IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Docket No. 23-565

RAZE INTERNATIONAL, INC.,
Plaintiff,

v.

Appeal from a final order
of the Circuit Court of Ohio County
(Civil Action No. 23-C-119)

WHEELING HOSPITAL. INC.,
CITY OF WHEELING, and
WHEELING MUNICIPAL BUILDING COMMISSION,
Respondents.

CITY OF WHEELING AND WHEELING MUNICIPAL BUILDING COMMISSION RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

A. Procedural History

Petitioner, Raze International, Inc. ("Petitioner), filed its original Complaint for Injunction, Declaratory Judgment and Writ of Mandamus on August 2, 2023. A.R. 1-14. Petitioner filed its First Amended Complaint for Injunction, Declaratory Judgment and Writ of Mandamus on August 8, 2023. A.R. 1-14. Petitioner, in its First Amended Complaint, alleged that the award of the contract to demolish the former Ohio Valley Medical Center ("OVMC") to FR Beinke Wrecking Inc. ("FR Beinke") was subject to and violated West Virginia's Fairness in Competitive Bidding Act, as contained in West Virginia Code § 5-22-1 *et seq.* A.R. 1-14. Petitioner alleged that it should have been awarded the contract for the demolition work ("Project"). A.R. 1-14. Petitioner sought a preliminary injunction to enjoin FR Beinke from being awarded the Project (Count I), alleging that Petitioner was the bidder entitled to be awarded the Project (Count II), and requesting the court to order that Petitioner be awarded the Project (Count III). A.R. 1-14.

On August 16, 2023, Respondents, City of Wheeling and the Wheeling Municipal Building Commission ("Municipal Respondents"), as well as the other respondent, Wheeling Hospital Inc., filed their Motions to Dismiss with accompanying Memoranda. A.R. 15-50. On August 18, 2023, Petitioner filed their Response to the Motions to Dismiss. A.R. 51-57. On August 21, 2023, the Circuit Court of Ohio County by Judge Michael J. Olejasz, conducted a hearing where arguments were heard on the motions to dismiss. A.R. 65-122. On August 25, 2023, the Honorable Michael J. Olejasz entered the court's Order, finding that Petitioner failed to state a claim upon which relief could be granted under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and dismissed the case. A.R. 58-64.

B. Factual History

On September 5, 2023, members of Wheeling City Council authorized its City Manager to transfer $2 Million to WVU Health System to be used for economic redevelopment purposes at the former OVMC site. The Municipal Respondents believed that the transfer of these funds for redevelopment and establishment of a new Regional Cancer Center was in the best interest of the City and surrounding communities. Residents of Wheeling, the Northern Panhandle, and the West Virginia-Pennsylvania-Ohio tristate region will benefit from a new, comprehensive, Regional Cancer Center that the WVU Health Systems and WVU Cancer Institute (Respondent/Wheeling Hospital Inc.) plan to build on the site of the former Ohio Valley Medical Center located in Center Wheeling. OVMC was formerly one of only two hospitals in the immediate area. The OVMC campus of approximately seven (7) acres in the Center Wheeling area, was closed down several years ago. The OVMC property was then sold to a private entity which is now defunct, and the property was ultimately given to the City. Over the past several years the City has worked tirelessly to offer the site for redevelopment for the betterment of the community. As West Virginia has the second highest cancer mortality rate in the United States this project will enhance access to a network of needed Cancer care and will be a major catalyst for economic growth and development within the City of Wheeling.

Wheeling Hospital Inc. has agreed to develop a cancer treatment center in Ohio County, to be owned and operated by Wheeling Hospital Inc., a member of West Virginia United Health System, Inc. d/b/a West Virginia University Health System ("WVUHS"). In order to effectuate the construction of this cancer treatment center, Wheeling Hospital Inc., not the Municipal Respondents, as identified in all the bidding documents as the Owner of the Project, solicited and controlled bids for the Project. A.R. 27, 36-38. Additionally, Wheeling Hospital Inc., not the

