DO NOT REMOVE
FROM FILE

FILE COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 19-0228

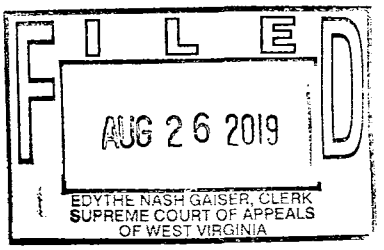
MONONGAHELA POWER COMPANY,

Petitioner,

v.

MICHAEL A. BUZMINSKY and
VICKIE BUZMINSKY,

Respondents.



BRIEF OF RESPONDENTS

Counsel for Respondents,
Michael A. Buzminsky and
Vickie Buzminsky

STEPHEN B. FARMER (W.Va. State Bar No. 1165)
ROBERT A. CAMPBELL (W.Va. State Bar No. 6052) - *Counsel of Record*
BRIAN E. BIGELOW (W.Va. State Bar No. 7693)
JENNIFER D. ROUSH (W.Va. State Bar No. 11165)
FARMER, CLINE & CAMPBELL, PLLC
746 Myrtle Road (25314)
Post Office Box 3842
Charleston, WV 25338
(304)-346-5990
racampbell@fcclaw.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

West Virginia Statutes and Rules

Out of Jurisdiction Statutes

Secondary Sources

STATEMENT OF THE CASE [1]

Respondent Michael A. Buzminsky ("Mr. Buzminsky") suffered severe burns on July 1, 2016 while working on an electrical panel at a wastewater treatment plant ("Plant") operated by the City of Ronceverte, West Virginia (the "City"). *Appendix* ("*App.*") 12. The Plant's electrical panels had been submerged in water due to the Greenbrier River flooding on June 23, 2016. *App.* 9. To restore operations at the Plant following the flood, the City obtained a generator to power the Plant's pumps. *App.* 10-11. Due to concerns about unknown damage to the Plant's electrical panels, the generator was directly wired to individual pieces of equipment, as opposed to wiring the generator to the electrical panels. *App.* 10.

On June 29, 2016, while the Plant's pumps were still being powered by the generator, Mon Power restored direct electrical power to the Plant. *App.* 10. Shortly after power was restored, it was discovered that the Plant had lost one phase of its three phase electrical system, and Mon Power returned to the Plant a second time on June 30, 2016. *App.* 10. On that occasion, Mon Power determined that the loss of an electrical phase was due to an electrical problem with the Plant. *App.* 10. Despite this determination and Mon Power's knowledge that the Plant's electrical panels had been submerged in water, Mon Power left the Plant energized. *App.* 10.

Respondents allege that Mon Power negligently, carelessly and recklessly energized the Plant or left the Plant energized: (a) despite the fact that the electrical panels had been submerged in water; (b) despite knowing that the Plant had lost one phase and that there

---

[1] Pursuant to Rule 10(d) of the *West Virginia Rules of Appellate Procedure*, the purpose of the Respondents' Statement of the Case is to correct various inaccuracies in the Petitioner's brief and to provide relevant facts which were omitted.

was an electrical problem with the Plant; (c) without the high level of care required of electric companies; and (d) in derogation of company and industry standards. *App.* 10-13. Mon Power claims that it is statutorily immune from these claims pursuant to West Virginia Code § 15-5-11.

The Circuit Court rejected Mon Power's immunity arguments and concluded that the definition of "duly qualified emergency service worker" in W.Va. Code § 15-5-11(c) is specifically limited to individuals and not corporations. *App.* 382. Further, the Circuit Court determined there was no evidence that Mon Power was acting as an employee of the City when it energized the Plant. *App.* 383. Finally, the Circuit Court determined that even if Mon Power could fit within the definition of a "duly qualified emergency service worker," it could not be immune for acts of "willful misconduct."[2] *App.* 383. Therefore, the Circuit Court denied the Petitioner's motion to dismiss. *App.* 384.

In the Petitioner's Statement of the Case, Mon Power asserts at least a half-dozen times that it was "ordered" or "directed" by the City to restore power. *Brief of Petitioner*, pp. 1-3. The Petitioner also claims that it "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."[3] *Brief of Petitioner*, p. 2. There is absolutely no evidentiary support for these assertions.

---

[2] The Circuit Court found that the Respondents' Complaint sufficiently alleges that Mon Power's actions or inactions rose to the level of willful misconduct. *App.* 383. The Court also granted the Respondents leave to file an amended complaint to further specify the claims, if the Respondents choose to do so. *App.* 384.

[3] The only support Mon Power cites for this "fact" is page 10 of the Appendix, which is actually the Respondents' Complaint. *See Brief of Petitioner*, p. 2.

Mon Power admitted in discovery that it had no communications with the State during the relevant time period. *App.* 75; *see also App.* 25. With regard to the City, Mon Power initially stated that it had no communications with the City prior to the incident involving Mr. Buzminsky. *App.* 75-76.[4] Now, however, Mon Power asserts that it was "directed" and "ordered" by the City of Ronceverte to restore power.[5] *Brief of Petitioner*, 1-2.

Regardless of how many times Mon Power states that the City "ordered" or "directed" it to restore power, the evidence and testimony to date are limited as follows:

(1) No oral or written plan or agreement of any type has been identified or produced regarding what, if any, emergency services would be provided by Mon Power to the City or the conditions under which such services would be provided;

(2) The only communication the City had with Mon Power about restoring power to the Plant prior to Mr. Buzminsky's incident was an alleged phone call from a City bookkeeper, Pam Mentz, ("Ms. Mentz") who has no memory of the call.[6] *App.* 130;

(3) At the time of the alleged call, Ms. Mentz did not have any role under the City's emergency plan. *App.* 125, 128. Further, Ms. Mentz testified that:

---

[4] When asked about communications with the City, Mon Power only identified one – a recording of a call made by a City employee to Mon Power, alerting Mon Power of the incident and Mr. Buzminsky's injuries. *App.* 75-76.

[5] Mon Power apparently did not realize it was working at the direction of the government until after it had engaged in discovery, claiming that it was the testimony of Mon Power employee, Donna Hawver, that "provided the factual predicate." *Brief of Petitioner*, p. 3.

