



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0824

**LORRAINE M. UPCHURCH, Administratrix of
the Estate of Joe Edward Mallory, Deceased,
Plaintiff Below, Petitioner,**

v.

**Appeal from a final order of the Circuit
Court of Kanawha County (10-C-72)**

**McDOWELL COUNTY 911 and JANE DOE DISPATCHER,
Defendants Below, Respondents.**

PETITIONER'S BRIEF

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I. TABLE OF CONTENTS

Table of Authorities.....3

Assignments of Error4

Statement of the Case 4-11

Summary of Argument.....12

Summary Regarding Oral Argument and Decision13

Argument..... 14-21

Conclusion 21-22

II. TABLE OF AUTHORITIES

Statutes & Rules

| | |
|--|----|
| W.Va. Code Section 24-6-5..... | 8 |
| W. Va. Code Section 29-12A-5 <i>et seq.</i> | 15 |
| W.Va. Code Section 55-7-5..... | 20 |
| W.Va. Code Section 57-3-1..... | 20 |
| Rule 10(c)(6) of the West Virginia Rules of Appellate Procedure..... | 13 |
| Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure..... | 13 |
| Rule 19 of the West Virginia Rules of Appellate Procedure..... | 13 |
| Rule 56(c) of the West Virginia Rules of Civil Procedure..... | 10 |

Caselaw

| | |
|---|--------|
| <u>Benson v. Kutsch</u> , 181 W.Va. 1, 380 S.E.2d 36 (1989)..... | 14 |
| <u>J.H. v. West Virginia Div. of Rehab. Services</u> , 224 W.Va. 147, 680 S.E.2d 392 (2009)... | 14, 19 |
| <u>Long v. City of Weirton</u> , 158 W.Va. 741, 214 S.E.2d 832 (1975)..... | 15 |
| <u>McCormick v. West Virginia Department of Public Safety et al</u> , 202 W.Va. 189, 503 S.E.2d 502 (1998)..... | 14, 17 |
| <u>Mace v. Ford Motor Co.</u> , 221 W.Va. 198; 653 S.E.2d 660 (2007)..... | 12 |
| <u>Moore v. Goode</u> , 180 W.Va. 78, 375 S.E.2d 549 (1988)..... | 21 |
| <u>Parkulo v. West Virginia Bd. of Probation and Parole</u> , 199 W.Va. 161, 172, 483 S.E.2d 507, 518 (1996)..... | 14 |
| <u>Randall v. Fairmont City Police Department</u> , 186 W.Va. 336, 412 S.E.2d 737 | 14-17 |
| <u>Wilson v. Daily Gazette Co.</u> , 214 W.Va. 208, 588 S.E.2d 197 (2003)..... | 12 |
| <u>Wolfe v. City of Wheeling</u> , 182 W.Va. 253, 387 S.E.2d 307 (1989)..... | 16 |

III. ASSIGNMENTS OF ERROR

1. **THE CIRCUIT COURT ERRED WHEN IT RULED AS A MATTER OF LAW THAT NO PUBLIC DUTY EXISTED**
2. **THE CIRCUIT COURT ERRED WHEN IT CONSIDERED EVIDENCE OF AN ALLEGED TELEPHONE CALL THAT IS INADMISSIBLE PURSUANT TO THE DEAD MAN'S ACT.**

IV. STATEMENT OF THE CASE

On Saturday January 19, 2008 at around 10:00 a.m. Respondent McDowell County 911 admits it received an emergency phone call from Petitioner's decedent, seventy one (71) year old Joseph E. Mallory ("Joe Mallory," "Mr. Mallory" or "decedent").¹ (A.R. 56; 199; 213).² On that day a "Jane Doe Dispatcher," now identified as Martha Heffner, answered Mr. Mallory's call. (A.R. 213-214).³ Mr. Mallory told her, "I need somebody up here at my house with assistance." (A.R. 58). Mr. Mallory provided his telephone number, address and told Ms. Heffner someone was on his front porch threatening to "kick my damn door in." (A.R. 59). The dispatcher could hear the assailant screaming and beating on Mr. Mallory's front door. (A.R. 60). Ms. Hefner obtained Mr. Mallory's exact location along with a description of the assailant's vehicle. (A.R. 59-60). When asked to describe what the assailant was wearing Mr. Mallory

¹ The McDowell County Commission, McDowell County Sheriff's Department, John Doe McDowell County Deputy Sheriff, Robert Wayne Johnson, Sr. and Pat Johnson were co-defendants at the time the parties argued the Respondents' underlying Motion for Summary Judgment. Those Defendants were dismissed by agreement. The West Virginia State Police were also a prior party but previously settled.

² Ms. Heffner died from unrelated causes before this lawsuit was filed and was never deposed.

³ To avoid any confusion, the Petitioner's Appendix is numbered 0001-0261 at the bottom left of each page. The transcription of the 911 calls beginning at A.R. 57 can be somewhat difficult to follow since the 911 transcriptionist assigned initials, which are not always accurate, to the speaker. Trooper Keffer is misidentified as Trooper "Camper" with initials BC. Dispatchers Martha Heffner and Roger Cox are both labeled "911 dispatch, unidentified female" with initials BA and BE. Joe Mallory is identified with initials BB. This is another reason why the 911 audio CD's were provided to the trial court and also to this Court as part of the Appendix.

refused to go near the front door. (A.R. 60). Ms. Hefner ended the phone call by telling Mr. Mallory “Alright, I’ll get them out there.” (A.R. 60).

Ms. Hefner then called West Virginia State Trooper Jason Keffer who was stationed in McDowell County, West Virginia. Ms. Heffner relayed that she had not called a deputy since “Kevin [the McDowell County Sheriff’s Deputy she thought was on duty] is trying to find a car since he hit a dog and done [sic] some damage to his last night.” (A.R. 60).⁴ Ms. Heffner said she could hear a “man screaming beating [sic] on [Joe Mallory’s] door...[H]e is threatening to kick his door in and do him harm. Guy is driving a gray car.” (A.R. 60). She provided the location of the call. Trooper Keffer said he was not yet dressed and asked her to call Mr. Mallory back for more information. (A.R. 60).

During the second phone call with Mr. Mallory he was told there was “a trooper headed that way. He wanted me to call back and see what was going on” even though Trooper Keffer never said he was en route. (A.R. 61). Ms. Heffner asked if the assailant left to which Mr. Mallory said “Yes, he finally left, but...he was...threatening to kick my door in if I didn’t open up the door and...” when Ms. Heffner interrupted him. (A.R. 61). She stated, “Alright, well, I just had to call and make sure that you were safe because the trooper doesn’t need to come out there if [the assailant] is not there.” (A.R. 61). Ms. Heffner said if the assailant came back Mr. Mallory could call her.⁵ Mr. Mallory responded “I have got a shot gun upstairs if I go up there and load it and wait on him to come back and then...” at which point Ms. Heffner interrupted again and instructed, “No,

⁴ It later wound up being discovered that another Sheriff’s Deputy was on duty and available but Ms. Heffner never called to find out. (A.R. 70)

⁵ It is undisputed that Mr. Mallory lived approximately thirty (30) minutes away from the both the Sheriff’s Department headquarters and the State Police barracks.

no, no. Don't load the shotgun. Don't, don't be [sic] shooting nobody [sic]." (A.R. 61). Mr. Mallory then told Ms. Heffner "Well, it's, it's, 'cause I'm a little scared for myself." (A.R. 61). Mr. Mallory described where the assailant lived and that he had threatened Mr. Mallory apparently because he wanted money.⁶ (A.R. 61).

Ms. Heffner called Trooper Keffer back and initially informed him the assailant had left Joe Mallory's premises.⁷ She then made the statement "I guess he was going to shoot him and kill him." (A.R. 62). It is not clear from the recording or transcribed statement who Ms. Heffner claimed was going to shoot who. However, in his deposition Trooper Keffer denied remembering a description of any weapons stating, "I don't believe I was ever informed of any of that that I remember." (A.R. 73). He admitted, however, that "nine times out of ten" he will personally respond to a phone call in which weapons are involved. (A.R. 72). Aside from not remembering a mention of weapons Trooper Keffer also did not remember Mr. Mallory saying he was afraid for his safety or that anyone was going to be shot. (A.R. 26).

In any event, as noted Ms. Hefner told Mr. Mallory that no help was coming to his residence even before she called Trooper Keffer back. Within a few seconds of

⁶ If the Court is curious as to the underlying crime, Mr. Mallory lived next door to Robert Wayne Johnson, Sr. and Pat Johnson. Their son and Mr. Mallory's murderer, Robert Wayne Johnson, Jr. was visiting them from his home in North Carolina. While not totally clear there was evidence that at some point Mr. Mallory sold a hunting rifle to Johnson, Sr. The rifle allegedly needed a part. Mr. Mallory had no prior dealings with Johnson, Jr. On the day of the murder the Johnson men had apparently been drinking and were upset about the rifle part. One of Mr. Mallory's elderly brothers, who lived nearby, went to the Johnson home at some point and gave Johnson, Sr. approximately \$25.00 to cover the cost the of rifle part. Johnson, Jr. tried to kick Mr. Mallory's door down at around 10:00 a.m., allegedly because he was still upset over the rifle. It was at around 11:30 p.m. that same night when Johnson, Jr. broke into Mr. Mallory's home, killed and robbed him. This was despite the fact that Mr. Mallory's brother paid Johnson, Sr. the \$25.00 he claimed he was owed. Johnson, Jr. was convicted of first degree murder in McDowell County Circuit Court. These facts are contained in various parts of the underlying record. Petitioner believes the Respondents will agree with this background.

⁷ During the second phone call between Ms. Heffner and Trooper Keffer the Court will notice the appearance of a third person in the transcription. It is undisputed that this third person was McDowell 911 dispatcher Roger Cox.

Trooper Keffer being told that someone was potentially going to be shot and killed Dispatchers Heffner and Cox are heard laughing.⁸ Trooper Keffer was instructed twice by the McDowell County 911 dispatchers to “kick [his] shoes back off.” (A.R. 63). Shortly thereafter Ms. Heffner asks Trooper Keffer if he likes bluegrass music. The remaining three pages of the transcribed statement involve the dispatchers and Trooper Keffer, joking, discussing music and food. (A.R. 64-66). Only around two pages of the transcribed statement, involving two separate emergency phone calls, were dedicated to Mr. Mallory.

The next morning Ms. Heffner was still on duty when she received a telephone call from Pat Johnson.⁹ Ms. Johnson needed to “talk to a police officer.” (A.R. 77-78). Ms. Johnson explained that her step son, Robert Wayne Johnson, Jr.’s, ex-wife called to say that Johnson, Jr. had “killed a man last night[.]” (A.R. 78). Ms. Heffner asks, “Say what?” (A.R. 78). Ms. Johnson and Ms. Heffner then laugh before Ms. Heffner says “I’m sorry. I apologize. That was not professional.” (A.R. 78). Ms. Heffner put law enforcement on notice of Ms. Johnson’s call at which point Mr. Mallory’s body was found in his home. According to the Medical Examiner Mr. Mallory was stabbed approximately 30 times, primarily in the head, face and arms indicating he tried to defend himself from his attacker. (A.R. 150).

⁸ Audio CD’s were provided to the trial court as part of the Plaintiff’s Response to the Defendants’ Motion for Summary Judgment. Copies of those same CD’s are therefore included with this Brief since they were exhibits to a pleading in the Petitioner’s Appendix. One CD is dated January 19, 2008 and contains the “pre-murder” 911 calls. The second CD is dated January 20, 2008 and contains the “post-murder” phone calls. The Petitioner asks this Court to particularly consider the dispatchers’ levity displayed in the pre-murder 911 calls while talking with Trooper Keffer. The Petitioner argued to the trial court that the dispatchers’ attitudes were part of the necessary fact analysis when considering whether their actions contributed, for example, to the Trooper’s decision not to investigate Mr. Mallory’s call. Petitioner furthermore contends Mr. Mallory’s fear for his safety can also be heard in these calls, which should have been considered by a jury for purposes of deciding whether the Respondents met their legal burden.

⁹ In yet another bizarre twist to this case Pat Johnson has since been murdered by Robert Wayne Johnson, Sr. He then attempted his own suicide, which he survived. Robert Wayne Johnson, Sr. and Robert Wayne Johnson, Jr. are now both incarcerated.

It is undisputed that Trooper Keffer did not drive to Mr. Mallory's home until Sunday January 20, 2008 only after being told of the murder. It is undisputed that Mr. Mallory's 911 call for help occurred at approximately 10:00 a.m. on January 19, 2008. It is undisputed that Mr. Mallory's murder occurred on January 19, 2008 at approximately 11:30 p.m., or, thirteen and half hours after his initial 911 call. (A.R. 199).¹⁰

Trooper Keffer admitted to relying upon what the McDowell County 911 dispatchers told him when making his "decision as to what you are going to do in relation to the particular call[.]" (A.R. 73). He furthermore relied upon the dispatchers to relay appropriate information to him regarding the nature of the call. (A.R. 72). While Trooper Keffer could not remember the specifics of what he was told by 911 dispatchers he admitted the information they gave him factored into his decision not to investigate Joe Mallory's call.

The Petitioner retained the services of expert witness Charles Carter. A former member of the military and law enforcement officer Mr. Carter created the first 911 certification program for the State of Georgia at its Public Safety Training Center in 1988. Since then, among other things, he developed a 911 national certification program and began teaching 911 certification classes across the country. He has written thirty-three 911 training manuals of which many have been adopted by various states as their standard for training. (A.R. 158-160).

In his expert report Mr. Carter noted that the State of West Virginia enacted West Virginia Code § 24-6-5 in 1994, commonly referred to as the Local Emergency Telephone System Act, in order to insure that the citizens of West Virginia have access to

¹⁰ This part of the Appendix was a proposed Order submitted to the trial court by the Respondents. In this proposed Order they agree with the timelines described in this Brief.

public safety in a rapid and convenient manner. The Act requires, among other things, certain training mandates for 911 dispatchers. One of the certification programs recognized by public safety officials is the APCO Public Safety Telecommunicator 1, Sixth Edition Course. This was the certification program used by the McDowell County Respondents at the time Mr. Mallory was killed. (A.R. 166-167).

In accordance with the Local Emergency Telephone System Act the McDowell County Commission provides its citizens with 911 service for law enforcement calls. 911 fees are added to county residents' telephone bills in order to pay for this emergency service. As part of 911 dispatch service the APCO training manual used by McDowell County 911 reads, "when citizens call for help, they expect positive action to solve the problem. To accomplish this, the telecommunicator must take charge of the conversation." (A.R. 168; 171).

Mr. Carter opined that Joe Mallory's phone call could have been classified into one of several categories including assault and battery, burglary-home invasion, disturbance or prowler. These classifications are all contained within the APCO Manual used by the McDowell County Respondents. Mr. Mallory's call was never even given a classification. Among other things Mr. Carter wrote that the McDowell County Respondents "failed to follow up to insure a law enforcement response by the law enforcement agency to which the call was assigned for a citizen who described a life threatening or potential life threatening situation in which he verbally repeated he was in fear for this life." (A.R. 171; 184).

McDowell County 911 also "failed to implement a standard operating procedures manual for its employees to use while processing 911 calls." (A.R. 184). The

Respondents “ignore[d] protocols or written procedures for victims of crimes in McDowell County. Mr. Mallory would have received a rapid response in most any place in America except McDowell County, West Virginia.” (A.R. 185).

On May 22, 2012 (incorrectly referenced as May 12, 2012 in the Circuit Court’s Order) the parties appeared and argued the Respondents’ Motion for Summary Judgment pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure (“WVRCP”). On June 6, 2012, approximately a week and a half before trial, the Circuit Court granted the Respondents’ Motion. The Circuit Court acknowledged that the special or public duty analysis was appropriate. However, the Circuit Court acted as the fact finder and held as a matter of law that Mr. Mallory did not “justifiably [rely] upon any conduct of Heffner that created a special relationship between the two. As a result, the Plaintiff cannot, as a matter of law, demonstrate that a special duty was created upon Defendant that resulted in any harm to Mallory.” (A.R. 203-208).

In its Order the Circuit Court relied heavily upon a telephone call that Trooper Keffer alleges he had with Mr. Mallory after he spoke with dispatchers. In short, Trooper Keffer claims he made an un-witnessed call to Mr. Mallory on an unrecorded landline. Trooper Keffer alleges he told Mr. Mallory it was a Saturday so he was unable to contact Magistrate Court. Therefore, according to the Trooper no charges could be filed against Johnson, Jr. until the following Monday so there was essentially no use in him investigating that day. (A.R. 28-29). Trooper Keffer claimed that Mr. Mallory expressed an understanding of this alleged rationale. (A.R. 26). The Petitioner argued at hearing this phone call was barred by the Dead Man’s Act. (A.R. 231-236).

