

No. \_\_\_\_\_

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**CHARLESTON**

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**STATE OF WEST VIRGINIA ex rel.,  
CORPORATION OF CHARLES TOWN,  
a Municipal Corporation,**

**PETITIONER,**

**v.**

**IN PROHIBITION UPON  
ORIGINAL JURISDICTION**

**HONORABLE DAVID H. SANDERS,  
Judge of the Circuit Court of Jefferson County;  
ROBERT W. FURR and JACKSON-PERKS  
POST NO. 71, INC.,**

**RESPONDENTS.**

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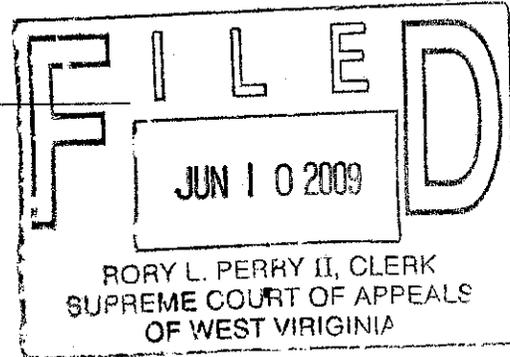
**PETITION FOR WRIT OF PROHIBITION  
AND MEMORANDUM OF LAW**

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Petition for Writ of Prohibition Pursuant to  
Attached Order Entered May 28, 2009  
In Case No. 08-C-297  
In the Circuit Court of Jefferson County, West Virginia

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Tamara J. DeFazio, Esquire  
W.Va. State Bar Id. No. 5130  
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The Corporation of Charles Town*



IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

ROBERT W. FURR,

CIVIL DIVISION

Plaintiff,

Civil Action No.: 08-C-0297

v.

CORPORATION OF CHARLES TOWN  
JACKSON-PERKS POST NO. 71, INC.,

Defendants.

RECEIVED

MAY 28 2009

JEFFERSON COUNTY  
CIRCUIT COURT

ORDER OF COURT

This day came the Plaintiff, Robert W. Furr, by his counsel, Dale A. Buck, Esq. and Thomas Murtaugh, Esq.; the Defendant, Jackson-Perks Post No. 71, Inc., by its counsel, Scott D. Clements, Esq. and Dickie, McCamey & Chilcote, P.C.; and the Defendant, Corporation of Charles Town, by its counsel, Tamara J. DeFazio, Esq. and Shuman, McCuskey & Slicer, PLLC, whereupon Defendant, Corporation of Charles Town, did move this Honorable Court for judgment on the pleadings and to dismiss the Second Amended Complaint, with prejudice.

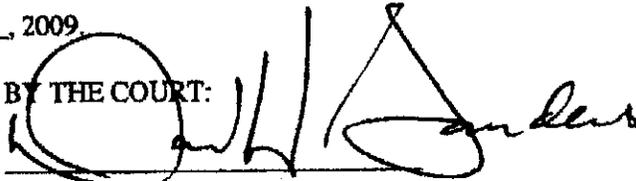
Upon consideration of the Corporation of Charles Town's Motion for Judgment on the Pleadings and to Dismiss Second Amended Complaint, and the Responses thereto filed on behalf of Plaintiff and Defendant Jackson-Perks Post No. 71, Inc., it is hereby ORDERED that the Corporation of Charles Town's Motion is DENIED.

The Clerk is DIRECTED to send certified copies of this Order to all counsel of record herein.

4 cc's ENTER this 28<sup>th</sup> day of May, 2009.

- D. Buck
- T. Murtaugh
- S. Clements
- T. DeFazio

5-29-09  
-DC

BY THE COURT:  


David H. Sanders  
Circuit Court Judge

**PETITION FOR WRIT OF PROHIBITION  
AND MEMORANDUM OF LAW**

The Petitioner, Corporation of Charles Town, (“Charles Town”), by and through its counsel, Tamara J. DeFazio and the law firm of Shuman, McCuskey & Slicer, PLLC, hereby petitions this Honorable Court, pursuant to Article VIII, Section III of the Constitution of the State of West Virginia, West Virginia Code Sections 51-1-3 and 53-1-1, *et seq.*, and Rule 14 of the West Virginia Rules of Appellate Procedure, to issue a rule to show cause and, ultimately, a Writ of Prohibition, which effectively precludes the Honorable David H. Sanders, Judge of the Circuit Court of Jefferson County, West Virginia, from conducting any further proceedings in Jefferson County Civil Action No. 08-C-297 before dismissing The Corporation of Charles Town as a party to that civil action with prejudice.

