

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Ronald Schleger, Counterclaim
Plaintiff Below, Petitioner**

vs) **No. 11-0388** (Preston County 06-C-126)

**Michela Livengood, Administratrix
Counterclaim Defendant Below, Respondent**

FILED
October 21, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Ronald Schleger appeals the circuit court's order granting partial summary judgment to Respondent Michela Livengood in regard to the damages stemming from petitioner's criminal prosecution as alleged in his amended counterclaim. Respondent Michela Livengood did not file a response. The County Commission of Preston County ("County Commission"), petitioner's co-defendant in respondent's wrongful death and personal injury suit, has filed a response.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on May 10, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner, while driving his vehicle, struck and killed respondent's family dog. Mr. Livengood, respondent's husband, confronted petitioner, who had remained in his vehicle. Petitioner asserts that Mr. Livengood punched and choked him, and had threatened further harm to petitioner. Petitioner contacted 911 and requested assistance. Prior to the arrival of the police, petitioner shot and killed Mr. Livengood and also shot respondent.

Respondent brought a wrongful death and personal injury suit against petitioner. Petitioner filed a counterclaim for personal injuries he allegedly sustained as a result of the decedent's attack upon him.

Petitioner was prosecuted for murder and was found not guilty. He later amended his counterclaim against respondent to include damages relating to his criminal prosecution including reimbursement of attorney's fees incurred in his criminal defense, lost wages, and damages for loss of reputation as a result of his incarceration, which caused him to lose his job.

The circuit court granted respondent's motion for summary judgment in part as to the damages alleged by petitioner in his amended counterclaim stemming from the criminal prosecution. The circuit court concluded that these damages were not the direct result of the attack of decedent upon petitioner, were not reasonably foreseeable and, therefore, no duty had been established. The circuit court reasoned that while decedent's conduct toward petitioner created the risk of physical and emotional harm to the petitioner as the victim of the attack, it did not create the risk that petitioner as the victim would be prosecuted and incarcerated. As an alternative ground, the circuit court concluded that petitioner's arrest and prosecution by law enforcement authorities constituted an intervening cause sufficient to relieve respondent from liability for subsequent damages. Thus, the circuit court granted partial summary judgment, dismissing petitioner's claims for damages based upon his prosecution.¹

"Appellate review of a partial summary judgment order is the same as that of a summary judgment order, which is *de novo*." Syl. Pt. 1, *W. Va. Dep't of Transp., Div. of Highways v. Robertson*, 217 W.Va. 497, 618 S.E. 2d 506 (2005). "The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law." Syl. Pt. 5, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E. 2d 576 (2000)." Syl. Pt. 4, *Strahin v. Cleavenger*, 216 W.Va. 175, 603 S.E.2d 197 (2004). Following a careful review of petitioner's arguments, the Court concludes that the circuit court's decision was proper in light of the facts and circumstances of the case-at-bar.²

For the foregoing reasons, we affirm.

¹ The circuit court denied the respondent's motion for summary judgment as to physical and emotional damages sought by petitioner due to the decedent's physical attack.

² There is a separate lawsuit brought by petitioner against the County Commission of Preston County, which is pending below. *See* Preston County Circuit Court Case No. 08-C-86. This Memorandum Decision only addresses the case-at-bar.

Affirmed.

ISSUED: October 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh