

**WEST VIRGINIA SUPREME COURT OF APPEALS**

**NO. 33102**

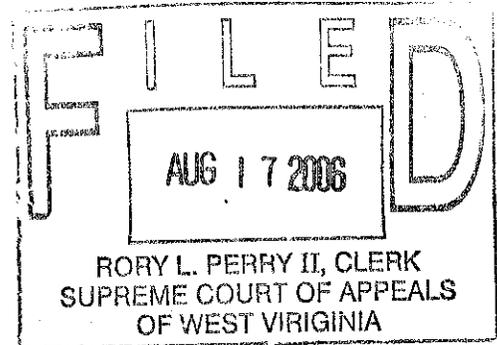
**JOHN BARBINA,  
individually and as parent of  
ANISSA BARBINA, an infant,**

**Appellants,**

**vs.**

**CHARLES CURRY,  
KELLEY A. CURRY,  
THE WEST VIRGINIA DEPARTMENT  
OF HEALTH AND HUMAN RESOURCES,  
LORI GLOVER, CLARK SINCLAIR,  
as Sheriff of Taylor County, West Virginia, and  
VALLEY COMPREHENSIVE COMMUNITY  
MENTAL HEALTH CENTER, INC.,**

**Respondents.**



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**REPLY BRIEF OF APPELLEE, CLARK SINCLAIR,  
AS FORMER SHERIFF OF TAYLOR COUNTY, WEST VIRGINIA**

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**Cases:**

*Wood v. Acordia of West Virginia, Inc.*, 217 W. Va. 406,  
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*Holstein v. Massey*, 200 W. Va. 775, 490 S.E.2d 864 (1997) ..... 4, 8

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*Sides v. Richard Mach. Works, Inc.*, 406 F.2d 445 (4<sup>th</sup> Cir. 1969) ..... 4, 10

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**THE KIND OF PROCEEDING AND NATURE OF**  
**THE RULING IN THE LOWER TRIBUNAL**

This is an appeal of an Order entered on September 20, 2005, granting the Defendant, Clark Sinclair, as Sheriff of Taylor County, West Virginia, summary judgment.

## STATEMENT OF THE FACTS

Anissa Barbina, an infant between the ages of nine and ten, was sexually assaulted some time prior to September 17, 1998. Purportedly, she advised the Valley Health Care System of this assault on September 17, 1998. The Appellants contend, and we agree, "neither Valley, nor the WVDHHR, then reported the sexual assault to the police". On Thanksgiving Day of 1999, Anissa Barbina was again assaulted by Charles Curry, her grandfather, who French kissed her. This assault was not reported to the WVDHHR until February 7, 2000. There is a dispute of facts as to whether or not the assault that took place in November 1999, was reported to the Sheriff's Department by WVDHHR. On February 14, 2000, John Barbina, the father of Anissa Barbina, was allegedly told by Deputy Beltner of the Sheriff's Department to go to the Magistrate Court and obtain a restraining order against Kelly A. Curry. That process was completed on February 22, 2000, approximately eight days after the Sheriff's Department allegedly advised John Barbina as to the proper procedure to obtain a restraining order. The Sheriff's Department contends it did not receive notice from the WVDHHR of the assault as does the Prosecuting Attorney's office. The Prosecuting Attorney, John Bord, testified in his deposition that he did not receive notice of the assault until February 2001. He further testified that as the Director of the Investigation Committee pursuant to statute he assigned all sexual assault crimes to the State Police. After it was reported to the State Police, the matter went forward with the customary investigation and ultimately resulted in Charles Curry entering a guilty plea. In October 2001, Charles Curry was sentenced to prison. It is undisputed that from February 7, 2000 to the date of the filing of this action that Anissa Barbina had no contact with Charles Curry. Judge Moats, in the Order entered in this action on September 20, 2005, made the following Findings of Facts and Conclusions of Law:

"8. Sheriff Sinclair and Prosecutor Bord both denied that they received said notice, but whether or not they received said notice is not material to the Court in the determination of this summary judgment motion;

11. The undisputed evidence before the Court is that after February 7, 2000, the day the report of improper touching was made to the West Virginia Department of Health and Human Resources, there was no subsequent contact between Charles Currey and his granddaughter, Anissa Barbina.

19. In this case there is no allegation or proof offered that Sheriff Sinclair entered into a special relationship with the Plaintiffs. First, there was no assumption by the Sheriff, by promises or actions, of an affirmative duty to act. There was no allegation of knowledge on the part of the Sheriff that inaction could lead to harm and there was no allegation of justifiable reliance on the Sheriff to take affirmative action.

23. The Court finds that though there are exceptions to that rule, in this particular case none of the exceptions recognized by the West Virginia Supreme Court apply. There was no physical touching of the Plaintiff or physical injury caused to the Plaintiff by the Sheriff. According to the allegations of the complaint the plaintiff believes she has suffered emotional and mental injury because Sheriff Sinclair did not act upon allegedly being notified of the assault on her by her grandfather. This injury was not caused by Sheriff Sinclair. There was no touching caused by the Sheriff and simple negligence on the part of Sheriff Sinclair does not create a cause of action pursuant to the public duty doctrine.

24. The Court further finds that failure to report would not in a direct sense be a proximate cause of the injury to Anissa Barbina and that even if the Sheriff was negligent in failing to report, that negligence would not be the proximate cause of the injury to the child since there is no evidence of any contact between the child and her grandfather subsequent to the time the Sheriff was allegedly notified of the improper touching. *Arbaugh, Jr., v. Board of Education, et al.* (No. 31346) decided in the September 2003 term of the West Virginia Supreme Court."

**THE ASSIGNMENT OF ERROR RELIED UPON ON APPEAL INsofar AS IT  
APPLIES TO CLARK SINCLAIR, AS FORMER SHERIFF  
OF TAYLOR COUNTY, WEST VIRGINIA**

The trial court erred in granting Clark Sinclair, the now former Sheriff of Taylor County, West Virginia, a summary judgment. Points and authorities relief upon by the Appellee, Clark Sinclair, former Sheriff of Taylor County, West Virginia.

**POINTS AND AUTHORITIES RELIED UPON**

**STATUTES:**

*West Virginia Code*, §29-12A-5(b)

*West Virginia Code*, §29-12A-3(a)

*West Virginia Code*, §49-5D-2

*West Virginia Code*, §49-6A-2

**CASES:**

*Wood v. Acordia of West Virginia, Inc.*, 217 W. Va. 406, 618 S.E.2d 415 (2005)

*Beckley v. Crabtree*, 189 W. Va. 94, 428 S.E.2d 317 (1993)

*Sewell v. Gregory*, 179 W. Va. 585, 587, 371 S.E.2d 82, 84 (1988)

*Randall v. Fairmont City Police Department*, 186 W. Va. 336, 412 S.E.2d 737 (1991)

*Benson v. Kutsch*, 181 W. Va. 1, 380 S.E.2d 36 (1989)

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*Arbaugh, Jr. v. Board of Education, et al.*, 214 W. Va. 677, 591 S.E.2d 235 (2003)

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*Barnes v. Sears, Roebuck & Co.*, 406 F.2d 859 (4<sup>th</sup> Cir. 1969)

*Johnson v. West Virginia University Hospitals, Inc.*, 186 W. Va. 648, 413 S.E.2d 889 (1991)

*Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992)

**DISCUSSION OF LAW**

**A. STANDARD FOR REVIEW OF THE CIRCUIT COURT'S ENTRY OF SUMMARY JUDGMENT IS DE NOVO.**

**STANDARD OF REVIEW**

Appellate review of the Circuit Court's Order granting a Motion for Summary Judgment is reviewed *de novo*. *Wood v. Acordia of West Virginia, Inc.*, 217 W. Va. 406, 618 S.E.2d 415(2005).

**B. THE TRIAL COURT DID NOT ERR IN THE GRANTING OF MOTION FOR SUMMARY JUDGMENT AS TO CLARK SINCLAIR, FORMER SHERIFF OF TAYLOR COUNTY, WEST VIRGINIA.**

**i. The Sheriff is immune from suit.**

Pursuant to the West Virginia Governmental Tort Claims and Insurance Reform Act codified in *W. Va. Code §29-12A-5(b)*, employees of political subdivisions are immune from personal tort liability, unless:

(1) [h]is or her acts or omissions were manifestly outside the scope of employment or official responsibilities;

(2) [h]is or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner, or

(3) [l]iability is expressly imposed upon the employee by a provision of this code.

Pursuant to *W. Va. Code §29-12A-3(a)*, an employee is:

an officer, agent, employee, or servant, whether compensated or not, whether full-time or not, who is

authorized to act and is acting within the scope of his or her employment for a political subdivision. "Employee" includes any elected or appointed official of a political subdivision.

