

No. 33311 - *Grady Colin Kelley, II, and Frieda Carol Kelley v. The City of Williamson, West Virginia, a municipal corporation, and Michael Barnes, individually and in his capacity of a police officer employed by the City of Williamson*

FILED

**November 21,
2007**

Davis, C.J., dissenting:

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

The majority opinion reverses the lower court's grants of summary judgments.

The reversal is based on the majority's assertion that genuine issues of material fact exist such that the case should have been submitted to the jury for decision. I disagree with the majority's contention that any genuine issues of material fact exist; therefore, I respectfully dissent.

The circuit court's decisions were 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) (quotations and citation omitted). "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).

We have previously explained that

[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.

Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). 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.

Officer Barnes issued a citation to Mr. Kelley for violating ABCC regulations.¹

¹The applicable ABCC provisions provide as follows, in relevant part:

Hours for sale of alcoholic beverages. - No licensee shall sell, give or dispense alcoholic liquor or nonintoxicating beer, or permit the consumption thereof, on any licensed premises or in any rooms directly connected therewith between the hours of three o'clock a.m. (3:00 AM) and one o'clock p.m. (1:00 PM) on any Sunday[.]

175 CSR § 2-4.7.

Hours of operation - The licensed premises of all private clubs shall be closed for operation and cleared of all persons, including employees, thirty (30) minutes after the hours of sale of alcoholic liquors and nonintoxicating beer have expired. . . .

(continued...)

Pursuant to the ABCC regulations, it is undisputed that all persons, including patrons and employees, must be cleared from the club by 3:30 a.m. on Sunday mornings. In discussing the summary judgment granted in Mr. Kelley's case, the majority opinion states as follows:

With regard to Mr. Kelley, and viewing the evidence in a light most favorable to the Appellants, a jury could find that Officer Barnes had improper motives underlying his decision to arrive at Colie's Club at approximately the time it should have been vacated and in writing a citation to Mr. Kelley. A jury could also conclude that Officer Barnes used excessive force in dealing with an alleged violation of ABCC regulations or that the detention of Mr. Kelley and the citations against him were unlawful based upon the conflicting evidence regarding the precise time at which Officer Barnes observed Mr. Kelley in Colie's Club. These factual discrepancies and conflicts in testimony create genuine issues of material fact ripe for jury resolution.

See Majority opinion, pp. 13-14.

Based on my own review of the record, I simply cannot agree with the factual

¹(...continued)

175 CSR § 2-4.8. Pursuant to W. Va. Code § 60-7-12 (1996) (Repl. Vol. 2005): "(a) It is unlawful for any licensee, or agent, employee or member thereof, on such licensee's premises to: (11) Violate any reasonable rule of the Commissioner." Further,

(c) Any person who violates any of the foregoing provisions is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than five hundred dollars nor more than one thousand dollars, or imprisoned in the county jail for a period not to exceed one year, or both fined and imprisoned.

Id.

interpretations held by the majority. At the forefront of my decision, I must note that nowhere in the applicable regulations does it include a discretionary standard. The majority opinion implies that an officer has discretion in finding an ABCC violation when stating that “a jury could find that Officer Barnes had improper motives underlying his decision to arrive at Colie’s Club at approximately the time it should have been vacated and in writing a citation to Mr. Kelley.” *See* Majority opinion, *id.* In contrast, my reading of the applicable regulations is very simple: if anyone, whether patron or employee, is inside a private club after 3:30 a.m. on a Sunday morning, there is an ABCC violation. If a person violates the time limitations, that is an infraction of the regulation. I fail to understand how an officer who enforces a regulation with strict time components can possibly have an “improper motive” such that would warrant relieving the offender of any obligation. While I recognize that the record indicates that there is a negatively charged personal history between Officer Barnes and Mr. Kelley, there is nothing on the record to indicate that the officer induced or assisted Mr. Kelley in violating the regulation. Thus, when Mr. Kelley violated a strict regulation, he should have been held accountable, no matter who issued the citation or what their personal past relationship entailed.

