No. 24446 -- Robert W. McCormick v. West Virginia Department of Public Safety, Division of Corrections, Joseph Skaff, Ron Gregory, Karen Schumaker, Donald Smith and Harold D. Gunnoe

Starcher, J., concurring in part and dissenting in part:

I join the majority opinion in all but one respect. I would reverse the circuit court's granting of summary judgment on behalf of the appellee Smith.

The majority refers at note 2 to conflicting evidence about the extent of Smith's contact with the CWRC. I am convinced from a review of the record that this evidentiary conflict creates material issues of fact, and these issues of material fact in turn preclude summary judgment.

The pertinent facts about the evidentiary conflict are as follows:

CWRC records reflect that in April, 1991 Gunnoe requested a $100 check to be made out to Smith for rent. Smith testified that prior to receiving this $100 check from the CWRC, Smith had no knowledge that Gunnoe was an inmate at the CWRC. After receiving the check, Smith testified that he confronted Gunnoe, who claimed to have previously told Smith of Gunnoe's work release status and a story about killing a man who had raped Gunnoe's sister. Smith testified that he knew that Gunnoe was lying when he claimed to have told Smith this story before, but Smith took no action to verify the truth of the story.

Notably, according to Smith's testimony, the receipt of the $100 CWRC check was the only contact that Smith would admit that he had with the CWRC. Smith said he had no recollection of ever meeting or speaking with any DOC employees, or

ever going to the CWRC -- and he said that if he had done so, he would have remembered it.

Contrary to Smith's testimony, DOC employee Donald Ervin specifically recalled meeting with Smith at the CWRC, and substantially discussing Gunnoe's "work for rent arrangement" with Smith.

According to Ervin, the work to be performed by Gunnoe consisted of "doing building maintenance on some apartments that he [defendant Smith] owned." Ervin explained that the meeting with Smith occurred some time after the $100 check was requested and approved.

Also contrary to Smith's testimony, DOC employee Karen Spoor specifically recalled having a telephone conversation with Smith about Gunnoe. Spoor also believed that Donald Ervin had spoken to Smith. Spoor stated that Smith indicated that Gunnoe was doing maintenance at Smith's apartments.

The foregoing conflict in the evidence is plain: two DOC employees have specific and consistent recollections of substantial discussions about Gunnoe with Smith, and Smith refuses to admit that these conversations occurred.

If a jury believed the DOC employees (of course, a jury would not have to do so), the jury could make at least two possible inferences from Smith's contrary testimony. One permissible inference is that Smith was innocently misremembering the facts.

However, an alternative permissible inference is that Smith was deliberately trying to conceal and minimize the truth about (1) the extent of Smith's appreciation that he was employing a man serving a prison sentence for a brutal murder -- and (2) about Smith's ability and opportunity to ascertain important information about that employee, once Smith learned about Gunnoe's criminal background.

A jury could further permissibly infer that if Smith is willing to deliberately misstate the truth to conceal important information showing Smith's involvement with the CWRC, Smith is also willing to be less than candid about other matters -- including the scope of Gunnoe's job.

What if such an inference is put together with the fact that Gunnoe installed window blinds for Ms. McCormick in her apartment -- and with the indisputably vague record about the exact scope and nature of Gunnoe's work in "building maintenance" for Smith?

From such a combination of facts and permissible inferences, a jury could conclude that the scope of Gunnoe's employment was broader than Smith was willing to acknowledge -- and that Smith knew that Gunnoe's work in fact included some degree of access to tenant areas, tenant contact, and/or even a grant of actual or apparent authority to perform repairs in tenants' apartments.

This Court recently stated in *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, ___, 459 S.E.2d 329, 336 (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 to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 553 (1986); *Masinter v. WEBCO Co.*, 164 W.Va. 241, 262 S.E.2d 433 (1980); *Andrick v. Town of Buckhannon*, 187 W.Va. [706] at 708, 421 S.E.2d [247] at 249. In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216. Summary judgment should be denied "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Pierce v. Ford Motor Co*., 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951). *Similarly, when a party can show that demeanor evidence legally could affect the result, summary judgment should be denied.*

(Emphasis added.)

Certainly, Smith's demeanor as a witness, as he contradicted the direct recollections of the DOC employees, could affect Smith's overall credibility -- and thus could affect the result of the appellant's claim against Smith.

Moreover, under the reasoning enunciated in the principal case cited by the majority, *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (Minn. 1983), it is clear that in a negligent hiring or retention case, if there is substantial factual dispute about the scope of employment or about the care that an employer needs to take, a jury question is

ordinarily presented. Such is the teaching of all of the negligent hiring and retention cases that the majority refers to in the instant case and that this Court cited in *State ex rel. Taylor v. Mills*, ___ W.Va. ___, ___ n. 7, ___ S.E.2d ___, ___ n. 7, 1997 WL 725779, No. 24150, Nov. 20, 1997.

On the record before us, a jury should make the determination as to the degree of risk associated with Gunnoe's job, the correlative degree and nature of Smith's duty with respect to hiring and retaining Gunnoe, whether that duty was breached, and whether such a breach proximately caused or contributed to Ms. McCormick's death.

As with the DOC, a finding of liability by Smith in this case would hardly be a certainty. Nevertheless, giving all permissible inferences to the appellant, a jury could find by a preponderance of the evidence that Smith employed Gunnoe to do building maintenance that included access to tenant areas and tenant contact; that Smith was negligent, despite ample opportunity, in not investigating to any degree the background and *bona fides* of such an employee -- even when Smith learned that the employee was serving a sentence for murder; and that such negligence proximately caused or contributed to Ms. McCormick's death.

Accordingly, I concur in part and dissent in part.

I am authorized to state that Special Justice Alan Moats joins in this separate opinion.