

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Patricia Harrison, Individually and as
Administratrix of the Estate of Brian Good,
Plaintiff Below, Petitioner**

FILED

November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-0598 (Kanawha County 09-C-2085)

**City of Charleston, a West Virginia Municipal
Corporation, Defendant Below, Respondent**

MEMORANDUM DECISION

Petitioner Patricia Harrison, individually and as Administratrix of the Estate of Brian Good, appeals the circuit court's order granting summary judgment in favor of the Respondent City of Charleston. Respondent filed a response brief.

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.

Deposition testimony, police statements, and other evidence establish the following. Petitioner's decedent, Brian Good, used his truck to attempt to injure a former girlfriend. Good fled from Charleston police officers and two separate, high-speed vehicular pursuits ensued. Ultimately, Good rammed his truck into the police cruiser driven by Officer Owen Morris. Morris has stated that he then exited his cruiser because he was afraid that Good was about to use his truck to push the cruiser over a hillside or otherwise seriously injure Morris. Another officer pulled a police sports utility vehicle bumper-to-bumper with Good's truck, but Good rammed his truck against the sports utility vehicle, revved his engine loudly, and spun the truck's wheels, ignoring police directives to stop and exit his truck. Officer Morris indicated in his statement that he was concerned that he was about to be run over or "smashed" between vehicles. The officers fired their weapons at Good, shooting and killing him. The City asserts that the officers acted in self-defense and in defense of Officer Morris

when they intentionally shot Brian Good.¹ Forensic toxicology tests showed that Good was under the influence of drugs.

Petitioner sued Respondent City of Charleston asserting “negligence and/or intentional dereliction of duty” and wrongful death, and seeking compensatory and punitive damages. The Complaint asserts that the City is liable under a *respondeat superior* theory.² The City is a political subdivision of the State of West Virginia and, as such, is covered by the West Virginia Governmental Tort Claims and Insurance Reform Act (“the Act”), West Virginia Code §§ 29-12A-1 to -18. By order entered November 1, 2010, the circuit court granted summary judgment in favor of the City, concluding that it is immune from the claims in this suit pursuant to the Act. West Virginia Code § 29-12A-4 provides, in part:

(b)(1) Except as provided in subsection (c) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function

(c) Subject to sections five and six of this article, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows: . . .

(2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the *negligent* performance of acts by their employees while acting within the scope of employment.

(Emphasis added.) The circuit court concluded that West Virginia Code § 29-12A-4 permits recovery against a political subdivision only when the political subdivision’s employee *negligently* causes injury or death, not when the employee acts *intentionally*. The circuit court rejected the notion that the officers acted negligently when shooting Mr. Good. Instead, the circuit court found that “the purposeful firing of a weapon at a suspect, with the intent to actually shoot the suspect and realizing that injury or death is likely as a result, is an intentional act.” The circuit court distinguished this shooting from a negligent shooting where a firearm accidentally discharges, as occurred in *Beckley v. Crabtree*, 189 W.Va. 94, 428 S.E.2d 317 (1993).

¹ Charleston Police Officer Jerry Jones was also shot and killed. This memorandum decision does not address any claims that Officer Jones’s estate or personal representatives might have.

² The Complaint does not name any of the police officers as defendants and does not assert any federal statutory claim or any state or federal constitutional claim.

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). "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. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

Upon a review of the record and arguments of the parties, we conclude that there is no genuine issue of material fact and affirm the circuit court's summary judgment order regarding the specific claims made in this Complaint against this defendant. When granting summary judgment, the circuit court correctly relied on *Mallamo v. Town of Rivesville*, where we held that a municipality is immune under West Virginia Code § 29-12-4 from claims that its police chief committed conspiracy because conspiracy is an intentional act, not negligence. *Mallamo*, 197 W.Va. 616, 624-25, 477 S.E.2d 525, 533-34 (1996). Moreover, in another case we concluded that "claims of intentional and malicious acts are included in the general grant of immunity in *W.Va. Code*, 29-12A-4(b)(1). Only claims of negligence specified in *W.Va. Code*, 29-12A-4(c) can survive immunity from liability under the general grant of immunity in *W.Va. Code*, 29-12A-4(b)(1)." *Zirkle v. Elkins Road Pub. Serv. Dist.*, 221 W.Va. 409, 414, 655 S.E.2d 155, 160 (2007) (per curiam). *Accord*, *Chapman v. Jarrell*, 2005 WL 3088422, at *8 (S.D.W.Va. Nov. 17, 2005) (applying West Virginia Code § 29-12A-4 to conclude that a city in West Virginia is immune from a vicarious liability state-law negligence claim where plaintiff asserted that a city police officer had intentionally acted to physically harm the plaintiff).

Petitioner asserts that there are outstanding issues of material fact such that summary judgment was erroneous, including expert opinions that the officers violated accepted police procedures. However, even if petitioner's assertions are correct in this regard, they would not change the fact that the officers intentionally fired their weapons at Mr. Good.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 28, 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