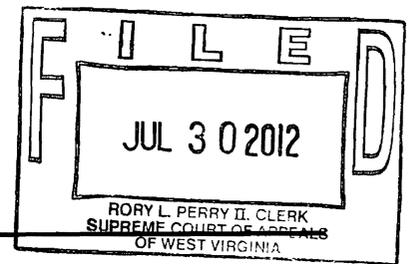


No. 12-0614



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DREAMA BOWDEN, as Administratrix of the
Estate of Lowell Bowden

*Petitioner and
Plaintiff below,*

v.

MONROE COUNTY COMMISSION, a political
subdivision and PATRICIA GREEN, individually
and in her official capacity,

*Respondent and
Defendants Below.*

From Monroe County Circuit Court
No. 11-C-18

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN RULING THAT PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AGAINST THE MONROE COUNTY COMMISSION DUE TO THE IMMUNITIES CONTAINED WITHIN THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT, WEST VIRGINIA CODE §29-12A-1, *ET SEQ.*
2. THE CIRCUIT COURT ERRED IN RULING THAT PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AGAINST PATRICIA GREEN DUE TO THE IMMUNITIES CONTAINED WITHIN THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT, WEST VIRGINIA CODE §29-12A-1, *ET SEQ.*
3. THE CIRCUIT COURT ERRED IN RULING THAT PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED PURSUANT TO THE PUBLIC DUTY DOCTRINE.
4. THE CIRCUIT COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT.

STATEMENT OF THE CASE

This case presents an appeal of the Circuit Court of Monroe County, West Virginia finding that the Complaint filed by the Plaintiff, Dreama Bowden, as Administratrix of the Estate of Lowell Bowden, failed to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Specifically, the underlying Court held that both the Monroe County Commission and its employee, Patricia Green, were statutorily immune from the claims made by the Petitioner pursuant to the West Virginia Governmental Tort Claims and Insurance Reform Act. Furthermore, the underlying Court also ruled that the Plaintiff could not state a claim upon which relief may be granted against either Defendant pursuant to the Public Duty Doctrine.

On November 27, 2009, Lowell Bowden was taking his daily walk along Broyles Cemetery Road near Landside, Monroe County, West Virginia. *Record* at 003. While walking

peacefully along Broyles Cemetery Road, Mr. Bowden was viciously attacked by several American Pit Bull Terrier dogs (“Pit Bulls”) owned by certain residents of Monroe County who lived in the same rural neighborhood of Mr. Bowden and his widow, Dreama. Mr. Bowden was maimed beyond recognition and maintained no recognizable facial features as a result of the vicious attack by the Pit Bulls. *Id.* Mr. Bowden miraculously survived the initial attack and was transported to a local hospital. When it was determined that Mr. Bowden needed more specialized intensive care he was immediately flown via airlift to Richmond, Virginia. Unfortunately, Mr. Bowden later died as a result of his injuries. *Id.*

The Pit Bulls in question were unrestrained and running at large through the community at the time of the attack. *Id.* Furthermore, these Pit Bulls were known to be vicious, dangerous and in the habit of attacking or biting persons. *Id.* Specifically, members of the community, including Mr. and Mrs. Bowden, had contacted the county in an effort to have something done about these animals. *Id.*, 046, 072, 079, 106. Dreama Bowden intended to testify that county officials traveled to their area as a result of their specific complaints; but, nothing was ever done about the vicious animals which ultimately took her husband’s life. *Id.* In fact, Mrs. Bowden intended to testify that Patricia Green was at her home and told the Bowden’s she would take care of the Pitt Bull problem. *Id.* at 79. However, the most that was ever done about the numerous complaints from the community and the Bowden’s was a citation issued by Defendant Green pursuant to West Virginia Code §19-20-20 against those certain residents of Monroe County.

Dreama Bowden, as the duly appointed Administratrix of the Estate of Lowell Bowden, filed her Complaint against the Monroe County Commission (hereinafter “the Commission”), Patricia Green, Justin Blankenship, Kim Blankenship, Anna Hughes, Mose Christian, and

American Modern Home Insurance Company on March 25, 2011.¹ *Record* at 001. Patricia Green is the duly appointed Dog Warden for Monroe County, West Virginia. *Record* at 002. In her Complaint, Petitioner made claims against the Commission and Patricia Green for Negligence in failing to impose and collect taxes on the subject Pitt Bulls pursuant to West Virginia Code §19-20-1, *et seq.* and for Wrongful Death. *Record* at 008-013.

Petitioner made an individual claim against the Commission for Negligence on the part of the Patricia Green in the scope of her employment. *Record* at 10. Specifically, Petitioner claimed that Patricia Green's failed to patrol the county, seizing on sight and impounding any dog more than six months of age found not wearing a valid registration tag which is a specific requirement of the job pursuant to West Virginia Code § 19-20-1, *et seq.* Petitioner's claim was that the Commission and Patricia Green had been made aware, by her household and others in the community, that the Pit Bulls referenced in this complaint were permitted to run at large, were not properly registered, were not wearing valid registration tags and were known to Patricia Green and the Commission to be "at large" by prior complaints lodged about the Pit Bulls by persons in the neighborhood and the Bowden's specifically. *Id.* at 010, 086. Consequently, Petitioner alleged that the Commission was liable for the negligence of Patricia Green to perform her official duties while in the scope of her employment.

Finally, Petitioner made an individual claim for punitive damages for any acts that Patricia Green made which were outside of the scope of her employment and were made with conscious disregard of, or indifference to, a known risk of harm to her constituting willfulness, wantonness and recklessness. *Record* at 088. This claim was specifically made in the event the

¹ Defendants Justin Blankenship, Kim Blankenship and American Modern Home Insurance Company entered into a settlement with the Estate on April 1, 2012 for their insurance policy limits of \$25,000.00. *Record* at 126. Defendant Mose Christian and Anna Hughes have failed to appear in the matter and remain in Default Judgment in the Circuit Court of Monroe County

actions of Patricia Green were later determined to be outside the scope of her employment as the Dog Warden of Monroe County.

In response to Petitioner's Complaint, the Commission and Patricia Green filed their Motion to Dismiss with the underlying Circuit Court on April 26, 2011. *Record at 017-040*. In their motion, the Defendants argued that the Petitioner failed to state a claim upon which relief may be granted based on the West Virginia Governmental Tort Claims and Insurance Reform Act (hereinafter "the Act"). *Record at 021-023*. Furthermore, the Defendants argued that the complaint failed to state a claim upon which relief could be granted based on the Public Duty Doctrine. *Record at 023-028*.

In response to Defendant's Motion to Dismiss, Petitioner filed "Plaintiff's Response to Defendants', Monroe County Commission's and Patricia Green's, Motion to Dismiss and Memorandum in Support" on September 1, 2011. *Record at 045-059*. In her Response, Petitioner explained that the Complaint did state a claim upon which relief may be granted based on West Virginia law. Pursuant to the Act and the case law that has interpreted the Act the general rule of construction in governmental tort legislation favors liability, not immunity. *Record at 048*. Pursuant to the Act, a political subdivision is liable in damages in a civil action for the death of another caused by an act or omission of the subdivision or its employees in connection with a governmental or proprietary function. *Id.* Specifically, the Commission can be held liable for the negligent performance of acts by employees acting within the scope of their employment. In this case, Petitioner's Complaint specifically pled negligent acts of Patricia Green in the scope of her employment. *Record at 050-051*. Patricia Green was charged with certain duties pursuant to statute as the appointed Dog Warden for Monroe County. It was the negligent failure of Patricia Green to perform those duties when called upon to do so that the

Petitioner alleged that the Commission could be held liable. *Id.* Consequently, there were numerous sets of facts wherein the Commission could be held liable in this case.

Next, the Petitioner explained the Public Duty Doctrine, its relation to the Act, and her position that the special relationship exception applied in this case. *Record* at 052-054. Specifically, Petitioner argued that she and other members of the community had contacted Patricia Green in an effort to stop the Pitt Bulls from roaming their neighborhood. *Record* at 054. In fact, Petitioner later disclosed that Patricia Green had been to her home and had assured her that the Pitt Bull problem would be taken care of. *Record* at 079, ¶¶ 21-24. Petitioner additionally argued that the four-part test for the special relationship exception was a rather fact driven test which was not appropriate for dismissal on a Rule 12(b)(6) motion. *Record* at 054.

