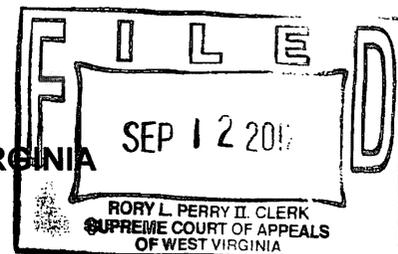


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0614



**DREAMA BOWDEN, as Administratrix  
of the Estate of Lowell Bowden,**

**Petitioner,**

**v.**

**(Civil Action No. 11-C-18)  
(Kanawha County Circuit Court)**

**MONROE COUNTY COMMISSION,  
A Political Subdivision; and  
PATRICIA GREEN, individually and in  
her official capacity,**

**Respondents.**

---

**Respondents, Monroe County Commission and Patricia Green's, Brief**

---

Wendy E. Greve, WV State Bar No. 6599  
Katie L. Hicklin, WV State Bar No. 11347  
**PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC**  
901 Quarrier Street  
Charleston, WV 25301  
Telephone (304) 344-0100  
Facsimile (304) 342-1545  
wgreve@pffwv.com  
khicklin@pffwv.com

## TABLE OF CONTENTS

Table of Authorities.....	2, 3
Statement of the Case.....	4
Summary of Argument.....	6
Statement Regarding Oral Argument.....	7
Standard of Review.....	7
Argument.....	7
<u>ASSIGNMENT OF ERROR 1: The Circuit Court Properly Ruled That Petitioner’s Complaint Fails to State a Claim Upon Which Relief Can Be Granted Against the Monroe County Commission Because It Is Immune Under the West Virginia Governmental Tort Claims and Insurance Reform Act.....</u>	7
<u>ASSIGNMENT OF ERROR 2: The Circuit Court Properly Ruled That Petitioner’s Complaint Fails to State a Claim Upon Which Relief Can Be Granted Against Patricia Green Because She Is Immune Under the West Virginia Governmental Tort Claims and Insurance Reform Act.....</u>	11
<u>ASSIGNMENT OF ERROR 3: The Circuit Court Properly Ruled That Petitioner’s Complaint Fails to State a Claim Upon Which Relief Can Be Granted Pursuant to the Public Duty Doctrine.....</u>	13
<u>Public Duty Doctrine Precludes Liability.....</u>	13
<u>No Proximate Cause of Death as Intervening Criminal Acts Broke Chain of Causation.....</u>	18
<u>ASSIGNMENT OF ERROR 4: The Circuit Court Did Not Err in Failing to Grant Petitioner’s Motion for Leave to File an Amended Complaint.....</u>	20
Conclusion.....	22

## TABLE OF AUTHORITIES

### **Cases:**

<u>Benson v. Kutsch</u> , 181 W. Va. 1, 380 S.E.2d 36 (1989).....	14
<u>Farmer v. L.D.I., Inc.</u> , 169 W. Va. 305, 286 S.E.2d 924 (1982).....	21
<u>Hutchinson v. City of Huntington</u> , 198 W. Va. 139, 479 S.E.2d 649 (1996).....	8
<u>McCoy v. Cohen</u> , 149 W. Va. 197, 140 S.E.2d 427 (1965).....	19
<u>Rosier v. Garron, Inc.</u> , 156 W. Va. 861, 199 S.E.2d 50 (1973).....	21
<u>Roth v. Defelicecare, Inc.</u> , 226 W. Va. 214, 700 S.E.2d 182 (2010).....	7
<u>Sergent v. City of Charleston</u> , 209 W. Va. 437, 549 S.E.2d 311 (2001).....	19
<u>State ex rel. McGraw v. Scott Runyon Pontiac-Buick</u> , 194 W. Va. 770, 461 S.E.2d 516 (1995).....	7
<u>Wolfe v. City of Wheeling</u> , 182 W. Va. 253, 387 S.E.2d 307 (1989).....	14
<u>Yoak v. Marshall Univ. Bd. of Governors</u> , 223 W. Va. 55, 59, 672 S.E.2d 191, 195 (2008).....	8
<u>Yourtee v. Hubbard</u> , 196 W. Va. 683, 474 S.E.2d 613 (1996).....	19

### **Statutes, Rules, and Regulations:**

W. Va. Code § 19-20-1.....	9
W. Va. Code § 19-20-2.....	15
W. Va. Code § 19-20-6.....	16
W. Va. Code § 19-20-20.....	5, 10
W.Va. Code § 29-12A-1.....	6, 8
W. Va. Code § 29-12A-4.....	8
W. Va. Code § 29-12A-4(c)(5).....	16

