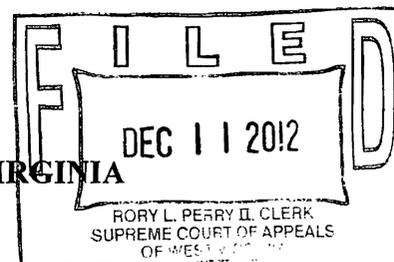


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 REPLY BRIEF

**Counsel for Petitioner, Lorraine M. Upchurch,
Administratrix of the Estate of Joe Edward Mallory, Deceased**

JB Akers

JB Akers, Esq. (WVSB #8083)

Akers Law Offices, PLLC

P.O. Box 11206

Charleston, WV 25339

(304) 720-1422

(304) 720-6956 (facsimile)

jb@akerslawoffices.com

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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

The Petitioner relies upon the Statement of the Case outlined in her original Brief. However, Petitioner contends there are several inaccuracies in Respondent's Brief (which was titled "Petitioner's Brief" when filed with this Court). These inaccuracies are addressed below.

In their factual statement the Respondents argue, "logic clearly dictates, that as a result of [a conversation between decedent Joe Mallory and West Virginia State Trooper Jason Keffer] Mallory did not expect law enforcement to come to his house as a result of the initial or subsequent 911 call." Respondents' Brief ("RB") at p.6. Respondents further argued, "Trooper Keffer exercised his discretionary decision making, based upon the conversation with Mallory, and determined that there was not an immediate threat occurring and that he did not need to travel to the residence. All reasonable inferences from these facts support the conclusion that Mallory did not disagree with the plan." *Id.* at 6. It is simply not factually accurate to say that Mr. Mallory agreed with the refusal to investigate his emergency call. This is because the only evidence of Mr. Mallory's expectations is contained on the included 911 recordings when he asked for help.

For purposes of reviewing summary judgment, whatever expectations Mr. Mallory had after allegedly speaking with Trooper Keffer must be considered the same as

his expectations when he spoke with McDowell 911 dispatchers.¹ The undisputed material evidence is that Mr. Mallory was in fear for his safety. It is undisputed that he asked for help. It is undisputed that no help was ever provided. The *disputed* material evidence revolves around why no one helped him. The Petitioner argued the lack of help stemmed from Respondents' misconduct. That misconduct ranged from Respondents' failure to properly classify the decedent's call to joking about Mr. Mallory and thereby influencing a State Trooper to ignore a life threatening situation.

Respondents also claimed that Petitioner's 911 expert, Charles Carter, opined the Respondents failed to implement proper policies and procedures. *Id.* at 6. Mr. Carter's opinions were much broader and deeper. Those opinions were discussed at length in Petitioner's Brief and his full report was made part of this Court's Appendix. The Petitioner will therefore not rehash all those opinions here. Suffice to say, Mr. Carter was not merely critical of the Respondents' "policies and procedures." Mr. Carter pointed to a systemic and complete failure by Respondents in response to the decedent's emergency phone call.

¹ The Petitioner asks the Court to remember from her original Brief that the question of whether Trooper Keffer even called Mr. Mallory is disputed. That phone call therefore should not have even been considered under a summary judgment analysis. More importantly, the alleged substance of the call violates West Virginia Code § 57-3-1, the Dead Man's Act, and should have been excluded from review by both the court and a hypothetical jury.

V. ARGUMENT

A. THE CIRCUIT COURT ERRED WHEN IT RULED AS A MATTER OF LAW THAT NO SPECIAL DUTY EXISTED²

Respondents agree that a special or public duty analysis was required at summary judgment. **RB** at p.12. However, Respondents do not offer one case in support of their argument that the Circuit Court properly applied the test. In fact, Respondents did not even distinguish the Petitioner's citations.³

Instead of relying upon authority the Respondents use subjective reasoning to justify the Circuit Court's decision to act as fact-finder. Respondents claim, "[McDowell 911 Dispatcher] Heffner clearly communicated the relevant information to [State Trooper] Keffer about the nature of [decedent's] call and he was then permitted to use his training and experience to make an informed decision about how to handle the situation, after having spoken to Mallory on the phone." **RB** at p.12. This is an obvious example of *petitio principia*, or, Respondents' act of begging the question.