In applying the Act to a West Virginia Sheriff, the Court in *Beckley v. Crabtree*, 189 W. Va. 94, 428 S.E.2d 317 (1993), held that the sheriff employed by the county was entitled to immunity pursuant to §29-12A-5(b) for accidentally discharging a shotgun and injuring a state trooper during the completion of a joint arrest. *Id.* The Court held that the sheriff's actions in effectuating the arrest of a criminal suspect were clearly within the scope of his employment and that there was no indication that the sheriff committed any acts with malicious purpose, in bad faith, or in a wanton or reckless manner.

Similarly, the alleged inaction of Sheriff Sinclair was clearly within the scope of his employment. If indeed, Sheriff Sinclair had been notified of the alleged sexual abuse of Anissa Barbina, then any acts or failure to act would fall within his scope of employment and official responsibilities as the Sheriff of Taylor County to participate in the investigation of the alleged sexual abuse as designated in *W. Va. Code §49-5D-2* as he may be directed by the Prosecuting Attorney. Furthermore, there have been no allegations in the Appellants' Complaint that Sheriff Sinclair acted wantonly, willingly, recklessly or in bad faith. The alleged nonfeasance of Sheriff Sinclair does not rise to the level of bad faith or intentional acts expressly carved out as exceptions to immunity in the statute. Accordingly, Sheriff Sinclair is immune from suit.

- ii. **Even if this Court determines that Sheriff Sinclair is not immune from this suit pursuant to the West Virginia Governmental Tort Claims and Insurance Reform Act, he did not owe any duty to the Appellants and is not liable.**

One of the primary elements of a negligence action is the existence of a legal duty. See Sewell v. Gregory, 179 W. Va. 585, 587, 371 S.E.2d 82, 84 (1988). Generally, a governmental entity's duty in the context of an alleged failure to provide any, or sufficient, police protection to a particular individual is defined at common law by the "public duty doctrine". Randall v. Fairmont City Police Department, 186 W. Va. 336, 412 S.E.2d 737 (1991). The public duty doctrine is a principle independent of the doctrine of governmental immunity, although in practice, it achieves the same result. Benson v. Kutsch, 181 W. Va. 1, 380 S.E.2d 36 (1989). The public duty doctrine is that a local governmental entity's liability...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. *Id.* at 346. Absent a special relationship to the plaintiff, no liability for governmental inaction attaches. *Id.* To establish that a special relationship exists between a local government entity or employee and an 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 agents and the injured party; and
4. that party's justifiable reliance on the local governmental entity's affirmative undertaking.

Holstein v. Massey, 200 W. Va. 775, 490 S.E.2d 864 (1997).

The Sheriff of Taylor County, by statute, can be named a member of the Child Protective Services Investigatory Committee. That Committee was composed of a member of the

Department of Health and Human Resources, the Prosecuting Attorney's office, a representative of the West Virginia State Police, a representative of the Taylor County Sheriff's Department and a representative of the City of Grafton Police Department. The function of that body is as an investigatory body and not as a child protective body. See *W. Va. Code* §49-5D-2 (stating that the investigative team "shall be responsible for coordinating or cooperating in the initial and ongoing investigation...") The protection of the child and the treatment of the child and the supervision of the child is left in the hands of the Department of Health and Human Resources.

Pursuant to *W. Va. Code* §49-5D-2, the Prosecuting Attorney is in charge of the Child Protective Service Investigative Committee. The Prosecuting Attorney elects which governmental police agency will investigate any child protective services claims that are made and, in this particular case, the Prosecuting Attorney, John Bord, acknowledges that he did not designate the Sheriff of Taylor County as the person to investigate the alleged improper conduct of Charles Curry. In fact, John Bord testified under oath that he designated the West Virginia State Police to make an investigation into the allegations against Charles Curry. There is no contest to the issues set forth above.

Sheriff Sinclair did not, through any promises or actions, assume an affirmative duty to protect Anissa Barbina. He did not possess any specific knowledge that any inaction could lead to her harm and Sheriff Sinclair did not have any contact with Anissa Barbina or her family. Furthermore, there is no indication that John Barbina or Anissa Barbina relied on Sheriff Sinclair for protection from Charles Curry. Accordingly, there is no special relationship between Sheriff Sinclair and the Appellants and Sheriff Sinclair was not under any duty to protect them.

One of the Appellant's claims is that the Sheriff had a duty to report the assault under *W. Va. Code* §49-6A-2, even though the premise of his claim against the Sheriff under *W. Va. Code* §49-5D-2, is that the assault on the infant was reported to him by the WVDHHR.

- iii. **Summary judgment is warranted because the Appellants did not suffer any damages proximately caused by Sheriff Sinclair and no cause of action exists for failing to act under *W. Va. Code* §49-6A-2 or *W. Va. Code* §49-5D-2.**

No cause of action is recognized in the State of West Virginia for failing to act under *W. Va. Code* §49-6A-2. *Arbaugh, Jr. v. Board of Education, et al.*, 214 W. Va. 677, 591 S.E.2d 235, (2003). The same logic would apply to *W. Va. Code* §49-5D-2.

No damages have been alleged or can be alleged against Clark Sinclair. This is a civil action and not a suit for mandamus. Assuming that all the facts are alleged to be true in the Complaint and, even taking the allegations one step further and assuming that there is a duty on the part of Clark Sinclair to the Appellants, the Appellee, Clark Sinclair, is still entitled to summary judgment. There can be a failure to properly perform a duty owed, but, unless there are damages that result from the failure to perform the duty, there is no legitimate basis for a claim to be made by the party alleging that a Defendant breached a duty owed to her. In *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988), the court noted that "[i]n the matters of negligence, liability attaches to a wrongdoer, not because of a breach of a contractual relationship, but because of a breach of duty **which results in an injury** to others. (Emphasis added). See also *Sides v. Richard Mach. Works, Inc.*, 406 F.2d 445 (4<sup>th</sup> Cir. 1969); *Barnes v. Sears, Roebuck & Co.*, 406 F.2d 859 (4<sup>th</sup> Cir. 1969).

Damages, or resulting injury, are equally as important in a civil action as is the breach of duty. In this case, the improper conduct of Charles Curry occurred prior to February 8, 2000, the

date the Sheriff was allegedly notified of the prior incidents, and there has been no contact whatsoever by Charles Curry since that date. Appellants have not been damaged and cannot show or allege any damage as a result of the alleged failure of Clark Sinclair to act. There is no allegation in the Complaint that the conduct of Clark Sinclair caused an injury to the Appellants and there has been no evidence developed that the Appellants have been damaged by the inaction, if any, by Clark Sinclair.

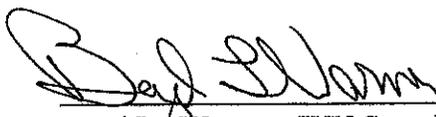
The lower court found that failure to report would not, in a direct sense, be a proximate cause of injury to Anissa Barbina and even if Sheriff Clark Sinclair was negligent in failing to investigate an assault on Anissa Barbina, that negligence was not the proximate cause of the injury to the child since there is no evidence of any contact between the child and her grandfather subsequent to the time the Sheriff was allegedly notified of improper touching. *Johnson v. West Virginia University Hospitals, Inc.*, 186 W. Va. 648, 413 S.E.2d 889 (1991), *Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992).

## CONCLUSION

This action was properly dismissed on the Motion for Summary Judgment by the Circuit Court of Taylor County because former Sheriff Clark Sinclair is immune from suit; a duty was never plead or attempted to be established under the "special relationship" theory against the Sheriff and the facts do not support such a claim; no cause of action existed against the former Sheriff for his conduct or lack of conduct under *W. Va. Code* §49-6A-2 or *W. Va. Code* §49-5D-2, and more importantly the Sheriff's conduct was not the proximate cause of any injuries allegedly suffered by the Appellants. The undisputed fact are that there was no contact between Anissa Barbina from the time the Sheriff was allegedly notified of the improper touching up to the time of filing suit.

**WHEREFORE**, Respondent, Clark Sinclair, former Sheriff of Taylor County, prays that this Honorable Court affirm the decision of the Circuit Court of Taylor County as to him.

Respectfully submitted this 16 day of August, 2006.



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**NO. 33102**

**JOHN BARBINA,  
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LORI GLOVER, CLARK SINCLAIR,  
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MENTAL HEALTH CENTER, INC.,**

**Respondents.**

**CERTIFICATE OF SERVICE**

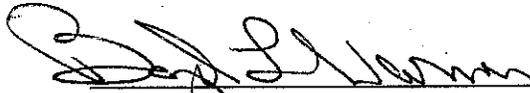
The undersigned hereby certify that a true copy of the foregoing instrument was served on each of the attorneys of record of all parties to the above-styled cause by enclosing the same in an envelope addressed to each such attorney and/or party, if a party has filed pleadings and is not represented by counsel, at his or her respective address as disclosed by the pleadings record herein and set forth below, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Clarksburg, Harrison County, West Virginia, on the 16th day of August, 2006, as follows:

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