at issue and the trial date is rapidly approaching, The City of Bridgeport and its named officials below will be irreparably damaged in a manner not correctable on appeal if the requested Writ Of Prohibition does not issue.

Not only does the trial court's denial of The City of Bridgeport Defendants' Motion for Summary Judgment constitute clear legal error that cannot be addressed via a direct appeal after trial, there is no other adequate means by which The City of Bridgeport Defendants may obtain the desired relief.

Finally, the trial court's failure to grant The City of Bridgeport's Motion for Summary Judgment with respect to the punitive damage claim is in clear violation of Section 29-12A-7(a) and is in excess of the trial court's jurisdiction.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

This case is one in which the decisional process is like to be aided by oral argument. Oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate in this case because it involves both assignments of error in the application of well-settled law and an unsustainable exercise of discretion where the law governing the discretion is

well-settled. This case may or may not be appropriate for Memorandum Decision depending upon the extent to which this Court wishes to elaborate upon the trial court's misapplication of the immunities found in Sections 29-12A-5(a)(4), 5(a)(5) and 5(b).

V. ARGUMENT.

A. LEGAL STANDARD FOR ISSUANCE OF A WRIT OF PROHIBITION.

In this Petition, The City of Bridgeport and its City officials seek the issuance of a Rule to Show Cause and, ultimately, a Writ of Prohibition, to preclude the trial court from conducting the jury trial scheduled to begin on March 31, 2014.

Where a circuit court is acting within its jurisdiction, this Court has traditionally examined five factors to determine whether a writ of prohibition should issue:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). *See also*, *State ex rel. City of Martinsburg v. Sanders*, 219 W. Va. 228, 231, 632 S.E.2d 914, 917 (2006) (writ of prohibition granted based upon circuit court's failure to dismiss action on immunity grounds). In this case, at least three (3) of the five (5) factors, including the third factor, exist.

B. THE TRIAL COURT EXCEEDED ITS LEGITIMATE POWERS BY ERRONEOUSLY RULING THAT THE INSTANT ACTION MAY PROCEED TO TRIAL AND BY DENYING THE BRIDGEPORT DEFENDANTS THE STATUTORY IMMUNITY THEY ARE ENTITLED TO UNDER WEST VIRGINIA CODE SECTION 29-12A-5 OF THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT.

The City of Bridgeport, the Bridgeport Police Department, as an instrumentality of The City of Bridgeport, Chief Walker and City Manager Haws are entitled to the protection afforded by the provisions of the Tort Claims Act.⁶

Under the Tort Claims Act, the term “political subdivision” includes “any . . . municipality” W. VA. CODE § 29-12A-3(c) (Repl. Vol. 2013). The Act defines a municipality as “any incorporated city . . . and all . . . instrumentalities of a municipality.” W. VA. CODE § 29-12A-3(b). The Act further defines an employee of a political subdivision as including “an officer, agent, employee, or servant, whether compensated or not, whether full-time or not, who is authorized to act and is acting within the scope of his or her employment for a political subdivision.” W. VA. CODE § 29-12A-3(a) (Repl. Vol. 2013).

In this action and pursuant to the Charter of The City of Bridgeport, the City is a municipal corporation. *Appx. 0128 (Charter of The City of Bridgeport, West Virginia, Section 1)*. The Bridgeport Police Department is an instrumentality of The City. Plaintiff concedes in its

⁶ The express purpose of the Tort Claims Act is “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.” W. VA. CODE § 29-12A-1 (Repl. Vol. 2013). (Emphasis added).

The Tort Claims Act was “the result of legislative findings that political subdivisions of the State were unable to obtain affordable tort liability insurance coverage without reducing the quantity and quality of traditional governmental services. W.Va.Code, 29–12A–2.” *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 600, 425 S.E.2d 551, 555 (1992). Accordingly, “to remedy this situation, the legislature specified seventeen instances in which political subdivisions would have immunity from tort liability. W.Va.Code, 29–12A–5(a).” *Id.* Of those seventeen (17) exceptions, at least two are applicable in the case *sub judice*.

