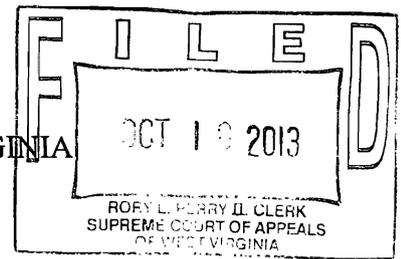


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



MICHAEL A. GRAY

Petitioner,

v.

Docket No. 13-0531

JEFFREY C. BOYD and the
CITY OF PARKERSBURG,

Respondents.

**RESPONDENTS JEFFREY C. BOYD AND THE CITY OF PARKERSBURG'S RESPONSE
TO PETITIONER MICHAEL A. GRAY'S BRIEF
FROM THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA
Civil Action No. 12-C-123**

Submitted by:

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RESPONSE TO ASSIGNMENT OF ERROR

Did the Circuit Court err in granting the Respondents' Motion for Summary Judgment by finding there were no genuine issues of material fact based upon the clear and unambiguous language of the West Virginia Code and the standing precedent of this Honorable Court?

STATEMENT OF THE CASE

Petitioner's description of the proceedings below omitted facts that are crucial to this Honorable Court's analysis of the issue presented on appeal. An examination of these facts should lead this Honorable Court to affirm the Circuit Court's decision in granting summary judgment as a matter of law. Thus, pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Respondents submit the following recitation of relevant facts below.

The Petitioner correctly points out on page 4 of his brief that subject collision underlying this matter occurred on December 3, 2011 at the intersection of Avery Street and 7th Street in downtown Parkersburg, West Virginia. 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 different motor vehicle accident which had just occurred on the Parkersburg-Belpre toll bridge. [See "Deposition Transcript of Jeffrey Boyd" - *Appendix pg. 96*]. One of the fire trucks was operated by Respondent Jeffrey C. Boyd. Respondent Boyd had been driving fire trucks for approximately five (5) years prior to December 2011. [*Id.* at *pg. 94*]. Upon exiting the fire station, Respondent Boyd activated the lights and siren on the fire truck before departing for the emergency call. [*Id.* at *pg. 96*].

As the two fire trucks approached the intersection of Avery and 7th Street, the first fire truck proceeded through a green light without incident. [*Id.* at *pg. 98*]. As the second fire truck operated by Respondent Boyd approached the intersection of Avery and 7th Street, his first

officer activated two additional manual sound devices. [*Id.* at *pg.* 98]. Respondent Boyd was driving approximately thirty (30) mph, but slowed down to five (5) mph or less to travel over the railroad tracks just before the intersection. As Respondent Boyd was traveling over the railroad tracks the light at the intersection of Avery and 7th Street was yellow. [*Id.* at *pg.* 98].

Upon his arrival to the intersection of Avery and 7th Street, Respondent Boyd slowed down to a creep through the intersection out of regard for the safety of other vehicles approaching the intersection from 7th Street. [*Id.* at *pg.* 103]. Respondent Boyd observed a Frontier bucket truck operated by eyewitness, Matthew Winans, stopped directly to his left in the far right lane of 7th Street. [*Id.* at *pg.* 99]. The bucket truck remained stopped at a green light while the fire truck operated by Respondent Boyd passed through the intersection. [*Id.* at *pg.* 99]. After observing no other traffic on 7th Street, Respondent Boyd continued through the intersection of Avery and 7th Street. [*Id.* at *pgs.* 99, 100]. As he traveled through the intersection with his lights and sirens activated, Petitioner Michael Gray proceeded into the intersection and was struck by Respondent Boyd's truck. The lights and siren on Respondent Boyd's truck were activated from the time he departed the station until he proceeded through the subject intersection. [*Id.* at *pgs.* 102-03].

