

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ESTHER GIBSON,

Appellant,

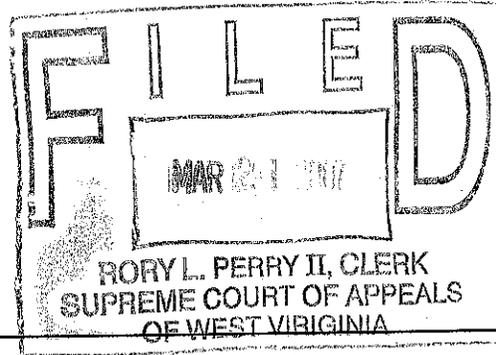
v.

APPEAL NO. 33313

Greenbrier County Circuit Court No.: 03-C-121(R)

LITTLE GENERAL STORES, INC.,

Appellee.



APPELLEE'S BRIEF

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is a negligence action arising from an incident that allegedly occurred at the Appellee's gas station located in Charmco, Greenbrier County, West Virginia on June 5, 2001. The Circuit Court of Greenbrier County determined that there was no genuine issue as to any material fact and granted the Appellee's/Defendant's motion for summary judgment; finding, among other things, that the Appellant failed to present evidence as to whether or not the gasoline pump malfunctioned. Further, the Court found that Appellant/Plaintiff did not have any factual support for her statement that the gasoline pump malfunctioned. The Court found the only statements regarding the same were Appellant's/Plaintiff's self-serving assertions, with no factual support, and a conclusory affidavit containing unsupported speculation. The Court granted Appellee's/Defendant's Motion for Summary Judgment by Order dated June 2, 2006.

STATEMENT OF FACTS

This is a negligence action arising from an incident on June 5, 2001 in Charmco, Greenbrier County, West Virginia. Appellant's claim concerns allegations that Appellee was responsible for an accident involving Appellant on June 5, 2001, in Charmco, Greenbrier County, West Virginia. Appellant, Esther Gibson, was attempting to fill her vehicle with gasoline at the Little General location at Route 60, Charmco, West Virginia, when she alleges the pump malfunctioned and caused the hose to come out of the gas tank of her vehicle while it was pumping gasoline. The Appellant claims she was dowsed with gasoline as a result, with the gasoline spewing onto her head, face, eyes, arms and chest.

Appellee states that its equipment was working properly. There was zero evidence in this case to support Appellant's claim that the gasoline pump malfunctioned, other than her own self-serving assertions and conclusory affidavit containing unsupported speculation regarding the same.

RESPONSE TO ASSIGNMENT OF ERROR

The Circuit Court was correct in determining that the Appellant's own self-serving assertions and unsupported speculative and conclusory affidavit is insufficient to create a genuine issue of material fact.

POINTS AND AUTHORITIES

Summary Judgement is appropriate as the Appellant failed to present evidence sufficient to create a genuine issue of material fact, because Appellant's own self-serving, unsupported speculative and conclusory affidavit, without admissible evidence to support the same, is insufficient to create a genuine issue of material fact pursuant to West Virginia law.

Aluise v. Nationwide Mut. Fire Ins. Co., 218 W. Va. 498, ____,
625 S.E.2d 260, 266 (2005)

Chafin v. Gibson, 213 W. Va. 167, 171, 578 S.E.2d 361, 365 (2003)

Hoskins v. C & P Tel. Co., 169 W. Va. 397, 400, 287 S.E.2d 513, 515 (1982)

Hoskins v. C & P Tel. Co. of W.Va., 169 W.Va. 397, 400,
287 S.E.2d 513, 515 (1982),
citing Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987)

Jividen v. Law, syl. pt. 5, 194 W. Va. 705, 461 S.E.2d 451 (1995)

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Marcus v. Holley, 217 W. Va. 508, ___, 618 S.E.2d 517, 525 (2005);

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590 SE2d 683, 686 (2003),
citing Williams v. Precision Coil, Inc., 194 W.Va. 52, 61,
459 SE2d 329, 338 (1995).

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(quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252,
106 S. Ct. 2505, 2512, 91 L. Ed.2d 202, 214 (1986))

Toth v. Board of Parks and Recreation Comm'rs., 215 W. Va. 51, 56,
593 S.E.2d 576, 581 (2003).

