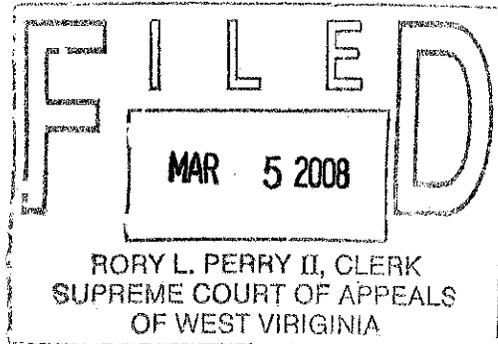

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33812

IN RE: CHARLESTON GAZETTE
FOIA REQUEST



BRIEF OF THE CITY OF CHARLESTON, APPELLANT

STEPTOE & JOHNSON PLLC
Of Counsel

Bryan R. Cokeley (WV Bar No. 747)
Scott E. Johnson (WV Bar No. 6335)
Chase Tower, 7th Floor
P. O. Box 1588
Charleston, WV 25326-1588
(304) 353-8000

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I. INTRODUCTION

The City of Charleston asked the Circuit Court for a declaratory judgment determining the City's obligations in responding to a Freedom of Information Act request filed by the Charleston Gazette. The City sought the judgment as it found itself in the uniquely precarious position of juggling (1) prior court rulings covering some of the documents requested, (2) an ongoing criminal investigation, (3) stated concerns of an employee organization and (4) a state statute covering public document disclosure. The Circuit Court, concluding that any declaratory judgment ruling would not finally resolve the controversy, dismissed the case *sua sponte* without awaiting an answer from the Gazette or allowing for any argument by the City prior to the dismissal. After the City filed a motion to alter or amend judgment under Rule of Civil Procedure 59(e), the Circuit Court—again *sua sponte* and without affording the City an opportunity to respond—entered an amended order (without referring to the motion to alter or amend judgment) that effectively denied the motion to alter or amend judgment *sub silentio*. Because a “[f]ailure to afford an opportunity to address the court’s *sua sponte* motion to dismiss is, by itself, grounds for reversal[,]” *Lewis v. New York*, 547 F.2d 4, 5-6 & n. 4 (2 Cir.1976), *aff’d on other grounds*, 476 U.S. 409 (1986), *accord Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006) (citing cases), *see also King v. Mosher*, 629 A.2d 788, 790 (N.H. 1993) (state due process clause), the City appeals.

II. STANDARD OF REVIEW

Although the Circuit Court did not specifically cite a rule of civil procedure governing its decision, it appears that the Circuit Court concluded that the City did not state a claim upon which relief could be granted. A dismissal for failure to state a claim upon which relief can be granted falls under Rule of Civil Procedure 12(b)(6). This Court “review[s] *de novo*

a dismissal under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, construing the factual allegations in the light most favorable to the plaintiffs.” *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996).¹ Additionally, this Court has held that questions of pure law, such as constitutional questions, are subject to *de novo* review. *Phillip Leon M. v. Greenbrier County Bd. of Educ.*, 199 W. Va. 400, 404, 484 S.E.2d 909, 913 (1996) (observing that “interpretations of the West Virginia Constitution, along with interpretations of statutes and rules, are primarily questions of law”). *See also United States v. Legree*, 205 F.3d 724, 729 (4th Cir. 2000) (“We review the alleged denial of due process *de novo*.”).

III. STATEMENT OF FACTS

The Charleston Gazette filed a Freedom of Information Act request with the City of Charleston seeking “inspection and copying all records related to” weekly payroll timesheets for certain named officers and activity logs for certain named officers, to which the City timely responded and to which the Gazette replied. Compl. ¶ 2. The Gazette’s FOIA request placed the City in an untenable position for a number of reasons.

First, some of the documents sought by the Gazette directly pertain to an ongoing criminal investigation being undertaken by the Charleston Police Department. *Id.* ¶ 4.

