No. 31396 – Mindy and Billy McCormick and David Carroll v. Walmart Stores, Inc., a Delaware Corporation; RCDI Construction, Inc., a West Virginia Corporation; West Virginia Department of Transportation, Division of Highways, an agency of the state government of the State of West Virginia; and The Town of Lewisburg, West Virginia, a municipality

FILED

June 30, 2004

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RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Maynard, Chief Justice, dissenting:

The facts of this case are simple. The Town of Lewisburg issued a permit to build a Walmart SuperCenter. The appellants now allege that, as a result of the construction of the Walmart, stormwater flows onto their property and causes damage. As the circuit court correctly recognized, the appellants have no cognizable cause of action against the Town, although it is certainly not for lack of effort on the appellants' part. The appellants' complaint against the Town has been a moving target including claims for wrongful issuance of a permit; failure to maintain storm water management facilities; strict liability; liability for changes made decades ago which now may be contributing to the appellants' problems; and breach of an affirmative duty to reconfigure the Town's storm water management facilities whenever changes are made in surrounding areas by third parties to ensure that the changes made by the third parties do not cause water originating on City property to spread to other landowners. Although these theories constitute creative pleading, they fail as viable causes of action under the facts of this case. If there is a possible recovery to be had in this case, it should be against the defendant Walmart and not against the Town of Lewisburg. Therefore, I would affirm the circuit court's dismissal of the Town of Lewisburg from the lawsuit.

The Town correctly asserts that because any stormwater from its property and stormwater drainage systems first passes through property owned by Walmart before arriving on the appellants' property, the Town has no liability for injuries caused by that drainage. The majority opinion dismisses this argument by relying on *Whorton v. Malone*, 209 W.Va. 384, 549 S.E.2d 57 (2001). However, the principles in *Whorton* are not applicable to the instant facts. In *Whorton*, a landowner claimed immunity from stormwater drainage because the water did not originate on his property. In contrast, in the instant case, the water originated on the Town's land, but drained onto Walmart's property before reaching the appellants' land. *Whorton* would be applicable here only if Walmart claims immunity because the water originated on the Town's property rather than on Walmart's.

Concerning liability for surface water run-off, this Court held in Syllabus Point 2 of *Morris Associates, Inc. v. Priddy*, 181 W.Va. 588, 383 S.E.2d 770 (1989), in part, that,

> Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the *adjoining* landowners, as well as social utility.

(Emphasis added). Thus, a landowner may be liable for surface water run-off that damages the property of an adjoining landowner. However, we have never held that a party may be liable for surface water run-off that damages the property of *nonadjacent* landowners. In the instant case, the appellants are *nonadjacent* landowners to whom the Town owed no duty.

This Court further has held that "[a] city is not bound to furnish drains or sewers to relieve a lot of its surface water, whether its own or that flowing from other premises." Syllabus Point 1, *Jordan v. City of Benwood,* 42 W.Va. 312, 26 S.E. 266 (1896), *overruled on other grounds by Morris, supra. See also Carter v. Monsanto Co.*, 212 W. Va. 732, 575 S.E.2d 342, 346 ("Neither West Virginia common law nor West Virginia statutory law presently supports or recognizes a claim for property monitoring.").

In addition, we have never recognized a duty to intervene and preemptively alleviate water problems caused by a third party's development of its property. According to the appellants, prior to the construction of the Walmart SuperCenter, the bulk of the stormwater from the Town's property did not reach the appellants' property. Since the construction of Walmart, however, the stormwater drainage now flows across Walmart's property and onto the appellants' property. This clearly indicates that it is not the Town's actions, but rather the actions of Walmart that have caused the appellants' alleged injury.

It is undisputed that the only act which the Town undertook is the permitting and zoning of Walmart and other commercial development. As a matter of law, acts associated with a political subdivision's permitting, zoning, licensing, and inspection functions are acts afforded express immunity under W.Va. Code § 29-12A-5(a)(9) (1986) which states:

> A political subdivision is immune from

> liability if a loss or claim results from: ... (9) Licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority[.]

This Court addressed the immunity of political subdivisions in the case of *Hose v. Berkeley County Planning Com'n*, 194 W. Va. 515, 460 S.E.2d 761 (1995). In *Hose*, a landowner attempted to impose liability on a developer for changing the flow of surface water which resulted in flooding of the landowner's property. We found that the County Planning Commission and the County Engineer were immune under W.Va. Code § 29-12A-5(a)(9), and we held in Syllabus Point 5:

> *W. Va. Code*, 29-12A-5(a)(9) [1986] clearly contemplates immunity for political subdivisions from tort liability for any loss or claim resulting from licensing powers or functions such as the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval order or similar authority, regardless of the existence of a special duty relationship.

The majority's contention that *Hose* is not controlling rests on two unduly restrictive conclusions: (1) *Hose* was a summary judgement case, where a substantial amount of factual development had taken place, whereas in the instant case, there has not been development of the record to see what specific facts the appellants can attempt to prove to support their claim; and (2) there was no claim by the plaintiffs in *Hose* that their property

was being injured as a result of negligent conduct in the maintenance and operation of property and drainage systems owned and maintained by a political subdivision. With regard to the first argument, the majority misapplies the applicable rule of law. This court has said that in cases of an immunity defense, a heightened pleading is required and early resolution by summary disposition is encouraged:

> We agree with the United States Supreme Court to the extent it has encouraged, if not mandated, that claims of immunities, where ripe for disposition, should be summarily decided before trial. Public officials and local government units should be entitled to qualified immunity from suit under § 1983, or statutory immunity under W. Va. Code, 29-12A-5(a), unless it is shown by specific allegations that the immunity does not apply .

Hutchison v. City of Huntington, 198 W. Va. 139, 147-48, 479 S.E.2d 649, 657-58 (1996) (footnote and citation omitted). In the instant case, the appellants were given three chances to state facts sufficiently specific to support a claim against the Town of Lewisburg; however, the allegations of all the appellants' complaints fail to meet the heightened pleading requirement afforded a municipality when an immunity defense exists. The Town's conduct falls squarely within the immunity defense.

Finally, the appellants admit that the alleged changes made by the Town caused them no damage or injury for almost twenty years and that the only "changes" which allegedly caused the appellants' problems were undertaken by third parties. In addition, the appellants allege no facts to support a claim of continuing tortious conduct such that the two-

year statute of limitations would be tolled from the date the Town issued permits for the construction of Walmart. Accordingly, I believe that the two-year statute of limitations in W.Va. Code § 29-12A-6(a) (1986), which applies to claims against a political subdivision for damages or loss to persons or property caused by any act or omission in connection with a governmental or proprietary function, bars the appellants' claims against the Town.

In sum, the appellants' allegations in all three separate complaints fail to establish a cognizable claim against the Town of Lewisburg, and the circuit court properly dismissed the Town from the appellants' lawsuit. Therefore, I would have affirmed the circuit court.