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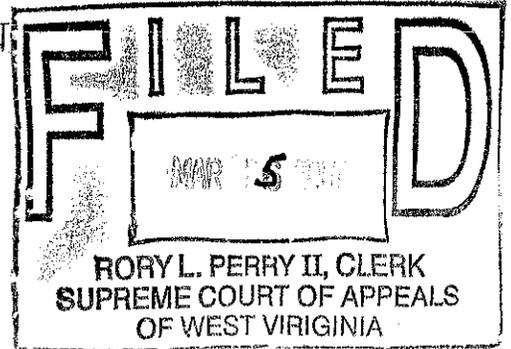
WEST VIRGINIA SUPREME COURT OF APPEALS

ESTHER GIBSON

APPELLANT

NO: 33313

VS.



LITTLE GENERAL STORES, INC.

APPELLEE

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APPELLANT'S APPEAL BRIEF

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**THE KIND OF PROCEEDING AND NATURE OF  
THE RULING IN THE LOWER TRIBUNAL**

This matter was brought before the Circuit Court of Greenbrier County, West Virginia, on an action for damages as the result of injuries suffered by the Appellant while at a store owned and operated by the Appellee in Greenbrier County, West Virginia. The Appellee moved for summary judgment, which was granted by Judge James J. Rowe, Chief Judge of the Circuit Court of Greenbrier County, West Virginia, in an Order entered on June 5, 2006. This Appeal follows, with the time to file the Petition of Appeal having been extended until October 20, 2006, by Order of the Court.

## STATEMENT OF THE FACTS OF THE CASE

The Appellee maintains a gas station and convenience store on U. S. Route 60, in Charmco, Greenbrier County, West Virginia. On June 5, 2001, the Appellant stopped at this store to fill her vehicle with gasoline. She inserted the nozzle of the gasoline pump into her car, turned the pump on, and started to refuel her vehicle. While the gas was pumping, the nozzle of the pump forcefully popped out of the car, spraying gasoline around the area, and dousing the Appellant. The gasoline spewed onto her head, face, eyes, arms and chest, and she aggravated an existing neck injury while trying to avoid the gas flow. She thereafter sought medical attention at the Rainelle Medical Center for the injuries she sustained in this incident, and continues to suffer from the effects of her injuries.

The Appellant alleged that the gas pump operated by the Appellee malfunctioned, causing her injuries, and that the Appellee is liable to her as a result. The Appellee maintains that its equipment functioned normally, and that the Appellant's injuries were the result of her own negligence. The Appellant has asserted that she was not negligent in her operation of the gas pump.

The Appellee moved for summary judgment. Judge James J. Rowe, Chief Judge, Circuit Court of Greenbrier County, West Virginia, stated that

he would grant summary judgment unless the Appellant was able to produce an expert witness willing to testify to that a gas pump could malfunction in such a manner, but granted the Appellant a period of time to locate such an expert. The Appellant has limited funds and was unable to find such an expert that she could afford to hire. Judge Rowe ruled that the Appellant's Affidavit was self-serving, speculative, and conclusionary in nature, and that without evidence from an expert, he was granting the motion for summary judgment. This appeal followed.

#### ISSUES PRESENTED

2. DID THE TRIAL COURT ERR IN GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT BASED UPON HIS EVALUATION OF THE WEIGHT, CREDIBILITY AND SUFFICIENCY OF THE EVIDENCE ?

#### CITATION OF AUTHORITIES

##### COURT RULES

**Rule 56, West Virginia Rules of Civil Procedure**

##### CASES REFERENCED

**AETNA CASUALTY & SURETY CO. VS. FEDERAL INS. CO. OF NEW YORK, 148 W. Va. 160, 133 S. E. 2d 770 (1963)**

**DAWSON VS. NORFOLK AND WESTERN RY. CO., 197 W. Va. 10, 475 S. E. 2d 10 (1996)**

DAWSON VS. WOODSON, 180 W. Va. 307, 376 S. E. 2d 321 (1988)

PAINTER VS. PEAVY, 192 W. Va. 189, 451 S. E. 2d 755 (1994)

### SUMMARY OF ARGUMENT

A motion for summary judgment is to be granted only when it is clear that there is no genuine issue of material fact to be tried and when an inquiry into the facts is not desirable to clarify the application of law. The particular incident in this case arose as a result of the Appellant being injured as a result of being doused with gasoline while filling her vehicle at a store owned and operated by the Appellee. That she was doused with gasoline while at that store and that she was injured as a result are not facts which are in dispute. The dispute arises over how she became doused with gasoline, with the Appellee alleging that the Appellant was negligent in her operation of the equipment, while the Appellant maintains that she operated the equipment properly, and that it was a malfunction of the Appellee's equipment which caused the incident.

The Trial Court ruled that this was not a genuine issue of material fact, and granted the Appellee's motion for summary judgment. The Court made its ruling based upon its evaluation of the credibility, weight and sufficiency of the Appellant's evidence. This exceeds the scope of the Trial Court's function at the summary judgment stage, which is to determine if

there is a genuine issue of fact, not weigh the evidence and determine the truth of the matter.

## ARGUMENT

1. THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT BASED UPON HIS EVALUATION OF WEIGHT, CREDIBILITY, AND SUFFICIENCY OF THE EVIDENCE.

