IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

BLAKE AUTON, PLAINTIFF,

v. CIVIL ACTION NO.: 20-C-75-MW

ADAM GOODMAN and
PAUL UNDERWOOD, DEFENDANTS.

ORDER

This matter came before the Court on Defendant Adam Goodman's *Motion for Summary Judgement* and Defendant Paul Underwood's *Motion for Summary Judgment.* There appearing were Ryan J. Flanigan, Esq., on behalf of the Plaintiff, Kermit Moore, Esq., on behalf of the Defendant Adam Goodman, and ***Chip E. Williams, Esq.***, on behalf of Defendant Paul Underwood. After careful consideration of the facts and circumstances in this case along with arguments of counsel, and pertinent legal authorities, and for the reasons discussed more fully hereinafter, the Court FINDS and CONCLUDES that both the Defendants' *Motion for Summary Judgement* are DENIED.

I. Background

Plaintiff instituted this action on March 17, 2020, alleging that on March 28, 2018, Plaintiff was working for the City of Bluefield on a garbage truck that was owned by the City of Bluefield (hereinafter "the City"). On that date Defendant Adam Goodman (hereinafter "Goodman") was allegedly under the influence of drugs and/or alcohol while operating the garbage truck which belonged to the City. Further, Defendant Paul Underwood (hereinafter "Underwood") was on the back of the garbage truck along with Plaintiff. On that day, Goodman allegedly placed the garbage truck in reverse and hit something, which knocked Plaintiff of the garbage truck. Plaintiff landed in the road

behind the truck. Goodman continued to operate the garbage truck in reverse and backed over Plaintiff's right leg. Plaintiff further alleges that despite being knocked of the garbage truck, Underwood failed to notify Goodman that he was knocked off and in a dangerous position. Plaintiff filed one Count of Negligence against each defendant and is seeking damages included but not limited to past and future medical expenses, lost income, compensatory damages, and attorney's fees.

Defendant Goodman filed his Motion for Summary Judgment arguing that (1) Goodman is immune from liability pursuant to West Virginia Code § 23-2-6(a); and (2) he is immune from liability pursuant to West Virginia Code § 29-12A-5(b). He first argues that pursuant to West Virginia Code § 23-2-6(a):

> Any employer...who subscribes and pays into the workers' compensation fund...or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee....

Specifically, he argues that the, "The immunity from liability set out in the preceding section shall extend to every officer, manager, agent, representative or employee or such employer when he is action in furtherance of the employer's business and does not inflict an injury with deliberate intention." W.Va. Code Ann. § 23-2-6(a). Further, Plaintiff admitted having filed for workers' compensation coverage and was granted workers' compensation benefits as a result of the injuries sustained from the subject incident. In addition Goodman was not operating the garbage truck in a conscious, subjective, or deliberate way to produce Plaintiff's injuries, instead, he was reversing the truck solely for the purpose of collecting trash and he was only going five miles per hour.

Because Plaintiff's damages were covered by workers' compensation provided to him by his employer and there is no evidence to show Goodman had any deliberate intent to cause Plaintiff's injuries, then, he has immunity as set out in the aforementioned code as a co-employee of Plaintiff.

Second, Goodman argues that pursuant to West Virginia Code § 29-12A-5(b):

> An employee of a political subdivision is immune from liability unless one of the following applies:
> (1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities;
> (2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner ; or
> (3) Liability is expressly imposed upon the employee by a provision of this code.

Specifically, he argues that he was operating the garbage truck in order to pick up trash in the scope of his employment. Further, the substance allegedly found by the test conducted at Bluefield Regional Medical Center does not make his actions reckless. The accident report did not indicate any suspected use of drugs or alcohol nor did the narrative make a mention that he was under the influence and the criminal count against him was dismissed. Thus, none of the exclusions apply because he was working within the scope of his employment and his operation of the garbage truck was not in bad faith, or in a wanton or reckless manner.

Defendant Underwood filed his Motion for Summary Judgment arguing that (1) Plaintiff's Compliant must fail as a matter of law because it is precluded by W.Va. Code §§ 23-2-6 and 23-2-6a; and (2) Defendant is immune from suit under West Virginia Code § 29-12A-5.

First, he argues that it is uncontroverted that Plaintiff's injuries were covered by the workers' compensation insurer for the City and Plaintiff admits the same. Further, it

is clear based upon the plain an unambiguous language of West Virginia Code §§ 23-2-6 and 23-2-6a, that Underwood cannot be held liable for Plaintiffs alleged injuries because any such injuries were covered by the City of Bluefield's workers' compensation coverage.

Second, he argues that he is immune form suit pursuant to the West Virginia Governmental Torts Claims and Insurance Reform Act, Specifically, West Virginia Code § 29-12A-5(a)(11) provides that political subdivisions are immune from liability if a loss or claim results from ...any claim covered by any workers' compensation law or employer's liability law..." *O'dell v. Town of Gauley Bridge* 188 W.Va. 596, 425 S.E.2d 551 (1992). Further, because the City is a political subdivision, the immunity provisions of Governmental Tort Claims and Insurance Reform Act limit the extent to which the City and its employees may be held liable for their actions. He argues that four requirements must be met before a claim against a political subdivision is barred under the Governmental Tort Claims and Insurance Reform Act, which are: (1) the Plaintiff must have been injured by the negligence of an employee of a political subdivision, (2) the Plaintiff must have received the injury int eh court of and resulting from his or her employment, (3) the employer must have workers compensation coverage, and (4) the plaintiff must be eligible for such benefits.

He argues that in this case Plaintiff asserts that he was injured by the negligence of Underwood because of Underwood's failure to notify Goodman that the Plaintiff had fallen off the garbage truck. Thus, by Plaintiff's admission he was injured as a result of Underwood's negligence. Also, Plaintiff admits that he had workers compensation coverage and he admits that he was acting within the scope of his employment at the time

of his injury. Plaintiff also admits that he was eligible and did receive workers' compensation benefits as a result of the subject accident. Thus, the four-part test is satisfied, which provides the Defendant immunity from this suit. Finally, Underwood argues that even if all of the facts in the case are viewed in the light most favorable to the Plaintiff, he is still barred from bringing any cause of action against this Defendant as a result of the immunity provided under West Virginia Code § 29-12A-5(a)(11).

Plaintiff responds that on the Morning of March 28, 2018, at 8:05 a.m., the Defendant Adam Goodman was under the influence of opiates, oxycodone, hydrocodone, and hydromorphone while operating a six (6) ton garbage truck. Plaintiff suffered a traumatic amputation of his right leg, from the mid-thigh, because Goodman was high on drugs and drove over his leg. At that time, Goodman was employed by the City and the garbage truck was owned by the City. Plaintiff was also employed by the City. During their route, Goodman recklessly ran over a curb and the force was so great that it knocked Plaintiff off the back, yet, Goodman did not stop but continued to operate the truck and backed over Plaintiffs leg dragging him approximately 30-feet down the road. Only after Underwood went to the front of the truck and got Goodman's attention did he realize that he had ran over Plaintiff's leg.

According to the criminal investigation report, Goodman appeared shaken and nervous at the scene and was taken to Bluefield Regional Medical Center to undergo a mandatory drug screen where it was determined that while he was operating the six (6) ton garbage truck he was positive for Hydromorphone, Hydrocodone, Oxycodone, and Oxymorphone, which he had no prescription for, and which explains why he appeared shaken an nervous at the scene.

Plaintiff points out that that although Goodman argues he was "working within the scope of his employment" at the time, the City obviously did not agree. As a result of the incident, Goodman was terminated and according to the investigation, Goodman's supervisors with the City suspected he was using drugs for some time. Goodman was indicted for his conduct, however, due to procedural issues the case had to be dismissed.

Plaintiff points out that the case is not against the City, it is against Goodman and Underwood. He further points out that the question of whether being high on illegal drugs while operating a six (6) ton garbage truck and causing injury to the Plaintiff is within your job duty or "scope of employment" is a question of fact for a jury to decide. Plaintiff asserts that Underwood makes much of the same arguments, however, limited discovery has been done in this case, thus, both Motions for Summary Judgment have been filed prematurely. Finally, Plaintiff argues that because the crucial issues regarding whether the conduct that occurred on the day at issue was "within their scope of employment" is a question of fact and depending on how a jury answers that question of fact, will determine how the question of law, the application of the Workers Compensation immunity and West Virginia Governmental Torts Claims and Insurance Reform Act, applies in this case.

II. Standard of Review

The Court recognizes that ordinarily "[s]ummary 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." Syllabus point 4, *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994). The court in

Williams v. Precision Coil, Inc., 459 S.E. 2d 329 (W. Va. 1995), acknowledged that "[w]hen a motion for summary judgment is mature for consideration and properly is documented with such clarity as to leave no room for controversy, the non-moving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists." *Id.* at 335. Continuing, the *Williams* court stated "to be clear, there is no need for a circuit court to wait until after evidence has been received at trial when the standard we articulated in *Painter* has been met and summary judgment is warranted." *Id. Minnie WARZYNIAK, Plaintiff, v. CONSTANTINO C. ARCEO, M.D., Henry Breland, M.D. and Charleston Area Medical Center, Inc., doing business as Women & Children's Hospital, Defendants.*, 2000 WL 35540108.

