

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



Chad Edwards and Matthew Maxwell,
Defendants Below, Petitioners,

vs.

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

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

FILE COPY

REPLY BRIEF OF PETITIONERS CHAD EDWARDS AND MATTHEW MAXWELL

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I. INTRODUCTION

Respondent concedes that the West Virginia Governmental Tort Claims and Insurance Reform Act does not expressly create an exception for public employee individual liability in workplace injury settings under W.Va. Code § 29-12A-5(b), suggests that the Petitioners are asking this Court to legislate from the bench via crafting of a new “immunity”, then boldly asks this Court to fundamentally incorporate W.Va. Code § 23-4-2(d)(2)(a) deliberate intent claims as an exception to the broad immunity granted to public co-employees within the context of W.Va. Code § 29-12A-5(b) – despite the Legislature’s failure to do the same.

As the Respondent’s logic is fundamentally flawed, and Respondent’s citation to Brooks v. City of Weirton, 202 W.Va. 246, 503 S.E.2d 814 (1998) is equally unavailing, this Court should reverse the denial of the Petitioners’ Motion to Dismiss entered by the Circuit Court of Harrison County and in so doing, confirm and enforce the immunity provisions set forth within W.Va. Code § 29-12A-5, enter judgment in favor of the Petitioners, and award Petitioners such further relief which the Court deems appropriate.

II. STATEMENT OF THE CASE

November 19, 2020, Rhonda Stark, individually and as the Administratrix of the Estate of Robert E. Stark, (“Respondent”), filed her First Amended Complaint in the Circuit Court of Harrison County, West Virginia, asserting therein two claims against Petitioners Chad Edwards and Matthew Maxwell, (collectively “the Petitioners”): (1) deliberate intent pursuant to W.Va. Code § 23-4-2(d)(2); and (2) intentional and reckless conduct. (Appx. 18-42). This case was assigned to The Honorable James A. Matish.

Concerning the First Amended Complaint, Defendant Chad Edwards was solely sued in his capacity as the City Manager at the City of Shinnston, as the First Amended Complaint plainly states that at all relevant times Defendant Chad Edwards “was the City Manager for the

City of Shinnston . . . responsible for the day to day operations of all aspects of the City, which included, but were not limited to, operation of the Public Works and Utilities Division of the City of Shinnston.” (Appx. 20).

Similarly, Defendant Matthew Maxwell was solely sued in his capacity as the Public Works Supervisor at the City of Shinnston, West Virginia, as the First Amended Complaint plainly states that at all relevant times “Robert Stark’s boss was Defendant Edwards and his immediate supervisor was Defendant Maxwell.” Id.

As a predicate for the Respondent’s claims, in these respective, public employment positions, the First Amended Complaint further states that as the City Manager and Public Works Supervisor, the Petitioners were “subject to and responsible for compliance with all applicable regulations, statutes, and safety standards for workplace safety and training” applicable to work done by public employees at the City of Shinnston, West Virginia. (Appx. 20-21).

Turning to the workplace incident at issue, “at all times relevant, Robert E. Stark was employed by the City of Shinnston, Harrison County, West Virginia in the Public Works and Utilities Division” – Mr. Stark had served in this position from 2016 through 2019. (Appx. 21-22).

The First Amended Complaint alleges generally that in the Spring of 2019 the Petitioners, in their roles as municipal employees/supervisors, directed municipal public works employees, including Mr. Stark, to complete a municipal public works project generally known as the Van Rufus Drive drain project at the City of Shinnston, West Virginia, (“the Project”), despite the Petitioners’ alleged actual knowledge of existing safety concerns. (Appx. 22-24).

The First Amended Complaint additionally alleges that, relevant to the Project, the Petitioners were the public employees and public supervisors responsible for ensuring the safety of City of Shinnston, West Virginia employees, including Mr. Stark. (Appx. 24-25).

As more specifically alleged by the Respondent, on June 14, 2019, Robert Stark, while working as a City of Shinnston municipal employee within the framework of the Project, entered a trench along Van Rufus Drive, and the trench subsequently collapsed injuring Respondent and ultimately leading to Respondent Robert E. Stark's untimely passing. (Appx. 29-31). Following this unfortunate event, as alleged, Rhonda Stark, filed for, and received death/dependent's benefits under the West Virginia workers' compensation system/benefits. (Appx. 53).