The Circuit Court disagreed and gave substantial weight to Trooper Keffer's alleged phone call. This is plainly evident when comparing the Respondents' proposed Order granting summary judgment to the Order the Circuit Court actually entered. The two Orders are virtually the same. However, in paragraph four of its Findings of Fact the Circuit Court added reference to the dispatchers calling the Trooper after they spoke with Mr. Mallory. (A.R. 199; 204). In paragraph five of their proposed Order the Respondents wrote that Trooper Keffer "determined it was not necessary for him to go to the Mallory residence...because there was no police action he could take as to Johnson, Jr.'s conduct." The Circuit Court removed the latter half of that sentence, presumptively knowing that the Trooper could have, in fact, taken police action. (A.R. 199; 205).¹¹ In paragraph five, Conclusions of Law the Circuit Court made changes to the Respondents' proposed Order, again highlighting Trooper Keffer's claims as to the contents of his alleged phone call with Mr. Mallory. (A.R. 202; 207)

The Respondents argued there was no public duty. The Circuit Court made factual findings and agreed, relying at least in part upon Trooper Keffer's alleged phone call to Mr. Mallory. The Petitioner's case against the Respondents was therefore dismissed since without a public duty the Respondents were immune from suit. (A.R. 203-208). For the reasons outlined below the Petitioner contends the Circuit Court erred when it acted as the fact finder in addition to its reliance upon inadmissible facts while doing so.

¹¹ By example, the fact that it was a Saturday and Magistrate Court was closed would not have stopped the Trooper from executing a warrantless arrest of Johnson, Jr. if appropriate.

V. SUMMARY OF ARGUMENT

The Circuit Court committed two errors when it granted the Respondents' Motion for Summary Judgment. First, the Circuit Court ruled as a matter of law there was no public duty owed to Joe Mallory by McDowell 911 and its dispatchers. It is well-settled that the question of whether a public duty exists is one for the jury rather than the trial court. Nevertheless, the Circuit Court ignored this Court's precedent and inserted itself as fact-finder. This error was compounded by abundant material questions of fact that made summary judgment improper.

The Circuit Court's second error was its reliance upon an inadmissible, alleged telephone conversation between a party/interested witness, West Virginia State Trooper Keffer, and decedent Joe Mallory. The unrecorded and un-witnessed telephone conversation was barred by the Dead Man's Act and is therefore inadmissible at trial. When the Circuit Court assumed the role of fact-finder it should not have considered this statutorily barred conversation. The Petitioner contends this Court should reverse the trial court's Order granting summary judgment and remand this matter to the Circuit Court of Kanawha County. This Court's review of the trial court's Order granting summary judgment is subject to *de novo* review with all facts viewed in a light most favorable to the Petitioner. *See, Mace v. Ford Motor Co.*, 221 W.Va. 198; 653 S.E.2d 660 (2007); *Wilson v. Daily Gazette Co.*, 214 W.Va. 208, 588 S.E.2d 197 (2003).

VI. SUMMARY REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 10(c)(6) of the West Virginia Rules of Appellate Procedure the Petitioner requests oral argument. Pursuant to Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure Petitioner contends oral argument is necessary due to the fact intensive nature of the underlying matter. Oral argument will aid the Court's decisional process since the trial court acted as the finder of fact, which makes complete presentation of those facts important upon appeal. As a claim of wrongful death the Petitioner's damages are significant, which further supports the need for oral argument. Moreover, this case involves an important question of what constitutes reliance upon 911 dispatchers and how much they must arguably do to satisfy their duty. This case could shape 911 response attitudes in future situations. The legal issues are well-settled, i.e. – that a jury rather than trial court should determine whether a public duty exists and that Trooper Keffer's alleged phone call is barred by the Dead Man's Act. Pursuant to Rule 10(c)(6) of the West Virginia Rules of Appellate Procedure the Petitioner therefore believes the time allotted by Rule 19 of the West Virginia Rules of Appellate Procedure is sufficient.

VII. ARGUMENT

A. THE CIRCUIT COURT ERRED WHEN IT RULED AS A MATTER OF LAW THAT NO SPECIAL DUTY EXISTED

The Circuit Court assumed a role that it has been instructed not to take when it made itself the finder of fact. “[T]he question of whether a special duty arises to protect an individual from a State governmental entity's negligence is ordinarily a question of fact for the trier of facts.” Syl. Pt. 11., Parkulo v. West Virginia Bd. of Probation and Parole, 199 W.Va. 161, 172, 483 S.E.2d 507, 518 (1996); *cited in*, McCormick v. West Virginia Department of Public Safety et al, 202 W.Va. 189, 503 S.E.2d 502 (1998) (per curiam); Syl. Pt. 12, J.H. v. West Virginia Div. of Rehab. Services, 224 W.Va. 147, 680 S.E.2d 392 (2009). While those citations make reference to the liability of State government agencies the test as to whether a public duty exists is the same when the claim involves a county or municipality.¹²

The parties disagreed that a public duty existed but it was undisputed that a public duty analysis was required. At that point the issue was, “if a special relationship exists between a local government 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. 6, Randall v. Fairmont City Police Department, 186 W.Va. 336, 412 S.E.2d 737: *quoting* Syl. Pt. 3 Benson v. Kutsch, 181 W.Va. 1, 380 S.E.2d 36 (1989). In Randall a woman made several phone calls to the Fairmont City Police Department after she was harassed and threatened by a man named Zachary Curtis Lewis.