Finally, Petitioner explained the theory for potential individual liability against Patricia Green. *Record* at 055-056. Pursuant to the Act, individual liability can be had against an employee of a political subdivision if it is found that their acts are manifestly outside the scope of their employment or if their acts were perpetrated in a wanton and reckless manner. *Record* at 055. In Petitioner's Complaint and Amended Complaint allegations were made so as to plead within the statutory and Court-recognized exception to the Act. *Record* at 009-010, ¶¶ 72-73; 012-013, ¶¶ 97, 99; 085, ¶¶ 78-79; 088-089, ¶¶ 103-105. Consequently, Petitioner specifically pled her case so as to properly state a claim upon which relief may be granted against Patricia Green.

Thereafter, Respondents filed a Reply brief to the Petitioner's Response again arguing the immunities available under the Act and claiming that the Public Duty Doctrine precludes a claim against the Commission and Patricia Green. *Record* at 060-069. Moreover, the Respondents for

the first time in their Reply brief asserted that the criminal acts of the individual defendants acted as an intervening cause.² *Record* at 066. Interestingly, one of the main arguments made by the Respondents was that no special relationship existed between Mr. Bowden and the Commission. This argument specifically dismisses the fact that Petitioner asserted that the Bowden home had contacted Ms. Green and had spoken with her regarding the Pitt Bulls.

Thereafter, Petitioner filed a motion to amend her complaint to add the allegations that Patricia Green had been contacted by the Petitioner and had been assured that the Pitt Bull problem would be addressed by the County. *Record* at 071-093. Respondents filed a response to Petitioner's motion for leave arguing that the Petitioner's amended complaint would be futile. *Record* at 119-124.

On February 6, 2012, Respondents' motion to dismiss was heard before the Honorable Robert A. Irons in Monroe County, West Virginia. The arguments made by the parties were heard before the Circuit Court at which time the Court took the motion under advisement. In so doing, the Court further went on to state the following:

Okay. All right. I'll tell you what I'm going to do. I'm going to take it under advisement. And, quite honestly, you know, the fact is that it's a motion to dismiss as opposed to a motion for summary judgment may make some difference. But I want to look at it more carefully before I rule on it.

But having said that, I'm really having a hard time seeing much liability on the part of the county here, counsel. I mean, you know, I have probably the advantage over you all that I sat here and I heard the evidence in the trial against Ms. Blankenship. And, you know, the evidence was that the dog warden went out there several times. And there were some problems with some dogs and some problems with the pony or horse or something. And she went out and responded to the complaints.

And the dog that was the primary problem dog was locked up. And it was locked up when the police went out after all this occurred. And the dogs that are

² The final Order dismissing this case is silent as to the criminal acts argument made in Respondents' Reply brief.

– I mean, that’s totally outside the scope of this motion to dismiss. That’s stuff that we couldn’t even really consider today. But, you know, having sat through the criminal trial, you know, I don’t see a lot of liability on the part of the county. And regardless of these motions, you know, I mean, there’s not enough – there’s, you know – the Intergovernmental Tort Claims Act, the Public Duty Doctrine, the superseding criminal activities of the third party aside, all that, I mean, there just wasn’t a whole lot of evidence of negligence on the part of the Monroe County Commission. But that’s neither here nor there for today’s hearing.

Record at 110-112. Subsequent to the hearing, Petitioner noticed for hearing her motion for leave to amend the complaint for April 2, 2012. Upon arrival at the Monroe County courthouse on April 2, the undersigned counsel was presented with the Order dismissing the case which had been entered the previous Friday. No Order was ever entered on Petitioner’s motion for leave to amend the Complaint. Thereafter, Petitioner filed the instant appeal.

SUMMARY OF ARGUMENT

Petitioner asserts that the underlying Circuit Court committed reversible error in finding that her negligence claims against the Monroe County Commission failed to state a claim upon which relief may be granted. The West Virginia Governmental Tort Claims Acts provides a remedy to plaintiff’s who have been damaged by the negligence of an employee of a political subdivision and she believes her Complaint made adequate allegations of such negligence pursuant to Rule 8 of the West Virginia Rules of Civil Procedure. Likewise, Petitioner believes she asserted adequate allegations of willful and wanton acts on the part of Patricia Green to survive a motion to dismiss. Moreover, Petitioner believes she asserted appropriate claims to meet the special relationship test exception to the Public Duty Doctrine. To the extent she needed to make more specific claims, Petitioner attempted to amend her complaint to allege such specific facts. Therefore, Petitioner finally believes that the Court committed error in failing to even consider her motion for leave to amend the Complaint.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner requests a Rule 19 oral argument. The Petitioner is asserting that the underlying Circuit Court erred in the application of well settled law. *See* Rule 19(a)(1). Further, the Petitioner believes that a Memorandum Decision would be inappropriate in the matter as she is requesting the reversal of the decision of a Circuit Court. *See* Rule 21(d).

STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

ARGUMENT

1. THE CIRCUIT COURT ERRED IN RULING THAT PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AGAINST THE MONROE COUNTY COMMISSION DUE TO THE IMMUNITIES CONTAINED WITHIN THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT, WEST VIRGINIA CODE §29-12A-1, *ET SEQ.*

Petitioner asserts that she did state a claim for which relief can be granted against the Monroe County Commission and Patricia Green under West Virginia law. Specifically, in 1974, the West Virginia Supreme Court held that state constitutional sovereign, or absolute, immunity from tort liability is not available to a municipality. *Higginbotham v. City of Charleston*, 157 W.Va. 724, 204 S.E.2d 1 (1974), overruled on another point in Syl. Pt. 3, *O'Neil v. City of Parkersburg*, 160 W.Va. 694, 237 S.E.2d 504 (1977). Subsequently, in *Long v. City of Weirton*,

Syl. Pt. 10, 158 W.Va. 741, 214 S.E.2d 832 (1975), this Court abolished qualified tort immunity for municipalities for “governmental” as opposed to “proprietary” functions. The Court in *Long* discussed in detail problems in both the nature and inconsistent application of qualified immunity. Likewise, this Court proceeded to abolish common law qualified governmental tort immunity as to counties and other political subdivisions. See, *Gooden v. City Comm’n.*, Syl. Pt. 2, 171 W.Va. 130, 298 S.E.2d 103 (1982) (county commissions); *Ohio Valley Contractors v. Board of Educ.*, 170 W.Va. 240, 293 S.E.2d 437 (1982) (boards of education).

Thereafter, the West Virginia Legislature in 1986 enacted the West Virginia Governmental Tort Claims and Insurance Reform Act (“the Act”) West Virginia Code §§ 29-12A-1 through 18. The purpose of the Act was two-fold. First the purpose was to limit the liability of political subdivisions and provide immunity in certain instances. Second, the purpose was to regulate the costs and coverage of insurance available to political subdivisions for such liability. It should be noted that the Monroe County Commission maintains insurance under which elected officials and employees, including the County Dog Warden, are covered.

The Act has survived constitutional challenges that it violated State principles of equal protection and certain remedy. *Randall v. Fairmont City Police Dep’t.*, 186 W.Va. 336, 412 S.E.2d 737 (1991). There has followed a large body of law applying the Act. **Importantly, this Court has repeatedly indicated that the general rule of construction in governmental tort legislation cases favors liability, not immunity,** unless the legislature clearly provided for immunity under the circumstances, as the general common-law goal of compensating injured parties for damages is to prevail. See, *Id.*, 186 W.Va. at 347, 412 S.E.2d at 748. (emphasis added).

Pursuant to the Act, a political subdivision is immune generally from liability for damages in a civil action brought for death, injury, or loss to persons or property allegedly caused by any act or omission of the subdivision or employee in connection with a governmental or proprietary function. W.Va. Code § 29-12A-4(b)(1). Subject to certain provisions, **a political subdivision is liable in damages in a civil action for injury, death or loss to persons or property caused by an act or omission of the subdivision or its employees** in connection with a governmental or proprietary function. W.Va. Code § 29-12A-4(c). This liability applies in the context of negligent performance of acts by employees while acting within the scope of employment. W.Va. Code § 29-12A-4(c).

The Act recognizes five broad situations wherein a political subdivision is liable in damages in a civil action for injury, death or loss to persons or property. The five situations include: (1) those caused by the negligent operation of a vehicle; (2) **those resulting from the negligent performance of acts by employees while acting within the scope of employment;** (3) those caused by failure to keep roads, highways, alleys, sidewalks and the like open, in repair or free from nuisance; (4) those caused by employee negligence and occurring within or on the grounds of buildings used by the political subdivision and (5) those resulting from other expressly imposed liability under the State Code. W.Va. Code § 29-12A-4(c)(1)-(5). (emphasis added). At issue here is situation number two wherein liability results from the negligent performance of acts by employees while acting within the scope of employment. The individual immunity is based upon related *respondeat superior* liability of the political subdivision for negligent acts for employees. In other words, you cannot sue both the political subdivision and the employee for individual acts of negligence. However, both are named in this suit in the event

it is discovered that Patricia Green's acts were outside the scope of her employment or intentional in nature.