Municipal Respondents, published the Advertisements for Bids, and expressly reserved the right to "reject any and all bids and to waive informalities and irregularities". A.R. 27, 37. Interested bidders submitted bids on the project to Wheeling Hospital Inc., not the Municipal Respondents. The bids were opened and examined by Wheeling Hospital Inc., not the Municipal Respondents. Wheeling Hospital Inc., not the Municipal Respondents, determined the two lowest bidders being the Petitioner and FR Beinke. Wheeling Hospital Inc's., not the municipal Respondents, design team conducted a scope review to determine which bid best met the requirements for the project. A.R. 28, 40-44. After the scope review, by Wheeling Hospital Inc., not the Municipal Respondents, Wheeling Hospital Inc. solely selected FR Beinke for the demolition project. Every aspect of the bidding process and proposed demolition was conducted by Wheeling Hospital, Inc/WV and the Municipal Defendants had nothing to do with the bidding process, demolition plans and demolition. Additionally, everything relating to the construction and operation of the proposed cancer center has been and will be done by Wheeling Hospital/WV not the Municipal Defendants. Municipal Defendants have merely created an opportunity for a separate entity to redevelop a property within its city boundaries. The entire project – start to finish- is being done by Wheeling Hospital/WVU not Municipal Defendants.

The Municipal Defendants played no role in any aspect of the demolition bidding process and demolition and will have no role in the redevelopment of this property. The municipal defendants have given Wheeling Hospital/WVU an opportunity to redevelop a critical piece of property within its boundaries. Importantly, Municipal Defendants have no control or rights relating to any aspect of the demolition, construction or operation of the anticipated New Cancer Center. Such rights lie exclusively with Wheeling Hospital/WVU. The Municipal Respondents believe that Wheeling Hospital Inc/WVU is not subject to the state bidding and purchasing laws

and is not bound to take the lowest bid or to require proof of licensure at the time of bidding and is permitted to evaluate the low bids and determine which bid is in its best interest as the owner of the project. The Municipal Respondents believe that the decision made by Wheeling Hospital Inc.'s, not the Municipal Respondents, to choose FR Beinke over the Petitioner was not done in an arbitrary or capricious manner but was based upon its bidding specifications and its scope of review as found by the Circuit Court of Ohio County.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument may be deemed unnecessary pursuant to the criteria in Rule 18(a), as the dispositive issue or issues have been authoritatively decided, and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

III. SUMMARY OF ARGUMENT

Petitioner complains of various issues but primarily that it was the low bidder for the demolition work and that it is therefore entitled to be awarded a contract for the work under state bidding laws that govern Government Construction Contracts. The Wheeling Hospital Inc./ WVUHS project is not such a government construction project. The Demolition work complained of is not a City, or Commission (Municipal Respondents) project. The Municipal Respondents had no authority, control or involvement in the bidding process and therefore W. Va. Code § 5-22-1 et seq. is inapplicable. Simply put this project is not a demolition and/or construction project of a political subdivision of the State of West Virginia. Therefore, the Petitioner's reliance on W. Va Code § 5-22-1 et. seq, and case law citing said statue, failed to support the Petitioner's Complaint. The project owner was and is Wheeling Hospital, which is a member hospital of the West Virginia

United Health System, Inc. d/b/a West Virginia University Health System ("WVUHS") whose projects are not subject to state bidding and purchasing laws.

The City and it's Commission may provide funding for re-development projects within the City, which does not convert the donation into a City project. Such donations incentivize the business and economic development within communities and should be encouraged. The Regional Cancer Center, initiated, planned, designed, constructed, and operated solely by Wheeling Hospital Inc., not the Municipal Respondents, will benefit not only the citizens of Wheeling but far beyond the boundaries of this City, County and State.

The Project is owned and controlled by Wheeling Hospital Inc., under WVUHS, which is exempt from the competitive bidding requirements of West Virginia Code § 5-22-1. Economic incentives to Wheeling Hospital Inc's. project to locate the cancer center in the area does not transform the project into one that requires compliance with public project competitive bidding requirements. Petitioner also argues that Wheeling Hospital, Inc's exemption to the competitive bidding requirements, as provided by West Virginia Code § 18-11C-5, only applies to new facilities constructed in Monongalia County. The Municipal Respondents agree with Wheeling Hospital Inc. and the Circuit Court of Ohio County that such interpretation is absurd and contradicts the intent and purpose of the West Virginia Legislature to allow WVUHS to operate as a not-for-profit corporation to serve the healthcare needs of the citizens of the State.