¹Under the Uniform Declaratory Judgment Act, a court “may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.” *Id.* § 55-13-6. This is the provision the circuit court relied upon in making its ruling. The term “may,” of course, denotes discretion, *In re Cesar L.*, ___ W. Va. ___, ___, 654 S.E.2d 373, 385 (2007), but under the Uniform Declaratory Judgment Act, that discretion is limited to circumstances where a ruling “would not terminate the uncertainty or controversy giving rise to the proceeding.” If a ruling would terminate the uncertainty or controversy, the circuit court would lack discretion. The question of whether a ruling would or would not terminate the controversy is a legal one to which this Court need not defer to the circuit court.

Although that circumstance may not in and of itself be determinative, it certainly provides a gloss on the background of this case that cannot be ignored.

Second, in earlier proceedings both Judges Jennifer Bailey Walker and Tod Kaufman issued protective orders sealing the records of some (actually six) of the twenty-eight officers made the subject of the Gazette document request. Judge Walker and Judge Kaufman limited release of the documents to only certain persons and entities—the Gazette is not one of those entities. *Id.* ¶ 5. In issuing these orders, Judges Walker and Kaufman specifically noted the privacy rights of the officers covered by the orders; hence, disclosure now of the covered records would violate the orders of two judges and would breach judicially recognized privacy rights. *Id.* ¶¶ 5, 6.

Third, Judge Walker has ruled, when similar information was sought by a defendant for use in his criminal case “that the type of information requested by Defendant, some of which would have to be obtained from personnel files, together with the proffer of the C[harleston] P[olice] D[epartment] about that information, would trigger the protections afforded under *Manns* [*v. City of Charleston Police Department*, 550 S.E.2d 598 (W. Va. 2001) (*per curiam*)] and *Maclay* [*v. Jones*, 542 S.E.2d 83 (W. Va. 2001)].” *Id.* ¶ 6. Judge Walker *sua sponte* “note[d] that the suggestion that Defendant’s request is tantamount to a *de facto* investigation of the CPD without affording officers the protections under W. Va. Code 8-14A-1 *et seq.* is colorable.” *Id.* While under *Manns*, records are subject to an in camera review in order to determine if they should be disclosed, there is no court case currently pending so there is no judge to whom the records could be submitted for such a review (save for those records specifically covered by Judge Walker’s order). *Id.* ¶ 7. The

rationale of these orders—balancing privacy interests and individual officer rights against public disclosure—is extendable to the Gazette’s FOIA request and, thus, the rationale of these orders can also be said to cover those twenty-two officers not specifically named in Judge Kaufman’s and Judge Walker’s orders. *Id.* ¶ 9.

And, fourth, the Fraternal Order of Police, Capitol City Lodge 74, on behalf of some or all of the officers whose records have been requested, has sent correspondence to the City of Charleston “request[ing] that the City not produce these records absent a court order . . .” *Id.* ¶ 10. The FOP also stated in its correspondence that it objects to the disclosure of the information sought absent notice to the affected officers and an opportunity to be heard, *id.* ¶ 11, and, indeed, Judge Walker also referred to this concern. *Id.* ¶ 8. The FOP has indicated that failure to provide such notice and opportunity “may subject the City to significant liability.” *Id.* ¶ 12.

Because of the unique situation in which it found itself, between the proverbial “rock and a hard place,” the City sought a declaratory judgment, serving the Gazette through the Secretary of State’s Office. Before the Gazette filed an answer, the Circuit Court dismissed the case.

The Circuit Court found that an order in this case would not be of practical assistance in setting the controversy to rest—one of the four factors to be considered in deciding whether a justiciable controversy exists. The Circuit Court specifically found that the documents at issue were under seal by orders entered by Judges Kaufman and Walker. The Circuit Court held,

For the purposes of this Order, the Court assumes all the facts proffered by the City of Charleston’s Complaint for Declaratory Judgment to be true. As

such, the Court takes judicial notice of the fact that the documents at issue are currently under seal by Orders of both Judges Jennifer Bailey Walker and Tod Kaufman. Were this Court to enter the requested declaratory judgment, the documents would still remain under seal, and thus, [sic] the underlying controversy of this matter would persist.

The City then filed a Motion to Alter or Amend Judgment under Rule of Civil Procedure 59(e), pointing out that “as set forth at paragraph 5 of the City’s Complaint, Judges Walker and Kaufman only ‘have issued protective orders sealing *some* of the documents requested by the Gazette . . . [.]’ Compl. ¶ 5 (emphasis added), and, as set forth in the Complaint, some of the requested records are not covered by Judge Walker and Kaufman’s Orders—in fact, only 6 of the 28 records sought are specifically covered by Judge Kaufman’s and Judge Walker’s Orders[.]” *Rule 59(e) Motion to Alter or Amend Judgment*, ¶ 5.

The City’s Rule 59(e) motion also observed that “because 22 records sought by the Gazette are not covered by either Judge Kaufman’s or Judge Walker’s Orders—yet contain the exact same type of information that Judges Walker and Kaufman found warranted protection for public disclosure—the City seeks a declaratory judgment to determine if the requested documents *not* covered by protective Orders should be disclosed (the City, of course, cannot and will not turn over the 6 records specifically sealed by Judges Kaufman and/or Walker)[.]” *Id.* ¶ 6.

Notwithstanding the Rule 59(e) motion, the Circuit Court entered an Amended Order dismissing the complaint. The only change from the original order was inclusion of the words “some of,” so that the Court’s holding in its Amended Order reads, “For the purposes of this Order, the Court assumes all the facts proffered by the City of Charleston’s

Complaint for Declaratory Judgment to be true. As such, the Court takes judicial notice of the fact that *some of* the documents at issue are currently under seal by Orders of both Judges Jennifer Bailey Walker and Tod Kaufman. Were this Court to enter the requested declaratory judgment, the documents would still remain under seal, and thus, [sic] the underlying controversy of this matter would persist.” (emphasis added).

IV. ARGUMENT

The Circuit Court committed reversible error in dismissing the case sua sponte because the City’s Complaint did allege Facts which demonstrate that there was a live controversy that would be finally resolved by a declaration of the rights and obligations of the parties.

West Virginia Code § 55-13-2 provides, “Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.” A court [though] may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.” *Id.* § 55-13-6. In reviewing the declaratory judgment act, it need be remembered that the act “is . . . remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.” *Id.* § 55-13-12.

Here, the Circuit Court dismissed the case without awaiting an answer or affording the City an opportunity to be heard concerning the propriety of a dismissal. “Fundamental

to the jurisprudence of all civilized nations is the idea of notice and an opportunity to be heard for all parties. In the United States, this concept has taken on constitutional dimensions. In both the federal constitution and the West Virginia Constitution, due process of law has been guaranteed to everyone.” *Bailey v. Norfolk and Western Ry. Co.*, 206 W. Va. 654, 676, 527 S.E.2d 516, 538 (1999) (Davis, J., concurring in part, dissenting in part) (footnotes omitted). “The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard.” Syl. Pt. 2, *Simpson v. Stanton*, 119 W. Va. 235, 193 S.E. 64 (1937). See also *Schupbach v. Newbrough*, 173 W. Va. 156, 158, 313 S.E.2d 432, 435 (1984) (“The due process clauses of our State and Federal Constitutions afford parties the procedural rights of notice and opportunity to be heard.”); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) (“The core of due process is the right to notice and a meaningful opportunity to be heard.”). These “[l]ongstanding due process protections . . . are scrupulously applied.” *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 300, 359 S.E.2d 124, 133 (1987). Indeed, in analogous circumstances, this Court has held that due process requires notice and an opportunity to be heard before a case is dismissed.

Under Rule of Civil Procedure 41(b) a circuit court may dismiss an action that has been pending without action for more than one year. This Court has held that a circuit court cannot dismiss a case under Rule 41(b) without affording notice and an opportunity to be heard. Syl. pt. 2, *Dimon v. Mansy*, 198 W. Va. 40, 479 S.E.2d 339 (1996). See also *Covington v. Smith*, 213 W. Va. 309, 318, 582 S.E.2d 756, 765 (2003); *Howerton v. Tri-State Salvage, Inc.*, 210 W. Va. 233, 235, 557 S.E.2d 287, 289 (2001) (per curiam);

