

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

GRADY COLIN KELLEY, II,

Appellant, Plaintiff-Below

vs.

CITY OF WILLIAMSON, WEST VIRGINIA, a municipal corporation, and MICHAEL BARNES, individually and in his capacity as a police officer employed by the City of Williamson,

Appellees, Defendants-Below

FRIEDA CAROL KELLEY,

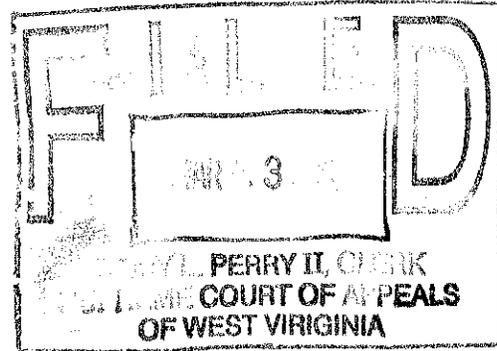
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S. Ct. No. 063006



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BRIEF OF APPELLANTS

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1. KIND OF PROCEEDING

Appellants-Plaintiffs, Grady Colin Kelley, II and Frieda Carol Kelley appeal the orders of the Circuit Court of Mingo County granting Summary Judgment to Defendant's City of Williamson and Williamson police officers Michael Barnes.

Defendant Barnes filed his Motion for Summary Judgment in the Grady Colin Kelley, II case alleging that the Plaintiff had not produced sufficient evidence to establish that the citation issued to him

was unlawful. The Court granted Summary Judgment to Defendant Barnes on the Grady Colin Kelley, II case by its order of January 10, 2006.

Defendant Barnes also filed a Motion for Summary Judgment against Frieda Carol Kelley alleging that the Plaintiff had not shown sufficient facts to sustain allegations of unlawful arrest, battery, outrageous conduct and false swearing. The Court granted Summary Judgment by order entered March 20, 2006 finding that the Plaintiff's testimony established that the arrest was lawful and Defendant Barnes was entitled to judgment as a matter of law.

The City of Williamson filed its Motions for Summary Judgment on or about February 8, 2006. Despite being past the deadline for dispositive motions and over Plaintiffs' objections, the Court heard the motions. This Defendant argued that in light of the Court's ruling granting Summary Judgment in favor of Defendant Barnes in the Grady Colin Kelley, II case that the charges against the City were derivative in nature and the City was entitled to judgment as a matter of law. The Judge granted Summary Judgment in the Frieda Carol Kelley case by order entered by the Mingo County Clerk on April 17, 2006 and again on April 24, 2006. Judge Perry granted Summary Judgment to the Defendant City in the Grady Colin Kelley, II case by an order signed on April 21, 2006 and entered by the Clerk on April 24, 2006.

## II. ISSUES ON APPEAL AND RELIEF REQUESTED

Whether the trial judge erred by failing to construe the evidence in the light most favorable to Plaintiff Grady Colin Kelley, II, the nonmoving party, in granting summary judgment to the Defendants; and whether the trial judge erred by failing to construe the evidence in the light most favorable to Plaintiff Frieda Carol Kelley, the nonmoving party, in granting summary judgment to the Defendants. It is respectfully requested that the orders of the Circuit Court of Mingo County be reversed and that the Court hold, as a matter of law, that Plaintiffs-Appellants are entitled to a trial on all issues before a jury.

### III. RESTATEMENT OF THE FACTS

On July 23, 2000 Grady Colin Kelley, II closed the bar he operated in Williamson, West Virginia and proceeded in his automobile toward his home in Borderland (Grady Colin Kelley deposition [GCK DP} p. 17). Also in his car were some patrons that needed rides home (GCK DP p. 26). On the way home he was advised by his sister of an automobile accident near Borderland (GCK DP p. 21). When he arrived at the accident scene Kelley realized that he had left a cash bag back at the bar (GCK DP p. 17,31). He then turned his car around and went back to the bar to retrieve the bag (GCK DP p. 28). Once there, he went inside and asked his passengers to wait in the small area between the bar's outer door that opened onto the street and the inner door that went into the bar (GCK DP p. 41, 42). Kelley went into his office at the bar, retrieved the cash bag, and proceeded toward the front exit. At that time, he was advised by the others that Officer Michael Barnes was at the outside door (GCK DP p. 44). Kelley answered the door at which time Barnes told him "I told you I got you. I was going to get you." (GCK DP p. 54).

The record reveals a long-standing antipathy against Kelley by Barnes. Several years earlier Barnes' brother had shot at Kelley (GCK DP p. 87,88) for which he was convicted on wanton endangerment. More recently, Kelley had to remove Barnes from his bar due to Barnes' intoxication and aggressive behavior (GCK DP p.91). On this occasion Barnes stayed outside the bar after being removed and beat on the locked door and threatened to get even with Kelley. The incident ended only when State Trooper Stewart Harper came to the scene and convinced Barnes to leave (GCK DP p. 92, Stewart Harper DP p. 4-6) Furthermore, Barnes was, at the time, carrying on an affair (Barnes DP p. 53) with a rival bar owner Reva Ruble, who owned the Kitty Kat Club and Barnes had made statements about his financial interest in her bar (Donald Wilkerson DP p. 140). Kelley testified that in an effort to hurt his business Barnes routinely parked his cruiser outside Kelley's bar and harassed customers as they left (GCK DP p.92-96). Kelley further had made complaints about Barnes to Williamson Police Chief Roby

Pope but the harassment had not stopped (GCK DP p.135).

At Barnes' request, Kelley and the others exited the bar at which time Kelley states that Barnes pushed him against the police cruiser (GCK DP p.58). Kelley and the others were taken the Williamson Police Department where Kelley was eventually charged with violating ABCC regulations CSR 175-2-4.7 and 175-2-4.8 requiring private clubs to be vacated by 3:30 a.m. on Sunday mornings. The sworn Criminal Complaint of Officer Barnes alleges the incident took place after "4:00 a.m." whereas the citation issued by Barnes on July 23, 2000 states that the incident took place at 4:30 a.m. Kelley testified that he did not know if he was in the bar after 3:30 a.m. but admitted "... it was close because I close a few minutes early, I try to close a few minutes early . . ." (GCK DP p. 18). Importantly, both Grady Colin Kelley, II (DP p. 76) and Frieda Kelley (DP p. 56) have testified that Colin II called to tell his family he was in custody about 4:00 a.m., contrary to Barnes' sworn statements on the Criminal Complaint and citation.

After being notified by her son that he was in custody, Plaintiff Frieda Kelley and her husband then went to the Williamson Police Department. Frieda Kelley testified that she was particularly concerned for the safety of her son and nephew (FK DP p. 64) and she stated as much to Officer Barnes. She testified that he told her to leave but she said she told Barnes she wasn't going to leave without her son and nephew and that he then handcuffed her and pushed her out of the door (FK DP p. 66). Frieda Kelley denies interfering with the officers in any way and denies using profanity or calling the officers names prior to her arrest (FK DP p. 67-68). Her testimony is supported by her son. Officers Barnes and Hall claim Frieda Kelley used racial slurs and profanity and refused to leave when told to do so, which lead to her arrest.

All charges against these Plaintiffs were dismissed (as were charges against three other Plaintiffs) after Officer Barnes was convicted of false swearing on the criminal complaint filed against Robin Maynard Williamson. Officer Barnes later resigned from the police force.

Plaintiffs, Grady Colin Kelley, II and Frieda Carol Kelley filed lawsuits against Williamson Police Officer Michael Barnes and the City of Williamson alleging outrageous conduct, Battery, False Swearing and Negligence in the hiring and retention of Officer Barnes. Three other individuals, Robin Maynard, Doug Ward and Donald Wilkerson also filed suit against the City of Williamson and Officer Barnes. Those cases were resolved through settlement. Because Frieda Kelley was Bailiff for Judge Thornsbery at the time of the incident the Kelley cases were assigned to Judge Roger Perry. The Defendants contended that the arrest of Frieda Carol Kelley and the citation issued to Grady Colin Kelley, II were lawful and proper.

#### IV. STANDARD OF REVIEW

“Summary Judgment is proper only if, in the context of the motion and any opposition to it, no genuine issue of material fact exists and the movant demonstrates entitlement to judgment as a matter of law.” Syllabus Point 2, in part, Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995). The party opposing summary judgment must satisfy the burden of proof by offering more than a mere “scintilla of evidence” and must produce evidence sufficient for a reasonable jury to find in the nonmoving party’s favor. Painter v. Peevey, 192 W.Va. 189, 451 S.E.2d 755 (1994).

In determining whether a genuine issue of fact exists, the trial court must construe the facts in the light most favorable to the party against whom summary judgment is sought. Belcher v. Wal-Mart, 211 W.Va. 712, 568 S.E.2d 19 (2002); Alpine Property Owner’s Association v. Mountaintop Development Co., 179 W.Va. 12, 365 S.E.2d 57 (1987). Furthermore, since this Court favors resolution of issues on the merits, the use of Summary Judgment is disfavored, especially in complex cases, where issues involving motive and intent are present Masinter v. Webco, 164 W.Va. 241, 262 S.E.2d 433 (1983), or where factual development is necessary to clarify application of the law Lengel v. Lint, 167 W.Va. 272, 280 S.E.2d 66 (1981).

## V. ARGUMENT

### A. THE TRIAL JUDGE ERRED BY FAILING TO CONSTRUE THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PLAINTIFF GRADY COLIN KELLEY, THE NONMOVING PARTY, IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS.

Appellant Grady Colin Kelley, II was charged by Williamson Police Officer Michael with violating the provisions of West Virginia CSR 175-2-4.8 which provides that clubs shall be cleared of all persons 30 minutes after the sale of alcohol has expired, which in this instance would have been 3:30 a.m. Clearly for the charge to be properly asserted against Mr. Kelley, it is necessary that the officer prove that Mr. Kelley was in the bar after 3:30 a.m. That essential fact is in dispute.

Mr. Kelley was deposed by defense counsel and offered the following testimony regarding his return to the bar after closing it to pick up a money bag (p 38-39):

“Q: What time do you think you got back to Collie’s?”

A: Probably around 3:30 maybe.

Q: Do you think it was before or after 3:30?

A: I don’t remember.

Q: You don’t know? It could have been before or after?

A: No. It was close.”

Neither Officer Barnes, the charging officer, nor Officer John Hall testified in their depositions that it was at or after 3:30 a.m. when they first approached the bar. The only evidence provided by Officer Barnes are the contradictory statements set forth in the criminal citation filed on July 23, 2000, that asserts the offense occurred at 4:30 a.m. and the statement he made in his Criminal Complaint sworn before Magistrate Greene on January 11, 2001 that the offense occurred “after the hour of 4:00 a.m.”

In granting summary judgment the trial court simply ignored the obvious conflict in the evidence. In Aetna Casualty & Surety Co. v. Federal Insurance Co., 148 W.Va. 160, 133 S.E.2d 770 (1963) this

Court held that a motion for summary judgment must be denied if varying inferences may be drawn from evidence accepted as true. Furthermore, even if the contradictions contained in the charging officers documents are insufficient to raise an issue of fact, the possibility that the initial confrontation between Plaintiff and Defendant occurred prior to 3:30 a.m. is satisfied by the testimony of Frieda Kelley (DP p. 52) that her son called her "probably around 4:00" and the testimony of Grady Colin Kelley II that he called his father to let him know he had been detained probably 15 minutes after being taken to the police station (GCK DP p. 70). Certainly, when these facts are construed in the light most favorable to the Plaintiff, a jury could infer that the detention of the Plaintiff and the charges against him were not lawful. As such, the trial judge should have denied summary judgment.

The trial court further erred in its ruling in favor of Defendant Barnes on the issue of false swearing. The trial court relies on Farber v. Douglas, 178 W.V.a 491, 361 S.E.2d 142 (1985) for the proposition that a citation is not a sworn statement therefore Defendant Barnes could not falsely swear against these Plaintiffs.

Plaintiffs assert that the trial court erred in two aspects of this ruling. First, a citation written in lieu of arrest is provided for by West Virginia Code 62-1-5a and is an exception to the requirements of West Virginia Code 62-1-1 which requires a police officer must charge an accused by a written statement of the essential charges sworn upon oath before a Magistrate. Furthermore, the citation contains the following language directly above the space for the officer to sign as the Complainant:

"The undersigned further states that he has just and reasonable grounds to believe, and does believe, that the person named above committed the offense(s) herein set forth contrary to law sworn to and subscribed by me."

To suggest that a lesser standard of veracity exists merely because the accused is not taken forthwith before a magistrate is contrary to the complainant's oath as set forth above as well as the principles of justice. To the extent that Farber leaves this issue unresolved, this court should adopt the

same standard of veracity whether the charges are sworn before a magistrate or sworn upon a citation.

Secondly, the trial court erred in that it only references the citation in its ruling as to false swearing and completely ignores the criminal complaint actually sworn before a Magistrate by Defendant Barnes. Clearly, even if the oath contained on the citation is insufficient as a basis for false swearing, the same cannot be said of the sworn statement on the criminal complaint.

In granting the City of Williamson's Motion for Summary Judgment the trial court reasoned that because Summary Judgment was granted to Defendant Barnes and the claims against the City were derivative therefrom, Defendant City was entitled to judgment as a matter of law. In support thereof the Court stated that the "undisputed facts" of this case establish that the arrest was lawful. As set forth above, a significant material fact, subject to varying inferences, exists herein and the trial court erred in granting summary judgment.

B. THE TRIAL JUDGE ERRED BY FAILING TO CONSTRUE THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PLAINTIFF FRIEDA CAROL KELLEY, THE NONMOVANT PARTY, IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS.

Appellant Frieda Carol Kelley was charged with wilful disruption of a Governmental Process, Obstructing an Officer and Disorderly Conduct when she appeared at the Williamson Police Station after being informed by her son that he was being detained. In granting summary judgment the trial judge that the evidence was "uncontested" that the Plaintiff used "profane language and was told repeatedly to leave, yet refused to leave" and therefore the arrest was appropriate and lawful. The Order references her deposition testimony at Pg. 72:8-11 and page 68:9-15 to support the trial court's conclusion.

In relying on this testimony as "uncontested" evidence of lawful arrest, not only did the Court fail to construe the evidence in the light most favorable to the Plaintiff, the Trial Judge, in fact, went to extraordinary lengths to misconstrue the evidence in the light most favorable to the movant.

Frieda Kelley went to the Williamson Police Station on July 23, 2000 because she was concerned

for the safety of her son and nephew. She was aware of the problems between her son and Officer Barnes and was also aware of his reputation for violence. She was in a public waiting area of the police station and, prior to her arrest, her testimony was that she had told Defendant Barnes that she wasn't going to leave without her son and nephew.

The Court references lines 9 through 15 of page 66 where she admits that she didn't leave when asked but omits the exchange with defense counsel beginning on line 16 of Page 66 continuing to line 13 on Page 67:

“Q: Well, somehow this escalates into you getting arrested, so tell me what happens after he says leave, leave, leave and you didn't leave?”

A: He came over and handcuffed me, in front of all of those boys, he came and handcuffed me and pushed me out the door.

Q: Did he tell you to leave or you were going to be arrested, before he handcuffed you?

A: He might have said that, but I thought I really had as much right there as anybody else. It's a public place and I wasn't doing nothing to...

Q: Weren't doing anything to interfere with his ability to cite those people?

A: No.

Q: Okay, so he says leave or you'll be arrested, and you say?

A: I think he really arrested me was maybe to provoke Colie, my son. My son was real calm. I really believe that's why he arrested me. He thought "Well, I'll provoke him" and Colie's a big boy, I mean you know."

Her testimony also reveals that prior to her arrest that Defendant Barnes referred to her son as her "baby boy" (DP p.66) and that she denies insulting other officers or using profane language (DP p. 68). Her son's testimony supports these assertions. The Court's reference to her use of profane language

as basis for her appropriate arrest (DP p. 72:8-11) in fact took place after her arrest while she was handcuffed. In this instance she had asked "10 or 15 times" to go to the bathroom and used an expletive to reference the bodily function that would occur if she wasn't permitted to go to the bathroom.

Nothing in Frieda Kelley's testimony establishes that she was acting profane, violent, indecent or boisterous prior to arrest. As to resisting arrest, it is interesting that she is charged with this crime because she allegedly left the police station after being repeatedly told to leave. Frieda Kelley denies that she ran outside. On page 68 of her deposition she is asked:

Q: At any time did you run outside?

A: He (Barnes) took me outside.

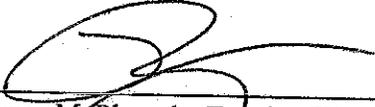
While her testimony may conflict with the officers or even her son, it nevertheless creates an issue for the trier of fact as to whether her actions constitute resisting arrest, obstruction of an officer or wilful disruption of a governmental process. The trial judge was obligated to construe this evidence in the light most favorable to the Plaintiff. Accordingly, Summary Judgment against this Plaintiff in favor of Defendant Barnes and the City of Williamson upon the premise that the action against the City was derivative, was improper.

## VI. CONCLUSION

Upon the foregoing facts, circumstances, authorities and arguments, Appellants pray that this Honorable Court reverse the orders of the Circuit Court of Mingo County granting Summary Judgment to Defendants.

RESPECTFULLY SUBMITTED,

GRADY COLIN KELLEY, II and  
FRIEDA CAROL KELLEY



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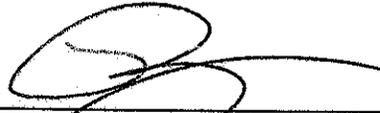
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**CERTIFICATE OF SERVICE**

I, Thomas M. Plymale, counsel for Plaintiffs, do hereby certify that a true copy of the foregoing *Brief of Appellants* was served upon the following individuals this 22<sup>nd</sup> day March, 2007, by placing the same in an envelope, properly addressed with postage fully paid and depositing a true copy thereof in the United States Mail.

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