IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0578

ADAM GOODMAN AND
PAUL UNDERWOOD,

PETITIONERS,

VS.)

APPEAL FROM AN ORDER OF THE
CIRCUIT COURT OF MERCER COUNTY
CIVIL ACTION NO.: 20-C-75

BLAKE AUTON,

RESPONDENT

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

STATEMENT OF THE CASE

On the morning of March 28, 2018, at 8:05 a.m., the Petitioner Adam Goodman was under the influence of opiates, oxycodone, hydrocodone and hydromorphone while operating a six (6) ton garbage truck. See Appendix page (hereinafter "pg.) 75, 84. On this same day, the Respondent Blake Auton suffered a traumatic amputation of his right leg, from the mid-thigh, because the Petitioner Goodman was high on drugs and drove over his leg. pg. 4, 73.

The Petitioner Goodman was employed at the time by the City of Bluefield - Sanitation Department and the six (6) ton garbage truck was owned by the City of Bluefield. pg. 72 and 73. The Respondent Blake Auton at the time was an employee of the City of Bluefield – Sanitation Department, and was on the back of the garbage truck alongside the Petitioner Paul Underwood also an employee. pg. 72, 74-83.

The incident occurred during their garbage pick-up route when the Petitioner Goodman placed the garbage truck in reverse and recklessly ran over a curb in the road. pg. 72. The force from the truck running over the curb was so great it knocked Blake off the back of the garbage truck and he landed in the road directly behind the truck. Id.

The Petitioner Goodman did not stop. He did not stop to check on Blake or Petitioner Underwood, and he continued to operate the garbage truck in reverse. As a result, he backed over Blake's leg dragging him down the road approximately 30-feet. pg. 3, 74-83.

Only after Petitioner Underwood went to the front of the garbage truck and got the Petitioner Goodman's attention, did he realize that he had run over Blake and moved the garbage truck forward in order to remove the truck off of Blake's leg. Unfortunately, the damage to Blake's leg was already done. *Id.*

Thereafter, the Bluefield City Police Department arrived and investigated the incident. According to the criminal investigation report, Petitioner Goodman appeared shaken and nervous

at the scene. pg. 79. At 10:03 a.m., Petitioner Goodman was taken to Bluefield Regional Medical Center to undergo a mandatory drug screen where it was determined that while he was operating the six (6) ton garbage truck, he was *positive* for *Hydromorphone, Hydrocodone, Oxycodone, and Oxymorphone*, which he had no prescription for and explains why he was shaken and nervous at the scene. pg. 75 and 84.

Although the Petitioner Goodman agues he was "working within the scope of his employment" at the time, the City of Bluefield *did not agree*. As a result of the illegal drug usage while operating a six (6) ton garbage truck and the traumatic injury caused to Blake, Petitioner Goodman was terminated by the City of Bluefield immediately after the incident. pg. 149. According to the investigation concerning the incident, Petitioner Goodman's supervisors with the City of Bluefield suspected he was using drugs for some time. pg. 119.

Additionally, although Petitioner Goodman agues he was "working within the scope of his employment" at the time, the Bluefield City Police Department *did not agree*. As a result of the illegal drug usage while operating a six (6) ton garbage truck and the traumatic injury caused to Blake, he was charged criminally and indicted for Driving in an Impaired State Proximately Causing Serious Bodily Injury - pursuant to West Virginia Code Section 17C-05-02(c). pg. 85. Unfortunately, the Mercer County Prosecuting Attorney's Office had to dismiss the criminal indictment against Petitioner Goodman for procedural issues and the Petitioner Goodman was never held accountable for his conduct. pg. 86.

The Respondent on March 17, 2020, filed his civil complaint in this case against the Petitioners as individuals to hold them personally accountable to what happened to Blake. pg. 1-6. The Petitioners filed their answers to the complaint and written discovery was exchanged by the parties. pg. 7-26. The Petitioners were served the complaint in this case in March of 2020,

when the COVID-19 pandemic hit which delayed discovery and as a result no depositions were taken.

In October of 2020 and in January of 2021, the Petitioners filed their Motions for Summary Judgment and the Mercer County Circuit Court heard arguments on February 22, 2021. pg. 44-65, 66-96, 133-158. The Petitioners argued that they both could escape liability by asserting the former immunity they enjoyed under the West Virginia Workers' Compensation Act and West Virginia Governmental Torts Claims and Insurance Reform Act. *Id.*

On June 22, 2021, the Mercer County Circuit Court denied the Petitioners' Motions for Summary Judgment. pg. 158-168. The Mercer County Circuit Court held that the application of the immunities asserted by the Petitioners under the West Virginia Workers' Compensation Act and West Virginia Governmental Torts Claims and Insurance Reform Act were a question of fact for a jury to determine under West Virginia law. pg. 167-168.

SUMMARY OF ARGUMENT

The issue in the case, recognized by the Circuit Court of Mercer County and identified by the Petitioners in their brief, is whether the Petitioners conduct on March 28, 2018, was "within the scope of employment," which would determine the application of both the West Virginia Workers Compensation Act and West Virginia Governmental Torts Claims and Insurance Reform Act immunity in this case.

The Petitioners are entitled to the immunities under the statutes but pursuant to those statutes only if they were within the "scope of their employment" at the time of the incident. West Virginia law has long since held that whether an agent is acting within the "scope of his employment" is a question of fact for the jury.

Likewise, there was significant evidence that Petitioner Goodman was not within the "scope of his employment" at the time. The most compelling evidence of which is that Defendant Goodman was terminated by The City of Bluefield immediately after the incident for being under the influence of illegal drugs while operating a six (6) ton garbage truck that seriously injured the Respondent. Additional evidence is that Petitioner Goodman was arrested and indicted for Driving in an Impaired State Proximately Causing Serious Bodily Injury - pursuant to West Virginia Code Section 17C-05-02(c), clearly indicating that he was not within the "scope of his employment."

Finally, very limited discovery had been done at the time the Mercer County Circuit Court heard arguments on the Petitioners Motions for Summary Judgment to determine if there was a genuine issue of fact concerning Petitioner Underwood conduct. The civil complaint was filed on March 17, 2020, and the COVID-19 pandemic delayed discovery.

Accordingly, the Mercer County Circuit Court correctly denied the Petitioners' Motion for Summary Judgment holding that the issue on whether or not the Petitioners were within their "scope of employment" under West Virginia law is a question of fact for the jury.

STATEMENT REGARDING ORAL ARUGMET

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

STANDARD OF REVIEW

The sole issue on appeal is whether summary judgment was appropriate. A circuit court's entry of summary judgment is reviewed de novo, see Syl. pt. 1, Painter v. Peavy,192 W. Va. 189,

451 S.E.2d 755 (1994); Drewitt v. Pratt, 999 F.2d 774, 778 (4th Cir. 1993); and, therefore, this Honorable Court applies the same standard as a circuit court. Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329(1995); see also Helm v. Western Maryland Ry. Co., 838 F.2d 729, 734 (4th Cir. 1988). This Honorable Court additionally stated that

> "this Court will reverse summary judgment if we find, after reviewing the entire record, a genuine issue of material fact exists or if the moving party is not entitled to judgment as a matter of law. In cases of substantial doubt, the safer course of action is to deny the motion and to proceed to trial." The court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).

ARGUMENT

1. THE CIRCUIT COURT OF MERCER COUNTY DID NOT ERROR IN DENYING THE PETITIONERS' MOTIONS FOR SUMMARY JUDGMENT.

A. There is a genuine issue of fact on whether or not Petitioner Goodman was within the "scope of employment" when he was under the influence of illegal drugs and operating a six (6) ton garbage truck that caused serious injury.

The crucial issue regarding this case, recognized by the Circuit Court of Mercer County and identified by the Petitioners in their briefs, is whether the Petitioners' conduct on March 28, 2018, was "within the scope of employment," which would determine the application of both the West Virginia Workers' Compensation Act (hereinafter " Workers' Compensation Act") and West Virginia Governmental Torts Claims and Insurance Reform Act (hereinafter "Governmental Torts Claim Act") immunity in this case.

The Workers' Compensation Act clearly states that "[t]he immunity from liability set out in the preceding section [§23-2-6] shall extend to every officer, manager, agent representative or employee of such employer when he is ***acting in furtherance of the employer's business*** and

does not inflict an injury with deliberate intention." W. Va. Code §23-2-6a (2020)(emphasis added).

