

No. 24012 -- Ray Junior Moran and Mary V. Moran, Husband and Wife, v. Atha Trucking, Inc., a corporation; James A. Fornash; Chuck Kirkpatrick; and E.&S. Coal Company, Inc.

AND

No. 24081 -- Deborah A. Fletcher v. Raymond R. Sias

Starcher, J., concurring:

FILED
January 16, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
January 17, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I concur with the majority’s opinion, and write to emphasize that all negligence cases are to be tried exclusively under the umbrella of comparative negligence principles.

As the majority opinion deftly discusses, the common law is constantly flexing to change with the times. Nineteenth century concepts of contributory negligence have given way to principles of comparative negligence. However, vestigial doctrines of the contributory negligence era, such as the “sudden emergency” doctrine or the “clear distance ahead” rule, as well as other doctrines, continue to exist.

It seems to me that with the clear principle of comparative negligence, as adopted by this Court in *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979), other doctrines, that heretofore may have been defenses, should be merged under the umbrella doctrine of comparative negligence and simply become *factors* for the jury to consider in determining the comparative negligence of the parties.

I refer specifically to doctrines such as assumption of risk,¹ last clear chance,² sudden emergency, rescue doctrine,³ and the clear distance ahead doctrine. These factors, when relevant to a particular case, should be instructed upon by the judge, but it should be made clear that these are simply *factors* in determining the comparative negligence of the parties, and *not* defenses when assigning comparative fault to the parties.

And, accordingly, a party should certainly be allowed to argue to the jury the relevance of any of these doctrines as they are applicable to a particular case.

I therefore concur with the majority's opinion that courts should rarely give a sudden emergency instruction, and only then as a part of a comparative negligence instruction.

¹See, e.g., *King v. Kayak Mfg. Corp.*, 182 W.Va. 276, 387 S.E.2d 511 (1989) (adopting "comparative assumption of risk"); *Spurlin v. Nardo*, 145 W.Va. 408, 114 S.E.2d 913 (1960).

²The "last clear chance" rule ameliorated the harsh effects of the contributory negligence rule in the following circumstance:

[A] negligent plaintiff, oblivious of impending danger, may nevertheless recover for injuries, where the defendant knew of the plaintiff's situation, and, under the circumstances, in the exercise of reasonable care, should have realized the plaintiff's peril, and, on such realization, could have avoided the injury.

Syllabus Point 4, in part, *Meyn v. Dulaney-Miller Auto Co.*, 118 W.Va. 545, 191 S.E. 558 (1937). See also, *Smith v. Gould*, 110 W.Va. 579, 159 S.E.53 (1931).

In *Ratlief v. Yokum*, 167 W.Va. 779, 786-86, 280 S.E.2d 584, 589 (1981), the Court acknowledged that there was "little practical reason" for maintaining the last clear chance rule, and therefore chose to "abolish the use of the doctrine of last clear chance for the plaintiff."

³See, e.g., *Bond v. Baltimore & Ohio Railroad Co.*, 82 W.Va. 557, 96 S.E. 932 (1918).