STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
October 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

David M. Johns,
Plaintiff Below, Petitioner

vs) No. 11-0359 (Kanawha County 09-C-2226)

West Virginia Parkways, Economic Development and Tourism Authority, Defendant Below, Respondent

MEMORANDUM DECISION

Petitioner David M. Johns appeals the circuit court order granting summary judgment on behalf of Respondent West Virginia Parkways, Economic Development and Tourism Authority ("Parkways Authority"). The appeal was timely perfected by counsel, with the complete record from the circuit court accompanying the petition. Respondent Parkways Authority filed a timely response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On January 17, 2007, Petitioner David Johns was operating his pickup truck on I-77 near the Camp Creek exit when he collided with a large boulder that had fallen into the roadway. Petitioner received personal injuries and property damage. Petitioner filed suit against the Respondent Parkways Authority on January 27, 2009. In his complaint, petitioner alleged that rocks and debris had fallen into the roadway in that area numerous times, and Parkways Authority had notice that this was an unstable area which could cause an accident. The initial complaint was dismissed on November 25, 2009, because petitioner failed to follow proper notice procedures pursuant to West Virginia Code § 55-17-3(a)(1). Petitioner then re-filed the case on December 3, 2009, after giving proper notice.

Petitioner filed interrogatories, requests for admission and requests for production. Pursuant to these requests, the Radio Station Log Sheet from the State Police was produced, showing a call regarding a rock in the road at 9:57 p.m. A State Police Unit saw petitioner's accident at 10:07 p.m. that same evening. Petitioner was deposed, but produced no evidence as to how the rock got into the road, nor did he produce evidence that there had been prior rocks in the road.

Respondent filed a Motion for Summary Judgment on July 28, 2010. Respondent argued that the doctrine of qualified immunity precludes the Parkways Authority from being held liable for mere negligence, and based on the evidence submitted, petitioner has not shown that the Parkways Authority was even negligent. Petitioner responded, and a hearing was held on November 22, 2010.

The circuit court entered an Order granting summary judgment on behalf of Respondent on November 23, 2010. The circuit court found that none of the discovery gave rise to a question of fact on the issue of negligence against the respondent, as there was no sworn statement by petitioner or any other person as to foreseeability or notice, and there was no sworn statement by anyone that there were eyewitnesses to rocks falling in a particular area that would give rise to notice to respondent. The court found that petitioner had a duty to "make a case for a dispute of facts sometime within the above timeline that has been described and has failed to make one."

Petitioner appeals the circuit court's grant of summary judgment in favor of the respondent. This Court reviews a circuit court's entry of summary judgment under a *de novo* standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Petitioner argues that the circuit court erred in granting summary judgment to the respondent prior to the completion of discovery and development of the case. As a general rule, summary judgment is appropriate only after the parties have had adequate time to conduct discovery, and granting a motion for summary judgment before the completion of discovery is precipitous. *Board of Education of the County of Ohio v. Van Buren & Firestone, Architects, Inc.* 165 W.Va. 140, 144, 267 S.E.2d 440, 443 (1980). However, in order to defeat a motion for summary judgment, the petitioner must rehabilitate the evidence attacked by the Respondent; produce additional evidence showing the existence of a genuine issue for trial; or submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. *See*, Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). *Williams* states that "[a] nonmoving party cannot avoid summary judgment merely by asserting that the moving party is lying. Rather, Rule 56 requires a nonmoving party to produce specific facts that cast doubt on a moving party's claims or raise significant issues of credibility. The nonmoving

party is required to make this showing because he is the only one entitled to the benefit of all *reasonable* or *justifiable* inferences when confronted with a motion for summary judgment. Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition or rumors." 194 W.Va. 61, n. 14, 459 S.E.2d at 338, n.14 (emphasis in original).

Petitioner argues that further discovery was needed, as there was a "possibility" that further discovery could have produced evidence useful to Petitioner's case. However, "there is no requirement that all facts must be developed through discovery, and certainly no grounds for the assumption that they have been developed by discovery." *Masinter v. WEBCO Company.*, 164 W.Va. 241, 243, 262 S.E.2d 433, 436 (1980). Pursuant to *Crum v. Equity Inns, Inc.,* this Court stated that:

> An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. *Elliott v. Schoolcraft,* 213 W.Va. at 73, 576 S.E.2d at 800. However, at a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier. *Id.*

224 W.Va. 246, 254, 685 S.E.2d 219, 227 (2009). Petitioner had approximately four years from the time of this accident until the motion for summary judgment was granted to satisfy these requirements, but at no time did he meet this burden. The circuit court properly found that "the Court cannot make a case for the Plaintiff where Plaintiff's Counsel has failed to make one." Petitioner failed to produce any witness statements or witnesses, did not conduct any depositions, and did not meet his burden to defeat this motion for summary judgment. This Court finds no error in the circuit court's order granting respondent summary judgment.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh