



## DECISIONS, NOTICES AND ORDERS

**Friday, September 27, 2013**

The Supreme Court of Appeals of West Virginia has taken action in the following cases. This list contains only the action taken by the Court, not the content or actual date of orders or decisions.

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### REHEARINGS

The Court took the following action on petitions for rehearing:

Hartford Fire Insurance Company v. Micah Curtis and Angela Curtis,

No. 12-0037 (Jackson 08-C-157)

Hartford Fire Insurance Company v. Jerry Lee Rhodes and Bonnie Cochran,

No. 12-0522 (Kanawha 10-C-592)

Refused (3-2) (Chief Justice Benjamin and Justice Ketchum would grant)

James P. Campbell v. Glen Poe, No. 12-0130

Steven D. Foster v. Glen Poe, No. 12-0165

(Jefferson 08-C-223)

Refused (5-0)

Michael Conrad Murray v. Kellie Marie Murray, No. 12-0771 (Kanawha 10-D-1183)

Refused (4-1) (Chief Justice Benjamin would grant)

Jerome E. Heinemann v. Pocahontas County Commission, No. 12-0610 (Pocahontas 12-P-18)

Refused (5-0)

CJH, Inc. v. Quadruple S Farms, LLC; and Four-S Development, LLC, No. 12-0825

(Putnam 09-C-438)

Refused (5-0)

Roger Riggelman v. Pilgrim's Pride Corporation of West Virginia, Inc. and Jerry Hughes,

No. 12-1025 (Hardy 11-C-21)

Refused (5-0)

Joseph McCutcheon v. Larry D. Parsons, No. 12-0698 (Kanawha 09-C-250)

Refused (5-0)

State of West Virginia v. Charlotte Elza, No. 12-1049 (Pocahontas 09-M-AP-2)

Refused (5-0)

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Posie Phillips and Ethel Phillips v. Bryce Phillips and Pauline Phillips, No. 12-0292  
(Wyoming 01-C-137)  
Refused (5-0)

State of West Virginia v. Gabriel Heater, No. 12-0814 (Kanawha 12-F-227)  
Refused (5-0)

In Re: A.T., No. 12-1419 (Preston 12-JA-11)  
Refused (5-0)

James and Katheryn Broderick v. Big Bear Lake Property Owners Association, Inc., No. 12-1087  
(Preston 11-C-142)  
Refused (5-0)

Sherry Frame v. JPMorgan Chase, Cathy Martindill and Donna Willis, No. 12-0967  
(Ohio 09-C-184)  
Refused (5-0)

Mary Collia v. David Grubb, No. 12-0956 (Kanawha 10-C-1672)  
Refused (5-0)

Jannell Williams, Personal Representative of the Estate of Kenneth Williams; and Cheryl Rutledge, Personal Representative of the Estate of Quentin Rutledge v. Werner Enterprises, Inc. and Drivers Management, LLC, No. 12-0847 (Ohio 09-C-419)  
Refused (5-0) – Corrected Memorandum Decision issued

We the Parents v. Rocco S. Fucillo, Cabinet Secretary, WV Department of Health and Human Resources; and Marian L. Swinker, Commissioner, Bureau of Public Health, No. 12-1394  
(Kanawha 12-C-1700)  
Refused (5-0)

Donna J. White v. National Church Residence and National Church Residences Elderly of Montgomery, WV, Inc., No. 12-1427 (Kanawha 11-C-982)  
Refused (5-0)

**MEMORANDUM DECISIONS**

In accordance with Rule 21, memorandum decisions were entered  
in the following cases:

Joshua Slater v. David Ballard, Warden, No. 12-0330 (Kanawha 09-MISC-120)  
Affirmed (5-0)

Commerce Limited Partnership #9213; Commerce Group, Inc.; NCV Equity Funding, LLC; and Martin and Sheila Boyle v. Olivieri, Shousky and Kiss, P.A. and Paul Kiss, No. 12-1421  
(Greenbrier 11-C-206)

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Affirmed (4-1)(Justice Davis dissenting)

Jamal Redman v. South Branch Career and Technical Center, No. 13-0090 (Grant 11-C-63)  
Affirmed (5-0)

**RULE 19 ARGUMENT GRANTED**

The following cases will be scheduled for Rule 19 oral argument on a later date:

SER Linda York v. West Virginia Real Estate Appraiser Licensing and Certification Board, No. 13-0827 (Original Prohibition)

Christina L. v. Steven L., No. 12-1508 (Hampshire 11-D-152)

Barbara Powell v. Donald Meredith, No. 13-0252 (Harrison 11-C-324)

Donald Burgess and Patricia Burgess v. Corporation of Shepherdston and Jim Auxer, Mayor, No. 12-1278 (Jefferson 11-C-421)

David and Deborah Dickens v. Sahley Realty Company, Inc.; Patrick and Melinda Sterner; and WHR Group, Inc., No. 13-0117 (Putnam 11-C-221)

Cathy Cyfers, Joseph Cyfers and Megan Cyfers v. Jack Cyfers, Helen Cyfers, Roger Cyfers, Dottie Cyfers and Wayne Cyfers, No. 12-1541 (Cabell 10-C-744)

Lindsay M. Arthurs v. Eilene R. Pownell, No. 13-0089 (Monongalia 10-C-743)

**RULE 20 ARGUMENT GRANTED**

The following cases will be scheduled for Rule 20 oral argument on a later date:

SER State of West Virginia v. Hon. Robert A. Burnside, Jr., Judge; and Richard E. Hardison, Jr., No. 13-0733 (Original Prohibition)

United Hospital Center, Inc. v. Cheryl Romano, Assessor of Harrison County; and Mark W. Matkovich, Acting State Tax Commissioner, No. 13-0120 (Harrison 11-C-124)

State of West Virginia v. Gary Lee Rollins, No. 13-0099 (Nicholas 11-F-81)

National Union Fire Insurance Company of Pittsburgh, PA v. Dan Cava, Stephen Hall, and Dan's Car World, LLC, No. 13-0215 (Marion 09-C-110)

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WV Regional Jail and Correctional Facility Authority v. Amanda Belcher, No. 13-0037  
(Kanawha 10-C-2131)

Liberty Mutual Insurance Company and Greg Chandler's Frame and Body, LLC v. Patrick  
Morrisey, Attorney General, No. 13-0195 (Kanawha 11-C-2231)

**ORDERS**

Orders of note were entered in the following cases:

Joe Young and Nicholas Sanitation, Inc. v. Nicholas County Solid Waste Authority, Robert  
Johnson, Larry Bradford, Pat Justice, Gary Brown, Chris Mondreas, and Larry Harrah,  
No. 13-0135

The Circuit Court of Nicholas County certified the following four questions to the Court:

1. Is a county solid waste authority, such as the Nicholas County Solid Waste Authority exempt, pursuant to West Virginia Code § 24A-1-3(2), from the provisions of Chapter 24A of the West Virginia Code, the provision of which require, among other things, that any common carrier by motor vehicle operating within the State to obtain a certificate of convenience and necessity pursuant to West Virginia Code § 24A-2-5?

Circuit Court Answer: "Yes." The motor vehicles owned and operated by a county solid waste authority are exempt from the provisions of Chapter 24A of the West Virginia Code pursuant to West Virginia Code § 24A-1-3(2).

2. Is it unlawful for a county solid waste authority, such as the Nicholas County Solid Waste Authority to collect and transport solid waste from residences, commercial businesses, and government entities under the authority of West Virginia Code § 22C-4-23(6), when there is a private hauler entitled to "primacy" pursuant to West Virginia Code § 22C-4-8(b)(2) because such hauler has been issued a certificate of need by the Public Service Commission, pursuant to West Virginia Code § 24A-2-5, for that same geographic area?

Circuit Court Answer: "No." Pursuant to West Virginia Code § 22C-4-23(6), a county solid waste authority has the power and authority to collect and transport solid waste. The use of the word "primacy" in West Virginia Code § 22C-4-8(b)(2) relates to the solid waste control plan to be developed by the county solid waste authority pursuant to West Virginia Code § 22C-4-8. Therefore, the word "primacy" as used in § 22C-4-8(b)(2) does not affect the power and authority of the county solid waste authority to collect and transport waste pursuant to § 22C-4-23(6).

3a. Alternatively, if the answer to Question No. 2 is "Yes" and it is unlawful for a county solid waste authority to collect and transport solid waste where a private hauler has been issued a certificate of necessity by the Public Service

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Commission for that same geographic area, then: Are respondents in this case, entitled to *qualified immunity*?

Circuit Court Answer: “Yes.” Respondents’ discretionary decision to collect and transport solid waste in connection with the Nicholas County Solid Waste Authority’s recycling program does not violate any clearly articulated statute, rule, regulation, standard or right which an entity or person in their respective positions would have known; and was not fraudulent, malicious, or otherwise oppressive.