IV. ARGUMENT

A. Standard of Review

As noted by this Court:

> When a circuit court dismisses a complaint under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, we review the decision de novo on appeal . . . When assessing whether a complaint states a valid claim, we take its allegations as

> true and construe them in the light most favorable to the plaintiff. The trial court, in appraising the sufficient of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Edwards v. Stark, 247 W. Va. 415, 419-20, 880 S.E.2d 881, 885-86 (2022).

B. The Project Is Owned by Wheeling Hospital, Not the City of Wheeling, Therefore the Project is Not Subject to Competitive Bidding

The West Virginia Fairness in Competitive Bidding Act, as set forth in W. Va. Code § 5-22-1 *et seq.* provides in relevant part: "The state and its subdivisions shall, except as provided in this section, solicit competitive bids for every construction project exceeding $25,000 in total cost." W. Va. Code § 5-22-1(c). While the City of Wheeling is a political subdivision of the State of West Virginia, the Project is not the construction project of the City of Wheeling or Municipal Respondents. Instead, the Project Owner is clearly Wheeling Hospital Inc. A.R. 36. The Municipal Respondents neither played nor will play any part in the demolition, construction, and operation of the planned Regional Cancer Center.

In legislation concerning West Virginia University Hospital and West Virginia Health System in W.Va. Code Chapter 18 Article 11c, our legislature declared the legislative purposes which included that existing facilities were to facilitate among other purposes "patient care including specialized services not widely available elsewhere in West Virginia." W.Va. Code § 18-11C-2(a)(1). All statements relating to the purposes of this legislation contemplated efficient patient care opportunities for all citizens of West Virginia with "**flexibility in a rapidly changing health care environment"**. W. Va. Code § 18-11c-2(b)(1) (emphasis supplied). This legislation also specifically contemplated more "**affiliated institutions"**. W.Va. Code § 18-11c-2(b)(3)

(emphasis supplied). The declared purposes of this act in no way were intended to limit its boundaries forever.

W.Va. Code § 18-11c-5 specifically provided that transactions provided by this article shall be exempt from the bidding…requirements. Chapter 18, Article 11c is to be "…liberally construed to effectuate the purposes hereof". See § 18-11c-10. Despite the clear purposes defined by the legislature, appellants cite W.Va. Code § 18-11c-1(l) definition of "new facilities" which on its face limited its scope to Monongalia County.

The lower court found that such application, considering the purposes of the act, would be absurd. The word "transactions" referenced in the exemption statute is not defined within the article. Interestingly, the "transaction date" is defined as July 1, 1984 (4 decades ago) and at a time when today's expansion of West Virginia's Health System was not foreseen.

West Virginia's Health System has, over recent years, greatly expanded throughout the state and well beyond the Monongalia County boundaries. Appellant's strict application argument would be contrary to the declared purposes of the act and its goal to provide efficient medical care throughout all of West Virginia. There is no reason that can justify the limitation of the act to Monongalia County when the purposes are directed to all West Virginians. When the literal meaning of a statute appears absurd, courts will seek an alternative reading of the statutory text. For a thorough analysis of the Absurdity doctrine, see generally John F. Manning, The Absurdity Doctrine, 116 HARV. L. REV. 2387 (2003). See also Veronica M. Dougherty, Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation, 44 AM. U.L. REV. 127 (1994); Jonathan R. Siegel, What Statutory Drafting Errors Teach Us About Statutory Interpretation, 69 GEO. WASH. L. REV. 309 (2001); John Copeland Nagle, Textualism's Exceptions, in Issues in Legal Scholarship (2002), available at

http://www.Bepress.com/ils/iss3/art15. The avoidance of absurd results is commonly referred to as the absurdity doctrine.

There is no logical reason not to sacrifice plain meaning of a statute when it results in an "unreasonable" result that was probably unintended by the legislature. *See* Cass R. Sunstein, Problems with Rules, 83 Cal. L. Rev. 953, 986 (1995). Justice Kennedy, in a concurring opinion in the United States Supreme Court of Appeals, suggested that the absurdity doctrine is a legitimate tool "where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone." Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 471 (1989).