Complaint that Chief Walker and City Manager Haws are employees of The City of Bridgeport and has named them in their official capacities. *Appx. 0036 (Complaint, p. 1)*. Thus, The City of Bridgeport and its Police Department are political subdivisions and, as such, Chief of Police Walker and City Manager A. Kim Haws are employees of a political subdivision.

1. **THE CITY OF BRIDGEPORT AND THE BRIDGEPORT POLICE DEPARTMENT ARE STATUTORILY IMMUNE FROM LIABILITY UNDER WEST VIRGINIA CODE SECTION 29-12A-5(a)(4) FOR THE CLAIMS ASSERTED AGAINST THEM BY DOUG'S TOWING BECAUSE THOSE CLAIMS RESULT FROM THEIR FAILURE TO ADOPT A WRITTEN POLICY.**

Section 29-12A-5(a)(4) states:

A political subdivision is immune from liability if a loss or claim results from:

* * *

(4) Adoption or failure to adopt a law, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy;

W. VA. CODE § 29-12A-5(a)(4) (Repl. Vol. 2013). (Emphasis added).

Although this Court has yet to issue a reported decision with respect to the immunity provided by Section 29-12A-5(a)(4), the language of the statutory immunity is clear: a loss or claim resulting from the decision to adopt or not adopt a particular regulation or written policy is a governmental function for which the statute provides absolute immunity from liability.

In this action, the gravamen of the Complaint below is The City of Bridgeport and its Police Department's failure to adopt and abide by The Towing Policy and Regulations established by The Harrison County Commission. Moreover, set forth on page 624 of that Policy is the following E 9-1-1 Policy on Dispatching Towing:

3. Law Enforcement and fire department personnel should abide by the normal E 9-1-1 rotation except in a situation that is deemed a threat to life or property. . . .

Appx. 0120 (Harrison County Towing Rotation Policy, at p. 624).

Thus, the Complaint below clearly constitutes a loss or claim resulting from The City and Its Police Department's failure to adopt and abide by The County's written policy and their corresponding adoption of an alternative policy. Plaintiff's claims therefore fall squarely within the purview of Section 29-12A-5(a)(4) and The City of Bridgeport and its Police Department are therefore entitled to absolute immunity as a matter of law.

2. THE CITY OF BRIDGEPORT AND THE BRIDGEPORT POLICE DEPARTMENT ARE STATUTORILY IMMUNE FROM LIABILITY UNDER WEST VIRGINIA CODE SECTION 29-12A-5(a)(5) FOR THE CLAIMS ASSERTED AGAINST THEM BY DOUG'S TOWING BECAUSE THOSE CLAIMS RESULT FROM THEIR METHOD OF PROVIDING POLICE AND LAW ENFORCEMENT PROTECTION.

Section 29-12A-5(a)(5) states:

A political subdivision is immune from liability if a loss or claim results from:

* * *

(5) Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection.

W. VA. CODE § 29-12A-5(a)(5) (Repl. Vol. 2013). (Emphasis added).

As the plain language of Section 29-12A-5(a)(5) demonstrates, this immunity applies when a loss or claim results from the development of a policy for the provision of police and law enforcement protection. According to the Complaint, The City Defendants "established a policy of having their officers contact defendant Dan Riggs' Towing via their officers' cell phones to request towing services, in violation of Code 24-6-12." *Appx. 0037 (Complaint, ¶ 6)*. In this regard, this Court in *Smith v. Burdette*, 211 W. Va. 477, 566 S.E.2d 614 (2002) held that:

[t]he phrase "the method of providing police, law enforcement or fire protection" contained in W.Va. Code, 29-12A-5(a)(5) [1986] refers to the decision-making or the planning process in developing a governmental policy, including how that policy is to be performed...

Id. at Syl. Pt. 4.

