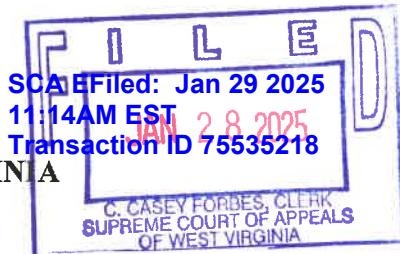


IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION



THE COUNTY COMMISSION OF
FAYETTE COUNTY, WEST VIRGINIA, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 2:21-cv-00307

NATIONAL GRID NE HOLDINGS 2 LLC, et al.,

Defendants.

**ORDER OF CERTIFICATION TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

This Court respectfully requests that the Supreme Court of Appeals of West Virginia exercise its certification jurisdiction pursuant to West Virginia Code §§ 51-1A *et seq.* and answer the question of law set forth below. The question concerns the collection of attorney's fees and prosecutorial immunity under West Virginia state law. This Court believes that the answer to this question may be determinative for the award of attorney's fees in the above captioned case. There is no controlling appellate decision, Constitutional provision, or West Virginia statute on the question.

I. Question of Law

Is a West Virginia political subdivision that brings a citizen suit under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, entitled to prosecutorial immunity from being assessed a prevailing opponent's attorney fees and costs?

II. Facts

This case arises out of a remedial environmental suit pertaining to alleged coal refuse piles in the Johnson Fork-Loop Creek watershed in Fayette County, West Virginia. In 2017, the County Commission of Fayette County (“the County”) enacted an ordinance authorizing the Fayette County Prosecuting Attorney to commence civil litigation in cases of perceived environmental contamination. In 2021, the County, by relator Prosecuting Attorney Anthony Ciliberti, Jr., exercised that authority by filing a complaint in the United States District Court for the Southern District of West Virginia. The County was represented by private attorneys who were deputized as assistant prosecuting attorneys for purposes of advancing the litigation.

Amongst other claims, the complaint alleged a citizen suit under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B) (“RCRA”), against several defendant entities alleged to have contributed to refuse piles. For relief, the complaint sought (1) to compel the defendants to undertake additional investigation and remediation; (2) declaratory relief that the defendants are jointly and severally liable for clean-up costs incurred by the County; and (3) an award of the County’s attorney’s fees and costs pursuant to RCRA and other fee-shifting environmental statutes.

Defendant Pardee and Curtin Realty LLC (“Pardee”) was named as a defendant upon the County’s allegation that Pardee owned surface property that included the coal refuse piles from 2003 to 2013. According to the County, Pardee failed to remediate the refuse during its period of ownership and was therefore liable under RCRA and other statutory, common law, and ordinance-based theories of liability. However, Pardee disputed owning the refuse. Pardee took ownership of surrounding land, but the source deed excepted and reserved certain tracts that encompassed the

historical coal mining sites. The County insisted that Pardee owned the entire property by arguing that the exception is void. This Court found the County's contentions against Pardee without merit under West Virginia law and nearly sanctionable under Federal Rule of Civil Procedure 11, granting summary judgment in Pardee's favor. This Court later granted summary judgment in favor of the remaining defendants due to the lack of evidence supporting the County's environmental allegations.

Thereafter, Pardee moved for an award of its fees and costs as a prevailing defendant pursuant to RCRA, 42 U.S.C. § 6972(e). RCRA provides that a United States District Court "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing party or substantially prevailing party whenever the court determines an award is appropriate." 42 U.S.C. § 6972(e). Under applicable federal law, United States District Courts have discretion to award fees and costs to a prevailing defendant if "the plaintiff's action was frivolous, unreasonable, or without foundation," or if the plaintiff "continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978). Pardee contends that happened here, and requests an award of \$225,498.36 in attorney's fees, expert witness fees, and costs Pardee incurred as a result of the County's conduct in the litigation.

In opposition, the County argues that the Governmental Tort Claims and Insurance Reform Act immunizes political subdivisions from liability stemming from "judicial, quasi-judicial or prosecutorial functions." West Virginia Code § 29-12A-5(a)(2). The County contends that "at all times, this case was prosecuted by Anthony Ciliberti, Esq, Fayette County Prosecuting Attorney, Relator, by Assistant Fayette County Prosecuting Attorneys performing prosecutorial functions." Moreover, the County has asserted that pursuant to West Virginia Code § 29-12A-

5(a)(8) political subdivisions are immune from “other fees or charges imposed by law.” Pardee disputes that this case arises out of the County’s prosecutorial functions and argues that the County is estopped from asserting immunity.

III. Acknowledgment

Pursuant to West Virginia Code § 51-1A-6(a)(3), this Court and the parties agree and acknowledge that the Supreme Court of Appeals of West Virginia may reformulate the certified question presented.

IV. Names and Addresses of Counsel of Record

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B. Counsel for Pardee

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The Court **DIRECTS** the Clerk to send a copy of this Order the Clerk of the Supreme Court of Appeals of West Virginia, counsel of record and any unrepresented party.

ENTER: January 22, 2025



THOMAS E. JOHNSTON, CHIEF JUDGE