To the contrary, the Petitioner argues that Respondents failed to acquire all relevant information. Respondents failed to even classify Mr. Mallory's call per their own guidelines. Even worse, the information they obtained was made into a joke thereby arguably influencing a State Trooper to ignore a life threatening situation. The Respondents' entire appellate defense is built upon the principle argument that their

² Respondents reversed the order of Petitioner's Assignments of Error in their Response Brief. Petitioner maintains their original order, with the public duty analysis first and the questions surrounding application of the Dead Man's Act second.

³ Petitioner questions whether Respondents' failure to cite to their own authority, or to try and distinguish Petitioner's citations, makes their argument susceptible to adverse application of Rule 10(d) of the West Virginia Rules of Appellate Procedure. That Rule states, in part, "the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue."

factual view is the correct one. The problem remains that the Circuit Court should have never decided this factual dispute for itself. The Respondents cite no authority, since none presumptively exists, in support of the Circuit Court's improper role as fact-finder.

Without any new authority to address the Petitioner generally relies upon her original Brief. The Respondents continue to almost singularly rely upon Trooper Keffer's alleged phone call with the decedent so the Petitioner again notes:

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?

Petitioner's Brief at pp.18-19.

At summary judgment the Respondents successfully passed the buck to Trooper Keffer. However, the Petitioner continues to allege that whatever Trooper Keffer's failings may have been they were created, influenced and assisted by the Respondents' own misconduct. "A party in a tort action is not required to prove that the negligence of one sought to be charged with an injury was the sole proximate cause of an injury." Syl.

pt. 1, Mays v. Chang, 213 W. Va. 220, 579 S.E.2d 561 (2003). “In addressing questions of causation, this Court has been careful to defer to the judgment of a jury where different conclusions may be drawn from the presented facts, noting that ‘questions of proximate cause are often fact-based issues reserved for jury resolution.’” Stewart v. George, et al, 216 W.Va. 288, 292, 607 S.E.2d 394, 398 (2004). Only a jury should have answered the question of whether the Respondents’ misconduct was *a* proximate cause of Mr. Mallory’s death.

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

The Respondents’ argument against application of the Dead Man’s Act is equally devoid of authority. Respondents only cited to one case in their Brief, Meadows v. Meadows, 196 W.Va. 56, 468 S.E.2d 309 (1996) for the proposition that the phone call between the decedent and Trooper Keffer was not a “transaction” and therefore not subject to exclusion under W.Va. Code Section 57-3-1, the Dead Man’s Act.⁴ Respondents’ reliance upon Meadows is not only misguided but that case actually strengthens the Petitioner’s position.

Meadows involved a will dispute between the decedent’s second wife and his sons by a prior marriage. The trial court excluded the wife’s testimony regarding her personal observations of the decedent around the time he executed a second will that disfavored her. Precedent indicated that any testimony regarding a decedent, even if solely based upon observations of the decedent’s behavior, was a “transaction” under the Dead Man’s Act.

⁴ Meadows was actually the only case cited by Respondents, whether in reference to the Dead Man’s Act or otherwise.

This Court reversed and determined that a transaction did not include personal observations such as the wife testifying that her husband seemed confused at around the time he executed his last will. The wife's proffered testimony did not include any alleged conversations she had with the decedent.

In this case all of Trooper Keffer's testimony regarding the decedent arose from an alleged conversation. The "transaction" between the two men had nothing to do with the Trooper's personal observations and everything to do with a phone call. If that phone call does not run afoul of the Dead Man's Act then the Act itself is dead.

