

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

AT BLUEFIELD

HELEN GREEN, as Administratrix of the)
Estate of CLAUDE GREEN, JR., deceased)
and as Personal Representative,)
)
Plaintiff,)
)

vs.)

CIVIL ACTION NO. _____

)
THE CITY OF WELCH, a West Virginia)
Political Subdivision, and)
ROBERT K. BOWMAN, individually and)
in his official capacity as the Chief of Police)
of the Welch Police Department,)
)
Defendants.)
_____)

COMPLAINT

Comes now the Plaintiff and for her Complaint against the Defendants states the following:

NATURE OF THE ACTION

1. On June 21, 2005, Claude Green, Jr., suffered a heart attack while driving in the City of Welch, West Virginia. A passenger in his car began performing CPR, when the Defendant Robert K. Bowman, the Chief of Police of the Welch Police Department, arrived at the scene and ordered him to stop, claiming that Claude was HIV positive. Instead of providing emergency medical care himself, or even allowing others to continue to do so, Defendant

Bowman physically pulled the passenger away from Claude, stood in the doorway of the car, and then directed traffic, while Claude waited approximately eight minutes for the ambulance to arrive. Despite efforts to revive Claude at the hospital, he died. There is no medical basis to justify the refusal to provide emergency care to a person with the Human Immunodeficiency Virus (HIV), and Claude was not HIV positive. Defendant Bowman wrongly believed Claude was HIV positive simply because he was known to be gay and to associate with gay men in McDowell County.

2. Plaintiff Helen Green, as the appointed administratrix of the estate of her son Claude Green Jr., and as personal representative of his surviving family members pursuant to W.V. Code § 55-7-6, brings this claim pursuant to Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, *et seq.*, to remedy discrimination based on perceived disability in the provision of public services by Defendant Bowman and the City of Welch. Plaintiff also brings claims under 42 U.S.C. §§ 1983 and 1988, for Defendants' violation of Claude's right to equal protection of the laws by treating him differently because of his perceived HIV status, and to due process of law by interfering with the efforts of others to provide life-saving medical care, and by placing Claude at increased risk of harm, all in violation of the Fourteenth Amendment to the United States Constitution. Plaintiff also brings a claim against Defendants for discrimination based on perceived disability under the West Virginia Human Rights Act, W.V. Code § 5-11 *et seq.* Finally, Plaintiff seeks damages because Defendants' actions resulted in the wrongful death of the decedent, pursuant to W.V. Code § 55-7-5.

JURISDICTION AND VENUE

3. This case arises under the Constitution and laws of the United States and presents a federal question within this Court's jurisdiction under Article III of the Constitution, 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. §§ 1983, 12132. This Court has supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367.

4. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because (1) the Defendants are located within this judicial district, (2) the events or omissions giving rise to Plaintiff's claim for relief occurred in this judicial district, (3) the unlawful acts are alleged to have been committed in this judicial district, and (4) the records relevant to such acts are maintained and administered in this judicial district.

PARTIES

5. Plaintiff, Helen Green, is a citizen of the United States of America and a resident of Coeburn, Virginia. She is the mother of decedent Claude Green, Jr.

6. Plaintiff's decedent, Claude Green, Jr., resided in Hemphill, McDowell County, West Virginia, at the time of his death, and in addition to his mother, is survived by his son, C. Christopher Green, and four siblings, Madge Kiser, Mary Mullins, Anita Tickle and Richard Green.

7. On July 28, 2005, Helen Green was duly appointed by the McDowell County Commission as the Administratrix of the Estate of Claude Green, Jr., deceased.

8. Defendant Robert K. Bowman is at this time and was on or about June 21, 2005, employed as the Chief of Police by the City of Welch, a West Virginia political subdivision, and at all times material to this action was performing law enforcement activities on behalf of and

under the control and supervision of the City of Welch and its police department. As the Chief of Police of the Welch Police Department, Defendant Robert K. Bowman is and was responsible for establishing policies of the City of Welch and its Welch Police Department related to the provision of emergency care by the police in the City of Welch, and Defendant Bowman has final policymaking authority regarding police services in the City of Welch.

9. Defendant Robert Bowman is named as a defendant in this matter in his official capacity as Chief of Police for the City of Welch and in his individual capacity.

10. Defendant the City of Welch is at this time and was on or about June 21, 2005, a West Virginia political subdivision providing services to its citizens, including public safety and law enforcement activities directed toward the provision of emergency medical care. As a state actor, the City of Welch must perform its law enforcement activities, including its law enforcement procedures, policies and customs in conformity with the United States Constitution.

FACTUAL ALLEGATIONS

11. At approximately 2:00 p.m., on June 21, 2005, Claude Green Jr. was driving his truck in the City of Welch on Virginia Avenue.

12. Billy Snead, one of Claude's neighbors, was a passenger in the truck with Claude.

13. While they were driving, Claude commented that he felt discomfort and had indigestion or gas.

14. Claude suddenly stiffened and his foot pressed down on the accelerator. The truck went out of control and veered off the road.

15. Snead quickly got the truck under control and brought it to a stop. The loss of control of the truck did not result in any physical injury to either Snead or Claude.

16. Snead immediately noticed that something was wrong with Claude's ability to breathe, and he ran around to the driver's side, opened the truck door and called Claude's name. Claude responded when Snead called his name by turning his head towards him.

17. Because Claude was a much larger man than Snead, Snead was unable to get Claude out of the truck on his own.

18. Snead had training in cardiopulmonary resuscitation (CPR) and believed that Claude might be choking because his face was red. He checked for obstructions in Claude's mouth, and tried to tilt his head back.

19. When he realized that Claude was still unable to breathe, Snead shook him several times, and Claude gasped for breath.

20. Snead then immediately realized that Claude's heart was not beating, and he hit Claude's chest with his fist two or three times. After several blows, Claude's heart started beating again. It was a hot summer day, and Claude was wearing a light-weight shirt. Snead could feel Claude's heart beat when he shook him and pushed on his chest. Claude continued to gasp for breath when Snead pushed on his chest.

21. Approximately two to three minutes after Snead stopped the truck, defendant Robert K. Bowman arrived, while Snead was attempting to revive Claude.

22. Defendant Bowman then stated that Claude was HIV positive, and told Snead to get back.

23. Snead did not stop because he knew the chest compressions were helping Claude to breathe and he did not then know that Bowman was a police officer.

24. Defendant Bowman approached Snead and Claude and grabbed Snead by the shoulders, interfering with his efforts to revive Claude.

25. Another person at the scene also stated that Claude was HIV positive, and Defendant Bowman responded, “Yes, he is.”

26. Bowman then again ordered Snead to get away from Claude because he was HIV positive. Snead realized that Bowman was a police officer, and obeyed the command.

27. Snead immediately told Bowman that he had “gotten [Claude] to take a breath,” because Snead thought Bowman did not realize that Claude was still alive.

28. Bowman told Snead that he would “take care of it,” but did nothing to help Claude.

29. Bowman ordered Snead to go sit by the curb in front of the truck, and Snead complied with this instruction.

30. Instead of administering CPR to Claude or trying to help him in any way, Bowman looked into the truck at Claude, and then began to direct traffic.

31. Bowman called the 911 dispatcher and requested that an ambulance be sent. He was aware that Claude was unresponsive and needed immediate medical care.

32. The 911 dispatcher confirmed that an ambulance was on its way.

33. Bowman stood in front of the door to the truck, and he prevented anyone else from coming to Claude’s assistance.

34. As the minutes passed, Snead became agitated by Bowman’s continued failure to help Claude and he tried to look into the truck window to see how Claude was doing. Bowman then instructed another officer who had arrived at the scene to take Snead into his car to give a statement.

35. No effort was made by Bowman or anyone else to perform CPR or provide any other emergency care to Claude.

36. At approximately 2:12 p.m., approximately eight to ten minutes after Claude's cardiac arrest, an ambulance arrived to take Claude to Welch Community Hospital.

37. As the Emergency Medical Services team was getting out of the ambulance, Defendant Bowman stated to them that Claude was HIV positive and warned them to be careful when assisting him. There was no medical reason for Bowman to tell the EMS personnel that Claude was HIV positive. In addition, there was no medical reason for the EMS personnel to record Defendant Bowman's statement in their OEMS Patient Care Record, but they did so.

38. Upon information and belief, the EMS personnel performed CPR on Claude en route to the hospital and attempted to revive him.

39. At approximately 2:15 to 2:17 p.m., Claude arrived at Welch Community Hospital.

40. CPR was in progress, and the hospital staff immediately began defibrillation.

41. Defendant Bowman followed the ambulance to the hospital. While the medical staff at the hospital attempted to save Claude's life, Bowman and the EMS personnel, based on Bowman's information, told them that Claude was HIV positive.

42. Despite the efforts at the hospital to revive Claude, he was declared dead at 2:52 p.m.

43. There was no blood in the truck or anywhere on Claude.

44. An autopsy performed on June 22, 2005 by Zia Sabet, M.D., Deputy Chief Medical Examiner, found that the cause of death was coronary artery disease.

45. Claude was not HIV positive.

46. Upon information and belief, the only basis for Defendant Bowman's erroneous speculation about Claude's medical status was Defendant Bowman's knowledge that Claude had

been in an intimate relationship with a man, and that he was friends with several gay men in McDowell County.

47. But for Defendant Bowman's erroneous beliefs that Claude was HIV positive and that HIV could be transmitted through CPR or other physical contact, Bowman would have taken steps to assist Claude.

48. But for Defendant Bowman's erroneous beliefs that Claude was HIV positive and that HIV could be transmitted through casual contact, Bowman would not have interfered with Snead's attempts and other's attempts to save Claude.

49. Defendant Bowman is and was obligated to provide emergency services, including CPR, without regard to the HIV status of the person needing assistance.

50. When performed immediately after sudden cardiac arrest, CPR can significantly reduce the likelihood of death by providing a small but critical amount of blood flow to the heart and brain. Studies have found that for every minute without CPR, the survival rate from sudden cardiac arrest decreases by seven to ten percent. Other studies have shown that CPR performed immediately by a bystander can double or triple the survival rate from sudden cardiac arrest.

51. HIV disease can be spread only when the virus is introduced into the blood stream of an uninfected individual by one of four bodily fluids (blood, blood-containing fluids, semen, or genital secretions) from an infected individual. HIV cannot be spread by casual contact, such as shaking hands, hugging, touching objects handled by a person with AIDS, or by spending time in the same house, business, or public place.

52. HIV is not spread through the physical contact involved with CPR (mouth-to-mouth breathing and chest compressions), and there has never been a reported case of

transmission of HIV to anyone providing CPR to HIV-infected persons after out-of-hospital cardiac arrest.

53. There is no medical or other legitimate basis to refuse to provide CPR or similar emergency assistance to a person who is infected with HIV who has suffered sudden cardiac arrest.

54. The Federal Centers for Disease Control and Prevention (CDC) has recognized since at least 1989 that the risk of transmission of HIV through CPR was minimal unless there was direct exposure to blood. The CDC does not recommend denying emergency care to persons who are HIV positive.

55. By refusing to provide life-saving medical assistance to Claude or to allow Snead or others to provide medical assistance to Claude, Defendant Bowman destroyed Claude's chances of surviving the cardiac arrest and robbed him of the significant benefits of early intervention, and Claude died. Defendants, at all relevant times, acted under color of state law, and no reasonable person in the position of Bowman could have thought that his conduct was lawful.

COUNT I
(Americans with Disabilities Act)

56. Plaintiff repeats and realleges the allegations in paragraphs 1-55.

57. Claude was disabled within the meaning of the Americans with Disabilities Act, 42 U.S.C. § 12102(2), because he was regarded by Defendant Bowman as having HIV and therefore regarded as substantially limited in one or more major life activities, including, but not limited to, interacting with others.

58. Performing CPR on a person with HIV poses no medical risk, and there was no legitimate reason for Defendant Bowman's refusal to provide assistance to Claude or to allow others to assist him.

59. Defendant Bowman did not provide medical assistance to Claude and refused to allow others to do so because he believed that Claude had HIV.

60. Defendant Bowman's refusal to provide assistance to Claude or to allow others to assist Claude because of his perceived HIV status deprived Claude of the emergency services of the City of Welch and its Police Department because of perceived disability, in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132.

61. The City of Welch and Defendant Bowman in his official capacity are liable for these actions under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132.

62. As a result of Defendants' actions, decedent's estate suffered both economic and non-economic losses, emotional distress and other compensable damages.

COUNT II
(42 U.S.C. § 1983 Claim - Equal Protection)

63. Plaintiff repeats and realleges the allegations in paragraphs 1-62.

64. Defendant Bowman refused to provide medical assistance to Claude or to allow others to assist Claude because of Claude's sexual orientation and perceived HIV status.

65. Defendant Bowman wrongly inferred from Claude's sexual orientation and association with gay people that he was HIV positive.

66. Defendant Bowman did not assist Claude, and prevented others from doing so, because he believed that the decedent was HIV positive.

67. But for being perceived as HIV-positive by Defendant Bowman, Claude would have received or continued to receive potentially life-sustaining treatment.

68. There is no legitimate reason to refuse to provide CPR to a person who is, or is believed to be, HIV positive.

69. There is no legitimate reason to interfere with the attempts of others to provide CPR to a person who is, or is believed to be, HIV positive.

70. As the Chief of Police, Defendant Bowman has final policymaking authority regarding police services in the City of Welch, including responsibility for establishing policies and training regarding the provision of emergency care by the Welch Police Department for the City of Welch, and the City of Welch is liable for his actions under 42 U.S.C. § 1983.

71. By purposefully and intentionally discriminating against Claude by refusing to provide life-saving medical care and by preventing others from providing life-saving medical care because of Claude's sexual orientation and/or perceived HIV status, Defendant Bowman, in his individual and official capacities, and the City of Welch, both acting under color of state law, deprived Claude of his clearly established constitutional rights to equal protection of the laws of which a reasonable person would have known, and are liable under 42 U.S.C. § 1983.

72. Defendant Bowman's actions of intentionally refusing to provide assistance to Claude and interfering in the efforts of others to assist Claude were willful, wanton, malicious, or taken with reckless indifference to the foreseeable consequences of his acts and to Claude's federally protected rights.

73. As a result of Defendants' actions, decedent's estate and his surviving family members suffered both economic and non-economic losses, emotional distress and other compensable damages.

COUNT III
(42 U.S.C. § 1983 Claim - Due Process)

74. Plaintiff repeats and realleges the allegations in paragraphs 1-73.

75. By taking over the scene, preventing Snead from providing CPR, and blocking the way so that no one else could attempt to revive Claude, Bowman established custody over Claude and he therefore assumed a duty to provide appropriate aid.

76. By interfering with the attempts of others to revive Claude, Defendant Bowman directly caused harm to Claude.

77. As the Chief of Police, Defendant Bowman has final policymaking authority regarding police services in the City of Welch, including responsibility for establishing policies and training regarding the provision of emergency care by the Welch Police Department for the City of Welch, and the City of Welch is liable for his actions under 42 U.S.C. § 1983.

78. Defendant Bowman, in his individual and official capacities, and the City of Welch, acting under color of state law, deprived Claude of clearly established rights under the Due Process Clause of the United States Constitution by increasing the harm to him and refusing to permit others to assist him, and are liable under 42 U.S.C. § 1983.

79. Defendant Bowman's actions of intentionally refusing to provide assistance to the decedent and interfering in the efforts of others to assist Claude were willful, wanton, malicious, or taken with reckless indifference to the foreseeable consequences of his acts and to Claude's federally protected rights.

80. As a result of Defendants' actions, decedent's estate and his surviving family members suffered both economic and non-economic losses, emotional distress and other compensable damages.

COUNT IV

(West Virginia Human Rights Act – W.V. Code § 5 – 11 *et seq.*)

81. Plaintiff repeats and realleges the allegations in paragraphs 1-80.

82. If Defendant Bowman had not believed that Claude was HIV positive and had not wrongly believed that it was unsafe to provide medical assistance to a person with HIV disease, he would have provided assistance to Claude or allowed others to assist him.