The Act further enumerates seventeen specific types of acts or omissions for which there is immunity from liability. W.Va. Code § 29-12A-5(a)(1)-(17). One of those seventeen immunities is for "the failure to provide, or the method of providing police, law enforcement or fire protection" is at issue here. W.Va. Code § 29-12A-5(a)(5). An employee of a political subdivision is also immune from liability unless: (1) his or her acts or omissions were manifestly outside the scope of employment or official responsibilities; (2) his or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (3) if liability is expressly imposed by the Act. W.Va. Code § 29-12A-5(17)(b)(1), (2), (3).

First and foremost, the Dog Warden of any given county, if one is appointed³, is required to enforce certain laws with respect to the ownership and regulations with regard to dog ownership in the county for which they are appointed. It is for the failure in this law enforcement capacity after plaintiff specifically lodged complaints and expressed fears for their personal safety and the safety of the public at large for which the Plaintiff is suing the Defendant Commission and Ms. Greene, the appointed Dog Warden for Monroe County, West Virginia. Specifically, a County Dog Warden is charged with the following:

The county dog warden and his deputies shall patrol the county in which they are appointed and shall seize on sight and impound any dog more than six months of age found not wearing a valid registration tag, except dogs kept constantly confined in a registered dog kennel. They shall be responsible for the proper care and final disposition of all impounded dogs. The county dog warden shall make a monthly report, in writing, to the county commission of his county.

³ Pursuant to West Virginia Code §19-20-6(a), each county may choose to appoint a County Dog Warden, the position is not required pursuant to West Virginia law. Consequently, it is discretionary whether any given County has a duly appointed Dog Warden.

When any dog shall have been seized and impounded, the county dog warden shall forthwith give notice to the owner of such dog, if such owner be known to the warden, that such dog has been impounded and that it will be sold or destroyed if not redeemed within five days. If the owner of such dog be not known to the dog warden, he shall post a notice in the county courthouse. The notice shall describe the dog and the place where seized and shall advise the unknown owner that such dog will be sold or destroyed if not redeemed within five days.

W. Va. Code §19-20-6(a), in part. In the instant case, it is the position of the Petitioner, as articulated in the Complaint, that the County Dog Warden failed in her law enforcement duties to protect Lowell Bowden from the dangers for which she was specifically employed despite knowledge of these vicious animals. Furthermore, it is the belief of the Petitioner that numerous neighbors and residents of the area had contacted the Commission as well as Dog Warden Patricia Green to complain and ask that something be done about these animals. However, Petitioner was never given the appropriate time and opportunity to develop this evidence due to the Court's dismissal of the Petitioner's claims.

Consequently, in the instant case, it is the Respondents' failure to provide specific protection to the Petitioner after receiving actual notice of the subject pit bulls' dangerous and violent behavior for which Petitioner filed suit. Patricia Green, on behalf of the Commission, was charged with the enforcement of laws related to animal control in Monroe County, West Virginia. Petitioner asserts that her claim and arguments are not subject to the above-referenced immunity for "the failure to provide, or the method of providing police, law enforcement or fire protection." W.Va. Code § 29-12A-5(a)(5). This Court has specifically founds that "the phrase 'the method of providing police, law enforcement or fire protection' contained in W. Va. Code §29-12A-5(a)(5) refers to the formulation and implementation of policy related to how police, law enforcement or fire protection is to be provided." Syl. Pt. 3, *Beckley v. Crabtree*, 189 W. Va.

94, 428 S.E.2d 317 (1993); *see also Knight v. Wood County Board of Education*, 200 W. Va. 247, 489 S.E.2d 1 (1997). Petitioner did not make allegations with regard to policy formation and implementation utilized by the Monroe County Commission. Instead, this case is completely about the clear failure of the Commission, through its employee Patricia Green, to enforce laws which it/she was clearly statutorily required to enforce after receipt of actual notice by way of complaints from Plaintiffs and others in the community. It is for Patricia Green's negligent failure to meet her obligations as the County Dog Warden that Petitioner's Complaint and Amended Complaint were based. As the Complaint states an appropriate negligence claim against the Commission, Petitioner requests this Court reverse the ruling of the underlying Circuit Court dismissing her claim and remand the matter back for further proceedings.