The Respondents also argue that Trooper Keffer was not a party or interested person in Petitioner's suit at the time of summary judgment. Trooper Keffer was originally named as "John Doe State Trooper." The State Police settled their liability shortly after Trooper Keffer was identified in discovery. It is undisputed Trooper Keffer was a party although he was originally named as a "John Doe" defendant.

Even if this Court establishes a new rule that the Trooper must have been an active party at the time the Dead Man's Act was applied then he was still, at a minimum, an interested person. It is undisputed the Trooper was given actual knowledge of an assailant. It is undisputed the Trooper was given actual knowledge of the location of the eventual crime. It is undisputed the Trooper was around thirty minutes away from the crime scene. Trooper Keffer is recorded joking with Respondents' dispatchers after being told that someone is going to be shot. It is undisputed the assailant did not return until over thirteen hours later, leaving the Trooper with more than enough time to travel to the scene to investigate Mr. Mallory's emergency call.

Despite all this Trooper Keffer never investigated the decedent's call until he was told the next day that Mr. Mallory was already dead. Trooper Keffer clearly has an interest in protecting himself in this case, whether he is telling the truth or not. Trooper Keffer's allegedly unrecorded and unwitnessed phone call to Mr. Mallory is exactly the kind of self-interested conversation the Act was meant to exclude.⁵

Respondents finally argue the phone call "had nothing to do with any rights of Mallory's representatives, heirs at law, etc." This circular logic fails to recognize that Mr. Mallory's representatives, heirs at law, etc. had no legal rights against the Respondents until Mr. Mallory was killed. The phone call had to occur first. The Petitioner's rights could only arise thereafter.

Respondents ultimately make several representations regarding what we "know" of Trooper Keffer's alleged call to the decedent. Respondents allege we know the call occurred, that the Trooper determined he did not need to investigate based upon what Mr. Mallory told him and during that call Mr. Mallory knew law enforcement was not coming to his home. We actually do not "know" any of this. That is because, as the Meadows Court discussed, Mr. Mallory's lips are now sealed. Trooper Keffer's lips should also be sealed with regard to the men's alleged phone call. The Circuit Court erred by considering evidence of a conversation that should have been excluded by the Dead Man's Act.

⁵ The Petitioner is still at a loss to understand why Trooper Keffer testified that he could not do anything to the assailant/eventual murderer since Mr. Mallory called on a Saturday. Even if a Magistrate Judge was not on duty the Trooper could have still investigated the call and made a warrantless arrest if necessary. The incredible fact that Trooper Keffer claims he was powerless to help on a Saturday is even more reason to exclude the alleged phone call he had with Mr. Mallory. Again, Petitioner argues that this revisionist defense arose after the Respondents joked with the Trooper and told him to kick his shoes off. A jury may believe the Trooper or they may not. In any event, a jury should be given that opportunity.

VI. CONCLUSION

This case arose from a tragedy. That tragedy was compounded when the Circuit Court granted summary judgment. There are several alleged bad actors in this case from the murderer, to the State Police to the Respondent 911 authorities. A jury may believe some or none of the liability falls upon the Respondents. Regardless, it was not the Circuit Court's job to decide the factual winners and losers. Petitioner requests reversal. Petitioner requests her day in court.

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

By Counsel



JB Akers, Esq. (WVSB #8083)
Akers Law Offices, PLLC
P.O. Box 11206
Charleston, WV 25339
(304) 720-1422
(304) 720-6956 (facsimile)
jb@akerslawoffices.com

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Defendants Below, 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 Reply Brief** upon the following counsel of record this 11th day of December, 2012, via hand-delivery as follows:

Albert C. Dunn, Jr., Esq.
Allen, Kopet & Associates, PLLC
900 Lee Street East, 11th Floor
Charleston, WV 25301
Counsel for McDowell County 911 and Jane Doe Dispatcher



JB Akers, Esq. (WVSB #8083)
Akers Law Offices, PLLC
P.O. Box 11206
Charleston, WV 25339
(304) 720-1422
(304) 720-6956 (facsimile)