Clearly, two requirements pursuant to the statute must exist for an officer, manager, agent representative or employee to enjoy immunity. First, the officer, manager, agent, representative or employee must be "acting in furtherance of the employer's business" and second, the officer, manager, agent, representative or employee must not inflict an injury with deliberate intent. The statute is clear; both requirements must be satisfied in order for the officer, manager, agent representative or employee to enjoy the immunity.

The Governmental Torts Claims Act states that a political subdivision, such as the former employer of the Petitioners the City of Bluefield, is immune from liability as a sovereign government. This immunity extends to the employees of a political subdivision as well, because the employees of the political subdivision are acting on behalf of the political subdivision which is immune. However, that immunity does not apply when "his or her acts or omissions were manifestly ***outside the scope of employment***" or "his or her acts or omissions were with ***malicious purpose, in bad faith, or in a wanton or reckless manner***." W. Va. Code §29-12A-5(b)(2020)(emphasis added).

Thus, whether or not an employee enjoys the immunity depends on two factors; (1) whether their "acts or omissions were manifestly outside the scope of employment" or (2) their conduct was malicious, in bad faith, or in a wanton or reckless manner.

The language from the Workers' Compensation Act that triggers immunity "***acting in furtherance of the employer's business***" and the language from the Governmental Torts Claims Act "***scope of employment***" are one in the same. This Honorable Court defined "scope of

employment" in the case of Foodland v. West Virginia Department of Health and Human Resources, 207 W. Va. 392, 397, 532 S.E.2d 661 (2000), stating:

> "Scope of employment" is a relative term and requires a consideration of surrounding circumstances, including the character of the employment, the nature of the wrongful deed, the time and place of its commission and the purpose of the act. In general terms, it may be said that an act is within the course of the employment, if: (1) It is something fairly and naturally incident to the business and (2) it is ***done while the servant was engaged upon the master's business*** and is done, although mistakenly or ill-advisedly, with a view ***to further the master's interests***, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account.(citing 12B M.J. *Master and Servant Section* 99 (1992)(emphasis added)
>
> see also Courtless v. Jollliffe, 203 W. Va. 258, 507 S.E.2d 136 (1998)(citing Cochran v. Michaels, 110 W.Va. 127, 157 S.E. 173 (1931)("when he is engaged in doing, for his master, either the act consciously and specifically directed or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act or a natural, direct and logical result of it.")

The term "acting in furtherance of the employer's business" found in the Workers' Compensation Act is contained within the definition of "scope of employment" part (2), "***done while the servant was engaged upon the master's business***" and "***to further the master's interests***."

Under this definition, it is difficult to imagine that Petitioner Goodman's conduct, using illegal drugs while operating a six (6) ton garbage truck, running over a street curb with such force that it causes a co-worker to be thrown off the garbage truck, not stopping to check on your co-workers, which ultimately leads to a traumatic injury to him would be considered "acting in furtherance of the employer's business" part (2) of the definition or "a fairly and natural incident to the masters' business" part (1) of the definition.

Moreover, West Virginia law has long since held that "whether an agent is acting within the scope of his employment and about his employer's business" is a question of fact for the jury.

Syl. Point 4, of Griffith v. George Transfer and Rigging, Inc., 157 W.Va. 316, 201 S.E.2d 281 (1973) (quoting "Whether the driver-owner of a tractor trailer, under exclusive lease to a corporation, which corporation holds an I.C.C. certificate, evidence of which is prominently displayed on the tractor trailer, was acting within the scope of his employment and about his employer's business at the time of a collision, is generally a question of fact for the jury and a jury determination on that point will not be set aside unless clearly wrong.").

In Griffith v. George Transfer & Rigging, Inc., the defendant John Herilla, a truck driver, was hauling cargo for defendant George Transfer which owned the tractor-trailer he was driving. During his trip home, while driving the subject tractor-trailer, he was involved in a collision with a motorcycle. One of the questions on appeal was whether there was sufficient evidence presented to the jury to prove that the defendant was "within the scope of employment" at the time of the collision.

This Honorable Court held that there was sufficient evidence presented to the jury. Stating "[i]n this context it became the province of the jury to determine whether Herilla (defendant), at the time of the collision, was acting "within the scope of his employment." 'That question was determined by the jury which determination, in view of the evidence, we cannot say was clearly wrong." *Id.* at 288.

In Levine v. Peoples Broad. Corp. 149 W.Va. 256, 261, 140 S.E.2d 438 (1965), the plaintiff Levine's property was damaged when the defendant's employee McKinney caused a water leak which damaged the plaintiff's property. A jury ruled in favor of the plaintiff; however the defendants filed a motion to set aside the verdict arguing there was insufficient evidence for the jury to determine if the defendant's employee was "within the scope of his employment."

The circuit court granted the defendants' motion; however, this Honorable Court reversed

and reinstated the jury's verdict stating that "we believe it was a jury question as to whether the employee McKinney was acting within the scope of his employment at the time he did the negligent act which resulted in damage to the plaintiff." *Id.* at 442.

In Cremeans v. Maynard, 162 W.Va. 74, 246 S.E.2d 253 (1978), William Cremeans was shot and killed during a union strike against his employer the defendant. His estate filed a wrongful death suit against the defendant who brought in a worker who fired a shotgun at the union resulting in William Cremeans' death. The circuit court granted the defendant summary judgment holding that it was a question of law on whether or not the worker firing the shotgun was "within the scope of employment."

This Honorable Court disagreed and reversed the circuit court's summary judgment and remanded the case back holding that "[o]nly in those rare cases where the evidence conclusively shows lack of authority and where conflicting inferences cannot be drawn should the court decide the issue." *Id.* at 259. In the syllabus of Cremeans v. Maynard, 162 W.Va. 74, 246 S.E.2d 253 (1978), this Honorable Court stated that "[w]hen the evidence is conflicting the questions of whether the relation of principal and agent existed and, if so, whether the agent acted within the scope of his authority and in behalf of his principal are questions for the jury." Syl. pt. 2, Laslo v. Griffith, 143 W.Va. 469, 102 S.E.2d 894 (1958)."

In Webb v. Raleigh County Sherriff's Department, 761 F. Supp.2d 378 (S.D. W.Va. 2010), an off-duty Raleigh County Sherriff's Department deputy responded to a complaint of gunfire at the plaintiff Robert Webb's residence. Ultimately, the plaintiff was shot and killed by the off-duty deputy. The circuit court granted summary judgment stating that the off-duty deputy was immune from liability under the Governmental Torts Claims Act.

The United States Court for the Southern District of West Virginia Supreme Court held that summary judgment was not appropriate because it was a question of fact for the jury to decide on whether or not the off-duty deputy was "within the scope of his employment" at the time he shot and killed Mr. Webb. *Id.* at 393-395.

In W. Va. Regional Jail and Corr. Facility Auth. v. A.B., 234 W.Va. 492, 766 S.E.2d 751, (2014), the West Virginia Regional Jail appealed the circuit court's order denying its motion for summary judgment on the grounds that it was immune under the Governmental Torts Claims Act, arguing that when its employee sexually assaulted a female inmate, he was outside "the scope of his employment."

This Honorable Court held that whether or not the guard was "within the scope of his employment" was ordinarily a question of fact; however, this Honorable Court held that such an act was so egregious "there can be no question that these acts, as alleged, are in no way an "ordinary and natural incident" of the duties with which he was charged." *Id.* at 768-769. This Honorable Court reversed the circuit court's ruling and granted the West Virginia Regional Jails Immunity. *Id.*

In Edwards v. Mcelliotts Trucking, LLC, 268 F.Supp.3d 867 (S.D. W.Va. 2017), the plaintiff Richard Edwards was injured while helping his boss Danny McGowan, the owner of Mcelliotts Trucking, load 2,000 pound metal rods on a flatbed trailer for shipment. Defendant McGowan also worked for Cardinal Transport who filed a motion for summary judgment arguing that at the time of the accident, defendant McGowan was not "within the scope of his employment."

This Honorable Court held that "[o]rdinarily, the determination whether an employee has acted within the scope of employment presents a question of fact.' 'Where there is conflicting

evidence or where the evidence is in accord but is subject to conflicting inferences, the determination is for the jury." *Id.* at 875. Ultimately this Honorable Court concluded that "the jury must decide whether McGowan was acting within the scope of his employment when Edwards was injured."

Clearly, the Petitioners do not get the option to avail themselves under the Workers' Compensation Act immunity or the Governmental Torts Claims Act immunity simply because they say so. The relevant statutes clearly state that to enjoy immunity the employee must have been within the "scope of employment." "[W]hether an agent is acting within the scope of his employment" is a question of fact for the jury under West Virginia law. Syl. Point 4, of Griffith v. George Transfer and Rigging, Inc., 157 W.Va. 316, 201 S.E.2d 281 (1973). The Mercer County Circuit Court denied the Petitioners' Motion for Summary Judgment stating that "due to the varying factual accounts on the day in question, along with the issue of whether Defendant [Goodman's] behavior, whatever it may have been, was in the scope of his employment being a factual one for the jury, the Court finds and concludes that genuine issues [sic] of material fact remains, thus Summary Judgment is not appropriate at this time." pg. 167-168. The decision by the Mercer County Circuit Court was correct under the law and it did not commit reversible error.

(1). Unlike the Eisnaugle v. Booth case, there is sufficient evidence in this case to conclude that Petitioner Goodman was not working within the "scope of his employment."

The Petitioners rely on the 1976 pre-Mandolidis v. Elkins Indus., Inc., case of Eisnaugle v. Booth 159 W. Va. 779, 226 S.E.2d 259 (1976) to argue that case is factually the same and controlling (Petitioners' Brief pg. 9-10); however, in Eisnaugle, unlike this case, it is not clear

what all the facts are, to what extent Eisnaugle was intoxicated and more importantly, whether or not Eisnaugle's conduct was found to be outside the "scope of his employment" by his employer.

In this case, the City of Bluefield did not find that Petitioner Goodman using illegal drugs while operating a six (6) ton garbage truck and causing the traumatic injury to the Respondent was "within the scope of his employment," or the City would not have terminated him. The Petitioner Goodman was terminated immediately after the March 28, 2018, incident, which clearly shows the City of Bluefield was of the opinion that Petitioner Goodman was not acting within the "scope of his employment." pg. 149, 115.

Additionally, Petitioner Goodman was arrested for Driving in an Impaired State Proximately Causing Serious Bodily Injury - pursuant to West Virginia Code Section 17C-05-02(c). pg. 85. The Bluefield City Police Department did not find that the Petitioner Goodman using illegal drugs while operating a six (6) ton garbage truck and the traumatic injury caused to the Respondent was "within the scope of his employment," or he would not have been criminally charged. Workplace accidents occur every day and they do not all lead to criminal charges because they are truly work accidents, "within the scope of employment."

Clearly, the Petitioner Goodman's employer the City of Bluefield did not believe he was within the "scope of his employment" when he chose to operate a six (6) ton garbage truck under the influence of opiates, oxycodone, hydrocodone and hydromorphone.

(2) Petitioner Goodman's argument that the Respondent's successful workers' compensation claim supports the Petitioners' immunity claim is misplaced.

The Petitioner Goodman argues that the Respondent's successful workers' compensation claim supports the argument that Petitioner Goodman was within the "scope of his employment" is erroneous. (Petitioners' Brief pg. 8). The Respondent's successful workers compensation

claim only proves one thing, the Respondent at the time he was injured was within the "scope of his employment." The determination whether or not the person who injured the Respondent, Petitioner Goodman in this case, was outside or within the "scope of his employment" has no bearing on a successful workers' compensation claim. The conduct of the person injured is what is relevant to determine a successful workers' compensation claim not the person who injured the worker. Pursuant to the Workers' Compensation Act a compensable injury is an "occurrence of an injury which the employee asserts, or which reasonably appears to have, occurred in the course of and resulting from the employee's employment." W. Va. Code §23-4-2(a)(2020).

Likewise, West Virginia Code Section 23-4-2(a) specifically states that an employee, who is intoxicated, is not entitled to receive any workers' compensation benefits and any injury is considered a self-inflicting injury. West Virginia Code Section 23-4-2(a) states:

> Notwithstanding anything contained in this chapter, no employee or dependent of any employee is entitled to receive any sum under the provisions of this chapter on account of any personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of the employee. W. Va. Code §23-4-2(a)(2020).

As clearly referenced in these statutes it is the injured person's conduct that is relevant to a successful claim not the person who injured the employee. The conduct of the person who injured the worker is only relevant to determine whether or not the immunity applies as argued above.

(3). The Mercer County Circuit Court did take into consideration the purpose of the immunity statutes.

The Petitioners erroneously argue that the Mercer County Circuit Court failed to take into account the purpose of the immunity statute (Petitioners' Brief pg. 16); however, the Circuit Court did take it into account this argument. The Petitioners presented this argument to the Circuit Court in their Motions for Summary Judgment. pg. 63 and 93, 94.

The Petitioners argue correctly that the purpose of the immunities under West Virginia law is to prevent governmental bodies and public offices from the burden of unnecessary litigation into the merits of a case, but only if an immunity applies. The objective is to address the immunity issues early in the case to prevent the burden of unnecessary litigation into the merits of the case if the immunity applies.

This Honorable Court held in City of Bridgeport v. Marks, 233 W. Va. 449, 759 S.E.2d 192, 199 (2014) "[i]n absolute statutory immunity cases, the lower court has little discretion, and the case must be dismissed **if** ***one or more of the provisions imposing absolute immunity applies***." In this case, the Mercer County Circuit Court held that the issue on whether or not the Workers' Compensation Act and/or Governmental Torts Claims Act immunity applied was a question of fact because of the disputed factual issues in the case.

This Honorable Court held in Hutchinson v. City of Huntington, 198 W. Va. 144, 479 S.E.2d. 649 (1996), that the determination of whether qualified or statutory immunity bars a civil action is one of law for the court, unless, "there is a ***bona fide dispute as to the foundational or historical facts*** that underlie the immunity determination." This Honorable Court stated that "[w]hat this means is that ***unless there is a dispute of facts***, the ultimate question of qualified or statutory immunity is ripe for summary disposition." *Id.* at 654.

It is unmistakably clear, that the Mercer County Circuit Court believed that there was "a bona fide dispute as to the foundational [] facts that underlie the immunity determination" as this Honorable Court held in Hutchinson v. City of Huntington when it denied the Petitioners' Motions for Summary Judgment. The Mercer County Circuit Court held that "due to the varying factual accounts on the day in question, along with the issue of whether Defendant [Goodman's] behavior, whatever it may have been, was in the scope of his employment being a factual one for

the jury, the Court finds and concludes that genuine issues [sic] of material fact remains." pg. 167-168.

2. ONLY LIMITED DISCOVERY HAD BEEN DONE TO DETERMINE IF THERE WAS A GENUINE ISSUE OF FACT ON WHETHER OR NOT THE PETITIONER UNDERWOOD WAS WITHIN THE "SCOPE OF EMPLOYMENT" AT THE TIME OF THE INCIDENT.

The same issue applies on whether the Petitioner Underwood can escape liability and use the immunities under the Workers' Compensation Act immunity or the Governmental Torts Claims Act immunity. The Respondent acknowledges that the evidence obtained at the time the Motions for Summary Judgment were filed and argued was not as clear and significant regarding the conduct of Petitioner Underwood as was the indicating that Petitioner Goodman was not within the "scope of his employment"; however, the Respondent had only be permitted to conduct limited discovery because of the COVID-19 pandemic. Only written discovery was conducted and no depositions were taken before the Petitioners filed their Motions for Summary Judgment.

This Honorable Court held in Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 474 S.E.2d 872, 882, 196 W.Va. 692 (1996), "[a]s a general rule, summary judgment is appropriate only after adequate time for discovery. Likewise, this Honorable Court, held in Board of Education of the County of Ohio v. Van Buren, 267 S.E.2d 440, 443 (1980), "granting a motion for summary judgment before the completion of discovery is "precipitous."

Accordingly, the Mercer County Circuit Court was correct in not granting the Petitioner Underwood's Motion for Summary Judgment as adequate discovery had not been completed.

CONCLUSION

Based on the arguments as stated above, it is unmistakably clear, that the Mercer County Circuit Court must have believed that there was "a bona fide dispute as to the foundational facts

that underlie the immunity determination" when it denied the Petitioners' Motions for Summary Judgment. Accordingly, the Mercer County Circuit Court's Order of June 21, 2021, should be affirmed.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0578

Paul Underwood and Adam Goodman,
Defendants Below Petitioners,

vs.)

Appeal from an Order of the Circuit Court of Mercer County 20-C-75

Blake Auton,
Plaintiff Below, Respondent

CERTIFICATE OF SERVICE

I, Ryan J. Flanigan, attorney for Respondent, hereby certify that on December 9, 2021, I served **RESPONDENT'S BRIEF** upon Petitioners counsel by U.S. mail to said attorney as follows:

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