83. Defendant Bowman’s intentional refusal to provide medical assistance to Claude or to allow others to assist Claude because of his perceived HIV status was discrimination based on disability in violation of the West Virginia Human Rights Law, W.V. Code § 5-11 *et seq.*

84. Defendant Bowman’s actions of intentionally refusing to provide assistance to Claude and interfering in the efforts of others to assist him were performed in a wanton and reckless manner.

85. Defendant Bowman is liable under the West Virginia Human Rights Act, W.V. Code § 5-11 *et seq.* for discrimination against Claude based on a perceived disability.

86. The City of Welch is liable for discrimination against Claude based on perceived disability in violation of the West Virginia Human Rights Act because it is liable for the acts of Defendant Bowman performed within the scope of his duties as Chief of Police, including the duties to provide emergency medical assistance on a non-discriminatory basis and not to interfere with the provision of such care by others.

87. As a result of Defendants’ actions, decedent’s estate suffered both economic and non-economic losses, emotional distress and other compensable damages.

COUNT V
(Wrongful death)

88. Plaintiff repeats and realleges the allegations in paragraphs 1-87.

89. By taking over the scene, preventing Snead from providing CPR, and blocking the way so that no one else could attempt to revive Claude, Defendant Bowman assumed a special duty to Claude to provide necessary emergency care, and he failed to provide such care.

90. Defendant Bowman also had a duty not to discriminate on the basis of perceived disability in the provision of emergency medical services.

91. Bowman's actions of preventing others from providing life-saving measures to Claude and of refusing to perform CPR himself because of Claude's perceived HIV status were wrongful acts that destroyed any chance of Claude's survival from his heart attack, making it substantially more likely that he would die, and Bowman is liable for these acts and omissions.

92. Bowman's actions of intentionally refusing to provide assistance to the decedent and interfering in the efforts of others to assist the decedent were performed in a wanton or reckless manner.

93. The City of Welch is liable under W.V. Code § 29-12A-4(c)(2), for the acts of Defendant Bowman performed within the scope of his duties as Chief of Police, including the duties to provide emergency medical assistance on a non-discriminatory basis and not to interfere with the provision of such care by others.

94. As a result of Defendants' actions, decedent's estate and his surviving family members suffered both economic and non-economic losses, emotional distress and other compensable damages, including, but not limited to loss of income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice. Additionally, Plaintiff is entitled to an award for the medical, funeral and burial expenses occasioned by Claude's death.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in her favor and against Defendants, and award the following relief:

- a. Declaratory relief, including but not limited to a declaration that Defendants' actions violated the Americans with Disabilities Act, the Fourteenth Amendment to the United States Constitution, the West Virginia Human Rights Act, and the West Virginia Wrongful Death Statute;
- b. Compensatory and consequential damages, including for emotional distress, on behalf of decedent's estate;
- c. Compensatory and consequential damages, including for emotional distress, on behalf of decedent's surviving family members;
- d. Punitive damages against Defendant Bowman in his individual capacity;
- e. Pre-judgment and post-judgment interest at the highest lawful rate;
- f. Attorneys' fees and costs of this action, including under 42 U.S.C. § 1988;
- and
- g. Any such further relief as justice allows.

Respectfully submitted,

HELEN GREEN, as Administratrix of the Estate of
Claude Green, Jr., deceased and
as Personal Representative,

By Counsel

Marshall S. Campbell (WV Law ID # 9497)
The Law Office of Marshall S. Campbell PLLC
P.O. Box 578
210 Vermillion Street
Athens, WV 24712
(304) 384-3050

Terri S. Baur (WV Law ID # 9495)
American Civil Liberties Union of West Virginia
Foundation, Inc.
205 Capitol Street, Suite 201
P.O. Box 3952
Charleston, WV 25339
(304) 345-9246

Rose A. Saxe*
AIDS Project
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2605

*Statement of Visiting Attorney to be filed

Counsel for Plaintiff