[6] The alleged communication between Ms. Hawver and Ms. Mentz, as well as documents prepared by Ms. Hawver, were not properly disclosed in discovery. *App.* 75-76, 130-131,143-201. This limited the ability of counsel for the Respondents and the other parties to effectively question both Ms. Mentz and Ms. Hawver. During Ms. Mentz's deposition, when it became apparent that counsel for Mon Power was questioning her about alleged communications which should have been identified in response to Respondents' discovery requests, counsel for the Respondents objected and reserved the right to re-open the deposition. *App.* 130-131. The ability to question Ms. Hawver was similarly frustrated by Mon Power's failure to comply with its discovery obligations, such that counsel for all parties, except Mon Power, agreed to adjourn the deposition. *App.* 170-175, 178, 200-201.

> I would call them [Mon Power] if they [sewage plant] said check on something. I could check and give someone a time or what they thought of it, maybe an ETA of stuff. But I could never tell them [Mon Power] to do something of that nature [having power turned back on at the Plant]. That is not – that's not my job to do that. *App.* 132;

(4) The Mon Power employee who recalled the call, Donna Hawver ("Ms. Hawver"), did not testify that Ms. Mentz or anyone with the City "directed" or "ordered" Mon Power to do anything, and did not testify that Ms. Mentz or anyone else requested any type of emergency services. *App.* 143-201;

(5) In fact, Ms. Hawver testified that Ms. Mentz simply stated "they were ready, the sewer plant was ready to be turned back on." *App.* 180;

(6) Ms. Hawver claims she told Ms. Mentz to call the 800 number that customers are typically asked to call. According to Ms. Hawver, Ms. Mentz supposedly stated that she had called the 800 number first, but did not have the account number to give to the customer service person who answered the phone. *App.* 180; and

(7) As a result of the call that Ms. Hawver allegedly received, Ms. Hawver claims she created an internal Mon Power work "order" to start the process of having a worker sent out to the Plant, just like for any other customer who called in and asked that their power be restored. *App.* 180-182.

Based on this evidence, the Circuit Court concluded that Mon Power was not acting as an employee of the City and, therefore, is not immune from suit. *App.* 383.

SUMMARY OF ARGUMENT

(1) West Virginia Code § 15-5-11 provides no immunity to Mon Power; and

(2) Mon Power cannot assert vicarious immunity through its individual employees as vicarious immunity has been rejected by this Court, the Fourth Circuit Court of Appeals, the Restatement (Second) of Agency, and many other courts.

The longstanding common law goal in West Virginia is to compensate injured parties for damages caused by the negligence of others. Any law that provides a defendant with

immunity is in derogation of the common law and must be strictly construed.

The plain and clear language of West Virginia Code § 15-5-11 provides no immunity to Mon Power. Specifically, since Mon Power is neither the State nor an agency of the State, nor a political subdivision or agency of a political subdivision, it is not entitled to immunity under W.Va. Code § 15-5-11(a). Additionally, Mon Power does not fit within the definition of a "duly qualified emergency service worker" under W.Va. Code § 15-5-11(c). Thus, the express terms of the statute provide no immunity to Mon Power. Further, although the statute needs no interpretation, any and all reasonable interpretations of the statute support the same conclusion.

The only way to shoehorn Mon Power into the immunity provisions of West Virginia Code § 15-5-11 is to read into the statute that which is not there. First, Mon Power asks this Court to legislate from the bench and rewrite the plain and clear language of the statute in order to redefine and broaden the ambit of persons and entities entitled to immunity. Then, if that doesn't work, Mon Power asks this Court to make it vicariously immune for any acts by its employees. The only way to do this is to disregard the longstanding law of this and many other states, the law of the Fourth Circuit Court of Appeals, and the Restatement (Second) of Agency, all of which reject the concept of vicarious immunity.

If this Court were to adopt Mon Power's arguments, the end result would entitle Mon Power to even greater immunity than the State itself. This would be an absurd result.

As Mon Power enjoys no immunity under West Virginia Code § 15-5-11, the Circuit Court's decision to deny Mon Power's motion to dismiss was not in error.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is appropriate under Rule 19 of the *West Virginia Rules of Appellate Procedure* as the case presents a narrow issue of law as to whether Mon Power is entitled to immunity under West Virginia Code § 15-5-11. Further, a memorandum decision is appropriate for deciding this narrow issue.

ARGUMENT

A. STANDARD OF REVIEW

Whether or not a statute provides immunity is a question of law that is subject to *de novo* review. Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996); Syl. Pt. 3, *Steager v. Consol Energy, Inc.*, No. 18-0121, 2019 WL 2414962 (W.Va. June 5, 2019)(citations omitted). However, if there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate question of statutory immunity is **not** ripe for summary disposition. Syl Pt. 1, *Hutchison*, 198 W.Va. 139, 479 S.E.2d 649 (emphasis added).

B. THE CIRCUIT COURT DID NOT COMMIT ERROR IN DENYING THE MOTION TO DISMISS WHERE THE CLEAR LANGUAGE OF WEST VIRGINIA CODE § 15-5-11 DOES NOT PROVIDE MON POWER WITH IMMUNITY.

The plain and unambiguous language of West Virginia Code § 15-5-11 does not provide Mon Power with any immunity. While the provisions provide specific entities and certain individuals with immunity while performing emergency services, Mon Power does not qualify as any of the listed entities or individuals. The immunity provisions specifically state, in pertinent part:

> 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.

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

The plain language of the statute only provides immunity (except in cases of willful misconduct) to the following entities and individuals:

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

See W.Va. Code § 15-5-11(a). Mon Power infers that it qualifies for immunity as a "duly qualified emergency service worker." However, the statute limits a "duly qualified emergency service worker" to employees of the entities listed in the statute. In W.Va. Code § 15-5-11(c)(1), the Legislature defined "duly qualified emergency service worker" 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) (emphasis added).[7] The definition specifically limits the immunity to individual **employees**:

(1) **of** this State;
(2) **of** any other State, territory, possession or the District of Columbia;

[7] West Virginia Code § 15-5-11 provides two additional definitions for "duly qualified emergency service worker" which are not applicable. *See* W.Va. Code § 15-5-11(c)(2)-(3).

(3) **of** the federal government;
(4) **of** any neighboring country or political subdivision thereof;
(5) **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.[8]

See W.Va. Code § 15-5-11(c) (emphasis added). Mon Power simply does not meet the definition of "duly qualified emergency service worker."

"A cardinal rule of statutory construction is that significance and effect must . . . be given to every section, claim, word or part of the statute." *Jackson v. Belcher*, 232 W.Va. 513, 518, 753 S.E.2d 11, 16 (2013) (citing Syl. pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999)).[9] In doing so, the Court should look first to the statute's language and if the plain meaning of the statute answers the question, the language must prevail and further inquiry is foreclosed. *See State ex rel. Gallagher Bassett Services, Inc. v. Webster*, 829 S.E.2d 290, 296 (2019) and *Jackson*, 232 W.Va. 513, 518-519, 753 S.E.2d 11, 16-17 (citing *Appalachian Power Co. v. State Tax Dep't. of W.Va.*, 195

---

[8] The word "**of**" in W.Va. Code § 15-5-11(c) limits immunity to employees of the entities performing emergency services listed in the statute and does not provide immunity to the entities themselves. *See* Syl. Pt. 3, in part, *Osborne v. United States*, 211 W.Va. 667, 567 S.E.2d 677 (2002)(emphasis added)(it is presumed that the legislature has a purpose in the use of every word, phrase, and clause found in a statute and intended the terms so used to be effective).

[9] W.Va. Code § 15-5-11(c) clearly and unambiguously only provides immunity to employees of the entities listed in the definition. After the first use of the phrase "employee of," the word "of" appears three additional times immediately following a comma. Each time "of" appears in this manner, it does so at the beginning of a descriptive phrase defining who is entitled to immunity. If the word "employee" did not modify each of these descriptive phrases, the word "of" would have no effect, and the statutory grant of immunity would be nonsensical. For instance, in describing those that are immune it would make no sense to grant immunity to "of the federal government." However, by giving effect to each word in the statute, including the repeated use of the word "of," it is clear that the word "employee" modifies each phrase beginning with the word "of." Thus, immunity is thereby granted to any employee of the listed entities, including, by way of example, any employee of the federal government who otherwise meets the remaining statutory requirements.

W.Va. 573, 587, 466 S.E.2d 424, 438 (1995)). Further, "[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." *Jackson*, 232 W.Va. 513, 518, 753 S.E.2d 11, 16 (citing Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968)).

Applying the plain language of West Virginia Code § 15-5-11, Mon Power does not meet the statutory definition of a "duly qualified emergency service worker." Mon Power apparently agrees, as its brief is devoid of any analysis of how it could possibly meet the statutory definition. Instead, Mon Power devotes its argument to arguing that the Legislature intended to include all "emergency responders" within the term "duly qualified emergency service worker," despite a clear statutory definition that says otherwise. As the statutory definition is clear, no further interpretation is necessary. Accordingly, the Circuit Court did not commit error in denying Mon Power's motion to dismiss and that decision should be affirmed.

C. THE CIRCUIT COURT DID NOT COMMIT ERROR IN DENYING THE MOTION TO DISMISS WHERE NO REASONABLE INTERPRETATION OF WEST VIRGINIA CODE § 15-5-11 PROVIDES MON POWER WITH ANY IMMUNITY.

Immunity provisions are in derogation of common law. *See Calabrese v. City of Charleston*, 204 W.Va. 650, 656, 515 S.E.2d 814, 820 (1999) and Syl. Pt. 3, *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007). As such, this Court has specifically directed:

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

Syl. Pt. 2, in part, *Calabrese*, 204 W.Va. 650, 515 S.E.2d 814 (emphasis added) (citing Syl.

Pt. 2, *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996) and Syl. Pt. 1, *Brooks v. City of Weirton*, 202 W.Va. 246, 503 S.E.2d 814 (1998)). Any attempt to interpret immunity provisions beyond the actual terms must be strictly construed in a way that **favors liability, and opposes immunity**. *See* Syl. Pt. 2, in part, *Calabrese*, 204 W.Va. 650, 515 S.E.2d 814; *see also Phillips*, 220 W.Va. 484, 492, 647 S.E.2d 920, 928 (emphasis added). In fact, **if there is any doubt** about the meaning of a statute that is in derogation of common law, the statute must be interpreted as not providing immunity. Syl. Pt. 5, *Phillips*, 220 W.Va. 484, 647 S.E.2d 920 (emphasis added). Further, a statute may not "under the guise of interpretation, be modified, revised, amended or rewritten." Syl. Pt. 5, in part, *Steager*, 18-0121, 2019 WL 2414962 (W.Va. June 5, 2019)(citations omitted). All reasonable attempts to interpret the statute in accordance with these longstanding legal principles result in but one conclusion – Mon Power cannot satisfy the statutory definition of "duly qualified emergency service worker" as it applies only to employees of those entities listed in the statute.

1. The Legislature clearly intended to immunize individual employees and not employers like Mon Power.

The Legislature chose to define "duly qualified emergency service worker" narrowly and the fact that the Legislature limited the definition to individual employees should be honored as an explicit intent to exclude employers from the definition. This Court has long honored the maxims that the express mention of one thing implies the exclusion of another and that courts should assume that certain omissions from a statute by the Legislature are intentional. *See* Syl. Pt. 5, *Young v. Apogee Coal Co., LLC*, 232 W.Va. 554, 753 S.E.2d 52 (2013) (citations omitted). The fact that the Legislature expressly chose to use the word

"employee" implies that it specifically intended to exclude employers from the definition.

Subsection (d) of West Virginia Code § 15-5-11 further evidences the Legislative intent in that the Legislature again refers to duly qualified emergency service workers as individuals by referring to them as "his" and "her" and "he" and "she":

> A duly qualified emergency service worker performing **his or her** duty in this state pursuant to any lawful agreement, compact or arrangement for mutual aid and assistance to which the state or a political subdivision is a party shall possess the same powers, duties, immunities and privileges **he or she** would possess if performing the same duties in **his** or **her** own state, province or political subdivision thereof.

W.Va. Code § 15-5-11(d) (emphasis added). Had the Legislature intended to include corporate employers in the definition, it would not have used the terms "employee," "his," "her," "he" and "she" which expressly reference individuals.

What the Legislature wrote is enough to conclude that Mon Power doesn't fit within the definition. However, what the Legislature did not write is also instructive. In the definitions for Chapter 15, Article 5, the Legislature defined "person" in such a way that it includes corporations: a "person" is "any individual, corporation, voluntary organization or entity, partnership, firm or other association, organization or entity organized or existing under the laws of this or any other state or country." W.Va. Code § 15-5-2(k). Despite this definition, when selecting a term for the immunity provisions in W.Va. Code § 15-5-11, the Legislature chose to use the term "employee," as opposed to "person."

Importantly, in the very next section following W.Va. Code § 15-5-11, the Legislature grants immunity to "**[a]ny person** owning or controlling real estate or other premises who voluntarily and **without compensation**" allows the property to be used for shelter during an emergency. *See* W.Va. Code § 15-5-12 (emphasis added). Unlike the immediately

preceding immunity provision, the Legislature used the term "person" in W.Va. Code § 15-5-12 to indicate that not just individual land owners are immune, but companies who allow their land to be used for shelter without compensation are also immune. Had the Legislature wanted to provide immunity to companies in W.Va. Code § 15-5-11, it would have used the term "person," as it did in W.Va. Code § 15-5-12. It did not, which again evidences an intent to only immunize individual employees of the entities identified in W.Va. Code § 15-5-11(c).

2. The Legislature specifically states when it intends to grant immunity to employees, as well as their employers.

In addition to W.Va. Code § 15-5-12, there are other instances where the West Virginia Legislature has granted immunity to both employees and employers. When doing so, the Legislature expressly provides for dual immunity. For instance, in West Virginia Code § 55-7-26 (the "first responder statute"), the Legislature granted immunity to first responders for civil or criminal damages resulting from the good faith forcible entry of a home, business, or other structure. In doing so, the Legislature specifically stated that the immunity belongs to "first responders" and "his or her supervisor, agency, employer, or supervising entity." *Compare* W.Va. Code § 15-5-11 to W.Va. Code § 55-7-26. Similarly, with regard to the third-party administration of a workers' compensation claim, the Legislature expressly provided immunity to both the private carrier or third-party administrator and any employees or agents of the private carrier or third-party administrator. *See* W.Va. Code § 23-2C-21; Syl. Pt. 2, *State ex rel. Gallagher Bassett Services*, 829 S.E.2d 290.

On the other hand, the Legislature has provided no immunity to either employees or employers for deliberate intent actions brought under W.Va. Code § 23-4-2(d)(2)(A), but has provided immunity to employees – not employers– for deliberate intent actions brought under W.Va. Code § 23-4-2(d)(2)(B). *See Adkins v. Consolidation Coal Co.*, 856 F.Supp.2d 817, 824 (S.D. W.Va. 2012); *see also Young*, 232 W.Va. 554, 561, 753 S.E.2d 52, 59 (the Legislature's express reference to "person" in (d)(2)(i) and the omission of a commensurate reference in (d)(2)(ii) is unmistakable of the Legislature's intent).[10]

Had the Legislature intended to grant immunity to both the duly qualified emergency service worker and his or her private employer, the Legislature would have used express language to do so. The Legislature did not. Therefore, West Virginia Code § 15-5-11 should not be interpreted more broadly than it is written. As such, Mon power does not meet the definition of a duly qualified emergency service worker under any reasonable interpretation and, thus, the Circuit Court's decision was not in error and should be affirmed.

3. Many of the "nearly identical statutes" the Petitioner cites are completely different from West Virginia Code § 15-5-11.

The Petitioner claims that West Virginia's emergency response statute is not unique and that many other jurisdictions "have nearly identical statutes, using almost identical words to provide similar immunity." *Brief of Petitioner*, 14. Despite this bold assertion, many of the fifteen statutes the Petitioner cites differ substantially from West Virginia Code § 15-5-11.

---

[10] While the Courts in *Adkins* and *Young* analyzed the prior version of W.Va. Code § 23-4-2(d), the language upon which the Courts relied is the same as the current version of the statute. *See* W.Va. Code § 23-4-2(d)(A)-(B).

For instance, the Petitioner cites to a North Carolina statute as being "nearly identical." *Brief of Petitioner*, 14. The North Carolina statute however is far different from W.Va. Code §15-5-11. First, the North Carolina statute grants immunity to emergency management workers, but also expressly grants immunity to corporations. *See* N.C.G.S. § 166A-19.60(a). A further difference is found in the fact that the North Carolina statute limits a corporation's immunity to factual situations where the corporation acted without compensation.[11] *See* N.C.G.S. § 166A-19.60(b). Finally, the North Carolina statute also provides that corporations waive any immunity to the extent that they have insurance. *Id.* Thus, the North Carolina statute is nothing like the West Virginia statute and it is baseless to claim otherwise.

The Petitioner also cites an Alabama emergency service immunity statute as being "nearly identical." *Brief of Petitioner*, 14. Again, completely unlike West Virginia Code § 15-5-11, the Alabama statute specifically includes within its grant of immunity, emergency management workers, as well as partnerships, associations, and corporations. *See* Ala. Code § 31-9-16(b) (emphasis added). As such, the Alabama statute is also completely different from West Virginia's statute.

Mon Power also cites to other statutes from Arkansas, New Hampshire, New York, North Carolina, and even the Poarch Creek Indian Tribe. Again, the Petitioner declares these statutes "nearly identical" to West Virginia Code § 15-5-11. *Brief of Petitioner*, 14. However, just like the Alabama and North Carolina statutes, these other statutes differ quite substantially from West Virginia Code § 15-5-11 in that they expressly include private entities and corporations in the immunity granting provisions. *See* AR ST § 12-75-103 and

[11] Or with compensation limited to actual expenses.

128 (Arkansas emergency responder immunity statute includes "entity" within the definition of emergency responder); N.H. Rev. Stat. § 21-P:41 (New Hampshire statute includes corporations in its definition of emergency management workers); N.Y. Unconsol. Law § 9193 (McKinney) (New York statute includes corporations and partnerships as those immune for emergency work); N.C.G.S. § 106-1044 (North Carolina statute specifically lists partnerships and corporations as immune for responding to an agricultural emergency); and Poarch Band Cr. Ind. Code § 29-3-1 (includes partnerships and corporations within the definition of those immune). There is absolutely no basis to claim that these statutes are nearly identical to the West Virginia statute.

Given the very different terms, those statutes have no bearing on this case and, if anything, support the argument that had the West Virginia Legislature intended to provide immunity to corporations it would have included language like the legislatures of these other states.

4. The Indiana Court of Appeals case of *Sharp v. Town of Highland* is not applicable where West Virginia has long rejected the concept of vicarious immunity.

Mon Power also cites an Indiana statute in support of its statutory interpretation argument. *Brief of Petitioner*, 19. The Indiana statute was at issue in the Indiana intermediate state court decision of *Sharp v. Town of Highland*, upon which Mon Power also cites in support of its statutory interpretation arguments. *Sharp v. Town of Highland*, 665 N.E.2d 610 (Ind. Ap.1996). While the statutory language in Indiana's statute may be similar to W.Va. Code § 15-5-11, Mon Power completely ignores key factual and legal differences that make *Sharp* inapplicable to the application of W.Va. Code § 15-5-11.

In *Sharp*, the City was building a dike to deal with a flood.[12] *See Sharp*, 665 N.E.2d 610, 613. Unlike the factual situation in this case, officials for the City in *Sharp* were deemed to be in ultimate control of the utility company's employees who were working at the site as the City specifically told the workers what to do. *Sharp*, 665 N.E.2d at 616. Further, the *Sharp* opinion contains no analysis or discussion as to how the utility company would itself qualify for immunity as a "civil defense and disaster worker" under the statute. *Sharp*, 665 N.E.2d at 616. As noted by the United States District Court for the District of Kansas, the Court in *Sharp* "gave the matter no serious discussion" and failed to cite a single authority for its proposition that the company was shielded from liability by the individual workers' immunity. *Garcia v. Estate of Arribas*, 363 F.Supp.2d 1309, 1320 (D.Kan.,2005). Indeed, it appears that the court in *Sharp* found that the utility company was vicariously immune simply on the basis that the City was exercising control over the utility company's employees. As discussed below, the *Sharp* opinion is not only factually distinguishable, but also legally distinguishable in that this Court, the Fourth Circuit Court of Appeals, the Restatement (Second) of Agency, and many other jurisdictions have rejected the vicarious immunity principle upon which the *Sharp* decision is apparently based. Accordingly, the Indiana statute and the *Sharp* decision are irrelevant to the facts and applicable law in this case.[13]

---

[12] Unlike in this case, the *Sharp* decision was appealed not on a motion to dismiss, but on a motion for summary judgment. *Id.*

[13] The Petitioner also fails to recognize two other interesting facts about *Sharp*. First, despite the intermediate appeals court finding that the utility company was potentially immune, the case was remanded for the trier of fact to determine whether or not the utility company's acts constituted willful misconduct, gross negligence, or bad faith, such that it lost immunity. Id. at 618. After the case was remanded, the jury found the utility company at fault and the case was then appealed to Indiana's highest Court, the Supreme Court, which upheld the jury's

5. Even if Mon Power could establish that it was working at the direction, control, or at the request of the State or City, Mon Power is still not entitled to immunity.

Mon Power devotes considerable time to arguing that it restored power at the direction, control or request of the City. Assuming *arguendo* that Mon Power is correct, Mon Power would still not qualify as a "duly qualified emergency service worker" since the statute only provides immunity to "**employees 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." W.Va. Code § 15-5-11(c). Thus, while an individual working subject to the order, control, or request of the City may qualify for immunity, the employer (in this case Mon Power) is still not entitled to immunity under the statute.

Additionally, there is no evidence that any Mon Power employee was working under the direction or control of the City. While the City may have requested that its power be turned back on, Mon Power has not offered any evidence to show that the City, in any way, directed or controlled the work of any Mon Power employee. Unlike the factual situation in Sharp, the record is simply devoid of any evidence that the City was in charge of, directing or controlling the utility company's work. *Sharp*, 665 N.E.2d at 616.

---

verdict. *Northern Indiana Public Service Co. v. Sharp*, 790 N.E.2d 462 (Ind. 2003). The Circuit Court's opinion in this case also acknowledges that the Respondents' Complaint can be read to include an allegation that Mon Power's actions constituted willful misconduct such that the motion to dismiss was not appropriate as even if Mon Power was deemed a duly qualified emergency service worker, Mon Power would not be immune for its acts of willful misconduct, just like in the final outcome of the Sharp case. *App.* 383. *See also Northern Indiana Public Service Co.*, 790 N.E.2d 462. Although Mon Power attempts to redefine "willful misconduct" as "deliberate disobedience," Mon Power fails to cite any authority for the interpretation, other than a somersault through dictionary definitions, none of which use the term obey. Proving willful misconduct does not require evidence that Mon Power deliberately disobeyed any order or request.

Despite Mon Power's attempt to characterize the City's request as a controlling directive or order, the fact of the matter is that the City was an existing customer of Mon Power and if the City made any request, it did so as any other customer and not as a City asserting control in an emergency situation.

Mon Power also grasps at the general purpose provision for the entire article, listed in W.Va. Code § 15-5-1, to argue that the immunity provisions in W.Va. Code § 15-5-11 should be interpreted to include private entities. Interestingly, the purposes listed in West Virginia Code § 15-5-1 do not even mention immunity. *See* W.Va. Code §15-5-1. The purposes (which again relate to the entire article) deal with the creation of the Division of Homeland Security and Emergency Management and confer upon the Governor certain emergency powers. *See* W.Va. Code § 15-5-1, *et seq.* The purpose provision referenced by Mon Power states:

> It is further declared to be the purpose of this article and the policy of the state that **all homeland security and emergency management funds and functions of this state be coordinated** to the maximum extent with the Secretary of the Department of Military Affairs and Public Safety and with the comparable functions of the federal government including its various departments and agencies, of other states and localities and of private agencies of every type, so that the most effective preparation and use may be made of the nation's and this state's manpower, resources and facilities for dealing with any disaster or large-scale threat that may occur.

W.Va. Code § 15-5-1 (in part)(emphasis added).

The purpose provision actually proves the Respondents' point: Mon Power's acts in restoring power to the Plant were not the result of a coordination of state and city resources, facilities, and funding. Mon Power was at the Plant as a business that was servicing a customer's account. The customer just happened to be a City, which has no

effect on the plain and limited immunity providing provision of W. Va. Code § 15-5-11. Accordingly, Mon Power is not entitled to immunity and the Circuit Court's decision to deny its motion to dismiss was not in error and should be affirmed.

D. WEST VIRGINIA HAS LONG REJECTED MON POWER'S VICARIOUS IMMUNITY ARGUMENT, WHICH WOULD CAUSE THE ABSURD RESULT OF GIVING PRIVATE CORPORATIONS MORE IMMUNITY THAN THE STATE ITSELF.

In an apparent acknowledgment that it does not qualify as an employee of any entity entitled to immunity under W.Va. Code § 15-5-11, Mon Power then pivots and argues that its employees would be immune and, therefore, Mon Power should be vicariously immune through its employees.[14] More specifically, Mon Power claims over and over again that under the doctrine of respondeat superior, if its employees are immune from suit and thus cannot be held liable, then Mon Power, as the principal or employer, can also not be liable. *Brief of Petitioner*, 17-20. The fatal flaw in Mon Power's argument is it wholly ignores the longstanding law in this State, the Fourth Circuit Court of Appeals, the Restatement (Second) of Agency (1958), and numerous other jurisdictions which expressly reject vicarious immunity for employers. *See Smith v. Smith*, 116 W.Va. 230, 179 S.E. 812 (1935); *Freeland v. Freeland*, 152 W.Va. 332, 337-338, 162 S.E.2d 922, 926 (1968) (overruled on other grounds by *Lee v. Comer*, 159 W.Va. 585, 224 S.E.2d 721 (1976) (abrogating parental immunity in the context of automobile accidents)); *Woodrum v. Johnson*, 210 W.Va. 762, 768-769, 559 S.E.2d 908, 914-915 (2001); Restatement (Second) Agency § 217 (1958); *Garcia*,363 F.Supp.2d at 1318-1319.

---

[14] No claims were made against any employee of Mon Power. Also, Mon Power is liable for its own negligent acts in regard to its failure to follow applicable industry and company standards and procedures in the restoration of power following the flood. *See Harless v. First Nat. Bank in Fairmont*, 169 W.Va. 673, 684, 289 S.E.2d 692, 699 (1982) (citing Syl. Pt. 4, *Humphrey v. Virginian Railway Co.,* 132 W.Va. 250, 54 S.E.2d 204 (1948)).

Contrary to Mon Power's argument, the law in West Virginia is that the principal is not immune just because the agent is immune. Rather, the agent's negligent acts (even if he or she is immune) are imputed to the principal such that the recovery can be had from the principal alone.

1. Even where an employee is immune, his or her negligent act is still imputed to the employer under West Virginia law.

This Court has long recognized that the right of action against an employer "is separate from that of the act of the agent, and if the act was negligent, the principal is liable **although the agent may not, under the law, be held accountable**." *Smith*, 116 W.Va. 230, 179 S.E. at 812 (holding that an owner of an automobile is liable under the doctrine of respondeat superior for its driver-agent's negligent acts regardless whether the driver-agent enjoys immunity)(emphasis added). The reason for holding the employer responsible is that an employee's negligent acts are imputed to the employer. *See Griffith v. George Transfer & Rigging, Inc.*, 157 W.Va. 316, 324–25, 201 S.E.2d 281, 287 (1973); *see also Musgrove v. Hickory Inn, Inc.*, 168 W.Va. 65, 281 S.E.2d 499 (1981). Simply put, the doctrine is "one of vicarious liability, not vicarious immunity," so any immunity an employee may enjoy does **not** protect the employer. *Pavelka v. Carter*, 996 F.2d 645, 651 (4th Cir. 1993). Therefore, the law in West Virginia is completely the opposite of what Mon Power argues: an employer in West Virginia is **not** immune just because the employee is immune.

The prohibition of vicarious immunity in West Virginia is directly in accord with the Restatement (Second) of Agency § 217(b)(ii) which states, in part:

> In an action against a principal based on the conduct of a servant in the course of employment ... [t]he principal has no defense because of the fact that ... the agent had an immunity from civil liability as to the act.

As recognized by the Court in *Garcia*, many jurisdictions "have either expressly adopted the rule from Restatement (Second) of Agency § 217, or have crafted their own rules which are essentially the same as that of the Restatement. *See Garcia*, 363 F.Supp.2d at 1318-1319 (citing numerous cases from other jurisdictions indicating the Restatement position represents the rule in a majority of jurisdictions).

2. West Virginia law regarding joint tortfeasors supports the longstanding rejection of vicarious immunity.

Under West Virginia law, a negligent employee and his or her employer are considered joint tortfeasors. *See O'Dell v. Universal Credit Co.*, 118 W.Va. 678, 191 S.E. 568 (1937) (plaintiff's cause of action against employee and his employer was in its nature joint and several liability); *see also State ex rel. Bumgarner v. Sims*, 139 W.Va. 92, 111, 79 S.E.2d 277, 289 (1953) ("the relation of master and servant in those cases, in which the doctrine of *respondeat superior* applies, is joint, and the parties should be regarded as though they were joint tort-feasors") (citations omitted); *see also Griffith*, 157 W.Va. at 324–25, 201 S.E.2d at 287; *see also* Syl. Pt. 2, *Harless v. First Nat. Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982) (quoting Syl. Pt. 3, *Musgrove*, 168 W.Va. 65, 281 S.E.2d 499); *see also* Syl. Pt. 4, *Humphrey v. Virginian Railway Co.,* 132 W.Va. 250, 54 S.E.2d 204 (1948) (holding that where an action is against an employer and his employee, liability of the employer "is not predicated solely upon the employee's negligence, but upon the negligence of another employee, or that of the employer himself, [and] a verdict against the employer and exonerating the employee is not inconsistent."). Given their joint liability, an injured party can choose to sue either of the joint tortfeasors, or both. *See Bumgarner*, 139 W.Va. 92, 79 S.E.2d. 277.

For example, in *Bumgarner*, a prison guard shot Bumgarner, a person he incorrectly presumed was an escaped convict. *Bumgarner*, 139 W.Va. at 96, 79 S.E.2d at 282. Bumgarner then sued the guard and obtained a judgment. *Id.* The prison guard filed bankruptcy and the judgment was discharged. *Id.* at 97, 282. Bumgarner then pursued a claim against the guard's employer - the State of West Virginia. *Id.* The Court found that the bankruptcy discharge was personal to the guard and did not serve to vitiate Bumgarner's claim against the employer. *Id.* at 118, 293. The basis for this decision was the fact that the employer and employee were considered joint tortfeasors. *Id.* at 117, 292.

Moreover, even where both the employer and employee are sued, under West Virginia law a voluntary settlement with and release of the employee does not operate to release the employer whose liability is vicarious or derivative. *See* Syl. Pt. 3, *Woodrum*, 210 W.Va. 762, 559 S.E.2d 908. In fact, even in cases where both are sued but the employee is dismissed (for a reason other than an adjudication on the merits), the plaintiff may still proceed against the employer. Syl. Pt. 1, *O'Dell*, 118 W.Va. 678, 191 S.E. 568.

In *O'Dell*, the estate of a person killed in a car accident sued both the negligent driver and the company for which the negligent driver was working. *O'Dell*, 118 W.Va. 678, *, 191 S.E. 568, 570. The estate voluntarily dismissed the negligent driver, but the claim continued against the employer because they were joint tortfeasors. *Id.* Importantly, the Court noted that had the driver been exonerated (i.e., found not negligent), then the claim against the employer would have failed. *Id.* Again, the reason for the decision is that it is the negligent act of the tortfeasor that is imputed to the employer. *See* Syl. Pt. 4, *O'Dell*, 118 W.Va. 678, 191 S.E. 568.

These decisions are consistent with West Virginia's long rejection of vicarious immunity.[15] That is, regardless of whether the employee is included in the suit, dismissed from the suit, judgment proof, or immune, the employer can still be liable as it is the negligent act that is imputed. If the employee's actions are found to be negligent and a proximate cause of a plaintiff's injuries, any immunity the employee may enjoy does not relieve the employer from liability for the immunized negligent acts of its employee. *See Smith*, 116 W.Va. 230, 179 S.E. 812; *see also Freeland*, 152 W.Va. 332, 337-338, 162 S.E.2d 922, 926 (overruled on other grounds by *Lee*, 159 W.Va. 585, 224 S.E.2d 721 (1976) (abrogating parental immunity in the context of automobile accidents)). Just as with the tortfeasor's bankruptcy in *Bumgarner*, any immunity is personal to the employee and may not be used by the employer as a defense. *See Bumgarner*, 139 W.Va. at 118, 79 S.E.2d at 293; *see also Garcia*, 363 F.Supp.2d at 1321 (citing Restatement (Second) of Agency §217)).

3. *Dunn v. Rockwell* does not alter West Virginia's longstanding rejection of vicarious immunity.

To support its vicarious immunity argument, Mon Power cites to *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009). *Brief of Petitioner*, 17-18. The *Dunn* Court addressed the question of when the statute of limitations begins to run for an action against an employer based on claims of vicarious liability under respondeat superior. *Dunn*, 225 W.Va. at 62, 689 S.E.2d at 274. The Court decided that the applicable statute of limitations for an action against an employer for vicarious liability under the doctrine of respondeat

---

[15] The decisions are also consistent with the new comparative fault statue, W.Va. Code § 55-7-13d, which allows the comparative fault of an employee to be imputed to the employer. *See* W.Va. Code § 55-7-13d(b).

superior is determined by the tortious act of the employee. Syl. Pt. 12, in part, *Dunn*, 225 W.Va. 43, 689 S.E.2d 255. Specifically, the *Dunn* Court found that the claims against the law firm-employer were time barred, but the claims against the attorney-employee were not time barred, due to questions of material fact regarding the continuing representation rule and because some of the acts were outside the scope of the attorney-employee's employment. *Dunn*, 225 W.Va. at 61, 63, 689 S.E.2d at 273, 275.

In *Dunn*, because the negligent acts of the attorney-employee that could be imputed to the law firm-employer were committed outside the applicable statute of limitations, the vicarious claims against the employer were time barred. *Dunn*, 225 W.Va. at 61, 63, 689 S.E.2d at 273, 275. The holding in *Dunn* does not support Mon Power's assertion of vicarious immunity, but is, in fact, consistent with West Virginia law on respondent superior: the employer and employee are considered joint tortfeasors and both can be held liable for the negligent acts of the employee as it is the negligent act of the employee that is imputed to the employer.

Mon Power attempts to use *Dunn* to show that the Legislature intended to provide immunity to employers in these situations. Mon Power argues 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 existing law." *Brief of Petitioner*, p. 16. Based on this principle, Mon Power argues that when it enacted W.Va. Code § 15-5-11 "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." *Brief of Petitioner*, p. 17 (emphasis omitted), citing *Dunn*, 225 W.Va. 43, 62, 689 S.E.2d 255, 274. The problem with Mon Power's argument is twofold. First, as noted above, the

Dunn decision did not adopt vicarious immunity. Second, the *Dunn* opinion was issued in 2009 and, thus, the Legislature surely wasn't aware of that decision when it last revised W.Va. Code § 15-5-11 in 2006.

The law in the State of West Virginia has long been that vicarious immunity does not exist in West Virginia. Thus, while Mon Power is correct that the Legislature is presumed to be aware of West Virginia law when it enacts legislation, the West Virginia law it would have been aware of when it enacted and revised W.Va. Code § 15-5-11 was the longstanding proposition that employees/agents and their employers/principals are considered joint tortfeasors and the employee's/agent's immunity does not provide vicarious immunity to his or her employer/principal. The provisions of W.Va. Code § 15-5-11 evidence no intent to depart from this firmly established proposition.

4. There is a balance between encouraging service and providing a recovery to injured individuals and the Legislature has balanced those needs by immunizing certain employees without providing immunity to their employers.

With regard to a person providing services during an emergency, the Petitioner is correct that the purpose of providing immunity is to encourage those persons to help when an emergency arises. However, it is also recognized that "[c]harity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing." *Adkins v. St. Francis Hospital of Charleston, W.Va.*, 149 W.Va. 705, 713, 143 S.E.2d 154,159 (1965). Indeed, there is a balance between encouraging good acts and ensuring that those who are injured by careless acts can still be compensated. *See Calabrese*, 204 W.Va. 650, 515 S.E.2d 814. In finding that a statute provided immunity to emergency medical workers but not the workers' employers, the

United States District Court in Kansas noted:

> vicarious liability represents a policy choice that, as between an innocent victim and the otherwise innocent employer of a tortfeasor, the latter should bear the risk that the tortfeasor is incapable of satisfying any judgment arising from his negligence. The employer is better positioned than the victim to mitigate those risks by diligently Selecting and training its employees, purchasing liability insurance, and passing on the added costs to its customers.

Garcia, 363 F.Supp.2d at 1316 (citations omitted).

Judge Copenhaver in the Southern District of West Virginia acknowledged the same policy choice in stating that as between the employer and its offending employee, it is the employer who is customarily liable as "it is the employer who is near always the lone source of funds to redress a deliberate intent workplace injury." *Adkins*, 856 F.Supp.2d 817, 824; *see also Young*, 232 W.Va. 554, 561, 743 S.E.2d 52, 59.

