

SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**New China Restaurant, Inc. and
Philip Dy Chin,
Plaintiffs Below, Petitioners**

vs.)

No. 24-403

**City of Charleston,
Defendant Below, Respondent.**

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Mountain Lodge Association v. Crum & Foster Indemnity Co. 210 W.Va.
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*Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Insurance
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Syl. Pt. 5 of *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451
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Lengyel v. Lint, 167 W. Va. 272, 280, 280 S.E.2d 66, 71 (1981).

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Camden-Clark Mem'l Hosp. Corp. v. Turner, 575 S.E.2d 362, 366 (W.
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BRIEF OF PETITIONERS

ASSIGNMENTS OF ERROR:

- I. THE LOWER COURT AND THE INTERMEDIATE COURT OF APPEALS
ERRED IN GRANTING SUMMARY JUDGMENT IN THE FACE OF GENUINE
ISSUES OF MATERIAL FACT.

- II. THE LOWER COURT ERRED IN TREATING THE DECISION IT MADE IN
DENYING A TEMPORARY RESTRAINING ORDER AS RES JUDICATA FOR
GRANTING A SUMMARY JUDGMENT IN A SUBSEQUENT ACTION FOR
DAMAGES, THEREBY DECIDING THE CASE ON THE WRONG LEGAL
STANDARD.

INTRODUCTION, STATEMENT OF THE CASE AND ERRORS MADE BY

INTERMEDIATE COURT OF APPEALS:

This case concerns the appeal of the wrongful destruction of

a building by the City of Charleston and the denial of a meaningful review of the process by the Kanawha County Circuit Court and the Intermediate Court of Appeals when the building owner subsequently brought an action for damages. Despite the existence of numerous genuine issues of material fact, the Kanawha County Circuit Court granted summary judgment against the building owner and the Intermediate Court of Appeals (ICA) affirmed.

The first error of the ICA is on page 1 of its Memorandum Decision which stated that "an inspection by the City's code enforcement agency concluded that the building or its foundation was likely to suffer a partial or whole collapse." This statement is refuted by the evidence and by the City's code enforcement head halting Mr. Chin's remediation efforts pending further testing. See, Affidavit of Attorney John E. Dorsey wherein he states:

At 11:28 a.m. on Monday, February 24, 2020, I received a telephone call from Mr. Brett Hodgdon to advise that he had met with Mr. Harmon at the building site and they had agreed that sufficient brick had been removed from the veneer, until "non-destructive testing" could be accomplished for the inner courses of the exterior wall so as to better evaluate and ensure the structural integrity of the inner brick walls. At approximately 12:00 on that date, I spoke with Mr. Harmon and advised that I was endeavoring to arrange for this testing. In this conversation, Mr. Harmon advised me that he and Mr. Hodgdon had discussed the potential of erecting scaffolding along the sidewalks as an additional safety measure; however, because the necessary amount of scaffolding was not available, that requirement, if needed, could be delayed.

The bricks fell from a brick facade and had nothing to do with the actual structure of the building. Although all of the

competent inspections of the subject building indicated stated that the building was dilapidated and needed substantial rehabilitation, none concluded that there was any problem with the building foundation, let alone that it was likely to suffer a partial or whole collapse.

Paragraph 3, Page 2 of the Memorandum Decision opined that New China "failed to take sufficient corrective action." The above quote from Attorney John Dorsey's affidavit clearly shows that Mr. Harmon, the City's code enforcement officer, halted further work pending non-destructive testing. Not only is it incorrect and disingenuous for the ICA to assert that New China failed to take sufficient corrective action under these circumstances, but the fact that New China's efforts were halted by the City pending further testing implicitly admits that the building did not constitute any threat to the public, and therefore, demolition of the building was not justified.

The Memorandum Decision erroneously asserts that the brief of New China fails to present a well-developed argument. In a case challenging a summary judgment, the presentation of the existence of genuine issues of material facts, especially those contrary to the Court's findings of fact supporting its summary judgement, should be sufficient to rebut the finding of summary judgment. Also present in this case was the fact that the Circuit Court

Judge, who previously denied a temporary restraining order by proffer, treated that denial as *res judicata* for the present case. See first full paragraph 1, page 6 of the ICA decision.

STATEMENT OF THE CASE:

FACTS:

On or about February 17, 2020, some bricks fell from the veneer brick facade of The New China Restaurant (hereinafter the building). No person nor property was injured and it was subsequently determined that the bricks had been dislodged by ice. Despite there being no evidence of imminent harm, the City of Charleston wrongfully destroyed a historical building. Furthermore, the City made this decision contrary to its regulations. The City had no factual basis to destroy Mr. Chin's property and its Motion for Summary Judgment is overwhelmingly precluded by multiple issues of material fact.

As is obvious from a review of the timetable in this matter, this case is rife with factual issues:

February 17, 2020 - about 100 bricks fell from the New China building, landing on the sidewalk. No one was injured and the cause was due to water being present behind the bricks which froze and expanded, dislodging the bricks.

Tuesday, February 18, 2020 - Professional engineer was engaged; Code official notified; access to the building denied by City; Chin informed that City had already decided to destroy Mr. Chin's building.

Wednesday, February 19, 2020 - Professional engineer inspected the building; Licensed contractor Robert Dorsey and attorney John Dorsey also inspected the building.

Thursday, February 20, 2020 - Mr. Chin engaged a masonry contractor to finish cleaning up the fallen bricks and to remove all loose bricks from the building to eliminate any potential danger to the public from the building. The contractor estimated it would be ten days to perform this.

Friday, February 21, 2020 - Attorney Dorsey received the report of the professional engineer, which showed the building to be in a rundown state, but posed no immediate danger to the public. See, Page 16 of the Appendix hereto for the Report. Code official informed Mr. Chin that if he wanted to salvage the building that he must dismantle all portions of the parapet walls and begin repairs of any hidden damage and to have this accomplished by 6:00 pm on Monday, February 24, 2020. Mr. Chin was given approximately 72 hours to accomplish this task, which was an unreasonable time period wholly in line with the City's prior decision to destroy the

building. However, Mr. Chin, the contractor and others worked daily at the building to accomplish this.

Monday, February 24, 2020 - At 11:28 am, the professional engineer telephoned attorney Dorsey and informed him that he had met with the Code Official at the subject building and the Code Official stated that a sufficient number of bricks had been removed pending further testing. Attorney Dorsey arranged for the necessary testing, which could not be accomplished until Friday, February 28, 2020. The Code official was informed of this at 5:00 pm. At 8:00 pm, Mr. Baker, counsel for the City of Charleston, telephoned attorney Dorsey and essentially informed him that the Code official, the person charged with the sole responsibility of enforcing the code, was being overridden and that the building would be demolished the next day. This raises the obvious issue of estoppel and of someone other than the Code official making the decision. The City made this decision notwithstanding the fact that at no time did the Code official, the professional engineer and a licensed contractor express that the subject building was presently in danger of collapse or that the building otherwise posed an imminent threat or risk of harm to anyone.

Attorney Dorsey then worked late into the night to prepare a petition for a temporary restraining order. See, page 244 of the Appendix hereto. The petition was heard by The Honorable Judge

Joanna Tabit, who denied the temporary restraining order on the grounds that the building was dilapidated and presented a public safety risk. See, Transcript page 16 (internally numbered), Appendix page 250.

Mr. Chin filed a suit for damages for wrongfully and illegally destroying his building and the lien against him for the demolition charges on February 23, 2021. See, page 51 of the Appendix. This case also went to Judge Tabit, who granted the City of Charleston's Motion for Summary Judgment despite the existence of numerous factual issues. Judge Tabit treated the prior case as being res judicata with respect to the second case. This is the main case under appeal, but the case of New China Restaurant v. City of Charleston, 20-C-181, Pages 1 through 50 of the Appendix and page 250 of the Appendix, is inextricably intertwined with the present case, as Judge Tabit essentially treated her ruling on that case, although based solely on proffer of counsel, as res judicata in granting the City's Motion for Summary Judgment. See, Page 15, lines 15-16 of the Transcript. Page 259 Of the Appendix.

It appears from the email from the Court regarding the decision to grant the City's Motion for Summary Judgment that Judge Tabit had prejudged the present case and therefore, being biased, should have recused herself. See, Appendix page 240.

Please note that Appendix pages 237 through the transcript are part of the Kanawha County Circuit Clerk's Docket Sheet, but were apparently not scanned in at the time a copy of the two cases were obtained.

SUMMARY OF THE ARGUMENT:

There even exists a genuine issue of material fact as to the condition of the building. Destroying a valuable building was wrong, a gross abuse of power and manifestly unreasonable under the circumstances. There existed no emergency justifying the speed with which the City destroyed the building.

Petitioner's expert witness, a registered professional engineer, was the only expert qualified to truly assess the condition of the building. The City relied on lay persons and firemen. However, all witnesses agreed the building needed some maintenance and work. The City Code Enforcement Officer and the Petitioner's engineer agreed that the building did not present an immediate threat to the public.

Ultimately, this Court must decide whether the City acted reasonably in destroying a building which was capable of rehabilitation and which did not present any immediate threat to the public. The evidence clearly shows the City acted unreasonably in destroying Petitioners' property and even reneged on an agreement which recognized the lack of immediate peril and which

mandated nondestructive testing, which ironically is the opposite of razing the building.