**Rule 56 (b) of the West Virginia Rules of Civil Procedure** provides that a Defendant in any civil action may, at any time, move for summary judgment, and that any such motion may be made with or without supporting affidavits. **Paragraph (c) of the said Rule** provides that the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no material issue of fact, and that the moving party is entitled to judgment as a matter of law. **Paragraph (e) of the said Rule** provides that the supporting affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall affirmatively show that the affiant is competent to testify to the matters stated therein.

This Court held in AETNA CASUALTY & SURETY CO. VS. FEDERAL INS. CO. OF NEW YORK, 148 W. Va. 160, 133 S. E. 2d 770 (1963) that a motion for summary judgment should only be granted when it

is clear that there is no genuine issue of fact to be tried and that an inquiry into the facts is not desirable to clarify the application of the law.

This Court held in PAINTER VS. PEAVY, 192 W. Va. 189, 451 S. E. 2d 755 (1994) that when a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy, then the non-moving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists.

However, the Court in PEAVY further stated that the circuit court judge's function at the summary judgment stage was not to weigh the evidence and determine the truth of the matter, but to determine if there was a genuine issue for trial. This echoes the Court's ruling in DAWSON VS. WOODSON, 180 W. Va. 307, 376 S. E. 2d 321 (1988), where it was held that a trial judge should ordinarily hear the evidence and, upon trial, direct a verdict if he is of the opinion to do so, rather than try a case in advance on a motion for summary judgment. In DAWSON VS. NORFOLK AND WESTERN RY. CO., 197 W. Va. 10, 475 S. E. 2d 10 (1996), the Court held that credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are jury functions, and not the function of a judge for summary judgment purposes.

Therefore, it is necessary that the Trial Court find that there is no

genuine issue of material fact before it can grant a motion for summary judgment. In the present case, it is not disputed that the Appellant was doused with gasoline, nor is it disputed that she suffered injuries as a result of being doused with gasoline. What is in dispute is how she came to be doused with gasoline. It would seem that there are 3 ways in which the Appellant could have become doused with gasoline; (1) the gasoline pump owned and operated by the Appellant malfunctioned and caused her to be covered in gasoline, (2) the Appellant was negligent in her operation of the gasoline pump, and caused herself to become doused in gasoline, or (3) she became doused in gasoline as the result of the actions of some third party. Since there are no allegations of the involvement of any third party in this matter, the question becomes whether the Appellant was doused with gasoline due to the malfunction of the Appellee's equipment or due to her own negligence.

Although the Appellee did not provide any supporting affidavits with its motion for summary judgment, it is asserted on page 5 of its Memorandum in support of its Motion that

“..the uncontroverted evidence demonstrates that the sole precipitating cause of the Plaintiff's injuries was her own negligent failure to watch what she was doing while she was pumping gas.”

The Appellant's response to the motion was supported by her affidavit. In her affidavit, she states what actions she took, what actions she

did not take, and how she came to be injured. This affidavit fulfilled all of the requirements of **Rule 56 (e)** of the **West Virginia Rules of Civil Procedure**, in that it was made upon personal knowledge, set forth facts which would be admissible in evidence, and showed that she was competent to testify. She was the person injured, and she set forth under oath how, where, and when she was injured.

Under the **PEAVY, IBID**, standard, the trial is **ONLY** to determine if there is a genuine issue of fact, **NOT** weigh the evidence and determine the truth of the matter. (emphasis added). Yet in this instance, the Trial Court Judge ruled that the Appellant's affidavit was self-serving, speculative, and conclusionary in nature. By doing so, he is ruling upon the credibility of the Appellant, weighing the evidence, and making a determination of the outcome of the action, all of which exceed the scope of his responsibilities in ruling upon a motion for summary judgment, and instead encroaches upon the responsibilities of the jury.

### **CONCLUSION**

A genuine issue of material fact exists in this case, and that issue is "HOW DID THE APPELLANT BECOME DOUSED IN GASOLINE ?". The Appellant maintains in both her complaint and her affidavit that the gasoline pump malfunctioned, while the Appellee maintains in its

memorandum that it was her own negligence that caused the incident. Determining the answer to this question should have been the responsibility of the jury. The jury might decide in her favor, or it might decide against her. Either way, it is the responsibility of the jury to make such determinations, based upon the weight and credibility of the evidence at trial, not the responsibility of the Trial Judge upon a Motion for Summary Judgment.

The Trial Court erred in granting the motion for summary judgment. The decision should be reversed and remanded with instruction to vacate the summary judgment and to schedule the matter for trial on the merits.

Respectfully submitted.

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## CERTIFICATE OF SERVICE

I, Douglas H. Arbuckle, Counsel for the Appellant, Esther Gibson, do hereby certify that I have served a true and exact copy of the foregoing Appellant's Appeal Brief upon Little General Stores, Inc., by mailing a copy of the same unto their Counsel, Shawn C. Gillispie, at his address of P. O. Box 3283, Charleston, West Virginia, 25332-3283, by United States Mail, first class, postage prepaid, on this the 15<sup>th</sup> day of March, 2007.

  
DOUGLAS H. ARBUCKLE