IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1997 Term

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No. 24029

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DOUGLAS D. FISK, EXECUTOR OF THE ESTATE
OF ROBERT L. WADE, JR., TAMMY BOWMAN
AND BRIAN DODSON BOWMAN,
Plaintiffs

v.

RUSSEL DEAN LEMONS, JANET LYNN LEMONS,
E. A. TUCKWILLER, JR., THE GREENBRIER COUNTY COMMISSION,
THE GREENBRIER COUNTY SHERIFF'S DEPARTMENT,
AND NATIONWIDE MUTUAL INSURANCE COMPANY,
Defendants

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Certified Questions from the Circuit Court of Greenbrier County
Honorable Charles M. Lobban, Judge
Civil Action No. 94-C-92

CERTIFIED QUESTIONS ANSWERED; CASE DISMISSED

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CHIEF JUSTICE WORKMAN delivered the Opinion of the Court.
JUSTICE McHUGH, deeming himself disqualified, did not participate in the decision in this case.
JUSTICE DAVIS dissents, and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. The provisions of The Governmental Tort Claims and Insurance Reform Act, West Virginia Code §§ 29-12A-1 to -18 (1992), clearly contemplate that immunity will be extended to a political subdivision in connection with a claim arising from a court-ordered or administratively-approved work release program.

2. "W. Va. Code, 29-12A-5(a)(5) [1986], which provides, in relevant part, that a political subdivision is immune from tort liability for "the failure to provide, or the method of providing, police, law enforcement or fire protection[,]" is coextensive with the common-law rule not recognizing a cause of action for the breach of a general duty to provide, or the method of providing, such protection owed to the public as a whole. Lacking a clear expression to the contrary, that statute incorporates the common-law special duty rule and does not immunize a breach of a special duty to provide, or the method of providing, such protection to a particular

individual." Syl. Pt. 8, Randall v. Fairmont City Police Dep't, 186 W. Va. 336, 412 S.E.2d 737 (1991).

3. "To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agent and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking." Syl. Pt. 2, Wolfe v. City of Wheeling, 182 W. Va. 253, 387 S.E.2d 307 (1989).

Workman, Chief Justice:

This case is before us upon certified questions from the Circuit Court of Greenbrier County to resolve whether the Greenbrier County Commission ("Commission") and the Greenbrier County Sheriff's Department ("Sheriff") are liable in connection with the commission of negligent acts by an inmate on work release. After considering the questions presented, we determine that The Governmental Tort Claims and Insurance Reform Act (the "Act"), West Virginia Code §§ 29-12A-1 to -18 (1992), does extend immunity to the Commission and the Sheriff under the facts of this case. Based on our conclusion that the public duty doctrine is applicable, the Plaintiffs must prove the existence of a special relationship under that doctrine to recover against the Commission and the Sheriff.

Defendant Lemons was first placed on work release on March 30, 1992, by the circuit court.[1] Beginning in June 1992, Lemons was authorized to do farm work on E.A. Tuckwiller's farm for his work release assignment.

[1]At the time work release was ordered, Lemons was serving a six-month

On August 12, 1992, Lemons struck a vehicle head-on and killed one individual--Robert Wade, Jr.,--and injured two others--Tammy and Brian Bowman. The vehicle Lemons was driving at the time of the accident belonged to his mother. Lemons pled guilty to DUI causing a death in connection with the accident.

The Plaintiffs in the underlying civil action, Douglas D. Fisk, as Executor of the estate of Robert L. Wade, Jr., and Tammy Bowman and Brian Dodson Bowman brought suit against Lemons, his mother, E.A. Tuckwiller, the Commission, the Sheriff, and Nationwide Mutual Insurance Company.[2] Based on the immunity provisions afforded to political subdivisions[3] in West Virginia Code § 29-12A-5(a)(3) and -5(a)(13),[4] the Commission and the Sheriff

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sentence at the Greenbrier County jail.

[2]The Plaintiffs have settled with all the defendants except the Commission and the Sheriff.

[3] Both the Commission and the Sheriff qualify as "political subdivision[s]" within the meaning of the Act under the definitional provision found in West Virginia Code § 29-12A-3(c), which expressly includes "any county commission" and "any public body charged by law with the performance of a government function." Id.

[4]West Virginia Code § 29-12A-5(a)(3) provides that "[a] political

filed a motion to dismiss on October 3, 1994. After the circuit court found the motion premature on November 23, 1994, the parties began to engage in discovery. During discovery, it was revealed that Lemons had not been at his work release assignment for twenty-seven days preceding the accident that occurred on August 12, 1992.

