IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NUMBER: 21-0578

ADAM GOODMAN and
PAUL UNDERWOOD,

Petitioners,

v.

BLAKE AUTON,

Respondent.

Appeal from a final order of the Circuit Court of Mercer County (20-C-75)

Petitioners' Joint Brief

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ASSIGNMENTS OF ERROR

1. **THE CIRCUIT COURT ERRED IN DENYING PETITIONERS' MOTIONS FOR SUMMARY JUDGMENT, BECAUSE THE PETITIONERS ARE ENTITLED TO IMMUNITY PURSUANT TO WEST VIRGINIA CODE §§ 23-2-6 and 23-2-6a.**

2. **THE CIRCUIT COURT ERRED IN DENYING PETITIONERS' MOTIONS FOR SUMMARY JUDGMENT, BECAUSE THE PETITIONERS ARE ENTITLED TO IMMUNITY PURSUANT TO WEST VIRGINIA CODE §§ 29-12A-5(b) and 29-12A-5(a)(11).**

STATEMENT OF THE CASE

On March 28, 2018, Petitioner Adam Goodman (hereinafter "Petitioner Goodman"), Co-Petitioner Paul Underwood (hereinafter "Petitioner Underwood"), and Respondent Blake Auton (hereinafter "Respondent") were performing their duties as trash collectors for the City of Bluefield.[1] On that day, Petitioner Goodman, in his official capacity as an employee of the City of Bluefield, was operating a garbage truck owned by the City of Bluefield;[2] Petitioner Underwood and Respondent, in their official capacities as employees of the City of Bluefield, were riding as passengers on the back of said garbage truck: Petitioner Underwood was standing on the driver's side rear and Respondent was standing on the passenger's side rear.[3]

In the midst of their route that day, the three men arrived at the intersection of Wyoming Street and Glendale Avenue; at that intersection, there is a wide curve and a hill that regularly requires special maneuvering by Petitioner Goodman so to effectively collect the trash on Glendale Avenue.[4] Said special maneuvering necessitates Petitioner Goodman to reverse the truck around the wide curve and down the hill on Glendale Avenue, which creates a blind

[1] *See* App. R. 72, 73, and 3.
[2] *See* App. R. 72.
[3] *See* App. R. 72 and 74-83.
[4] *Id.*

vantagepoint for him.[5] Petitioner Goodman, thus, relies on his co-employees to observe oncoming traffic that might be driving up Glendale Avenue.[6]

So, as Petitioner Goodman began reversing the garbage truck at a speed of approximately five miles per hour, with the assistance of Petitioner Underwood and Respondent, he supposedly struck a curb, which caused Respondent to fall off the truck (it was noted in the accident report that Respondent was facing the other way—to help Petitioner Goodman navigate—and that his handle was wet).[7]

Unfortunately, due to the size of the truck, Petitioner Goodman was unaware that Respondent had fallen off, so he continued to back up, which caused Respondent to become trapped underneath the truck.[8] Eventually, after traveling approximately 30 feet, Petitioner Underwood was able to flag down Petitioner Goodman who, now, became aware of the situation and moved the garbage truck forward to release Respondent.[9] Ultimately, as a result of the incident, Respondent sustained several injuries, including the amputation of his right leg, for which he filed for and was granted workers' compensation.[10]

Police arrived on scene and conducted an investigation of the incident. The accident report noted Petitioner Goodman's condition at the time of the crash as 'normal.'[11] Also, the accident report indicated that no suspected alcohol or drug use was present and/or contributed to the accident.[12] Immediately following, however, Petitioner Goodman was sent to Bluefield

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[5] *Id.*
[6] *Id.*
[7] *Id. see also* App. R. 72.
[8] *See* App. R. 3; *see also* App. R. 74-83.
[9] *See* App. R. 3-4; *see also* App. R. 74-83.
[10] *See* App. R. 4; *see also* App. R. 73.
[11] *See* App. R. 79.
[12] *Id.*

Regional Medical Center to undergo a mandatory drug screen, which is common practice in the event of a work related accident; the results of the controlled substance test concluded that Petitioner Goodman was positive for Opiates, Oxycodone, and Hydrocodone/Hydromorphone.[13]

Consequently, a criminal complaint was filed against Petitioner Goodman alleging DUI causing bodily injury. On October 10, 2018, Petitioner Goodman was indicted by a grand jury in Mercer County, West Virginia.[14] However, on March 28, 2019, Judge William J. Sadler granted the State's motion to dismiss the charges against Petitioner Goodman.[15]

Nearly a year later, Respondent initiated a civil action in Mercer County Circuit Court on March 17, 2020, alleging that Petitioners Goodman and Underwood negligently caused Respondent's injuries.[16] Notwithstanding the granting of Respondent's workers' compensation claim as a result of his injuries, Respondent's Complaint seeks damages including, but not limited to, past and future medical expenses, lost income, compensatory damages, and attorney's fees.[17] In furtherance of the underlying litigation, each party has conducted some form of discovery.

On October 13, 2020, Petitioner Underwood filed his Motion for Summary Judgment and Memorandum of Law in Support thereof with the circuit court.[18] On January 11, 2021, Petitioner Goodman filed his corresponding Motion for Summary Judgment and Memorandum of Law in Support thereof.[19] Petitioners' arguments in both motions were rooted in the theory of

[13] *See* App. R. 75; *see also* App. R. 84.
[14] *See* App. R. 85.
[15] *See* App. R. 86.
[16] *See* App. R. 73; *see also* App. R. 1-6.
[17] *See* App. R. 1-6.
[18] *See* App. R. 44-65.
[19] *See* App. R. 66-96.

immunity from suit pursuant to West Virginia Codes §§§ 23-2-6, 23-2-6a, and 29-12A-5. On February 17, 2021, Respondent filed his Joint Response in Opposition to Petitioners' Motions for Summary Judgment.[20]

On June 22, 2021, the circuit court entered its Order denying Petitioners' Motions for Summary Judgment.[21] In doing so, the circuit court based its ruling on the notion that varying factual accounts on the day of the accident necessitate a jury determination.[22] Further, as it pertains to Petitioner Underwood, the circuit court believed that the lack of discovery thus far meant more evidence may come to light against him, which required he continue as a defendant in the matter.[23]

Finally, on July 22, 2021, Petitioners filed this Joint Appeal of the circuit court's June 22 Order.

SUMMARY OF ARGUMENT

Contrary to the circuit court's ruling, West Virginia Code §§§ 23-2-6, 23-2-6a, and 29-12A-5(b) provide Petitioners with immunities by virtue of their employment by a political subdivision at the time of the incident. Petitioner Underwood also believes that the lower court erred in finding that he was not entitled to immunity pursuant to W.Va. Code § 29-12A-5(a)(11). Petitioner Underwood asserts that as an employee of a political subdivision he was immune from Respondent's claims pursuant to W.Va. Code §29-12-5(a)(11).

In its Order, the circuit court stated that "due to the varying factual accounts on the day in question, along with the issue of whether Defendant [Goodman's] behavior, whatever it may

[20] *See* App. R. 97-125.
[21] *See* App. R. 158-168.
[22] *Id.*
[23] *Id.*

have been, was in the 'scope of his employment' being a factual one for the jury, the Court finds and concludes that a genuine issues [sic] of material fact remains, thus, Summary Judgment is not appropriate at this time." Furthermore, the circuit court also stated that Petitioner Underwood's Motion for Summary Judgment was denied "due to the lack of discovery at this time,"; the circuit court was seemingly attempting to avoid unnecessary procedural delay Petitioner Underwood's dismissal might have due to the possibility that Respondent may discover evidence of Petitioner Underwood's negligence through further discovery.[24]

Ultimately, however, the circuit court's aforementioned rationale for denying both motions for summary judgment was incorrectly applied in accordance with West Virginia Codes §§ 23-2-6, 23-2-6a, and 29-12A-5 *et seq* and supporting West Virginia case law. The discoverable evidence provided thus far is sufficient to support the granting of both Petitioners' motions for summary judgment, considering the applicability of West Virginia Codes §§ 23-2-6, 23-2-6a, and 29-12A-5 *et seq* and supporting West Virginia case law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners believe that the facts and legal arguments are adequately presented in the briefs and record on appeal, and oral argument is not necessary pursuant to Rule 18(a)(3-4) of the West Virginia Rules of Appellate Procedure.

STANDARD OF REVIEW

"This Court reviews de novo the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Syl. Pt. 2, *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018) (quoting Syl. Pt. 1, *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002)).