¹² As discussed later in this Brief the McCormick case, which involved State liability, relied upon Randall, *supra*, which was a case involving municipal liability. The public duty doctrine has been consistently applied in the same manner whether the agency at issue is a State or local entity.

An arrest warrant was also issued for Mr. Lewis but the law enforcement Respondents took no action to apprehend him. On a later date the decedent noticed Mr. Lewis was following her at which point she drove to the City of Fairmont Police Department, parked her car, and blew her horn for attention. Before there was any response she was shot and killed by Mr. Lewis in the police parking lot. The decedent's estate sued the City of Fairmont Police Department for failure to provide proper police protection. The trial court dismissed the estate's claim alleging that the law enforcement Respondents were immune from suit pursuant to the West Virginia Governmental Tort Claims and Insurance Reform Act of 1986, West Virginia Code § 29-12A-5 *et seq.*

This Court reversed the trial court. The Randall Court first noted that the tort immunity available to municipalities or "governmental" versus "proprietary" functions was abolished in 1975 in Syl. Pt. 10 of Long v. City of Weirton, 158 W.Va. 741, 214 S.E.2d 832 (1975). Since 1975 "[a] municipal corporation shall be liable, as if a private person, for injuries inflicted upon members of the public which are proximately caused by its negligence in the performance of functions assumed by it." *Id.* at Syl. Pt. 11.

In response to Long, in 1986 the Legislature enacted the Tort Claims and Insurance Reform Act providing immunity in certain instances.¹³ The Randall Court held the Act was constitutional but acknowledged that law enforcement Respondents still did enjoy blanket immunity to tort liability when a special duty existed. In order to establish this special duty or relationship there must exist:

- (1) An assumption by the local governmental entity, through promises or actions, of an affirmative duty to act

¹³ The Petitioner does not dispute that the McDowell County Respondents qualify as a political subdivision under the Act and that the Act otherwise applies.

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

Randall at 348, 749; *quoting* Syl. Pt. 2, Wolfe v. City of Wheeling, 182 W.Va. 253, 387 S.E.2d 307 (1989).

While acting as fact-finder the Circuit Court only ruled that the Petitioner failed to satisfy the third element of the test. This was apparently due to the alleged phone call Trooper Keffer claims he made to Mr. Mallory after he spoke with dispatchers. The Circuit Court's reasoning is flawed on multiple levels.

McDowell County 911 had a statutory obligation to provide 911 service to citizens such as Mr. Mallory. Mr. Mallory and other citizens paid a fee for 911 service. 911 services were advertised as the appropriate emergency number. Mr. Mallory relied upon 911 as his emergency provider. He did not call the State Police or the Sheriff's Department. He called 911.

During that call a 911 dispatcher took control of the situation without seeking advice from law enforcement. She made the decision to first send and then cancel a State Trooper. She told Mr. Mallory not to use a weapon in his home. She told Mr. Mallory to call back if there were further problems. Ms. Heffner joked about Mr. Mallory's call while talking to a State Trooper. She and another dispatcher twice told the Trooper to kick his shoes back off. The Trooper, in turn, said dispatchers influenced his decision making process. Mr. Mallory called 911, which was the most logical number he knew of for help. At least for purposes of summary judgment a question of material fact remains as to whether that was the agency he justifiably relied upon for protection.

By comparison the Petitioner points to the much more tenuous justifiable reliance present in the McCormick case. In that matter convicted murderer Harold D. Gunnoe was on work release when he met a counselor name Alicia McCormick. Among other things Ms. McCormick counseled former inmates such as Gunnoe. She also coincidentally lived in an apartment building where Gunnoe apparently performed occasional maintenance.

Prior to their meeting Gunnoe performed poorly while on work release. In early June 1991 the West Virginia Department of Corrections (“DOC”) described him as a “program failure.” While still on release Gunnoe met McCormick in late June 1991 and murdered her on July 20, 1991. Prior to that time there was no proof, nor even any argument, that McCormick requested or relied upon representations of help from the DOC. The circuit court granted the DOC’s motion for summary judgment after ruling as a matter of law that the plaintiff could not meet the public duty test.

This Court reversed the circuit court and relied upon Randall when it found sufficient questions of material fact. This was despite the fact that Ms. McCormick never sought help from the DOC prior to her murder. In this case the decedent twice spoke with the Respondents, specifically requested help from an identified assailant, was denied assistance, was told not to load his shotgun in his own home, was told to call back if necessary. More than half a day then passed before Mr. Mallory was murdered by the very man against whom he sought help.¹⁴

¹⁴ The Petitioner contends that the thirteen and half hour time period between Mr. Mallory’s 911 call and his murder is part of the relevant factual analysis the circuit court should have left to the jury. This was not a case in which the decedent called for help and was murdered a few minutes later before police could even arrive.

In its Order the Circuit Court relied heavily upon a phone call that State Trooper Keffer claims he made to Mr. Mallory after he spoke with 911 dispatchers. For reasons discussed later in this Brief the Petitioner contends that phone call should not have been considered by the circuit court nor is it admissible at trial. However, for argument's sake, even if that phone call is part of the factual analysis it should do nothing more than go towards the weight of the evidence. If so the phone call raises more questions than it answers.

Trooper Keffer testified that his decision not to travel to Mr. Mallory's residence and investigate his emergency call was based, at least in part, on the information given to him by Respondents. If that conversation is admitted will a jury believe, for example, that Trooper Keffer took the call less seriously based upon the attitudes displayed by 911 dispatchers when they joked about Mr. Mallory? Did he fail to investigate after dispatchers twice told him to kick his shoes back off? Since Trooper Keffer testified that "nine times out ten" he will investigate a call when weapons are involved why did he not go to the Mallory residence after he was told someone may get shot?

Why is it that Trooper Keffer could not remember mention of weapons, a potential shooting or Mr. Mallory's fear for his safety on the transcribed 911 calls but could remember important details about his alleged unrecorded call to the decedent? Dispatcher Heffner told Mr. Mallory that no law enforcement was going to his home before Trooper Keffer allegedly called the decedent. Ms. Heffner never checked to see if Trooper Keffer was on scene per normal protocol. Perhaps most telling is this – if Ms. Heffner thought the Trooper was going to handle everything why was her last instruction

for Mr. Mallory to call her back if he had any more problems? Will a jury believe the alleged substance of Trooper Keffer's phone call when considering the totality of facts?

The only way to answer these questions is to submit them to a jury rather than decide them as a matter of law. This has been the rule of this Court and this State for two decades. As recently as 2009 this Court reminded us in the J.H. case that the public duty test is to be answered by the jury.

The trial court also wrongly ruled as a matter of law that Mr. Mallory did not justifiably rely upon the Respondents for help. This ruling has the effect of relieving public entities from future responsibility. May a 911 operator ostensibly tell a caller, "You need to talk to someone else because, even though you pay a fee for our services, we're not helping. Instead we are going to make light of your situation to law enforcement. On top of that don't protect yourself in your own home, just call us back after we didn't help you this time." The Circuit Court's ruling may encourage a "pass the buck mentality" that could lead to another tragedy.

Joe Mallory did rely upon the Respondents. They are who he called when he was in danger. He followed their instructions. When all the preceding facts are viewed in a light most favorable to the Petitioner then reversal of the Circuit Court is the only legitimate outcome. The question of whether Joe Mallory justifiably relied upon McDowell 911 was a jury's decision to make.

B. THE CIRCUIT COURT ERRED WHEN IT CONSIDERED EVIDENCE OF AN ALLEGED TELEPHONE CALL THAT IS INADMISSIBLE PURSUANT TO THE DEAD MAN'S ACT.

A key piece of evidence relied upon by the Circuit Court is inadmissible at trial and should have likewise been disregarded for purposes of summary judgment. W.Va. Code Section 57-3-1 reads, in relevant part:

No party to any action, suit, from through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness against the executor, administrator, heir at law, next of kin, assignee, legatee, assignee or survivor of such person, or the assignee or committee of such insane person lunatic...Provide, however, that were an action is brought for causing the death of any person by any wrongful act, neglect or default under article seven, chapter fifty-five of this Code, the person sued, or the servant agent or employee of any firm or corporation sued, shall have the right to give evidence in any case in which he or it is sued, but he may not give evidence of any conversation with the deceased.

The phone call at issue falls squarely within this statute.

