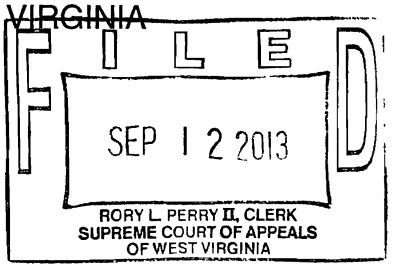
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 13-0531

MICHAEL A. GRAY,

Petitioner,

vs.

JEFFREY C. BOYD and CITY OF PARKERSBURG,

Respondents.

PETITIONER MICHAEL A. GRAY'S AMENDED BRIEF

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I. ASSIGNMENT OF ERROR

The following Assignment of Error is identified to this Honorable Court by the Petitioner:

The Circuit Court of Wood County, West Virginia, erred in granting Respondents' Motion for Summary Judgment. There were genuine issues of material fact as to the cause of the wreck of December 3, 2011, and as to the breach, if any, of the duties and the standards of care owed by the Petitioner to the Respondents, and by the Respondents to the Petitioner. The jury should have been permitted to hear the evidence and apply the facts of the case to the law pertaining to those duties owed and the standards of care required.

II. STATEMENT OF THE CASE

This case arises out of a motor vehicle collision which occurred on December 3, 2011, at the intersection of Avery and 7th Streets in Parkersburg, Wood County, West Virginia. Petitioner, Michael A. Gray, was proceeding eastbound on 7th Street and testified that he had a green light at the intersection of 7th Street and Avery Street. (Deposition of Michael A. Gray, Appendix 4, P. 4) Meanwhile, a fire truck owned by the City of Parkersburg, and operated by Jeffrey C. Boyd, both Respondents, was proceeding northbound on Avery Street toward its intersection with 7th Street. Respondent, Boyd, stated in his deposition that, as he proceeded northbound on Avery Street from the fire station, he knew that the traffic lights were controlled by Opticons, which are devices used to override the system to make the lights turn green for emergency vehicles. (Deposition of Jeffrey C. Boyd, Appendix 4, P. 8) Respondent,

Boyd, also testified in his deposition that he and other members of the fire department knew that the Opticon device was not working with respect to the traffic light at the intersection of 7th and Avery Streets on the date of the accident, and this fact had been known for some period of time. (Deposition of Jeffrey C. Boyd, Appendix 4, P. 8) Respondent, Boyd, admits that he drove the fire truck through a red light at the aforementioned intersection and collided with the rear passenger side of the Petitioner's vehicle. (Deposition of Jeffrey C. Boyd, Appendix 4, P. 23) The collision was of such force as to disable the Petitioner's vehicle, spin it around 180°, knock off its bumper, and cause the Petitioner's vehicle to come to rest facing in the direction from whence it came. The Petitioner's vehicle had to be towed from the scene. (Deposition of Michael A. Gray, Appendix 5, P. 30, 35)

The collision was investigated by Patrolman Nichols of the Parkersburg Police Department. In the crash report, which he filed, Patrolman Nichols concluded that Respondent, Boyd, had failed to yield the right-of-way to the Petitioner and had run a red light. Patrolman Nichols assigned all of the blame for the collision to Respondent, Boyd. No blame or improper driving was attributed by Patrolman Nichols to the Petitioner in the crash report. (Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Appendix 10, Exhibit D)

Following discovery on the issue of liability, Respondents, City of Parkersburg and Jeffrey C. Boyd, filed a Motion for Summary Judgment, and an accompanying Memorandum, alleging that the Petitioner was guilty of negligence in causing the collision as a matter of law, and that Respondent, Boyd, was operating his emergency vehicle fully in accordance with the requirements of W.Va. Code § 17C-2-5, and that he