A party is entitled to summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Material facts are those necessary to establish the elements of a party's cause of action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). *Settle v. Hall*, No. CIV.A. 2:11-00307, 2012 WL 1831845, at *1 (S.D.W. Va. May 18, 2012). Further, the Court has held recently that the burdens of proof in attempting to meet this test are allocated between the moving party(s) and opposing party(s), respectively, as follows:

a. Burden of the Moving Party:

A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such summary judgment *Smith v. Sears. Roebuck & Co*, 447

S.E.2d 255 (W. Va 1994). Although, on a motion for summary judgment, an adverse party may not rest upon the mere allegations or denials of his pleadings, the moving party still will not be entitled to summary judgment unless the record demonstrates he has met his initial burden of establishing that there is no genuine issue as to any material fact. *Ramev v. Ramey*, 180 W.Va. 230 (1990).

b. Burden of the Opposing Party:

When the moving party presents depositions, interrogatories or affidavits or otherwise indicates there is no genuine issue as to any material fact, the resisting party to avoid summary judgment must present some evidence that the facts are in dispute. *Williams v. Precision Coil, Inc.*, 459 S.E. 2d 329 (W. Va. 1995)... by offering more than a "scintilla of evidence"...sufficient for a reasonable jury to find in a non-moving party's favor. *Painter v. Peavy*, 451 S.E. 2d 755 (W.Va. 1994). *3 The Supreme Court has more recently, however, provided another facet for the Court to consider by the issuance of *Fayette County National Bank v. Gary C. Lilly, et al.* 199 W. Va. 499 (1997). In the *Lilly* case, the Court held as follows in the first two syllabus points: A motion for summary judgment should be granted only when (a) it is clear that there is no genuine issue of fact to be tried and (b) inquiry concerning the facts is not desirable to clarify the application of the law. Cited from Syl. Pt 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y.*. 148 W. Va. 160(1963).

III. Discussion

a. Defendant Goodman

The factual assertions made by Plaintiff and Defendant Goodman in this case make it quite simple to determine that Summary Judgment is inappropriate at this time.

Defendant Goodman makes factual assertions in his Memorandum in Support of Defendant's, Adam Goodman, Motion for Summary Judgment that "The accident report noted Mr. Goodman's condition at the time of the crash as **normal**. Also, the accident report reflected there was **no suspected alcohol or drug use**...on March 28, 2019, Judge William J. Sadler granted the State's motion and dismissed the case against Mr. Goodman." Further, "the **substance allegedly found** by the test conducted at Bluefield Regional Medical Center does not make Mr. Goodman's actions reckless. The accident **report did not indicate any suspected use of drugs** or alcohol nor did the narrative ever make any mention that Mr. Goodman was under any influence that could have caused this accident. Moreover, **the criminal count against Mr. Goodman was dismissed.**

In the alternate, Plaintiff's factual assertions are that, according to the criminal investigation report, Goodman appeared **shaken and nervous at the scene** and was taken to Bluefield Regional Medical Center to undergo a mandatory drug screen where it was determined that while he was operating the six (6) ton garbage truck **he was positive for Hydromorphone, Hydrocodone, Oxycodone, and Oxymorphone, which he had no prescription for**, and which explains why he appeared shaken an nervous at the scene. As a result of the incident, Goodman was terminated and **according to the investigation, Goodman's supervisors with the City suspected he was using drugs for some time.** Goodman was indicted for his conduct, however, **due to procedural issues** the case had to be dismissed.

Accordingly, due to the varying factual accounts on the day in question, along with the issue of whether Defendant's behavior, whatever it may have been, was in the "scope of his employment" being a factual one for the jury, the Court FINDS and

CONCLUDES that a genuine issues of material fact remains, thus, Summary Judgement is not appropriate at this time.

b. Defendant Underwood

While the factual assertions against Underwood are not as egregious, the Plaintiff points out that at the grand jury proceedings the Detective who investigated this incident testified that "for somebody to get run over is one thing but to be drug under a truck for that long when they're going at a slow rate of speed, it's almost like someone wasn't watching." Plaintiff also points out that limited discovery has been completed and more needs to be done to determine what occurred in this case. Further he argues that it does not make procedural sense to dismiss Underwood before any depositions, only to bring him back if evidence is found that he may have some responsibility. The West Virginia Supreme Court has held that "[a]s a general rule, summary judgement is appropriate only after adequate time for discovery." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.* 474 S. E.D 2d 872, 882, 196 W.Va. 692 (1996).

Accordingly, the Court FINDS and CONCLUES that due to the lack of discovery at this time, Summary Judgment is not appropriate at this time.

IV. Ruling

WHEREUPON, for the foregoing reasons, the Court does hereby ORDER, ADJUDGE, and DECREE that both Defendants' Goodman and Underwood's Motions for Summary Judgment are DENIED. The circuit clerk is directed to send a copy of this Order to all counsel of record. It is so ORDERED.

ENTER: This the 22nd day of June 2021.

Mark Wills

MARK WILLS, JUDGE