IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MONONGAHELA POWER COMPANY,

Petitioner,

v. No. 19-0228

MICHAEL A. BUZMINSKY and
VICKIE BUZMINSKY,

Respondents.

REPLY 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

Respondents' Statement of the Case requires a brief reply on one point.[1]

The Court can easily be left with an incorrect impression of Monongahela Power Company's (hereinafter, "Mon Power") duty in this case. Respondents suggest that Mon Power had some legal duty to take action on the electrical equipment owned and operated solely by the City of Ronceverte. R. Br. 1. This is incorrect. The National Electrical Code specifically directs that the electrical utility is responsible for inspection only to the first point of electrical cutoff, i.e., the "main switch." App. 50. It is undisputed that Respondent's injury occurred on equipment beyond that point. App. 12.

SUMMARY OF REPLY ARGUMENT

West Virginia Code § 15-5-11 provides immunity to Mon Power as an emergency responder. The statute's purpose, construction, and language all demonstrate not only individuals, but entities, are immune as emergency responders.

An entity like Mon Power can only act through its agents. All liability to Mon Power flows exclusively from the liability of its agents. Because those agents have immunity, there is no way for them to impute any liability to their master. None of the cases cited by Respondents in any way question this point. All address situations which are not relevant here.

[1] Respondents engaged in multiple instances of argument throughout their Statement of the Case. Those arguments will be addressed in the reply argument section.

Respondents quibble with the title of the order from the City of Ronceverte. Their argument with word choices has no support. Such semantics flies in the face of the well understood concept that orders from the government are to be obeyed, however politely they are phrased. Respondents' suggestion that Mon Power cannot rely on directions from a government agent, especially in an emergency situation, is courting disaster in the real world and has no legal or practical support.

The idea that no one may have greater immunity in a particular situation than the State is without legal authority. If accepted by this Court, this novel concept would render this statute, and others, a nullity, because this Court has previously held that this statute does not immunize the State.

Respondents ask this Court to impose a regime would endanger the lives and property of the citizens of West Virginia, in derogation of the intent of the Legislature in granting this immunity, as it would result in private entities declining to participate in disaster recovery or severely limiting their actions through methods intended to replace the immunity W.Va. Code § 15-5-11(a) now provides them. This Court should decline that invitation.

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, pursuant to Rule 20, as the resolution of this

immunity question could severely impact the manner in which emergency assistance is provided by private entities during in future disasters.

REPLY ARGUMENT

West Virginia Code § 15-5-11 provides immunity to Mon Power

Purpose, construction, and language all fit with immunity

Contrary to what Respondents urge this Court to conclude, the West Virginia Emergency Response statute, specifically West Virginia Code § 15-5-11(a), does provide immunity to Mon Power in this case.

As discussed exhaustively in the opening brief, the purpose, construction, and language of the statute all are geared toward maximizing the contribution of every resource, including the specific enumeration of "private agencies of every type." W.Va. Code § 15-5-1; *see generally*, P. Br. 7-22.

This Court has previously held that "[t]he language of the statute is only the beginning point. To determine legislative intent, we start with the text of the statute in question and then move 'to the structure and purpose of the Act in which it occurs.'" *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 338, 472 S.E.2d 411, 423 (1996)(Cleckley, J.), *quoting, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Justice Cleckley continued, "[i]ndeed, statutory interpretation 'is a holistic endeavor...and, at a minimum, must account for a statute's full text, language as well as punctuation, structure and subject matter." *Boone*, 196 W.Va. at 338, 472 S.E.2d at 423, *quoting, United States Nat'l Bank of Or. V. Independent Ins. Agents of Am., Inc.*,

508 U.S. 439, 455 (1993). Respondents seek to have this Court focus in tightly on only a small portion of the statute, rather than examine it as Justice Cleckley and the Supreme Court of the United States have prescribed, as a wholly integrated document, with a purpose which must be considered along with the terms.

W.Va. Code § 15-5-11 would be irrational if "the structure and purpose of the Act in which is occurs" were not considered. Respondents' position would leave a gaping hole in the statutory scheme, by giving protection from suit to everyone helping the citizens of West Virginia recover from a disaster, except private entities. To do so would create a situation where private entities would be discouraged from assisting in emergency response, which clearly runs contrary to the statute's purpose.

As but one example, if Respondents' view were correct, then if a Boy Scout Troop had turned out to help with the flood recovery, was asked by the City of Ronceverte to remove debris from a street, and accidentally broke a window, the Boy Scouts of America itself might be found liable for all damages, even though its Scouts would be individually immune, subjecting the Troop to potential liability it could avoid simply by not helping with the recovery. This is not what the Legislature did or intended in writing W.Va. Code § 15-5-11.

Mon Power only acts through its agents

Respondents act as if a company like Mon Power were a natural person, capable of its own independent acts. R. Br. 1 & 18. In other words, the outcome sought by Respondents would necessarily be based on a legal fallacy that Mon Power has some ability to act when its agents do not. *Id.* They cite no law for this concept.

Instead, it is well-settled that a corporate entity acts only through its agents. *Beasely v. Mayflower Vehicle Systems, Inc.*, No. 13-0978, 2014 WL 2681689 at 3 (W.Va., 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 v. Marshall County Bd. of Educ.*, 179 W.Va. 282, 286, 367 S.E.2d 751, 755 (1988). A company has no independent ability to do anything itself; it needs its agents to act for it. *Id.* Therefore, any act of Mon Power is, by definition, also an act of at least one of Mon Power's agents.

Respondents' entire argument to this Court hinges on this point: they somehow believe, in complete derogation of both law and reality, that Mon Power is a corporation incarnate, a living being capable of taking action on its own, without the agency of an employee. In the absence of a legally recognized ability of a corporation to act independently of its employees or other representatives, Respondents are attempting to impose vicarious liability on Mon Power for the actions of its employee(s) who are themselves immune. There is not, and never has been, an employee or agent of Mon Power who is not immune under the facts of this case; therefore, there is no potential liability upon which to impose vicarious liability on Mon Power. Respondents have asserted no basis for liability against Mon Power that is not based on actions taken by its employees or agents.

Joint tortfeasor is not the same as immunity

Respondent attempts to avoid this issue by conflating two very different concepts of tort law. They seek to have this Court confuse the concept of joint tortfeasors with *respondeat superior.* R. Br. 21. Respondents believe that just because an entity is a joint tortfeasor, it necessarily has some independent existence that avoids the need for the entity to take some action itself, or through a liable agent.

Respondents contend that the immunity of the agent does not defeat *respondeat superior*, and thus, does not make Mon Power immune as an emergency responder. Unfortunately, the law cited by Respondents does not stand up to scrutiny. Not a single case cited in Respondents' brief addresses the situation presented here. Instead, all of the authority relied on by Respondents address far different concepts in the law, none of which apply to this situation. These include bankruptcy, accord and satisfaction, settlement, and circumstances that do not relate to master-servant liability.

Respondents try to analogize by citing cases involving bankruptcy, accord and satisfaction, settlement, and other issues. R. Br. 19, *citing, e.g., State ex rel. Bumgarner v. Sims*, 139 W.Va. 92, 79 S.E.2d 277 (1953); *Woodrum v. Johnson*, 210 W.Va. 762, 599 S.E.2d 908 (2001); *O'Dell v. Universal Credit Co.*, 118 W.Va. 678, 191 S.E. 568 (1937). The problem here is that none of these decisions address the immunity of an employee or agent of a corporate entity. Unlike the immunity granted by W.Va. Code § 15-5-11(a) to emergency responders, which is an incentive to those responders long before a suit is filed to act to save lives and property, bankruptcy, accord and satisfaction, and settlement are subsequent legal events that occur as part

of litigation. None is a pre-suit grant of immunity – they simply implicate later events that bar recovery from an agent or employee.

The other cases cited by Respondents all address situations where there is a immunity, but none that are applicable to this situation. Common law parental immunity, already severely limited, has no application to this case. *Freeland v. Freeland*, 152 W.Va. 332, 162 S.E.2d 922 (1968). There is no master-servant relationship between parent and child. The workers' compensation cases are of no help to the Respondents' position, either. *Jackson v. Belcher*, 232 W.Va. 513, 753 S.E.2d 11 (2013). They either address a variation of accord and satisfaction, or the wholly separate, and statutorily circumscribed, concept of deliberate intent. In a deliberate intent claim, the question is the Legislature's *abrogation* of immunity for the employer; the opposite concept than that discussed with the grant of immunity to emergency responders. W.Va. Code § 23-4-2(d).

Respondents cite no case which eliminates the well-established law that a master is only as liable as his servant, and that if the agent is not liable, then neither is the master. *See, 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.")(further

citations omitted).[2] Absence of the agent's liability means Mon Power cannot be liable here either.

Immunity of emergency response fits with the rest of the United States

Respondents argue that the law of W.Va. Code 15-5-11(a) does not provide immunity to Mon Power because of the law of other states and attempts to distinguish statutes that, on their face, are identical to West Virginia's. R. Br. 14.

The language of the statutes cited in Mon Power's opening brief (P. Br. 14) is the same, or nearly so, to W.Va. Code § 15-5-11, later changes to other states' statutes notwithstanding. While some states may have seen fit to amend their statutory immunities, that is not the case in West Virginia. *Post hoc* changes elsewhere provide no support to Respondents on this statute.