Within this factual framework, Respondent subsequently asserted two (2) claims against the Petitioners.

First, in Count I, Respondent asserted a "heightened" deliberate intent claim against the Petitioners, alleging therein that "Defendant Edwards and Defendant Maxwell violated the deliberate intent standard set forth within W.Va. Code § 23-4-2(d)(2)(A) insofar as they "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of death to Robert Stark." (Appx. 31).

Additionally, within Count I, Respondent initially asserted a standard five (5) factor deliberate intent claim pursuant to W.Va. Code § 23-4-2(d)(2)(B) against the Petitioners, alleging therein that: (1) a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death; (2) the Petitioners had actual knowledge of the existence of the specific unsafe working condition and of the high and the strong probability of serious injury or death presented by the specific unsafe working condition; (3) the specific unsafe working condition was a violation of a commonly

accepted and well-known safety standard within the industry or business of the Petitioners; (4) notwithstanding the foregoing, the Petitioners nevertheless intentionally exposed Robert Stark to the specific unsafe working conditions; and (5) Mr. Stark suffered serious, compensable injury and death. (Appx. 31-32).

Second, Respondent asserted a claim in the context of this unfortunate workplace injury labeled “intentional and reckless conduct” – which fundamentally sounds in negligence.

Specifically, Respondent alleges in Count II that the Petitioners, in their roles as City Manager and Public Works Supervisor for the City of Shinnston, West Virginia, had “a duty of reasonable and ordinary care to provide a safe workplace, safe work environment, safe equipment, to adopt and implement safe work practices and procedures, and to ensure that employees of the Public Works Utilities Division were adequately trained to perform their assigned work tasks.” (Appx. 33). Respondent has further alleged that the Petitioners intentionally and recklessly breached the foregoing duties, and that as a direct and proximate result of their breaches, Mr. Stark suffered injury and damages, including death. (Appx. 33-34).

After denial of Defendants’ Motion to Dismiss at the Circuit Court level, as previously outlined in the opening briefs, this appeal ensued.

III. ARGUMENT

- A. **THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PETITIONERS' MOTION TO DISMISS CONSISTENT WITH THIS COURT'S RECENT RULING IN LARRY BRADFORD v. WEST VIRGINIA SOLID WASTE MANAGEMENT BOARD, 2021 W.VA. LEXIS 631 (NOVEMBER 16, 2021), AS IT IS NOT THE COURT'S ROLE TO READ INTO A STATUTE WHAT IT DOES NOT SAY, AS RESPONDENT HAS AFFIRMATIVELY REQUESTED THIS COURT DO.**

In Larry Bradford v. West Virginia Solid Waste Management Board, 2021 W.Va. LEXIS 631 (November 16, 2021), this Court was recently tasked with a detailed examination of statutory provisions in the context of West Virginia Code § 22C-4-17, which the Court noted had never before been interpreted.

After finding no evidence that the West Virginia Legislature's intent supported the Petitioner's proposed construction of West Virginia Code § 22C-4-17, that the Legislature intended to include "employees" among the persons with whom the board of directors of a county solid waste authority may contract, this Court was firm in declaring that: "[i]t is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." (emphasis added) Syllabus Point 5, citing Syllabus point 11, Brooke B. v. Ray C., II, 230 W. Va. 355, 738 S.E.2d 21 (2013).

Returning to the exceptions to the general rule of governmental employee immunity at issue, there are only three instances specified by the Legislature, conceded by Respondent, when a co-employee may be liable within the framework of the West Virginia Governmental Tort Claims and Insurance Reform Act, as follows:

(b) An employee of a political subdivision is immune from liability unless one of the following applies:

(1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities;

(2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or

(3) Liability is expressly imposed upon the employee by a provision of this code.

W.Va. Code § 29-12A-5(b).

Here, as plainly set forth above within W.Va. Code § 29-12A-5(b), the Legislature simply has not created an exception to immunity for workplace injury claims against municipal employees in the context of a W.Va. Code § 23-4-2(d)(2)(A) deliberate intent claim which requires affirmative proof of conscious, subjective and a deliberately formed intention to produce the specific result of injury or death to an employee – as such language/statutory reference is wholly absent from the express exceptions to the general rule of public co-employee immunity set forth within W.Va. Code § 29-12A-5(b).