The Petitioner, Michael Gray, was driving on 7th Street as he approached the intersection in question. [*See* "Deposition Transcript of Michael Gray" - *Appendix pg.* 118]. Petitioner Gray did not see the first fire truck pass through the intersection of Avery and 7th Street. [*Id.* at *pg.* 119]. The Petitioner does not dispute that the fire truck had its lights and siren on as it approached and entered the intersection. In fact, the Petitioner heard the siren as he entered the intersection of Avery and 7th Street. [*Id.* at *pg.* 119].

The driver of aforementioned Frontier bucket truck, Matt Winans, was an eyewitness to the collision. Matt Winans was the first vehicle stopped in the right-hand lane of 7th Street. [See “Deposition Transcript of Matt Winans” - *Appendix pg. 143*]. Mr. Winans testified that the lights and sirens on the fire truck operated by Respondent Boyd were activated as he approached the intersection. [*Id.* at *pg. 144*]. Mr. Winans testified that Respondent Boyd slowed down as he approached the intersection. [*Id.*]. In fact, Mr. Winans stayed at the scene of the incident to advise emergency personnel that the accident was not Respondent Boyd’s fault. [*Id.* at *pgs. 145-146*].

SUMMARY OF ARGUMENT

The Honorable J.D. Beane’s February 6, 2013 Order granting the Respondents’ Motion for Summary Judgment should be affirmed by this Honorable Court. In his brief, Petitioner requests that this Court ignore the West Virginia Code and West Virginia case law with respect to authorized emergency vehicles. The West Virginia Code defines the obligations of the operators of emergency vehicles and citizens in W.Va. Code §§ 17C-2-5 and 17C-2-9. The record below is clear that Respondent Boyd complied with the West Virginia Code and did not act with a reckless disregard for the safety of others in operating the fire truck. Respondent Boyd acted with due regard for the safety of others when he slowed down as he approached the intersection of 7th Street and Avery with his lights and siren activated. Furthermore, this Honorable Court’s common law precedent supports the Defendants’ position in this case. Accordingly, the Circuit Court properly granted the Respondents’ Motion for Summary Judgment.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Respondents submit that oral argument is unnecessary as the record below is clear, the question presented has been authoritatively decided by this Honorable Court, and the facts and legal arguments on

behalf of the Respondents in upholding the Circuit Court's rulings have been adequately presented in Respondents' Brief and the record below. Furthermore, affirming the Circuit Court's February 6, 2013 Order by memorandum decision pursuant to W.Va.R.A.P. 21(c) would be appropriate. If the Court, in its discretion, determines that oral argument would be appropriate, this case is suitable for Rule 19 argument. W.Va.R.A.P. 19(a).

ARGUMENT

This Honorable Court reviews a circuit court's entry of summary judgment under a *de novo* standard of review. Syl. Pt. 1, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994). "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." Id. at Syl. Pt. 2. "Summary judgment is appropriate if, from the totality of the evidence present, the record could not lead a rational trier of fact to find for the nonmoving party. Syl. Pt. 2, Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W.Va. 1995). With this standard in mind, this Honorable Court will consider the facts presented in the light most favorable to the Petitioner, the non-moving party. Painter, 451 S.E.2d at 758.

In his brief, Petitioner argues that the Circuit Court improperly granted the Respondents' Motion for Summary Judgment. Petitioner submits five (5) grounds in support of his argument on appeal that the Circuit Court ignored and/or disregarded certain evidence in the record. As more fully set forth below, Respondents respectfully submit that the Circuit Court properly granted Respondent's Motion for Summary Judgment.

I. THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE WEST VIRGINIA CODE SUPPORTS THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS.

Petitioner submits that the Circuit Court in the underlying matter ignored the Petitioner's claim against the Respondent City of Parkersburg that it should have repaired the Opticon system¹ in a timely fashion, in which case the light for the Petitioner would have been red. Petitioner further submits that the Circuit Court's ruling of February 6, 2013 was entirely opposite of the conclusion reached by the Parkersburg City Police Officer who investigated the incident. Petitioner states that the Circuit Court ruled that the City of Parkersburg bore no responsibility for the breach of its duty to maintain its streets and highways. [*See* Petitioners' Brief at pg. 12]. However, these arguments by the Petitioner ignore the clear and unambiguous language of West Virginia Code § 17C-2-5² and § 17C-2-9.