The same holds true for *Sharp v. Town of Highland*, 665 N.E.2d 610 (Ind. Ct. App., 1996). Respondents cannot really attack the facts and law from *Highland*, so they instead try to attack the Indiana Court of Appeals, claiming there is not a good analysis of the nearly-identical Indiana statute. This is folly. As is plain from the text of the case, in *Highland*, just as here, the government (a city, just like Ronceverte), directed that the power be energized because it was deemed necessary for the good of the population. *Highland*, 665 N.E.2d at 613 & 616. The resultant injury, while unfortunate, was the result of that order, just as the injury here was allegedly the result of the order by the City of Ronceverte to restore power to the wastewater plant. The Indiana Court of

[2] Respondents suggest that *Dunn* is relatively recent. As this Court noted, the law supporting the limitation of the master's liability to that of the servant extends to at least 1937. Syl. Pt. 3 & 4, *O'Dell*, 118 W.Va. 678, 191 S.E. 568 (1937). This is not new law.

Appeals correctly found the electric utility was covered by the immunity of its employee, and enforced the immunity.[3]

Orders of the government are obeyed

Respondents quibble with the concept of orders from the government. As a political subdivision of the State of West Virginia, the City of Ronceverte has law enforcement powers. Like any reasonable person, a utility such as Mon Power, does not distinguish between orders, demands, requests, or other euphemisms or synonyms when it comes to the directive of an agent of the government in the throes of a disaster when both are attempting to address emergency conditions.

Further, the call from the City of Ronceverte was not simply a request from a customer, such as a non-emergency request for the lights to be turned on in a warehouse. Quite to the contrary, as pled by Respondents, this was the City of Ronceverte making a demand for its citizens, as well as passing on the demands of the State Department of Environmental Protection; a demand made while an emergency declaration was in place. App. 12, 220-223. The need to restore power to the City's wastewater plant, for the disaster recovery of the entire community, were well understood by all parties concerned with addressing, or experiencing, such conditions.

Respondents seem to believe that it would appropriate somehow for Mon Power, and potentially others assisting with emergency response, to question the orders received from government officials, by parsing the position of the individual

[3] Respondents' reliance on later events in the history of *Highland* is irrelevant. The questions raised in that case are not raised here, and that part of the Indiana statute is significantly different. This Court should note that *Highland* has not been overruled by the Indiana courts and remains good law today.

communicating the directive, the authority that individual has, and whether that person is the "proper" person to be making the call. As a consequence of their position, Respondents necessarily also ask this Court to impose a regime where, if a government body is in need of emergency assistance, it is forced to utilize only designated people to direct outside agencies, whose authority is well understood by anyone they call, instead of fully utilizing their personnel, such as in this case, having a clerical person who is capable of manning the phones and was familiar with Mon Power and the needs of the wastewater treatment plant pass on the direction to restore power to the plant, relieving skilled personnel of the task of outside communications. This is facially nonsensical.[4]

The effects of this sort of logic, requiring "orders" to be made only in a certain manner or by specified individuals, or both, would go far beyond this case and extend to every time a government agent directed an outside agency to do anything. They would impact the police calling for someone to open a door to check a burglar alarm, regulatory agencies of every type requesting records from their regulated entities, and even the Courts communicating with the parties to a suit.[5] Requiring this sort of parsing and deciding in the middle of a crisis if a communication is a request, an order, or something else, and whether the particular government agent making the communication is the proper person to be part of that communication, would be horribly

[4] This is the equivalent of government stating that only certain people in a household are allowed to call 911.

[5] A good example of this is the conduct of the parties in this case. Although it is well-settled law in this state that "a Court speaks only through its orders" (*State ex rel. Gallagher Basset Services, Inc. v. Webster*, __ W.Va. __, __, 829 S.E.2d 290, 295 n.6 (2019)), the parties have erred on the side of caution and taken the emails of the Circuit Court's law clerk as orders of the Circuit Court.

inefficient, unduly burden the government's resources during the event, and would not further the purposes of the statutory scheme adopted by the Legislature.[6]

Finally, Respondents' own argument accepts the communication at issue, between Mon Power and a City of Ronceverte employee, as an "order" under the immunity statute. They concede that Mon Power's agents are immunized by W.Va. Code § 15-5-11(a).[7] R. Br. 17. However, the statutory immunity of Mon Power's agents would flow solely from the fact that those same agents were acting upon the "order," as the term is used in the statute, of the City of Ronceverte. App. 227. Therefore, if those agents would be immune, then the order to return power to the wastewater plant was also that – an order.

In this case, there was no question that Mon Power did what it was told to do – restore the power to the wastewater treatment plant – and it did so both because the Department of Environmental Protection ordered the City to get the power on to the plant, as well as for the benefit and storm recovery of the citizens of the City of Ronceverte.

This immunity system functions as designed

Respondents attempt to attack the structure of the immunity created by the Legislature, suggesting that Mon Power could not possibly enjoy this immunity because the State itself does not have similar immunity in this situation. R. Br. 28. This view ignores both the purpose of the immunity and how it operates in practice.

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[6] Indeed, questioning the orders of a government agent can sometimes be considered obstructing an officer, a misdemeanor criminal offense. W.Va. Code § 61-5-17.

[7] This acknowledgement contradicts Respondents' argument that an emergency responder's immunity cannot be greater than that of the State.

This immunity, unlike some others in this State, does not protect the State at all, because *Pittsburgh Elevator* permits claims against the State and its subdivisions under the circumstances specified in that opinion. *Jackson*, 232 W.Va. at 517, 753 S.E.2d at 17 (2013); *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983). Rather, the immunity at issue here is intended to protect those who help and act at the direction of those in charge of disaster recovery: the State, its agencies, and local governments. It is an enticement from the State to encourage these private entities to cooperate in helping the population when there is a disaster and to allow those governmental entities to do what needs to be done in those cases, unimpeded by "too many cooks in the kitchen."

If Respondents are correct, and the State cannot create an immunity that accrues to an entity that it does not also enjoy, then this entire statute is a nullity.[8] It is well settled, since almost the founding of this State, that the Legislature does not enact a pointless statute. Syl. Pt. 2, *Slack v. Jacob*, 8 W.Va. 612 (1875)("It is always to be presumed that the Legislature designed the statute to take effect, and not to be a nullity.").[9] This makes Respondents' view impossible for this Court to support.

Respondents would have this Court rewrite this statute so that no one receives immunity under the statute. If it is impermissible for anyone to have more immunity than the State, and this Court has determined that this statute does not provide the State immunity because of *Pittsburgh Elevator*, then W.Va. Code § 15-5-11, contrary to its

[8] There is another statute this Court would implicitly invalidate: the West Virginia Governmental Tort Claims and Insurance Act, W.Va. Code §§ 29-12A-1 et seq. That Act protects only political subdivisions, not the State itself.

[9] This case predates the Southeast Reporter.

terms, and the acknowledgement of the Respondents, has no effect at all. Respondents' argument is irrational.

Respondents would completely upend the emergency response system of this State. Under this statute, in the case of a declared emergency, emergency responders, including "private agencies of every type," are able to follow the instructions of government agents expeditiously and without fear of liability for difficult situations that arise during such crises. Without that protection, that degree of cooperation may likely end. Utilities would likely instead refuse or delay action on an expedited basis; demand indemnity agreements before providing assistance; or, as Respondents apparently believe would have been appropriate here, require time-consuming inspections far beyond anything the law or industry standards require in such circumstances, before citizens could have their utilities restored. Without statutory immunity, a utility or other service provider may elect to protect its own interests while exercising extreme caution, disregarding the press of time in an emergency situation as a reason to act expeditiously. Under those circumstances, in the context of an emergency declaration, there would be expected delays, added expense, and increased risks to local citizens, who depend on the sanitation services provided by the wastewater treatment plant. This is exactly the opposite of what the West Virginia Emergency Response statute is intended to do. This Court should reject Respondents' invitation to eviscerate the system of protection for emergency responders the Legislature created.

This Court should uphold emergency responder immunity for private entities

There is no question that W.Va. Code § 15-5-11(a) provides immunity to emergency responders, including their employers, who are "private agencies of every type." The purpose, construction, and language of the statute all support this conclusion. It is undisputed that the City of Ronceverte, through its agent, called Mon Power's agent and directed that the power to the City's wastewater treatment plant be restored, so that the City's requirement, imposed by the Division of Environmental Protection, to restore wastewater services to the citizens of the City, could be completed. It is undisputed that Mon Power complied with that order.

Accordingly, pursuant to W.Va. Code § 15-5-11(a), Mon Power is immune from suit for the consequences of its compliance with the order of the City of Ronceverte.[10]

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[10] In the interest of preventing confusion, Mon Power strongly denies it was negligent for its actions in this case.

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, subject matter jurisdiction is lacking, and 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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CERTIFICATE OF SERVICE

I hereby certify that on the September 16, 2019, I served the foregoing **"REPLY BRIEF OF PETITIONER"** upon counsel of record by hand or by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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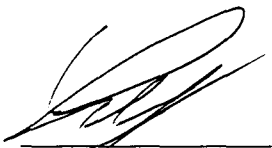

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