W. Va. Code § 29-12A-5.....	8
W. Va. Code § 29-12A-5(a)(5).....	10, 11
W. Va. Code § 29-12A-5(a)(8).....	8
W. Va. Code § 29-12A-5(a)(9).....	9
W. Va. Code § 29-12A-5(a)(10).....	9
W. Va. Code 29-12A-5(b).....	12
W. VA. R. CIV. P. 15.....	20
W. VA. R. APP. P. 18.....	7

## STATEMENT OF THE CASE

Petitioner's statement of the case incorporates both a procedural history as well as a statement of facts. Respondents object to and do not adopt those provisions in Petitioner's Statement of the Case that are rhetoric, argument, and do not cite to the Appendix Record. Accordingly, Respondents state as follows:

On March 25, 2011, Petitioner, Dreama Bowden, as Administratrix of the Estate of Lowell Bowden, filed suit against Respondents, Monroe County Commission and Patricia Green, individually and in her official capacity as a Dog Warden employed by the County Commission, as well as Co-Defendants, Justin Blankenship, Kim Blankenship, Anna Hughes, Mose Christian, and American Modern Home Insurance Company, arising from the death of Mr. Bowden, Petitioner's husband, following an attack of Mr. Bowden by American Pit Bull Terrier dogs ("Pit Bulls"). (App. R. 001-016.)

On November 27, 2009, while Mr. Bowden was taking his daily walk along Broyles Cemetery Road in Monroe County, West Virginia, "several" Pit Bulls allegedly owned and/or harbored by Co-Defendants, Mr. Blankenship, Ms. Hughes, and Mr. Christian, attacked Mr. Bowden, resulting in severe injuries to Mr. Bowden and ultimately his unfortunate death on December 4, 2009. (App. R. 003-004 at ¶¶ 13, 14, 28.)

Petitioner alleges in the Complaint that the Pit Bulls were unrestrained and running at large throughout the community at the time of the attack (App. R. 003 at ¶ 15) and that the Pit Bulls were known to be vicious, dangerous, and in the habit of biting or attacking people (App. R. 003 at ¶ 16.) Petitioner alleges that prior to Mr. Bowden's attack, Respondent County Commission received numerous complaints regarding the

vicious and dangerous nature of the Pit Bulls and that they were running at large. (App. R. 003 at ¶¶ 19, 20.)

Petitioner also alleges that prior to the attack, Ms. Hughes was cited for keeping vicious dogs in violation of West Virginia Code Section 19-20-20 [App. R. 003 at ¶ 18] and that three weeks prior to the attack Respondent Green issued a citation to Mr. Blankenship for harboring vicious dogs. (App. R. 004 at ¶ 22.) Subsequent to the attack, Respondent County Commission euthanized the Pit Bulls. (App. R. 004 at ¶ 26.)

On April 25, 2011, Respondents filed their Motion to Dismiss and Memorandum of Law in Support. (App. R. 017-031.) On September 1, 2011, Petitioner filed her Response to Respondents' Motion to Dismiss (App. R. 045-059), and on November 22, 2011, Respondents filed their Reply. (App. R. 060-070.) On February 6, 2012, the parties presented oral argument at the hearing on Respondents' Motion to Dismiss. (App. R. 094-115.)

Petitioner filed a Motion for Leave to File Amended Complaint on February 1, 2012. (App. R. 071-093.) On March 19, 2012, Petitioner noticed the hearing on her Motion for April 2, 2012. (App. R. 116-118.) Respondents filed their Response on March 28, 2012. (App. R. 119-124.)

By Order-Granting Motion to Dismiss, entered March 29, 2012, the Circuit Court granted Respondents' Motion to Dismiss, dismissing all claims against Monroe County Commission and Patricia Green. (App. R. 131-134.) Petitioner appeals the March 29, 2012, Order.

## SUMMARY OF ARGUMENT

First, the Circuit Court did not err in granting Respondents' Motion to Dismiss, finding that Respondents were immune against Petitioner's claims of liability allegedly caused by an act or omission in connection with a governmental or proprietary function, pursuant to the immunities relating to taxing, licensing, registration, and inspection functions provided in the West Virginia Governmental Tort Claims and Insurance Reform Act, West Virginia Code Section 29-12A-1, et seq.