West Virginia Code § 17C-2-5 provides as follows:

(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

¹ An Opticon system is a traffic control system that automatically provides a green light through an intersection to emergency vehicles.

² The Petitioner also claims in his brief that West Virginia Code 17C-2-9 provides that even though motorists must yield that right-of-way to emergency vehicles, drivers of those emergency vehicles still have the duty to operate those vehicles in a safe manner.

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.

See W.Va. Code § 17C-2-5.

West Virginia Code § 17C-9-5 provides as follows:

- (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.

See W.Va. Code § 17C-9-5.

In Peak v. Ratliff, the West Virginia Supreme Court, in addressing W.Va. Code § 17C-2-5, stated that “[t]his provision, which is common to the statutes of other states, appears to contain a dual standard of care. The provision states that the driver of an emergency vehicle has the

"duty to drive with due regard for the safety of all persons," implying a negligence standard. However, this is followed by the statement that the driver is not protected "from the consequences of his reckless disregard for the safety of others." This language clearly suggests that the emergency driver is accountable only for reckless acts or gross negligence." 408 S.E.2d 300, 304 (W.Va. 1991).

The Court in Peak further stated that "[u]nder W.Va. Code § 17C-2-5, the appearance of the "reckless disregard" language suggests that this high measure of liability was reserved by the legislature for collisions other than those involving the emergency vehicle itself." Id. at 554. The reckless disregard language's omission from W.Va. Code § 17C-9-5 "indicates that the legislature was concerned solely with the operation of the emergency vehicle vis-a-vis other vehicles and elected to impose a general due care standard." Id.

In his brief, the Petitioner neglects to discuss W.Va. Code § 17C-9-5. Petitioner's primary focus is on W.Va. Code § 17C-2-5, a higher standard as set forth in Peak (i.e. reckless disregard), to support his argument that Respondent Boyd knew that he could not change the light from green to red, and that because the investigating officer found Respondent Boyd to have caused the wreck, there is a question of fact as to whether Respondent Boyd met the applicable standard of care. (*See* pg. 13 of *Petitioner's Brief*). Petitioner further argues that the testimony in this case regarding the force of the impact that jury could find that Respondent Boyd did not slow down as required by W.Va. Code § 17C-2-5. (*See* pgs. 14-15 of *Petitioner's Brief*). However, the record below establishes Respondent Boyd's compliance with the West Virginia Code.

In the case *sub judice*, it is undisputed that upon his approach to the intersection of Avery and 7th Street, Respondent Boyd slowed down to a creep through the intersection out of regard for the safety of other vehicles approaching the intersection from 7th Street. [*See* pg. 103 of

Appendix]. Moreover, the lights and siren on Respondent Boyd's truck were activated from the time he departed the station until he proceeded through the subject intersection. [*Id.* at *pgs. 102-103*]. Eyewitness, Matt Winans, corroborated the testimony of Respondent Boyd in this regard. [*See pg. 144 of Appendix*]. Moreover, the fire truck being operated by Respondent Boyd on December 3, 2011 was equipped with at least one lighted flashing lamp which was visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle. [*See pg. 186 of Appendix*].

The West Virginia Supreme Court has held that "a statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, State v. Epperly, 65 S.E.2d 488 (W.Va. 1951). "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, Crockett v. Andrews, 172 S.E.2d 384 (W.Va. 1970). In deciding the meaning of a statutory provision, it is clear that the West Virginia Supreme Court of Appeals first looks to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed. Appalachian Power Co. v. State Tax Dep't, 466 S.E.2d 424, 438 (W.Va. 1995).

Based upon the foregoing, it is undisputed that Respondent Boyd complied with the West Virginia Code and did act with a reckless disregard for the safety of others as set forth in Peak. Respondent Boyd acted with due regard for the safety of others when he activated the lights and sirens on the fire truck, slowed down to a "creep" as he approached the intersection of 7th Street and Avery Street, and attempted to avoid striking the Petitioner. Accordingly, the Circuit Court properly granted the Respondents' Motion for Summary Judgment.

Finally, Petitioner Gray argues in his brief that the Circuit Court erred in granting the Respondents' Motion for Summary Judgment in that the Circuit Court ignored his claim that the Respondent City should have repaired the Opticon system at the intersection in which this accident occurred. (*See* pg. 12 of *Petitioner's Brief*). First of all, the Plaintiff's Complaint makes no allegation of negligence against the City for failing to properly maintain the Opticon system at this intersection. Furthermore, there is no governing law in West Virginia that requires municipalities to implement Opticon systems on their traffic lights in the first place. The Opticon system is simply an additional layer protection provided by certain municipalities in West Virginia over and above the requirements set forth in the West Virginia Code. Simply stated, the Opticon system does not supplant the exemptions and duties provided by the Legislature in W.Va. Code §§ 17C-2-5 and 17C-2-9. For these reasons, the Petitioner's argument as to the City's alleged failure to maintain the Opticon system are unmeritorious.

II. THE WEST VIRGINIA SUPREME COURT'S DECISION IN DAVIS v. CROSS FURTHER SUPPORTS THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS.

In his brief, the Petitioner argues that the Circuit Court 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. (*See* pg. 15 of *Petitioners Brief*). Petitioner claims that the Circuit Court's grant of summary judgment had no basis when issues of negligence, comparative negligence, causation, duty, standard of care and witness credibility is unresolved. *Id.* Regardless of these claims, Petitioner has failed to address the guidance provided by this Honorable Court in Davis v. Cross, 164 S.E.2d 899 (W.Va. 1968), which Respondents respectfully submit is controlling in this matter. In fact, the Petitioner failed to address this controlling authority at all in response to the Respondents' motion for summary judgment below.

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.

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.

The facts of the present case are very similar to the facts in Davis. Here, Respondent Boyd slowed down to a "creep" through the intersection out of regard for the safety of other vehicles approaching the subject intersection with the lights and sirens on the fire truck activated. These facts are corroborated by an independent eyewitness, Matt Winans, and not disputed with any credible evidence by the Petitioner. Below, the Petitioner simply failed to present any

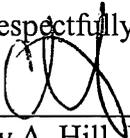
genuine issue of material fact to defeat summary judgment under the applicable statutes and the Davis case.

CONCLUSION

Based upon the foregoing arguments, Respondents submit that this Court should affirm the February 6, 2013 Order granting their Motion for Summary Judgment. The record below is clear that Respondent Boyd complied with the West Virginia Code. Respondent Boyd acted with due regard for the safety of others when he approached the intersection of 7th Street and Avery and did not act with a reckless disregard for the safety of others so as to remove the statutory exemptions applicable to the operators of emergency vehicles. Furthermore, this Honorable Court's decision in Davis v. Cross is applicable and supports the Respondents' position. Accordingly, the Circuit Court properly granted the Respondents' Motion for Summary Judgment.

WHEREFORE, the Respondents, Jeffrey C. Boyd and the City of Parkersburg, by and through their counsel of record, respectfully pray that this Honorable Court deny Petitioner's Petition for Appeal and uphold the Circuit Court's February 6, 2013 Order granting the Respondents' Motion for Summary Judgment. The Respondents further pray for such further and full relief as this Honorable Court deems appropriate under the circumstances.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing "*Respondents Jeffrey C. Boyd and City of Parkersburg's Response to Petitioner Michael L. Gray's Brief*" was served via US Mail, this 18th day of October, 2013, to the following:

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