Hartman v. Morningstar Bldg. Co., Inc., 206 W. Va. 616, 620, 527 S.E.2d 160, 164 (1999) (per curiam). The same rationale and result is mandated here, that is, a plaintiff is entitled to notice and an opportunity to be heard in opposition of the dismissal before a trial court dismisses a case for failure to state a claim. “[D]ismissals under Civ. R. 12(B)(6) are akin to dismissals pursuant to Civ.R. 41(B)(1) in that they are ‘fundamentally unfair’ in the absence of prior notice and an opportunity to respond.” *Thrower v. Olowo*, 2003 WL 1924652, *3 (Ohio Ct. App.). Additionally, this Court in *Dimon* observed that “[t]he decision we reach today moves our civil practice forward and in lock-step with the manner in which the majority of jurisdictions address this issue.” *Dimon*. 198 W. Va. at 47, 479 S.E.2d at 48. Equally, a majority of courts, both state and federal, have required the due process protections of notice and a right to be heard be afforded before dismissing a case for failure to state a claim.

“If the court is inclined to dismiss a complaint sua sponte, it should, as a matter of fundamental fairness, if not due process, give the plaintiff an opportunity to persuade the court that dismissal is not proper.” *Schwartz v. Owens*, 134 P.3d 455, 457 (Colo. Ct. App. 2005). Thus, both state and federal courts have long recognized that it is error for a trial court to dismiss a case sua sponte without affording notice and an opportunity to be heard. *See Rubins v. Plummer*, 813 P.2d 778, 778-79 (Colo. Ct. App. 1990) (collecting cases). *See also State ex rel. Edwards v. Toledo City Sch. Dist.*, 647 N.E.2d 799, 801 (Ohio Ct. App. 1995); *Osborn v. Emporium Videos*, 848 P.2d 237, 242 (Wyo. 1993); *People v. Anderson*, 817 N.E.2d 1000, 1007 (Ill. Ct. App. 2004).

In fact, in the federal system if a court wishes to sua sponte raise the issue of whether

to dismiss a declaratory judgment complaint, it should do so by issuing a rule to show cause as to why the case should not be dismissed. *Bituminous Cas. Corp. v. Combs Contracting Inc.*, 236 F. Supp.2d 737, 741 (E.D. Ky. 2002) (citing *Westfield Ins. Co. v. Stone Harbor Const., Inc.*, 106 F. Supp.2d 956, 957 (W.D. Mich. 2000)). The City's argument is colorable and the city is entitled to make its case before the circuit court,

The City had a legitimate argument to have convinced the Circuit Court that dismissal was improper. "A successful complaint for declaratory judgment must include a statement of controversy in which the plaintiff must allege facts from which it appears there is a ripe controversy; and substantial likelihood that he or she will suffer injury in the future. In addition, the request for declaratory relief must specifically include the facts of the respective claims concerning the underlying subject of the case, and must demonstrate that the plaintiff is interested in the controversy." 22 Am. Jur.2d *Declaratory Judgments* § 223 (footnotes omitted). "[T]he pertinent question on motion to dismiss is whether under the allegations made plaintiff has stated enough to invoke substantive principles of law which entitled him to some relief[.]" *City of Creve Coeur v. Creve Coeur Fire Pro. Dist.*, 355 S.W.2d 857, 859 (Mo. 1962) (banc). Further, "it is not decisive that a plaintiff is not entitled to all the relief sought, so long as he has averred enough to entitle him to some relief." *Id.* (citing 1 Walter H. Anderson, *Actions for Declaratory Judgment* § 307 (2d ed. 1951)). Indeed, the general rule that 12(b)(6) dismissal's are disfavored and should rarely be granted, *see, e.g., Sauer, Inc. v. American Bituminous Power Partners*, 192 W. Va. 150, 154, 451 S.E.2d 451, 455 (1994) (per curiam), is equally applicable to declaratory judgment complaints. *See, e.g., Waite v. Waite*, 959 So.2d 610, 614 (Ala. 2006); *Myers v. Chief*,

Baltimore County Fire Bureau, 207 A.2d 467, 471 (Md. 1965); *Cannon County Bd. of Ed. v. Wade*, 178 S.W.3d 725, 730 (Tenn. Ct. App. 2005); *R&B Falcon Drilling USA, Inc. v. Pittman*, 2002 WL 31886792, *1 (E.D. La.). See generally 26 C.J.S. *Declaratory Judgments* § 140. Here, the Circuit Court erred because the City's complaint did set forth specific factual averments that a controversy existed and that a declaration of the rights of the parties would settle the underlying controversy.