Second, the Circuit Court did not err in granting Respondents' Motion to Dismiss, finding that Respondent Green was immune from Petitioner's claims against her in her individual capacity as she is an employee of Respondent County Commission and all allegations relate to her acts and/or omissions within the scope of her employment.

Third, the Circuit Court did not err in granting Respondents' Motion to Dismiss, finding that Respondents are immune from Petitioner's claims pursuant to the "Public Duty Doctrine" and Petitioner did not allege in the Complaint nor did the Complaint set forth any facts which would support finding that a special relationship existed to establish a special duty owed by Respondents to Petitioner and/or Petitioner's decedent, Mr. Bowden.

Fourth, the Circuit Court did not err in failing to grant Petitioner's Motion for Leave to File Amended Complaint because it granted Respondents' Motion to Dismiss, rendering the Motion moot. Even if the Circuit Court were required to rule on Petitioner's Motion for Leave to File Amended Complaint, the Circuit Court would have likely denied it as the proposed amendments sought to add futile negligence claims and allowing such amendments would have overly prejudiced Respondents.

## **STATEMENT REGARDING ORAL ARGUMENT**

Oral argument is not required as the claims raised in Petitioner's Brief have been definitively, if not exhaustively, determined and the facts and legal arguments are adequately presented in the Briefs and Record on Appeal and the decisional process would not be significantly aided by oral argument. W. VA. R. APP. P. 18.

## **STANDARD OF REVIEW**

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

The appellate court's review of an order granting a motion to dismiss a complaint is limited to the sufficiency of the complaint; thus, the appellate court must accept as true all well-pled facts and must draw all reasonable inferences in favor of the dismissed party. Any facts asserted in a memorandum in opposition to a motion to dismiss but not contained in the complaint are relevant to the extent that they could be proved consistent with the allegations. Roth v. Defelicecare, Inc., 226 W. Va. 214, 222, 700 S.E.2d 182, 191 (2010); McGraw, 194 W. Va. at 776, 461 S.E.2d at 522 n. 3.

## **ARGUMENT**

**ASSIGNMENT OF ERROR 1: The Circuit Court Properly Ruled That Petitioner's Complaint Fails to State a Claim Upon Which Relief Can Be Granted Against the Monroe County Commission Because It Is Immune Under the West Virginia Governmental Tort Claims and Insurance Reform Act.**

The Circuit Court properly granted Respondents' Motion to Dismiss, finding that Respondents were immune against Petitioner's claims of liability allegedly caused by an act or omission in connection with a governmental or proprietary function, pursuant to

the West Virginia Governmental Tort Claims and Insurance Reform Act, West Virginia Code Section 29-12A-1, et seq., (“Act”).

A political subdivision is not liable in damages in a civil action for death allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function. W. Va. Code § 29-12A-4. There is no dispute that Respondent County Commission is a political subdivision and that Respondent Green is an employee of a political subdivision. The Act provides immunity from liability if a loss or claim results from specific types of acts and/or omissions. W. Va. Code § 29-12A-5. These immunities “are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.” Hutchinson v. City of Huntington, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996). This includes sparing the defendant from the burden of discovery. Yoak v. Marshall Univ. Bd. of Governors, 223 W. Va. 55, 59, 672 S.E.2d 191, 195 (2008).

Petitioner has entirely failed to set forth any legal or factual basis for the inapplicability of the immunities relating to taxing, licensing, registration, and inspection functions.

The Circuit Court properly found that Respondents were immune from liability as the immunity relating to taxing functions bars Petitioner’s claims. “A political subdivision is immune from liability if a loss or claim results from . . . [a]ssessment or collection of taxes lawfully imposed or special assessments license or registration fees or other fees or charges imposed by law . . . .” W. Va. Code § 29-12A-5(a)(8). The basis of

Petitioner's claim that Respondents owed Mr. Bowden, her decedent, a duty at all is her claim that Respondent County Commission and Respondent Green were negligent in failing to impose and collect taxes on the subject Pit Bulls, pursuant to West Virginia Code Section 19-20-1, et seq., and wrongful death. (App. R. 008-010 at ¶¶ 61, 62, 64-71.) However, as the tax was not imposed, Respondent Green did not collect it. (Id. at ¶ 64.) Accordingly, the Circuit Court did not err in finding that Respondents were immune from liability for alleged negligence relating taxing functions.

The Circuit Court properly found that Respondents were immune from liability as the immunity from negligence claims relating to licensing and inspection powers and functions bars Petitioner's claims. A political subdivision is immune from liability if a loss or claim results from "[l]icensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority" and "[i]nspection powers or functions, including failure to make an inspection, or making an inadequate inspection, of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety." W. Va. Code §§ 29-12A-5(a)(9), (10). Another basis of Petitioner's claim that Respondents owed Petitioner's decedent a duty is her claim that Respondents were negligent in patrolling the County, seizing on sight and impounding unregistered or improperly registered dogs. (App. R. 010-011 at ¶¶ 75-85.) Petitioner alleges that the Pit Bulls were not properly registered, were not wearing valid registration tags, and were known to Respondents to be "at large." (App. R. 010 at ¶ 78.) Accordingly, the Circuit Court

did not err in finding that Respondents were immune from liability for alleged negligence relating to licensing and registrations powers as well as powers relating to inspection.

Regarding Petitioner's allegation that liability existed as Respondent Green did not impound or "dispose of" the animals owned by the Co-Defendants below or any one of them, neither of the Respondents even had the power or authority.<sup>1</sup> (App. R. 004 at ¶¶ 24.)

Except as provided in section twenty-one of this article, no person shall own, keep or harbor any dog known by him to be vicious, dangerous, or in the habit of biting or attacking other persons, whether or not such dog wears a tag or muzzle. Upon satisfactory proof before a circuit court or magistrate that such dog is vicious, dangerous, or in the habit of biting or attacking other persons or other dogs or animals, the judge *may authorize* the humane officer to cause such dog to be killed.

W. Va. Code § 19-20-20 (emphasis added).

The Circuit Court properly found that Respondents were immune from liability as the immunity from negligence claims relating to method and failure to provide law enforcement bars Petitioner's claims. Petitioner argues that the immunity afforded to political subdivisions for "the failure to provide, or the method of providing police, law enforcement or fire protection," pursuant to West Virginia Code Section 29-12A-5(a)(5), is at issue in this case. (App. R. 051; Pet'r's Br. 12.) Petitioner contends that this immunity does not apply to the instant case based on reasoning that "method of providing" refers to the formulation and implementation of policy related to the manner in which police, law enforcement or fire protection is to be provided. (Pet'r's Br. 12.) Petitioner explains that she did not allege claims relating to the policy formation and

---

<sup>1</sup> For the reasons more fully discussed below, even if Respondents had such a power or authority, the alleged failure to exercise it does not give rise to an actionable claim as such a duty is a public duty.

implementation, but, instead, alleges that Respondent County Commission through its employee, Respondent Green, completely failed to enforce the law it was statutorily required to enforce and, as such, the immunity is inapplicable. (Pet'r's Br. 13.) In Petitioner's Response to Respondents' Motion to Dismiss, Petitioner went at great length in explaining that her Complaint against Respondent County Commission and Respondent Green is for "**failure to provide** specific protection," elaborating that "this case is **completely about the clear failure** of the Commission, through its employee Defendant Green, to enforce the laws which it/she was clearly statutorily required to enforce . . . ." (App. R. 051.) However, Petitioner blatantly disregards the portion of this immunity provision which unambiguously provides that "[a] political subdivision is immune from liability if a loss or claim results from . . . [c]ivil disobedience, riot, insurrection ore rebellion **or the failure to provide**, or the method of providing, police, law enforcement or fire protection . . . ." W. Va. Code § 29-12A-5(a)(5) (emphasis added). Accordingly, the immunity is applicable as not only does it provide immunity relating to formulation and implementation, upon which Petitioner relies in attempt to defeat the immunity, but also for **failure to provide** protection which Petitioner is clearly alleging.

Thus, the Circuit Court did not err in finding that Petitioner's Complaint fails to state a claim upon which relief can be granted against Respondent County Commission due to the statutory immunities afforded to it.

**ASSIGNMENT OF ERROR 2: The Circuit Court Properly Ruled That Petitioner's Complaint Fails to State a Claim Upon Which Relief Can Be Granted Against Patricia Green Because She Is Immune Under the West Virginia Governmental Tort Claims and Insurance Reform Act.**

The Circuit Court properly granted Respondents' Motion to Dismiss, finding that Respondent Green was immune from Petitioner's claims against her in her individual capacity as she is an employee of Respondent County Commission and all allegations relate to her acts and/or omissions within the scope of her employment.