Thus, despite the harsh nature of such a result, the Respondent's heightened deliberate intent claim must fail, and this Court should, consistent with its recent ruling in Larry Bradford v. West Virginia Solid Waste Management Board, 2021 W.Va. LEXIS 631 (November 16, 2021), find that the Court is simply not free to arbitrarily create a claim/statutory exceptions to immunity within the West Virginia Governmental Tort Claims and Insurance Reform Act as requested by Respondent – where the Legislature has not expressly crafted such a statutory claim/exception to the immunities provided to public employees.

Consistent with the foregoing, this Court should reverse the Circuit Court's denial of the Petitioners' Motion to Dismiss, and thereby grant public employees the immunity conferred upon them by the Legislature and enter judgment in favor of Petitioners.

B. THE CIRCUIT COURT COMMITTED ERROR IN DENYING THE PETITIONERS' MOTION TO DISMISS CONSISTENT WITH THIS COURT'S PREVIOUS RULING IN ZELANKA v. CITY OF WEIRTON, 208 W.VA. 243, 539 S.E.2d 750 (2000), AS THE RESPONDENT'S ARGUMENTS SOUNDING IN "UNFAIRNESS" WITHIN THE FRAMEWORK OF THE EXCLUSIVE REMEDY/IMMUNITY PROVISIONS OF THE WEST VIRGINIA CODE WERE PREVIOUSLY REJECTED BY THIS COURT GIVEN THAT THE IMMUNITIES SET FORTH WITHIN THE GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT ARE BROAD AND ALL-ENCOMPASSING IN THIS FACTUAL SETTING.

In Zelanka, an employee of the City of Weirton, West Virginia was working at a city garage near a hydraulic lift when a municipal garbage truck fell on the City employee causing his death. After the City employee's death, a workers' compensation claim was initially filed which was limited to \$5,000.00 in funeral expenses as the decedent had no dependents. Id., 246.

Subsequently, the executrix of the decedent's estate filed a wrongful death/deliberate intent claim under W.Va. Code § 23-4-2(c)(2)(ii) in the Circuit Court of Hancock County, West Virginia against, among others, the City of Weirton. Id.

Central to the executrix's position, similar to the arguments advanced by the Respondent on appeal, was that application of the immunity would lead to a result which was "grossly inadequate" and "patently unfair" – such that the immunities set forth within the Governmental Tort Claims and Insurance Reform Act should not apply. Id., at 754 (stating that "the plaintiff argues that, under the specific circumstances of this case, the amount of \$5,000.00 paid to the decedent's estate as a result of the alleged wrongful conduct by the City of Weirton is 'grossly inadequate' and 'patently unfair' so that immunity should not apply.").

In rejecting the estate's "fundamental fairness" arguments on appeal, this Court noted as follows:

[T]he general rule of construction in governmental tort legislation cases favors liability, not immunity. The statutory provision at issue, however, is clear and unambiguous. Our task, therefore, is

not to construe it but, rather, to simply apply it to the facts of the case. The difficulty with the plaintiff's argument is that it requires us to read into W.Va. Code § 29-12A-5(a)(11) the term 'meaningful,' as defined by the plaintiff, as a qualification of the term 'covered.' We decline so to do. The Legislature has clearly provided for immunity under the facts of this case. Therefore, we 'may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.' (internal citations omitted).

Stated succinctly, similar to Zelanka, this Court should reject the Respondent's request, which fundamentally sounds in equity, to re-write the Governmental Tort Claims and Insurance Reform Act to craft a claim which the Legislature has previously barred via crafting of a broad, all-encompassing type of immunities set forth within W.Va. Code § 29-12A-5(a)(11), without further exception in W.Va. Code § 29-12A-5(b) which would allow for the existence of such claims against public employees. See Michael v. Marion County Bd. of Educ., 198 W.Va. 523, 529, FN 13 (emphasis added) (stating that "[w]e find significant the fact that the Tort Claims Act was enacted in 1986, three years after the pertinent amendments to West Virginia Code § 23-4-2(c). Because the Legislature is presumed to be aware of its own laws, we can only assume that the omission of any limiting language from West Virginia Code § 29-12A-5(a)(11) is indicative of an intention to provide a broad, all-encompassing type of immunity.").

This Court should reverse the Circuit Court's denial of the Petitioners' Motion to Dismiss, and thereby grant public employees the immunity conferred upon them by the Legislature and enter judgment in favor of Petitioners.

C. AS THE RESPONDENT'S RELIANCE UPON BROOKS V. CITY OF WEIRTON, 202 W.VA. 246, 503 S.E.2d 814 (1998) IS MISPLACED AND DOES NOT SUPPORT THE RESPONDENT'S STATED POSITION, THIS COURT SHOULD REVERSE THE DENIAL OF THE PETITIONERS' MOTION TO DISMISS.

The seminal case cited by Respondent is Brooks v. City of Weirton, 202 W.Va. 246, 503

S.E. 2d 814 (1998). Simply put, Brooks is factually inapposite to the issues before this Court.

In Brooks, the decedent was working as an employee of a private employer, Defendant Charles Isinghood d/b/a Charles Isinghood Excavating, at the time of his unfortunate workplace injury/death arising from a trench collapse. Id., pg. 248.

Subsequently, the Brooks' estate filed a deliberate intent claim against Defendant Charles Isinghood d/b/a Charles Isinghood Excavating, a private employer, and the Brooks' estate filed common law claims, outside of the workers' compensation system/immunities/deliberate intent statutory framework, against the City of Weirton, the City of Weirton Sanitary Board, the City of Weirton Building Agency, and the City of Weirton Public Works Department alleging therein that the political subdivision employees "recklessly issued permits for the excavation work, recklessly permitted the excavation work to be performed in an unsafe manner, and recklessly performed work near the location of the trench." Id., 249.

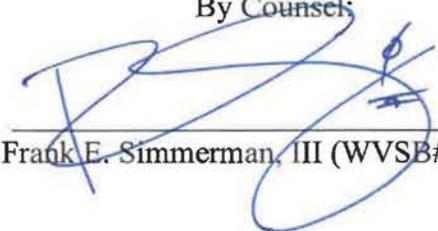
Unequivocally, factually, Brooks did not address the issues now before this Court, whether public co-employees of a public employee decedent against whom a heightened deliberate intent claim has been filed must be afforded the immunity generally set forth W.Va. Code § 29-12A-5(b), when no express exception to immunity allows for a claim predicated upon the deliberate intent elements of recovery, which require that the Respondent prove that the Petitioners acted with a consciously, subjectively and deliberately formed intention to produce the specific result of death.

Accordingly, Respondent's citation to Brooks should not be given weight, as suggested by Respondent, and this Court reverse the Circuit Court' denial of the Petitioners' Motion to Dismiss, as set forth herein and as previously submitted to this Court.

IV. CONCLUSION

Petitioners respectfully request that this Court reverse the denial of the Petitioners' Motion to Dismiss entered by the Circuit Court of Harrison County and in so doing, confirm and enforce the immunity provisions set forth within W.Va. Code § 29-12A-5, enter judgment in favor of the Petitioners, and award Petitioners such further relief which the Court deems appropriate.

Respectfully submitted,
Petitioners,
By Counsel:



Frank E. Simmerman, III (WVSB# 11589)

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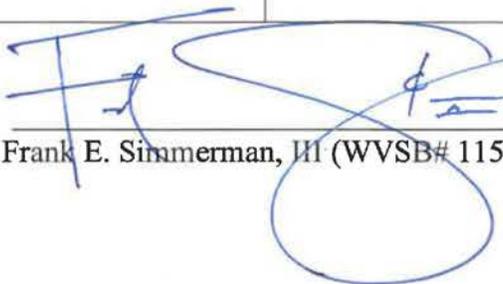
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "*Reply Brief of Petitioners Chad Edwards and Matthew Maxwell*" was served upon the following counsel of record, by U.S. Mail, on December 30th, 2021:

Timothy R. Miley, Esq. Douglas R. Miley, Esq. The Miley Legal Group, PLLC 229 W. Main Street, Suite 400 Clarksburg, WV 26301 <i>Counsel for Respondent</i>	
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