W. Va. R. Civ. P. 56(c)

W. Va. R. Civ. P. 56(e)

Franklin D. Cleckley *et al.*, Litigation Handbook on West Virginia Rules
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DISCUSSION

A. Summary judgment was appropriate, as the Appellant failed to present evidence sufficient to create a genuine issue of material fact.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). For purposes of Rule 56, “a ‘genuine issue’ . . . is simply one half of a trial worthy 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 trial worthy 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.”

Jividen v. Law, syl. pt. 5, 194 W. Va. 705, 461 S.E.2d 451 (1995). See also, Marcus v. Holley, 217 W. Va. 508, ___, 618 S.E.2d 517, 525 (2005) (same); Chafin v. Gibson, 213 W. Va. 167, 171, 578 S.E.2d 361, 365 (2003) (same).

To resist a motion for summary judgment,

“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 a nonmoving party’s favor.” Painter [v. Peavy], 192 W. Va. [189,] 192-93, 451 S.E.2d [755,] 758-59 (1994) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed.2d 202, 214 (1986)). Moreover,

[s]ummary judgment is appropriate where the record taken as a whole 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. 4, Painter.

Toth v. Board of Parks and Recreation Comm’rs, 215 W. Va. 51, 56, 593 S.E.2d 576, 581 (2003). See also, Lovell v. State Farm Mutual Ins. Co., 213 W. Va. 697, 703, 584 S.E.2d 553, 559 (2003) (“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 a nonmoving party’s favor. The nonmoving party must offer some concrete evidence from which a reasonable finder of fact could return a verdict in his/her favor or other significant probative evidence tending to support his/her case.” Franklin D. Cleckley *et al.*, Litigation Handbook on West Virginia Rules of Civil Procedure § 56(c)[b], at 935 (2002) (footnote omitted).” Evidence submitted in opposition to a motion for summary judgment must be of the same quality as evidence that would be admissible at trial. W. Va. R. Civ. P. 56(e). See also, Aluise v. Nationwide Mut. Fire Ins. Co., 218 W.

Va. 498, ____, 625 S.E.2d 260, 266 (2005) (“in deciding a motion for summary judgment, a court may rely only on material that would be admissible at trial”); Hoskins v. C & P Tel. Co., 169 W. Va. 397, 400, 287 S.E.2d 513, 515 (1982) (allegations contained in affidavits that would be inadmissible in court cannot be used to respond to a motion for summary judgment). For example, “unsupported speculation is not sufficient to defeat a summary judgment motion.” Id. at 400.

Here, the Appellant argues that the court incorrectly based its ruling after his evaluation of the weight, credibility and sufficiency of the evidence. This is not true. The Court did not weigh the evidence or determine the truth of the matter, the Court correctly found that Appellant’s evidence was based solely on unsupported speculation and conjecture. As stated above, “on a motion for summary judgment, only reasonable inferences from the evidence need be considered by the court; the court need not credit purely conclusory allegations and indulgent speculation...” William v. Precision Coil, Inc. 194 W.Va. 52, 459 S.E.2d 329 (1995). Further, as this Court has found, “unsupported speculation is not sufficient to defeat a summary judgment motion.” Id. Further, in the above case, the Court found “...that a genuine issue of material fact cannot be created through mere speculation or building of one inference upon another.” Id.

In this case, Appellant has utterly failed to provide any supporting affidavits to corroborate her self-serving statements and unsupported speculation, and has further failed to identify specific facts in the record and articulate the precise manner in which that evidence supports her delay in discovering the causal connection between her injuries and Appellee’s actions. Accordingly, she has not established the existence of a genuine issue

of material fact with respect to her knowledge of a causal connection between her injury and Appelle's alleged actions.

In this case, the Circuit Court correctly found that "despite the allegations in the Complaint in which the Plaintiff alleges that the defendant's gasoline pump malfunctioned, the Plaintiff has failed to produce even a scintilla of evidence to support her claim." (Order Granting Summary Judgment, June 2, 2006.) Further, the Circuit Court correctly found that "Self-serving assertions, without factual support in the record, will not defeat a motion for summary judgment." Mrotek v. Coal River Canoe Livery, Ltd., 214 W.Va. 490, 493, 590 SE2d 683, 686 (2003), citing Williams v. Precision Coil, Inc., 194 W.Va. 52, 61, 459 SE2d 329, 338 (1995). (Order Granting Summary Judgment, June 2, 2006.) It further found that "unsupported speculation is not sufficient to defeat a summary judgment motion." Hoskins v. C & P Tel. Co. of W.Va., 169 W.Va. 397, 400, 287 S.E.2d 513, 515 (1982), citing Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987), and that "plaintiff has not produced evidence through discovery, or in response to Defendant's Motion for Summary Judgment, sufficient to permit a trier of fact to consider such claims without completely basing any such claims upon pure speculation and conjecture." (Order Granting Summary Judgment, June 2, 2006.)