Because The City of Bridgeport's policy of summoning towing services by using cell phones to call a towing company requested by the vehicle owner or selected by The City when the vehicle owner has no clear preference describes the manner in which The City's policy is to be performed, this falls within the meaning of the phrase "method of providing police [or] law enforcement . . . protection" as utilized in Section 29A-12A-5(a)(5). As attested to by Chief Walker, the policy of having police officers summon tow services by cell phone was instituted by the Bridgeport Police Department in order to maximize the efficient use of law enforcement resources so as to better serve the law enforcement needs of the general public utilizing the roadways within the jurisdiction of the City of Bridgeport. *See generally Appx. 0140-0142 (Affidavit of Chief John Walker).*

Thus, Plaintiff's claim likewise falls within the parameters of Section 29-12A-5(a)(5) and The City of Bridgeport and its Police Department are therefore absolutely immune from liability for Plaintiff's claims under Section 29-12A-5(a)(5) as well. *See, Standard Distributing, Inc. v. City of Charleston*, 218 W. Va. 543, 549, 625 S.E.2d 305 (2005) (*per curiam*) (applying immunity under Section 29-12A-5(a)(9) to a claim for damages even where City ordinance was invalidated by the Supreme Court of Appeals, finding that "appellants' contention that the Tort Claims Act has no application here because a municipal liquor license was barred by W. Va. Code § 60-4-18 would render the [Tort Claims Act] meaningless. Clearly, that was not the intention of the Legislature."). Just like the City of Charleston in *Standard Distributing*, The City of Bridgeport and the Bridgeport Police Department are absolutely immune from any claim for damages by virtue of Sections 29-12A-5(a)(4) and 29-12A-5(a)(5) of the Tort Claims Act.⁷

⁷ Application of the statutory immunity in this manner is necessary to fulfill the Legislative mission underlying the Tort Claims Act:

3. CHIEF WALKER AND CITY MANAGER HAWS ARE IMMUNE FROM LIABILITY UNDER WEST VIRGINIA CODE SECTION 29-12A-5(b) FOR THE CLAIMS ASSERTED AGAINST THEM BY DOUG'S TOWING BECAUSE DOUG'S TOWING HAS FAILED TO PRODUCE EVIDENCE SUFFICIENT TO SATISFY ANY EXCEPTION TO THAT IMMUNITY.

The general rule of immunity conferred upon employees of political subdivisions is set forth in West Virginia Code Section 29-12A-5(b) which states as follows:

An *employee* of a political subdivision is *immune from liability unless* one of the following applies:

- (1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities;
- (2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or
- (3) Liability is expressly imposed upon the employee by a provision of this code.

W. VA. CODE § 29-12A-5(b) (2002 & 2013 Cum. Supp.). (Emphasis added).

While Plaintiff concedes in its Complaint that Chief Walker and City Manager Haws are employees of The City of Bridgeport, it seeks to avoid the general rule of immunity applicable to such employees through a rote recitation of the language contained in two (2) of the exceptions to that immunity. *Appx. 0037-0041 (Complaint, ¶¶ 5, 22, 26 and 30)*. In its Complaint, Doug's Towing alleges that Chief Walker and City Manager Haws have acted with malicious purpose, outside the scope of their official responsibilities, in bad faith and in a wanton and reckless

The Legislature finds and declares that the political subdivisions of this State are unable to procure adequate liability insurance coverage at a reasonable cost due to: The high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services. Therefore, it is necessary to establish certain immunities and limitations with regard to the liability of political subdivisions and their employees, to regulate the insurance industry providing liability insurance to them, and thereby permit such political subdivisions to provide necessary and needed governmental services to its citizens within the limits of their available revenues.

W. VA. CODE § 29-12A-2 (Repl. Vol. 2013).

manner. Pursuant to clearly established law, this rote regurgitation of the statutory language is not enough. The actual alleged conduct must be analyzed. When the foundational allegations set forth in the claims of negligence, conspiracy and tortious interference are viewed against the backdrop of the substantive law that applies to the statutory employee immunity under the Tort Claims Act, it is clear that Plaintiff's claims cannot survive the immunity standard. *Appx. 0039-0042 (Complaint, Counts II, III and IV)*.

During his deposition, the principal of Doug's Towing, Douglas Brady, testified that the factual bases underlying the allegations of negligence and tortious interference with business were essentially limited to those set forth in the Complaint and added only, with regard to negligence, that "these guys give, . . . Dan Riggs the tows" and Riggs calls Summers to come in to do "the big stuff". *Appx. 0144 (Douglas Brady Deposition, at p. 82-83)*. With respect to its tortious interference claim, Brady added that the factual basis is "they're not going by rotation." *Appx. 0145 (Douglas Brady Deposition, at p. 86-87)*.

