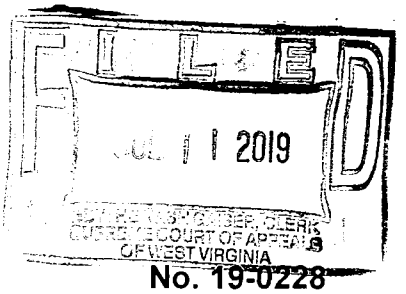
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



MONONGAHELA POWER COMPANY,

Petitioner,

v.

No. 19-0228

MICHAEL A. BUZMINSKY and
VICKIE BUZMINSKY,

Respondents.

BRIEF OF PETITIONER

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ASSIGNMENT OF ERROR

The Circuit Court committed reversible error by refusing to dismiss Monongahela Power Company as statutorily immune.

STATEMENT OF THE CASE

1. Statement of Facts

On June 23, 2016, the Greenbrier River, as well as several other rivers, creeks, and streams, rose beyond flood stage at numerous points throughout the State, and especially in Greenbrier County, creating a disaster situation. App. 9. Because of the extensive flooding, in June, 2016, then-Governor Tomblin declared a State of Emergency, which encompassed the City of Ronceverte in Greenbrier County. App. 220-221. The City of Ronceverte's wastewater treatment plant was one of the areas that flooded as it was located directly alongside the Greenbrier River. Id. As a result, electric service to the plant, provided by Monongahela Power Company (hereinafter, "Mon Power"), was interrupted. App. 10.

On June 29, 2016, during the emergency response to the 2016 flooding in Greenbrier County, the City of Ronceverte, West Virginia, through its official, Pam Mentz contacted the Fairlea (Greenbrier County) Service Center of Mon Power by telephone and spoke with one of the employees there, Donna Hawver. App. 226 (..."Pam called me.").[1] During that telephone conversation, Ms. Mentz directed Mon Power to restore power to the Ronceverte wastewater treatment plant. App. 227 ("She

[1] Ms. Mentz could not remember the conversation, but neither denied nor contradicted it. App. 233 (Q: "Do you remember calling up and asking [Mon Power] about the power at the water and sewage plant? A: I can't recall." However, Ms. Mentz was able to remember that she did call Donna [Hawver] at the Mon Power service center on other occasions and was familiar with Ms. Hawver. App. 232-233.

told me they were ready, the sewer plant was ready to be turned back on."); *see also*, App. 228 and 229-230.[2] In compliance with that order, Mon Power restored service to the plant the same day. App. 228 & 234.

The power was restored to the Ronceverte wastewater treatment plant that day because Mon Power was ordered to do so. App. 227. As a result of that order, and after the required inspection was performed by an independent inspector who verified to Mon Power that it was safe to act, Mon Power restored electric service. App. 202, 227, and 228. Concurrently, the City of Ronceverte was cautioned not to operate its equipment until further repairs were performed by a licensed electrician. App. 11. On July 1, 2016, Respondent Michael Buzminsky, a licensed and certified master electrician was summoned to the plant by the City to perform the required repairs. App. 140, 141, 142. While not wearing the required personal protective equipment for working with 440 volts of electricity, Respondent apparently disregarded his training and experience and contacted a live bus bar[3] on that equipment, which was solely owned by the City of Ronceverte, and for which Mon Power had no ownership or control, causing his injuries. App. 29; App. 12.

Mon Power was working with and at the direction of the government agencies that were coordinating the response, and was focused on the temporary restoration of public utility services. App. 10. It is undisputed that it was due to the order of the City of Ronceverte to Mon Power that the power was restored to the wastewater treatment

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[2] Plaintiffs' counsel actually went over this phone call three (3) times with Ms. Hawver during her deposition. App. 227, 228, and 229-230.

[3] A bus bar is metallic strip or bar, typically housed inside switchgear for local high current power distribution. They are usually uninsulated. A master electrician would be very familiar with them and understand their potential hazard if energized with electricity.

plant on June 29, 2016. App. 202, 227, and 228. It is also undisputed that Mon Power did exactly what the City of Ronceverte ordered Mon Power to do – restore the power so that the City could repair the damaged plant and restore normal operation. App. 228.

2. Procedural History

This action was initiated with the filing of the Complaint on or about April 12, 2018. App. 5. Defendants named in the action include Mon Power, the electric utility provider for the Ronceverte treatment plant, and the West Virginia Department of Environmental Protection, Division of Water and Waste Management. Respondents alleged that Mon Power negligently, carelessly, and/or recklessly failed to properly restore service to the treatment plant. App. 13. Inasmuch as the facts supporting Mon Power's claim of statutory immunity had not yet been developed, Mon Power filed its answer, and the discovery process began.

Mon Power's Motion to Dismiss for Lack of Subject Matter Jurisdiction[4] was filed on January 15, 2019, the day after the parties' receipt of the transcript of the deposition of Donna Hawver, whose testimony provided the factual predicate required to support the Motion.[5] App. 225. The two supporting depositions were held early, on the first

[4] A Motion pursuant to West Virginia Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction is a proper method for invoking an immunity to which a litigant is entitled by law. *Johnson v. C.J. Mahan Construction Co.*, 210 W.Va. 438, 441, 557 S.E.2d 845, 848 (2001).

[5] It was necessary to develop the required factual support for the Motion, in order to satisfy the requirements of West Virginia Rule of Civil Procedure 11. In this case, all the witnesses who were party to the communications between the City of Ronceverte and Mon Power (that is, the only witnesses who could have the requisite knowledge) were deposed prior to filing the Motion, to clearly establish the factual basis of the order from the City to Mon Power.

available dates, and were delayed only by the entry of third-party defendant John Humphries into the case.[6] App. 304 & 310.

The Circuit Court initially intended to delay hearing Mon Power's Motion until the pretrial hearing. Upon consideration of the pronouncements by this Court that both claims of immunity and issues of subject matter jurisdiction are to be resolved as a matter of first importance were brought to the Circuit Court's attention, the Circuit Court stayed the action and set an expedited briefing schedule on Mon Power's Motion. App. 303.

Respondents filed their Response to the Motion, and Petitioner filed its Reply shortly afterward. App. 272 & 298-299. No hearing was held on the Motion. The email order of the Circuit Court denying Mon Power's Motion to Dismiss, was sent to the parties by the Circuit Court's law clerk on March 13, 2019.[7] App. 350-352. A proposed written order was provided to the Circuit Court by Respondents on March 22, 2019 and agreed to as to form by Petitioner on March 26, 2019. App. 367 & 370-371. The Circuit Court did not enter a traditional, signed order until June 28, 2019. App. 372.

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[6] There was previously an unrelated Motion to Dismiss heard from co-defendants West Virginia Department of Environmental Protection and John H. Hendley (non-participants in this appeal), on the grounds of qualified immunity, which is a different matter than the statutory immunity discussed in this appeal. Mon Power was not a participant in that Motion.

[7] It has been the Circuit Court's practice in this case to issue its rulings via email from the law clerk. App. 303, 319, & 350-352; *see also* App. 374, 375, & 376 (Circuit Court's statements on these email orders). These emails do not contain a signature by the Judge, and neither the Judge nor the Circuit Clerk appears to be copied on the email orders. App. 303, 350-352. These have been treated by the Court and by all parties as the equivalent of more traditional orders that are filed with the Clerk. App. 319 & 327. The Circuit Court highlights and admits this irregular practice in the order, discussing the use of emails from the Circuit Court's law clerk as substitutes for signed and entered orders four (4) times. App. 374, 375, & 376.

SUMMARY OF ARGUMENT

Mon Power is an emergency responder within the meaning of West Virginia Code § 15-5-11 and associated statutes. The Legislature designed a comprehensive emergency response system, integrating private entities with government actors and assuming the liability for them by designating all emergency response activities as government functions.

The statutes' purpose is to provide all responders, including private entities, with immunity from suit to encourage those entities to participate and to improve public safety through following the orders of government officials, who have the best view of the complete situation, by providing those entities an immunity similar to those enjoyed by those same government officials. To do otherwise would create the opposite incentive by penalizing private entities for following the orders of the government and making them liable to suit for following those orders, while the party issuing the orders is immune. This would endanger life and property by discouraging private entities from participating in emergency responses and, instead, would cause them to take strong efforts to avoid liability and litigation, delaying and hampering the unified effort of the government to respond to emergencies.

It is undisputed that Mon Power did exactly what it was ordered to do by the City of Ronceverte while participating in the State's emergency response to the flooding in Greenbrier County in 2016. Mon Power is entitled to immunity from suit because it was acting as an emergency responder under the order of the City of Ronceverte pursuant to W.Va. Code § 15-5-11.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument under West Virginia Rule of Appellate Procedure 20(a) because interpretation of the scope of the immunity provided under W.Va. Code § 15-5-11 is a matter of first impression before this court. It is also a matter of fundamental public importance, as the resolution of this immunity question could severely impact the manner in which public utilities and governmental services are restored in future disasters.

ARGUMENT

STANDARD OF REVIEW

1. Review of motion to dismiss for immunity

This Court has long held that it reviews an order of a Circuit Court denying a motion to dismiss for immunity *de novo*. *West Virginia Bd of Educ. v. Marple*, 236 W.Va. 654, 660, 783 S.E.2d 75, 81 (2015), *citing, Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W.Va. 228, 234, 503 S.E.2d 541, 547 (1998).

2. Direct appeal of denial of immunity

This Appeal was filed pursuant to the collateral order doctrine. This Court has previously held on numerous occasions that denials of motions to dismiss for immunity are immediately appealable as a direct appeal of right, under the collateral order doctrine, and not by way of petition for an extraordinary writ. *Marple*, 236 W.Va. at 659, 783 S.E.2d at 80, *citing Hutchison v. City of Huntington*, 198 W.Va. 139, 147, 479 S.E.2d 649, 657 (1996), and Syl. Pt. 2, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d

660 (2009)("Ordinarily we do not review the denial of a Rule 12(b)(6) motion because it is not a final order. However, we recognize an exception to this general rule 'when the defense is in the nature of an immunity'").

ASSIGNMENT OF ERROR

The Circuit Court committed reversible error by refusing to dismiss Monongahela Power Company as statutorily immune.

1. Law of emergency response and immunity

West Virginia emergency response statute is comprehensive

The Legislature has provided a comprehensive emergency response statute in Chapter 15, Article 5, of the West Virginia Code. The Legislature stated its intention "to establish and implement comprehensive homeland security and emergency management plans to deal with such disasters...," including floods. W.Va. Code § 15-5-1. The Legislature expressly stated that "the purpose of this article [is] to deal with such disasters... [so that the] functions of this state [are] coordinated to the maximum extent with...private agencies of every type." *Id.*

The Legislature expanded coverage of the emergency response statute to the broadest possible limits. For example, in the definitions found in W.Va. Code § 15-5-2, it expanded the reach of the definition of emergency services beyond the traditional group of fire, police, and emergency medical services, to include, to name but a few, communications, special weapons defense, evacuation services, emergency welfare services, plant protection, and "temporary restoration of public utility services." W.Va. Code § 15-5-2(a). The term "disaster" was also expanded to cover every conceivable

emergency, from terrorism to fire to storms to chemical spills to floods, some of which are controlled at the State level, while most others are handled by smaller political subdivisions of the State. W.Va. Code § 15-5-2(h). The wide reach demonstrates the Legislature's intent to expand the scope of the emergency response statute as far as possible, to cover every conceivable circumstance, and to provide protection to every entity that works with the State and its political subdivisions to respond to a disaster.

The statement of purpose in W.Va. Code § 15-5-1 demonstrates the Legislature intended the State and its political subdivisions to assume responsibility for emergency response and to coordinate the activities not only of the government, but also "private agencies of every type." W.Va. Code § 15-5-1. Obviously, such control and coordination of effort is necessary in the face of emergency events.

For example, the specified powers of the Governor include the authority to "assume direct operational control of any or all emergency service forces and helpers in the state,"[8] including, as shown by the definitions in W.Va. Code § 15-5-2(a) and (k), privately owned utility companies. W.Va. Code § 15-5-6(b)(1). The Legislature has empowered the Governor to "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules of any state agency, if strict compliance therewith would in any way prevent, hinder, or delay

[8] "Operational control" is defined in the homeland security context as "[t]he authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission." Department of Defense Dictionary of Military and Associated Terms at 164 (June 2019). The powers of the Governor are delegable to deal with problems at a tactical or local level. W.Va. Code §§ 15-5-1 and 15-5-5(6). In other words, it was not necessary for then-Governor Tomblin to personally appear in every single locale where there is an emergency for these powers to be exercised, especially when the emergency is occurring simultaneously in many locations statewide, making such low-level direct control neither feasible nor desirable. He may exercise control through his duly appointed agents.

necessary action in coping with the emergency" [*sic*], thus allowing the State to adjust its acceptable risk, if that is necessary to deal with the emergency. W.Va. Code § 15-5-6(b)(7). The statute even allows the Governor, in a massive expansion of executive authority, to "perform and exercise other functions, powers, and duties that are necessary to promote and secure the safety and protection of the civilian population," giving the State the widest possible discretion in responding to an emergency. W.Va. Code § 15-5-6(b)(11).

A further example that the Legislature intended for the government to take full control of all activities when responding to emergencies can be found in W.Va. Code § 15-5-11(a). That section provides, in pertinent part, "All functions hereunder and all other activities relating to emergency services are hereby declared to be governmental functions...." This plainly states that, no matter who actually performs the specific tasks necessary to disaster response, the government is in control and those specific tasks, and, under those circumstances, those tasks become government functions. The intent of the Legislature to put the State and its political subdivisions in the driver's seat of disaster response cannot be more obvious.

Immunity granted to emergency responders

Concurrent with that legislative intent is the recognition that it is necessary for the State to protect the entities, companies, and support forces that it relies upon to respond to an emergency from liability that might arise from the orders of the government officials. In other words, the State and its political subdivisions cannot be hampered in their control of the efforts to save lives and property by fears on the part of

utility companies and other agencies of being hauled into court because of the often necessary decisions relating to the restoration of utilities and government services, which emergencies require.

Accordingly, the Legislature enacted W.Va. Code § 15-5-11, which provides immunity from civil liability for emergency responders. That section states,

> All functions hereunder and all other activities relating to emergency services are hereby declared to be governmental functions. Neither the state nor any political subdivision nor any agency of the state or political subdivision nor, except in cases of willful misconduct, any duly qualified emergency service worker complying with or reasonably attempting to comply with this article or any order, rule, regulation or ordinance promulgated pursuant to this article, shall be liable for the death of or injury to any person or for damage to any property as a result of such activity. This section does not affect the right of any person to receive benefits or compensation to which he or she would otherwise be entitled under this article, chapter twenty-three of this code, any Act of Congress or any other law.

W.Va. Code § 15-5-11(a).

It is necessary to parse the language of the statute and to examine the definitions of many of the terms and their larger effect in the law, to understand the full scope of the immunity the Legislature conveyed in the emergency response statute.

The first term that requires definition is that of "emergency services". W.Va. Code § 15-5-2 defines "emergency services" as

> the preparation for and the carrying out of all emergency functions, other than functions for which military forces are primarily responsible, to protect, respond and recover, to prevent, detect, deter and mitigate, <u>to minimize and repair injury and damage resulting from disasters or other event caused by flooding</u>, terrorism, enemy attack, sabotage or other natural or other man-made causes. These functions include, without limitation, firefighting services, police services, medical and health services, communications,

> radiological, chemical and other special weapons defense, evacuation of persons from stricken areas, emergency welfare services, emergency transportation, existing or properly assigned functions of plant protection, and other functions related to the health, safety and welfare temporary restoration of public utility services and other functions related to the health, safety and welfare of the citizens of this state, together with all other activities necessary or incidental to the preparation for and carrying out of the foregoing functions. Disaster includes the imminent threat of disaster as well as its occurrence and any power or authority exercisable on account of a disaster that may be exercised during the period when there is an imminent threat thereof.

W. Va. Code § 15-5-2(a)(Emphasis added).

When reduced to the language relevant to this case, W.Va. Code § 15-5-2(a) reads: "'Emergency services' means...the carrying out of all emergency functions... to...respond and recover...from disasters or other event[s] caused by flooding.... These functions include...temporary restoration of public utility services and other functions related to the health, safety, and welfare of the citizens of this state."

A second pertinent definition is that of "duly qualified emergency services worker," which is defined as

> [a]ny 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)(1).

Again, reduced to the essentials, W.Va. Code § 15-5-11(c)(1) reads, "As used in this section, 'duly qualified emergency service worker' means: Any duly qualified full or part-time...employee...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."

Finally, the term "willful misconduct" must be defined. Unlike the preceding terms, the Legislature did not choose to define this term in the emergency response statute. It is well settled by the Supreme Court of Appeals that when a statute does not define a term that the proper action is to give the words their common, ordinary and accepted meaning in context, usually by referring to the dictionary for its definition. *See, West Virginia Racing Commission v. Reynolds*, 236 W.Va. 398, 402, 780 S.E.2d 664, 668 (2015), *citing,* Syl. pt. 1, *Miners 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)("[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used."). The dictionary's only pertinent definition of the term "willful," is "done deliberately – intentional." Webster's Ninth New Collegiate Dictionary 1350 (1990). "Misconduct" is defined as "intentional wrongdoing". Webster's at 750.

To determine legislative intent behind use of the term "willful misconduct" in Section 15-5-11(a), the context of this statutory language is also relevant. *See, Mylan Laboratories, Inc. v. American Motorists Ins. Co.*, 226 W.Va. 307, 317, 700 S.E.2d 518, 528 (2010), *citing, Wolfe v. Forbes, et al.,* 159 W.Va. 34, 44, 217 S.E.2d 899, 905 (1975)(further citations omitted)("[i]t is a fundamental rule of construction that in accordance with the maxim '*noscitur a sociis*' the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is

associated."). Here, the term "willful misconduct" immediately precedes the clause of the sentence discussing compliance with the orders of the government. It is logical to conclude that the Legislature's intended definition is focused on those orders. Thus, considering the context in which the term "willful misconduct" is used, the Legislature intended to exempt from the immunity afforded by the statute only that liability arising from "intentionally disobeying an order of the government."

This fits with the overall purpose of the emergency response statute. Consistent with the statute's designation of activities relating to emergency services as governmental functions, as shown above, it follows for the Legislature to condition the grant of immunity on compliance with governmental orders. In other words, the statute provides immunity for acts done in compliance with the order of a governmental entity, while recognizing that immunity does not extend to liability for acts that intentionally disobey such an order.

Reduced to its essence, therefore, Section 15-5-11(a) can be paraphrased to read: All functions or other activities relating to restoration of public utility services after a flood are governmental functions. Except in cases of deliberate disobedience to the orders of the government, an employee of an agency or organization performing the restoration of public utility services after a flood, pursuant to the request of a political subdivision of this state, complying with or reasonably attempting to comply with the order of the political subdivision to restore public utility services, shall not be liable for the death of or injury to any person or for damage to any property as a result of the restoration of public utility services.

This creates an explicit immunity from suit, sufficient to meet this Court's requirement that "the Legislature clearly provide for immunity under the circumstances." *Jackson v. Belcher*, 232 W.Va. 513, 517, 753 S.E.2d 11, 17 (2013)(stating the statute provides immunity to emergency services workers); Syl. Pt. 3, *Phillips v. Larry's Drive-In Pharmacy*, 220 W.Va. 484, 647 S.E.2d 920 (2007); *see also*, *Sharp v. Town of Highland*, 665 N.E.2d 610, 614-615 (Ind., 1996).

West Virginia's emergency response statute is not unique. Many other jurisdictions have nearly identical statutes, using almost identical words to provide similar immunity. *See, e.g.*, Code of Alabama § 31-9-16; Arkansas Code § 12-75-128; Indiana Code 10-14-3-15; Revised Statutes of Nebraska § 81-829.55; Revised Statutes of the State of New Hampshire § 21-P:41; Consolidated Laws of New York, Unconsolidated Laws § 9193 Nevada Revised Statutes 414.110; North Carolina General Statutes § 166A-19.60; North Dakota Century Code § 37-17.1-16; Oklahoma Statutes § 683.13; General Laws of Rhode Island § 30-15-15; South Dakota Codified Laws § 34-48A-49; Wyoming Statutes § 19-13-113; Poarch Creek Indians Tribal Code § 29-3-1; *see also*, North Carolina General Statutes § 106-1044 (relating to agricultural emergencies).

2. Emergency response immunity applies to Mon Power

For the reasons addressed above, there can be no doubt that Mon Power is entitled in this case to the immunity from suit granted by W.Va. Code § 15-5-11.

Legislative purpose and structure supports immunity to all emergency responders, including private entities

The entirety of the emergency response statute reflects the unambiguous intent to bring the marshalling of the disaster relief resources of the state and local governments, as well as all private entities, under the control of the government. The statement in Section 15-5-11(a) that "[a]ll functions hereunder and all other activities relating to emergency services are hereby declared to be governmental functions..." is unambiguous and demonstrates the Legislature's intent to bring the complete control of every facet of the response to a disaster into the government's control. W.Va. Code § 15-5-11(a). In emergency response, the government plays the most critical role, as the agents of the state and its political subdivisions are in charge and give the orders.

In addition, the list of emergency response activities listed in W.Va. Code §15-5-2(a) includes "firefighting services, police services, medical and health services, communications, radiological, chemical and other special weapons defense, evacuation of persons from stricken areas, emergency welfare services, emergency transportation, existing or properly assigned functions of plant protection, temporary restoration of public utility services and other functions related to the health, safety and welfare of the citizens of this state." This comprehensive list further reflects the legislative intent that everything possibly related to a emergency response is meant to be controlled by the government. W.Va. Code §15-5-2(a).

This well understood and expected concept, that the State and its political subdivisions have the power to direct all emergency responders, would be completely frustrated by a limited grant of immunity that protected only the individual members of private entities who are responding, but not the entity itself. Such a limited grant would

be illusory and would provide no real protection against liability to the companies, volunteer groups, and other organizations who pitch in to help, and who often are the sole defendant in lawsuits. Interpreting W.Va. Code § 15-5-11(a) so as not to cover the entities as well as their employees would actually operate as a disincentive for any private entity to cooperate with the government.

Instead of moving quickly to assist in an emergency, no private entity would ever act in anything other than the most deliberate and cautious manner, without regard to the public need, and would absolutely refuse to take any action directed by the government, unless and until it the entity itself had itself determined that the government was choosing the wisest, safest, and most litigation-free course of action, a choice that likely will be contrary to that of both the direction and needs of the government, and potentially will favor the interests of the private entity over the interests of the people as a whole. If W.Va. Code § 15-5-11(a) were to be construed to limit immunity only to employees of emergency responders, it would create a fractured emergency response system in which the government would not be in control of the response effort and would actually endanger lives and property. This is completely contrary to the expressed intent of the Legislature.

Statutory construction also supports immunity of private entity emergency responders

An additional applicable rule of statutory construction provides that the Legislature is presumed to understand the full scope of the law of the State of West Virginia, and its actions are considered within the meaning of the existing law. *Kessel v. Monongalia County General Hosp. Co.*, 220 W.Va. 602, 611-612, 648 S.E.2d 366, 375-376 (2007), *quoting*, Syl. Pt. 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E.385 (1908) and

Syl. Pt. 2, *Stephen L.H. v. Sherry L.H.*, 195 W.Va. 384, 465 S.E.2d 841 (1995)("A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it was intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same...[w]hen the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch")(further citations omitted). In other words, the Legislature knows and understands what this Court has stated about the matters it legislates on and enacts its statutes in accordance with that law. *Id.*

