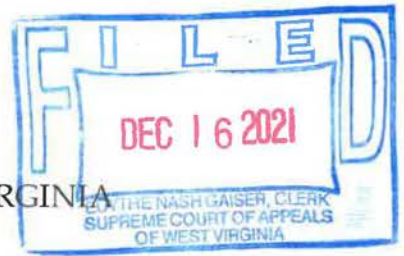


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0589

Chad Edwards and Matthew Maxwell,
Defendants Below, Petitioners,

**DO NOT REMOVE
FROM FILE**

v.

Appeal from an Order of the
Circuit Court of Harrison County
(Case No. 20-C-267-3)

Rhonda Stark, Individually and as
Administratrix of the Estate of
Robert E. Stark,
Plaintiff Below, Respondent.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

On or about November 19, 2020, Respondent filed Plaintiff's First Amended Complaint against Petitioners. In Count I, Respondent asserted that Petitioners "violated the deliberate intent standard set forth within W.Va. Code §23-4-2(d)(2)(A)." (Appx. 31). Respondent further asserted that Petitioners "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of death to Robert Stark." (Appx. 31).

On December 23, 2020, Petitioners filed their Motion to Dismiss with Memorandum in Support. (Appx. 43). First, Petitioners argued that Respondent's First Amended Complaint should be dismissed as there was no viable deliberate intent claim governed by W.Va. Code §23-4-2(d)(2) against supervisors/co-employees. (Appx. 48 - 49). Second, Petitioners argued that the workers' compensation system is the sole/exclusive remedy available to Respondent for a workplace injury because a viable deliberate intent claim was not alleged. (Appx. 49 - 52). Third, Petitioners argued that Respondent's claims were merely subterfuge for bringing a claim against the political subdivision itself and were barred by W. Va. Code §29-12A-5(a)(11) because workers' compensation benefits were available. (Appx. 53 - 55). Finally, Petitioners argued that W.Va. Code §29-12A-13(b) precluded the claims because naming an employee of a political subdivision acting within the scope of employment as a defendant was prohibited. (Appx. 55).

Respondent filed her Memorandum in Opposition on January 22, 2021. (Appx. 58). Citing to Young v. Apogee Coal Co., LLC, 232 W.Va. 554, 753 S.E.2d 52, 54 (2013),

Respondent asserted that a deliberate intent claim brought pursuant to W. Va. Code §23-4-2(d)(2)(i) [injury resulting from a deliberately formed intention to produce a specific injury or death] could be brought against supervisors/co-employees. (Appx. 64 – 65). Respondent also asserted that the allegations in the First Amended Complaint were for malicious conduct wherein immunity was specifically not granted to employees of a political subdivision [relying on W.Va. Code §29-12A-5(b)(2)]. (Appx. 65 - 66).

Petitioners filed a Reply Brief on or about February 4, 2021. (Appx. 68). Petitioners argued that Respondent's claims are barred because the Legislature did not include a specific exception to immunity in W.Va. Code §29-12A-5(b) for deliberate intent claims, and because immunity was provided to political subdivisions for any claim covered by workers compensation law. (Appx. 69 – 71).

On May 19, 2021, following a Hearing on Petitioners' Motion, the Circuit Court ordered that a ruling would be held in abeyance and the parties were directed to further brief specified issues. (Appx. 75). These issues were briefed by the parties. (Appx. 78 – 93). In Plaintiff's Supplemental Brief in Opposition to Defendants' Motion to Dismiss, Respondent brought the Circuit Court's attention to this Court's previous ruling that "W.Va. Code 29-12A-13(b) does not prohibit the naming of an employee of a political subdivision acting within the scope of employment as a defendant for purposes of establishing the employee's liability, when one or more of the statutory exceptions in W.Va. Code 29-12A-5(b) to employee immunity is present." Syl. Pt. 5, Brooks v. City of Weirton, 202 W.Va. 246, 503 S.E.2d 814 (1998). (Appx. 86 – 88).

The Circuit Court, on June 30, 2021, entered its Order Denying Defendants' Motion to Dismiss. (Appx. 94 – 103). The Circuit Court held that Respondent's Complaint stated a sufficient cause of action to survive Petitioners' Motion to Dismiss. Relying on Brooks v. City of Weirton, *supra*, the Circuit Court held that Respondent's claims against Petitioners were appropriate to establish individual liability on the part of Petitioners. (Appx. 101). Relying on Young v. Apogee Coal Co., LLC, *supra*, the Circuit Court further held that Respondent stated a sufficient cause of action for the deliberate intention claim because the language of the statute did not prohibit asserting such a claim against a co-employee. (Appx. 101).

II. SUMMARY OF ARGUMENT

Petitioners, employees of a political subdivision, are asking this Court to legislate from the bench because it does not agree with the clear and unambiguous intent and language chosen by our Legislature. Petitioners have abandoned their previous claims that Respondent cannot bring a claim pursuant to W.Va. Code §23-4-2(d)(2) because it seeks to hold supervisors/co-employees accountable versus an employer. Now, arguments are raised by Petitioners (some for the first time) that a claim brought pursuant to W.Va. Code §23-4-2(d)(2) fails because it is not specifically enumerated in the exceptions to immunity for employees of a political subdivision. Even assuming some of these arguments were not waived for failing to raise them before the Circuit Court, Petitioners' arguments fail to recognize the Legislature's intent to hold persons

accountable when their conduct rises to the level of acting with a malicious purpose to produce a specific injury or death. As a result, Petitioners' arguments fail.

First, the Legislature chose to make such conduct an exception to the general immunity afforded when workers are killed in the workplace. Likewise, the Legislature chose to make such conduct an exception to the immunity otherwise afforded employees of a political subdivision.

Second, an exception to the immunity of an employee of a political subdivision exists where the employee's acts or omissions are done with malicious purpose. Malice is a condition of mind which prompts a person to purposefully injure another without justification. BLACK'S LAW DICTIONARY 862 (5th ed. 1979). Petitioners are alleged to have acted with a consciously, subjectively, and deliberately formed intention to produce the specific result of death to Robert Stark. (Appx. 31). Petitioners are alleged to have acted with malice and therefore they do not enjoy immunity for their actions.

Third, the Circuit Court's ruling regarding the claim for intentional and reckless conduct is proper as the claim establishes individual liability on the part of Petitioners, as opposed to attempting to establish liability on the part of the Petitioners employer, the City of Shinnston.

Finally, the Circuit Court's ruling does not fundamentally erode the spirit and intent of the West Virginia Tort Claims and Insurance Reform Act. Instead, the Circuit Court's ruling promotes the legislative intent of not protecting conduct which is deplorable and unworthy of immunity.

The foregoing, as discussed more fully below, demonstrates there was no error in the Circuit Court denying Petitioners' Motion to Dismiss. Accordingly, this Court should affirm the Circuit Court's Order. This Court should further decide that malicious conduct includes one acting with a consciously, subjectively, and deliberately formed intention to produce the specific result of death. Finally, this matter should be remanded for further proceedings.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent agrees with Petitioners that oral argument is not necessary in this matter pursuant to West Virginia Rule of Appellate Procedure 18(a)(4). However, should this Court believe this matter to be suitable for Rule 20 oral argument, Respondent is prepared to present same.

IV. STANDARD OF REVIEW

This Court is being asked to review the Circuit Court's decision denying Petitioners Motion to Dismiss Respondent's First Amended Complaint. A trial court's ruling on a motion to dismiss is reviewed under a *de novo* standard. Morris v. Crown Equip. Corp., 219 W.Va. 347, 352, 633 S.E.2d 292, 297 (2006) [citing Kopelman and Associates v. Collins, 196 W.Va. 489, 492, 473 S.E.2d 910, 913 (1996)].

"For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." John W. Lodge Distrib. Co., Inc. v. Texaco, Inc., 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978).

Likewise, dismissal for failure to state a claim is only proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint. Syl. Pt. 3, Chapman v. Kane Transfer Co., Inc., 160 W.Va. 530, 236 S.E.2d 207 (1977). A Complaint should not be dismissed simply because there may be doubt whether the plaintiff will succeed on the merits of the claim. "Whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings." Mandolidis v. Elkins Indus., Inc., 161 W.Va. 695, 718, 246 S.E.2d 907, 920 (1978)(overruled on other grounds).

V. ARGUMENT

A. THE CIRCUIT COURT DID NOT ERR IN DENYING PETITIONERS' MOTION TO DISMISS AS THE GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT, W. VA. CODE §29-12A-5, ET SEQ. DOES NOT PROHIBIT CLAIMS FROM BEING ASSERTED AGAINST EMPLOYEES OF A POLITICAL SUBDIVISION WHERE THE CONDUCT ALLEGED IS MALICIOUS.

Petitioners' first argument starts with a misunderstanding of the law set forth in W.Va. Code §29-12A-5. Petitioners assert that political subdivisions and employees of a political subdivision are immune from liability if a loss or claim results from any claim covered by any workers' compensation law. While this may be true for political subdivisions, it is not an accurate statement of law regarding employees of political subdivisions. This Court has long recognized that while a political subdivision may enjoy immunity where the injuries were covered by workers' compensation benefits, suit against individual employees of the political subdivision may continue if the conduct

alleged fits within one of the statutory exceptions to immunity provided for in W.Va. Code 29-12A-5(b). Syl. Pt. 5, Brooks v. City of Weirton, 202 W.Va. 246, 503 S.E.2d 814 (1998).

W.Va. Code § 29-12A-5(b)(2) provides immunity to an employee of a political subdivision unless “his or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.” Respondent asserted that Petitioners acted with a consciously, subjectively, and deliberately formed intention to produce the specific result of death to Robert Stark. (Appx. 31). Such conduct, if proven, amounts to acting with a malicious purpose.

Malice is defined as:

The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent. A condition of mind which prompts a person to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse.

BLACK’S LAW DICTIONARY 862 (5th ed. 1979). This Court has recognized that “[m]alice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” State v. Davis, 220 W.Va. 590, 594, 648 S.E.2d 354, 358 (2007) [citing People v. Goecke, 457 Mich. 442, 579 N.W.2d 868, 878(1998)].

Petitioners essentially argue that Respondent’s claims are barred because the legislature did not specifically list deliberate intent claims asserted under W.Va. Code §23-4-2(d)(2)(i) as one of the enumerated exceptions to immunity for employees of

political subdivisions set forth in W.Va. Code §29-12A-5(b). This argument misses the point for several reasons. This Court has held that “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Holsten v. Massey, 200 W. Va. 775, 778, 490 S.E.2d 864, 867 (1997) [citing Syl. Pt. 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968); Syl. Pt. 1, Peyton v. City Council of Lewisburg, 182 W.Va. 297, 387 S.E.2d 532 (1989); Syl. Pt. 3, Hose v. Berkeley County Planning Commission, 194 W.Va. 515, 460 S.E.2d 761 (1995)]. The plain meaning of the statutes involved [W.Va. Code §23-4-2(d)(2)(i) and W.Va. Code §29-12A-5(b)] are clear.

Further, Petitioners ignores this Court’s decades old declaration:

The general rule of construction in governmental tort legislation cases favors liability, not immunity. Unless 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, Marlin v. Bill Rich Const., Inc., 198 W.Va. 635, 482 S.E.2d 620 (1996).

Brooks v. City of Weirton, 202 W. Va. 246, 247, 503 S.E.2d 814, 815 (1998). This rule of construction does not change simply because the conduct alleged is more than negligence. In ignoring this rule of construction, Petitioners also ignore the obvious – our Legislature has chosen to provide exceptions to immunity, both for workplace injuries and involving employees of a political subdivision, when the alleged conduct is so serious that allowing immunity from such claims would result in perverting justice.

In this matter, a deliberate intent claim is asserted under W.Va. Code §23-4-2(d)(2)(i). It alleges conduct which is malicious. Employees of political subdivisions do

not enjoy immunity for conduct which is malicious. W.Va. Code §29-12A-5(b)(2). Therefore, Petitioners are not afforded immunity and Respondent's Complaint should not be dismissed.

B. THE CIRCUIT COURT DID NOT ERR IN DENYING PETITIONERS' MOTION TO DISMISS AS THE CONDUCT ALLEGED IN RESPONDENT'S FIRST AMENDED COMPLAINT AMOUNTS TO ACTS OR OMISSIONS DONE WITH MALICIOUS PURPOSE, IN BAD FAITH, OR IN A WANTON OR RECKLESS MANNER.

Much of Petitioners arguments simply mirror the arguments presented in Section A above. Petitioners argue that the Legislature provided exceptions to immunity for political employees in W.Va. Code §29-12A-5(b). Because there is no specific provision indicating that deliberate intent claims brought pursuant to W.Va. Code §23-4-2(d)(2)(i) are an exception to immunity, Petitioners argue the Legislature must have intended to exclude such conduct from the exceptions and afford immunity to employees of a political subdivision. However, the Legislature did provide that acts done with a malicious purpose are an exception where employees of a political subdivision do not enjoy immunity. W.Va. Code §29-12A-5(b)(2). Respondent has alleged that Petitioners acted with a consciously, subjectively, and deliberately formed intention to produce the specific result of death to Robert Stark. (Appx. 31). Such conduct, if proven, amounts to acting with a malicious purpose. Therefore, pursuant to W.Va. Code §29-12A-5(b)(2), Petitioners do not enjoy immunity for their alleged actions.

C. THE CIRCUIT COURT DID NOT ERR IN DENYING PETITIONERS' MOTION TO DISMISS COUNT TWO OF RESPONDENT'S COMPLAINT AS IT INCORPORATES THE ALLEGATIONS OF COUNT I AND SERVES TO SPECIFY INDIVIDUAL LIABILITY ON THE PART OF PETITIONERS.

Petitioners arguments are predicated on the success of dismissing Count I of Respondent's Complaint. As indicated above, Count I states a viable claim against Petitioners for which relief may be granted. The arguments focus on the allegations in Count II without recognizing the incorporation of the allegations from Count I into the allegations of Count II. As the Circuit Court acknowledged in its Order Denying Defendants' Motion to Dismiss, "Plaintiff is asserting this claim against the Defendants in order to establish individual liability on the part of these Defendant, not to establish liability on the part of the City." It was not error for the Circuit Court to deny Petitioners Motion as it relates to Count II. Respondent did not attempt, nor did the Circuit Court allow for, an abrogation of alleging a deliberate intent claim as set forth in W.Va. Code §23-4-2(d) as the exception to general immunity for workplace injuries.

D. THE CIRCUIT COURT DID NOT ERR IN DENYING PETITIONERS' MOTION TO DISMISS AS RESPONDENT ASSERTED CLAIMS WHICH ARE NOT BARRED AS A MATTER OF LAW AND ARE NOT INCONSISTENT WITH THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT.

Petitioners allege in this part of their argument that disastrous consequences will result if Respondent's Complaint is allowed to proceed. Such argument is without proof and without merit. Respondent is not asking for an expansion of the law as currently written. Respondent is not asking that some new, novel type of claim be allowed under

the current statutory language of W.Va. Code §23-4-2(d) and W.Va. Code §29-12A-5(b). Instead, Respondent is simply asking that these laws and their plain language be given effect as written.

Respondent would submit that the legislature knew exactly what it was doing when these two statutes were written. There are difficulties in overcoming immunities provided for workplace injuries, and for good reasons. There are difficulties in overcoming immunities provided to employees of political subdivisions, and for good reasons. However, the Legislature put its proverbial foot down when it decided that immunity would not extend to conduct which was malicious and caused the death of another. Certain conduct, if proven, is not worthy of immunity. The conduct alleged by Respondent in her Complaint sets forth a factual scenario in which the Legislature saw fit to not afford immunity. There is nothing about this lawsuit proceeding which would "open the flood gates" to litigation. Petitioners arguments otherwise are simply a tactic to strike fear in the hearts of this Court and should be ignored. If the fear were that real, the argument would have been raised before the Circuit Court.

VI. CONCLUSION

Respondent respectfully requests this Court affirm the Circuit Court's denial of Respondent's Motion to Dismiss, remand this matter for further proceedings consistent with its ruling herein, and award Respondent such further relief which the Court deems appropriate.

Respectfully submitted,
Respondent, By Counsel:



Douglas R. Miley (WVSB #10611)

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Rhonda Stark, Individually and as
Administratrix of the Estate of
Robert E. Stark,
Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "Brief of Respondent" was served upon the following counsel of record, by U.S. Mail, at the address indicated below, on December 15th:

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