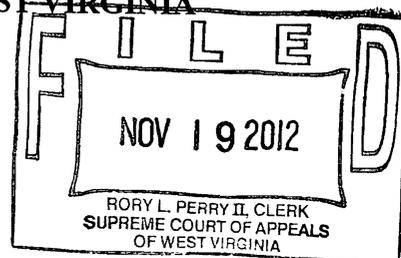


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 12-0824



LORRAINE M. UPCHURCH,
administratrix of the estate
of Joe Edward Mallory, Deceased,
Petitioner

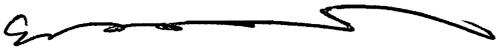
vs.

Appeal from Final Order of Circuit Court
Kanawha County (10-C-72)

**MCDOWELL COUNTY 911 and
JANE DOE DISPATCHER,**
Respondent

Respondent's
~~PETITIONER'S BRIEF~~

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Jane Doe Dispatcher**


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III. ASSIGNMENTS OF ERROR

1. **The Court did not error in considering deposition testimony of West Virginia State Trooper Jason Keffer in support of Defendant's Motion for Summary Judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure.**
2. **The Court did not abuse its discretion in ruling as a matter of law that Defendants were entitled to Summary Judgment by finding that no special duty was created between Defendants and Joe Mallory associated with the decision of law enforcement not to visit Mallory's residence after Mallory made a 911 call.**

IV. STATEMENT OF THE CASE

Plaintiff filed the instant action presenting a claim of alleged negligence and wanton endangerment on the part of the McDowell County 911 and its dispatcher, Martha Heffner, resulting in the death of Joe Edward Mallory. The basic facts are as follows: On January 20, 2008, a call was made by the decedent to 911 regarding an incident that was occurring at his residence. (Compl. at 16). The Plaintiff alleges that at the time of the call, Mr. Mallory was in fear of his safety and requested assistance from the West Virginia State Police. (Compl. at 17). At the time of the first 911 call, the dispatcher could hear banging and screaming in the background. (Compl. at 18). After this first call, Heffner called the State Police and talked to Trooper Keffer, he asked that she call Mallory back and gather additional information. So, after the first call, Heffner called back to gather additional information then called Keffer again to relay the information she had learned. At that time, it was disclosed that the perpetrator had left, but that Mr. Mallory made some indication he continued to fear for his safety and allegedly informed the 911 dispatcher that he was going to load his shotgun. (Compl. at 20-21). The 911 operator cautioned Mr. Mallory about shooting anyone and, in the

event the perpetrator returned to his residence, he should call 911 again. (Compl. at 22). During one of the conversations with the 911 dispatcher, Mr. Mallory identified the perpetrator as Robert Wayne Johnson Jr., and further provided his address and the make and model of Johnson's vehicle. (Id.) After the second call, Keffer called Mallory himself and discussed the situation with him; because Johnson had left and because Keffer did not believe that there was any criminal charges that could be filed, he and Mallory agreed that Keffer would not drive to the residence. On January 21, 2008, the body of Mr. Mallory was discovered stabbed and murdered. The murder occurred ~ 13 ½ hours after the first call to 911. Robert Wayne Johnson, Jr. confessed to the murder and was sentenced to prison as a result.

The undisputed, material facts of this case developed in discovery established that Martha Heffner (now deceased), the 911 call center employee who fielded the call from Mr. Mallory, called WV state trooper Jason Keffer, reported the call and the information that she learned from Mallory; and that she gave Keffer Mallory's phone number so he could call and follow-up on the status of the situation. Heffner made two calls to Trooper Keffer, at his request, and performed the functions of her job as a 911 operator by relating the pertinent information from Mallory to law enforcement. At the heart of this case, as testified to by Keffer, he called Mallory using the number provided by Heffner but after speaking to Mallory, ultimately decided not to go to his home based upon a number of facts; the primary factor being that Johnson had left the Mallory residence without an altercation and that Johnson did not think there was a further altercation going to occur. *Keffer Depo., pp. 8-11*. In fact, Keffer testified that Mallory stated to him that he [Mallory] did not think there was going to be any more problems

between Johnson and him. Keffer and Mallory discussed the issue between Mallory and Johnson having to do with an argument over change owed from the purchase of a gun by Robert Johnson, Sr. from Mallory. He further stated that he told Mallory if there were any other problems, to call 911 back and report it. So, logic clearly dictates, that as a result of that conversation, Mallory did not expect law enforcement to come to his house as a result of the initial or subsequent 911 call. Mallory never called 911 again before Johnson, Jr. came to the residence almost a full day later, broke in and murdered him by stabbing. It is also obvious that 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 this plan.

Plaintiff's counsel retained a 911 emergency expert, Charles Carter, who issued a report and was deposed at length. Carter's basic opinion in this case was that the 911 center should have utilized the training and certification manual that the call center used to train its employees, and created some form of policy and procedure from the substance of the training material, and for its dispatchers to have relied upon same to classify incoming calls. Carter admitted in his deposition that this missing policy and procedure document would simply have been a redrafting of the same thing contained with the training material, but adopted as a policy and procedure. Carter also opined that the call center should have followed-up with law enforcement to ensure that an appropriate response was provided. Tellingly, the opinion that Carter did not give was that had the 911 call center performed these functions, Mallory's death would have been prevented.

Defendant filed a properly supported Motion for Summary Judgment pursuant to Rule 56 of the WVRCP that was fully briefed by the parties and argued at a hearing. The trial court entered an order with formal findings of fact and conclusions of law granting the Motion for Summary Judgment. The Court basically agreed that Defendant was entitled to immunity from suit because Plaintiff could not establish a material issue of triable fact existed that would go toward establishing that a special duty was created between Mallory and Defendant that would operate as an exception to the application of the immunity doctrine. Petitioner is correct that one of the key holdings of the lower court, in finding that no special duty was created, was a determination that Mallory could not have justifiably relied upon any conduct of Defendant based upon the evidence of the intervening communication between he and Keffer over the phone.

V. SUMMARY OF ARGUMENT

Petitioner contends that the trial court committed two errors: 1) Finding that, as a matter of law, no special duty was created between Mallory and Heffner; and as a result, Defendant was entitled to immunity. 2) Relying upon the deposition testimony of Keffer concerning the understanding between Mallory and him; and concluding that there was no factual basis from which a jury could rely upon to find that Mallory detrimentally relied upon any conduct of the 911 call center. It is clear from the lower court's ruling that this finding was, in essence, that trooper Keffer's communication with Mallory and the result of that communication broke any causal connection between the 911 call center and Mallory.

Respondent believes that the lower court's reliance on the deposition testimony of trooper Keffer was appropriate and that his testimony would not have been properly

excluded under the Dead Man’s Act. Therefore, the lower court’s determination of the lack of evidence to support a potential jury finding of a special relationship between the 911 center and Mallory was an appropriate decision and was not an abuse of discretion. As a result, the application of the immunity doctrine was also a correct ruling by the Court. Respondent does not believe that the lower court improperly “assumed the role of the fact finder” in making a determination of the relevant facts that were or were not in dispute in order to rule on the Defendant’s Motion for Summary Judgment; every ruling on such a motion necessarily involves a determination by a trial court of the existence of material issues of fact; the lower court here did not engage in any inappropriate function.

VI. SUMMARY REGARDING ORAL ARGUMENT AND DECISION

Respondent agrees with Petitioner’s position as to oral argument and decision.

VII. ARGUMENT

- A. The Court did not abuse its discretion in ruling as a matter of law that Defendants were entitled to Summary Judgment by finding that no special duty was created between Defendants and Joe Mallory associated with the decision of the law enforcement not to visit Mallory’s residence after Mallory made a 911 call.**

Petitioner identifies the correct statutory language of the Dead Man’s Act, West Virginia Code, Section 57-3-1, and the conditions the must be met to refuse a witness from providing testimony about the substance of the conversations had with a person who is now deceased: the conversation must be related to a “personal transaction” with the deceased; the witness must be a party to the suit or interested in its event or outcome; and, the testimony must be in opposition to the deceased person’s personal

representative, etc. However, Petitioner incorrectly applies these factors to the analysis of the deposition testimony of trooper Keffer herein.

First, while Petitioner has made some inferences in this case that there is a question as to whether this phone call actually occurred between Keffer and Mallory; there is no evidence in the record to the contrary so the lower court properly concluded that the phone call was made and a conversation took place. Second, even if trooper Keffer's specific testimony about the substance of the conversation were to be excluded for some reason, the lower court's ruling would have been/should have been the same. We know that trooper Keffer called and spoke to Mallory; we know that trooper Keffer, based upon whatever information he gained from that conversation with Mallory, determined that he did not need to drive to the residence; therefore, the actual testimony regarding Mallory agreeing Keffer was not coming to his home and that he did not need to come to the home, was really not necessary for the lower court to conclude that no special duty was formed between Defendant and Mallory based upon Mallory's detrimental reliance. The only proper inference from the fact that Keffer was called and told about the nature of the call from Mallory and, that he subsequently called Mallory; then determined that he did not need to go to the residence, was that Mallory knew no police officer was coming to his residence. There can be no material issue of fact in dispute in this regard. Simply stated, the lower court did not need to rely upon every piece of testimony of trooper Keffer to support the finding of a lack of justifiable reliance upon Mallory's behalf.

In addition, the additional testimony of Keffer regarding his conversation with Mallory and the agreement between the two that he did not need to come to the residence,

was also not in violation of the Dead Man's Act. At the time Keffer provided this deposition testimony, neither he nor the WV State Police were parties to the lawsuit as the claims against the State Police were dismissed pursuant to a settlement. In fact, trooper Keffer was never an actual party to the suit. And the fact that Keffer was an employee of the State Police that was once a defendant in the suit still would not result in the preclusion of his testimony; the statute requires the person be a party to the suit or interested in its outcome; because Keffer was never a party and, at the time of his deposition, the State Police was also not a party, Keffer was not interested in the result of the case as that requirement is contemplated by the statute. Perhaps Keffer would have been curious concerning the result of the lawsuit, he clearly had no professional, personal, financial interest or otherwise in the outcome. His testimony would have had no impact upon him as a person or officer with the State Police. There is no evidence that he had any financial incentive to lie about the substance of the conversation or would have benefited in any way from the testimony.

Further, the conversation held between Keffer and Mallory was not related to a personal transaction between the two as contemplated by the Dead Man's Act. The case law in West Virginia is clear that the use of the term "transaction" means something more than a conversation incident to a 911 call. In Meadows v. Meadows, 196 W.Va. 56, 468 S.E.2d 309 (1996), this Court discussed the term "transaction" within the context of the act. In this case, the Court stated as follows:

In our judgment, the word 'transaction' includes a business deal where the legal relationship of the parties is altered. To suggest as we did in Kuhn and Freeman that the term 'transaction' includes mere unilateral observations of a survivor is to disregard the customary, common, and ordinary meaning of the word, and we believe that such a holding was a judicial extension of this exclusionary rule far beyond what the legislature intended.

Id., page 62.

The Court further referred to *Webster's New Collegiate Dictionary* and *Black's Law Dictionary*, for a the definition of the word "transaction"; *Webster's* defines the word "transaction" as "an act, process or instance of transacting . . . ; something transacted, esp.: a business deal" *Blacks* also defines the term as an "[A]ct of transacting or conducting any business between two or more persons, . . . involving legal rights Id., p. 62. Clearly, the conversation held between Mallory and Keffer did not involve any business transaction affecting either person's legal rights or any business endeavor.

Finally, the topic of the conversation between Mallory and Keffer had nothing to do with any rights of Mallory's representatives, heirs at law, etc. The reliance upon the testimony of Keffer in this case has something to do with the Petitioner's lawsuit but that is not the type of interest that the statute was crafted to protect. At the time of the conversation between the two, Mallory's estate had no interest at stake in the substance of the conversation, such as in the classic example where a party to a conversation with a deceased person offers to testify that he/she had a conversation with the deceased about the change in a will that would impact the heirs of the estate.