The Court should bear in mind that the building wrongfully destroyed by the City of Charleston was built by the father of Philip Chin and passed on to him and his brother. At the time of the incident, the building was vacant. The building was destroyed even though it posed no immediate threat to public safety. The City of Charleston knew the building was no longer a hazard and could have ordered the plaintiffs to rehabilitate the building over a reasonable period of time. The City failed to adopt the least restrictive alternative and destroyed a valuable piece of real estate for no reason.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION:

Oral argument is unnecessary for this appeal.

ARGUMENT:

I. THE LOWER COURT AND THE INTERMEDIATE COURT OF APPEALS ERRED IN GRANTING SUMMARY JUDGMENT IN THE FACE OF GENUINE ISSUES OF MATERIAL FACT.

LEGAL STANDARD FOR SUMMARY JUDGMENT:

Rule 56 of the West Virginia Rules of Civil Procedure governs motions for summary judgment and sets forth the standard for the

Court to grant a motion for summary judgment. There must exist no genuine issue of material fact.

B. CASE LAW ON SUMMARY JUDGMENT:

Rule 56 WVRCP and case law thereon, expressly provides that there may not be summary judgment if there is a genuine issue of material fact to be tried and if a material fact exists, the motion is to be denied. Rule 56(c) WVRCP, *Haga v. King Coal Chevrolet Co.* 151 W.Va. 125, 150 S.E.2d 599 (1966), *Mountain Lodge Association v. Crum & Foster Indemnity Co.* 210 W.Va. 536, 558 S.E.2d 336 (2001).

it is not the Court's function at the summary judgment stage to weigh the evidence and determine the truth of the matter, but it is to determine whether there is a genuine issue for determination at trial. *Painter v. Peavy* 192 W.Va. 189, 451 S.E.2d 755 (1994). *Wilson v. Daily Gazette Co.*, 214 W.Va. 208, 588 S.E.2d 197 (2003).

In addition, summary judgment motions are not favored. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Syl. Pt. 5 of *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995) says: "Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is

simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law."). See also, *Lengyel v. Lint*, 167 W. Va. 272, 280, 280 S.E.2d 66, 71 (1981).

C. ARGUMENT:

The core factual issue in this case was whether the City acted reasonably in destroying Mr. Chin's property. It is clear from the timetable and from the affidavits that Mr. Chin cleaned up the fallen bricks, employed a professional engineer to inspect the building and followed the Code Enforcement Officer's instructions regarding the subject building until he was told by that official to cease these actions, pending further testing. It is also clear that the building, although in a rundown state, did not present any danger to the public.

Although the Code official is the person charged by the above ordinance with making the decision regarding destruction of property, in this case that decision came from outside of the Code enforcement agency. Practically speaking, this means the

destruction of Mr. Chin's property was, by the words of the City's ordinance, an *ultra vires* act.

Although the building was in need of repairs, the City could have and should have ordered to be made under the above ordinance. Thus, there is a question of fact whether the City acted reasonably in destroying the building. See, Affidavits of John Dorsey and Robert Dorsey, Exhibits pages 244 and 248. Clearly, the City did not choose the least restrictive alternative, which it is bound by law to do.

II. THE LOWER COURT ERRED IN TREATING THE DECISION IT MADE IN DENYING A TEMPORARY RESTRAINING ORDER AS RES JUDICATA FOR GRANTING A SUMMARY JUDGMENT IN A SUBSEQUENT ACTION FOR DAMAGES, THEREBY DECIDING THE CASE ON THE WRONG LEGAL STANDARD.

Temporary restraining orders are governed by Rule 65 of the West Virginia Rules of Civil Procedure. A preliminary injunction compels affirmative conduct or prevents conduct. A preliminary injunction preserves the status quo between the litigants pending a final determination on the merits of an underlying claim for permanent injunction or other claims for relief. See, *Kessel v. Leavitt*, 511 S.E.2d 720, 776 (W. Va. 1998).

Four factors are considered to determine whether to issue a preliminary injunction: The likelihood of irreparable harm to the

plaintiff without the injunction; The likelihood of harm to the defendant with an injunction; The plaintiff's likelihood of success on the merits; and The public interest. See, *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 575 S.E.2d 362, 366 (W. Va. 2002). Given that Judge Tabit's ruling denying the temporary restraining order decided only on proffers of counsel, her denial of the petition for such an order has no effect on subsequent litigation.

It is obvious from the email of Judge Tabit's law clerk that the Judge mistakenly believed that the earlier hearing on the temporary restraining order established certain facts, despite her statement on the record at the time she made the ruling that no facts were established. See, Transcript page 15, page 250 of the Appendix. That email provided in relevant part:

Consistent with the factual summary set forth in the City's motion, the Court finds that the material facts are not in dispute. Having presided over related proceedings in February, 2020, in which the Plaintiff sought a TRO and preliminary injunction stemming from these matters, the Court is very familiar with the facts of the case and incorporates the factual and procedural background more particularly set forth on pages 1-3 of the City's motion for summary judgment.

