

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MICHAEL A. BUZMINSKY and
VICKIE BUZMINSKY,

Plaintiffs,

v.

CIVIL ACTION NO. 18-C-500
HONORABLE CARRIE L. WEBSTER

MONONGAHELA POWER COMPANY d/b/a
Allegheny Power, Allegheny Energy and/or Mon Power,
an Ohio Corporation; WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, DIVISION OF WATER
AND WASTE MANAGEMENT, a West Virginia State agency;
JOHN H. HENDLEY; HUGHES SUPPLY CO., a West Virginia Corporation; and
HSC LLC, a West Virginia Limited Liability Company.

Defendants.

**ORDER DENYING DEFENDANT MONONGAHELA POWER COMPANY'S
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

On a previous day, came the above-named parties, by and through their respective counsel, upon "*Defendant Monongahela Power Company's Motion to Dismiss for Lack of Subject Matter Jurisdiction*" ("*Mon Power's Motion to Dismiss*"). Upon review of Mon Power's Motion to Dismiss, the parties' briefs, and the applicable law, the Court is of the opinion that the Motion should be denied, based on the following findings of fact and conclusions of law.

PROCEDURAL HISTORY

1. The Plaintiffs, Michael and Vickie Buzminsky ("Plaintiffs"), filed their Civil Complaint on April 11, 2018, against, among other parties, Defendant Monongahela Power Company ("Mon Power"). The Complaint relates to injuries sustained by Plaintiff Michael

A. Buzminsky, as a result of an arc flash explosion that occurred on July 1, 2016, at the wastewater treatment plant in Ronceverte, Greenbrier County, West Virginia.

2. The Plaintiffs served discovery requests upon all parties when they served the Complaint.

3. On or about May 11, 2018, Defendant John H. Hendley ("Defendant Hendley") filed a Rule 12(b)(6) Motion to Dismiss Plaintiffs' Complaint.

4. On or about June 8, 2018, Defendant West Virginia Department of Environmental Protection, Division of Water and Waste Management ("WV DEP") filed a notice of joinder in Defendant Hendley's motion to dismiss.

5. Defendant Hendley and WV DEP sought dismissal on the basis of qualified immunity.

6. On July 16, 2018, the Court held a hearing on the motion to dismiss of Defendants Hendley and WV DEP.

7. On August 6, 2018, the Court entered an order denying Defendants Hendley and WV DEP's motion to dismiss.

8. On September 4, 2018, the Plaintiffs filed their "*Motion to Compel Mon Power's Discovery Responses and Supporting Memorandum of Law*" ("*Motion to Compel*").

9. On September 6, 2018, the Court provided a deadline for Defendant Mon Power to file its response to Plaintiffs' *Motion to Compel* and advised that it would refer the matter to the Discovery Commissioner.¹

¹ The deadline was provided by e-mail from the Court's Judicial Law Clerk.

10. The Court advised Mon Power that it would have to provide substantive argument if it refuses to produce the requested documents or if it persisted in its claim that doing so may “compromise the security of the nation [sic] and place in serious risk of harm the lives of potentially millions of United States citizens.”²

11. On October 1, 2018, Mon Power filed “*Defendant Monongahela Power Company’s Response in Opposition to Plaintiff’s Motion to Compel*,” to which Plaintiffs filed their reply on October 22, 2018.

12. On October 23, 2018, the Court entered a “*Protective Order*.”

13. On October 29, 2018, Defendant Mon Power submitted to the Court “*Under Seal Defendant Monongahela Power Company’s Presentation to Court for In Camera Review*,” a redacted portion of its operations manual. Mon Power asserted that the redacted portion of its operations manual was the only part of its operations manual responsive to Plaintiffs’ discovery requests.³

14. On December 6, 2018, the Court entered its “*Order Appointing Discovery Commissioner*,” for the purposes of hearing outstanding discovery motions in this matter.

15. In the interim, counsel for Mon Power contacted the Court seeking a ruling regarding the document that had been produced for *in camera* review.

16. On January 8, 2019, the Court advised the parties that the Court found that because it was still the discovery phase in litigation, the document submitted by Mon Power

² The Court also cautioned Mon Power that if the Discovery Commissioner determined that Mon Power’s assertion of a national security risk was frivolous or without merit, that it would direct Mon Power to pay the full cost of the Discovery Commissioner.

³ In their *Motion to Compel* and reply brief, the Plaintiffs pointed out that Mon Power’s operations manual was but one discovery request and that Mon Power had failed to produce documents in response to a number of Plaintiffs’ discovery requests.

for *in camera* review is relevant and should be produced, as redacted, and marked "confidential" under the terms of the *Protective Order*.⁴

17. On January 16, 2019, Mon Power filed the subject "*Motion to Dismiss for Lack of Subject Matter Jurisdiction*" ("*Mon Power's Motion to Dismiss*") and its memorandum of law in support of its motion.

18. In connection with *Mon Power's Motion to Dismiss*, Mon Power also unilaterally cancelled the hearing that had been scheduled before the Discovery Commissioner on January 25, 2019. Mon Power asserted that Rule 12(h)(3) of the West Virginia Rules of Civil Procedure and W.Va. T.C.R. 22.02 call for priority status of its motion, which effectively stays proceedings until a ruling is issued.

19. Also, Mon Power determined that the filing of *Mon Power's Motion to Dismiss* excused it from complying with this Court's order directing disclosure of the document that had been submitted for *in camera* review.

20. On January 23, 2019, the Court set forth an expedited briefing scheduling for *Mon Power's Motion to Dismiss*, which required the Plaintiffs to file/serve their response to *Mon Power's Motion to Dismiss* within two weeks from the date of the e-mail and Mon Power to file any reply brief within three (3) days of the filing/service of Plaintiffs' response. The Court also reluctantly stayed discovery pending its ruling upon *Mon Power's Motion to Dismiss*.⁵

⁴ The Court advised the parties via e-mail from its Judicial Law Clerk and directed counsel for Mon Power to prepare an order reflecting its ruling on the *in camera* review.

⁵ The briefing schedule was set forth in an e-mail from Court's Judicial Law Clerk.

21. On February 5, 2019, the Plaintiffs filed "*Plaintiffs' Response in Opposition to Defendant Monongahela Power Company's Motion to Dismiss for Lack of Subject Matter of Jurisdiction*" ("*Plaintiffs' Response*").

22. On February 11, 2019, Mon Power filed "*Defendant Monongahela Power Company's Reply to Plaintiffs' Response to the Motion to Dismiss for Lack of Subject Matter Jurisdiction*" ("*Mon Power's Reply*").

FINDINGS OF FACT

1. The Plaintiffs allege that Plaintiff Michael A. Buzminsky suffered severe electrical burns while working on an electrical panel at the City of Ronceverte's Wastewater Treatment Plant ("Plant"). *Complaint*, ¶43.

2. Relevant to the allegations against Mon Power, the Plaintiffs allege that:

- (a) The Plant's electrical panel had been submerged in water due to the Greenbrier River flooding the Plant. *Complaint*, ¶19.
- (b) Mon Power initially restored power to the Plant after the flood, despite the fact that the electrical panels had been submerged in flood water. *Complaint*, ¶26.
- (c) The Plant then lost a phase of its three phase electrical system. *Complaint*, ¶ 27.
- (d) Mon Power returned to the Plant and determined that the loss of phase was due to some problem on the Plant's side of the electrical service. *Complaint*, ¶ 28.
- (e) Despite Mon Power's determination regarding the loss of phase, Mon Power left the Plant energized. *Complaint*, ¶ 29.

3. The Plaintiffs further allege that Mon Power negligently, carelessly, and recklessly energized the Plant and left the Plant energized:

- (a) despite the fact that the electrical panels had been submerged in water;

- (b) without the legally required inspection;
- (c) without the high level of care required of electric companies;
- (d) in direct derogation of company and industry standards; and
- (e) that as a result of those actions and inactions, Plaintiff Michael Buzminsky suffered foreseeable permanent injuries and damages.

See *Complaint*, ¶¶ 26, 29, 47-50.

4. In its answer to the Plaintiffs' Complaint, Mon Power admits that it is a corporate entity and not an individual. See *Mon Power's Answer*.

5. In the *Motion to Dismiss*, Mon Power asserts that it is entitled to immunity under West Virginia Code § 15-5-11, because at the time it restored power to the Plant it was acting as a "duly qualified emergency service worker" at the request of the City of Ronceverte, a political subdivision. Specifically, Mon Power asserts that because its customer, the City of Ronceverte ("City), called Mon Power to restore the power to the Plant after the flood, that Mon Power was performing "emergency services," as defined in W.Va. Code § 15-5-11, at the request of a political subdivision, entitling Mon Power to immunity under the statute. See *Mon Power's Motion to Dismiss and Reply*.

6. In contrast, in response to *Mon Power's Motion to Dismiss*, the Plaintiffs assert that under the plain language of W.Va. Code § 15-5-11, Mon Power is not entitled to immunity, as Mon Power is not any of the specific entities and individuals that are afforded immunity by the statute. Alternatively, the Plaintiffs assert that even if Mon Power could meet the definition of a "duly qualified emergency service worker," Mon Power is still not immune for engaging in willful misconduct during the performance of emergency

services. Under the liberal rules of notice pleading, the Plaintiffs assert that their Complaint sufficiently alleges willful misconduct against Mon Power.⁶ See *Plaintiffs' Response*.

