

15-0711

FILED

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

2015 JUN 26 PM 1:39

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DAVID KING As Administrator of the
Estate of WILMA ANN KING, Deceased

J.E. HOOD
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JUL -1 2015

Attorney General Office
Tax Division

Plaintiff,

v.

Civil Action No. 13-C-199
Judge Christopher D. Chiles

THE WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
MOTOR VEHICLES,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On the 18th day of June, 2015 the above-styled civil action came for a hearing on the Defendant's Motion for Summary Judgment. The Plaintiff, David King as Administrator of the Estate of Wilma Ann King, appeared by counsel, Dwight J. Staples and Gail Henderson- Staples, and the Defendant, The West Virginia Department of Transportation, Division of Motor Vehicles, appeared by their counsel, Mary Downey.

After considering the parties briefs, arguments and representations of counsel, the Court finds as follows:

1. On June 2, 2014 David King, as Administrator of the Estate of Wilma Ann King, filed his *Amended Complaint* against the Department of Transportation, Division of Motor Vehicles (hereinafter referred to as Division) for the death of Wilma King.
2. Plaintiff alleges that the Division was negligent when on February 17, 2009, it medically approved Ms. Peyton's driver's license by failing to require a follow-up

medical report and by failing to refer her medical history to the Division's Medical Advisory Board.

3. The Defendant alleges that they are entitled to qualified immunity because they contend the act of referring someone's medical history to the Division's Advisory Board is a discretionary act.
4. The Court finds that "To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions." Syl. Pt. 10, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 756 (2014).
5. The Court also finds that "To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must 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, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 756 (2014).
6. As the Defendant recognizes in its Motion for Summary Judgment, "There must first be a determination of the acts or omissions that gave rise to the suit. If the acts or omissions giving rise to the suit fall within the category of nondiscretionary duties, qualified immunity does not follow." In this case the Division's regulation in effect at

the time Ms. Peyton's license was reinstated in February 2009, W. Va. Code R. § 91-5-3(2006), **required** the Division to refer her medical file to the Medical Advisory Board for its review and recommendation before her license could be reinstated. This was not done.

7. The Court therefore **FINDS** that the act of referring a licensee's medical records to the Division's Advisory Board was a nondiscretionary duty and therefore **FINDS** that the Division is not entitled to qualified immunity in this case.

The Court **DENIES** the Defendant's Motion for Summary Judgment. The Court finds that there are still substantial issues of fact that remain at this time.

Defendant's exceptions and objections to the Court's ruling are hereby noted and preserved.

The Court **FURTHER DIRECTS** the Circuit Clerk of Cabell County, West Virginia to forward upon its entry certified copies of this Order to the parties' counsel at the addresses listed below.

Gail Henderson- Staples, Esq.
Dwight J. Staples, Esq.
Henderson, Henderson, & Staples, L.C.
711 Fifth Avenue
Huntington, WV 25701

Mary M. Downey, Esq.
Assistant Attorney General
State Capital Building 1, Room W-435
1900 Kanawha Boulevard East
Charleston, WV 25305

Entered this 26th day of June, 2015.

Christopher D. Chiles

Christopher D. Chiles, Judge

STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON JUN 26 2015

GIVEN UNDER MY HAND AND SEAL OF SAID COURT

THIS JUN 26 2015

Jeffrey E. Hood
CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA