

13-0531

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

MICHAEL A. GRAY,

Plaintiff,

v.

CIVIL ACTION NO.: 12-C-123
Honorable J.D. Beane

JEFFREY C. BOYD and
CITY OF PARKERSBURG

Defendants.

ORDER GRANTING DEFENDANTS CITY OF PARKERSBURG AND JEFFREY C.
BOYD'S
MOTION FOR SUMMARY JUDGMENT

On the 3rd day of January 2013, came the parties for Defendants' Motion for Summary Judgment. The Court has reviewed the motion and supporting memoranda, Plaintiff's response, and Defendants' reply as well as exhibits attached thereto. After careful review of the pleadings filed herein, the Court does hereby GRANT Defendants' motion. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This case arises from a motor vehicle accident involving a motor vehicle owned and operated by the Plaintiff, Michael Gray, and a City of Parkersburg fire truck operated by Jeffrey Boyd. The collision occurred on December 3, 2011 at the intersection of Avery Street and 7th Street in downtown Parkersburg, WV.

2. Just moments prior to the collision, two fire trucks pulled out of the fire station next to the Municipal Building near Avery Street and 4th Street in response to a motor vehicle accident which had just occurred on the Parkersburg-Belpre toll bridge. One of the fire trucks was operated by Defendant Boyd. Boyd activated the lights and siren on the fire truck before departing for the emergency call.

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CAROLE JONES
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3. As the fire trucks approached the intersection of Avery and 7th Street, the first fire truck proceeded through a green light without incident. As the second truck operated by Boyd approached the intersection, the light turned red. Boyd was travelling approximately 35 mph as he approached the intersection, but slowed down through the intersection. His co-worker also activated the horn on the truck as he approached the intersection to warn other vehicles of the approaching emergency vehicle. The lights and siren on Boyd's truck were activated from the time he departed the station until he proceeded through the subject intersection.

4. The operators of the vehicles in the right-hand lane on Seventh Street clearly saw and/or heard the approaching fire truck as they remained stopped at a green light while the fire truck operated by Jeffrey Boyd passed through the intersection. The Plaintiff, Michael Gray, was driving eastbound in the left-hand lane on 7th Street as he approached the intersection in question. Plaintiff proceeded to drive through the intersection in front of the fire truck operated by Boyd. Although Boyd testified that he attempted to avoid the collision, he was not able to do so. The fire truck operated by Boyd did clip the rear of Gray's vehicle causing him to spin around multiple times in Seventh Street.

5. There was an eyewitness to the collision, Matt Winans, who was the first vehicle in the right-hand lane of 7th Street. Mr. Winans stated that the lights and sirens on the fire truck operated by Boyd were activated as he approached the intersection. Winans also confirmed Boyd's testimony that he slowed down as he approached the intersection. In essentially all respects, Matt Winans corroborates and supports Jeffrey Boyd's description of the collision.

CONCLUSIONS OF LAW

1. Under the law of West Virginia, summary judgment should be granted when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law. The party who moves for summary judgment has the burden of showing there is no genuine issue of fact. When the moving party presents depositions, interrogatories and affidavits or otherwise indicates that there is no genuine issue as to any material fact, to avoid summary judgment, the resisting party must present some evidence of facts or dispute. Stemple v. Dotson, 400 S.E.2d 561 (W.Va. 1990).

2. In Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W.Va. 1995), the West Virginia Supreme Court of Appeals revisited the standard to be applied in deciding whether to grant or deny a motion for summary judgment. The Court stated that while the facts and evidence are to be considered in the light most favorable to the non-moving party, "the nonmoving party must nonetheless offer some 'concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in ... [its] favor'." Id. at p.337, quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), quoting First National Bank of Arizona v. Cities Service Inc., 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

3. Further, the courts have established that "a 'genuine' issue of material fact is just that; in other words, the issue must be real, relevant, and not fabricated or concocted. Moreover, "the mere existence of a scintilla of evidence in support of the [plaintiff's] position will be insufficient." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2512 (1986) (emphasis added). Simply stated, the non-moving party must offer "some concrete evidence" in opposition to the motion. Williams v. Precision Coil, Inc., 459 S.E.2d. 329, 37 (W.Va. 1995). Finally, any such "evidence" must be properly made of record and may not consist of vague,

unsupported assertions by counsel.

4. In Syllabus Point 4 of Jack v. Fritts, 457 S.E.2d 431 (W.Va. 1995), the West Virginia Supreme Court of Appeals held that “in order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant was guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken. Syl. Pt. 1, Parsley v. General Motors Acceptance Corp., 280 S.E.2d 703 (W.Va. 1981). ~~“The determination of whether a plaintiff is owed a duty of care by the defendant must~~ be rendered as a matter of law by the court.” Parsley, 280 S.E.2d at 706. “If the plaintiff fails to establish the existence of a duty of care owed by the defendant to the plaintiff, then no case of *prima facie* negligence can be established.” Atkinson v. Harman, 158 S.E.2d 169, 175 (W.Va. 1967). “The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.” See Syl. Pt. 3, Jackson v. Putnam County Bd. of Educ., 653 S.E.2d 632 (W.Va. 2007).

5. In the case at hand, the Plaintiff has alleged a simple negligence case against Defendant Boyd based upon the standard of care applicable to conventional drivers. However, a different standard of care applies to Defendant Boyd, an operator of an emergency vehicle, than would apply to a conventional driver. See Davis v. Cross, 164 S.E.2d 899 (W.Va. 1968). In the instant matter, the Emergency Vehicles Statute applies and provides that operators of emergency vehicles have the right-of-way through intersections and are not liable for negligence so long as their actions comply with the statute.

6. W.Va. Code § 17C-2-5 provides:

§17C-2-5. Authorized emergency vehicles.

(a) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

...

(2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

...

(c) The exemptions herein granted to an authorized emergency vehicle shall apply only when the driver of any said vehicle while in motion sounds audible signal by bell, siren, or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted flashing lamp as authorized by section twenty-six, article fifteen of this chapter which is visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a warning light visible from in front of the vehicle.

(d) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

7. A companion statute to W.Va. Code § 17C-2-5 can be found at W.Va. Code § 17C-9-5, which sets forth non-emergency vehicles' obligations to an approaching emergency vehicle.

W.Va. Code § 17C-9-5 provides in relevant part:

§ 17C-9-5. Operation of vehicles and streetcars on approach of authorized emergency vehicles.

(a) Upon the immediate approach of an authorized emergency vehicle equipped with at least one flashing lighted lamp of a color authorized by section twenty-six [§ 17C-15-26], article fifteen of this chapter, which is visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle other than a police vehicle when operated as an authorized emergency vehicle, and when the driver is giving audible signal by siren, exhaust whistle, or bell:

(1) The driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the

authorized emergency vehicle has passed, except when otherwise directed by a police officer.

...

(b) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.

8. Defendant Boyd was operating an emergency vehicle (a fire truck responding to a motor vehicle accident) and did have his lights and sirens activated when he approached the intersection. This fact is corroborated by eyewitness, Matt Winans. Jeffrey Boyd also testified ~~that the horn on the truck was sounded prior to entering the intersection as an additional warning~~ of the approaching fire truck. Also, Defendant Boyd slowed down through the intersection in further compliance with W.Va. Code § 17C-2-5. Again, the fact that Boyd slowed down through the intersection is also corroborated by an independent eyewitness, Matt Winans. Finally, the fire truck at issue was equipped with at least one flashing lamp as authorized by W.Va. Code § 17C-15-26 which is visible under normal atmospheric conditions for a distance of 500 feet to the front of the vehicle as required by W.Va. Code § 17C-2-5 and § 17C-9-5.

9. The West Virginia Supreme Court of Appeals case of Davis v. Cross, 164 S.E.2d 899 (W.Va. 1968) is factually on point with the facts of this case and is controlling authority. In Davis, a fire truck owned and operated by the City of Elkins was responding to an emergency call with its lights and sirens activated when it ran a stop sign and collided with the Plaintiff who was on a motorcycle. Id. at 900. The operator of the motorcycle sued the City for negligence. The jury returned a verdict in favor of the Plaintiff, but the circuit judge set aside the verdict and entered judgment in favor of the City based on the Emergency Vehicles Statute. Id. On appeal, the West Virginia Supreme Court of Appeals upheld the lower court's entry of judgment in favor of the City finding that the Emergency Vehicles Statute negated any negligence on the part of the fire truck

driver and that his actions of proceeding slowly through an intersection with his lights and siren activated constituted reasonable care under the emergency circumstances. Id. at 904.

10. Although the Plaintiff in Davis claimed that he did not hear the sirens or see the fire truck's lights, multiple witnesses testified that the trucks lights and sirens were activated. In Davis, the Supreme Court found that the negative testimony by the Plaintiff was insufficient to overcome the positive testimony of multiple witnesses that the fire trucks' lights and siren were activated. Id. at 903. ~~Likewise, in the instant case, Plaintiff's negative testimony that he did not hear the siren~~ until the moment of impact is insufficient evidence to overcome Boyd and Winan's testimony that the siren was activated and audible. As noted in Davis, "The evidence of the plaintiff and his witness is negative in character. The most that can be said of it is that they did not hear the siren. That, however, is no evidence that it was not sounded." Id.

11. In the case at hand, there is no genuine issue of material fact that the lights and siren on the City fire truck were activated prior to proceeding through the intersection and colliding with Plaintiff's vehicle. Defendant Boyd or his co-worker also sounded a horn and slowed down prior to entering the intersection which is evidence that Boyd did operate the vehicle with due regard for the safety of others. Accordingly, the Court **FINDS** that the Emergency Vehicles Statute, W.Va. Code § 17C-2-5, negates any negligence on the part of Defendant Boyd and his actions of proceeding slowly through the intersection with his lights and siren activated constitute reasonable care under the emergency circumstances. As such, the Court **FINDS** that Defendant Boyd is entitled to summary judgment as a matter of law.

12. Furthermore, the Plaintiff's theories of liability against the City are purely derivative and predicated upon a finding of negligence against Boyd. Thus, the Court **FINDS** that the City is likewise entitled to summary judgment as a matter of law

WHEREFORE, for the reasons set forth above, the Court does hereby **GRANT** the Defendant's Motion for Summary Judgment. Accordingly, this matter is hereby **DISMISSED**, **WITH PREJUDICE**, and shall be removed from the Court's docket.

The Clerk is hereby Ordered to send copies of this Order to counsel of record.

ENTERED THIS THE 6th DAY OF February, 2013.



Honorable J.D. Beane

STATE OF WEST VIRGINIA,
COUNTY OF WOOD, TO-WIT:

I, CAROLE JONES, Clerk of the Circuit Court of Wood County, West Virginia, hereby certify that the foregoing is a true and complete copy of an order entered in said Court, on the 7 day of Feb., 2013, as fully as the same appears to me of record.

Given under my hand and seal of said Circuit Court, this the 27 day of March, 2013

Carole Jones

Clerk of the Circuit Court of
Wood County, West Virginia.

By: T. Walters Deputy