An employee of a political subdivision is immune from liability unless . . . [h]is or her acts or omissions were manifestly outside the scope of employment or official responsibilities; [h]is or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or [l]iability is expressly imposed upon the employee by a provision of this code.

W. Va. Code 29-12A-5(b). Petitioner alleges no conduct of Respondent Green that would strip her of immunity.

First, because Petitioner's allegations against Respondent Green all involve an alleged failure to act as required by statute, all alleged conduct was within Respondent Green's scope of employment as the Dog Warden.

Second, Petitioner fails to plead any facts that Respondent Green acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Petitioner has merely, insufficiently alleged that Respondent Green was "guilty of willful, wanton and/or reckless disregard to natural consequences of her acts and/or omissions, and disregard for the Plaintiffs' rights, well-being, health and safety." (App. R. 009-011 at ¶¶ 72, 73, 86, 87.) In the Petitioner's Brief, for the first time since filing of the Complaint, Petitioner alleges that Respondent Green may have failed to seize the Pit Bulls because she was personal friends with or related to the owners and that "[t]here are numerous reasons which may exist which would case Ms. Green to abandon her dog warden duties in favor of these Pitt Bulls." (Pet'r's' Br. 14.)

Therefore, the Circuit Court did not err in finding that Petitioner's Complaint against Respondent Green in her individual capacity failed to state a claim upon which relief can be granted as Respondent Green is immune from suit as all alleged conduct occurred within the scope of her employment.

**ASSIGNMENT OF ERROR 3: The Circuit Court Properly Ruled That Petitioner's Complaint Fails to State a Claim Upon Which Relief Can Be Granted Pursuant to the Public Duty Doctrine.**

The Circuit Court properly granted Respondents' Motion to Dismiss, finding that Respondents are immune from Petitioner's claims pursuant to the Public Duty Doctrine, and Petitioner did not allege in the Complaint nor did the Complaint set forth any facts which would support finding that a special relationship existed to establish a special duty owed by Respondents to Petitioner and/or Petitioner's decedent, Mr. Bowden. Not only would any such duty be at best a public duty, but, such a breach cannot be the proximate cause of the criminal mauling death of Mr. Bowden, as the criminal act or acts of the individual Co-Defendants were intervening criminal acts which would break the chain of causation in any putative negligence claim whether based upon a statutory duty or any other basis for a negligence claim.

**Public Duty Doctrine Precludes Liability**

The Public Duty Doctrine precludes an action against a local government entity or officer unless a "special relationship" existed between the government actor and the claimant: "[t]he public duty doctrine is that a local governmental entity's liability for nondiscretionary governmental 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).

However, a recognized exception to the Public Duty Doctrine is as follows: “[i]f a special relationship exists between a local governmental entity and an individual which gives rise to a duty to such individual, and the duty is breached causing injuries, then a suit may be maintained against such entity.” Id. at syl. pt. 1; syl. pt. 3, Benson v. Kutsch, 181 W. Va. 1, 1, 380 S.E.2d 36, 36 (1989). The following four elements must all be satisfied to establish the existence of a special relationship between a local governmental entity and an individual to trigger a special duty of care owed to such individual:

- (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
- (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm;
- (3) some form of direct contact between the local governmental entity's agents and the injured party; and
- (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.

Syl. pt. 2, Wolfe, 182 W. Va. at 254, 387 S.E.2d at 308. “The injured party's reliance is as critical in establishing the existence of a ‘special relationship’ as is the local governmental entity’s voluntary affirmative undertaking of a duty to act toward the injured party. The element of reliance provides the essential causative link between the special duty assumed by the local governmental entity and the injury.” Id. at 311, 257.

Here, Petitioner fails to state a claim against Respondent County Commission and Respondent Green because all of Petitioner’s claims contained in the Complaint are based on a general duty owed to the public at large and not on a special duty created by a special relationship between Petitioner and/or Mr. Bowden and

Respondent County Commission and/or Respondent Green.