[24] *Id.*

A motion for summary judgment should be granted where the pleadings, exhibits, and discovery forming the basis for the motion reveal that the case contains no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Redden* v. *Comer*, 200 W. Va. 209, 211, 488 S.E.2d 484, 486 (1997). "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 3, *Brady* v. *Deals on Wheels, Inc.*, 208 W. Va. 636, 542 S.E.2d 457, 462 (W. Va. 2000) (quoting Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

This Honorable Court has held that "claims of immunities, where ripe for disposition, should be summarily decided before trial." *Robinson v. Pack*, 223 W. Va. 828, 831, 679 S.E.2d 660 (2009); see also *Hutchison v. City of Huntington*, 198 W. Va. 139, 147, 479 S.E.2d 649 (1996). This is so because, "[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." *Hutchison*, 198 W. Va. at 148, 479 S.E.2d 649 (citing *Swint v. Chambers County Commission*, 514 U.S. 35, 115 S.Ct. 1203 (1995)).

ARGUMENT

Petitioners argue that the circuit court's denial of their motions for summary judgment should be reversed seeing that the rationale applied in denying said motions is misplaced, as it incorrectly applies the pertinent West Virginia statutory and case law. Moreover, while making its determination, the circuit court seemingly failed to consider the very intent behind the

immunity statutes: to protect employers and their employees, like Petitioners, the burdens and expenses of litigation, not just trial.

Therefore, employees of political subdivisions, like Petitioners, are afforded the legal safeguards presented to them by West Virginia Codes §§§ 23-2-6, 23-2-6a, and 29-12A-5 *et seq*. Moreover, this Honorable Court has provided legal precedent that confirms Petitioners' argument. As a result, the circuit court erred in not granting Petitioners' motions for summary judgment seeing that the discoverable evidence provided thus far is sufficient to support the granting of both Petitioners' motions for summary judgment in light of the applicability of West Virginia Codes §§ 23-2-6, 23-2-6a, and 29-12A-5 *et seq* and supporting West Virginia case law.

1. **THE CIRCUIT COURT ERRED IN DENYING PETITIONERS' MOTIONS FOR SUMMARY JUDGMENT, BECAUSE THE PETITIONERS ARE ENTITLED TO IMMUNITY PURSUANT TO WEST VIRGINIA CODE §§ 23-2-6 and 23-2-6a.**

As illustrated by this Honorable Court through legal precedent, a jury determination of varying factual disputes is not necessary in this particular case. Rather than determining whether Petitioner Goodman was "within the scope of his employment" due to his alleged intoxication, the circuit court should have determined whether he was acting "in furtherance of" the City of Bluefield's business, which the evidence clearly illustrates that he was. Further, Petitioner Underwood should not be subject to the burdens and expenses of litigation for the sake of potential procedural delay. There is no dispute that he satisfies each requirement in accordance with West Virginia Code § 23-2-6a, as Respondent simply alleges negligence against him.

"This Court reviews de novo the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Syl. Pt. 2, *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018) (quoting Syl. Pt. 1, *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002)). The circuit court's ruling that (1) there exist factual disputes which

necessitate a jury determination and (2) Petitioner Underwood's dismissal may present procedural delay should be reviewed *de novo* and be reversed.

A. There is sufficient evidence to conclude that Petitioner Goodman should be afforded immunity pursuant to West Virginia Code §§ 23-2-6 and 23-2-6a as a result of (1) Respondent's successful workers' compensation claim, (2) clear acts by Petitioner Goodman "in furtherance of the employer's business", and (3) the lack of deliberate intent.

According to West Virginia Code § 23-2-1a, "[e]mployees subject to this chapter are all persons in the service of employers, except those classified as an independent contractor pursuant to § 21-5I-4 of this code, and employed by them for the purpose of carrying on the industry, business, service, or work in which they are engaged . . ." W. Va. Code § 23-2-1a.

Further, West Virginia Code § 23-2-6 states:

> Any employer . . . who subscribes and pays into the workers' compensation fund . . . or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee . . .

W. Va. Code § 23-2-6. West Virginia Code § 23-2-6a continues with, "[t]he immunity from liability set out in the preceding section [§ 23-2-6] shall **extend to every . . . employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.**" W. Va. Code § 23-2-6a (emphasis added).

