

IN THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA

DANIEL LEE HOKE, as Administrator of
The Estate of Justin Lee Hoke, and in his individual
capacity as the natural father of Justin Lee Hoke,
BRENDA L. HOKE, natural mother of
Justin Lee Hoke, and ANDREA HOKE, the
natural sister of Justin Lee Hoke,

Plaintiffs,

v.

CA No. 06-C-66

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
WEST VIRGINIA DIVISION OF HIGHWAYS,
WEST VIRGINIA STATE POLICE, and
SIDNEY SCOTT KEATON, in his individual capacity, and

SUNRISE AUTOMOTIVE GROUP, INC., a West Virginia corporation
d/b/a FREEDOM MOTORSPORTS, and POLARIS INDUSTRIES, INC. and
POLARIS SALES, INC., Minnesota corporations,

Defendants.

COMPLAINT

For their cause of action in this matter, Plaintiffs, by Counsel, state as follows:

I. Jurisdiction and Venue

1. Pursuant to Rule 11 (b)(3), Plaintiffs state that the allegations and other factual contentions in the following paragraphs 2 through 28 of this Complaint, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

2. This Court has jurisdiction of this claim under W. V. Code § 51-2-2. Venue for this action properly lies in Monroe County under W. V. Code § 56-1-1 because cause of action arose there. Because the claim against state defendants is limited to the amount of available insurance, the exclusive venue provisions of W. V. Code § 14-2-2 are inapplicable notwithstanding the fact that the defendants include an agency of the

State of West Virginia and an employee of the State of West Virginia. See King v. Heffernan, 214 W.Va. 835, 591 S.E.2d 761 (2003)(Syl. 3. “Because *W.Va. Code* § 14-2-2 does not exclusively govern claims in which recovery is sought against the liability insurance coverage of a state agency, venue for such claims is proper under either *W.Va. Code* § 14-2-2 or *W.Va. Code* § 56-1-1”).

II. Parties

3. Donald Lee Hoke is the natural father, and administrator of the estate, of Justin Lee Hoke, who died following an all-terrain vehicle accident on September 12, 2004. Brenda L. Hoke is the natural mother of Justin Lee Hoke, and Andrea Hoke is the sister of Justin Lee Hoke. All Plaintiffs reside in Monroe County, West Virginia.

4. The West Virginia Department of Highways and the West Virginia State Police are agencies of the State of West Virginia. Trooper Sidney Scott Keeton is an employee of the West Virginia State Police, and is sued in his individual capacity.

5. Sunrise Automotive Group, Inc., is a West Virginia corporation doing business as Freedom Motorsports, and Polaris Industries, Inc. and Polaris Sales, Inc. are Minnesota corporations, engaged in the manufacture and sale of all terrain vehicles (ATV’s).

III. Statement of Facts

6. On September 12, 2004, Justin Lee Hoke, then 16 years old, was seriously injured, and subsequently died from the injuries sustained in an all-terrain vehicle accident in Monroe County, West Virginia. At the time of the accident, Justin Lee Hoke was wearing a helmet as required by law. The ATV operated by Justin Lee Hoke on

September 12, 2004 was manufactured and distributed by Polaris Industries, Inc. and/or Polaris Sales, Inc., Minnesota corporations. The vehicle was sold by Sunrise Automotive Group, Inc., a West Virginia corporation doing business as Freedom Motorsports, with a principal place of business in Princeton, W. Va.

7. In the course of investigating the accident, State Trooper Keaton was consistently advised that Justin Lee Hoke was wearing his helmet at the time of the accident by all persons whom he interviewed, including interviews with Matthew Dunbar, the sole witness to the accident on September 12, 2004. Notwithstanding the consistent reports that Justin Lee Hoke was wearing his helmet at the time of the accident, Defendant Keaton persisted in his interrogation of Matthew Dunbar, also a minor, and requested Matthew Dunbar to leave his residence and submit to further interrogation in Defendant Keaton's cruiser. After continued interrogation in Defendant Keaton's cruiser, and outside of the presence of his parents, Matthew Dunbar acquiesced in Defendant Keaton's insistence that Dunbar state that Justin Lee Hoke was not wearing a helmet at the time of the accident. Matthew Dunbar at that point relented and stated that he would sign anything the State Trooper put in front of him. Knowing that the statement was not true, State Trooper Keaton presented to Mr. Dunbar a statement that Justin Lee Hoke was not wearing his helmet at the time of the accident, which statement Mr. Dunbar signed.

8. Thereafter, State Trooper Keaton, knowing that the statement was false, stated in his official report, and to newspaper reporters in Monroe County, that Justin Lee Hoke was not wearing his helmet at the time of the accident.

