No. 32057 – *Martha Spencer and Edward M. Spencer v. Timothy R. McClure, Philip E. Davis, Sarah M. Harpold and Roger F. Rabalais*

FILED
July 14, 2005
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

More often than not, I believe a circuit judge should let juries of our peers hear the evidence and decide cases. That's the democratic system our forefathers wisely adopted, and I pain a little every time I see a judge substituting his or her judgment of the facts for the judgment of a jury.

I dissent in this case for that very reason. This case is a classic example of multiple defendants, multiple tortfeasors, causing injury to an innocent plaintiff. The textbook rule in such an instance is that the plaintiff need only show that the combined negligence of the tortfeasors caused or contributed to her injury. The plaintiff need only show the defendants were negligent, and that the negligence was *a* proximate cause, not *the* proximate cause.

Public policy dictates that, when multiple defendants jointly or separately engage in negligent conduct which, acting together, causes a plaintiff a single injury, the burden is upon the defendants to sort out who is more responsible.

The textbook example is the two negligent hunters firing shotguns into the woods, and a plaintiff who walks out of the woods injured by a load of buckshot. The plaintiff does not have to show which hunter's shotgun was *the* proximate cause of the injury; the plaintiff need only show the two hunters were negligent and the negligence was a cause

of the injury. It is between the hunters to show who is more, or who is solely, responsible for the injury. *See Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948).

At that point, the burden shifts to the tortfeasors to allocate causation among themselves. Syllabus Point 1, *Baker v. City of Wheeling*, 117 W.Va. 362, 185 S.E. 842 (1936) ("Concurrent negligence creates joint liability."); Syllabus Point 6, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990) ("A tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct.").

In this case, the plaintiff showed that her vehicle had stopped, and that the Toyota behind her vehicle had stopped. The next vehicle in line, a Chevrolet S-10 pickup truck, did not stop, plowed into the Toyota and drove the Toyota into the plaintiff's vehicle. Thereafter, a Jeep rammed into the Chevrolet S-10, which again hit the Toyota, which again hit the plaintiff's car. The owner and driver of the Chevrolet S-10 settled; the owner and driver of the Jeep went to trial. The plaintiff contends that she heard three bumps, three collisions, in this chain-reaction accident.

In this case, the plaintiff only had to prove that before the collisions, she was fine, and after the collisions, she had an injury, and that the injury was a result of these collisions. The burden then shifted to the owner and driver of the Jeep to sort out who was more or solely responsible for the injury: the driver of the Jeep, or the driver of the Chevrolet

S-10. In other words, the jury should have been allowed to decide if the defendants, the owner and driver of the Jeep, were liable for any of the plaintiff's injuries.

The majority opinion, however, buys into the defendants' argument that the plaintiff was required to put on expert testimony saying which impact in the collision caused her injury. Because "Dr. Thaxton stated that he could not say what portion of Mrs. Spencer's injuries resulted from the third collision," the majority opinion concludes that the jury was left to speculate what degree of responsibility the defendants bore for the plaintiff's injury. This is nonsense; the plaintiff bore the burden of proving the defendants were, to some degree, a cause of her injury and she met that burden. The burden then shifted to the defendants to show they were not a proximate cause.

One other thing troubles me. The majority's opinion almost suggests that simple car wrecks like this case should become "expert festivals," attacking the plaintiff for not having an accident reconstruction expert, and not having a medical expert who could scientifically say which impact caused what percentage of the plaintiff's cervical strain. I disagree with such a reading of the majority's opinion. The courts of this State are to be open to the people to resolve their disputes, quickly, efficiently and inexpensively. They are not to be ruled by the party who has the most lawyers and can afford the most experts.

I would have let the jury sort out, between the various drivers, who was more responsible for the plaintiff's injury in this case. I therefore respectfully dissent.