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SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

JESSE A. THOMAS,
PLAINTIFF IN ERROR,

vs.

WILLIAM S. SNOW,
DEFENDANT IN ERROR.

REPLY BRIEF IN BEHALF OF PLAINTIFF IN ERROR

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THERE IS NO EVIDENCE IN THE CASE THAT THE DEFENDANT WAS GUILTY OF GROSS NEGLIGENCE OR THAT THE INJURY WAS KNOWINGLY OR WANTONLY INFLICTED BY CONDUCT OF THE DEFENDANT

The issue of fact raised by the Brief for Defendant in Error is whether the testimony of Thomas, the defendant below, relating to the cause of the collision, was true, or

whether his testimony as to the third car was "a creature of Thomas' imagination". Counsel is careful not to label Thomas' testimony false; for plaintiff testified that Thomas and he had been warm personal friends for many years, and were so at the time of the trial. (P. R. 41).

In considering this issue of fact, it is pertinent to note that the defendant filed a special plea, alleging that the collision "was caused by the gross negligence of a person driving a third automobile, who, by his action, placed both the plaintiff and defendant in a position of imminent peril, to avoid which the defendant used his best efforts". (P. R. 85).

Thomas' testimony, to sustain this plea, is direct and clear. (P. R. 79). He states that he and his guest were going south on the old Alexandria Road, and just before they came to the intersection or just as they got to the intersection of the Fort Meyer Road, there were some cars coming to his right; and just as he got opposite the north end of the gas station (in the acute triangle between the Alexandria Road and the Fort Meyer Road), there being three places to drive in, he noticed a car coming down the Fort Meyer Road proceeding toward Washington, and the car wheeled to its right and cut through the gas station; that his own car was six or eight feet from the curb on his side of the road; that the car came across the gas station directly towards his car, and to keep this car from hitting defendant's car, he turned his car to the left, throwing his car on the wrong side of the road; that as he wheeled his car across the road, he made a bad remark to the plaintiff about the driver of the third car cutting through the gas station, and this remark he would not repeat because ladies were present. (P. R. 79).

The plaintiff had previously testified, on direct examination, that he had on dark glasses and was unable to see so well, but when he noticed that they were near the center of the road, he turned to defendant and asked, "What is the matter? What are you doing?"; and then the record reads:

> "He (Thomas) said 'Did you see that?' He was looking over his right shoulder. I glanced to my right but did not see anything." (P. R. 30).

On Cross examination, plaintiff repeated the same story, and admitted that Thomas might have made a remark about the driver of the third car. (P. R. 40, 41).

The defendant was not cross-examined.

In spite of the failure of counsel for plaintiff to cross-examine the defendant on his pleaded defense, he now states that the car which defendant said he saw crossing the gas station was a "phantom" car and that the defendant's account of the incidents leading up to the collision "was a creature of Thomas' imagination", and that the story of the third automobile "was in fact, a phantom."

In view of the rule adopted by this court in *White* v. *Southern Railway Company*, 151 Va. 302, as to the value of positive testimony of an unimpeached witness that he saw a particular thing at a particular time and place, it is submitted that Thomas' testimony, which was not impeached by cross-examination or otherwise, must be taken as establishing the facts testified to by him, and as showing clearly that he was not guilty of any wanton or intentional misconduct towards his guest; and that, instead of being guilty of culpable negligence, Thomas was justified in turning

his car to the left in order to avoid the sudden emergency and peril caused to him and his guest, by the third car coming across the gas station bearing directly on the side on which his guest was seated.

Even if the view of plaintiff's counsel that defendant was suffering from an hallucination were established by the evidence, (of which there is not the slightest scintilla) it is doubtful whether a host can be said to have knowingly or wantonly added to the assumed risks of his guest, if, while under an hallucination, he swerves to the left to escape a phantom car.

It is respectfully submitted, therefore, that under the record and the rule laid down in *Boggs* v. *Plybon,* 157 Va. 30, and followed in *Jones* v. *Massie,* 158 Va. 121 and *Young* v. *Dyer,* 170 S. E. 737, there is not the slightest evidence of culpable negligence on the part of Thomas; and it is clear that his action, in turning to the left to escape the third car crossing the gas station, was a reasonable effort to escape an imminent peril, to his guest as well as to himself, and was such a choice as an ordinarily prudent person would have made under the same circumstances; and therefore this court should enter up judgment for the defendant.

PLAINTIFF'S INSTRUCTIONS WERE ERRONEOUS IN WITHDRAWING FROM THE JURY DEFENDANT'S EVIDENCE TO SUSTAIN HIS PLEADED DEFENSE, AND THIS ERROR WAS NOT CURED BY GRANTING DEFENDANT'S INSTRUCTIONS.

It seems to be contended by counsel for plaintiff that, because Thomas drove his car to the left side of the road and

thereby violated the rule of the road, therefore, this act in itself was wanton or culpable negligence, and on this ground alone, the judgment must stand. This was the theory that the plaintiff has always had of his case. See Plaintiff's Instruction No. 4, P. R. 89, where he asked the court to instruct the jury that, "if you believe from the evidence that the defendant left the right-hand half of the highway and had entered the left of the center line of the highway at the time of the collision, this constitutes such an act of negligence as makes the defendant liable for any injuries to the plaintiff caused thereby."

It is true that the court modified this instruction (P. R. 91); but, neither in the original nor in the modified form of the instruction, was any notice taken of the emergency rule or the evidence of the defendant with regard to the third car.

This mistaken theory of the plaintiff's counsel with reference to his case led him into the error of refusing to cross-examine, or otherwise impeach, the defendant, whose testimony was directed solely to his pleaded defense that the collision was the direct result of the imminent peril to both plaintiff and defendant caused by a third car coming across the gasoline station and threatening him and his guest.

Counsel for the plaintiff contends that the case of *Collins* v *Robinson,* 160 Va. 520, 169 S. E. 609, should control in this case. In that case, the host driver of an automobile was driving around a curve, on the inside, and left side, of the curve, in the night time on a twenty-two foot roadway, when he could not see around the curve by reason of the bank on the inside; and, although he admitted that he knew of the approach of the oncoming car, in time to turn to his

right, he did not turn to his right, but remained on the left side of the curved road. In that case, there was no question of the host's going to the left side to escape a third car; but the driver, knowing that another car was approaching around a curve, persisted in staying on the left, instead of returning to the right side of the road and obeying the law of the road. This court correctly held that he was guilty of gross and culpable negligence and, therefore, reversed the judgment entered by the court below in favor of the defendant. In the case at bar, the defendant pleaded that "the collision did not occur as a result of negligence on the part of the defendant but was an unavoidable accident caused by gross negligence of a person driving a third automobile, who, by his action, placed both the plaintiff and the defendant in a position of imminent peril, to avoid which the defendant used his best efforts" (P. R. 85). The defendant's evidence amply sustained this plea.

In response to the argument in the petition for writ of error that the court erred in granting plaintiff's Instructions 3 and 4, as modified, because they disregarded the defendant's evidence as to the sudden emergency caused by a third car, counsel has cited the case of *Clinchfield Coal Corporation* v. *Compton*, 148 Va. 437, as modifying the cases cited in the petition to the effect that, where a peremptory instruction directs the jury upon a hypothetical state of facts to find for the plaintiff, and such instruction omits any reference to the evidence in behalf of the defendant's theory, which, if true, would exonerate him from liability, this is error not cured by another instruction. The case cannot be cited for that purpose. The essential difference between that case and the case at bar, is that, if the facts set out in Instruction No. 1, which was granted to the plain-

tiff in the former case, had been true, the plaintiff would have been entitled to a verdict irrespective of the facts set out in the instructions for the defendant; whereas, in the instant case, it was not sufficient for the plaintiff to prove the facts set out in his Instructions 3 and 4, but he had also to disprove the facts set out in the instructions granted to the defendant in regard to the emergency rule.