Thus, contrary to Mon Power's argument, the statute strikes a reasonable balance. It provides immunity to individual employees of certain entities, but holds employers liable for the careless acts of their employees so that the common-law goal of compensating injured parties is effectuated.

5. Providing immunity to employees for certain acts is not unique to the Emergency Management Act and does not provide vicarious immunity to their employers.

The incongruent immunities provided to employees versus employers are not statutorily unique to the Emergency Management Act, W.Va. Code § 15-5-1, *et seq.* West Virginia Code § 23-4-2(d)(2)(A)-(B) (2015) is another example of the different treatment our Legislature has afforded employees and their employers. In W.Va. Code § 23-4-2(d)(2)(A), the Legislature provided that immunity may be lost if "the employer or person" against whom liability is asserted acted with consciously, subjectively and deliberately formed

intention to produced the specific result of injury or death to an employee." W.Va. Code § 23-4-2(d)(A). On the other hand, in W.Va. Code § 23-4-2(d)(2)(B) the Legislature did not use the term "person," but rather only the term "employer" in describing the necessary proof required to sustain an action brought against an employer under that subsection. *See* W.Va. Code § 23-4-2(d)(B).

In *Adkins v. Consolidation Coal*, Judge Copenhaver analyzed the differences in the workers' compensation immunity provisions contained within W.Va. Code § 23-4-2(d)(2)(i) and (ii) (2005).[16] *Adkins*, 856 F. Supp.2d 817, 823-824. Judge Copenhaver refused to add words to the statute that are not there and concluded that the Legislature intended to provide immunity to employees, but not the employer under subsection (d)(2)(ii) where the Legislature used the term "employer," as opposed to using the phrase "employer or person" as appears in subsection (d)(2)(i). *Id.* at 824. Judge Copenhaver found the contrast "stark and telling." *Id. See also Young*, 232 W.Va. 554, 561, 753 S.E.2d 52, 59 (the Supreme Court of Appeals of West Virginia has also found that the Legislature's express reference to a "person" in (d)(2)(i) and the omission of a commensurate reference in (d)(2)(ii), which was drafted and enacted at the same time, is unmistakable of the Legislature's intent).[17]

---

[16] Although W.Va. Code § 23-4-2(d) has been amended since the *Adkins* decision, the specific language Judge Copenhaver analyzed and relied upon in *Adkins* remains the same as in the current version of the statute. *See* W.Va. Code § 23-4-2(d)(A)-(B).

[17] In the same way, the Legislature's action is stark and telling in its choice of the word "employee" in defining who is immune under West Virginia Code § 15–5-11, as opposed to using the defined term "person". The Legislature's action in this regard is certainly indicative of the intent to not immunize private entities like Mon Power, even if its individual employees may qualify for immunity. Again, the public policy behind such a distinction is the "general common-law goal of compensating injured parties for damages". *See* Syl. Pt. 2, in part, *Calabrese*, 204 W.Va. 650, 515 S.E.2d 814.

An analysis of W.Va. Code § 23-4-2(d)(2)(B) and cases brought under that subsection prove Respondents' point that the concept of vicarious immunity is contrary to West Virginia law. If West Virginia adhered to the concept of vicarious immunity, as Mon Power argues it should, employers would have no liability under W.Va. Code § 23-4-2(d)(2)(B) for the deliberate intent acts of their immunized employees. This is not the law in West Virginia and never has been. *See Adkins*, 856 F.Supp.2d at 824; *see also Young*, 232 W.Va. at 561, 753 S.E.2d at 59.

6. Mon Power's interpretation would result in an absurdity.

Lastly, to read West Virginia Code § 15-5-11 as Mon Power argues, the Court would have to assume that the Legislature implicitly abrogated the well-established doctrine of respondeat superior without once mentioning the word "employer" or "corporation" in the definition of a duly qualified emergency services worker. *See Garcia*, 363 F.Supp.2d at 1315-1316. Further, to adopt Mon Power's interpretation would create the absurd result of providing a private corporate entity, like Mon Power, greater immunity under W.Va. Code §15-5-11 than the State itself enjoys under the law. *See Jackson v. Belcher*, 232 W.Va. 513, 753 S.E.2d 11.

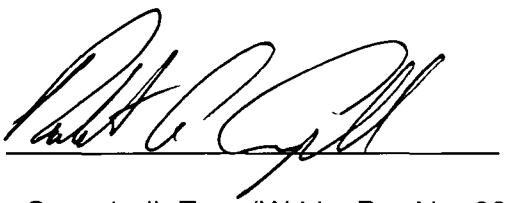
In *Jackson*, there were claims against the State based on the negligent operation of a motor vehicle by a State employee during a state of emergency. *Jackson*, 232 W.Va. 513, 516, 753 S.E.2d 11, 14. This Court held that because W.Va. Code § 15–5–11(a) expressly preserves an individual's right "to receive benefits or compensation to which he or she would otherwise be entitled under ... any other law," an individual may maintain an action against the State and/or its employees for injuries caused in the rendering of emergency services, up to the limits of the State's liability insurance coverage. Syl. Pt. 8,

Jackson, 232 W. Va. 513, 753 S.E.2d 11.[18] Therefore, under W.Va. Code § 15-5-11 the State is not entitled to immunity for the negligent acts of its employee during a state of emergency, up to the limits of the State's liability insurance coverage.

Under Mon Power's warped application of the doctrine of respondeat superior, Mon Power, a private corporate entity, would enjoy greater immunity under W.Va. Code § 15-5-11, than the State. The statute's own language and the long-standing law in West Virginia prohibiting vicarious immunity prevents such an absurd result. Accordingly, any immunity under West Virginia Code § 15-5-11 that may be enjoyed by an employee of Mon Power does not impute to Mon Power.

CONCLUSION

For the reasons set forth above, the Respondents respectfully submit that the Circuit Court did not err by denying Mon Power's motion to dismiss, as Mon Power enjoys no immunity under West Virginia Code § 15-5-11. Therefore, the Respondents request that the Circuit Court's decision be affirmed.

Signed: 

Robert A. Campbell, Esq. (W.Va. Bar No. 6052)
Counsel of Record for Respondents

[18] Mon Power also relies on *Jackson* for the proposition that the Respondents are not without remedy, as any liability of Mon Power is shifted to the City of Ronceverte. However, the City of Ronceverte also enjoys certain immunities and whether or not another person or entity may be jointly liable to the Respondents is irrelevant as to whether Mon Power is entitled to immunity under W.Va. Code § 15-5-11.