At a hearing on May 22, 1995, the circuit court converted the motions to dismiss filed by the Commission and the Sheriff into summary judgment motions and then denied these motions by order entered on September 22, 1995. The lower court, however, entered an order of certification on October 21, 1996, through which it certified the following questions to this Court:

> 1. Are the defendants, Greenbrier County Sheriff and County Commission, immune from liability for damages to individual plaintiffs and plaintiffs' decedent, under W. Va. Code § 29-12A-5(a)(3), by reason of complying with a lawful order of the Court?

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subdivision is immune from liability if a loss or claim results from [the] execution or enforcement of the lawful orders of any court." West Virginia Code § 29-12A-5(a)(13) provides that immunity extends to all claims which result from "[a]ny court-ordered or administratively approved work release or treatment or rehabilitation program."

> 2. Are the defendants, Greenbrier County Sheriff and County Commission, immune from liability for damages to individual plaintiffs and plaintiffs' decedent, under W. Va. Code § 29-12A-5(a)(13), by reason of complying with a court-ordered or administratively-approved work release, treatment or rehabilitation program by releasing an inmate?
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> 3. Must plaintiffs then prove under the "public duty doctrine" that a "special relationship" existed between defendants, Greenbrier County Sheriff and County Commission, and plaintiffs' decedent, which is the basis for an actionable special duty of care, as required by the case of Randall v. Fairmont City Police Dept., 186 W. Va. 336, 412 S.E.2d 737 (1991); that is, must plaintiffs establish by a preponderance of the evidence the following four elements: (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 entities' agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agent and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking?

The circuit court answered the first two questions in the negative and the final question in the affirmative.

## I. Statutory Immunity

The first two certified questions present the issue of whether either West Virginia Code § 29-12A-5(a)(3) or -5(a)(13) provide immunity to the Commission and the Sheriff under the facts of this case. The language of subsection (a)(3) extends immunity to political subdivisions "if a loss or claim results from" "[e]xecution or enforcement of the lawful orders of any court." W. Va. Code § 29-12A-5(a)(3). Subsection (a)(13) creates immunity when "a loss or claim results from" "[a]ny court-ordered or administratively approved work release or treatment or rehabilitation program." W. Va. Code § 29-12A-5(a)(13). Plaintiffs take the position that because Lemons "was not participating or otherwise acting within the scope of any bona fide work-release program" at the time of the vehicular accident, immunity is not afforded pursuant to the provisions of West Virginia Code § 29-12A-5(a)(3) or -5(a)(13). Conversely, the Commission and the Sheriff argue that "[t]he plaintiffs' claims are clearly predicated upon an incident which occurred while Lemonss was enrolled, and had been released, in a court-ordered work release program."

The circuit court concluded, in its order denying summary judgment to the Commission and the Sheriff, that immunity is not afforded under the Act based on its "belie[f] [that] the purpose of the act is to insulate the county when, in effect, the party defendant is where he is supposed to be but is doing something negligent that causes injury to other persons." Recognized principles of statutory construction constrain us from engaging in the interpretive analysis that the lower court applied to reach its conclusion. "General[ly,] . . . courts may only construe a statute to effectuate legislative intent, and a statute that is clear and unambiguous should be applied by the courts and not construed or interpreted." Carper v. Kanawha Banking & Trust Co., 157 W. Va. 477, 517, 207 S.E.2d 897, 921 (1974) (citing State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968)). As we find the statutory language at issue to be clear and free from ambiguity, we can only apply the Act's terms as stated without injecting our view of the Legislature's intent into the process.

Against these axioms of statutory construction, we look to the operative terms in West Virginia Code § 29-12A-5(a)(3) and -5(a)(13). According to the introductory language of this statutory provision, immunity is afforded to political subdivisions for "a loss or claim [that] results from" "[e]xecution or enforcement of the lawful orders of any court." W. Va. Code § 29-12A-5(a)(3). No one disputes that Lemons was on work release pursuant to valid court orders.[5] As the Commission and the Sheriff note, they were required to release Lemons on work release pursuant to the applicable court order. The true dispute below with regard to immunity under the Act arose in connection with the Plaintiffs' contention that Lemons was not "actually participating" in the work release program at the time he caused an accident. Both the Plaintiffs and the circuit court subscribed to the theory that because Lemons had not reported to his work release

[5]Although Plaintiffs state in their appellate brief that "defendants [Commission and Sheriff] completely failed to execute any court order related to a work-release program" on the date of the accident, we do not view the immunity provision that pertains to court orders as requiring the preparation of an order distinct from the order in this case that authorized Lemons to be on work release. There were actually two work release orders prepared by the circuit court that authorized Lemons to be on work release; the initial order was entered on March 30, 1992, and a second one was entered on June 8, 1992, when Lemons' assignment was changed to the Tuckwiller farm.

assignment on the day in question, the Commission and the Sheriff were not entitled to immunity under a statutory provision which required, as a predicate to its invocation, that the claim must result from an approved work release program.[6] This theory takes a narrow and isolated view of the inclusion of work release programs within the statutory provisions affording immunity to political subdivisions.

