No. 30098—*Allstate Wrecker Service, et al. v. Kanawha Co. Sheriff's Dept., et al.*

McGraw, Justice, dissenting:

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I disagree with the majority that the evidence presented in this case is not sufficient to produce a genuine issue as to a material fact.

In *Williams v. Precision Coil, Inc*., 194 W.Va. 52, 459 S.E.2d 329 (1995), Justice Cleckley noted "This Court will reverse summary judgment if we find, after reviewing the entire record, a genuine issue of material facts exists or if the moving party is not entitled to judgment as a matter of law. *In cases of substantial doubt, the safer course of action is to deny the motion and to proceed to trial*." (emphasis added) *Id*. at 59. It was further stated that "we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion...as credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202, 216 (1986)). *Id*.

In the instant case, I believe Allstate Wrecker presented sufficient evidence to support its claim. The evidence put forth indicates Abbott's received a significantly higher percentage of calls from the 911 Emergency Service, which appears to contradict the Sheriff's Department's self-proclaimed, longstanding practice of calling whichever towing service was geographically closer. Additionally, further evidence was submitted by Allstate challenging the City of St. Albans' contention that the city alternated calls between the two companies.

City records obtained by Allstate Wrecker indicated Abbott's received almost twice as many calls as Allstate. This evidence alone could lead a reasonable jury to find that appellees have significant control over the relevant market in Kanawha County, and therefore, the case should not have been dismissed on summary judgment.

In *Barrett v. Fields, et al*., 924 F.Supp. 1063 (Kan. 1996), where a claim was brought against the county sheriff and other department officials alleging conspiracy to restrain wrecker business, the court dismissed a motion for judgment as a matter of law based on evidence suggesting the sheriff's department dispatched approximately 50% of all calls for towing services. The plaintiff's evidence indicated that during a four-year period, two particular wrecker services received 85% of the calls from the sheriff's department while the other four towing companies divided the remaining 15% among them. The court held "the jury could easily determine the defendants restrained competition for tow services...and that the restraint substantially injured competition in the market with little or no legitimate business justification." *Id*. at 1075.

Although I recognize summary judgment as a valuable litigation tool that promotes judicial economy, it is no substitute for a jury trial, and should only be used in the proper circumstances. "[T]he inquiry the court must make is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Williams*, 194 W.Va. at 61. The evidence present here is not so one-sided, therefore, I respectfully dissent.