2. THE CIRCUIT COURT ERRED IN RULING THAT PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AGAINST PATRICIA GREEN DUE TO THE IMMUNITIES CONTAINED WITHIN THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT, WEST VIRGINIA CODE §29-12A-1, *ET SEQ.*

Petitioner further asserts that her individual claims against Patricia Green state a viable claim upon which relief may be granted. In this case, Petitioner asserted wanton or reckless conduct as to Patricia Green so as to plead within the statutory and Court-recognized exception to immunity. W.Va. Code §29-12A-5(b)(2). Respondent cannot rely on an invalid assumption that wanton or reckless conduct is mutually exclusive of scope of employment. The Court has rejected such an argument. *See Brooks v. City of Weirton*, 202 W.Va. 246, 257, 503 S.E.2d 814, 825(1998).

West Virginia Code §20-12A-5(b) provides that employees of political subdivisions are immune from personal tort liability unless (1) their acts were “manifestly” outside the scope of employment; or (2) their acts were malicious, in bad faith or in a “wanton or reckless” manner. An “employee” of a political subdivision is one authorized to act and acting within the scope of employment. W.Va. Code §29-12A-3(a). The term “scope of employment” is defined as performance acting in good faith within duties or tasks but not including corruption or fraud. W.Va. Code §29-12A-3(d).

In analyzing the statutory provisions, this Court has concluded that an exception to employee immunity exists when an employees’ conduct, despite being within the scope of employment, was in a wanton or reckless manner. *Brooks*, 202 W.Va. 254-257, 503 S.E.2d 822-825. Here, Petitioner has properly alleged acts and omissions within the scope of employment and has alleged wantonness or recklessness. Thus, at this stage, Petitioner is entitled to proceed and develop the evidence against Patricia Green. It may later be determined that Patricia Green did not seize these animals as she was personal friends with the individual defendants. Perhaps Ms. Green was related to one of the individual defendants. There are numerous reasons which may exist which would cause Ms. Green to abandon her dog warden duties in favor of these Pitt Bulls. However, without discovery into the issue we are left merely to speculate as to what her motivations were. Clearly, Petitioner stated an appropriate claim against Ms. Green and she requests this Court reverse the decisions of the underlying Circuit Court and remand the case for further proceedings.

3. THE CIRCUIT COURT ERRED IN RULING THAT PLAINTIFF’S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED PURSUANT TO THE PUBLIC DUTY DOCTRINE.

Petitioner asserts that the underlying Circuit Court committed error in ruling that the Complaint fails to state a claim upon which relief may be granted pursuant to the Public Duty Doctrine. This Court has made plain that the public duty doctrine and its special relationship exception are applicable to West Virginia Code § 29-12A-5-(5), which provides tort immunity for “the failure to provide, or the method of providing, police, law enforcement or fire protection.” On the other hand, the Court has also determined that the public duty doctrine and its special relationship exception are not applicable to other sections of the Act. *See, e.g., Moats v. Preston County Comm’n.*, 206 W.Va. 8, 521 S.E.2d 180 (1999).

The immunity provided by the section of the Act for loss or claims resulting from “the failure to provide, or the method of providing, police, law enforcement or fire protection”, W.Va. Code § 29-12A-5(a)(5), is subject to and coextensive with the common law public duty doctrine and the special relationship exception. It is noted that the phrase “method of providing” police or law enforcement protection refers to the formulation and implementation of policy related to how police or law enforcement is provided, not whether such protection is provided at all. *See, e.g., Beckley v. Crabtree*, 189 W.Va. 94, 458 S.E.2d 317 (1993). Significantly, it is this section five together with the coexistent public duty doctrine and special relationship exception that is at issue here.

Simply stated, the public duty doctrine is that a governmental entity’s liability for nondiscretionary, ministerial or operational functions may not be predicated upon the breach of a general duty owed to the public as a whole. For example, the duty to fight fires or to generally provide police protection runs to all citizens for the purpose of protecting the safety and well-being of the public. Accordingly, in the absence of some special duty to an individual, no liability attaches to a fire or police department’s failure to generally provide adequate protection.

See, e.g., *Randall v. Fairmont City Police Dep't.*, 186 W.Va. 336, 412 S.E.2d 737 (1991); *Wolfe v. City of Wheeling*, 182 W.Va. 253, 387 S.E.2d 307 (1989); *Benson v. Kutsch*, 181 W.Va. 1, 380 S.E.2d 36 (1989). The Act's statutory subdivision as to police, law enforcement or fire protection incorporates the common law public duty doctrine and does not immunize a breach of a special duty to provide, or the method of providing, such protection to a particular individual. Syl. Pt. 8, *Randall*, 186 W.Va. at 340, 412 S.E.2d at 740.

The special relationship exception provides that the law enforcement entity, while not owing a duty to the general public, does have a duty toward individuals with whom the law enforcement entity has established a special relationship. Thus, if a special relationship exists between a governmental entity and an individual which gives rise to a duty to such individual and the duty is breached, causing injuries, then a suit may be maintained against such entity. Syl. Pt. 3, *Benson*, 181 W.Va. at 254, 380 S.E.2d at 308. As this Court has observed, at the heart of most cases applying the special duty exception, is the unfairness courts identify in precluding recovery when an undertaking has lulled an injured party into a false sense of security or induced him or her to relax vigilance or forego other avenues of protection.

This Court has enunciated a four part test for the purpose of providing guidance on the determination of whether a special relationship exists in a given fact setting:

To establish that a special relationship exists between a local governmental entity and an individual which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4)

that party's justifiable reliance on the local governmental entity's affirmative undertaking.

Syl. Pt. 2, *Wolfe*, 182 W.Va. at 1, 387 S.E.2d at 36. Furthermore, when discussing the special relationship exception to the Public Duty Doctrine, this Court has recently noted that “[i]n cases arising under W.Va. Code §29-12-5, the question of whether a special duty arises to protect and individual from a State governmental entity’s negligence is ordinarily a questions of fact for the trier of the facts.” Syl. Pt.12 *J.H. v. W.Va. Div. Of Rehabilitation Services*, 224 W.Va 147, 680 S.E.2d 392 (2009) (quoting Syl. Pt. 11, *Parkulo v. W.Va. Bd. Of Prob. And Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996)).

Again, discovery never occurred in this case. Petitioner believes that the evidence will show that numerous neighbors in the area where the attack happened had contacted the Commission and, specifically Patricia Green, for something to be done about a pack of wild and vicious pit bulls terrorizing their neighborhood in Monroe County. Furthermore, while the decedent’s wife was not deposed, she has explained to her counsel that she and her husband specifically contacted Patricia Green on two separate occasions about these dogs and were told that the situation would be handled. The decedent’s wife will testify that she personally made the calls and on one occasion Patricia Green was at her home assuring her that the dogs would be taken care of. While the telephone calls from the neighbors might not rise to the level of defeating the public duty doctrine, the calls from the decedent’s wife surely would rise to lull Mr. Bowden into a false sense of security or induce him to relax vigilance or forego other avenues of protection. Without this false sense of security, it is arguable, if not likely, that the decedent would have ceased his evening walks after dinner altogether. In this regard, the Respondents owed a duty to the public at large and the Plaintiff in particular to exercise their law enforcement duties with regard to these vicious pit bulls.

Finally, it is clear that the four part test established by our Court is a rather fact driven vehicle. Evidence of whether the Commission and Green assumed a duty, knew that failing to follow through on that duty could cause harm, whether direct contact existed between the Commission/Green and the Bowden's, and the reliance of the Bowden's on the Commission and Green clearly go far outside the pleadings in this case and are inappropriate for a motion under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Consequently, Plaintiff request that this Court reverse the ruling of the underlying Circuit Court and remand for further proceedings.

4. THE CIRCUIT COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT.

Petitioner also asserts that the Court should have considered and granted her motion for leave to amend her complaint. Rule 15(a) specifically provides that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; **and leave shall be freely given when justice so requires.**" (emphasis added). Additionally, this Court has consistently held as follows:

The purpose of the words 'and leave [to amend] shall be freely given when justice so requires' in Rule 15(a) W.Va. R.Civ.P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.

Syllabus Point 3, *Rosier v. Garron, Inc.*, 156 W.Va. 861, 199 S.E.2d 50 (1973); *Brooks v. Isinghood*, 213 W. Va. 675, 584 S.E.2d 531 (W.Va. 2003).

In the instant action, the amendment requested by the Petitioner would permit the presentation of the merits of the action in that they bring all proper factual allegations to the suit and involves all events which led to the injuries made subject of Petitioner's Complaint. Furthermore, no adverse party would have been prejudiced by this amendment as no discovery was taken in this matter and no Scheduling Order was ever entered by the Circuit Court. Finally, all adverse parties in this case will have ample opportunity to meet the issues in this matter.

Furthermore, the factual allegations being added to this Complaint clearly related back to the original Complaint and only clarify minor factual issues. Rule 15(c) provides as follows:

An amendment of a pleading relates back to the date of the original pleading when:

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing paragraph (2) is satisfied and, within the period provided by Rule 4(k) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have brought against the party.

See also Syl. Pt. 1, *Plymale v. Adkins*, 429 S.E.2d 246, 189 W.Va. 204 (1993); *Farmer v. L.D.I., Inc.*, 286 S.E.2d 924, 169 W.Va. 305 (1982); *Lawson v. Hash and Benford*, 545 S.E.2d 290, 209 W.Va. 230 (2001).

In the instant action, the claim being made does arise out of the conduct, transaction, and occurrence set forth in the original pleading as it involves the conduct of the Respondents' employees, agents and/or servants leading up to the incident made subject of plaintiff's original Complaint. The notice pleading requirements of Rule 8 are rather minor; however, given the arguments made by Respondents in their Motion to Dismiss, it was clear that Petitioner should

clarify that the Commission had direct contact with this Petitioner in particular prior to the tragic death of Mr. Bowden. Clearly, these minor factual additions to the Complaint relate back to the original pleading and should have been considered by the underlying Circuit Court.

Consequently, Petitioner requests this Court reverse the ruling of the underlying Circuit Court and remand this case for further proceedings.

CONCLUSION

On March 29, 2012, the underlying Circuit Court committed reversible error in dismissing the Petitioner's Complaint for failure to state a claim upon which relief may be granted. It is the long standing policy of this Court that "[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief. Syl. Pt. 2, *McCormick v. Wal-Mart Stores*, 215 W. Va. 679; 600 S.E.2d 576 (2004) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99 [102], 2 L.Ed.2d 80 (1957)).' Syl. pt. 3, *Chapman v. Kane Transfer Company*, 160 W.Va. 530, 236 S.E.2d 207 (1977), Syl. Pt. 2, *Holbrook v. Holbrook*, 196 W.Va. 720, 474 S.E.2d 900 (1996) (*per curiam*)). In the instant case, Petitioner proceeded in a suit against the Monroe County Commission and Patricia Green for appropriate claims upon which relief may be granted. Specifically, the Commission was sued for the negligent actions of its employee, Patricia Green, which were taken in the scope of her employment with the Commission. Patricia Green was individually sued for those actions which were outside the scope of her employment or performed wantonly and willfully. Neither Respondent was an appropriate candidate for dismissal pursuant to a Rule 12(b)(6) motion. Moreover, the dismissal of these Respondents pursuant to Rule 12(b)(6) as the complaint fails to state a claim upon which relief may be granted due to the Public Duty Doctrine

simply misapplies the law. As this Court has expressed through its decisions the Public Duty Doctrine and its special relationship exception are factually driven and should be left to the trier of the fact to decide.

Finally, the underlying Circuit Court committed error in not even considering the Petitioner's motion for leave to file an amended complaint. To the extent that the underlying Court believed that the Public Duty Doctrine was appropriate for it to dismiss Petitioner's claims, the minor changes to the complaint would have alleviated all doubt that Mr. Bowden had a special relationship with the Commission. At a minimum, the Court should have at least gone forward with the scheduled hearing on Petitioner's motion before it entered its dismissal order.

The tragic death of Lowell Bowden at the hands of the vicious Pitt Bull Terriers is a case that should be decided on its merits. Consequently, the Petitioner respectfully requests that this Court REVERSE the order from the underlying Circuit Court dismissing her case for failure to state a claim upon which relief may be granted and REMAND the matter for further proceedings.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON

DREAMA BOWDEN, as Administratrix of the
Estate of Lowell Bowden

*Petitioner and
Plaintiff below,*

v.

Case No. 12-0614

MONROE COUNTY COMMISSION, a political
subdivision and PATRICIA GREEN, individually
and in her official capacity,

*Respondent and
Defendants Below.*

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, Dreama Bowden, does hereby certify that a true copy of the foregoing "*Petitioner's Brief and Peitioner's Appendix*" has been served on this 30th day of July, 2012, via United States Mail, in an envelope properly addressed and with postage fully paid to the following:

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