9. In addition to his knowing and intentionally false statements relating to Justin Lee Hoke's use of a helmet, State Trooper Keaton also falsely stated in his reports that Justin Lee Hoke's motorcycle had performed improperly both prior to and on September 12, 2004. At the time he made these false statements, State Trooper Keaton had been advised by witnesses that the exact opposite was the case, viz., that in fact, prior to September 12, 2004, Justin Lee Hoke had never had the problem described in State Trooper Keaton's report.

10. Also, on September 12, 2004, State Trooper Keaton contacted representatives of the West Virginia State Highway Department and instructed them to clean excessive cinders and other debris from the highway on which Justin Lee Hoke had been killed because the presence of those cinders had caused the accident in which Justin Lee Hoke had died.

11. Pursuant to State Trooper Keaton's instructions, the West Virginia State Department of Transportation, through its Division of Highways, on the morning of September 13, 2004, with State Trooper Keaton present and directing the action, cleaned the road on which Justin Lee Hoke had died, thereby knowingly and intentionally destroying evidence on which a claim for negligence might be filed against one or more state agencies.

IV. Cause of Action for Negligent Maintenance of Highway

12. Plaintiff incorporates paragraphs 1 through 11 of this Complaint as though fully set out herein.

13. The West Virginia State Department of Transportation, through its Division of Highways, and/or other agents, negligently maintained a road in Monroe County, West Virginia, which negligence was the proximate cause and/or a substantial contributing factor in the ensuing accident and death of Justin Lee Hoke on September 12, 2004.

14. As a result of the negligence of the West Virginia State Department of Transportation, acting through its Division of Highways, Plaintiffs' decedent, Justin Lee Hoke, has suffered grievous wounds and died. Additionally, Plaintiffs have undergone great emotional pain and suffering, and will in the future undergo great emotional suffering, and have incurred other losses, all in an amount to be proved at trial.

V. Cause of Action for Spoliation of Evidence

15. Plaintiff incorporates paragraphs 1 through 14 of this Complaint as though fully set out herein.

16. Defendant Keaton's publication of false statements regarding the operation of Justin Lee Hoke motorcycle, and the West Virginia State Department of Transportation actions, under Defendant Keaton's direction, through the Division of Highways' in cleaning of the road in Monroe County on which Justin Lee Hoke died, constituted spoliation of evidence.

17. Under settled principles of West Virginia law, spoliation of evidence is actionable against a third party where done negligently by a third party with a duty to preserve evidence. Additionally, West Virginia recognizes the tort of spoliation against a party or third party where done intentionally. Specifically, in *Hanna v Heeter*, 213 W.

Va. 704, 584 S.E.2d 560 (2003), the West Virginia Supreme Court of Appeals, in a series of syllabus points, held as follows:

5. West Virginia recognizes spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a third party, and the third party had a special duty to preserve the evidence.

6. “In order to establish a prima facie case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken.” Syllabus Point 1, *Parsley v. General Motors Acceptance Corp.*, 167 W.Va. 866, 280 S.E.2d 703 (1981).

7. A duty to preserve evidence for a pending or potential civil action may arise in a third party to the civil action through a contract, agreement, statute, administrative rule, voluntary assumption of duty by the third party, or other special circumstances.

8. The tort of negligent spoliation of evidence by a third party consists of the following elements: (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party’s ability to prevail in the pending or potential civil action; and (6) damages. Once the first five elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The third-party spoliator must overcome the rebuttable presumption or else be liable for damages.

9. West Virginia recognizes intentional spoliation of evidence as a stand- alone tort when done by either a party to a civil action or a third party.

10. Intentional spoliation of evidence is defined as the intentional destruction, mutilation, or significant alteration

of potential evidence for the purpose of defeating another person's recovery in a civil action.

11. The tort of intentional spoliation of evidence consists of the following elements: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages.

12. "In actions of tort, where . . . willful . . . conduct . . . affecting the rights of others appears . . . the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous." Syllabus Point 4, in part, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895).

[Hannah v. Heeter, 213 W. Va. 704 \(W. Va. 2003\).](#)

18. The action of the West Virginia Department of Transportation, through its Division of Highways, was a negligent spoliation which proximately caused damage to Plaintiffs in an amount to be proved at trial.

19. The action of the State Police, through its employee, Sidney Scott Keaton, was a negligent spoliation of evidence which proximately caused damage to Plaintiffs in an amount to be proved at trial.

20. Pursuant to the provisions of Rule 8, WVRCivP, permitting pleading in the alternative, Plaintiffs state that the action of the West Virginia Department of Transportation, through its Division of Highways, was an intentional spoliation which proximately caused damage to Plaintiffs in an amount to be proved at trial.

21. Pursuant to the provisions of Rule 8, WVRCivP, permitting pleading in the alternative, Plaintiffs state that the action of the State Police, and its employee, Sidney Scott Keaton, was an intentional spoliation which proximately caused damage to Plaintiffs in an amount to be proved at trial.

VI. The West Virginia Department of Transportation and State Police Are Liable for Their Agent's Actions To The Extent of Available Insurance, and Defendant Keaton Is Liable for Punitive Damages To The Extent His Actions Were Beyond The Scope of Employment and Intentional

22. Plaintiff incorporates paragraphs 1 through 21 of this Complaint as though fully set out herein.

23. All of the actions of Defendant Keaton recited herein were within the scope of his employment by the West Virginia State Police, which is responsible for those actions under the doctrine of *respondeat superior* to the extent of any available insurance, which limits Plaintiffs expressly acknowledge, and which limit the damage claims represented by this Complaint in their entirety.

24. Pursuant to Rule 8 (e)(2) of the Rules of Civil Procedure, permitting pleading in the alternative, to the extent that Defendant Keaton's actions were beyond the scope of his authority and intentional, Plaintiffs are to entitled to punitive or exemplary damages from Keaton which bear a reasonable relationship to compensatory damages and which take into consideration:

- (a) the fact Keaton's actions caused, and are likely to cause in a similar situation, grievous harm;
- (b) the reprehensibility of Keaton's conduct,

- (c) the fact that Keaton's had to be aware that their actions were causing, or were likely to cause, harm,
- (d) the extent to which Keaton's have attempted to conceal or cover up their actions and the harm caused by them by refusing to apologize to Plaintiff and publicly withdraw his false statements,
- (e) the extent to which Keaton's has engaged in similar conduct in the past;
- (f) the damages needed to achieve the desired effect of punishing Keaton and discouraging others from engaging in the same or similar acts in the future.

VII. Negligence

25. Plaintiffs incorporate paragraphs 1 through 24 of this Complaint as though fully set out herein.

26. Defendant West Virginia State Police, were negligent in their hiring, supervision and retention of Sidney Scott Keaton, which negligence proximately caused injuries to Plaintiffs in an amount to be proved at trial.

VIII. Cause of Action for Strict Liability in Manufacture and Sale of Defective Product

27. Plaintiff incorporates paragraphs 1 through 26 of this Complaint as though fully set out herein.

28. The ATV manufactured and distributed by Polaris Industries, Inc. and/or Polaris Sales, Inc., and sold by Sunrise Automotive Group, Inc., was defective in that it was not reasonably safe for its intended use, as measured by what a reasonably prudent manufacturer's standards should have been at the time the product was made. A

malfunction occurred in the ATV that would not ordinarily happen in the absence of a defect, and there was neither abnormal use nor a reasonable secondary cause of the malfunction. The crash in which Justin Lee Hoke was killed would not have happened but for the defect in the ATV manufactured, distributed and sold by Defendants Polaris Industries, Inc., Polaris Sales, Inc. and Sunrise Automotive Group, Inc.

29. Under settled principles of West Virginia law, the product defect need not be the only cause of the incident, and the fact that there were other concurrent causes of the harm as a result of the negligence of the Defendant state agencies and employees does not preclude liability. *Bennett v. ASCO Services, Inc.*, 621 S.E.2d 710 (2005).

30. Plaintiffs have been injured in an amount to be proved at trial by the manufacture, distribution and sale of the defective ATV, as recited herein, and are entitled to damages in an amount to be proved at trial. If, under the standards authorizing imposition of punitive damages, the evidence adduced at trial warrants, Plaintiffs will request punitive damages.

IX. Prayer for Relief

WHEREFORE, Plaintiffs respectfully request that this Court:

1. enter a judgment for Plaintiffs for compensatory damages against Defendants, jointly and severally, but as against the state agencies only, to the extent of, not more than, insurance available to the state;
2. award punitive damages against Sidney Scott Keaton in an amount to be determined by jury at trial, and
3. award the costs of this action and such other relief as the facts and law require, and the interests of justice demand.

PLAINTIFFS DEMAND A TRIAL BY JURY.

**DONALD LEE HOKE, BRENDA
L. HOKE AND ANDREA HOKE
By Counsel**

William V. DePaulo, Esq. #995
179 Summers Street, Suite 232
Charleston, WV 25301-2163
Tel: 304-342-5588
Fax: 304-342-5505
william.depaulo@gmail.com

Thomas Persinger, Esq. #2874
P. O. Box 2828
Charleston, WV 25330-1677
Tel: 304-343-0850
Fax: 304-343-1677
mtplaw@verizon.net