Applying this rule to West Virginia Code § 15-5-11(a), when it enacted the emergency response statute, the Legislature surely was aware of one of the most basic tenets of agency law, that a principal is liable for the acts of the agent, but is only liable to the extent of the liability of the agent. *Dunn v. Rockwell*, 225 W.Va. 43, 62, 689 S.E.2d 255, 274 (2009)("[T]he employer may only be held liable to the extent that the employee can be held liable..."); *quoting, Kocis v. Harrison*, 543 N.W.2d 164, 168-169(Neb., 1996)("If an employee is not liable, the employer cannot be liable under the doctrine of respondeat superior. The principal's liability is derived solely from that of its agent."). Therefore, if the agent commits a tort, the principal is liable. *O'Dell v. Universal Credit Co.*, 118 W.Va. 678, ___, 191 S.E. 568, 571 (1937)(further citations omitted). But, if the agent is not liable, for whatever reason, then the principal cannot be liable either. *Dunn*, 225 W.Va. at 62, 689 S.E.2d at 274 (further citation omitted). This Court has recognized this as the law of West Virginia. *See*, *Gray v. Marshall County Bd.*

of Educ, 179 W.Va. 282, 286, 367 S.E.2d 751, 755 (1988)(A "corporation, as a single business entity, acts with one mind."); *see also, Beasley v. Mayflower Vehicle Systems, Inc.*, No. 13-0978, 2014 WL 2681689 at 3 (2014)(Memorandum Decision); *quoting, Princeton Ins. Agency, Inc. v. Erie Ins. Co.*, 225 W.Va. 178, 187 690 S.E.2d 587, 596 (2009)("It is axiomatic that a corporation acts only through its officers, agents, and employees..."), *citing, Gray*, 179 W.Va. at 286, 367 S.E.2d at 755).

In the context of W.Va. Code § 15-5-11(a), application of this rule of construction operates to include the emergency response employer in the grant of immunity that is expressly extended to the employee Under *Dunn*, there is no question that, if the agent is immune, then so is the principal, because liability may be imposed on the principal only to the extent of the liability of the agent. *Dunn*, 225 W.Va. at 62, 689 S.E.2d at 274

This view has been confirmed elsewhere. In *Sharp v. Town of Highland*, 665 N.E.2d 610 (Ind., 1996), the only other case found where another court has examined a similar statute in this context, the Indiana Court of Appeals found that because the statute immunized the employees of a public utility who acted at the direction of the government in an emergency, the utility was also immune. Indiana Code 10-4-1-8(a)[9] reads almost identically to W.Va. Code § 15-5-11(a):

> All functions hereunder and all other activities related to civil defense and disaster are hereby declared to be government functions. Neither the state nor any political subdivision thereof nor any other agencies of the state or political subdivision thereof, nor, except in cases of wilful misconduct, gross negligence, or bad faith, any civil defense and disaster worker complying with or reasonably attempting to comply with this chapter, or any order, rule or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other

[9] Subsequently recodified at I.C. 10-14-3-15.

> precautionary measures enacted by any political subdivision of the state, shall be liable for the death of or injury to persons, or for damage to property, as a result of such activity....

I.C. 10-4-1-8(a). Similarly, subsection (c) of the same statute reads in parallel with W.Va. Code § 15-5-11(c): "civil defense and disaster worker" includes "any full or part-time paid, volunteer, or auxiliary employee of this state, or ... [other government entity] ..., or any agency or organization, performing civil defense and disaster services ... [while] ... subject to the control of, or pursuant to a request of, the state government or any political subdivision thereof." I.C. 10-4-1-8(c)[10].

In *Highland*, the facts were nearly identical to this case. There was a flood, and the government needed the assistance of the local electrical utility to help deal with the problem. *Highland*, 665 N.E.2d at 613. Specifically, an official of the City of Highland, in that case, the fire chief, directed the electrical utility to leave certain electrical lines energized. *Highland*, 665 N.E.2d at 616. Unfortunately, another worker inadvertently contacted one of those electrical lines and was fatally injured. *Highland*, 665 N.E.2d at 613.

The Plaintiff estate made the same argument as Respondents; that the language of I.C. 10-4-1-8(c) applies to individuals, not to entities. *Highland*, 665 N.E.2d at 615. The Indiana Court of Appeals disagreed. It held, "[t]he Estate attempts to impose liability upon [the electrical utility] as a corporate entity for its employees' alleged negligence upon the doctrine of *respondeat superior.* If [electrical utility] employees are immune from liability, then there is no basis for imputing negligence to [the electrical utility]." *Highland*, 665 N.E.2d at 615. It therefore affirmed the trial court's ruling stating

[10] Subsequently recodified at IC 10-14-3-3.

that "[the electrical utility] is therefore immune from the claims of plaintiff in this case." *Highland*, 665 N.E.2d at 615 & 618.

The immunity granted in W.Va. Code § 15-5-11(a), by operation of law, reaches both the agent and the principal. To do otherwise creates an absurd result.

Statutory language also makes private entity emergency responders immune

The statutory language demonstrates the Legislature intended for the immunity to reach every emergency responder involved, whether an individual or entity. The language of Sections 15-5-1 and 15-5-6(c)(1), authorizing the government "to assume direct operational control" of "private agencies of every type" covers every possible group, entity, or business present in West Virginia. W.Va. Code §§ 15-5-1 and 15-5-6(c)(1). The statutory immunity conferred by W.Va. Code § 15-5-11(a) reaches not only the individual, but also his employer.

Application of the law to the facts leads to this conclusion. Greenbrier County was under a State of Emergency, duly declared by the Governor, at all times pertinent to this case. App. 220-221 & 222-223. Mon Power also meets the necessary legal definitions under the emergency responder statute, either as a matter of statutory construction or by operation of law. Respondents have admitted that Mon Power was working to temporarily restore public utility services caused by flooding. App. 10. Mon Power's actions to restore the power to the wastewater treatment plant were taken solely upon the order of the City of Ronceverte, a political subdivision of the State of West Virginia. App. 227, 228, and 229-230.

When the undisputed facts, the pertinent statutory definitions, and the other provisions of the statute, taken together with the Legislature's intent to bring all emergency response under the control and responsibility of the State and its political subdivisions, it is apparent that W.Va. Code § 15-5-11(a) makes Mon Power immune from suit by the Respondents. The Complaint's allegations and the only possible evidence concerning the order from the City of Ronceverte to Mon Power show that, at all times relevant to this matter, Mon Power was acting at the express direction of the City, Mon Power acted exactly in compliance with the City's order to restore power to the wastewater treatment plant, and Mon Power engaged only in activities relating to post-flood restoration of public utility services, that is, electrical service and wastewater treatment service. Pursuant to the statutory provisions discussed above, there is no question that an employee of Mon Power, as an agency or organization performing the post-flood restoration of public electrical service and wastewater treatment service, under the direction of the City of Ronceverte (through its employee Pam Metz), a political subdivision of this state, and complying with the order of the City of Ronceverte to restore electrical service to the City's wastewater treatment facility (a public utility) cannot be liable – *i.e.,* is immune – for the injury to Respondents as a result of the restoration of the aforementioned public utility services. Accordingly, the statute, by its own terms, its intent, and operation of basic agency law, provides Mon Power immunity from suit to the same extent as its employees who carried out the City's order.

As for the statute's exemption, "willful misconduct" in this case would mean that Mon Power deliberately disobeyed the order of the City of Ronceverte to restore power and the Respondents' damages flow from such disobedience. It is undisputed,

however, that Mon Power performed exactly the order it received from the City of Ronceverte: to restore power to the wastewater treatment plant. Indeed, that is the basis of the Complaint against Mon Power. App. 13. Thus, there was no misconduct, willful or otherwise.

Accordingly, there is no issue of fact to be determined and no question that Mon Power is entitled to the statutory immunity of W.Va. Code § 15-5-11(a) extended to emergency services workers.

3. Circuit Court's order is erroneous

The Circuit Court's order contains numerous errors of law, which led the lower court to an incorrect conclusion.

First, the Circuit Court incorrectly found that the definition of "duly qualified emergency service worker" expressly excludes the private entity the employee was working for. App. 368. This is incorrect.

A simple reading of W.Va. Code § 15-5-11(c) shows there is nothing in the statute that "expressly" excludes anything. There is not a single word that states that anything, including a private entity, is excluded. *See generally*, W.Va. Code § 15-5-11(c).

Instead, what the terms of the statute shows is the Legislature's intent to expand the scope of the immunity to cover all emergency responders, including private entities, and fidelity to this Court's century-old rule in *Snyder* that the Legislature knows the state of the law as it is, and understands when it drafts new legislation that it will be interpreted by this Court in accordance with the law; therefore, the rule of *Dunn* applies

– that an employer may only be held liable to the extent that the employee can be held liable. W.Va. Code § 15-5-11; *Snyder*, 64 W.Va. 659 at Syl. Pt. 5, 63 S.E.385 at Syl. Pt. 5; *Dunn* 225 W.Va. at 62, 689 S.E.2d at 274. Contrawise, the Circuit Court's view would leave a gaping hole in the statute, sabotaging the Legislature's intent to promote a unified and harmonious emergency response system and creating a substantial impediment to the protection of lives and property.

The Circuit Court further was incorrect in its conclusion that the "willful misconduct" exception could save the claims against Mon Power from dismissal. App. 383. The Circuit Court handles this point in a summary fashion. *Id.* It does not make any finding of law as to the proper definition of the term "willful misconduct," nor does it explain how it is possible, under any definition, for Respondents to make any showing that the exception applies. *Id.*

Moreover, this view runs directly counter to this Court's pronouncements that immunities are from suit and not merely an affirmative defense. *Marple*, 236 W.Va. at 660, 783 S.E.2d at 81 (2015). Nor does the Circuit Court provide an explanation for this Court to examine, as was requested below. App. 279; *Cf., State ex rel. Massachusetts Mutual v. Sanders*, 228 W.Va. 749, 761, 724 S.E.2d 353, 365 (2012), *quoting, State ex rel. Allstate Insurance Co. v. Gaughan*, 203 W.Va. 358, 361, 508 S.E.2d 75, 78 (1998).

The Circuit Court also erroneously states, without any support in law or fact, "that there are material facts in dispute which hinders and makes any dispositive ruling on the issue of immunity premature at this early stage in discovery," and further notes that the Motion is based on the depositions of only two witnesses. App. 383.

First, as a matter of law, this Court should recall that immunity exists not only "to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery." *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cit., 1997), *citing, Mitchell v. Forsyth*, 457 U.S. 511, 526 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)(internal quotes omitted); *see also, Marple*, 236 W.Va. at 660, 783 S.E.2d at 81. The three courts with jurisdiction over matters in West Virginia[11] uniformly hold that immunity questions must be resolved as soon as possible, in order to effectuate the immunity from suit, and that continuing discovery beyond what is necessary to establish the factual basis for the immunity motion is not permitted. *Yoak v. Marshall Univ. Bd. of Governors*, 223 W.Va. 55, 59, 672 S.E.2d 191, 195 (2008)(per curiam); *citing, Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1185 (10th Cir., 2001)("[S]paring the defendant from having to go forward with an inquiry into the merits of the case includes the burden of discovery."); *Hutchison*, 198 W.Va. at 148. Therefore, as a matter of law, once the foundational facts have been established – and here, they are undisputed – the motion becomes ripe for adjudication.

As a practical matter, no additional discovery is required to establish the facts relevant to application of the subject statute, nor did the Respondents identify any additional, relevant evidence that was needed for that purpose. There were only two parties to the conversation wherein the order to restore the power to the City's wastewater treatment plant was conveyed from the City to Mon Power. One party, Ms. Hawver, had complete recollection, while the other, Ms. Mentz, could not recall, but admitted that she had contacted Ms. Hawver at Mon Power directly for service in the

[11] This Court, the Fourth Circuit, and the Supreme Court of the United States.

past. App. 232-233. No further discovery can change this, as there were no other parties to the call, and as a matter of law, any changed testimony by Ms. Mentz would be insufficient. *See, Collins v. Nationwide Mut. Ins. Co.*, No. 14-0357 at 4, 2015 WL 869255 at 4 (2015)(Memorandum decision), *quoting, Kiser v. Caudill*, 215 W.Va. 403, 405, 599 S.E.2d 826, 828 (2004)(discussing the "sham affidavit" rule).

Considering the Court's recognition that immunity issues should be decided early, it was incumbent upon the Respondents to provide to the Circuit Court more than a bald face claim that more discovery is required. *Cf.* Syl. 1, *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 695, 474 S.E.2d 872, 875 (1996)(holding that to resist dispositive motion under Rule 56 on grounds that additional discovery is needed, opponent of motion "should (1) articulate some plausible basis for the party's belief that specified 'discoverable' material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier"). Respondents have not made any attempt meet the requirements of *Powderidge*. Their only claim on discovery was in a boilerplate footnote, focused solely on an erroneous definition of "willful misconduct". App. 248. The fact that Respondents had such little faith in the value potential additional discovery shows this request is merely a smokescreen.

Finally, the Circuit Court did not examine the policy behind, or structure of, the emergency response statute, completely disregarding the basic requirement of agency

law that the liability of the principal cannot exceed the liability of the agent. The Order is completely devoid of any analysis explaining the Circuit Court's erroneous avoidance of the question that apparently the Legislature intended to pass a statute with the effect of hindering emergency response and endangering the lives and property of the citizens of West Virginia.

4. Respondents are not without remedy

An additional effect of this immunity statute, recognized in this Court's only opinion addressing W.Va. Code § 15-5-11, is a liability shift to the City of Ronceverte, so as not to leave Respondents without a remedy. In *Jackson*, this Court found that when an agency of the State involved in the case has liability insurance pursuant to *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983), all potential liability shifts to that entity. *Jackson*, 232 W.Va. at 520, 753 S.E.2d at 18. In other words, the governmental entity that directed that the public utility services be restored assumes the liability for the consequences, as the statute is explicit that these actions are deemed to be the actions of the government. This is also a practical result as it was the City's electric panels, not Mon Power's, that were involved in the alleged injury.

In this case, similar to *Jackson*, there is no question that the City of Ronceverte directed Mon Power to restore power to the City's wastewater treatment plant. App. 13. Thus, the Respondents may have the opportunity to seek a recovery from the City of Ronceverte for its decision, as provided for under *Pittsburgh Elevator*.

CONCLUSION

Under W.Va. Code § 15-5-11(a), Petitioner Monongahela Power Company is immune to Respondents' suit alleging injury by its temporary restoration of public utility services at the Ronceverte wastewater treatment plant pursuant to the City's order. As a result, this Court should reverse the Circuit Court of Kanawha County and remand the case with instructions to enter an order dismissing Respondents' claims against Monongahela Power Company, *with prejudice*.

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