In *Case v. Olson*, 14 N.W. 2d 717, 719 (Iowa, 1944) the court stated that the absurdity doctrine is to be used "where adherence to the letter would result in absurdity, or injustice, or would lead to a contradiction."

Historically, the absurdity doctrine goes back to 1765 when the learned author William Blackstone wrote: "If there arise out of acts of parliament any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void." Blackstone's [*511] Commentaries (91). The United States Supreme Court first recognized the doctrine in 1819 and later decided perhaps its most famous absurdity case, *United States v. Kirby*, in 1868. *United States v. Kirby*, 74 U.S. 482 (1868).

In cases of specific absurdity, the statute typically is unambiguous. However, it is the application of that unambiguous language to a particular fact pattern that creates the absurdity. And in those cases, the absurdity doctrine requires a court to undermine, rather than follow, the legislature's intent.

The term absurd represents a collection of values, best understood when grouped under the categories of reasonableness, rationality, and common sense. Based on those values, courts reject certain outcomes as unacceptable, thereby rejecting the literal interpretations of statutes when they would result in absurd outcomes. [T]hose values represented by the term absurd accordingly act as a pervasive check on statutory law and are rooted in the rule of law. The Absurdity Doctrine is a representative of rule of law values. See *supra* note 10, at 133 Veronica M. Dougherty, Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation, 44 AM. U.L. REV. 127, 129 n.9 (1994) (providing case cites for all jurisdictions).

An important reason that legislative intent is usually irrelevant in cases of specific absurdity is that the situation before the court was simply unimaginable or not considered at the time the legislature enacted the statute. The legislature, therefore, never had any intent regarding that situation that judges could later attempt to define, analyze and decide. "The nature of the legislative process raises serious doubts about the verifiability, and even existence, of a subjective legislative intent…". In these situations, a court may shift the goalposts a short distance by focusing on "the statute's substantive goals" or its "statutory purposes" which may be arguably different than legislative intent. Glen Staszewski, Avoiding Absurdity, 81 IND. L.J. 1001, 1049 (2006). See *supra* note 18, at 29 Andrew S. Gold, Absurd Results, Scrivener's Errors, and Statutory Interpretation, 75 U. CIN. L. REV. 25, 41 (2006) (comparing "textualists" with "intentionalists"); John F. Manning, The Absurdity Doctrine, 116 HARV. L. REV. 2387, 2393 (2003).

Chapter 18c Article 2 has existed for four decades and West Virginia's Health System through West Virginia University was at that time exclusively located in Monongalia County. The practice of medicine has vastly changed over the last forty years as a result of numerous mergers both in West Virginia and other states. Today, there are only large medical facilities, like West

Virginia University, with their smaller merged hospitals and facilities located throughout the state. This change in business operation is not addressed in Chapter 18 Article 11c and obviously was not considered or even contemplated. As was previously stated, there is no good explanation as to why the "new facilities" was limited to Monongalia County other than it was not foreseen that WVU's Health System would expand throughout the entire State of West Virginia.

The "new facilities" definition as now applied makes no sense, is unreasonable and brings about an absurd result. As such, this Court needs to affirm the lower court's decision to void the definition of new facilities as limited to Monongalia County and apply the beneficial exemption to the realities of our medical care within the entire state of West Virginia.

Municipal Defendants join in, adopt, and incorporate herein all the arguments of Wheeling Hospital Inc., as set forth in its Respondent's Brief regarding:

A. Standard of Review

B. The Project Is Owned by Wheeling Hospital, Not the City of Wheeling, Therefore the Project is Not Subject to Competitive Bidding

V. CONCLUSION

Wherefore, the ruling of the Circuit Court was proper and should be affirmed.

City of Wheeling and
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CERTIFICATE OF SERVICE

I, Robert P. Fitzsimmons., counsel for City of Wheeling and Wheeling Building Commission, hereby certifies that on the **8th day of February, 2024** I served a true and exact copy of the foregoing ***Respondent's Brief*** via the West Virginia Supreme Court e-filing system upon the following:

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