The Court concludes that the City provided the Plaintiff an opportunity to repair and rehabilitate the New China Restaurant building, but he failed to do so. It is undisputed that bricks began falling to the ground from the building on February 17, 2020. Subsequently, the City's enforcement officer concluded that the building was likely to collapse partially or wholly, or that some portion of the foundation of the building was likely to fall or give way. The City immediately took action to minimize any risk of injury or damage to persons or property and erected barriers to preclude pedestrians and vehicles from entering the area. The Plaintiff then obtained an independent structural review and report. This report concluded that the building was in a dilapidated state and that immediate repairs were necessary for the well being of the public. Based upon the preliminary investigation and the structural report, the City considered the building unsafe, dangerous, and detrimental to public safety.

In order to survive summary judgment, Plaintiff must establish or at the very least, create a genuine issue of material fact that he was not provided an opportunity to abate the dangerous and unsafe condition. In denying the Plaintiffs motion for TRO, this Court concluded that the City "provided reasonable notice and opportunity for (Chin) to abate the unsafe and dangerous building." Having reviewed the file and the affidavits attached to its response, the Court concludes that the Plaintiff has produced no information to create any genuine issue of material fact regarding the City's evidence that it provided him with proper notice and opportunity to repair the building.

See, Appendix page 240 for the full text of the email.

There are obvious issues in this email. First, there were no facts established at the hearing for the temporary restraining order. Secondly, any notice and opportunity for Mr. Chin to repair the building must be reasonable to satisfy due process. The concept of reasonableness is notably absent in the email except maybe by passing reference. Mr. Chin was denied due process in that the City did not apply the least restrictive alternative to destroying his property, the City did not give Mr. Chin a reasonable opportunity to correct any problems and Mr. Chin did not receive an impartial hearing during his subsequent suit for damages. Furthermore, beyond the loose brick issue, the City did not give Mr. Chin notice of what repairs it wanted. In fact, the code official and Mr. Chin's engineer had agreed the building was not a threat or danger to the public and based on this, the code official instructed Mr. Chin that no more work on the building was required.

As previously noted, Judge Tabit stated on the record that she made the decision regarding the temporary restraining order based

on proffer of counsel, yet she signed an Order provided by the City of Charleston which set forth Findings of Fact and Conclusions of law which the Court never made. Judge Tabit was then assigned the case under appeal, having already made her mind up as to what she deemed were the facts. The only fact the Court actually had was that it had previously denied a temporary restraining order solely on proffer of counsel, although in the Court's mind it knew all of the material facts. This prejudgment of Mr. Chin's damage action denied Mr. Chin an impartial judge. The Court, in the earlier related case, signed an Order setting forth findings of fact which were never established, and then used that Order to grant a summary judgment against Mr. Chin in this action, contrary to the existence of issues of genuine material facts. This is improper and is clearly reversible error.

CONCLUSION:

As to issue I of this appeal, this case involves the following questions of material fact:

1. The reasonableness of the City's decision to destroy Mr. Chin's property given that there was no imminent risk of harm to anyone.
2. The reasonableness of the time given by the City for Mr. Chin to make repairs.

3. Whether the decision to destroy the property was made in accordance with the City's ordinances.
4. Whether the City should be estopped from denying that Mr. Chin fully complied with all of the Code official's orders and that the Code official directed Mr. Chin to do nothing more until further testing was completed.
5. Whether the City accorded Mr. Chin with due process.
6. Whether the condition of Mr. Chin's building presented an imminent risk of danger to the public.
7. Whether any reports by anyone supported the City's decision to destroy Mr. Chin's building.
8. Whether the lien filed by the City is accurate and truthful.

As to issue II of this appeal, it is clear from reading the transcript and decision in Case 20-C-181 along with the email from the lower court and the decision in case 21-C-161 that the lower court was used the incorrect legal standard to decide the case under appeal, or incorrectly recalled that it had made findings of fact in the earlier case. If this was the case, the lower court had predetermined the outcome and would have ignored volumes of evidence and material fact to the contrary. It is apparent from the email that the lower court's position was it had already

decided the case under appeal by denying the temporary restraining order in the prior case.

RELIEF SOUGHT:

For the foregoing reasons and the reasons stated herein, this Court should reverse the decision of the ICA and remand the case to the Kanawha Circuit Court for a trial on the merits.

Respectfully submitted,

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Philip Dy Chin,
Plaintiffs Below, Petitioners**

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CERTIFICATE OF SERVICE

I certify that a copy of this appeal brief has been served upon the City of Charleston on November 3, 2024 through File and Serve Express.

Richard J Lindroth /s/