Another peculiar circumstance relating to the case of *Clinchfield Corporation* v. *Compton, supra,* is that, although the court sustained all the instructions granted, both for the plaintiff and for the defendant, it set aside the verdict of the jury and judgment of the court below for the the plaintiff, and entered up judgment for the defendant, because the court found no evidence in the case to sustain plaintiff's claim. Therefore, it was absolutely unnecessary for the court to decide the question as to whether there was error in the instructions or not.

While there seems to be some confusion in the cases on the question of how far one instruction may be read to correct another, it is perfectly clear that, where a jury is instructed, on a hypothetical state of facts, to find for the plaintiff, and such instruction ignores a matter of pleaded defense, of which there is evidence fairly tending to prove the same and which would exonerate the defendant from liability, it will be held to be erroneous, and that this error is not cured by another instruction on the point; or, to state the rule in another aspect, an instruction which concludes with a direction to find a verdict for the plaintiff must not exclude from consideration any material issue of the case, which would exonerate the defendant. See cases cited on this point in petition for writ of error and the fol-

lowing: *Chesapeake & Ohio Ferry Company* v. *Hudgins*, 155 Va. 874; *Reliance Ins. Co.* v. *Gulley*, 134 Va. 468, 483.

In *Norfolk & Sou. R. Co.* v. *Banks*, 141 Va. 715, 721, it was held that no instruction should have been given authorizing the jury to find for the plaintiff, and fixing the measure of damages, without calling to their attention the duty of considering whether or not the plaintiff was guilty of contributory negligence. In considering this question, the court said (p. 721):

> "It is quite true that an instruction given at the suggestion of defendant's counsel presented a correct statement of the law on this subject, but the effect upon the jury's mind of an instruction which tells them under what circumstances they may find for the plaintiff, when another instruction specifies a different set of facts which must be established before recovery can be had, can only serve to confuse, and bewilder and are manifestly in conflict."

Counsel for plaintiff seems to contend that the rule laid down by this court in *Washington Southern Railway Company* v. *Grimes' Administrator*, 124 Va. 460, has been modified or reversed by this court. In that case, it was held that, where an instruction to a jury directs a verdict upon a hypothetical statement of facts, ignoring the contributory negligence of the plaintiff, the defect is not cured by other instructions given by the court with respect to contributory negligence. In citing the cases, the court quoted from *Virginia & S. W. Ry. Co.* v. *Skinner*, 117 Va. 851, at page 854 as follows:

> "It is equally well settled that the defect in this instruction is not cured by other instructions given by the court with respect to contributory negligence. That makes a case of contradictory instructions upon a material point, which would require the verdict to be set aside, as it can not be said whether the jury were controlled by one or the other", citing a large number of cases.

It is respectfully submitted that these cases govern the case at bar, where the defendant pleaded the emergency caused by the third car (P. R. 85), and the only evidence given by the defendant was that his swerving to the left was done for the purpose of escaping injury from a third car bearing down upon his right. Defendant's counsel excepted to the peremptory instruction "because it withdraws from the jury the question of whether the defendant was faced with a sudden emergency which forced him to go to the left-hand side of the road" (P. R. 81, 91); and again on P. R. 82, defendant's counsel objected as follows:

> "Both instructions, number 3 and number 4, fail to recognize the emergency rule as stated by the Supreme Court in *Wyatt* v. *Chesapeake & Potomac Telephone Company*, 163 S. E. 70 and in *Jones* v. *Hanbury*, 164 S. E. 545 to 550." See, also, P. R. 91.

Plaintiff's counsel was able to argue to the jury, and did argue, that if they found the facts as set out in instruction No. 3 or in instruction No. 4, then they should find for the plaintiff.

In addition to the cases cited from Virginia holding that a peremptory instruction in behalf of the plaintiff, which ignores a material defense supported by substantial proof, is erroneous, and that this error is not corrected by another instruction in behalf of the defendant properly submitting the issue, see:

Schaffer v. *Consolidated Coal Company*, 108 W. Va. 365, 151 S. E. 326.

Stafford v. *Chesapeake & Ohio Railway Company*, 111 W. Va. 161 S. E. 447.

Curry v. *Newcastle Auto Express*, W. Va. 164, S. E. 147.