Further, the Circuit Court correctly followed West Virginia law in this case. In Hoskins v. C & P Tel. Co., 169 W. Va. 397, 400, 287 S.E.2d 513, 515 (1982), this Court held that allegations contained in affidavits that would be inadmissible in court cannot be used to respond to a motion for summary judgment. In the instant case, Appellant's affidavit attached to her response to the Motion for Summary Judgment was conclusory in nature and only contained statements based solely on unsupported speculation and

conjecture. Obviously, allegations that are clearly based solely on unsupported speculation and conjecture would not be admissible in court and therefore, those same allegations cannot be used to respond to a motion for summary judgment via affidavit. Further, in Hoskins, this Court held that "unsupported speculation is not sufficient to defeat a summary judgment motion." Hoskins v. C & P Tel. Co. of W.Va., 169 W.Va. 397, 400, 287 S.E.2d 513, 515 (1982), citing Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987).

Moreover, the Circuit Court correctly held "plaintiff does not have any factual support for her statement that the gasoline pump malfunctioned. The only statements regarding the same are Plaintiff's self-serving statements, with no factual support, and a conclusory affidavit containing unsupported speculation." (Order Granting Summary Judgment, June 2, 2006.) As this Court has held, "self-serving assertions, without factual support in the record, will not defeat a motion for summary judgment." Mrotek v. Coal River Canoe Livery, Ltd., 214 W.va. 490, 493, 590 SE2d 683, 686 (2003), citing Williams v. Precision Coil, Inc., 194 W.Va. 52, 61, 459 SE2d 329, 338 (1995).

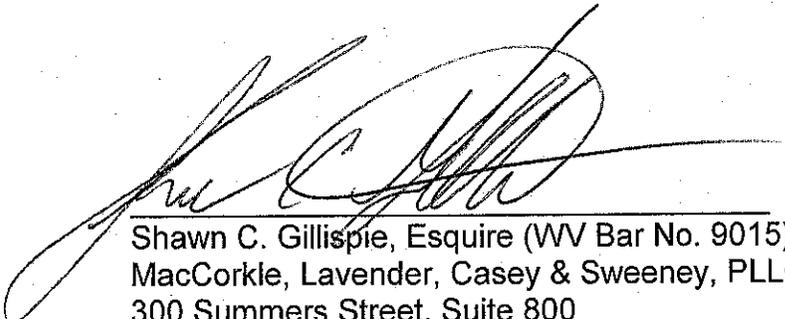
Accordingly, the Appellant has failed to present admissible evidence sufficient to create a genuine issue of material fact and to support her claim against the Appellee. Since the Appellant did not and cannot present *admissible* evidence to support her claim against the Appellant, the judgment of the Circuit Court of Greenbrier County granting Appellant's motion for summary judgment should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Greenbrier County should be affirmed.

LITTLE GENERAL STORES, INC.

By Counsel



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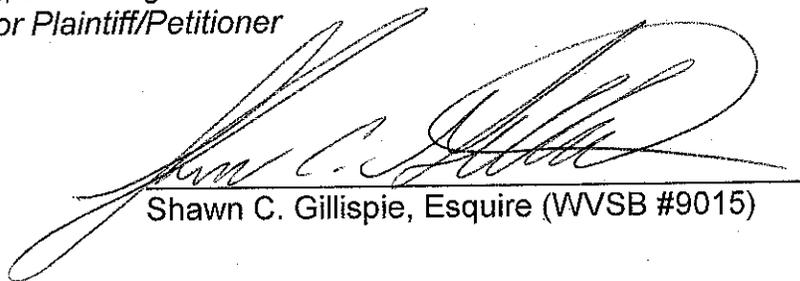
LITTLE GENERAL STORES, INC.,

Respondent.

CERTIFICATE OF SERVICE

I, Shawn C. Gillispie, counsel for Defendant, Little General Store, Inc., do hereby certify that on this 20th day of March, 2007, a true copy of the foregoing "Appellee's Brief" was served on the following counsel of record by depositing the same in the United States Mail, postage prepaid and addressed as follows:

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