7. In support of its assertion of immunity, Mon Power cites to the deposition testimony of Donna Hawver to support its argument that it turned power back on to the Plant at the request or order of the City, and thus, was acting as a "duly qualified emergency service worker." See *Mon Power's Motion to Dismiss*.

8. Ms. Hawver testified that she recalled Pamela Mentz, a bookkeeper with the City, calling her and telling her that "they were ready, the sewer plant was ready to be turned back on." *Hawver*, 97, Ex. D of *Plaintiffs' Response*. Ms. Mentz testified that she did not recall calling Mon Power during the flood or contacting anyone to obtain assistance for the City. *Mentz*, 20-22, Ex. B of *Plaintiffs' Response*. Further, Ms. Mentz testified that she had no role under the City's emergency plan. *Mentz*, 20, Ex. B of *Plaintiffs' Response*.

9. Even if Ms. Mentz did call Ms. Hawver to tell her that the Plant was ready to be turned back on, the Court finds that at the time Mon Power turned power back on to the Plant, the City was Mon Power's customer, not Mon Power's employer.

10. In regards to the timing of *Mon Power's Motion to Dismiss* and its act of unilaterally cancelling the hearing before the Discovery Commissioner, the Court finds Mon Power's actions to have been designed to directly contravene this Court's order.

⁶ Additionally, the Plaintiffs requested leave to amend their Complaint, in the event the Court determines that it did not sufficiently allege willful misconduct against Mon Power. The Plaintiffs also argued that at the very least additional discovery needs conducted as to whether Mon Power engaged in willful misconduct. See *Plaintiffs' Response*, pp. 11 and 12, n. 17 and 18.

11. Based on the procedural history set forth above, the Court further finds that Mon Power is engaging in conduct that the Court deems to be calculated to obstruct the process of this case.

STANDARD OF REVIEW

The Court is being asked to determine if West Virginia Code §15-5-11 provides Mon Power with immunity, in derogation of common law. When reviewing an immunity statute, the Court is required to strictly construe the language of the statute to favor a finding of liability, not a finding of immunity. See *Calabrese v. City of Charleston*, 204 W.Va. 650, 656, 515 S.E.2d 814, 820 (1999) and Syl. Pt. 3, *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007). The Supreme Court of Appeals of West Virginia has specifically directed:

[u]nless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail.

Syl. Pt. 2, in part, *Calabrese*, 204 W.Va. 650 (citing Syl. Pt. 2, *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996) and Syl. Pt. 1, *Brooks v. City of Weirton*, 202 W.Va. 246, 503 S.E.2d 814 (1998)). To make it even more clear, the Supreme Court has instructed that if there is any doubt about the meaning of a statute that is in derogation of common law, the statute must be interpreted as not providing immunity. See Syl. Pt. 5, *Phillips*, 220 W.Va. 484. Further, statutes in derogation of the common law should only be allowed effect to the extent clearly indicated by the terms in the statute and nothing should be added otherwise than by necessary implication arising from the terms of the statute. Syl. Pt. 4, *Phillips*, 220 W.Va. 484.

When interpreting statutory provisions “the familiar maxim *expression unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.” Syl. Pt. 6, *Phillips*, 220 W.Va. 484. Also, a “ ‘cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.’ ” Syl. Pt. 3, *Jackson v. Belcher*, 232 W.Va. 513, 753 S.E.2d 11 (2013)(citing Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999)). Finally, when words or terms used in a statute are not defined, they will, in the interpretation of the statute, “ ‘be given their common, ordinary and accepted meaning in the connection in which they are used.’ ” Syl. Pt. 4, *Jackson*, 232 W.Va. 513 (citing Syl. Pt. 1, *Miners in General Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W.Va. 162, 291 S.E.2d 477 (1982)).

CONCLUSIONS OF LAW

The provisions of W.Va. Code § 15-5-11 only provide immunity for claims arising out of the performance of emergency services to the following entities and individuals:

- (1) the State of West Virginia;
- (2) agencies of the State of West Virginia;
- (3) political subdivisions of the State of West Virginia;
- (4) agencies of a political subdivision of the State of West Virginia; and
- (5) duly qualified emergency service workers.

See W.Va. Code § 15-5-11(a).

The statute defines “duly qualified emergency services worker” as:

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) (emphasis added).⁷ The definition of duly qualified emergency service worker is specifically limited to individual **employees of** the following:

- (1) this State;
- (2) any other State, territory, possession of District of Columbia;
- (3) the federal government;
- (4) any neighboring country or political subdivision thereof; **or of**⁸
- (5) 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.

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

When strictly construing W.Va. Code § 15-5-11 in favor of a finding of liability and applying the rules of statutory construction, the Court concludes that Mon Power is not a “duly qualified emergency service worker” as defined in W.Va. Code § 15-5-11. The definition of “duly qualified emergency worker” does not include a corporate entity like Mon Power. Had the Legislature meant to include a corporate entity such as Mon Power within the definition of a duly qualified emergency worker, it would have used a word other than

⁷ West Virginia Code §15-5-11 provides two additional definitions for “duly qualified emergency service worker” that are not applicable. See W.Va. Code §15-5-11(c)(2)-(3).

⁸ The phrase “**or of**” limits immunity to the employees of an agency or organization performing emergency services and does not provide immunity to the agency or organization itself. See Syl. Pt. 3, in part, *Osborne v. United States*, 211 W.Va. 667, 567 S.E.2d 677 (2002) (it is presumed that the legislature has a purpose in the use of every word, phrase, and clause found in a statute and intended the terms so used to be effective).

employee. In fact, in the same Chapter and Article, the Legislature included "corporation" within the definition of "person," but yet chose to use the term employee as opposed to the term person when identifying those who are immune.⁹ Further, Mon Power was not an employee of the City at the time of the alleged events. Therefore, the Court concludes that Mon Power is not entitled to immunity under W.Va. Code § 15-5-11.

Even if Mon Power (a corporate entity) colorably fits within the definition of "duly qualified emergency service worker," statutory immunity afforded under W.Va. Code § 15-5-11 is not absolute. Immunity is lost, if during the performance of emergency service work, the actor engaged in willful misconduct.¹⁰ See W.Va. Code §15-5-11(a). The Court concludes that the Plaintiffs' Complaint sufficiently alleges willful misconduct by Mon Power to defeat Mon Power's assertion of immunity at this stage. However, as requested by the Plaintiffs and if they desire to do so, the Court concludes that the Plaintiffs are allowed to amend their Complaint with regard to the allegations of willful misconduct against Mon Power.

DECISION

Accordingly, the Court does hereby **ORDER** that Defendant Monongahela Power Company's Motion to Dismiss is **DENIED**. Also, the Court **GRANTS** the Plaintiffs leave to

⁹ Under the emergency services statute, "person" means "any individual, corporation, voluntary organization or entity, partnership, firm or other association, organization or entity organized under the laws of this state or any other state or country." W.Va. Code § 15-5-2(k). The legislature did not use the term person, but instead used the term employee, which clearly indicates an individual and not a corporation.

¹⁰ The statute also specifically preserves the right of any person to receive benefits or compensation to which he or she would otherwise be entitled under W.Va. Code § 15-5-1, *et. seq.*, Chapter 23 of the code, any Act of Congress or any other law. W.Va. Code § 15-5-11(a).

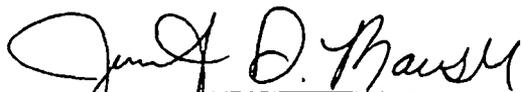
amend their Complaint against Mon Power. Finally, the Court **ORDERS** that any request of a stay of this Order, pending appeal, is **DENIED**.

The objections of Defendant Monongahela Power Company to this Order are noted and preserved.

ENTERED this _____ day of March, 2019.

Honorable Carrie L. Webster

Prepared and presented by:



STEPHEN B. FARMER (W.Va. State Bar No. 1165)
ROBERT A. CAMPBELL (W.Va. State Bar No.6052)
BRIAN E. BIGELOW (W. Va. State Bar No. 7693)
JENNIFER D. ROUSH (W.Va. State Bar No. 11165)
FARMER, CLINE & CAMPBELL PLLC
746 Myrtle Road (25314)
Post Office Box 3842
Charleston, WV 253338
(304) 346-5990

Counsel for the Plaintiffs

Pursuant to Rule 24.01(c) of the West Virginia Trial Court Rules, a copy of this order was provided to the following counsel of record for purposes of notifying them of their right to note any objections and exceptions to the order:

E. Taylor George, Esq.
Arden J. Cogar, Jr., Esq.
MacCorkle Lavender, PLLC
300 Summers Street, Suite 800
Charleston, WV 25301

John P. Fuller, Esq.
Jeffrey M. Carder, Esq.
Bailey & Wyant, PLLC
Suite 600,500 Virginia Street, East
Charleston, WV 25301

Corey L. Palumbo, Esq.
Andrew C. Robey, Esq.
Bowles Rice LLP
600 Quarrier Street
Post Office Box 1386
Charleston, WV 25325-1386

Timothy L. Mayo, Esq.
Raymond L. Harrell, Jr., Esq.
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
Post Office Box 3843
Charleston, WV 25338-3843