Nichols v. *Raleigh Wyoming Mining Co.*, (W. Va. 1933), 169 S. E. 45.

Shell Pipe Line Company v. *Robinson*, (C. C. A.) 66 Fed. (2d) 861.

Mooney v. *City of Chicago*, 239 Ill. 414, 88 N. E. 194.

In *Lawson* v. *Dye*, 106 W. Va. 494, it was held that an instruction which ignored the defense that an automobile driver was forced to turn left to avoid collision with a truck on the wrong side of the road was properly refused.

In *Mooney* v. *Chicago, supra*, plaintiff sued the defendant for death caused by wrongful act in allowing a street to remain in unsafe and dangerous condition. The defense included evidence to the effect that the plaintiff died of fatty degeneration of the kidneys complicated by compound fracture of the right leg; and further that he had executed a release. An instruction was given, reciting the hypothetical facts regarding the unsafe condition of the street, the duty of the city to repair, and the fact that the deceased

was driving over the streets and fell in the hole and was injured, and was exercising reasonable care; but this instruction, while directing a verdict for the plaintiff, made no reference to the material defenses raised by the city. The court said:

> "The instruction also omitted all reference to an affirmative defense which if established would have defeated a recovery, and it is error to give an instruction ignoring matter of defense which there is evidence fairly tending to prove."

And it was held that such an instruction could not be supplemented or cured by another instruction.

In the case at bar, it must be remembered that the defendant pleaded the emergency rule and that his evidence established the facts necessary for its application. Therefore, an instruction which peremptorily took away from the jury the right to pass upon the defendant's evidence relating to his plea, and told the jury to find for the plaintiff if the defendant was on the wrong side of the road, without any reference to his evidence sustaining his pleaded defense, is erroneous and cannot be sustained, and this error cannot be cured or supplemented by another instruction.

It is proper to call attention to the fact that the same defect which has been herein discussed as to plaintiff's Instruction No. 4 is just as apparent as to plaintiff's Instruction No. 3 (P. R. 90), relating to the duty of the defendant to keep a lookout ahead, and the argument hereinbefore set out is applicable to that instruction.

THERE IS NO EVIDENCE THAT DEFENDANT, AFTER BEING FORCED TO SWERVE HIS CAR TO THE LEFT SIDE, HAD TIME TO RETURN TO THE RIGHT AND AVOID THE COLLISION

It does not seem necessary to review at length the evidence on this point, when plaintiff's own witness, Lewis, the driver of the other car in collision, said that his first instinct when he saw Thomas' headlights was to turn to his left, but that he could not do it. Then ensues the following (P. R. 23):

> "Q. Your first instinct was to go to the left?
>
> A. Yes, sir, and then I thought, 'I can't do that', for the car just that quick (snapping his fingers), was down on me. I jammed on my brake and he ran into me head on. His headlights were right in mine.
>
> "Q. How far were you at that moment from your extreme right-hand side?
>
> A. About six feet—five or six feet.
>
> "Q. How long before the actual collision was it when you first discovered these lights coming down toward you?
>
> A. Just a fraction of time. It came down so quick I did not know what to do. It almost bore right down one me."

The plaintiff himself testified that when he noticed that defendant's car was near the center of the road, he turned to defendant and asked him what was the matter; that defendant was looking over his right shoulder, and said "Did

you see that?"; and the collision occurred "very shortly after that, in the fraction of a second. I just had about time to turn back and observe these head-lights." (P. R. 41, 30).

From the testimony of the plaintiff and his own witness, it is clear that the defendant had no opportunity to prevent the collision after he was forced to the left side of the road. See exception: P. R. 82.

While this reply brief has been addressed partly to the errors made in the instructions granted, a careful examination of the record will disclose that there is no evidence that the defendant was guilty of wanton or culpable negligence towards his guest, but, on the contrary, the evidence discloses that he was thoroughly justified in leaving the right side of the road and going to the left in order to escape imminent peril to himself and to his guest. Therefore, the case should be reversed and judgment should be entered for the defendant.

Respectfully submitted,

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