As grounds for the Writ of Prohibition sought herein, The Corporation of Charles Town asserts that Respondent Furr’s Second Amended Complaint, as filed against Charles Town, is barred by the immunities provided to municipalities under West Virginia Code Section 29-12A-5(a)(6) (2002 Rep.Vol. & 2008 Cum. Supp.) and the plain language set forth in West Virginia Code Section 8-12-12 (2002 Rep. Vol. & 2008 Cum. Supp.).

The Circuit Court of Jefferson County committed a clear legal error in direct contravention of West Virginia Code Section 29-12A-5(a)(6) (2002 Rep.Vol. & 2008 Cum. Supp.) of The West Virginia Governmental Tort Claims and Insurance Reform Act and West Virginia Code Section 8-12-12 (2002 Rep. Vol. & 2008 Cum. Supp.) by denying The Corporation of Charles Town’s Motion for Judgment on the Pleadings and to Dismiss Second Amended Complaint and requiring Charles Town to proceed as a party to the instant litigation,

despite its clear statutory immunity and the plain meaning of West Virginia Code Section 8-12-12 (2002 Rep. Vol. & 2008 Cum. Supp.).

**I. KIND OF PROCEEDING AND NATURE OF RULING BY  
THE CIRCUIT COURT BELOW**

In the underlying action, Respondent Robert W. Furr seeks to recover damages for injuries he allegedly sustained after slipping and falling on “black near-invisible ice” in a public parking lot “as a proximate result of the City’s negligence.” See Exhibit 1 - Second Amended Complaint at paras. 4 and 12.

The parking lot where Respondent Furr allegedly fell is owned by Jackson-Perks Post No. 71, Inc. of The American Legion and leased by the Petitioner. See Exhibit 2 - Lease Agreement.

Respondent Furr’s Second Amended Complaint is based premised upon and sounds exclusively in tort theory. See Exhibit 1 and Exhibit 3 - Answer, Affirmative Defenses and Cross-Claim To Plaintiff’s Second Amended Complaint.

Petitioner Charles Town is immune from liability for these claims pursuant to The West Virginia Governmental Tort Claims and Insurance Reform Act and supporting case law. Therefore, on March 20, 2009, Charles Town filed a Motion for Judgment on the Pleadings and to Dismiss Second Amended Complaint asserting its governmental immunity. See Exhibit 4 – The Corporation of Charles Town’s Motion for Judgment on the Pleadings And To Dismiss Second Amended Complaint and Supporting Memorandum.

On March 24, 2009, the Trial Court issued its Rule 22 Scheduling Order permitting the non-movants, Respondents herein, to file written responses to the Motion within 15 days and affording the Petitioner 10 days to file a rebuttal memorandum, if desired. See Exhibit 5 – Trial Court Rule 22 Scheduling Order. On May 11, 2009, Furr filed his Response to The City’s

Motion. See Exhibit 6 – Plaintiff's Response In Opposition to Motion. The City filed a Reply Memorandum to Plaintiff's Response on May 20, 2009. See Exhibit 7 – The Corporation of Charles Town's Reply to Plaintiff's Response In Opposition. On May 19, 2009, Jackson-Perks filed a Response In Opposition to The Corporation of Charles Town's Motion for Judgment on the Pleadings and to Dismiss Second Amended Complaint. See Exhibit 8 – Jackson-Perks' Response In Opposition to Charles Town's Motion for Judgment on Pleadings and to Dismiss Second Amended Complaint. On May 28, 2009, and prior to the expiration of The City's 10-day reply period, the Honorable David H. Sanders issued an Order of Court acknowledging his consideration of the Charles Town's Motion and Responses filed by Respondents Furr and Jackson-Perks, respectively, and summarily denying The City's Motion for Judgment on the Pleadings and to Dismiss without making any specific findings and without affording Charles Town the opportunity to reply to the Response filed by Jackson-Perks on May 19, 2009. See Exhibit 9 – Order of Court dated May 28, 2009. It is pursuant to this Order of Court that this Petition for Writ of Prohibition is filed.

Charles Town filed this Petition for Writ of Prohibition to address the Circuit Court's clear legal error in denying The Corporation of Charles Town the governmental immunity from suit under West Virginia Code Section 29-12A-5(a)(6) (2002 Rep.Vol. & 2008 Cum. Supp.) to which it is entitled in the subject action as a matter of law.

## **II. STATEMENT OF FACTS**

The Corporation of Charles Town's Motion for Judgment on the Pleadings and to Dismiss Second Amended Complaint is based upon the statutory immunity afforded to municipalities by West Virginia Code Section 29-12A-5(a)(6) (2002 Rep.Vol. & 2008 Cum. Supp.), the case law governing its application and the plain language set forth in West Virginia Code Section 8-12-12 (2002 Rep. Vol. & 2008 Cum. Supp.). See Exhibit 4. In so doing,

Charles Town acknowledges that the Respondent Furr's allegations are presumed to be true for purposes of its Motion and this Petition.<sup>1</sup>

The gravamen of plaintiff's Second Amended Complaint is that he fell and sustained injury on black ice which was present on a public parking lot leased by The City. Exhibit 1 - Second Amended Complaint, paras. 8, 9, 11, 12. In his Second Amended Complaint, Furr alleges that water would collect on the pavement and, during cold weather, the water would freeze in patches of black ice. Exhibit 1 - Second Amended Complaint, paras. 8, 9.

Respondent Furr further contends that:

The City was negligent and in breach of its contractual obligations in the following manner:

- A. In failing to remove snow and ice from the subject parking lot as a matter of practice, even though The City was equipped with ample equipment such as snow plows, snow scrappers, snow blowers and chemical (salt) spreaders as would be sufficient for removal of snow and ice.
- B. In failing to have practices and procedures proving [sic] for regular inspections and reports of safety conditions of the said city parking lot.
- C. In failing to either warn the public or close the parking lots when dangerous conditions, such as the presence of snow and ice, existed.

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<sup>1</sup> On July 24, 2008, Furr filed his initial Complaint in this action and subsequently moved to amend his Complaint on October 9, 2008. The City of Charles Town filed Motions for Judgment On the Pleadings and to Dismiss the Complaint and Amended Complaint, respectively. Both Motions to Dismiss were denied, but Furr was granted leave to amend his Complaint and Amended Complaint by Orders entered October 27, 2008, and February 17, 2009, respectively. Service of the Second Amended Complaint was requested on March 4, 2009. See Exhibit 10 - Docket Sheet. Jackson-Perks Post No. 71, Inc., appeared in this action for the first time on April 3, 2009. See Exhibit 10 - Docket Sheet.

Exhibit 1 - Second Amended Complaint, para. 13 (A-C). As part and parcel of his Second Amended Complaint, Respondent Furr also sets forth the following allegations:

8. Over the past several years, The City breached its Agreement with the Post. The City and the Post negligently allowed the subject parking lot to be improperly and dangerously maintained, in that the expansions and contractions caused by the forces of Nature over time resulted in a worn and uneven parking lot surface and contained low places in which water would collect, and during cold weather, said water would freeze in patches of black ice, making it dangerous and unfit for safe passage, all in violation of the lease agreement.

9. During cold weather, The City removes snow and ice from its streets and highways, but as a matter of practice, never removes now [sic] and ice from the subject parking lots after the formation thereof. After accumulations of snow and ice, cycles of thawing, evaporation, melting, draining and refreezing would occur, so that dangerous patches of ice would exist in the subject parking lot for extended periods, to be ignored and neglected by The City.

Exhibit 1 - Second Amended Complaint, paras. 8, 9.

In his Second Amended Complaint, Furr does not allege that the black ice on which he fell and was allegedly injured was “affirmatively caused by the negligent act” of The City of Charles Town, nor does he allege facts sufficient to support such an allegation. See Exhibit 1 - Second Amended Complaint generally. In fact, Furr alleges that “the City . . . never removed snow and ice from the subject parking lots after the formation thereof.” See Exhibit 1 - Second Amended Complaint, para. 9.

### III. LEGAL STANDARD FOR ISSUANCE OF A WRIT OF PROHIBITION

In this Petition, The Corporation of Charles Town seeks the issuance of a rule to show cause and, ultimately, a Writ of Prohibition to correct that Order of Court entered herein on May 28, 2009, which contains a substantial clear cut, legal error which may be resolved by this Court as a matter of law.

The legal standard governing the issuance of the Writ sought by Charles Town is as follows:

Where a circuit court is acting within its jurisdiction, this Court has traditionally examined the following five factors to determine whether a writ of prohibition should issue:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. pt. 4, in part, *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (1996) cited in *State ex rel. City of Martinsburg v. The Honorable David H. Sanders et al.*, 632 S.E.2d 914, 917 (W.Va. 2006). (*Writ of Prohibition granted based upon circuit court's failure to dismiss action on immunity grounds.*) The failure to apply the clear legal mandate of the Legislature set forth in the West Virginia Tort Claims and Insurance Reform Act is an important problem faced by municipalities where a plaintiff, as in this case, consistently fails to allege facts sufficient to overcome the grant of immunity and, in fact, alleges facts falling squarely within the spirit and letter of Section 29-12A-5(a)(6) of the Tort Claims Act. See *Porter v. Grant County Bd. Of Educ.*, 633 S.E.2d 38 (W.Va. 2006); *Hutchison v. City of Huntington*, 479 S.E.2d 649, 658 n. 10 (W.Va. 1996) (“[i]n

absolute statutory immunity cases, the lower court has little discretion, and the case must be dismissed if one or more of the provisions imposing absolute immunity applies.”).

The City of Charles Town is immune from the tort liability alleged by Respondents because the Respondent Furr does not allege facts in his Second Amended Complaint sufficient to state a claim against Charles Town under Section 29-12A-5(a)(6). This is true because Respondent Furr does not plead allegations demonstrating that Charles Town affirmatively caused the icy conditions upon which he slipped and fell. Although Respondent Furr seeks to predicate the tort liability he asserts on Lease language indicating that Charles Town covenanted to keep the lot on which Furr fell free of snow and ice, this Honorable Court in *Porter v Grant County Board of Education* made clear that “a political subdivision is immune from liability for injury caused by snow or ice placed on a sidewalk by the weather”. *Porter v. Grant County Bd. Of Educ.*, 633 S.E.2d 38, 42 (W.Va. 2006). In *Porter*, this Court held that the decision by school administrators to hold the basketball game despite the fact that class had been cancelled on that day was insufficient as a matter of law to meet the exception to the immunity granted by 29-12A-5(a)(6) because it did not, as a matter of law, affirmatively cause the snow and ice conditions upon which Mrs. Porter fell. *Id.* at 43. Assuming *arguendo*, that The City in this case failed to keep the parking lot free of snow and ice as required by the Lease language, this is, as a matter of law, an insufficient factual predicate to meet the exception to the immunity which requires that The City “affirmatively cause” the icy condition upon which Respondent Furr fell. Thus, the Circuit Court’s May 28, 2009, Order denying Charles Town immunity is clearly erroneous as a matter of law and therefore constitutes a substantial, clear cut legal error.

Secondly, Charles Town has no other adequate means to obtain the relief desired as it will be prejudiced in a manner not correctable on appeal if it is forced to continue defending this action from which it is clearly immunized as a matter of law.

As acknowledged by this Court in *Hutchison v. City of Huntington*, 479 S.E.2d 649 (W.Va. 1996), governmental immunity is an immunity from suit and inquiry into the merits of a case. Thus, the issuance of a writ of prohibition is an entirely appropriate and necessary remedy where a municipality is unjustly deprived of the immunity to which it is entitled as a matter of law. The prospect of proceeding through discovery and trial and the subsequent appeal of any adverse verdict is an inadequate remedy in the face of clear immunity apparent from the four (4) corners of a twice amended Complaint. It is likewise inconsistent with the public policy underlying The West Virginia Governmental Tort Claims and Insurance Reform Act. Moreover, the issuance of a rule to show cause and, ultimately, a Writ of Prohibition will save substantial time, effort and resources of the parties and lawyers and will likewise promote judicial economy and efficiency.

For these reasons, a rule to show cause and, ultimately, a Writ of Prohibition should issue.

#### **IV. RESPONDENT CAN STATE NO VIABLE TORT CAUSE OF ACTION AGAINST CHARLES TOWN**

##### ***A. The Circuit Court Ignored Charles Town's Basis For Statutory Immunity***

The West Virginia Governmental Tort Claims And Insurance Reform Act, as codified at West Virginia Code Section 29-12A-1 *et seq.*, has as its purpose “to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances . . .” W.Va. Code § 29-12A-1 *et seq.* (2002 Rep. Vol. & 2008 Cum. Supp.).<sup>2</sup>

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<sup>2</sup> The Act specifically defines the term political subdivision to include, among other things, “any . . . municipality . . . ; any separate corporation or instrumentality established by one or more . . . municipalities, as permitted by law; any instrumentality supported in most part by municipalities, any public body charged by law with the performance of a governmental function and whose jurisdiction is coextensive with one or more counties, cities or towns . . .” W.Va. Code § 29-12A-3(c) (2002 Rep. Vol. & 2008 Cum. Supp.). The Act further defines the term “Municipality” to mean “any incorporated city, town or village . . .” W.Va. Code § 29-12A-3(b) (2002 Rep. Vol. & 2008 Cum. Supp.). The City of Charles Town, West Virginia, is incorporated as “The Corporation of Charles Town.” See Charter of The City of Charles Town, West Virginia, Section 3, Town Incorporate, an attested true copy of which is attached to The Corporation of Charles Town’s Motion To Dismiss Second Amended Complaint as Exhibit A. In Paragraph 2 of his Second Amended Complaint, plaintiff concedes that The City is a municipal corporation

More specifically, West Virginia Code Section 29-12A-5(a)(6) provides that:

A political subdivision is immune from liability if a loss or claim results from:

\* \* \*

(6) Snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of a political subdivision.

W.Va. Code § 29-12A-5(a)(6) (2002 Rep. Vol. & 2008 Cum. Supp.).

When one applies the foregoing principles of law to the facts alleged by Respondent Furr, it is clear that The Corporation of Charles Town is entitled to immunity from liability in the instant action.