Moreover, in congruence with West Virginia Code § 23-2-6a, West Virginia Code § 23-4-2(d)(2) states, "[t]he immunity from suit provided under this section and under sections six and six-a, article two of this chapter [§ 23-2-6 and § 23-2-6a] may be lost **only if** the employer or person against whom liability is asserted acted with '**deliberate intention**'." W. Va. Code § 23-4-2(d)(2) (emphasis added). West Virginia Code § 23-4-2(d)(2)(A) continues with

> . . . It is proved that the employer or person against whom liability is asserted acted with a **consciously, subjectively, and deliberately** formed intention to produce the **specific result of injury** or death to an employee. This standard

> requires a showing of an actual, specific intent and may **not** be satisfied by allegation or proof of: (A) Conduct which produces a result that was not specifically intended; (B) **conduct which constitutes negligence, no matter how gross or aggravated**; or (C) willful, wanton, or **reckless** misconduct. . .

W. Va. Code § 23-4-2(d)(2)(A) (emphasis added).[25] Accordingly, the Respondent in this matter has not asserted any deliberate intent cause of action against the Petitioners.

This Honorable Court in *Eisnaugle v. Booth* analyzed whether West Virginia Code § 23-2-6a applied in a case that involved an employee being struck and injured by an intoxicated co-employee who was driving his personally owned vehicle in the employer's parking lot.[26] This Court stated,

> Neither gross negligence nor wanton misconduct are such as to constitute injury by deliberate intention as contemplated by the immunizing statute. So, **even if we were to assume that the defendant was intoxicated** and that his condition was responsible for his actions in injuring the plaintiff, we must nevertheless conclude that the requisite 'deliberate intention' is absent.

Eisnaugle v. Booth, 159 W. Va. 779, 783, 226 S.E.2d 259, 261 (1976) (quoting *Brewer v. Appalachian Constructors, Inc.*, 135 W. Va. 739, 65 S.E.2d 87 (1951)) (emphasis added).[27]

Ultimately, the *Eisnaugle* Court affirmed summary judgment pursuant to W. Va. Code § 23-2-6a, concluding that no breach or exception to W. Va. Code § 23-2-6a existed: Eisnaugle's (Plaintiff employee) injuries were compensable under West Virginia's Workers' Compensation

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[25] *See Young v. Apogee Coal Co., LLC*, 232 W. Va. 554, 753 S.E.2d 52, (2013), which analyzes "deliberate intent" in the context of § 23-4-2(d) in an attempt to determine if an individual can be sued under said statute after already enjoying immunity under § 23-2-6a—it concludes one cannot be sued.

[26] See *Eisnaugle v. Booth*, 159 W. Va. 779, 226 S.E.2d 259 (1976).

[27] *Eisnaugle's* rationale was based on the pre-*Mandolidis v. Elkins Indus., Inc.* definition of "deliberate intent," which did not allow for acts of willful, wanton, and reckless misconduct to constitute "deliberate intent." However, *Mandolidis* attempted to establish that acts of willful, wanton, and reckless misconduct shall constitute "deliberate intent" under workers' compensation immunity pursuant to the statute. The West Virginia legislature, in 1983, "removed the common law definition of deliberate intention established in *Mandolidis* and placed the definition in a precise, controlled, predictable statutory environment [in W. Va. Code § 23-4-2]", reinstating the interpretations as in *Eisnaugle. Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 143, 475 S.E.2d 138, 143 (1996). See also *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978) (Overruled).

laws, Booth (Defendant co-employee) acted in the 'zone of employment', and Booth's intoxication did not constitute "deliberate intent".[28]

The *Eisnaugle* decision is factually consistent with the present case before the Court. First, like in *Eisnaugle*, Respondent Auton's injuries were admittedly compensated under West Virginia's Workers' Compensation laws as provided by the City of Bluefield. Therefore, West Virginia Code § 23-2-6 is satisfied.