was automatically exempt from liability as a matter of law. (Defendant's Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and Supplemental Memorandum in Support of Motion for Summary Judgment, Appendix, 7, 8 and 9) The Circuit Court ruled that, under the facts of this case, Petitioner had failed to establish that Respondent, Boyd, in any way, violated the duty required of him as the operator of an emergency vehicle under W.Va. Code § 17C-2-5. The Circuit Court entered an Order granting summary judgment to Respondents on the basis that: (1) There was no genuine issue of material fact as to the cause of the accident; (2) A different standard of care applied to Respondent, Boyd, as an operator of an emergency vehicle; (3) Since Respondent, Boyd, testified, and a witness corroborated, that he did have his lights and sirens activated when he approached the intersection and that he sounded the horn on his truck, he had met all of the requirements of W.Va. Code § 17C-2-5 and could not be held legally liable for causing the wreck; (4) Petitioner's testimony that he did not hear the siren until the moment of impact was not sufficient to overcome the testimony of Respondent, Boyd, and the witness, that the siren was activated and audible; (5) Despite the fact that the force of the collision was enough to total the Petitioner's vehicle and spin it around 180° in the intersection, that there was no evidence to support the claim that Respondent, Boyd, had failed to slow down before approaching the intersection, or that Respondent, Boyd, had otherwise failed to comply with his duty under W.Va. Code § 17C-2-5(d) to drive with due regard for the safety of other persons on the highway. (Order Granting Defendant's Motion for Summary Judgment, Appendix 13) (6) Despite that Petitioner's vehicle was struck in the right rear, indicating that he had more than gained the intersection when Respondent, Boyd,

drove through it, there was no evidence to suggest that Respondent, Boyd, had failed to use due care before entering the intersection. The Circuit Court's Order ignored or disregarded the following evidence in the record: (1) Respondent, Boyd, admitted to running a red light; (2) Respondent, Boyd, admitted to knowing that the Opticon system at the intersection of 7th and Avery Streets in Parkersburg, West Virginia was not operating properly at the time of the collision, and that he had prior knowledge of the same, as did all of the other firemen; (3) The collision was of sufficient force to disable the Petitioner's vehicle, and to spin it around in the road 180°, knocking its bumper off, requiring it to be towed from the scene; (4) The investigation officer found Respondent, Boyd, fully and completely responsible for having caused the collision, and attributed no fault to Petitioner; (5) Neither vehicle had a measurable line of sight to the other prior to the collision (Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Appendix 10, Exhibits A, B and C); (6) Petitioner's vehicle was struck in the right rear quarter panel, meaning that his vehicle was almost completely through the intersection before it was hit by the fire truck operated by Respondent, Boyd (Defendant City of Parkersburg's Response to Plaintiff's First Set of Interrogatories and Requests for Production, Appendix 1, Exhibit B); (7) Petitioner stated that he did not hear a horn or a siren, nor did he see lights flashing, until immediately before the impact of the two vehicles (Deposition of Michael A. Gray, Appendix 5, P. 25 and 26)

III. SUMMARY OF ARGUMENT

Petitioner summarizes his argument as follows: (1) There were genuine issues of material fact as to the cause of the wreck of December 3, 2011; (2) There were genuine issues of material fact as to whether Petitioner and/or Respondents breached

their respective duties each to the other pursuant to W.Va. Code §17C-2-5 and W.Va. Code § 17C-2-9; (3) The Circuit Court substituted its judgment for that of the jury in determining issues of negligence, comparative negligence, causation, duty, standard of care witness credibility and other matters; (4) The Circuit Court adopted a view of the evidence in the light most favorable to the moving part (the Respondents), rather than adopting a view of the evidence in the light most favorable to the non-moving party (Petitioner); (5) The Circuit Court, in its findings, accepted the veracity of certain evidentiary matters while at the same time completely ignoring and/or disregarding the veracity of other evidentiary matters which favored the Petitioner's version of events as to how the collision occurred and as to the question of fault.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes oral argument is necessary in this case to provide an opportunity for the Court to inquire about specific facts and circumstances surrounding the wreck which is the subject of this case, and the application of the law as it pertains to the respective duties of the Petitioner and Respondent in the operation of their motor vehicles at the time of the collision.

V. ARGUMENT

A. Standard of Review.

"A circuit court's entry of summary judgment is reviewed de novo." Painter v. Peavy, 192 W.Va. 189, pt. 1, syl., 451 S.E.2d 755 (1994).

