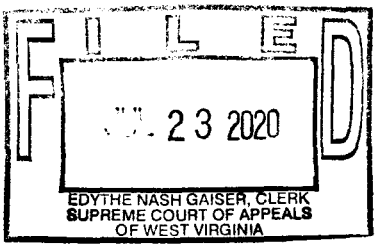
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 20-0063




**WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, a governmental entity,**

Petitioner,

v.

Appeal from the interlocutory order of the Circuit Court of McDowell County (Civil Action No. 16-C-96)

**DREMA DOTSON, a resident of West Virginia, individually and on behalf of other similarly situated,**

**DENVER ALLEN HUNT, a resident of West Virginia, individually and on behalf of other similarly situated**

**CONNIE LESTER, a resident of West Virginia, individually and on behalf of other similarly situated**

**WOODROW KIRK, a resident of West Virginia, individually and on behalf of other similarly situated,**

**JOHNNY LOCKHART, a resident of West Virginia, individually and on behalf of other similarly situated,**

Respondents.

---

# Petitioner's Reply Brief

---

**Counsel for Petitioner,**
**West Virginia Department of**
**Environmental Protection**

John P. Fuller (WV Bar # 9116)
Brent D. Benjamin (WV Bar # 307)
Daniel T. LeMasters (WV Bar # 12021)
Jeffrey M. Carder(WV Bar # 12725)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222

TABLE OF CONTENTS

## Table of Authorities

### Cases



### Statutes

# I. ARGUMENT

## A. The Circuit Court of McDowell County erred in denying WVDEP's Motions for Summary Judgment on the basis of the public duty doctrine.

Respondents seek recovery from the West Virginia Department of Environmental Protection ("WVDEP') for alleged negligent enforcement of the West Virginia Surface Coal Mining & Reclamation Act ("SCMRA"). However, under public duty doctrine a government entity cannot be held liable for breaching a general, non-discretionary duty owed to the public as a whole. *West Virginia State Police v. Hughes*, 238 W. Va. 406, 412, 796 S.E.2d 193, 199 (2017).

There is no dispute among the parties that WVDEP had a general nondiscretionary or ministerial/operational duty to the general public to enforce SCMRA. Rather, disagreement between the parties lies in whether a special relationship had formed between WVDEP and the individual Respondents thereby creating an exception to the public duty doctrine. Therefore, the issue becomes whether the Respondents can satisfy the elements to establish a special relationship had formed, or in other words, whether WVDEP: (1) assumed through promises or actions an affirmative duty to act on behalf of the individual Respondents; (2) had knowledge that its inaction could lead to harm; (3) had some form of direct contact with the individual Respondents; and (4) Respondents justifiably relied on WVDEP's affirmative undertaking. *Hughes* at 238 W. Va. 412-13, 796 S.E.2d 199-200.

Despite Respondents' arguments to the contrary, there are no remaining questions of fact as to whether Respondents fulfill the requirements to demonstrate a special relationship between themselves and WVDEP had been formed. Prior to moving for summary judgment, depositions of each of the individual Respondents were taken with regard to communications

and contacts between themselves and WVDEP. Respondents testified that no one from the WVDEP had made any specific promises directly to them nor are they aware of the WVDEP making any type of specific promise to anyone else in this litigation. *See J. App. 1: 000140 (p.57, lines 9 – 12); J. App. 1: 000185 (p. 166, lines 3 – 9).* Moreover, each of the individual Respondents testified that they, nor anyone on their behalf, had ever engaged in any direct written or verbal communication with anyone from the WVDEP. *See J. App. 1: 000139 – 000140 (p. 53 – 57, lines 6 – 2); J. App. 1 000240 (p. 104 – 107, lines 8 – 17); J. App. 1: 000183 – 000184 (p. 160 – 165, lines 22 – 20); J. App. 1: 000276 (p. 121 – 124, lines 16 – 5); J. App. 1: 000338 – 000339 (p. 180 – 181, lines 12 – 24).* Instead, Respondents argue that the WVDEP had engaged in direct contact with the individual Respondents by publishing notices of the mining permits issued to Twin Star mining published in the McDowell County newspaper. *See Respondents' Brief at p. 26.* Respondents further argue that those notices extend promises by the WVDEP specifically to the individual Respondents promising to keep them safe from Twin Starr's mining operations. *Id.* Therefore, the parties agree there was no direct communication between the Respondents and the WVDEP other than, to the extent that it can be considered a direct communication, publication of notices of mining permits in the local newspaper. The parties further agree no promises were made to the individual Respondents by the WVDEP outside of any promises that can be construed from WVDEP's publication of notices of mining permits in the newspaper or the mining permits themselves. These facts are not in dispute. Therefore, there are no issues a fact remaining, and this matter is appropriate for summary judgment.

In addressing the first question at issue, whether publication of notices of issuances of mining permits in the newspaper amount to a direct contact between WVDEP and the

individual Respondents, this Court has held that a direct contact as it pertains to the special relationship exception is defined as some form of contact undertaken by a governmental entity beyond that of contact that it has with all citizens. *Wolfe v. Wheeling*, 182 W. Va. 253, 257, 387 S.E.2d 307, 311 (1989). Again, as indicated above, the only direct contact alleged by the Respondents is the publication of notices of mining permits in the newspaper. Whereas the Respondents would like this Court to believe that those notices were published in the newspaper were meant for and specifically directed to them, that is simply untrue. Those notices were published for the benefit of anyone in the general public having an interest in the mining activities. As acknowledged at the hearing on WVDEP's motion for summary judgment, all citizens have an interest in the mining activities in McDowell County, not only the citizens who live there. *See J. App. 3: 002454 – 002480.* By publishing these notices of mining permits, the WVDEP alerts the general public of an open meeting concerning the mining permits allowing those with an interest to attend and participate. *Id.* To suggest that publications in the McDowell County newspaper are only directed to the individual Respondents in this matter is misguided. It would be akin to suggesting the New York Times is meant to only reach New York City residents or that the Boston Globe only communicates information directly to Boston residents. All citizens, or in other words the public at large, have an interest in mining activities in McDowell County, West Virginia, and therefore publication of notices of mining permits cannot be construed as direct communications to only McDowell County citizens but rather are communications, to the extent they are communications, to the public at large. Accordingly, Respondents fail to demonstrate any direct communication between the WVDEP and themselves and therefore fails to satisfy the requirements of the special duty exception under public duty doctrine.

Moreover, Respondents are unable to identify a specific promise or affirmative undertaking of a duty made specifically to them by the WVDEP beyond that of promises or duties owed to the general public. Respondents allege the notices of mining permits and mining permits themselves extend promises to protect them and other adjacent neighbors from harm but are unable to identify any such specific promise in the mining permit notices or the mining permits. *See Respondents' Brief at p. 26.* In their Response Brief, Respondents cite to deposition testimony in which many of the Respondents expressed they felt the WVDEP had a duty to protect them from harm, but again are unable to point to a single incident in which the WVDEP or anyone from the WVDEP had directly communicated a promise or specific additional undertaking. *Id.*

Respondents attempt to muddy the waters with regard to the special relationship exception by citing to this Court's holding in *Bowden v. Monroe Cty. Comm'n*, 239 W. Va. 214, 800 S.E.2d 252 (2017). *See Respondents' Brief at p. 27 - 28.* However, the *Bowden* holding only strengthens Petitioner's position that a special relationship had not formed between these Respondents and the WVDEP. The petitioner in *Bowden* had personally spoken to the dog warden on the phone regarding her and her husband's concerns of vicious pit bulls running loose and attacking people in their neighborhood. *Bowden v. Monroe Cty. Comm'n*, 232 W. Va. 47, 50, 750 S.E.2d 263, 266 (2013). Not long after speaking with her on phone, the dog warden personally visited the petitioner's home assuring her and her husband that the county would "take of it." *Id.* Thereafter, petitioner's husband, Mr. Bowden was attacked and killed by the pit bulls. *Id.* Petitioner then brought a negligence suit against the dog warden and the county for their failure to perform statutory duties and confiscate the dangerous dogs. *Id.* The dog warden moved to dismiss the complaint asserting the public duty doctrine. *Id.* Petitioner