More to the point, the allegations set forth in Respondent Furr's Second Amended Complaint demonstrate that his claim results from icy conditions existing on a public parking lot as a result of weather conditions. See Exhibit 1 - Second Amended Complaint, paras. 8, 9, 11, 12. There is no allegation indicating or tending to indicate that the snow and ice conditions complained of were affirmatively caused by a negligent act of The City which is the only recognized exception to the immunity from liability afforded to a political subdivision where a loss or claim results from weather conditions on a public way or other public place. In fact, plaintiff alleges that "the City . . . never removes snow and ice from the subject parking lot after the formation thereof." See Exhibit 1 - See Second Amended Complaint, para. 9.

This conclusion is buttressed by the allegations set forth in Paragraph 13 of Furr's Second Amended Complaint which specifically cites The City's failure to perform certain actions as a basis for Furr's claim of negligence. Because the claims asserted by Respondent Furr clearly fall

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organized and existing under the laws of the State of West Virginia. See Exhibit 1 - Second Amended Complaint, para. 2. Thus, it is clear that The Corporation of Charles Town is a political subdivision within the meaning of that term as it is employed in the West Virginia Governmental Tort Claims and Insurance Reform Act.

within the purview of the immunity set forth in Section 29-12A-5(a)(6), The Corporation of Charles Town is entitled to the immunity from liability provided by that Code Section.

Not only does a straightforward application of the immunity contained in West Virginia Code Section 29-12A-5(a)(6) to the facts alleged by Furr clearly merit the dismissal of the his claim against Charles Town with prejudice, a review of case law applying that immunity provision likewise mandates the dismissal of this claim.

Specifically, in Porter v. Grant County Board of Education, the West Virginia Supreme Court of Appeals directed the lower court to immunize the Grant County Board of Education pursuant to Section 29-12A-5(a)(6), where a spectator on her way to a high school basketball game slipped and fell on snow and ice on a sidewalk at Petersburg High School. Porter v Grant County Bd. of Educ., 633 S.E.2d at 38, 40 (W.Va. 2006). In so doing, the Court stated:

[i]t is obvious . . . that the language of W. Va. Code § 29-12A-5(a)(6) means that a political subdivision is immune from liability for injury caused by snow or ice placed on a sidewalk by the weather. **Thus, if the weather causes snow or ice to accumulate on a sidewalk and the political subdivision fails to remove it, the political subdivision is immune from liability for an injury caused by the snow or ice.**

Id. at 42. [Emphasis added].

According to the Court's analysis and the plain language of Section 29-12A-5(a)(6), the only noted exception is "where the snow or ice is placed on the public way by an act of the political subdivision, and the snow or ice causes an injury, . . ." Id. at 42. One need only view the allegations set forth in the Second Amended Complaint against the backdrop of the plain language of Section 29-12A-5(a)(6), as applied in Porter, to conclude that The City of Charles Town is entitled to a grant of immunity from liability in this case. This conclusion is further reinforced by the text of the Second Amended Complaint which states, in pertinent part,:

8. Over the past several years, . . . . The City and the Post negligently allowed the subject parking lot to be improperly and

dangerously maintained, in that the expansions and contractions caused by the forces of Nature over time resulted in a worn and uneven parking lot surface and contained low places in which water would collect, and during cold weather, said water would freeze in patches of black ice, making it dangerous and unfit for safe passage, all in violation of the lease agreement.

9. During cold weather, The City removes snow and ice from its streets and highways, but as a matter of practice, never removed snow and ice from the subject parking lot after the formation thereof. After accumulations of snow and ice, cycles of thawing, evaporation, melting, draining and refreezing would occur, so that dangerous patches of ice would exist in the subject parking lot for extended periods, to be ignored and neglected by The City.

Exhibit 1 - Second Amended Complaint, paras. 8-9.

The Second Amended Complaint concludes by stating:

The City was negligent and in breach of its contractual obligations in the following manner:

A. In failing to remove snow and ice from the subject parking lot as a matter of practice, even though The City was equipped with ample equipment such as snow plows, snow scrappers, snow blowers and chemical (salt) spreaders as would be sufficient for removal of snow and ice.

B. In failing to have practices and procedures proving [sic] for regular inspections and reports of safety conditions of the said city parking lot.

C. In failing to either warn the public or close parking lots when dangerous conditions, such as the presence of snow and ice, existed.

Exhibit 1 - Second Amended Complaint, para. 13 (A-C).

The immunity afforded to The Corporation of Charles Town by West Virginia Code Section 29-12A-5(a)(6) is underscored by the foregoing litany of failures alleged by Respondent Furr. Simply stated, Furr does not contend that there was an affirmative act by The City which caused the condition of black ice about which he complains. Thus, a rule to show cause and, ultimately, a Writ of Prohibition should issue.