The Circuit Court concluded that a declaratory judgment in this case would not terminate the controversy because any decision it rendered would leave in place the protective order covering some (actually six) of the officers whose records the Gazette seeks.² However, that still leaves twenty-two officers whose records are *not* directly covered by either Judge Kaufman's or Judge Walker's Orders. Yet, the records of these other twenty two officers contain *exactly* the same type of information that Judges Kaufman and Walker have already found to implicate the officers' privacy rights. The City has been put in that most unenviable of situations, "damned if it does and damned if it doesn't[.]" *Carey v. Brown*, 447 U.S. 455, 476 (1980) (Rehnquist, J., dissenting), either turn over the records and face legal action from the affected officers and/or the FOP, Compl. ¶ 10--with the City having to pay its own legal fees--or refuse to turn over the records and face legal action by the Gazette, W. Va. Code § 29B-1-5(a)--with the attendant specter of the City having to pay *both* the City's legal fees *and* the Gazette's fees, *id.* § 29B-1-7, and it is ultimately the City's taxpayers who will bear the cost of any litigation, including any sanctions against the City

²As the City noted below and observed in its motion to alter or amend judgment, there is no question that City cannot disclose the information related to the six officers whose records are under seal.

for having guessed wrong with respect to its obligations in the face of competing demands. This is “a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.” *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 773 (2007) (quoting *Abbot Labs. v. Gardner*, 387 U.S. 136, 152 (1967)).

The declaratory judgment act provides “an alternative to pursuit of the arguably illegal activity[.]” *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 772 (2007) (quoting *Steffel v. Thompson*, 415 U.S. 452, 480 (1974) (Rehnquist, J., concurring)), and affords a means “to avoid accrual of avoidable damages to [a] party uncertain of its rights.” *Volvo Constr. Equip. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 593 (4th Cir. 2004) (citing *NUCOR Corp. v. Aceros Y Maquilas de Occidente*, 28 F.3d 572, 577 (7th Cir.1994)). “The intent of the act is to have courts render declaratory judgments which may guide parties in their future conduct with each other, thereby relieving them from the risk of taking undirected action incident to their rights, which action would jeopardize their interests or cause them damage or serious difficulty, including the expending of unnecessary funds or imposition of civil or criminal liability.” 22A Am. Jur.2d *Declaratory Judgments* § 5 (footnotes omitted).

The Circuit Court here mistakenly found that its intervention would not settle the controversy. The City had a right to seek guidance from the Circuit Court and properly invoked the jurisdiction of the Circuit Court. The Circuit Court’s voice was exactly what the parties needed to hear on this matter.

V. CONCLUSION

The judgment of the Circuit Court of Kanawha County should be reversed and this case remanded for further proceedings in this matter not inconsistent with this opinion.

Respectfully submitted,

**City of Charleston, Appellant,
By Counsel,**



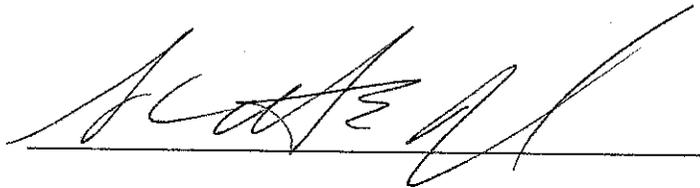
Bryan R. Cokeley (WV Bar No. 747)
Scott E. Johnson (WV Bar No. 6335)
Chase Tower, 7th Floor
P. O. Box 1588
Charleston, WV 25326-1588
(304) 353-8000

STEPTOE & JOHNSON PLLC
Of Counsel

CERTIFICATE OF SERVICE

I, Scott E. Johnson, Counsel for the City of Charleston, hereby certify that on the 5th day of March 2008, I served the foregoing *Brief of the City of Charleston, Appellant*, upon the Charleston Gazette by depositing true and correct copies thereof in the United States Mail, first class postage pre-paid addressed as follows:

Sean P. McGinley, Esquire
DiTrapano, Barrett & DiPiero
604 Virginia Street, East
Charleston, WV 25301-2184

A handwritten signature in black ink, appearing to read "Scott E. Johnson", is written over a horizontal line.