[6]Plaintiffs agree that had Lemons been operating a piece of farm equipment at the time he caused their injuries, immunity would unquestionably be afforded by West Virginia Code § 29-12A-5(a)(13).

Plaintiffs' position is essentially that the actions undertaken by Lemons to deceive[7] both the Sheriff and E.A. Tuckwiller had the effect of removing him as a participant in the work release program. Yet, despite Lemons' elaborate subterfuge, he was still being released pursuant to court order each day from the Greenbrier County jail as an authorized participant in a work release program. As the Commission and the Sheriff observe, "there is nothing in the Court's Order, Amended Order, or the West Virginia Code that indicates that an inmate becomes exempt from the guidelines of the work release program the instant that he strays from the program[']s provisions." If that were the case, as the Commission and the Sheriff note, there would be no basis for the Legislature's enactment of an immunity provision expressly designated in connection with work release programs.[8]

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[7]The record in this case indicates that Lemons went to elaborate and continuing ends to dupe everyone into believing that he was reporting to the Tuckwiller farm each day. For example, Lemons testified that he would douse his body in gasoline to cover up the smell of alcohol on his breath; step in cow manure to acquire the necessary farm smells; "chew bubble gum" or "eat fireballs" to mask the smell of alcohol; and "put Visine in my eyes to keep them from being red." Lemons also telephoned Tuckwiller on several occasions to inform him that he could not report to work for illness reasons.

[8]We observe that the Act was enacted one year following the enactment of West Virginia Code § 62-11A-3. Cf. W. Va. Code §§ 29-12A-1 to -18 (enacted

When, in fact, subdivision (a)(13) of West Virginia Code § 29-12A-5 was obviously enacted to provide for scenarios like that present in the instant case where an inmate strays from the expected duties or requirements of the work release program.

The provisions of The Governmental Tort Claims and Insurance Reform Act, West Virginia Code §§ 29-12A-1 to -18 (1992), clearly contemplate that immunity will be extended to a political subdivision in connection with a claim arising from a court-ordered or administratively-approved work release program. The facts of this case fit squarely within the provisions of the Act that extend immunity to political subdivisions for claims arising from "[e]xecution or enforcement of the lawful orders of any court" and from "[a]ny court-ordered or administratively approved work release or treatment or rehabilitation program." W. Va. Code § 29-12A-5(a)(3), -5(a)(13). Based on the above reasoning, we conclude that the circuit court erred in its conclusion that immunity is not extended to the Commission and the Sheriff under West Virginia Code § 29-12A-5(a)(3) or under West Virginia Code § 29-12A-5(a)(13).

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1986) with W. Va. Code § 62-11A-3 (enacted 1985).

## II. Public Duty Doctrine

The third certified question involves the issue of whether Plaintiffs are required to demonstrate the existence of a special relationship between themselves and the Commission and Sheriff. This Court has fully resolved the interrelation of the Act and the public duty doctrine, first in Randall v. Fairmont City Police Dep't, 186 W. Va. 336, 412 S.E.2d 737 (1991), and more recently in Holsten v. Massey, __ W. Va. __, 490 S.E.2d 864 (1997). Addressing the continued viability of the public duty doctrine following the Act's enactment, this Court held in Randall that

> W. Va. Code, 29-12A-5(a)(5) [1986], which provides, in relevant part, that a political subdivision is immune from tort liability for "the failure to provide, or the method of providing, police, law enforcement or fire protection[,]" is coextensive with the common-law rule not recognizing a cause of action for the breach of a general duty to provide, or the method of providing, such protection owed to the public as a whole. Lacking a clear expression to the contrary, that statute incorporates the common-law special duty rule and does not immunize a breach of a special duty to provide, or the method of providing, such protection to a particular individual.

Syl. Pt. 8, 186 W. Va. at 339, 412 S.E.2d at 740 ; see also Holsten, __ W. Va. at __, 490 S.E.2d at 871, (acknowledging that "[t]he legislature . . . has not expressly abrogated the public duty doctrine in the Act as we recognized in Randall").[9] Based on our decision in Randall that the public duty doctrine is "coextensive" with the Act, the circuit court was correct in its ruling that plaintiffs will have to meet the four-part test first enunciated in Wolfe v. City of Wheeling, 182 W. Va. 253, 387 S.E.2d 307 (1989):

> To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct

[9]We also explained the basis in terms of statutory construction for the continued applicability of the common law doctrine of public duty in Holsten by stating that, "'[o]ne of the axioms of statutory construction is that a statute will be read in context with the common law unless it clearly appears from the statute that the purpose of the statute was to change the common law.' Syl. pt. 2, Smith v. West Virginia State Board of Educ., 170 W. Va. 593, 295 S.E.2d 680 (1982)." Holsten, __ W. Va. at __, 490 S.E.2d at 867, syl. pt.5.

> contact between the local governmental entity's agent and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.

Id. at 254, 387 S.E.2d at 308, syl. pt. 2. While the circuit court made no finding as to whether Plaintiffs can meet this special relationship test,[10] the Plaintiffs themselves have conceded that they cannot meet this four-criteria test necessary to proceed against the Commission and the Sheriff.

In Plaintiffs' attempt to continue their action against the Commission and the Sheriff, they look to the provisions of West Virginia Code § 62-11A-3 (1992).[11] The specific language which Plaintiffs call to our attention is found in subsection (b) of that statute and provides:

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[10]We ruled in Wolfe that "[t]he question of whether a special duty arises to protect an individual from a local governmental entity's negligence in the performance of a nondiscretionary governmental function is ordinarily a question of fact for the trier of the facts." 182 W. Va. at 254, 412 S.E.2d at 308, syl. pt. 3.

[11]The circuit court did not address the applicability of West Virginia Code § 62-11A-3(b) based on Plaintiffs' position below that such section was inapposite. On appeal to this Court, however, Plaintiffs altered their position to argue that such statute was somehow applicable.

> Neither the sheriff, the county commission or community service agency to which the person is assigned shall be liable for injury or damage to third parties intentionally committed by the person so sentenced or for any action on behalf of the person so sentenced except in the case of gross negligence on the part of the sheriff, county commission or community service agency or the supervisor of the person so sentenced. . . .

W. Va. Code § 62-11A-3(b). In their response to the motions to dismiss filed by the Commission and the Sheriff below, Plaintiffs stated that the provisions of West Virginia Code § 62-11A-1 to -4 did not "apply to the facts of the case at bar."[12] Citing the language of West Virginia Code § 62-11A-3(b) specifically, Plaintiffs argued that such language was inapplicable based on the requirement that liability be in connection with "intentional" acts committed by a work release inmate. Plaintiffs have made no argument that their claims against Lemons arise from an intentional act; their claims against him arise solely in connection with an automobile accident. Thus, we agree with the Plaintiffs' own acknowledgment that the

[12]The record does not reflect that the circuit court addressed the applicability of West Virginia Code § 62-11A-3, and as we have repeatedly held, "[t]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syl. Pt. 2, Sands v. Security Trust Co., 143 W. Va. 522, 102 S.E.2d 733 (1958).

facts of the case sub judice are inconsistent with the cited provisions of West Virginia Code § 62-11A-3(b). Accordingly, we leave for another day the issue of whether that statute, when properly invoked, requires a different conclusion regarding the application of the public duty doctrine.[13]

Having answered the certified questions, this matter is hereby dismissed from the docket of this Court.

Certified questions answered;

case dismissed.

[13]Plaintiffs' attempt to bring West Virginia Code § 62-11A-3 into this case stems from their admitted inability to establish a special relationship and thereby get around the public duty doctrine. Citing this Court's statement in Benson v. Kutsch, 181 W. Va. 1, 380 S.E.2d 36 (1989), that "[w]e have also recognized that a legislative enactment may affix liability on a city for the protection of a particular class[,]" Plaintiffs suggest that "where liability is predicated on a separate legislative enactment[,]" "the public duty doctrine might not apply." Id. at 7, 380 S.E.2d at 42. Since the "separate legislative enactment" that Plaintiffs look to--West Virginia Code § 62-11A-3--does not apply to this case because of the absence of an intentional act commited by Lemons, we do not address the merits of this contention. Nor do we in any way address the viability of West Virginia Code §62-11A-3.