In fact, the only contentions Doug's Towing has proffered to support any of its allegations is that: 1) Michelle Riggs, the wife of Dan Riggs, "had previously worked for the Bridgeport police" [*Appx. 0038-0039 (Complaint, ¶¶ 13, 22)*] and 2) Douglas Brady's belief that he was taken off the City of Bridgeport's Towing List in 2008 and "was told that he had to have a commercial location within Bridgeport City limits with industrial zoning, of which no such parcel was available except at a cost of millions of dollars," *Appx. 0037 (Complaint, ¶ 8)*.

When these allegations are viewed through the substantive prism of the law governing the exceptions to the immunity provided to political subdivision employees, it becomes clear that the evidence proffered by Doug's Towing is not sufficient, as a matter of law, to rise to the level

required to overcome the general rule of immunity established by Section 29-12A-5(b). *See, Holsten v. Massey*, 200 W. Va. 775, 490 S.E.2d 864 (1997).

In *Holsten*, this Court rejected the plaintiff's contention that the deputy wantonly or recklessly ignored his investigation of the prior accident or was consciously indifferent to the consequences of failing to quickly pursue his investigation of the prior accident. *Id.*, 200 W. Va. at 788-89, 490 S.E.2d at 877-78. Affirming the grant of summary judgment in favor of the deputy, this Court stated:

The usual meaning assigned to "willful," "wanton" or "reckless," according to taste as to the word used, is that the actor has *intentionally* done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a *conscious* indifference to the consequences, amounting almost to willingness that they shall follow; and, it has been said that this is indispensable.

Id., 200 W. Va. at 788, 490 S.E.2d at 877, quoting, W. Prosser, HANDBOOK OF THE LAW OF TORTS 185 (4th ed.1971). (Emphasis in original).

When one analyzes the allegations by Doug's Towing in light of the Court's pronouncement in *Holsten*, it is clear that the record in the underlying case is void of evidence sufficient to rise to the level required to meet the burden imposed by the definition set forth in *Holsten*. There is simply no evidence that either Chief Walker or City Manager Haws have intentionally done anything other than fulfill their duties as public servants, which includes acting in the best interest of The City of Bridgeport and those who travel through and within it. *Appx. 0140-0142 (Walker Affidavit)*.

There is likewise no evidence whatsoever that the decision not to adopt and abide by the Harrison/Taylor Towing Policy and Regulations, including the E-9-1-1 Policy on Dispatching Towing, was intended to harm Doug's Towing, LLC. For this reason, none of the evidence

developed in this case rises to the level required by *Holsten* and it is therefore insufficient to defeat the immunity conferred by Section 24-12A-5(b) as a matter of law.

Moreover, none of the acts of Chief of Police Walker or City Manager Haws are manifestly outside the scope of their employment or official responsibilities. In fact, their actions in declining to use the Harrison/Taylor Towing Policy and Regulations, including the E-9-1-1 Policy on Dispatching Towing, and in electing to use an alternative policy is entirely within the scope of their employment and official responsibilities.

Similarly, there is no liability expressly imposed upon Chief Walker or City Manager Haws by a provision of the West Virginia Code.

In this action, the record simply does not support Plaintiff's speculation that Chief Walker and City Manager Haws acted outside the scope of their official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner, when, in fact, Chief Walker and The City Defendants declined to adopt the Harrison/Taylor Towing Policy and Regulations, including the E-9-1-1 Policy on Dispatching Towing, in an effort to ensure the safety of Bridgeport's streets by facilitating the prompt removal of vehicles involved in traffic accidents or otherwise disabled and in seeking to make the most efficient use of The City of Bridgeport's law enforcement resources, all with a view toward enhancing public safety and promoting the public interest. *Appx. 0140-0142 (Affidavit of Chief of Police John Walker)*. See also, *Appx. 0099-0102 (The City of Bridgeport Defendants' Responses to Dan Riggs Towing's First Set of Requests for Admission)*.