The Dead Man's Act is to be strictly construed and limited to its narrowest application. Id., p. 61. "Only a restrictive application of the Dead Man's Statute is consistent with the liberal thrust of the West Virginia Rules of Evidence." Cleckley, [*Handbook on evidence for West Virginia Lawyers*] Section 1-4(A) at 11 (3rd Ed. [1994]). The testimony of trooper Keffer was not improperly relied upon by the lower court in contradiction to the mandates of the Dead Man's Act. Consequently, the lower court also property held that, based upon this undisputed evidence of record, Plaintiff could not

prove that Mallory relied to his detriment upon any act of Defendant; therefore, the court properly determined that no special relationship existed between the two.

B. The Court did not abuse its discretion in ruling as a matter of law that Defendants were entitled to Summary Judgment by finding that no special duty was created between Defendants and Joe Mallory associated with the decision of law enforcement not to visit Mallory's residence after Mallory made a 911 call.

Petitioner's counsel is correct that the 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 jury. This does not mean that every such case necessarily involves a question of fact and that cases similar to this one are immune from summary judgment. Here, there are no material issues of fact that supported the submission of the case to a jury for a finding that a special relationship existed between Defendant and Mallory. Petitioner states on page 16 of the brief, in the last sentence, that a question of material fact remains in the case as to whether Mallory relied upon the 911 call center for protection; and this alleged material issue of fact is predicated upon the argument that trooper Keffer's testimony was inadmissible which is clearly not the case. Defendant is a 911 call center, it is not law enforcement; Heffner clearly communicated the relevant information to Keffer about the nature of the call and he then was 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. In all honestly, using common sense, that phone call formed the basis of the decision-making of Keffer to determine whether he needed to go to the residence; Defendant understandably had no role in the decision. Keffer's exercise of his discretionary decision-making, practically, was the fact that makes the application of the immunity doctrine appropriate in this case.

The crux of Petitioner's argument in this case is that some law enforcement should have gone to the Mallory residence because of the serious nature of the call. The fact that Mallory called 911 and not law enforcement is of no relevance once Heffner got Keffer involved and he called Mallory. It is not logical to contend that Heffner "cancelled" law enforcement. Heffner had neither the responsibility nor the authority to mandate that law enforcement go to the Mallory residence. Petitioner attempts to draw some relevance from the fact that Heffner did not appear to support Mallory's idea to go up stairs and load his shotgun. Even Plaintiff's expert Carter opined that it is not prudent for 911 operators to go around enticing callers to prepare to shot people. And, there is clearly no evidence of record from which it can be concluded that Mallory's death was caused by the fact that he did not protect himself with a gun. (We also know that at the time of the break-in, assault and his death, Mallory was extremely intoxicated). In addition, it is not credible to argue that Keffer was influenced by the nature of the conversation he had with Heffner and Cox, when he had the opportunity to talk to Mallory himself. To cite to the testimony of Keffer, taken out of context, that the information given to him by 911 influenced his decision, is not a logical application of the facts. Surely, Keffer was interested in learning from Heffner the basic facts of the situation from the Mallory call; but to argue that simply because Heffner may have had some casual conversation with Keffer as well, cannot outweigh the fact that Mallory and Keffer spoke. It is incredible to think that Keffer would have declined to go to the residence after speaking with Mallory, because of prior conversations with Heffner. Petitioner draws some importance out of the statement of Keffer that nine out of ten times he goes to investigate a call when weapons are involved; but in the case, the only

reference to weapons was Mallory's statement that he had a shotgun upstairs that he could load; this situation is clearly not the fact pattern Keffer was referring to in his deposition. Finally, Petitioner also contends there was some significance to the evidence that Heffner told Mallory to call back if he had any more problems; the evidence of record does not establish that there was any reason for Mallory to call back between his last call and the assault; how is this fact relevant to establish a material issue of fact.