Count IV of the Complaint fails to state a claim upon which relief can be granted against Respondent County Commission and Respondent Green because it merely alleges breach of a duty owed to the public. Petitioner alleges that Respondent County Commission's and Respondent Green's failure to meet their respective statutory duties regarding imposing and collecting personal property tax on the Pit Bulls allowed Mr. Blankenship, Ms. Hughes, and Mr. Christian, to continue to harbor the vicious Pit Bulls which eventually attacked Mr. Bowden, causing his death. (App. R. 008 at ¶ 66.) Plaintiff merely asserts that Respondent County Commission breached its statutory duty by failing to impose and collect personal property taxes upon the owners of the Pit Bulls and to certify the tax to Respondent Green, who, in turn, failed to take charge and impound the Pit Bulls for the owners failure to pay the head tax. (App. R. 008-009 at ¶¶ 62, 64, 65.) However, the duty placed upon Respondent County Commission and Respondent Green to impose and collect the head tax on dogs and impound dogs, in the event of an owner's failure to pay the head tax, is a duty owed to the public at large and not one upon which liability can be predicated. See W. Va. Code § 19-20-2.<sup>2</sup> Accordingly, Count IV fails to state a claim upon which relief can be granted against Respondent County Commission and Respondent Green because it merely asserts that Respondent County Commission and Respondent Green failed to fulfill the general duty owed to the public regarding collection of head tax on dogs.

---

<sup>2</sup> Of note, although Petitioner attempts to predicate liability upon the argument that dog wardens may take certain acts pursuant to authority granted by statute, the Act provides that "[l]iability shall not be construed to exist under another section of this code merely because a

Similarly, Count V of the Complaint fails to state a claim upon which relief can be granted against Respondent County Commission and Respondent Green because it merely alleges breach of a duty owed to the public. Under Count V, Plaintiff alleges that Respondent County Commission and Respondent Green failed to meet the statutory duties imposed regarding the registration and licensing of dogs. Plaintiff merely asserts in the Complaint that the Pit Bulls were permitted to run at large, were not properly registered, and were not wearing valid registration tags. (App. R. 010 at ¶ 78.) Petitioner concludes that Respondent Green, in her capacity as the Dog Warden, breached her statutory duty to enforce the control and registration, impounding, care, and destruction of unlicensed dogs including patrolling the County and seizing and impounding all dogs not wearing a valid registration tag. Accordingly, Count IV fails to state a claim upon which relief can be granted because any duty that could be construed to be placed upon Respondent County Commission and Respondent Green to enforce the registration and licensing of dogs is a duty owed to the public at large. See W. Va. Code § 19-20-6.

Because Count VI of the Complaint merely alleges that Respondent County Commission's and Respondent Green's breach of the duty to protect the public, including the Plaintiff, from the known dangers associated with dogs proximately caused the attack of Mr. Bowden, it fails to state a claim upon which relief can be granted. (App. R. 011-012 at ¶¶ 89, 91.)

Plaintiff fails to plead any facts in the Complaint that meet all four requirements to trigger the special relationship exception to the Public Duty Doctrine. Plaintiff alleges

---

responsibility is imposed upon a political subdivision." W. Va. Code § 29-12A-4(c)(5).

no facts in the Complaint that establishes that Respondent County Commission and/or Respondent Green assumed through promises or actions a duty to protect Mr. Bowden from the Pit Bulls. The Complaint is void of any facts that would support the element of reliance because the Complaint reveals that Mr. Bowden did not rely on any affirmative undertaking by Respondent County Commission or Respondent Green that they would address any issues regarding the Pit Bulls or protect Mr. Bowden from the Pit Bulls. Petitioner merely alleges in the Complaint that Respondent County Commission received numerous complaints from neighbors regarding the Pit Bulls prior to the subject incident but does not allege that Petitioner and/or Mr. Bowden made any such complaints or had any direct contact with Respondent County Commission and/or Respondent Green. (App. R. 003-004 at ¶¶ 19-21.) Petitioner concedes that that the calls made by others would not likely rise to the level of defeating the Public Duty Doctrine. (App. R. 054; Pet'r's Br. 17.)

Petitioner did not allege that any direct contact occurred between Petitioner and/or Mr. Bowden and Respondent County Commission and/or Respondent Green until after Respondents filed their Motion to Dismiss, raising the Public Duty Doctrine and its special relationship exception, and just prior to the hearing on the Motion to Dismiss, when Petitioner filed her Motion for Leave to File an Amended Complaint to include allegations that there had been direct contact with Respondent Green. (App. 071-072.) For the first time, in Petitioner's Response to Respondents' Motion to Dismiss, Petitioner's counsel attempted to assert that a special relationship existed between Petitioner and Respondents, stating that he believed that Petitioner would testify that she and Mr. Bowden personally made calls, which lulled Mr. Bowden into a