"Unsupported speculation is not sufficient to defeat a summary judgment motion." *Williams v. Precision Coil*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995). Because the record in this case is void, as a matter of law, of evidence sufficient to support the exceptions to the

general rule of immunity conferred upon political subdivision employees, such as Chief Walker and City Manager Haws, they are statutorily immune from liability for the claims made by Doug's Towing.

Even if one were to assume that Section 24-6-12 has been violated, which it has not, this Court has previously held that, even if a political subdivision employee may have violated the law, a plaintiff must come up with more than speculation and rote recital of statutory language to overcome the employee immunity under Section 29-12A-5(b).

In *Wriston v. Raleigh County Emergency Services*, 205 W. Va. 409, 518 S.E.2d 650 (1999), the plaintiff alleged workers' compensation discrimination and constructive discharge on the part of her employer, the Raleigh County Emergency Service Agency, and her supervisor, Jack D. Bowden, Jr.. *Id.*, 205 W. Va. at 413-15, 518 S.E.2d at 654-56. In response, the defendants countered with the fact that they had followed their written policy on unpaid sick leave. *Id.* Plaintiff retorted that the policy violated West Virginia Code Section 23-5A-1 and -2. *Id.* As to defendant Bowden, the trial court granted summary judgment, finding that he was immune from liability under Section 29-12A-5(b) for his actions undertaken in support of the Agency policy, which violated West Virginia law. *Id.*, 205 W. Va. at 415-16, 518 S.E.2d at 656-57.

On appeal, Wriston argued that Bowden was not immune because he had acted "with malicious purpose, in bad faith, or in wanton or reckless manner" in enforcing the unlawful RCESA policy. *Id.*, 205 W. Va. at 421, 518 S.E.2d at 662. This Court upheld the grant of summary judgment in Bowden's favor, finding that:

[a]fter reviewing the record and the arguments of the parties, we find that the appellant has failed to articulate any action that appellee Bowden took towards her maliciously, in bad faith, or in a wanton or reckless manner. *While the record suggests that Mr. Bowden acted without the benefit of legal advice and may have*

violated W.Va.Code, 23-5A-1 and -2, we cannot say his actions rose to a level of malice, bad faith, or recklessness sufficient to avoid the immunity conferred upon Mr. Bowden by W.Va.Code, 29-12A-5(b).

Wriston, 205 W. Va. at 421, 518 S.E.2d at 662. (Emphasis added).

Like the plaintiff in *Wriston*, Doug's Towing is offering nothing more than speculation in support of its claims against Chief Walker and City Manager Haws. All of the acts alleged on the part of Chief Walker and City Manager Haws were consistent with the policy established by The City of Bridgeport in furtherance of the public interest. The West Virginia Legislature clearly intended to immunize political subdivisions, as well as their employees, from liability for the very types of claims being asserted by Doug's Towing when it enacted Section 29-12A-5(b). *See generally, Wriston*, 205 W. Va. at 420-21, 518 S.E.2d at 661-62. To do otherwise would tie the hands of officials utilizing their lawful discretion for the public good, a result not sanctioned by the spirit or the letter of West Virginia law.

As the Complaint, the deposition testimony and the discovery responses demonstrate, The City of Bridgeport, the Bridgeport Police Department, Chief John Walker and City Manager A. Kim Haws are statutorily immune from liability and should have been awarded summary judgment in their favor on Plaintiff's claims in their entirety. It was plain error for the trial court not to do so and Petitioners are therefore entitled to the issuance of the requested Writ of Prohibition.

C. THE BRIDGEPORT DEFENDANTS HAVE NO OTHER ADEQUATE MEANS TO OBTAIN THE DESIRED RELIEF AND WILL BE IRREPARABLY DAMAGED IN A MANNER NOT CORRECTABLE ON APPEAL IF A WRIT DOES NOT ISSUE BECAUSE THE BRIDGEPORT DEFENDANTS ARE ENTITLED TO STATUTORY IMMUNITY AS A MATTER OF LAW.

The City of Bridgeport Defendants have no other adequate means to obtain the relief desired as they will be prejudiced in a manner not correctable on appeal if forced to continue

defending this action from which they are clearly immunized as a matter of law. As this Court observed in *Hutchison v. City of Huntington*, absolute statutory immunity, like qualified immunity, ““is an *immunity from suit* rather than a mere defense to liability” that ““is effectively lost if a case is erroneously permitted to go to trial.”” *Hutchison v. City of Huntington*, 198 W. Va. 139, 147, 479 S.E.2d 649, 657 (1996), quoting, *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985). (Emphasis in original). See also, *City of St. Albans v. Botkins*, 228 W. Va. 393, 398, 719 S.E.2d 863, 868 (2011) (Applying *Hutchison* to an interlocutory appeal and reversing the trial court’s denial of a motion for summary judgment on grounds of qualified immunity).

This conclusion is also buttressed by other aspects of this Court’s opinion in *Hutchison*, wherein 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. *Hutchison*, 198 W. Va. at 145-47, 479 S.E.2d 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.* After a \$25,000 verdict was rendered against the City, it appealed based, in part, upon the lower court’s denial of its Rule 12(b)(6) motion and the statutory immunity set forth in Section 29-12A-5(a)(9). *Id.*, 198 W. Va. at 147, 479 S.E.2d at 657.

As part of the appellate review, this Court revisited the trial court’s denial of the City’s 12(b)(6) motion, noting that such a review, although not ordinarily undertaken, was warranted in order to provide trial courts with necessary guidance for handling such issues in the future. *Id.*, 198 W. Va. at 147-48 n.8, 479 S.E.2d at 657-58 n.8. This Honorable Court emphasized that “the

need for early resolution in cases ripe for summary disposition is particularly acute when the defense is in the nature of an immunity.” *Id.*, 198 W. Va. at 147, 479 S.E.2d at 657.

In so doing, this Court reversed the verdict in favor of the plaintiff and dismissed the action after it had been tried to a jury and commented that, “[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.*, 198 W. Va. at 151, 479 S.E.2d at 661.

More to the point, as this Honorable Court noted in *Hutchison*,

Immunities 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., 198 W. Va. at 148 n.10, 479 S.E.2d at 658 n.10. Equally important is the fact that this Court stated in regard to the statutory immunities set forth in Section 29-12A-5(a) that “[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.*, 198 W. Va. at 148, 479 S.E.2d at 658. (Emphasis added).

This reasoning underlies the following holding in syllabus point one of *Hutchison*:

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.

St. Albans, 228 W. Va. at 398, 719 S.E.2d at 863, quoting Syl. Pt. 1, *Hutchison*, *supra*.

Because an absolute statutory immunity is a defense against suit, the remedy of prohibition is appropriate.

Prohibition is a preventive remedy. One seeking relief by prohibition in a proper case is not required, as a prerequisite to his right to resort to such remedy, to wait until the inferior court or tribunal has determined the question of its jurisdiction, or to wait until the inferior court or tribunal has taken final action in the matter in which it is proceeding or about to proceed.

Syl. Pt. 3, *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985) (granting Writ of Prohibition against court-ordered preliminary injunction enjoining the Secretary of State from disclosing certain public information and holding an administrative hearing), quoting, Syl. Pt. 5, *State ex rel. City of Huntington v. Lombardo*, 149 W. Va. 671, 143 S.E.2d 535 (1965).

This Court likewise applied the lesson of *Hutchison* to a substantially similar situation. In *State ex rel. Charles Town v. Sanders*, 224 W. Va. 630, 687 S.E.2d 568 (2009) (*per curiam*), this Court was asked to grant a writ of prohibition to prevent the imposition of trial where the lower court denied Charles Town's motion for judgment on the pleadings. The plaintiff had asserted a negligence action against Charles Town for injuries he allegedly sustained while slipping and falling on "black ice" in a municipal parking lot. *Id.*, 224 W. Va. at 631-32, 687 S.E.2d at 569-70. Charles Town filed a motion for judgment on the pleadings urging the application of the immunity from suit found in Section 29-12-A-5(a)(6), which the circuit court denied. *Id.*, 224 W. Va. at 632, 687 S.E.2d at 570. Facing the prospect of having to go to trial and forever lose its absolute immunity, Charles Town filed a petition for writ of prohibition with this Court. *Id.*

We are also mindful of the public policy considerations underlying governmental immunity [such 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., 224 W. Va. 633, 687 S.E.2d at 571, quoting, *Hutchison*, 198 W. Va. 148, 479 S.E.2d at 658. (Emphasis added). In granting the writ to Charles Town, this Court held that “Charles Town is entitled to immunity under *W.Va. Code, § 29-12A-5(a)(6).*” *Charles Town*, 224 W. Va. at 636, 687 S.E.2d at 574.

Thus, the issuance of a writ of prohibition is not only an entirely appropriate remedy, but is an absolutely necessary one in this case. The prospect of proceeding to trial and the subsequent appeal of any adverse verdict is an inadequate remedy in the face of the clear statutory immunity to which The City of Bridgeport Defendants are entitled – one which the Circuit Court has consistently and erroneously refused to acknowledge.⁸

In addition, the issuance of a rule to show cause and, ultimately, a writ of prohibition will save substantial time, effort and resources of the parties and lawyers and will likewise promote judicial economy and efficiency.

For these reasons, a Writ of Prohibition should be issued in this case in accordance with this Petition.

⁸ Although the Circuit Court answered the proposed Certified Questions erroneously in its Order of January 14, 2013, this Petition for a Writ of Prohibition could not have been filed prior to the Circuit Court’s recent reiteration of its flawed rulings in response to the Motion for Summary Judgment. This Court has emphasized the fact that the refusal to docket a certified question appeal is not to be construed as a final adjudication of the questions presented on the certification, or as limiting either the trial court or this Court in decisions upon the record presented on final hearing. Syl. Pt. 1, *Work v. Rogerson*, 149 W. Va. 493, 142 S.E.2d 188 (1965), *overruled on other grounds*, *Pearson v. Dodd*, 159 W. Va. 254, 221 S.E.2d 171 (1975). *See also*, *Sweeney v. Security Trust Co.*, 116 W. Va. 344, 350, 180 S.E. 897, 901 (1935) (“Our refusal to docket the certification cannot be taken as an irrevocable expression of opinion that what had then been done by the circuit court must stand.”). As this Court made clear in *Rogerson*, the refusal by this Court to docket a certified question appeal “cannot be considered, either as to the trial court or this Court, as a final adjudication of the question certified.” *Rogerson*, 149 W. Va. at 496, 142 S.E.2d at 192.

D. THE TRIAL COURT EXCEEDED ITS LEGITIMATE POWERS BY FAILING TO GRANT THE CITY OF BRIDGEPORT'S DISPOSITIVE MOTION WITH RESPECT TO THE PUNITIVE DAMAGES CLAIM ASSERTED BY DOUG'S TOWING.

West Virginia Code Section 29-12A-7(a) states as follows:

§29-12A-7. Punitive damages not allowed; limitation on noneconomic loss; joint and several liability.

Notwithstanding any other provisions of this code or rules of a court to the contrary, in an action against a political subdivision or its employee to recover damages for injury, death, or loss to persons or property for injury, death, or loss to persons or property caused by an act or omission of such political subdivision or employee:

(a) In any civil action involving a political subdivision or any of its employees as a party defendant, an award of punitive or exemplary damages against such political subdivision is prohibited.

W. Va. Code § 29-12A-7(a) (Repl. Vol. 2013).

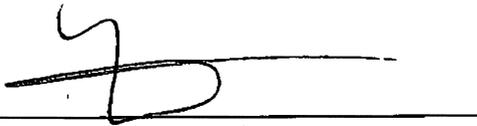
Based upon the foregoing mandatory prohibition and given that The City of Bridgeport, Its Police Department, The City of Bridgeport's Chief of Police John Walker and Its City Manager, A. Kim Haws, are named as parties to the instant action, Plaintiff's claim for punitive damages is barred as a matter of law and The City of Bridgeport Defendants were entitled to have summary judgment granted in their favor with regard to Plaintiff's punitive damage claim as a matter of law. The trial court's failure to do so is a clearly erroneous act by the Circuit Court in excess of its legitimate powers pursuant to which a Writ of Prohibition should issue.

VI. RELIEF REQUESTED.

The Petitioners, The City of Bridgeport, its Police Department, Chief John Walker and City Manager A. Kim Haws, respectfully request that this Honorable Court issue a rule to show cause prior to the March 31, 2014, trial date and expeditiously issue an automatic stay pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure.