As illustrated by the majority opinion, the crux of this determination is the time at which Mr. Kelley was found inside his bar. If it was before 3:30 a.m., there is no regulatory infraction. If it was after 3:30 a.m., he violated the ABCC regulations and is subjected to criminal penalty. The majority turns its decision on its perception that genuine

issues of material fact exist as to what time Mr. Kelley was found inside the bar. While I agree that the time when Mr. Kelley was found in the bar is dispositive, one party's dislike of a particular fact is not sufficient to deem it a genuine issue of material fact such that summary judgment should be defeated.

The underlying record reveals that there is no true question as to what time Mr. Kelley was inside his bar, and further, that it was after 3:30 a.m. on a Sunday morning in violation of ABCC regulations. Even the deposition testimony of Mr. Kelley alleviates any question as to whether he was inside his bar after 3:30 a.m. During the deposition, the following exchange occurred regarding Mr. Kelley's return to his bar after realizing he left a cash bag on the premises:

Q. Okay. So all these guys ride back with you over to Colie's again?

A. Yeah

Q. What time do you think you got back to Colie's?

A. Probably around 3:30 maybe.

....

Q. And you went inside to go get the money bag?

A. Yeah, and I made the rest of the guys come in with me because I still had the money bag with quarters in my vehicle.

In fact, when Officer Barnes approached the bar entrance and had one of the patrons get Mr.

Kelley, Mr. Kelley never objected to the citation on the grounds that it was prior to 3:30 a.m. Mr. Kelley's objection to the citation was that he never turned on the lights while there and that he did not serve any drinks after 3:30 a.m. However, under the regulation, the only relevant factor is that people were present in the club after 3:30 a.m.

The majority opinion states that the timeframe is in question based on the citation, criminal complaint, and Mrs. Kelley's testimony; however, the record does not support this assertion. The citation states that the offense occurred at 4:30 a.m., and the criminal complaint states that it occurred "after the hour of 4:00 a.m." Both times are consistent with a regulatory infraction because they are after 3:30 a.m. on a Sunday morning. Further, during her deposition, Mrs. Kelley was questioned regarding the time that she learned her son, Mr. Kelley, was receiving a citation. In doing so, the following exchange happened:

Q. What time was it when he called?

A. Gosh, I don't remember. Approximately, probably around 4:00. It might have been later than that. I don't know.

This Court has previously stated that the non-moving party must, at a minimum, offer more than a "scintilla of evidence" to support his or her claim. *Williams*, 194 W. Va. at 60, 459 S.E.2d at 337. Further,

[t]he opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. *Williams*, 194 W. Va. at 60-61, 459 S.E.2d at

337-38. A material fact is one “that has the capacity to sway the outcome of the litigation under the applicable law.” *Id.* at 60 [n.13], 459 S.E.2d at 337 n.13. As stated in *Anderson*, “[f]actual disputes that are irrelevant or unnecessary will not be counted.” *Anderson [v. Liberty Lobby, Inc.]*, 477 U.S. [242,] 248, 106 S. Ct. [2505,] 2510[, 91 L. Ed. 2d 202 (1986)].

Jividen, 194 W. Va. at 714, 461 S.E.2d at 460. There is no evidence, other than the appellants’ hopeful wishes, that it was before 3:30 a.m. when Officer Barnes found Mr. Kelley, along with several other people, in the club. Thus, the circuit court’s grant of summary judgment was proper in relation to Mr. Kelley.

In regards to the arrest of Mrs. Kelley, the majority opines as follows:

A jury could conclude that Officer Barnes did not have a legitimate basis for arresting Mrs. Kelley for her behavior at the police station. The jury could possibly find that Officer Barnes’ involvement in the charges of willful disruption of a governmental process and disorderly conduct were in bad faith or with malicious purpose. The evidence, when viewed in a light most favorable to Mrs. Kelley, would support a jury finding that she was simply a concerned mother going to the police station where her son was being processed for violation of an ABCC regulation.

See Majority opinion, p. 13. First and foremost, this reasoning is fatally flawed for one basic reason: Officer Barnes did not arrest Mrs. Kelley. A senior officer, Officer Hall, was the officer who arrested and placed handcuffs on Mrs. Kelley. However, neither Mrs. Kelley nor Mr. Kelley filed any causes of action against the actual arresting officer.

Moreover, the record is replete with the kind of behavior Mrs. Kelley exhibited

at the police station. The deposition testimony of Officer Barnes and Officer Hall indicates that Mrs. Kelley arrived at the station and began yelling and using profanity and racially derogatory comments to Officer Barnes. In fact, her behavior was loud enough for Officer Hall to hear it from a back room. It prompted Officer Hall to come out of the back room and tell her that she needed to calm down. He testified that “Frieda came in the police station. She was cussing, going on; coming in calling [Officer Barnes] n*gg**s and said, ‘I’ll have your f-ing job. You’ll be on the back of a trash truck before this week is out.’” She was repeatedly told to leave or she would be arrested. Her own testimony reveals that she was told to leave or she would be arrested, even though she indicated her disagreement with the correctness of that action as she felt she “had as much right there as anybody else.” Mrs. Kelley’s husband had accompanied her to the police station and even he attempted to calm her down and get her to leave, but she refused. Thus, based on her behavior and the fact she was warned to leave or be arrested, her arrest was lawful.² The circuit court’s grant of

²She was arrested pursuant to W. Va. Code §§ 61-6-1b(a) (1988) (Repl. Vol. 2000) and 61-6-19 (1971) (Repl. Vol. 2000). Her behavior clearly fits within the parameters of these code sections because she

[while] in a public place . . . disturb[ed] the peace of others by violent, profane, indecent or boisterous conduct or language or by the making of unreasonably loud noise that is intended to cause annoyance or alarm to another person, and who persists in such conduct after being requested to desist by a law-enforcement officer acting in his lawful capacity, is guilty of disorderly conduct, a misdemeanor[.]

W. Va. Code § 61-6-1b(a). Moreover, “[i]f any person willfully interrupt or molest the
(continued...)

summary judgment was correct in relation to Mrs. Kelley.

The circuit court weighed all of the evidence and decided that there was no genuine issue of material fact regarding what time Officer Barnes found Mr. Kelley inside his bar, along with other people, in violation of the ABCC regulations. A *de novo* review of the record leads me to the same conclusion. While the appellants desperately wish that the time involved was before 3:30 a.m., there is absolutely no evidence in the record to support their contentions, including their own deposition testimony. Because the citation was proper, the grant of summary judgment regarding Mr. Kelley should have been affirmed by this Court.³ Likewise, regarding Mrs. Kelley, Officer Barnes was not the arresting officer and, even if he had been, the arrest was lawful. Therefore, the grant of summary judgment regarding Mrs. Kelley should have been affirmed by this Court.

²(...continued)

orderly and peaceful process of any department, division, agency or branch of state government or of its political subdivisions, he [or she] shall be guilty of a misdemeanor[.]” W. Va. Code § 61-6-19.

³As recognized by the majority opinion, if Officer Barnes did not act in a negligent manner, the City of Williamson has no liability under W. Va. Code § 29-12A-4(c)(2) (1986) (Repl. Vol. 2004), and Officer Barnes would not be subject to liability pursuant to W. Va. Code § 29-12A-5(b) (1986) (Repl. Vol. 2004) absent any bad faith, malicious, wanton, or reckless conduct. *See* Majority opinion, p. 15. Thus, I would affirm the circuit court’s rulings that Officer Barnes did not act negligently or with bad faith, malicious, wanton, or reckless conduct. Hence, neither Officer Barnes nor the City should be exposed to liability under the Governmental Tort Claims and Insurance Reform Act. *See* W. Va. Code § 29-12A-1, *et seq.*

For the reasons stated, I dissent. I am authorized to state that Justice Benjamin joins me in this dissenting opinion.