Next, as in the *Eisnaugle* case, Petitioner Goodman's alleged intoxication has nothing to do with his ability to act "in furtherance of" the City's business; his alleged intoxication has everything to do with intent, i.e. "deliberate intent." Moreover, as in *Eisnaugle*, if a co-employee's actions while driving his **own** vehicle **on the way to work** establishes immunity under West Virginia Code § 23-2-6a, Petitioner Goodman is likewise immune. Regardless of intoxication or even negligence, Petitioner Goodman was admittedly an employee of the City of Bluefield who was authorized to act of its behalf by driving the City's garbage truck. Further, he was in the midst of his normal route on the subject day, collecting trash for the City during a shift. Therefore, much like *Eisnaugle*, Petitioner Goodman satisfies the "in furtherance of employer's business" prong of West Virginia Code § 23-2-6a, regardless of his alleged intoxication.[29]

Lastly, as it pertains to the "deliberate intent" prong of West Virginia Code § 23-2-6a, West Virginia Code § 23-4-2(d)(2), in accordance with *Eisnaugle's* rationale, has stipulated that any act constituting gross negligence or wanton misconduct, particularly intoxication, is incapable of establishing injury by "deliberate intent" pursuant to West Virginia Code § 23-2-6a. Moreover, seeing that Respondent fails to plead for any intentional tort or deliberate intent cause

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[28] See *Eisnaugle v. Booth*, 159 W. Va. 779, 226 S.E.2d 259 (1976).
[29] *Id.*

of action in his Complaint, the "deliberate intent" exception of West Virginia Code § 23-2-6a is not applicable.[30]

B. There is sufficient evidence to conclude that Petitioner Underwood should be afforded immunity pursuant to West Virginia Code §§ 23-2-6 and 23-2-6a as a result of (1) Respondent's successful workers' compensation claim, (2) clear acts by Petitioner Underwood "in furtherance of the employer's business", and (3) the lack of deliberate intent.

Considering the aforementioned argument for Petitioner Goodman, the argument for granting Petitioner Underwood's Motion for Summary Judgment should be even more straight forward.

Again, Respondent Auton's injuries were admittedly compensated under West Virginia's Workers' Compensation laws as provided by the City of Bluefield. Therefore, West Virginia Code § 23-2-6 is satisfied.

Next, Respondent makes no allegation against Petitioner Underwood claiming he, in any way, acted with deliberate intent on the day of the subject incident. Further, Respondent admits in his Complaint that Petitioner Underwood was an employee of the City of Bluefield on the day of the incident. Regardless of the alleged negligence, Petitioner Underwood was undoubtedly working "in furtherance of" the City of Bluefield's business on the day of the subject incident, as he was traveling on the back of the City's garbage truck and collecting trash on a regular route while on a shift. Thus, Petitioner Underwood satisfies the "in furtherance of employer's business" prong of West Virginia Code § 23-2-6a.

Finally, Respondent has not provided any evidence against Respondent supporting a claim of "deliberate intent"; nor did Respondent allege an intentional tort or deliberate intent

[30] *Id.*

cause of action against Petitioner Underwood in his Complaint. Therefore, the "deliberate intent" exception of West Virginia Code § 23-2-6a is not applicable.

Ultimately, then, because (1) Respondent's damages were covered by workers' compensation provided to him by his employer, (2) Petitioners were clearly acting "in furtherance of" the City of Bluefield's business, and (3) there is no evidence of deliberate intent, Petitioners are immune pursuant to West Virginia Code §§ 23-2-6 and 23-2-6a.

2. THE CIRCUIT COURT ERRED IN DENYING PETITIONERS' MOTIONS FOR SUMMARY JUDGMENT, BECAUSE THE PETITIONERS ARE ENTITLED TO IMMUNITY PURSUANT TO WEST VIRGINIA CODE §§ 29-12A-5(a)(11) and 29-12A-5(b).

The West Virginia Governmental Torts Claims and Insurance Reform Act, W. Va. Code § 29-12A-5 *et seq* provides immunity from civil liability for political subdivisions and their employees in certain situations.[31] Petitioners meet all the requirements necessary to qualify for immunity under the aforementioned statutes and no exceptions apply. Moreover, the very purpose of immunity is to protect qualifying entities and individuals the burdens and expenses of litigation.

"This Court reviews de novo the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Syl. Pt. 2, *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018) (quoting Syl. Pt. 1, *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002)). The circuit court's ruling that (1) there exist factual disputes which necessitate a jury determination and (2) Petitioner Underwood's dismissal may present procedural delay should be reviewed *de novo* and be reversed.

A. Petitioners are immune from liability pursuant to West Virginia Code §§ 29-12A-5(a)(11) and 29-12A-5(b), because they were working within the scope of their employment as employees of the City of Bluefield during the subject incident.

[31] *See* W. Va. Code § 29-12A-5 *et seq*.

W. Va. Code § 29-12A-5(a)(11) states that "[a] political subdivision is immune from liability if a loss or claim results from . . . any claim covered by any workers' compensation law or employer's liability law . . .". W. Va. Code § 29-12A-5(a)(11); and, according to West Virginia Code § 29-12A-3(c), "'[p]olitical subdivion' means any . . . **municipality** . . .." W. Va. Code § 29-12A-3(c) (emphasis added).

Here, then, it is quite clear that the City of Bluefield, a municipality, satisfies the statutory definition of a political subdivision in accordance with West Virginia Code § § 29-12A-3(c) and 29-12A-5 *et seq.* Additionally, it is also undisputed that Respondent was compensated for his injuries resulting from the subject incident by the City of Bluefield's Workers' Compensation coverage. As a result, West Virginia Code § 29-12A-5(a)(11) is satisfied.

Next, in extending to employees the same immunity afforded to their political subdivision employers, the West Virginia legislature 'found and declared' in the "Legislative Findings" section of West Virginia Code § 29-12A-2,

> 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 (emphasis added). Furthermore, West Virginia Code § 29-12A-5(b) provides,

> 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) (emphasis added).

With regards to the application of the three-part exclusionary test laid out in West Virginia Code § 29-12A-5(b) to the present case, Petitioners reiterate the foregoing argument in Section 1 of this Brief. Again, it is undisputed that Petitioners were each operating and/or riding on the City of Bluefield's garbage disposal truck immediately before and during the subject incident. Both Petitioners were working in the middle of a shift, on a regular route, performing their trash collection duties on behalf of the City. Naturally, then, Petitioners' activities were expressly within the scope of employment and prong (1) is satisfied.

Next, as it pertains to prong (2), Respondent makes no claim that Petitioners' alleged acts or omissions were done with malicious purpose or were in bad faith; nor is there any evidence of the like. In fact, Respondent simply claims that Petitioners acted negligently. Up for debate, then, is whether Petitioners' alleged negligent acts or omissions were either wanton or reckless; and, Petitioners argue that the evidence demonstrates Petitioners' actions were not.

First, there is no doubt that Petitioner Underwood's alleged negligent acts or omissions were neither wanton nor reckless. Petitioner Underwood, along with Respondent, was initially assisting Petitioner Goodman with safely maneuvering the wide curve and hill at the intersection of Wyoming Street and Glendale Avenue by watching out for potential oncoming traffic. Then, at the moment where Respondent argues that Petitioner Underwood acted negligent, grossly negligent, and/or willful, wanton, and reckless "in failing to act in a way to stop the garbage truck from running over the Plaintiff," it took Petitioner Underwood roughly four (4) seconds to wave down Petitioner Goodman so to stop the garbage truck and release Respondent.

Respondent, in his Complaint, alleges that he was dragged "some 30 feet in the road." Taking into account Petitioner Goodman's reported speed of 5 miles an hour, simple math suggests it only took four (4) seconds to release Respondent.[32] As unfortunate as Respondent's injuries are, Petitioner Underwood could not have acted much quicker in waving down Petitioner Goodman and stopping the garbage truck. Therefore, he, in no way, acted in a wanton or reckless manner.

Second, Respondent has argued that Petitioner Goodman's alleged intoxication warrants recklessness. However, as explained, Petitioner Goodman simply reversed the garbage truck around the wide curve and hill at the intersection of Wyoming Street and Glendale Avenue as he was required to do on a regular basis. Petitioner Goodman reversed the truck at a rate of approximately 5 miles per hour around the wide curve and down the hill. In attempting to do so, Petitioner Goodman accidentally struck a curb, which was a contributing factor in Respondent's fall (it was noted in the accident report that Respondent was facing the other way—to help Petitioner Goodman navigate—and that his handle was wet). Upon realizing that Respondent had fallen off and was stuck underneath the truck, Petitioner Goodman was notified by Petitioner Underwood and immediately pulled forward to stopped the truck and release Respondent; again, this took four (4) seconds. Other than claiming Petitioner Goodman was intoxicated, Respondent cannot argue that Petitioner Goodman's conduct rose to the level of wanton or recklessness; because, as explained, it did not. Therefore, prong (2) is satisfied.

