No. 25798 - Debbie Sipple, as Administratrix of the Estate of Sidney Ward Sipple, deceased, and Debbie Sipple, individually, v. David Starr, individually, and dba Rocket Mart, Inc., a West Virginia corporation, and Petroleum Products, Inc., a corporation

Davis, Justice, dissenting:

This was a simple and routine summary judgment case that has turned into a litigation nightmare. In this case, Sipple sought to hold Petroleum Products, Inc. (hereinafter "PPI"), a supplier of gasoline, liable for the death of her son, solely upon the basis that PPI distributed gasoline through the store in which her son was killed. Under the majority decision today, distribution of gasoline is all that is needed to establish a joint venture. Such a finding is contrary to the law. A joint venture requires a combination of property and skill to create a business entity, with a joint proprietary interest in which both parties share in the profits and maintain a mutual right to control the created enterprise. The sharing of profits must be joint and not several. *See* 10B Michie's Jurisprudence Joint Ventures, § 2 (1995).

In this case, PPI did not own the store and did not control the store. PPI's interest in the store involved only the distribution of its gasoline. Thus, the circuit court correctly concluded that no material issue of fact was in dispute, as PPI was not engaged in a joint venture with the store owner. It was specifically determined by the circuit

court that (1) David Starr, the only shareholder of Rocket Mart, owned and controlled Rocket Mart's premises; (2) PPI had no control over the store's daily affairs, including the hiring and firing of Rocket Mart employees; and (3) PPI and David Starr did not share in profits. The circuit court's decision was consistent with the standard for granting summary judgment. That is, "[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." Syl. pt. 1, *Tiernan v. Charleston Area Med. Ctr., Inc*., 203 W.Va. 135, 506 S.E.2d 578 (1998). "The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined." Syl. pt. 5, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). In Syllabus point 2 of *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 459 S.E.2d 329 (1995), we explained that

> 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.

Finally, in Syllabus point 5 of *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995), we explained the meaning of "genuine issue" as follows:

> Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

The facts of this case are consistent with the decision in *Cardounel v. Shell Oil Co.*, 397 So. 2d 328 (Fla. Dist. Ct. App. 1981). In *Cardounel*, the plaintiff drove into a service station to obtain water for his overheating vehicle. The service station was owned by Shell and leased to the gas station operator. The plaintiff got into an argument with the gas station operator, which culminated in the plaintiff being shot. An action was brought by the plaintiff in which he sought to hold Shell liable for the station operator's conduct. The trial court granted summary judgment to Shell. The appellate court affirmed, and in doing so held that "[t]he trial court was correct on the theory that [the gas station operator] was not an agent or employee, but was an independent contractor." *Cardounel*, 397 So. 2d at 328-329. (Citations omitted). *See also Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808 (Iowa 1994) (affirming summary

judgment for McDonald's because it did not have day-to-day operations control over franchisee); *Smith v. Exxon Corp*., 647 A.2d 577 (Pa. Super. Ct. 1994) (affirming dismissal of case against Exxon because it had only quality control over gasoline); *Myszkowski v. Penn Stroud Hotel, Inc*., 634 A.2d 622 (Pa. Super. Ct. 1993) (affirming summary judgment for Best Western because it did not control operative details of franchisee).

The majority opinion has leaped beyond rationality and reasonableness in order to conclude that genuine issues of material fact exist as to whether PPI was engaged in a joint venture with David Starr. With such an analysis, I cannot agree. Therefore, I respectfully dissent. I am authorized to state that Judge Kaufman, sitting as special judge, joins me in this dissent.