3b. Alternatively, if the answer to Question No. 2 is “Yes” and it is unlawful for a county solid waste authority to collect and transport solid waste where a private hauler has been issued a certificate of necessity by the Public Service Commission for that same geographic area, then: Are respondents in this case, entitled to *statutory immunity* under the West Virginia Governmental Tort Claims and Insurance Reform Act, as set forth in West Virginia Code §§ 29-12A-1, et seq.?

Circuit Court Answer: Respondents do not fall within the scope of the West Virginia Governmental Tort Claims and Insurance Reform Act, as set forth in West Virginia Code §§ 29-12A-1, et seq. because (1) the county solid waste authority falls within the definition of a “political subdivision” as set forth in West Virginia Code § 29-12A-3(c); and (2) therefore, the individually named respondents/defendants fall within the definition of “employee” in West Virginia Code § 29-12A-3(a).

The individually named respondents are immune from liability pursuant to West Virginia Code § 29-12A-5(b) because their alleged actions took place in the scope of their employment and there is no evidence that they were undertaken with malicious purpose, in bad faith, or in a wanton or reckless manner. However, the Nicholas County Solid Waste Authority is not entitled to statutory immunity under West Virginia Code § 29-12A-5(a)(16) because the collection and transfer of solid waste does not fall within “the operation of dumps, sanitary landfills, and facilities.” Finally, all respondents/defendants are entitled to statutory immunity from petitioners/plaintiffs punitive damages claims under West Virginia Code § 29-12A-7.

THE COURT DECLINED TO DOCKET CERTIFIED QUESTIONS (5-0)

Bayer Corporation v. Kvaerner, CDI Engineering Solutions, Inc. and Belcan Corporation,  
No. 13-0161

The Circuit Court of Marshall County certified the following question to the Court. The circuit court did not propose an answer to the certified question.

1. Does *Howell v. Luckey*, 205 W.Va. 445, 518 S.E.2d 873 (1999), prevent a party from bringing a separate subsequent actions for comparative contractual indemnity when the defendants in that separate subsequent actions were not joined as third-party defendants in the original action?

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THE COURT DECLINED TO DOCKET CERTIFIED QUESTION (5-0)

City of Bridgeport; The Bridgeport Police Department; John Walker, Chief of the Bridgeport Police Department; A. Kim Haws, City Manager; and Dan Riggs Towing v. Doug's Towing, LLC,  
No. 13-0188

The Circuit Court of Harrison County certified the following three questions to the Court:

1. Whether under West Virginia Code § 24-6-1a and § 24-6-12[,] Bridgeport, or any political subdivision, must follow the county's towing policy or rotation list?

Circuit Court Answer: "Yes."

2. Whether the City defendants are immune from suit in this case under the Governmental Tort Claims Act, West Virginia Code § 29-12A-5?

Circuit Court Answer: "No."

3. Whether violation of West Virginia Code § 24-6-1a and § 24-6-12 provides a private cause of action to any towing operator who wishes to challenge any deviations from or disputes over the county's towing policy?

Circuit Court's Answer: "Yes."

THE COURT DECLINED TO DOCKET CERTIFIED QUESTIONS (5-0)

Westbrook Health Services v. Cheryl Hall, Clerk, West Virginia Court of Claims; and the West Virginia Public Employees Insurance Agency, No. 13-0698 (Original Certiorari)  
Petition refused (5-0)

SER Vincent Blackmon v. Hon. Eric H. O'Briant, Judge, No. 13-0732 (Original Prohibition)  
Petition refused (5-0)

SER Eldon Russell "Pete" Haines, Jr. v. Hon. Christopher C. Wilkes, Judge, et al., No. 13-0749  
(Original Prohibition)  
Petition refused (5-0)

SER John McLaurin v. Hon. Jennifer Bailey, Judge, No. 13-0755 (Original Mandamus)  
Rule to show cause issued returnable November 4, 2013, unless sooner mooted by entry of a final order. (5-0)

SER Charlston, Revich & Wollitz, LLP v. Hon. Louis H. Bloom, Judge, et al., No. 13-0789  
(Original Prohibition)  
Petition refused (5-0)

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State of West Virginia v. Cornell F. Daye, No. 13-0724 (Post-Conviction Bail)  
Petition for Bail refused (5-0)

SER Gentiva Health Services, Inc., et al. v. Hon. Charles E. King, Judge; and Holly McComas,  
No. 13-0809 (Original Prohibition)  
Petition refused (5-0)

SER Kody Kerns v. Hon. Thomas C. Evans, III, Judge, No. 13-0836 (Original Prohibition)  
Petition refused (5-0)