false sense of security, without which would have caused Mr. Bowden to cease his evening walks after dinner altogether. (Id.) Petitioner sought leave to file an amended complaint “given the arguments made by Respondents in their Motion to Dismiss,” to “make additional factual assertions” and to “clarify that the County had direct contact with this Plaintiff in particular prior to the tragic death of Mr. Bowden.” (App. R. 074; Pet’r’s Br. 19-20.) Petitioner filed the Complaint on March 25, 2011, and did not make any factual assertions regarding any assumption by Respondents through promises or actions to affirmatively act regarding the Pit Bulls or any direct contact with Respondents until over a half a year later when Respondents filed their Motion to Dismiss partly based on the Public Duty Doctrine and Petitioner’s failure to plead any facts setting forth a special relationship to establish a special duty. It was opportune at best to make these allegations after Respondents filed a Motion to Dismiss relying on the Public Duty Doctrine and just prior to the hearing on the Motion to Dismiss and suspicious that if such communications did occur, that such had never been alleged.

Therefore, the Circuit Court did not err in granting Respondents’ Motion to Dismiss, finding that Respondents are immune from Petitioner’s claims pursuant to the Public Duty Doctrine.

**No Proximate Cause of Death as Intervening Criminal Acts Broke Chain of Causation**

Not only would any such duty be at best a public duty to impose and collect a tax and to register and license dogs, any such failure could not support a cause of action against Respondent County Commission or Respondent Green for the death of Mr. Bowden as there is no causal link whatsoever between the imposition of a tax or fee

and/or the registration and licensing of dogs and the criminal mauling death of Mr. Bowden. “A fundamental legal principle is that negligence to be actionable must be the proximate cause of the injury complained of and must be such as might have been reasonably expected to produce an injury.” Syl. pt. 2, McCoy v. Cohen, 149 W. Va. 197, 140 S.E.2d 427 (1965). “Proximate cause is a vital and an essential element of actionable negligence and must be proved to warrant a recovery in an action based on negligence.” Id. at syl. pt. 3. Here, as any such failure of Respondents to impose and collect taxes and/or register and license dogs cannot be said to proximately cause the death of Mr. Bowen, Petitioner’s negligence claims fail.

Additionally, the criminal act or acts of the individual Co-Defendants as alleged and pled, would, as a matter of law, serve as intervening criminal acts which would break the chain in any putative negligence claim whether based upon an alleged statutory duty to impose and collect a tax and register and license dogs or any other basis for a negligence claim. “Generally, a willful, malicious, or criminal act breaks the chain of causation.” Yourtee v. Hubbard, 196 W. Va. 683, 690, 474 S.E.2d 613, 620 (1996) (citation omitted). See Sargent v. City of Charleston, 209 W. Va. 437, 446-47, 549 S.E.2d 311, 320-21 (2001).

Accordingly, the Circuit Court did not err in granting Respondents’ Motion to Dismiss as any alleged duty would be at best a public duty to impose and collect a tax and to register and license dogs, any such failure could not support a cause of action against Respondent County Commission or its employees for the death of Mr. Bowden as there is no causal link whatsoever between the imposition of a tax or fee and/or the registration and licensing of dogs and the criminal mauling death of Mr. Bowden.

**ASSIGNMENT OF ERROR 4: The Circuit Court Did Not Err in Failing to Grant Petitioner's Motion for Leave to File an Amended Complaint.**

The Circuit Court did not err in failing to grant Petitioner's Motion for Leave to File Amended Complaint because it granted Respondents' Motion to Dismiss, rendering the Motion moot. Even if the Circuit Court were required to rule on Petitioner's Motion for Leave to File Amended Complaint, the Circuit Court would have likely denied it as the proposed amendments sought to add negligence claims that would have been futile and allowing such amendments would have overly prejudiced Respondents.

Petitioner argues that the Circuit Court should have considered and granted her Motion for Leave to File Amended Complaint. (Pet'r's Br. 18-19.) Respondents filed their Motion to Dismiss on April 19, 2011, and noticed a hearing on their Motion to Dismiss for February 6, 2012. (App. R. 041-044.) Petitioner filed her Motion for Leave to File Amended Complaint on February 1, 2012. (App. R. 071-118.) Subsequent to the hearing on the Motion to Dismiss, Petitioner noticed a hearing on the Motion for Leave to File Amended Complaint for April 2, 2012. (App. 116-118.) On March 29, 2012, the Circuit Court entered the Order granting Respondents' Motion to Dismiss. (App. R. 133-134.)

While Rule 15 of the West Virginia Rules of Civil Procedure provides opportunity for amendments to pleadings, leave to do so is to be freely given "when justice so requires":

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

the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.

Syl. pt. 3, Rosier v. Garron, Inc., 156 W. Va. 861, 199 S.E.2d 50 (1973).

Even if the Circuit Court were required to rule on Petitioner's Motion for Leave to File Amended Complaint, the Circuit Court would have likely denied it as the proposed amendments sought to add negligence claims that would have been futile.

Respondents' proposed Amended Complaint would have added Count IV Negligence "Liability of Defendant Monroe County Commission and Defendant Green" and Count V Negligence "Liability of Defendant Monroe County Commission," alleging negligent failure to impose and collect property tax revenues on the dogs, allowing Co-Defendants to harbor vicious dogs, and not locating and impounding dogs running at large without valid registration tags. Accordingly, because the proposed amended complaint merely sought to add negligence claims, the Circuit Court would have likely denied the Motion as indicated by the Order granting Respondents' Motion to Dismiss wherein the Circuit Court found that dismissal of Respondents was warranted based on Respondents' immunity from any such negligence claims pursuant to the immunities in the Governmental Tort Claims and Insurance Reform Act as well as the Public Duty Doctrine. It is logical that justice does not "require" leave be provided for amendments which would be futile. See e.g., Farmer v. L.D.I., Inc., 169 W. Va. 305, 308, 286 S.E.2d 924, 926 (1982). Further, amending the complaint to add futile claims would not further the purpose of securing an adjudication on the merits.

Further, even if the Circuit Court were required to rule on Petitioner's Motion for Leave to File Amended Complaint, it would likely deny the Motion because Petitioner's

proposed amendments would overly prejudice Respondents. As already discussed, Petitioner filed the Complaint on March 25, 2011, and did not make any factual assertions regarding any assumption by Respondents through promises or actions to affirmatively act regarding the Pit Bulls or any direct contact with Respondents until over a half a year later when Respondents filed their Motion to Dismiss partly based on the Public Duty Doctrine and Petitioner's failure to plead any facts setting forth a special relationship to establish a special duty. The proposed amended complaint adds factual assertions specifically regarding alleged promises and actions of Respondents to address complaints regarding the Pit Bulls and direct contact between Respondents and Petitioner and/or her husband. (App. R. 078-079, 086 at ¶¶ 20-24, 84.) It was opportune at best to make these allegations after Respondents filed a Motion to Dismiss relying on the Public Duty Doctrine and just prior to the hearing on the Motion to Dismiss and suspicious that if such communications did occur, that such had never been alleged.

### **CONCLUSION**

For all the foregoing reasons, Respondents, Monroe County Commission and Patria Green, respectfully request that this Court deny the instant Appeal and dismiss this matter with prejudice.

**MONROE COUNTY COMMISSION and  
PATRICIA GREEN**

By Counsel,



---

Wendy E. Greve, WV State Bar No. 6599  
Katie L. Hicklin, WV State Bar No, 11347  
**PULLIN, FOWLER, FLANAGAN,  
BROWN & POE, PLLC**  
901 Quarrier Street  
Charleston, WV 25301  
Telephone (304) 344-0100  
Facsimile (304) 342-1545  
wgreve@pffwv.com  
khicklin@pffwv.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0614

DREAMA BOWDEN, as Administratrix  
of the Estate of Lowell Bowden,

Petitioner,

v.

(Civil Action No. 11-C-18)  
(Kanawha County Circuit Court)

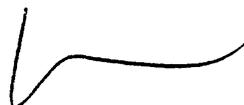
MONROE COUNTY COMMISSION,  
A Political Subdivision; and  
PATRICIA GREEN, individually and in  
her official capacity,

Respondents.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Defendants, Monroe County Commission and Patricia Green, does hereby certify on this 11<sup>th</sup> day of September, 2012, that a true copy of the foregoing "**Respondents, Monroe County Commission and Patricia Green's, Brief**" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

Travis A. Griffith, Esq.  
Olivio & Griffith, PLLC  
813 Quarrier Street  
Charleston, West Virginia 25301  
**Counsel for Petitioner**



---

Wendy E. Greve, WV State Bar No. 6599  
Katie L. Hicklin, WV State Bar No, 11347  
**PULLIN, FOWLER, FLANAGAN,  
BROWN & POE, PLLC**  
901 Quarrier Street  
Charleston, WV 25301  
Telephone (304) 344-0100  
Facsimile (304) 342-1545  
wgreve@pffwv.com  
khicklin@pffwv.com