asserted that a special relationship had been formed thereby defeating protections under the public duty doctrine. *Id.* On appeal, this Court reversed the underlying court's order dismissing petitioner's complaint holding the dog warden's additional assurance that "the county would take of it" may have created a special relationship between the county and the individual citizen and therefore creating an exception to the public duty doctrine. *Bowden v. Monroe Cty. Comm'n*, 239 W. Va. 214, 221-5, 800 S.E.2d 252, 259-63 (2017).

In the instant matter, Respondents argue that by issuing notices of mining permits the WVDEP had in effect promised the Respondents that the WVDEP would "take care of it" thereby creating an exception to the public duty doctrine. *See Respondents' Brief at p. 28.* Whereas Respondent's argument is certainly creative, it is a stretch, at best. There is absolutely nothing in the *Bowden* decision that can be possibly construed to mean a newspaper notice has the same operative effect as a direct verbal communication from a public official that she will "take care of it." Additionally, the *Bowden* Court placed great emphasis on the fact that the dog warden had made direct contact with the petitioner and her husband, personally communicating an additional assurance of "the county will take care of it." Although the dog warden did not specifically utter, "I promise", this Court held that the dog warden's additional assurance of "the county will take care of it" to the petitioner and her husband may have indicated an assumption of a duty beyond that of the duty owed to the general public, thereby creating a special relationship. However, unlike the dog warden in *Bowden*, these individual Respondents testified to never having engaged in direct communication with anyone from the WVDEP making it even possible for anyone from the WVDEP to indicate they would "take care of it." Put simply, the Respondents in the instant matter had no such direct contact with anyone from the WVDEP and received no such additional assurance from anyone at the

WVDEP, further demonstrating that no special relationship had been formed. Accordingly, Plaintiffs fail to defeat WVDEP's protections under the public duty doctrine, and as such, WVDP, as a matter of law, is entitled to summary judgment on the basis of the public duty doctrine.

**B. The Circuit Court of McDowell County erred in denying WVDEP's Motions for Summary Judgment on the basis of qualified immunity.**

The purpose of qualified immunity is to allow officials to do their jobs and to exercise judgment, wisdom, and sense without worry of being sued. *Parkulo v. W. Va. Bd. of Prob. & Parole*, 199 W. Va. 161, 177, 483 S.E.2d 507, 523. As such, the doctrine of qualified immunity bars a claim of mere negligence against a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.*, and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer." *W. Va. Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 572, 746 S.E.2d 554, 563 (2013).

Accordingly, in determining whether the State, its agencies, officials, and/or employees are entitled to qualified immunity, a reviewing court must first identify the nature of the governmental acts or omissions giving rise to the suit for purposes of determining whether such acts or omissions constitute legislative, executive or administrative policy-making acts or involve otherwise discretionary functions. Syl. Pt. 7 of *Parkulo.* If the act or omission is a legislative, judicial, executive or an administrative policy-making act, the State and the official involved are absolutely immune. Syl. Pt. 10 of *W. Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014).

