

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

6/30/2021
D. Miley
F. Simpson, Jr.
C. Taylor
F. Simpson, III

RHONDA STARK, individually and
as Administratrix of the ESTATE OF
ROBERT E. STARK,

Plaintiffs,

v.

CHAD EDWARDS and
MATTHEW MAXWELL,

Defendants.

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Civil Action No. 20-C-267-3
James A. Matish, Judge

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Presently pending before this Court is Defendants' Motion to Dismiss. The Court held a hearing on these Motions on May 5, 2021, which was conducted over Microsoft Teams due to the ongoing COVID-19 pandemic. The Court, having heard arguments of counsel on the Motion and considering the filings of counsel and the relevant authority, hereby **DENIES** Defendants' Motion to Dismiss for the reasons set forth herein.

Procedural History¹

This case arises out of the unfortunate death of Mr. Robert Stark, Plaintiff's husband, on June 14, 2019. Mr. Stark was an employee of the City of Shinnston, Public Works and Utilities Division. At this time, Mr. Edwards was the City Manager

¹ The facts and allegations are construed in the light most favorable to the Plaintiff and any allegations presented by Plaintiff are taken as true for purposes of a motion to dismiss brought under West Virginia Rule of Civil Procedure 12(b)(6). *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 608, 605, 245 S.E.2d 157, 158-59 (1978).

and Mr. Maxwell was Mr. Stark's immediate supervisor. In 2018, the City began planning a project to replace a storm drainpipe that was causing ground subsidence along a road in the city. Some employees of the Public Works Division complained that the job replacing the drainpipe would be dangerous to complete for many reasons: (1) the ground around the pipe to be excavated was unstable; (2) the excavation was too deep (the drainpipe was fifteen feet below the surface); (3) the City possessed insufficient equipment to complete the job; and (4) the City's employees did not have the training necessary to know how to excavate trenches safely. The City began obtaining quotes from contractors to complete the project, but ultimately, the City had employees of the Public Works Division perform work on the project. According to the Complaint, despite the project commencing over one year after the City began planning the project, the City did not provide training to its employees on excavation safety, nor did the City purchase new equipment for the purpose of performing the project.

The employees of the Public Works Division dug a trench to access the drainpipe, but the soil was not tested or monitored for stability, nor was the trench benched, shored, or sloped (as is the safety standard for work involving excavation of trenches). On June 14, 2019, Mr. Stark entered the trench to work on replacing the drainpipe, but a large section of one of the trench walls collapsed onto Mr. Stark, which ultimately led to Mr. Stark's death.

Mrs. Stark, Plaintiff, filed a Complaint against Defendants on November 17, 2020² and she asserts two causes of action against Defendants: (1) Defendants “acted with a consciously, subjectively, and deliberately formed intention to produce the specific result of death to Robert Stark,” Complaint, p. 13, and (2) Intentional and Reckless Conduct.

Defendants filed their Motion to Dismiss on December 28, 2020. Defendants assert three bases for dismissal: (1) the deliberate intent claim cannot be brought against a non-employer person; (2) the workers compensation system is the exclusive remedy for a workplace injury, and an employer who participates in the workers compensation system is granted statutory immunity from suit for workplace injuries; and (3) Suing the employees of the City of Shinnston is essentially a suit against the City, which has immunity from suit, because the City is statutorily obligated to indemnify its employees when the employees are sued for something related to the employees’ scope of employment. Specifically, Defendants argue that West Virginia Code § 29-12A-13, part of the Governmental Tort Claims and Insurance Reform Act, prohibits suits against political subdivisions and their employees acting within the scope of their employment.

Plaintiff counters that the deliberate intent statute, West Virginia Code § 23-4-2(d)(2), provides for two types of deliberate intent claims: one in which the individual can be sued, and one which provides a list of five factors to be satisfied to show deliberate intent; here, Plaintiff is pursuing the former. Plaintiff asserts that

² Plaintiff filed her Amended Complaint on November 19, 2020.

there is no statutory provision providing that an employee enjoys immunity in every instance in which the political subdivision itself enjoys immunity; further, indemnity by the City does not mean the employees have immunity.

Standard of Review

A Motion to Dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure tests the formal sufficiency of the complaint. *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 52, 717 S.E.2d 235, 239 (2011). A trial court “should not dismiss the complaint unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 604-05, 245 S.E.2d 157,158 (1978). A plaintiff is only required to “set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist.” *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 718, 246 S.E.2d 907, 920 (1978) (overruled on other grounds). A trial court is not to grant a 12(b)(6) motion simply because it doubts the plaintiff will succeed on the merits of the claim; “whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings.” *Id.*

Findings of Fact and Conclusions of Law

The West Virginia Governmental Tort Claims and Insurance Reform Act provides statutory immunity for political subdivisions related to claims covered by the workers compensation system. West Virginia Code § 29-12A-5(a)(11). The West Virginia Supreme Court of Appeals has held that employees of a political subdivision

acting within the scope of their employment cannot be named as defendants for purposes of establishing the political subdivision's liability; however, the employees can be named as defendants for establishing their own, personal liability when an exception to employee immunity is present. Syl. Pt. 5, *Brooks v. City of Weirton*, 202 W.Va. 246, 503 S.E.2d 814 (1998). In *Brooks*, an employee of a private employer was killed when the walls of a trench in which he was working collapsed; his survivor filed a wrongful death suit against the city.³ *Id.* at 248, 816. The Court's first holding was West Virginia Code § 29-12A-5(a)(11) provides for immunity of a political subdivision when the claim at issue is covered by workers compensation laws. *Id.* at 253, 821. The Court's second holding was West Virginia Code § 29-12A-13(b) prohibits an employee from becoming a defendant in a suit for the purpose of establishing liability on the part of the political subdivision; however, the employee can be named a defendant to establish her own liability to the plaintiff when a statutory exception, codified in West Virginia Code § 29-12A-5(b), is present. *Id.* at 258, 826.

The Court finds the *Brooks* case instructive in its analysis of the present case. Mrs. Stark is suing City of Shinnston employees for a workplace accident resulting in her husband's death, an incident covered by workers compensation laws. Because the incident is covered by workers compensation laws, the City of Shinnston is thus immune from suit in this matter; however, Plaintiff pursued this matter against two employees of the City, namely, the city manager and a supervisor within the Public

³ The employer in this case was a private employer; however, the plaintiff decided to sue the city on a theory that the city "recklessly issued permits for the excavation work, recklessly permitted the excavation work to be performed in an unsafe manner, and recklessly performed work near the location of the trench." *Id.* at p. 249, 817.

Works Division. Plaintiff is alleging individual claims against these two defendants, arguing that even though they were acting within the scope of their employment, their conduct – which she alleged in her Complaint – led to her husband’s death. Plaintiff has asserted no claims against the City because, according to her pleadings, she wishes to hold the defendants *personally* liable for damages in this matter, damages which a jury might determine are in excess of the recovery she receives from the workers compensation benefits. As such, Plaintiff has stated a claim upon which relief can be granted as to this claim, and the Motion to Dismiss for this claim should be denied.

Defendant argues that Plaintiff’s deliberate intention claim cannot survive because Mr. Edwards and Mr. Maxwell are co-employees of Mr. Stark, and they are not “employers” under West Virginia Code § 23-4-2. The West Virginia Supreme Court of Appeals clarified the proper defendant for a deliberate intention action, but only under the five factor theory of showing deliberate intent. Syl. Pt. 6, *Young v. Apogee Coal Co., LLC*, 232 W.Va. 554, 753 S.E.2d 52 (2013).

The Court in *Young* analyzed the statutory language of West Virginia Code § 23-4-2(d)(2)(ii)⁴ and, utilizing the canons of statutory construction, concluded that the express language of the statute indicates that a non-employer person is not a proper defendant in a deliberate intention action. West Virginia Code § 23-4-2(d)(2)(ii), or § 23-4-2-(d)(2)(B) as it is codified after the 2015 amendments, is but one means of

⁴The 2015 amendments to this statute changed the numbering of this particular section. Today, the same section is referenced as West Virginia Code § 23-4-2(d)(2)(B) with no change in wording for this section.

showing deliberate intent; this statutory section requires the trier of fact to make five factual findings in order for plaintiffs to prove their case of deliberate intent.

However, there is another means of asserting a deliberate intent claim, contained within West Virginia Code § 23-4-2(d)(2)(A). This statutory section provides “the employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee.” *Id.* This statute joins subsection A and subsection B with the conjunctive “or,” meaning that either satisfying the five factors or showing conscious, subjective, and deliberately formed intent is sufficient to prove deliberate intent and impose liability on the defendant.

In *Young*, the plaintiff asserted a deliberate intention claim against the defendants using the five factor theory of liability. *Young, supra*, at 557 and 55. The plaintiff's position in that case was that the language contained within the first section – “the employer or person against whom liability is asserted” – applied to the first section and the second, meaning that an employer or another person (such as a co-employee) could be joined as a defendant in a deliberate intent action. *Id.* The Court held this was not the case, that the second section (the five factor theory) only allowed an employer to be sued because the language of the second section only references an employer. *Id.* at 564 and 62.

Here, Plaintiff is asserting a deliberate intention claim against Defendants under the first theory of liability contained within West Virginia Code § 23-4-2(d)(2)(A). The Court in *Young* did not indicate that a co-employee could not be joined

as a defendant for a deliberate intent claim brought under this section; the Court only said that the co-employee could not be joined as a defendant for a deliberate intent claim *brought under the five factor theory*. As such, Plaintiff has stated a claim upon which relief can be granted for the deliberate intent claim, and the Motion to Dismiss should be denied as to this claim.

ORDER

Plaintiff's Complaint has stated a sufficient cause of action to survive Defendants' Motion to Dismiss for the intentional and reckless conduct claim because the Plaintiff is asserting this claim against the Defendants in order to establish individual liability on the part of these Defendants, not to establish liability on the part of the City. Plaintiff has stated a sufficient cause of action to survive Defendant's Motion to Dismiss for the deliberate intention claim because the language of the statute does not prohibit asserting this claim against a co-employee. Based on the standard set forth in Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, Defendants have not demonstrated in their Motion that, beyond doubt, no set of facts in support of Plaintiff's claim would entitle Plaintiff to relief. Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. at 530, 236 S.E.2d at 208 (1977) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

Accordingly, for the foregoing reasons, it is hereby **ORDERED** that Defendant's Motion to Dismiss be **DENIED**.

The Clerk of this Court is **DIRECTED** to send certified copies of this Order to the following:

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ENTER: 06/30/2021



Judge James A. Matish