VIII. Conclusion

Respondent requests that this Court uphold the lower court's granting of Defendant's Motion for Summary Judgment in that the granting of same was not an abuse of the court's discretion. The fact pattern of this case is not complex and there were no material issues of fact to be tried at the trial court level at the conclusion of discovery. Joe Mallory, deceased, call Defendant, a 911 emergency call center, as a result of Robert Johnson, Jr. coming to his home and arguing about a monetary dispute between Mallory and Robert Johnson, Sr. and \$25.00 dollars change owed from Johnson's purchase of a gun from Mallory. The 911 call was made during the time that Johnson was at the property. As a result of the call, Martha Heffner call the local state police detachment and spoke to trooper Keffer; she told Keffer about the incident and provided him information concerning Mallory, Johnson, the event that had transpired, etc. Keffer asked Heffner to call Mallory back and get additional information which she did; at that time, Johnson had left the property without incident. Heffner called Keffer back and reported that Johnson had left. Keffer then called Mallory himself and spoke to him about the status of the situation. As a result of this conversation with Mallory, Keffer

decided not to go to the Mallory residence or take any further action. The next day, Johnson, Jr. returned to the residence and murdered Mallory.

Heffner performed the function of her job properly. She related the pertinent information to Keffer who then exercised his discretionary decision-making and did not go to the residence. All reasonable inferences from these facts support the finding that Mallory was aware of this decision and was in agreement; there can be no triable issue of fact as to whether Mallory expected more from Heffner or Keffer at this time. And, although Plaintiff has retained an expert witness in this case who has opined that Heffner did not properly “classify” the call from Mallory and that Defendant did not adopt operating procedures substantially verbatim from the training procedures that they utilized for the staff; this expert witness testimony still did not create a material issue of fact related to the proximate cause of Mallory’s death. Simply stated, officer Keffer’s exercise of decision-making cut-off any causal connection between Defendant and Mallory; there was no requirement for Defendant to have taken any additional action that that performed.

The Court properly considered the deposition testimony of Keffer in ruling on the Motion for Summary Judgment and, the argument that his testimony should not have been considered under the Dead Man’s Act is not persuasive; Keffer was not a party nor an interested person whose testimony related to a “transaction” between Mallory and he as that term should be applied to the facts. Further, even if his specific testimony concerning the actual communication had with Mallory would be excluded, the result should have been the same; the only reasonable inference from the fact that Keffer talked

to Mallory and that Keffer did not go to the Mallory residence after the call, is that the two agreed Keffer would not make the trip. Again, this can not be a disputed fact.

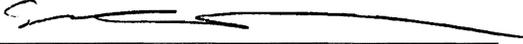
Because the lower court properly considered Keffer's role in this situation and the fact that he had a phone conversation with Mallory, the lower court also properly concluded that no special relationship was created between Defendant and Mallory. There is no reasonable basis to infer or conclude that Mallory would have expected some law enforcement officer, other than Keffer to come to his residence after he already understood that Keffer was not coming. Therefore, Defendant had no reason to take any additional action. Finally, the murder occurred over 12 hours after the 911 call; again, only speculation and conjecture by a jury could result in a finding that Defendant's conduct in some way caused or contributed to Mallory's death; even if law enforcement had gone to the Mallory residence, there is no way for anyone to know that the same event 13 ½ hours later would not have occurred.

Therefore, the lower court properly concluded that no special relationship was formed between Mallory and Heffner when he called 911 on January 19, 2008. And, as a result of the fact that no special relationship was created, Defendant was entitled to immunity from suit pursuant to West Virginia Code, 29-12A-5. The lower court's order granting Defendant's Motion for Summary Judgment was proper in that it contained appropriate findings of fact and conclusions of law; the lower court did not improperly abuse its discretion in acting as a fact finder; every trial court, in assessing a similar motion, must make a determination of the existence of material facts and whether those facts are contradicted; that is what the lower court did here. The lower court did not make any credibility determination as such was not necessary. The lower court's

granting of summary judgment to Defendant should be upheld even though, generally, these types of cases involve questions of fact for a jury. This case, based upon its own specific facts, was not immune from summary judgment.

**MCDOWELL COUNTY 911 AND JANE
DOE DISPATCHER**

By Counsel



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**MCDOWELL COUNTY 911 and
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Respondent

CERTIFICATE OF SERVICE

I, Albert C. Dunn, Jr., counsel for McDowell County 911 and Jane Doe Dispatcher, do hereby certify that I have served the “**RESPONDENT’S BRIEF**” upon counsel of record as listed below and addressed and served via U.S. Mail, first class, on this 19th day of November, 2012:

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