For a plaintiff to sustain a viable claim against a State agency or its employees or officials acting within the scope of their authority sufficient to overcome this immunity, it must be

established that the agency employee or official knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively. *Parkulo* 199 W.Va. at 161, 483 S.E.2d at 507. Therefore, if the acts or omissions giving rise to the suit fall within the category of discretionary functions, a reviewing court must then determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known *or* are otherwise fraudulent, malicious or oppressive. Syl. Pt. 11 of *West Virginia Regional Jail and Correctional Facility Authority v. A.B.* In the absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability. *Id.*

In turning to Plaintiffs' allegations against WVDEP, Plaintiffs allege that the WVDEP was negligent in granting Twin Star Permits No. S-4011-97 and S-4020-95 to operate Bull Creek Surface Mine No. 45 based upon designs which did not meet requirements of SCMRA. *J. App. 1: 000049 at ¶ 95 – 97.* Plaintiffs further allege that the WVDEP failed to issue Notices of Violations against Twin Star when it allegedly committed statutory violations under the SCMRA. *J. App. 1: 000029 at ¶ 3.* Put simply, Plaintiffs allegations against WVDEP go directly to discretionary functions for which WVDEP is immune under qualified immunity.

A discretionary function is defined as a duty involving the exercise of judgment, wisdom, and sense. *Parkulo*, 199 W. Va. at 177, 483 S.E.2d at 523. Plaintiffs allege that WVDEP officials were negligent in their issuance of permits to Twin Star for its Bull Creek Surface Mine No. 45 site. A WVDEP official reviewing a permit application and determine whether it sufficiently satisfied SCMRA requirements would certainly require the exercise of judgment, wisdom and sense. It was poignantly argued by WVDEP at the motions hearing before Judge Kornish:

> How is it not a discretionary decision for a state official to sit down and look at this – this permit application and decide whether or not it is sufficient? That absolutely would trigger qualified immunity and would be ground for this case to be disposed of with summary judgment.

*J. App. 2: 002479, lines 2 - 7.* Whereas SCMRA does require the WVDEP to review each permit application to ensure it contains the requisite information for approval, the function of determining whether that information satisfies SCMRA requirements is one requiring the exercise of judgment thereby making it a discretionary function.

Plaintiffs further allege that the WVDEP failed to issue Notices of Violations against Twin Star when it allegedly committed statutory violations under the SCMRA. *J. App. 1: 000049 - 000050.* W. Va. Code § 22-3-17(a) does mandate that WVDEP "shall" issue a Notice of Violation if an operator is not in compliance with provisions under SCMRA. However, Plaintiffs are not alleging that WVDEP neglected to issue Notices of Violations to Twin Star altogether. Plaintiffs' own experts acknowledge in their respective reports that Bull Creek Surface Mine No. 45 was a heavily cited mine and that the WVDEP had issued a total of thirty-eight (38) Notices of Violation prior to the flooding event on June 5, 2014. *J. App. 1:000763 – 000764; App. 000758.* What Plaintiffs are really asserting in their Complaint is that the WVDEP failed to issue the Notices of Violation that the Plaintiffs in hindsight felt that it should have issued. At the hearing before Judge Kornish, counsel for WVDEP argued that a mine inspector's discretion in issuing Notices of Violation is similar to that of a county prosecutor, as follows:

> MR. FULLER: Similar to a county prosecutor. He doesn't have to prosecute every time it's possible a crime was committed. He has discretion to decide who gets prosecuted and for what.
>
> THE COURT: So you know what I did before I became a judge.

MR. FULLER: I sure do, Your Honor. It's – it's usually best if you sell what people know.

THE COURT: Well done, there. Go ahead.

MR. FULLER: So you very well know as a prosecutor, you could have prosecuted 24 hours a day, but it is not feasible. You had to pick your fights. And you had the discretion to determine who gets prosecuted and what they get charged with. You can overcharge; you can undercharge. But it's your discretion.

*J. App. 3: 002457 – 002458.* The analogy being that like a county prosecutor having a statutory duty to prosecute crimes, a WVDEP inspector must exercise judgment in determining what amounts to a violation under SCMRA provisions. Accordingly, Plaintiffs' allegations against WVDEP go directly to discretionary functions for which the WVDEP is immune under qualified immunity.

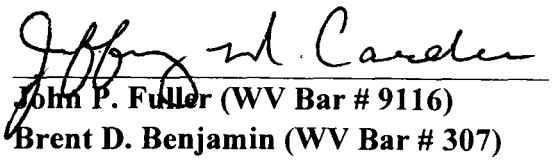
In their Response Brief, Respondents confusingly cite to *Bragg v. United States*, 230 W. Va. 532, 741 S.E.2d 90 (2013), in which this Court responded in the affirmative to a certified question as to whether a private party conducting mine inspections is liable for the wrongful death of miner resulting from the private party's negligent inspection. Respondents attempt to argue that the Court's holding in *Bragg* somehow negates qualified immunity in this matter. However, *Bragg* concerns a private party, not a State official, and has absolutely no application to matters involving qualified immunity. Respondents most likely struggled to find legal precedent to support its argument that a State agency such as the WVDEP would be liable for negligent performance of a discretionary function simply because there is none.

Because Respondents are asserting negligence claims against WVDEP for its discretionary judgments, decisions, and actions, the WVDEP is entitled to summary judgment on the basis of qualified immunity.

## II. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Honorable Court reverse the decision of the Circuit Court of McDowell County denying Petitioners' *Motion for Summary Judgment* on the basis of the public duty doctrine. In the alternative, Petitioners respectfully request that this Honorable Court reverse the decision of the Circuit Court of McDowell County denying Petitioners' *Motion for Summary Judgment* on the basis of qualified immunity.

Respectfully submitted by:



**John P. Fuller (WV Bar # 9116)**
**Brent D. Benjamin (WV Bar # 307)**
**Daniel T. LeMasters (WV Bar # 12021)**
**Jeffrey M. Carder(WV Bar # 12725)**
**BAILEY & WYANT, PLLC**
**500 Virginia Street, East, Suite 600**
**Post Office Box 3710**
**Charleston, West Virginia 25337-3710**
**(304) 345-4222**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 20-0063

**WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, a governmental entity,**

Petitioner,

v.

Appeal from the interlocutory order of the Circuit Court of McDowell County (Civil Action No. 16-C-96)

**DREMA DOTSON, a resident of West Virginia, individually and on behalf of other similarly situated,**

**DENVER ALLEN HUNT, a resident of West Virginia, individually and on behalf of other similarly situated**

**CONNIE LESTER, a resident of West Virginia, individually and on behalf of other similarly situated**

**WOODROW KIRK, a resident of West Virginia, individually and on behalf of other similarly situated,**

**JOHNNY LOCKHART, a resident of West Virginia, individually and on behalf of other similarly situated,**

Respondents.

## CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing **"Petitioner's Reply Brief"** has been served upon the following on July 23, 2020:

Kevin Thompson
David R. Barney, Jr.
Thompson Barney
2030 Kanawha Boulevard, East
Charleston, WV 25311
Drbarneywv@gmail.com
*Counsel for: Dreama Dotson, Johnny Lockhart, Woodrow Kirk, Connie Lester and Denver Allen Hunt*

Stephen Paul New
Amanda J. Taylor
The Law Office of Stephen P. New
PO Box 5516
Beckley, WV 25801
Steve@newlawoffice.com
*Counsel for: Dreama Dotson, Johnny Lockhart, Woodrow Kirk, Connie Lester and Denver Allen Hunt*

**John P. Fuller (WV Bar # 9116)**
**Brent D. Benjamin (WV Bar # 307)**
**Daniel T. LeMasters (WV Bar # 12021)**
**Jeffrey M. Carder(WV Bar # 12725)**
**BAILEY & WYANT, PLLC**
**500 Virginia Street, East, Suite 600**
**Post Office Box 3710**
**Charleston, West Virginia 25337-3710**
**(304) 345-4222**