No. 31271 - *Duane Adams, et al., Plaintiffs below, Appellees*
v. Consolidated Rail Corporation, t/d/b/a Conrail, et al.,
Defendants Below, Appellants

FILED
December 4, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

McGraw, Justice, concurring, in part, and dissenting, in part:

I fully agree with the holding of this Court that, inasmuch as appellee-plaintiff Walter Knight contracted malignant mesothelioma, the Circuit Court acted within its discretion in excluding his history of cigarette smoking from jury consideration. As noted in *Ayers*, cigarette smoking does not bear upon the risk of mesothelioma. In any event, any arguable connection between smoking and mesothelioma is, based upon current knowledge, extremely tangential.

I dissent, however, from the holding with regard to appellee-plaintiffs John Robinson and Ronald Shaffer. That holding paves the way for the admission of their smoking histories and suggests that, based upon such evidence, a jury is free to conclude that Robinson and Shaffer were guilty of contributory or comparative negligence. In my view, additional matters must be considered before Robinson and Shaffer may be said to be guilty of such negligence.

The record indicates that both John Robinson and Ronald Shaffer were elderly gentlemen with histories of long-term cigarette smoking. Moreover, the approximately 900 railroad employees who were initially involved in this litigation, no doubt, included varying groups, both in terms of age and in degree of cigarette smoking. Consequently, any determination of whether those individuals were guilty of contributory or comparative negligence within the meaning of the Federal Employers' Liability Act calls into play the fact that it was not until 1966 that Congress mandated the warning on cigarette packages that "Cigarette Smoking May be Hazardous to Your Health." Later, in 1969, the warning label was strengthened by requiring a statement that cigarette smoking "is dangerous," rather than that it "may be hazardous." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). In fact, it was not until this century that the public began to hear the phrase "There is No Safe Cigarette."

Accordingly, I am of the opinion that many of the older plaintiffs in this action, as consumers of a habit-forming tobacco product sold prior to the existence of uniform, mandatory health warnings, could not have been guilty of contributory or comparative negligence within the meaning of the Federal Employers' Liability Act. The Act is remedial in nature, and such negligence thereunder would be more attributable to the tobacco companies.

The majority opinion unfairly blurs the distinctions among the railroad employees and the tobacco companies in terms of their awareness of the dangers of cigarette smoking and the effect of that awareness in the context of negligence under the Federal Employers' Liability Act. I therefore dissent from the holding of this Court as to appellee-plaintiffs John Robinson and Ronald Shaffer because the majority opinion does not account for the status of those individuals as unknowing consumers of a dangerous product. How can such individuals be guilty of contributory or comparative negligence while being repeatedly told in the marketplace that "There's Not a Cough in a Carload"?