This Court has decided that it will apply the same standard as a circuit court when deciding issues of summary judgment:

> "Because appellate review of an entry of summary judgment is plenary, this Court, like the circuit court, must view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor. An appellate court is not restricted to the circuit court's reasoning but can affirm or reverse the entry of summary judgment on any independently sufficient ground." Asaad v. Res-Care, Inc., 197 W.Va. 684, 478 S.E.2d 357 at 360 (W.Va., 1996)

"A motion for summary judgment should be granted only 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 the law." Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York, 148 W.Va. 160, pt. 3, syl., 133 S.E.2d 770 (1963). Additionally:

> "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Painter v. Peavy, 192 W.Va. 189, pt. 4, syl., 451 S.E.2d 755 (1994)

A "totality of circumstances" analysis must be used by the circuit court:

> "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Williams v. Precision Coil, Inc., 194 W.Va. 52, pt. 2, syl., 459 S.E.2d 329 (1995)

"The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Painter v. Peavy, 192 W.Va. 189, pt. 3, syl., 451 S.E.2d 755 (1994). Also, in Williams v. Precision Coil, Inc., the Court noted that "'credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.' " Williams v. Precision Coil, Inc., 194

W.Va. at 59, 459 S.E.2d at 336 (1995), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216.

This Court has repeatedly ruled that issues of negligence, due care, proximate cause, and concurrent negligence are all the province of the jury, not the circuit court judge:

> "Questions of negligence, due care, proximate cause, and concurrent negligence present issues of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men may draw different conclusions from them." Evans v. Farmer, 148 W.Va. 142, pt. 2 syl., 133 S.E.2d 710 (1963); Butler v. Smith's Transfer Corporation, 147 W.Va. 402, pt. 8 syl., 128 S.E.2d 32 (1962); Lester v. Rose, 147 W.Va. 575, pt. 14 syl., 130 S.E.2d 80 (1963); Leftwich v. Wesco Corporation, 146 W.Va. 196, pt. 7 syl., 119 S.E.2d 401 (1961); Brace v. Salem Cold Storage, Inc., 146 W.Va. 180, pt. 5 syl., 118 S.E.2d 799 (1961); Spurlin v. Nardo, 145 W.Va. 408, pt. 3 syl., 114 S.E.2d 913 (1960); Lawrence v. Nelson, 145 W.Va. 134, pt. 1 syl., 113 S.E.2d 241 (1960); Clay v. Walkup, 144 W.Va. 249, pt. 2 syl., 107 S.E.2d 498 (1959); Wilson v. Edwards, 138 W.Va. 613, pt. 4 syl., 77 S.E.2d 164 (1953)

Even in cases where a trier of fact could come to two different conclusions, this Court has ruled that, "All reasonable doubts regarding the evidence must be resolved in favor of the non-moving party." Adkins v. K-Mart Corp., 204 W.Va. 215, 511 S.E.2d 840 at 845 (W.Va., 1998).

This Court has delineated and very clearly explained the burden of the moving party, the duty of the circuit court, and the benefit of the doubt given to the non-moving party:

> "The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment; in assessing the record to determine whether there is a genuine issue as to any material facts, the circuit court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought. The inferences to be drawn from the underlying affidavits, exhibits, answers to interrogatories, and depositions must be viewed in the

light most favorable to the party opposing the motion." Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (W.Va., 1995) at 747.

Finally, this Court has stated that it is not the duty of the circuit court to try the issues of the case, but to decide if there are issues to be presented to a jury:

"On a motion for summary judgment, neither a trial nor appellate court can try issues of fact; a determination can only be made as to whether there are issues to be tried. To be specific, if there is any evidence in the record from any source from which a reasonable inference can be drawn in favor of the nonmoving party, summary judgment is improper." Ibid., at 747.

B. Application of facts to the law.

If ever there was a case where summary judgment should have been denied by the Circuit Court, this is the one. There is no dispute that Respondent, Boyd, ran a red light. (Appendix P. 98, 118) There is no dispute that Respondent, Boyd's, fire truck hit the Petitioner's vehicle hard enough to total it and spin it around 180° in the intersection. (Appendix P. 20, 124 and 208) There is no dispute that Respondent, Boyd, knew that the Opticon system at the intersection of 7th and Avery Streets was not working at the time of the collision. (Appendix P. 97) There is no dispute that Respondent, Boyd, could not see the vehicle driven by Petitioner until the Petitioner was almost in the intersection, if not in the intersection. (Appendix P. 99, 205) There is no dispute that Petitioner did not hear a horn and did not hear a siren until immediately before the right rear end of his vehicle was struck by the fire truck. (Appendix P. 119) Yet, with all of this information, the Circuit Court ruled, as a matter of law, that there was no set of facts by which Petitioner could establish liability on the part of the Respondents for causing the wreck which injured the Petitioner. The Circuit Court's ruling reached a conclusion that was entirely opposite of the conclusion reached by the Parkersburg City Police Officer who investigated the wreck and determined, based on the investigation, that

Respondent, Boyd, was entirely responsible for causing the wreck, and that Petitioner did nothing to contribute to it. (Appendix P. 208, 216) Moreover, the Circuit Court's ruling completely ignored the Petitioner's claim against the City of Parkersburg, that it should have repaired the Opticon system in a timely fashion, in which case the light for Petitioner would have been red, he would have stopped, and the wreck would never have happened in the first place. The Circuit Court essentially ruled, as a matter of law, that the City of Parkersburg bore no responsibility for its breach of this obligation and its negligence in failing to fulfill its duty to maintain its streets and highways in a safe condition for motorists driving on them, including the Petitioner.

It is clear that both the Petitioner and Respondent, Boyd, were charged with certain requirements in the safe operation of their respective vehicles at the time and place of the collision. W.Va. Code § 17C-2-5 states that the driver of an authorized emergency vehicle, when responding to an emergency call, may proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation, and upon sounding an audible signal by bell, siren or exhaust whistle as may be reasonably necessary, and by employing at least one lighted flashing lamp. Having done so, W.Va. Code § 17C-2-5(d) further provides that the foregoing requirements, even if met, 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 provision protect the driver from the consequences of his reckless disregard for the safety of others. Yet, despite the fact that Respondent, Boyd, knew that he could not change the light from green to red for vehicles eastbound on 7th Street, and despite the fact that vehicles traveling northbound on Avery Street cannot see vehicles traveling eastbound

on 7th Street until both vehicles are essentially within the intersection, Respondent, Boyd, hit Petitioner's vehicle hard enough to total Petitioner's car and spin it completely around in the road. Moreover, the investigating officer, an employee of the City of Parkersburg, found Respondent, Boyd, to have caused the wreck. It is the position of the Petitioner that the question of whether Respondent, Boyd, met the standard of care required of him in the operation of the fire truck pursuant to W.Va. Code § 17C-2-5 is one of fact to be determined from the evidence in the case. Likewise, the evidence of whether Petitioner met his standard of care in the operation of his vehicle and either caused or contributed in some fashion to the collision is a question of fact for a decision by the jury.

W.Va. Code § 17C-2-9 provides that, even though motorists must yield the right-of-way to emergency vehicles, drivers of those emergency vehicles still have the duty and the legal obligations to operate those vehicles in a safe manner. In other words, just because a fire truck has the right-of-way, does not mean that it can blast through an intersection, run a red light and fail to yield to a motorist already in that intersection and, in fact, more than half-way through that intersection, as the evidence suggests. Accordingly, for the Circuit Court to have ruled, as a matter of law, that there is no set of facts under which a jury could find that Respondent, Boyd, violated his standard of care, and that the Petitioner did not, was in error. Moreover, the question of whether or not Respondent, City of Parkersburg, had a duty to repair the Opticon system well prior to the date of the collision so as not to have its fire trucks potentially proceeding through red lights at intersections when other traffic is not clearly visible constituted a breach of its duty to motorists traveling upon public highways within the City is a question of fact

for a jury to decide, and not for the Circuit Court to decide, as a matter of law, that such a duty does not exist under the facts and circumstances of this case.

The Circuit Court adopted, in its entirety, Respondents' version of the events which led to this collision. It either ignored or discounted the veracity of all of the evidence from which a jury could conclude that the wreck was the result of the negligence of both Respondents, Boyd and, the City of Parkersburg. In doing so, the Circuit Court substituted its judgment for that of the jury, and viewed the facts in the light most favorable to Respondents, rather than viewing those facts in the light most favorable to the Petitioner, as the law requires the Circuit Court to do. Given the knowledge of Respondent, Boyd, that the Opticon system at this intersection was not functioning properly, and had not been for some time, a jury could very easily conclude that his failure to come to a complete stop at that intersection before proceeding through it would have been the reasonable and prudent thing to do. This is particularly true, given the fact that there is virtually no line of sight to vehicles traveling eastbound on 7th Street from the vantage point that Respondent, Boyd, had while driving the fire truck northbound on Avery Street. (Appendix P. 99, 205) A jury could also easily find that the force of the impact between the Petitioner's car and the fire truck, in and of itself, establishes that Respondent, Boyd, was doing much more than "creeping" though the intersection (Appendix P. 103) and fully demonstrates that Boyd did not slow down, as he is required to do by W.Va. Code § 17C-2-5(d), nor did he operate the fire truck in a reasonably safe manner. A jury could also find that the City of Parkesburg, in failing to effect the repair of the Opticon system at that intersection, even though it had not been working for some time, was negligent, and that this negligence caused or at least

substantially contributed to the wreck. Had the Opticon system been operating properly, the light for the fire truck would have been green, and the light for the Petitioner's vehicle would have been red, and the jury could easily conclude that the wreck would never have happened.

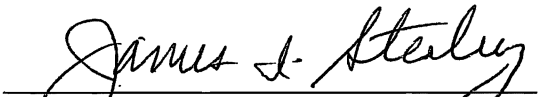
In summary, the Circuit Court totally substituted its own judgment and its own opinions and conclusions about how the wreck happened and about who caused the wreck for that of a jury. The opinion reached by the Circuit Court was even contrary to that of the police officer who investigated the wreck who is employed by one of the Respondents. It is the jury's job to sort out and then decide these issues. There is no basis whatsoever for the Circuit Court to have granted summary judgment when issues of negligence, comparative negligence, causation, duty, standard of care and witness credibility were unresolved. Such issues should be sorted out, analyzed and applied to the law by the jury. Nor was there even a hint of a basis for the dismissal of Respondent, City of Parkersburg, even though it is undisputed that the Opticon system which the fire department used to regulate the traffic light at the intersection of 7th and Avery Streets was not working, had not been working for some time, and did not allow Respondent, Boyd, or any other emergency vehicle operator to change that traffic light from green to red for traffic approaching that intersection from another direction.

VI. CONCLUSION

Petitioner requests that the decision of the Circuit Court of Wood County, West Virginia, which granted summary judgment to Respondents, Boyd and the City of Parkersburg, be reversed, and that the case be remanded with instructions to permit the

jury to hear the evidence and draw its own conclusions with respect to the issues of negligence, comparative negligence, causation, duty, standard of care and the breach thereof. There was no basis in law or in fact for the Circuit Court to grant summary judgment in this negligence case with such conflicting testimony, particularly when viewed in the light most favorable to the Petitioner, as the law requires.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned counsel for the plaintiff below Petitioner hereby certify that on the 10th day of September, 2013, they served the foregoing **AMENDED PETITIONER'S BRIEF** upon Cy A. Hill, Jr. and Andrew D. Byrd, counsel for defendants; and Thomas G. Steele, counsel for Allstate Insurance Company, by depositing true and exact copies thereof in the United States Mail, postage prepaid, addressed as follows:

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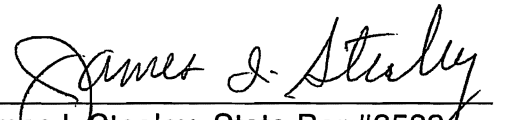

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