IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

FILED
November 18, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30431

RELEASED
November 20, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

AARON ELLIOTT,
Plaintiff Below, Appellant

v.

CHRIS SCHOOLCRAFT;
JAMES ROGER HOUSE, II, also known as J. R. HOUSE;
NANCY HOUSE; JAMES ROGER HOUSE;
JOSHUA HAYNES; GLENN HAYNES;
PATRICIA HAYNES; and
THE BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,
a West Virginia corporation,
Defendants Below, Appellees

Appeal from the Circuit Court of Kanawha County
Honorable Paul Zakaib, Jr., Judge
Civil Action No. 99-C-2674

REVERSED AND REMANDED

Submitted: September 18, 2002
Filed: November 18, 2002

C. Michael Bee, Esq.
Sandra Brenneman Harrah, Esq.
Hill, Peterson, Carper, Bee & Dietzler, P.L.L.C.
Charleston, West Virginia
Attorneys for the Appellant

Mark A. Atkinson, Esq.
John J. Polak, Esq.
Timbera C. Wilcox, Esq.
Rose & Atkinson
Charleston, West Virginia
Attorneys for Appellees

James Roger House, II,
Nancy House, and
James Roger House

Wendy E. Greve, Esq.
Pullin, Knopf, Fowler
& Flanagan, P.L.L.C.
Charleston, West Virginia
Attorney for Appellees
Joshua Haynes, Glen Haynes, and
Patricia Haynes

Ancil G. Ramey, Esq.
Jan L. Fox, Esq.
Michelle E. Piziak, Esq.
Steptoe & Johnson, P.L.L.C.
Charleston, West Virginia
Attorneys for Appellee
Board of Education of
the County of Kanawha

The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE DAVIS concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

JUSTICE MAYNARD concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

SYLLABUS

"An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier." Syllabus Point 1, *Powderidge Unit Owners Assoc. v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996).

Per Curiam:

In this appeal from the Circuit Court of Kanawha County, we are asked to review four orders granting summary judgment to several appellees. In each order, the appellant contends that the circuit court abused its discretion by granting summary judgment before the appellant was allowed to conduct discovery of facts necessary to oppose the appellees' motions for summary judgment.

As set forth below, we agree and reverse the circuit court's orders.

I.

The appellant, Aaron Elliott, was a senior at Nitro High School on December 5, 1998. On that day, Nitro High School won the state championship football game.

Appellee James Roger House, II ("J. R. House"), who was eighteen years old at the time and the team quarterback, hosted a "victory party" for high school students at an empty house he owned. J. R. House, along with his parents, appellees Nancy and James Roger House, lived in a home adjacent to the property where the "victory party" was to be held.

It appears from the record that alcoholic beverages, including beer, were served, sold (for $2.00 a cup), and consumed by many of the high school students at the party on J. R. House's property. Nancy House, along with other members of the House family, may have been supervising the party at the empty house, may have cleaned up empty cups, and may have allowed party attendees to use the restroom next door in the family house.

Appellees Glenn and Patricia Haynes also owned a home adjacent to the empty house where the party was held. Their son, appellee Joshua Haynes, who was then also eighteen years old, had several friends visiting the Haynes house that evening. Joshua Haynes and his friends, including defendant below Chris Schoolcraft, migrated next door to J. R. House's "victory party."

Witnesses allege that, while at the party, Joshua Haynes and Chris Schoolcraft consumed substantial amounts of beer. One witness testified in a deposition that both Joshua Haynes and Chris Schoolcraft performed "keg stands," and were held upside down drinking from a running beer keg tap. At some point, Joshua Haynes and Chris Schoolcraft returned to the Haynes property.

Appellant Aaron Elliott arrived at the party in the late evening, and after being at the party for 20-45 minutes, decided to leave. As he walked by the Haynes property, the appellant claims he saw J. R. House and stepped onto the Haynes property to congratulate him. Appellee Joshua Haynes immediately yelled for the appellant to leave his property, and after that began debating with Chris Schoolcraft as to who of the two was going to beat up the appellant. Chris Schoolcraft then hit the appellant in the jaw with his fist, and the appellant collapsed to the ground. Evidence revealed during the discovery process suggests that both Joshua Haynes and Chris Schoolcraft proceeded to kick the appellant as he lay on the ground.[1]

---

[1]As detailed *infra*, the allegation that Joshua Haynes actually kicked the appellant was not discovered until witness depositions were able to be conducted, approximately one month after the circuit court indicated it would grant summary judgment to Joshua Haynes and his (continued...)

The appellant was severely injured, and was diagnosed with a broken jaw which required his mouth be wired shut for six months. The appellant also sustained a back injury. He has incurred medical expenses in excess of $16,000.00.

On December 3, 1999, the appellant filed a complaint against various individuals seeking to recover compensation for his injuries. To begin, the appellant sued Chris Schoolcraft, who never answered the appellant's complaint. A default judgment was later entered against Mr. Schoolcraft by the circuit court, and he is not participating in the instant appeal.

The appellant also filed the instant lawsuit against J. R. House and his parents, Nancy and Roger House. The appellant contends that the Houses violated *W.Va. Code*, 11-16-19 [1993], which prohibits any person under the age of 21 from "purchas[ing], consum[ing], sell[ing], possess[ing] or serv[ing] nonintoxicating beer," and prohibits a person from giving or furnishing nonintoxicating beer to anyone under the age of 21. The legislatively-stated purpose of this statute is:

> . . . for the protection of the public safety, welfare, health, peace and morals and [is] further intended to eliminate, or to minimize to the extent practicable, the evils attendant to the unregulated, unlicensed and unlawful . . . sale, distribution . . . and consumption of such beverages[.]

W.Va. Code, 11-16-2 [1986]. The appellant alleged that the Houses, by furnishing, selling, and promoting the consumption of alcoholic beverages by and to high-school-aged students,

---

[1](...continued)
parents.

negligently contributed to the intoxication of Joshua Haynes and Chris Schoolcraft, and that the intoxication was a direct and proximate cause of an "evil" attendant to such activity, the appellant's injuries.

The appellant also filed the instant lawsuit against Joshua Haynes and his parents, Glenn and Patricia Haynes. The appellant alleged that Joshua Haynes' parents were negligent in allowing their son and his high-school-aged friends to gather and consume alcoholic beverages on their property, and that they failed in their duty to deter underage drinking. As a result of the testimony of a witness during discovery, the appellant later alleged that Joshua Haynes was liable for kicking the appellant as he lay on the ground.

Lastly, the appellant sued the Board of Education of Kanawha County ("the Board"). The appellant states that *W.Va. Code*, 18-2-25 [2000] places a duty on boards of education to exercise control, supervision, and regulation of all extracurricular activities. The appellant contended that the "victory party," because of its connection with the state high school football championship, was such an extracurricular activity. The appellant alleges that teachers at the school knew of the party beforehand, and that several coaches even attended the party and drank alcoholic beverages with students. The appellant argues that the Board had a duty to intervene and prevent students from drinking alcoholic beverages.

When the appellant filed his complaint in December 1999, he also filed a motion seeking a scheduling conference before the circuit court. The parties commenced trading written discovery, and a scheduling conference was planned for March 22, 2000. However, on March 13, 2000, appellees Nancy and James Roger House filed a motion for summary

judgment, and the scheduling conference was moved to April 28, 2000. Appellees Joshua, Glenn and Patricia Haynes similarly filed a motion for summary judgment on April 21, 2000.

On April 25, 2000, the appellant filed notices to take the depositions of the parties and several witnesses, beginning on June 1, 2000. The appellant indicated, before the circuit court, that because of the popularity of J. R. House, depositions were necessary to secure the statements of witnesses unwilling to talk informally with appellant's counsel. However, upon filing the notices of deposition, the appellant learned that several witnesses – including Chris Schoolcraft and Joshua Haynes – lived in South Carolina and were not subject to a West Virginia subpoena. Furthermore, counsel for the other parties – namely the Houses – refused to produce their clients for deposition.

At the April 28, 2000 hearing, counsel for the appellant indicated that the hearing was requested primarily as a scheduling conference to obtain a trial date and to "get the discovery moving along." The appellant also repeatedly indicated to the circuit court – orally and in pleadings – that discovery was still ongoing, and would be needed to respond to the appellees' motions. Still, at the hearing on April 28, 2000, the circuit court announced it would grant summary judgment to appellees Nancy and Roger House, and Joshua, Glenn and Patricia Haynes. The circuit court concluded that no genuine issue of material fact existed to establish a breach of any duty by these appellees, and dismissed the appellant's claims.[2]

[2]The order granting summary judgment to Nancy and James Roger House is dated June 1, 2000, while the Haynes' summary judgment order is dated July 7, 2000.

On May 17, 2000, appellee J. R. House filed a motion for summary judgment. The Board filed a motion for summary judgment on June 6, 2000. At a hearing on June 16, 2000, the circuit court again refused the appellant's request to delay consideration of the motions, and granted both motions for summary judgment.[3]

The appellant subsequently filed motions to reconsider or alter the circuit court's summary judgment orders. The circuit court refused to consider the evidence discovered in the few depositions that the appellant was able to conduct in June 2000, such as the testimony that Joshua Haynes had actually participated in kicking appellant Aaron Elliott. The circuit court concluded that its summary judgment orders "were sound and based on the facts and law before it at that time[.]" In an order dated April 17, 2001, the circuit court denied the appellant's motions to alter the summary judgment orders.

The appellant now appeals the circuit court's orders.

II.

We review a circuit court's grant of summary judgment *de novo.* Syllabus Point 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994).

The appellant contends that the circuit court "jumped the gun," and granted summary judgment to the appellees before substantial discovery could be completed. The appellant, orally and in writings, repeatedly requested that the circuit court delay ruling on the

[3]The order granting summary judgment to the Board is dated September 7, 2000, while the J. R. House order is dated November 21, 2000.

motions for summary judgment until discovery, particularly the depositions of the parties and eyewitnesses to the incident, could be conducted. The appellant essentially argues that the circuit court abused its discretion in considering the motions for summary judgment.

As a general rule, summary judgment is appropriate only after the parties have had adequate time to conduct discovery. As we stated in *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 701, 474 S.E.2d 872, 881 (1996):

> As a general rule, summary judgment is appropriate only after adequate time for discovery. See *Celotex* [*Corp. v. Catrett*], 477 U.S. [317] at 322, 106 S.Ct. [2548] at 2552, 91 L.Ed.2d [265] at 276 [(1986)]. A party opposing a motion for summary judgment must have a reasonable "opportunity to discover information that is essential to [its] opposition" to the motion. *See Anderson* [*v. Liberty Lobby, Inc.*], 477 U.S. [242] at 250 n. 5, 106 S.Ct. [2505] at 2511 n. 5, 91 L.Ed.2d [202] at 213 n. 5 [(1986)]. In *Board of Education of the County of Ohio* [*v. Van Buren and Firestone, Architects, Inc.]*, 165 W.Va. [140] at 144, 267 S.E.2d [440] at 443 [(1980)], we stated that granting a motion for summary judgment before the completion of discovery is "precipitous."

We went on to hold in *Powderidge* that a circuit court, within its discretion, could delay consideration of a summary judgment motion when a party files, in accordance with Rule 56(f) of the *Rules of Civil Procedure*,[4] an affidavit or some "alternative statement" indicating that

---

[4]Rule 56(f) of the *Rules of Civil Procedure* states:

> (f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

additional time was needed to discover facts necessary to oppose a motion for summary judgment. We stated the following rule in Syllabus Point 1 of *Powderidge*:

> An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

We stated, in explaining the application of Rule 56(f):

> Under Rule 56(f), a procedural "escape hatch" is provided for a party who genuinely requires additional time to marshal material facts to contest a summary judgment motion. . . . However, invocation of Rule 56(f) does not demand hypertechnical compliance with its terms. In appropriate surroundings, some alternative statement might serve. Indeed, some cases have accepted a nonaffidavit pleading – a letter – as sufficient under Rule 56(f).

Powderidge, 196 W.Va. at 701, 474 S.E.2d at 881.

In the instant case, the record indicates that the parties had only exchanged written discovery requests before motions for summary judgment were filed. Notwithstanding the incompleteness of the development of a factual record, the appellees began filing motions

for summary judgment four months after the lawsuit was initiated, and before the circuit court considered the appellant's motion for the entry of a scheduling order.[5]

Applying our four-point holding in *Powderidge*, the record reveals that the appellant articulated to the circuit court a plausible basis that material facts were discoverable, but were not accessible to the appellant. The appellant had scheduled depositions of the parties in what is clearly a fact-intensive case, yet counsel for several parties refused to produce their clients for deposition before the circuit court considered their motions for summary judgment. The appellant also demonstrated a realistic prospect that material facts could have been obtained within a reasonable additional time period. Depositions of the parties were highly likely to engender a genuine and material issue of fact. And lastly, "good cause" for the appellant's "failure to have conducted discovery earlier" was shown by the fact the appellees

---

[5]Our inspection of the record reveals that the circuit court never entered a scheduling order in the instant case. Rule 16(b) of the *Rules of Civil Procedure* requires the entry of a scheduling order, and states (with emphasis added):

> . . . [T]he judge *shall*, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail or other suitable means, enter a scheduling order that limits the time:
>
> (1) To join other parties and to amend the pleadings;
>
> (2) To file and hear motions; and
>
> (3) *To complete discovery*.
>
> The scheduling order also may include:
>
> (4) The date or dates for conferences before trial, a final pretrial conference, and trial; and
>
> (5) Any other matters appropriate in the circumstances of the case.
>
> A schedule shall not be modified except by leave of the judge.

The appellant asserts that the circuit court should have entered a scheduling order before considering the motions for summary judgment. We agree.

began filing motions for summary judgment only four months after a complex lawsuit with multiple parties was filed, even before depositions of the parties could be taken.

The record establishes that the appellant simply was not given an opportunity to conduct sufficient formal discovery of his case and, consequently, could not adequately respond to the appellees' motions for summary judgment. The record also establishes that this was made known, orally and in pleadings, to the circuit court. The circuit court therefore abused its discretion by ruling on the appellees' motions for summary judgment.

III.

The circuit court's orders granting summary judgment are reversed, and the case is remanded for further proceedings.

Reversed and Remanded.