***B. Respondent Furr's Second Amended Complaint Fails To State A Claim Against Charles Town***

In his Second Amended Complaint, Respondent seeks to predicate his tort cause of action upon the Lease Agreement entered into between The City of Charles Town and The American Legion, Jackson-Perks Post No. 71, Inc. See Exhibit 1 - Second Amended Complaint, para. 5. Furr appears to contend that because The City "affirmatively covenanted and agreed to keep the blacktop pavement in a reasonable state of repair, and to keep the parking lot free of snow and ice", his fall on black ice caused by weather conditions evidences The City's breach of the Lease Agreement and further that The City is liable to him as an intended beneficiary of the Agreement. See Exhibit 1 - Second Amended Complaint, paras. 5, 6.

Even if one were to accept Furr's allegations as true, West Virginia Code Section 29-12A-5(a)(6) nonetheless operates to immunize The City as a matter of law from a cause of action sounding in tort theory. Section 29-12A-5(a)(6) is broad and applies to immunize The City from liability for any claim or loss that results from:

- (6) Snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of a political subdivision.

*W. Va. Code* § 29-12A-5(a)(6) (2002 Rep. Vol. & 2008 Cum. Supp.). In the underlying action, it is undisputed that the parking lot in question is a public place. See Exhibit 1 - Second Amended Complaint, para. 4.

Moreover, West Virginia Code Section 8-12-12 states, in pertinent part,:

**§ 8-12-12. Power and authority to lease, establish, maintain and operate off-street parking facility.**

Every municipality shall have plenary power and authority to enter into a lease with the owner or owners of any real property situate within the corporate limits of such municipality by which such real property is demised, leased and let to such municipality for an off-street facility (including parking lots, buildings, ramps, parking meters and other appurtenances deemed necessary, appropriate or incidental to the regulation, control and parking of motor vehicles), which off-street parking facility is hereby declared to be a municipal public work, and every such municipality shall have plenary power and authority to establish, maintain and operate such parking facility.

\* \* \*

Any lease entered into by and between any such municipality and the owner or owners of any such real property may contain such terms and conditions as may be agreed upon between the parties, *not inconsistent with any of the provisions of this section or other provisions of law.*

*W. Va. Code* § 8-12-12 (2002 Rep. Vol. & 2008 Cum. Supp.). [Emphasis added].

When the foregoing Code Sections are read, *in pari materia*, the result, from an analytical standpoint, is clear: While Code Section 8-12-12 does not operate to void the Lease language upon which Furr relies, Section 29-12A-5(a)(6) sets forth the conditions under which any tort liability that is alleged to derive from that Lease language is effectively precluded. This is true because the imposition of tort liability pursuant to Paragraph 4 of the Lease Agreement would be

inconsistent with the immunity provided to The City of Charles Town under conditions covered by Code Section 29-12A-5(a)(6).

Similarly, Furr's contention that the Lease language itself constitutes "an affirmative cause" of the snow and ice condition upon which he is alleged to have fallen is without merit. One need only review the analysis set forth in *Porter v. Grant County Board of Education* to detect the flawed rationale underlying this contention. In *Porter*, this Court stated as follows:

[i]t is obvious . . . that the language of W. Va. Code § 29-12A-5(a)(6) means that a political subdivision is immune from liability for injury caused by snow or ice placed on a sidewalk by the weather. Thus, if the weather causes snow or ice to accumulate on a sidewalk and the political subdivision fails to remove it, the political subdivision is immune from liability for an injury caused by the snow or ice.

*Porter v. Grant Co. Bd. of Educ.*, 633 S.E.2d 38, 42 (W. Va. 2006).

However, according to this Court's analysis in *Porter* and the plain language of Section 29-12A-5(a)(6), there is *no* immunity only "where *the snow or ice is placed on the public way by an act of the political subdivision*, and the snow or ice causes an injury, . . ." *Id.* at 42. [Emphasis added.].

In this case, Respondent does not allege that The City placed the snow and ice on the parking lot where he fell. In fact, all of Furr's allegations, including the Lease language cited by him, speak directly to The City's failure to remove from the parking lot the snow and ice caused by the weather. As the analysis of this Honorable Court in *Porter* and the plain language of West Virginia Code Section 29-12A-5(a)(6) make clear, The City is immunized from liability for such a failure. *Porter, id.* at 42.

This conclusion is underscored by the fact that the plain language of Section 8-12-12 makes clear that any liability which is alleged to derive from the terms of a Lease Agreement is precluded to the extent that it is inconsistent with "other provisions of law." *W. Va. Code* § 8-

12-12 (2002 Rep. Vol. & 2008 Cum. Supp.). Thus, pursuant to Section 8-12-12, the Lease language cannot, as a matter of law, be used in this case as a predicate for the alleged tort liability of The City, given the immunity afforded by Section 29-12A-5(a)(6). The argument espoused by Respondent Furr vis a' vis the Lease is an insufficient factual predicate for tort liability. In fact, Furr's theory is substantially similar to the one rejected by this Court in *Porter* wherein plaintiffs contended that "the principal and athletic director were negligent for allowing the school to be open in violation of the normal school board policy and custom of cancelling all school related activities when classes are closed due to the weather" and proffered this as an affirmative cause of Mrs. Porter's fall. *Porter, id.* at 41, 43.

As the foregoing analysis demonstrates, The City is entitled to immunity in light of the circumstances giving rise to Furr's claim. In this case, the breadth and scope of the immunity set forth in Section 29-12A-5(a)(6) and the weather conditions which, as indicated in the Second Amended Complaint, resulted in the black ice upon which plaintiff fell make it virtually impossible for plaintiff to prove facts pursuant to which liability would be imposed upon the City. Thus, the standard for granting a dismissal pursuant to Rules 12(b)(6) and 12(c) of the West Virginia Rules of Civil Procedure has been met.

The foregoing analysis is buttressed by the decision rendered by this Supreme Court of Appeals in *Hutchison v. The City of Huntington*, 479 S.E.2d 649 (W.Va. 1996).

In *Hutchison*, a landowner sued The City of Huntington for additional costs incurred as a result of The City's initial refusal to issue a building permit to the plaintiff. *Id.* at 655-57. The trial court denied The City's Motion to Dismiss which was based, in part, on the immunity provisions of The West Virginia Governmental Tort Claims and Insurance Reform Act and the case proceeded to trial. *Id.* at 657. After a \$25,000 verdict was rendered against The City, it appealed based, in part, upon the lower court's denial of its Motion to Dismiss made pursuant to

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and the statutory immunity set forth in Section 29-12A-5(a). *Id.* at 657.

In reviewing the issues before it, this Honorable Court revisited the trial court's denial of The City's 12(b)(6) Motion, noting that such a review, although not ordinarily undertaken, was warranted in order to provide trial courts with necessary guidance for handling such issues in the future. *Id.* at 657-58 n.8. In so doing, this Court emphasized that "the need for early resolution . . . is particularly acute when the defense is in the nature of an immunity." *Id.* at 657.

This Court further refined the application of the immunities emanating from Section 29-12A-5(a) by indicating that "[p]ublic officials and local governmental units should be entitled to . . . statutory immunity under W. Va. Code, 29-12A-5(a), unless it is shown by specific allegations that the immunity does not apply." *Id.* at 657-58. [Emphasis added].

In *Hutchison*, this Court reversed and dismissed the action after it had been tried by a jury. *Id.* at 668. In so doing, this Honorable Court commented, "[h]ad the circuit court properly applied W. V. Code, 29-12A-5(a)(9), to this action, it would have dismissed all state law claims as a matter of law." *Id.* at 661. In Footnote 10 of the opinion, this Honorable Court stated in regard to the statutory immunities set forth in Code Section 29-12A-5(a), "[i]n absolute statutory immunity cases, the lower court has little discretion, and the case must be dismissed if one or more of the provisions imposing absolute immunity applies." *Id.* at 658.

***C. The Circuit Court May Have Erroneously Considered the Respondent Jackson-Perks Post No. 71, Inc.'s Response To Charles Town's Motion Because Jackson-Perks Post No. 71, Inc.'s Response Contained An Inaccurate Statement Of The Law.***

In its Order Denying Charles Town's Motion, the Court acknowledged its consideration of the Responses filed by Respondents Furr and Jackson-Perks Post No. 71, Inc., respectively. The Response filed by Jackson-Perks Post No. 71, Inc. contains an inaccurate statement of the law. On Page 4 of that Response, West Virginia Code Section 29-12A-4(c) is misquoted and the

language which actually appears in 29-12A-4(c) does not appear in the quotation. Section 29-12A-4(c) expressly states that it is “[s]ubject to sections 5 and 6 of this Article” and this is omitted from the Jackson-Perks Response and in its place the phrase “except as otherwise provided in this article” appears.

In actuality, 29-12A-4(c)(3) reads as follows:

(c) Subject to sections five and six of this article, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge.

*W.Va. Code § 29-12A-4(c)(3) (2002 Rep.Vol. & 2008 Cum. Supp.)*

While the undersigned counsel does not seek to ascribe anything more than inadvertence to this error, the inaccuracy of the quote cannot be disputed. Moreover, in the absence of specific findings and given that Charles Town was deprived of its Court ordered reply period, it may be assumed that the Circuit Court considered this inaccurate statement of law in making its ruling.

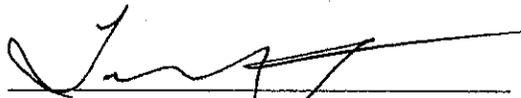
More to the point, in *Porter*, this Court expressly rejected the *Porter* plaintiffs' argument that 29-12A-4(c) overrode the immunity set forth in West Virginia Code Section 29-12A-5. In so doing, this Honorable Court held "any liability set forth in W. Va. Code § 29-12A-4(c) is subject to the immunity for liability for losses or claims arising from snow or ice conditions in W. Va. Code § 29-12A-5(a)(6)." *Porter, id.* at 43. Therefore, to the extent that the lower court, in denying Charles Town's Motion, considered the law set forth in Respondent Jackson-Perks Post No. 71, Inc.'s Response in relation to W. Va. Code § 29-12A-4(c), its ruling is erroneous as a matter of law.

#### **V. RELIEF REQUESTED**

The Petitioner respectfully requests this Honorable Court to issue a rule to show cause, returnable at such date and time as the Court deems appropriate; issue an automatic stay pursuant to Rule 14 of the West Virginia Rules of Appellate Procedure; require the Respondents to show cause, if they can, why a writ of prohibition should not be awarded which prohibits any further proceedings in this case until The Corporation of Charles Town is dismissed from the action with prejudice and award all such other and further relief as the Court may deem just and proper.

Further, the Petitioner respectfully requests that, after the Respondents have had an opportunity to show cause, a Writ of Prohibition be awarded to The Corporation of Charles Town, prohibiting the Honorable David H. Sanders, Judge of the Circuit Court of Jefferson County, from conducting any further proceedings in this action until The Corporation of Charles Town is dismissed from the underlying action with prejudice.

**PETITIONER  
CORPORATION OF CHARLES TOWN  
BY COUNSEL**



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Tamara J. DeFazio, Esquire  
W.Va. State Bar Id. No.: 5130

**Counsel For Petitioner  
Corporation of Charles Town**

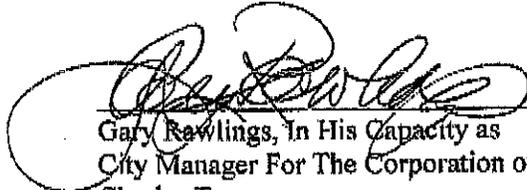
Shuman, McCuskey & Slicer, PLLC  
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Morgantown, WV 26505  
Telephone No.: 304-291-2702  
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**Of Counsel For Petitioner  
Corporation of Charles Town**

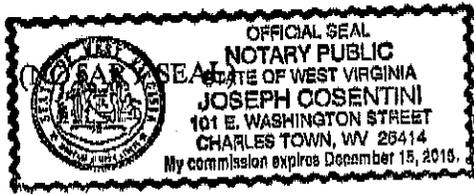
VERIFICATION

STATE OF WEST VIRGINIA,  
COUNTY OF JEFFERSON, TO-WIT:

Gary Rawlings, being first duly sworn, deposes and says that he is the City Manager for The Corporation of Charles Town, the petitioner herein; that he has read the Petition for Writ of Prohibition and that he has personal knowledge of the facts alleged therein or, to the extent he does not have personal knowledge, he believes, based upon information made known to him, the same to be true.

  
\_\_\_\_\_  
Gary Rawlings, In His Capacity as  
City Manager For The Corporation of  
Charles Town

Taken, subscribed, and sworn to before me this 9 day of JUNE, 2009, by Gary Rawlings,  
In His Capacity as the City Manager of The Corporation of Charles Town, for and On Behalf of The  
Corporation of Charles Town.



  
\_\_\_\_\_  
Notary Public

My commission expires:

Dec. 15, 2015

**CERTIFICATE OF SERVICE**

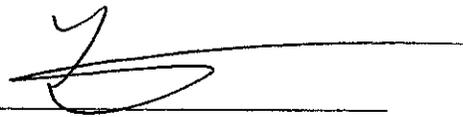
I hereby certify that I served the **“Petition for Writ of Prohibition And Memorandum Of Law”**, **“Appendix To Petition for Writ of Prohibition And Memorandum Of Law”**, and **“Memorandum of Persons Upon Whom The Rule To Show Cause Is To Be Served, If Granted”** upon the following parties on this the 10<sup>th</sup> day of June, 2009, by mailing a true copy thereof via Overnight Mail, as follows:

Dale A. Buck, Esquire  
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Pittsburgh, PA 15222  
**Counsel for Respondent/Defendant**  
**Jackson-Perks Post 71, Inc.**

The Honorable David H. Sanders  
Judge, 23<sup>rd</sup> Judicial Circuit  
Jefferson County Courthouse  
100 E. Washington Street  
Charles Town, WV 25414



Tamara J. DeFazio  
W.Va. State Bar Id. No.: 5130