No. 28852 -- Darlene Gillingham and Carl Bumgardner v. Albert Stephenson
and
Amber Goddard, David Goddard and Carrie Goddard, individually, and Carrie Goddard, mother, natural guardian and next friend v. Ronald G. Taylor and Albert Stephenson

Starcher, J., dissenting:

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I dissent to the majority opinion because I believe, on the facts presented in the record, that the plaintiffs' motion for judgment as a matter of law should have been granted on the issue of liability, and a jury should have been asked only to establish the amount of damages due plaintiffs, if any. The record firmly establishes that the defendant had a duty to drive carefully in accordance with road conditions, and that the defendant breached that duty.

The case boils down to this: the plaintiffs were driving down the road and came upon a collision that was blocking the road. Plaintiff Bumgardner stopped his pickup truck without incident, even though the road seemed to be icy. Moments later, defendant Stephenson came around a curve in a van, slammed on his brakes and slid into the Bumgardners' truck.

There is absolutely nothing in the record to suggest that the plaintiffs were negligent. Stephenson admitted he had encountered ice on the road prior to the collision, and the plaintiffs were sitting still. The only question was whether the defendant was negligent, and whether that negligence proximately caused the plaintiffs' injuries.

The term "negligence" means that a defendant (a) owed some duty, and (b) breached that duty. The plaintiffs argued that the defendant owed a duty to drive his car with a degree of care governed

by the conditions of the road. Because the road was icy, the plaintiff argues the defendant had a duty to slow down, and maintain his speed so that he could bring his car to a stop if another vehicle -- like plaintiff Bumgardner's -- blocked the road.

Instead, the trial court instructed the jury that "negligence requires a foreseeable risk of danger of injury and conduct unreasonable in proportion to the danger." This instruction simply should not have been given. The Legislature has already made the determination that certain types of conduct contain a "foreseeable risk of danger of injury." The Legislature has specified that driving a vehicle at a speed that is dangerous under the existing road conditions is a form of "conduct unreasonable in proportion to the danger."

W.Va. Code, 17C-6-1 states (with emphasis added) that "no person may drive a vehicle on a highway at a speed greater than is reasonable and prudent under the existing conditions and the actual and potential hazards. In *every* event speed shall be so controlled as may be necessary to avoid colliding with any . . . vehicle . . . on or entering the highways . . . . The driver of every vehicle shall . . . drive at an appropriate reduced speed . . . when approaching and going around a curve, when approaching a hill crest . . . and when special hazard exists with respect to . . . other traffic *or by reason of weather or highway conditions*."

In the instant case, defendant Stephenson plainly drove his van at a "speed greater than [was] reasonable and prudent under the existing conditions and the actual *and potential* hazards."

This Court once stated in an opinion by Justice Workman, in ruling that a landlord could be liable for failing to install statutorily-required smoke detectors, that the "violation of a statute is prima facie evidence of negligence. In order to be actionable, such violation must be the proximate cause of the

injury." *Reed v. Phillips*, 192 W.Va. 392, 395, 452 S.E.2d 708, 711 (1994). *Prima facie* evidence of negligence was defined by the Court as meaning:

> A *prima facie* case of actionable negligence is that state of facts which will support a jury finding that the defendant was guilty of negligence which was the proximate cause of plaintiff's injuries, that is, it is a case that has proceeded upon sufficient proof to the stage where it must be submitted to a jury and not decided against the plaintiff as a matter of law.

Syllabus Point 6, *Morris v. City of Wheeling*, 140 W.Va. 78, 82 S.E.2d 536 (1954).

Justice Workman, in discussing a "prima facie case of negligence" in the context of a violation of a statute, stated:

> Although the violation of a statute creates a prima facie case of negligence, the determination as to whether there was in fact a violation and whether the violation was the proximate cause of the injury is within the province of the jury.
>
> To establish a cause of action in negligence, it must first be shown that the alleged tortfeasor was under a legal duty or obligation requiring the person to conform to a certain standard of conduct. Where there is no legal duty to take care, there can be no actionable negligence.
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> In Prosser and Keeton on Torts, it is stated:
>
> > The standard of conduct required of a reasonable person may be prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate. The same may be true of municipal ordinances and regulations of administrative bodies. The fact that such legislation is usually penal in character, and carries with it a criminal penalty, will not prevent its use in imposing civil liability, and may even be a prerequisite thereto.

> W. Page Keeton et al., Prosser and Keeton on Torts § 36 at 220 (5th ed. 1984) (footnotes omitted). Thus, the violation of a statute adopted for the safety of the public is prima facie negligence in that it is the failure to exercise that standard of care prescribed by the legislature.

Reed v. Phillips, 192 W.Va. 392, 396, 452 S.E.2d 708, 712 (1994) (citations omitted).

This Court has made clear that a defendant's violation of a statute creates a *prima facie* case from which the jury may infer the defendant's negligence. Under some circumstances a statutory violation may be excused. Our law still holds that a sudden emergency defense may provide a legal excuse for the violation of a statute if the violation is caused by an "unusual or unsuspected situation."[1] However, ice and snow cannot qualify as a sudden emergency exception to *W.Va. Code*, 17C-6-1, which requires that a driver take such road conditions into account.

W.Va. Code, 17C-6-1 prohibits a person from driving on a highway at a speed which prevents the person from controlling the vehicle so as "to avoid colliding with any . . . vehicle . . . on or entering the highway[.]" The statute requires a person to "drive a vehicle on a highway at a speed" that is "reasonable and prudent under the existing condition and the actual and potential hazards."

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[1]In Syllabus Point 5 of *Moran v. Atha Trucking, Inc.*, 208 W.Va. 379, 540 S.E.2d 903 (1997), we stated:

> A sudden emergency instruction is to be given rarely, in instances of truly unanticipated emergencies which leave a party little or no time for reflection and deliberation, and not in cases involving everyday traffic accidents arising from sudden situations which, nevertheless, reasonably prudent motorists should expect.

When a defendant alleges he/she was faced with a "sudden emergency" as a defense, it is not an absolute defense. Rather, it simply becomes a "factor[] for the jury to consider in determining the comparative negligence of the parties." 208 W.Va. at ___, 540 S.E.2d at 916 (Starcher, J., concurring).

If a jury finds that the defendant violated this statute, adopted for the safety of the public, then the jury has made a *prima facie* finding that the defendant failed to exercise that standard of care prescribed by the Legislature. Accordingly, a finding that the defendant violated a statute is a finding that the defendant was negligent.

There was ample evidence in the record to establish that the defendant violated *W.Va. Code*, 17C-6-1, and none to contradict the evidence. Furthermore, the statute establishes that the Legislature has determined that harm was foreseeable from driving a vehicle at a speed that failed to account for actual and potential hazards, including adverse weather conditions, on the highway.

I therefore believe that it was error for the trial court to instruct the jury that it could consider the "foreseeable risk of danger of injury and conduct unreasonable in proportion to the danger" in deciding whether the defendant was negligent. I believe the defendant violated a statute, and was therefore, at a minimum, *prima facie* negligent. I would have gone further and ruled the defendant negligent as a matter of law, because there was no evidence of the plaintiffs' negligence and no legitimate justification for the defendant's actions. On this basis, I would have reversed the judgment for the defendant.

I therefore respectfully dissent to the majority's opinion.