Lastly, as it pertains to prong (3) of the three-part exclusionary test, there has been no argument that liability is expressly imposed upon Petitioners by a provision of West Virginia Code § 29-12A-1 *et seq*. Therefore, prong (3) is satisfied.

As a result, none of the exclusions pursuant to West Virginia Code § 29-12A-5(b) apply

[32] 1 mph = 1.4667 ft/s. So, 5 mph = 7.3333 ft/s x 4 sec. = 29.3332 ft.

to either Petitioner; and, as is such, immunity pursuant to West Virginia Code § 29-12A-5(b) should be afforded to both Petitioners.

B. The circuit court failed to take into consideration the very purpose of the immunity statutes, particularly W. Va. Code §§ 29-12A-5(a)(11) and 29-12A-5(b).

This Honorable Court has stated:

> 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.**

State ex rel. City of Bridgeport v. *Marks*, 233 W. Va. 449, 456, 759 S.E.2d 192, 199 (2014) (citing to *Hutchison* v. *City of Huntington,* 198 W. Va. at 148, 479 S.E.2d at 658) (emphasis added). In the *Marks* case, the petitioners appealed a trial court order that denied their motion for summary judgment against the respondent, a towing company. The petitioners included the City of Bridgeport, the City's police department, another towing company, and specific individuals that were **employees** of either the city or the police department. Accordingly, the individually named employees sought dismissal on the grounds of statutory immunity pursuant to West Virginia Code § 29-12A-5(a)(4) and West Virginia Code § 29-12A-5(b). In turn, the Court determined that summary judgment should have been granted seeing that the employees were shielded from civil liability by both immunities.[36]

With regard to West Virginia Code § 29-12A-5(b)'s immunity application, this Court found that there was no evidence to support any applicable exception barring said immunity:

> Rather than presenting evidence of a municipal towing policy that was designed and effectuated with malicious purpose, bad faith, or in a wanton, reckless manner, we see nothing but the paradigmatic governmental function—the very type of routine bureaucratic action that the Legislature sought to immunize from liability. Without such immunity, it has been observed, that governmental

[36] See *State ex rel. City of Bridgeport* v. *Marks*, 233 W. Va. 449, 759 S.E.2d 192 (2014).

> employees would regularly be prevented from utilizing their discretion for the public good for fear of litigious reprisal.

State ex rel. City of Bridgeport v. *Marks*, 233 W. Va. 449, 456, 759 S.E.2d 192, 199 (2014). The Court further went on to say:

> ... this Court has stated 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. *Hutchinson* at 148 n. 10, 479 S.E.2d at 658 n. 10.
>
> As a result, we held 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.

Id (citing Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W.Va. at 144, 479 S.E.2d at 654).

Thus, taking into account the intent behind immunity statutes, particularly West Virginia Code §§ 29-12A-5(a)(11) and 29-12A-5(b), as well as the corresponding ruling in *State ex el. City of Bridgeport*, this Court should reverse the lower court's ruling and instruct it to grant Petitioners' motions for summary judgment. Even if all of the facts in this case were viewed in light most favorable to Respondent, he is barred from bringing any cause of action against these Petitioners as a result of the immunity provided by the West Virginia legislature in West Virginia Code §§ 29-12A-5(a)(11) and 29-12A-5(b).

CONCLUSION

Ultimately, the circuit court's June 22 Order should be reversed. This Court should grant Petitioners' motions for summary judgment for the aforementioned reasons.

Respectfully submitted,

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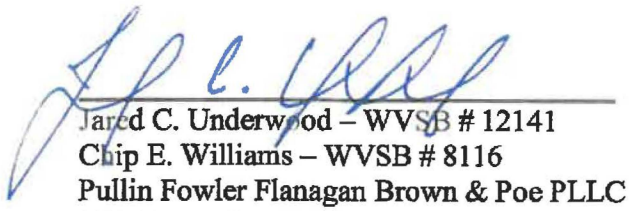

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2021, true and accurate copies of the foregoing ***Petitioners' Joint Brief*** were sent by mail to Ryan J. Flanigan, counsel for Respondent to this appeal, as follows:

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