Further, the Petitioners ask that, after the Respondents have had an opportunity to show cause, a Writ of Prohibition be awarded to Petitioners, prohibiting the Honorable John Lewis Marks, Jr., Judge of the Circuit Court of Harrison County, from conducting any further proceedings in this action until The City of Bridgeport, its Police Department, Chief Walker and City Manager Haws are dismissed as parties to the underlying action with prejudice. The law of this State demands as much insofar as the harm to the Petitioners would be irreparable and not correctable on appeal should the requested Writ of Prohibition not be issued forthwith.

**PETITIONERS
THE CITY OF BRIDGEPORT,
THE BRIDGEPORT POLICE DEPARTMENT,
JOHN WALKER, AND A. KIM HAWS,
BY COUNSEL**



Tamara J. DeFazio, Esquire
W.Va. State Bar Id. No.: 5130

J. Robert Russell, Esquire
W.Va. State Bar Id. No.: 7788

**Counsel For Petitioners,
City of Bridgeport, Bridgeport Police Department,
John Walker, and A. Kim Haws**

Shuman, McCuskey & Slicer, PLLC
1445 Stewartstown Road, Suite 200
Morgantown, WV 26505
Telephone No.: 304-291-2702
Facsimile No.: 304-291-2840
**Of Counsel For Petitioners,
City of Bridgeport, Bridgeport Police Department,
John Walker, and A. Kim Haws**

VERIFICATION OF COUNSEL

Pursuant to W.Va. Code § 53-1-3, counsel verifies that the statements contained in the within Petition are taken from the record in the proceedings below, including pleadings, affidavits, depositions and other documents filed therein.

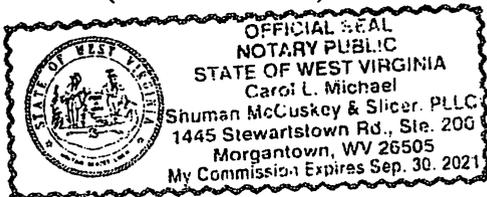


Tamara J. DeFazio, Esq.
West Virginia State Bar Id. No. 5130
tdefazio@shumanlaw.com
Shuman, McCuskey & Slicer, PLLC
1445 Stewartstown Road, Suite 200
Morgantown, WV 26505
Telephone: (304) 291-2702
*Counsel for Petitioners, City of Bridgeport,
Bridgeport Police Department,
John Walker and A. Kim Haws*

**STATE OF WEST VIRGINIA:
COUNTY OF MONONGALIA, TO WIT:**

Taken, subscribed, and sworn to before me this 19th day of March, 2014, by Tamara J. DeFazio, as counsel for Petitioners, City of Bridgeport, Bridgeport Police Department, John Walker, and A. Kim Haws.

(NOTARY SEAL)



Carol L. Michael

Notary Public

My commission expires:

9-30-21

VERIFICATION OF COUNSEL

Pursuant to W.Va. Code § 53-1-3, counsel verifies that the statements contained in the within Petition are taken from the record in the proceedings below, including pleadings, affidavits, depositions and other documents filed therein.

CERTIFICATE OF SERVICE

I hereby certify that I served "**Petition for Writ of Prohibition**" upon Respondents and Counsel for Respondents on this the 18th day of March, 2014, by delivering a true copy thereof via overnight mail to the following:

The Honorable John Lewis Marks, Jr
Judge, 15th Judicial Circuit
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301

Edward R. Kohout, Esquire
235 High Street, Suite 307
Morgantown, WV 26505
Counsel for Respondent Doug's Towing, LLC

Daniel C. Cooper, Esquire
Jamison H. Cooper, Esquire
Cooper Law Offices, PLLC
240 West Main Street
Bridgeport, WV 26330
Counsel for Respondent Dan Riggs Towing

Joseph F. Shaffer, Prosecuting Attorney
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301
Counsel for Harrison County Commission



Tamara J. DeFazio
W.Va. State Bar Id. No.: 5130
J. Robert Russell, Esquire
W.Va. State Bar Id. No.: 7788