This is a wrongful death claim pursuant to W.Va. Code Section 55-7-5. The conversation at issue was one between a witness who was sued, West Virginia State Trooper Keffer, and offered against the Petitioner, who was Administrator of Joe Mallory's Estate. Trooper Keffer claims he personally called Mr. Mallory after he spoke with Respondents. Trooper Keffer claims he told Mr. Mallory he could not arrest anyone since it was a Saturday. Mr. Mallory allegedly understood and then did not expect any help. The Circuit Court apparently decided that this alleged phone call removed liability from the Respondents.

The Circuit Court should have never even considered that alleged conversation.¹⁵ "To summarize the basic operation of the Dead Man's Act, W.Va. Code Section 57-3-1, a concurrence of three general conditions must be met in order to bar the witness'

¹⁵ It is again important to note that all the phone calls involving Respondents McDowell County 911 and dispatcher Martha Heffner were recorded and transcribed. The conversation Trooper Keffer had with Mr. Mallory was unrecorded and un-witnessed.

testimony. First, the testimony must relate to a personal transaction with a deceased or insane person. Second, the witness must be a party to the suit or interested in its event or outcome. Third, the testimony must be against the deceased person's personal representative, heir at law, or beneficiaries or the assignee or committee of insane person." Syl. Pt. 10, Moore v. Goode, 180 W.Va. 78, 375 S.E.2d 549 (1988). The first element is easily satisfied since the conversation at issue was with a deceased person, murder victim Joe Mallory.

The witness who claims to have had this conversation, Trooper Keffer, was a party when he was sued (initially as a John Doe Trooper). He was also the employee of a sued entity, the West Virginia State Police. Trooper Keffer was therefore both a party and an interested person.

Lastly, the alleged conversation/testimony was against Mr. Mallory's personal representative/administrator. This was evidenced by the Respondent's reliance upon the conversation along with the Circuit Court's finding that the conversation was adverse to the Petitioner in its ruling. In short, Trooper Keffer's memory is that he told Mr. Mallory no one was coming to his house that day. The Respondents argued and the Circuit Court agreed this absolved them from liability. This is exactly the type of testimony barred by the Dead Man's Act. Trooper Keffer should have been disallowed from giving "evidence of any conversation with the deceased."

VIII. CONCLUSION

The underlying facts of this appeal are succinctly summarized as follows: Joe Mallory called and asked the Respondents for help. He paid them a mandatory fee for their help. The Respondents knew he was in trouble. They could hear an assailant

beating on and screaming at Mr. Mallory's front door. Respondents knew where Mr. Mallory and the assailant lived. They had a description of the assailant's car. Respondents told the elderly caller not to use a firearm to protect himself in his own home. He was thirty minutes from the closest law enforcement but Respondents simply instructed him to call back if there was trouble. Respondents joked with a State Trooper about the calls and told him not once, but twice to kick his shoes off. They then talked about music and food. Respondents never checked to see if the Trooper was on scene nor did they contact the Sheriff's Department, who was also available to investigate.

Thirteen and a half hours later Mr. Mallory was stabbed thirty times in his own home by the same man who Respondents heard beating on and screaming at his front door. A nationally recognized expert believes the Respondents' conduct was unreasonable. The expert believes Mr. Mallory could have expected a rapid law enforcement response almost anyplace else in America. However, the same State Trooper who was told by Respondents to kick his shoes back off now claims to have told Mr. Mallory there was nothing he could do. The Circuit Court ruled that no reasonable jury could ever find any liability by the Respondents. The Circuit Court determined that Mr. Mallory did not rely upon the Respondents for help. This is despite the fact that all reasonable inferences must be viewed in a light most favorable to the Petitioner. This is furthermore despite the fact that a trial court is not supposed to make factual findings in a public duty case to begin with, especially when those factual findings include the use of an inadmissible conversation.

The Petitioner contends the Circuit Court was wrong. This case should have gone to a jury. Petitioner asks for reversal so that she may have her day in court.

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

By Counsel

Handwritten signature of JB Akers in black ink.

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Petitioner,

v.

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

**WEST VIRGINIA STATE POLICE, COLONEL TIMOTHY S. PACK,
JOHN DOE STATE TROOPER, 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,**

Respondents.

CERTIFICATE OF SERVICE

I, JB Akers, counsel for the Petitioner herein, do hereby certify that I have served a true copy of **Petitioner's Brief** and **Petitioner's Appendix** upon the following counsel of record this 9th day of October, 2012, via hand-delivery as follows:

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