

12-0824

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

LORRAINE M. UPCHURCH, Administratrix of the Estate  
of Joe Edward Mallory, Deceased,

2012 JUN -6 AM

CATHY S. GATSON, C  
KANAWHA COUNTY CIRC

Plaintiff,

v.

Civil Action No. 10-C-72  
Honorable James C. Stucky

McDOWELL COUNTY COMMISSION,  
McDOWELL COUNTY SHERIFF'S DEPARTMENT, JOHN  
DOE McDOWELL COUNTY DEPUTY SHERIFF,  
McDOWELL COUNTY 911,  
JANE DOE DISPATCHER,  
ROBERT WAYNE JOHNSON, SR., and PAT JOHNSON,

Defendants.

**ORDER GRANTING DEFENDANT MCDOWELL COUNTY  
911'S MOTION FOR SUMMARY JUDGMENT**

On Tuesday, May 12, 2012, came the Defendants McDowell County 911; McDowell County Commission and McDowell County Sheriff's Department, by Counsel; and, came Plaintiff by counsel, and presented oral argument in support of and in opposition to Defendants' Motion for Summary Judgment. After mature consideration of the written Motion, Plaintiff's Response, Defendants' Reply and, oral argument, the Court hereby makes the following findings of fact and Conclusions of Law:

**FINDINGS OF FACT**

1. On January 20, 2008, a call was made by Joe Mallory to 911 regarding an incident that was occurring at his residence. At that time, Robert Wayne Johnson, Jr., was at the front door of the

residence threatening Mallory and banging on the door. It was later learned during the police investigation that Mallory had sold a gun to Johnson's father, Defendant Robert Wayne Johnson, Sr., and the two were involved in a dispute over whether Mallory owed Johnson change.

2. As a result of the call to 911, Martha Heffner, the employee of 911 who handled the call, contacted West Virginia State Trooper Jason Keffer and reported to him the information that Mallory told her concerning the event.
3. State Trooper Keffer was in between shifts and was at the McDowell County Barrack; he asked Heffner to call Mallory back and get specific information concerning the perpetrator.
4. When Heffner called Mallory back, and inquired as to the situation and as to the identity, if known, of the perpetrator, Mallory indicated that the individual had left the residence. During the phone call to Mallory, Heffner stated, "I just had to call and make sure you were safe, because the trooper doesn't need to come out there if he's not there...now if he comes back, don't hesitate to call me back...I'll tell you what, how about if I just have the trooper call you..." Heffner called Trooper Keffer back and relayed this information to him.
5. After the call from Heffner indicating that Johnson, Jr. had left the scene, Trooper Keffer called Mallory and spoke to him about the situation. As a result of this conversation, Trooper Keffer

determined that it was not necessary for him to go to the Mallory residence.

6. The phone call from Mallory to Heffner occurred at approximately 10:00 a.m. At approximately 11:30 p.m., according to the State Police investigation, Johnson, Jr. returned to the Mallory residence, broke into the home through the back door, and stabbed Mallory to Death.
7. The McDowell County 911 is considered a "political subdivision" for purposes of evaluating liability under the Governmental Tort Claims and Insurance Reform Act, West Virginia Code §29-12A-1 et seq. and consequently, is entitled to all immunities set forth therein.

#### **CONCLUSIONS OF LAW**

1. Pursuant to West Virginia Code, § 29-12A-5. *Immunities from liability.* (a) A political subdivision is immune from liability if a loss or claim results from:
  - (1) Legislative or quasi-legislative functions;
  - (2) Judicial, quasi-judicial or prosecutorial functions;
  - (3) Execution or enforcement of the lawful orders of any court;
  - (4) Adoption or failure to adopt a law, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy;

- (5) Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection.
2. It has been held that “[i]n the context of an alleged failure of a local governmental entity to provide any, or sufficient, fire or police protection to a particular individual, the local governmental entity's duty is defined at common law by the public duty doctrine.” *Randall v. Fairmont City Police Dept.*, 186 W.Va. 336, 412 S.E.2d 737 (1991).
  3. Under the public duty doctrine, a local governmental entity's liability for nondiscretionary functions may not be predicated upon the breach of a general duty owed to the public as a whole; instead, only the breach of a duty owed to the particular person injured is actionable. *Wolfe v. City of Wheeling*, 182 W.Va. 253, 256, 387 S.E.2d 307, 310 (1989).
  4. In syllabus point 2 of *Wolfe v. City of Wheeling*, 182 W.Va. 253, 387 S.E.2d 307 (1989), the Court set forth a four-part test for determining whether a local governmental entity, in the exercise of a nondiscretionary function, owes an actionable special duty to a particular individual, as opposed to a mere general duty to the public as a whole for which no cause of action lies. The Court stated the following four factors are to be present before the existence of a special duty is created:

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.

5. There are no material issues of fact that exist which require a jury determination as to the existence of a special duty owed to Mallory by Defendant McDowell County 911. Under the facts of this case, the duty owed to Mallory by the Defendant was to take the emergency call; gather information concerning the situation and communicate relevant information to law enforcement so that law enforcement could determine the need to take further action.
6. In this case, Heffner, on behalf of Defendant, informed Mallory that she would have a State Trooper call him; importantly, Heffner advised Mallory, "don't hesitate to call me back..."<sup>1</sup> Immediately thereafter, Heffner, on behalf of Defendant, communicated the necessary information to the State Police, and specifically Trooper Keffer. Subsequently, Trooper Keffer called Mallory and, based upon the phone conversation, determined whether it was necessary or appropriate for him [Keffer] to travel to the Mallory residence.

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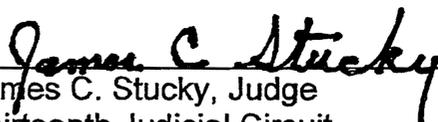
<sup>1</sup>Importantly, no facts provide that Mallory called Defendant back at any time during the approximate 11 hour timespan before Robert Wayne Johnson, Jr., returned.

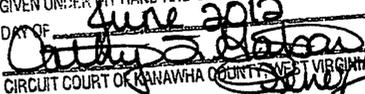
Trooper Keffer exercised his decision making authority as a State Trooper and did not travel to the Mallory residence.

7. Under these facts, the Court finds that Plaintiff can present no evidence at trial to support the legal position that Mallory justifiably relied upon any conduct of Heffner that created a special relationship between the two. As a result, Plaintiff cannot, as a matter of law, demonstrate that a special duty was created upon Defendant that resulted in any harm to Mallory.
8. Because no special relationship was created between Mallory and Heffner, Defendant is immune from this litigation pursuant to West Virginia Code, § 29-12A-5.

Wherefore, this Court hereby GRANTS Defendant's Motion for Summary Judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure based upon a finding that there are no material issues of fact and, as a matter of law, Defendant is entitled to judgment. Therefore, this case is hereby dismissed with Prejudice from the docket of this Court.

Entered this 6<sup>th</sup> day of June, 2012.

  
James C. Stucky, Judge  
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 7<sup>th</sup>  
DAY OF June 2012  
 CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

2012 JUN 12 AM 11:24

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

LORRAINE UPCHURCH, Administratrix of  
the Estate of Joe Edward Mallory, Deceased,

Plaintiff,

v.

Civil Action No.: 10-C-72  
Judge James C. Stucky

McDOWELL COUNTY COMMISSION, McDOWELL COUNTY SHERIFF'S  
DEPARTMENT, JOHN DOE McDOWELL COUNTY DEPUTY SHERIFF,  
McDOWELL COUNTY 911, JANE DOE DISPATCHER, ROBERT WAYNE  
JOHNSON, SR. AND PAT JOHNSON,  
Defendants.

**ORDER GRANTING PLAINTIFF'S RULE 59(e) MOTION  
DISMISSING PAT JOHNSON AND ROBERT WAYNE JOHNSON, SR.  
AND EXTENDING TIMEFRAME FOR FILING NOTICE OF APPEAL**

On June 12, 2012 came the parties, Plaintiff Lorraine Upchurch, by counsel, JB Akers, Esq. and Akers Law Offices PLLC, and Defendants McDowell County Commission, McDowell County Sheriff's Department, John Doe McDowell County Deputy Sheriff, McDowell County 911 and Jane Doe Dispatcher ("the McDowell County Defendants"), by counsel, Albert C. Dunn, Esq. and Allen Kopet & Associates, PLLC, pursuant to Plaintiff's Rule 59(e) Motion to Alter or Amend this Court's Order granting the McDowell County Defendants' Motion for Summary Judgment and Motion to Extend the Timeframe for Filing a Notice of Appeal.

After reviewing the Plaintiff's submission and allowing argument of counsel the Court grants the Plaintiff's Motion. Pat Johnson and Robert Wayne Johnson, Sr. are hereby **DISMISSED** from this matter. Moreover, the time allowed for the Plaintiff's filing a Notice of Appeal, or to otherwise commence an appeal, of this Court's grant of

Summary Judgment to the McDowell County Defendants shall commence thirty (30) days from the entry of this Order. The McDowell County Defendants **DO** \_\_\_\_\_ **DO NOT**  object to this Order. In the event of any objections the same are hereby preserved.

The Clerk of the Court is ORDERED to provide certified copies of this Order to the parties and counsel of record upon entry of the same.

ENTERED this 12 day of June, 2012.

James C. Stucky  
James C. Stucky, Judge

Prepared by:

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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 13th  
DAY OF June 2012  
Cathy S. Gatson  
CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Approved by:

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Sheriff's Department, John Doe McDowell County Deputy Sheriff, McDowell County 911  
and Jane Doe Dispatcher*