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IN THE
SUPREME COURT OF APPEALS
OF VIRGINIA
AT RICHMOND

Record No. 1410

NANCY COFFIN, AN INFANT UNDER THE AGE OF
TWENTY-ONE YEARS, WHO SUES BY HER
FATHER AND NEXT FRIEND,
P. R. COFFIN,
PLAINTIFF IN ERROR,

vs.

PHOENIX INDEMNITY COMPANY, A COR-
PORATION,
DEFENDANT IN ERROR.

PETITION FOR REHEARING

Lawyers Publishing Co., Inc., 1333 E. Franklin St., Richmond, Va.

164 Va 68

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DEFENDANT IN ERROR.**

PETITION FOR REHEARING

On March 14, 1935, this Honorable Court rendered judgment for the defendant in error in the aforesaid cause by an equally divided court. Your petitioner, Nancy Coffin,

etc., the plaintiff in error, respectfully asks that she be granted a rehearing in said cause.

Following the granting of the writ of error, this case was first heard before the Court, six Justices being present. On June 14, 1934, the decision affirming the judgment of the trial court was by an equally divided court.

Following that decision, the plaintiff in error filed the following petition for a rehearing:

“On June 14, 1934, this Honorable Court rendered judgment for the defendant in error in the aforesaid cause. Your petitioner, Nancy Coffin, etc., the plaintiff in error, respectfully asks that she be granted a rehearing in said cause.

“The decision in this case, affirming the judgment of the trial court, was by a divided court. Section 88 of the Constitution of Virginia and Section 6365 of the Virginia Code of 1930 provide that where the constitutionality of a law is involved, and not more than three of the judges sitting agree, then no decision shall be rendered therein, but the case shall be reheard by a full court.

“In the decision of *Funkhouser v. Spahr*, 102 Va. 306, 46 S. E. 378, it is declared by Judge Keith that the Constitution prohibits ‘any judgment for or against the validity of the law by an equally divided court,’ and his opinion concludes with the statement:

“‘Our consideration of the case leads us to the conclusion that the convention did not intend to forbid the decision of the case by this Court where the voices of both sides are equal unless there is drawn in question the constitutionality of a law.’

“The annotation to Section 88 of the Virginia Constitution states that now that the Court is composed of seven Justices, four of said Justices are now required to agree where the constitutionality of a law is drawn in question.

“Defendant’s sole defense herein depends upon the validity of Section 507, Sub-section 2, of the Norfolk City Code, which ordinance the plaintiff contends was unconstitutional, was repealed and superseded, and beyond the authority of the Council of the City of Norfolk to enact. (R. pp. 45, 61, 62.)

“Defendant cited cases, including *U. S. F. & G. Company v. Guenther*, 281 U. S. 34, 50 Sup. Ct. 165, and *Royal Indemnity Company v. Schwartz*, Tex., 172 S. W. 581, in support of the constitutionality and validity of the ordinance in question. Plaintiff’s counsel cited the California decisions of *Helmer v. Superior Court*, 191 Pac. 1001, and *ex parte Daniels*, 192 Pac. 442, and in addition distinguished the foregoing decisions cited by the defendant.

“No decision can be rendered against the plaintiff in the instant case without the finding by the Court that Section 507 of the Norfolk City Code is a valid, constitutional ordinance.

“In the decision of *Thompson v. Smith*, 155 Va. 367, 154 S. E. 579, the automobile driver’s permit law of the City of Roanoke was declared void by this Court. The opinion stated that:

“The right of a citizen to travel upon the public highway * * * is a * * * right which he has

under his right to enjoy life and liberty, to acquire and possess property, and to pursue happiness and safety.'

"Counsel respectfully submit that the purpose of the Virginia Constitution, and of the statute hereinbefore referred to, is to permit decisions by a divided court where ordinary questions of fact and law are in issue. But when the constitutional right of an individual is involved, and the issue is raised as to whether he has been deprived of that right by an invalid ordinance or law, then a decision which results in the sustaining of the validity of a law must be decided by the concurrence of a majority of the Court (four, under the present Constitution). In the event the Court is divided, the case must be heard by a full court.

"The contention of the plaintiff in the instant case is that he is a citizen of this State, qualified under the State Uniform Motor Vehicle Law to drive an automobile throughout the State, and is deprived of this right to drive in the City of Norfolk by a void ordinance of the Norfolk City Council.

"For the reasons aforesaid, your petitioner respectfully asks that a rehearing be granted of this cause by a full court, composed of seven Justices of the Supreme Court of Appeals of Virginia."

Pursuant to said petition for rehearing, a rehearing was duly granted and the case fully argued before the entire Court, composed of seven Justices. Because of the regrettable occurrence of the death of the late Mr. Justice Epes, the decision of the Court rendered on March 14, 1935, was

again by an equal division without the concurrence of four Justices required by Section 88 of the Constitution, the same issues being before the Court on the second hearing.

For the reasons aforesaid, your petitioner respectfully asks that a rehearing be granted of this cause by a full court composed of seven Justices of the Supreme Court of Appeals of Virginia.

For the additional reason that the instant case has been argued before the full Court, but the decision rendered being by only six of the said Justices, it is respectfully submitted that a rehearing should be granted.

Respectfully submitted,

NANCY COFFIN, an infant under
the age of twenty-one years, who
sues by her father and next friend,
P. R. Coffin.

By FEREBEE & WHITE, Counsel,

By J. WALTER WHITE.

I, J. Walter White, Attorney, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion the aforesaid judgment was erroneous and should be reheard and reversed by this Honorable Court.

J. WALTER WHITE.

