No. 11-0386 - *Alicia K. Halcomb v. Christopher G. Smith*

FILED
November 21, 2012
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting:

In this case, the majority granted the defendant a new trial on the grounds that the trial court erred in failing to give a contributory negligence jury instruction. For the two reasons set out below, I respectfully dissent.

1. The jury exonerated Mr. Withrow of all liability. The record in this case shows that the defendant had a third-party suit against Mr. Withrow, the driver of the car in which the plaintiff, Mr. Smith, was a passenger. The jury heard both cases together. The jury rejected the defendant's claim against Mr. Withrow and found that Mr. Withrow was not at fault in causing the accident. This point is crucial because it shows that even if the trial court had given an instruction on contributory negligence in Mr. Smith's case, the jury would have rejected that defense because it found that the driver, Mr. Withrow, was not negligent in the defendant's third-party claim.

In spite of the fact that the jury found that the driver of the car was not at fault in causing the accident, the majority has decided that the trial court erred in not giving a contributory negligence instruction. I find it difficult to discern, under the facts of this case,

how Mr. Smith can be held partly liable for the accident as a passenger, when the driver of the car in which he was riding was *completely exonerated* of *all* fault by the jury.

2. There was no evidence of contributory negligence. It has been properly observed that "[b]efore [a] party is entitled to an instruction on . . . contributory negligence . . . , there must be more than a scintilla of evidence introduced on the subject." *Ring v. Poelman*, 397 S.E.2d 824, 827 (Va. 1990). It also has been held that "where there is no evidence tending to show contributory negligence on the part of plaintiff, failure to instruct the jury on that subject is not error." Syl. pt. 1, in part, *Salmons v. Norfolk & W. Ry. Co.*, 100 W. Va. 49, 129 S.E. 760 (1925). *Accord Phillips v. Seward*, 51 So. 3d 1019, 1025 (Ala. 2010) ("In the absence of substantial evidence that Phillips was in some manner negligent, the trial court erred by charging the jury on contributory negligence."); *Sebring v. Colver*, 649 P.2d 932, 935 (Alaska 1982) ("We have carefully reviewed the trial record and have found the evidence of contributory negligence insufficient to warrant a jury instruction."); *Howard v. Sanborn*, 483 N.W.2d 796, 797 (S.D. 1992) ("[I]t was improper for the trial court to instruct on the issue of contributory negligence since there was no evidence in the record supporting it."); *Langford v. Arnold*, 707 S.W.2d 521 (Tenn. Ct. App. 1985) (holding that jury instruction on contributory negligence was error where there was insufficient evidence to justify submission of such issue to jury); *Ring v. Poelman*, 397 S.E.2d 824, 827 (Va. 1990) ("We agree with Ring that the record is devoid of evidence that she was guilty of negligence which proximately contributed to the collision, and we hold that

the trial court erred by granting a contributory negligence instruction.").

In the instant case, the majority's opinion fails to cite to *any* evidence of contributory negligence on the part of Mr. Smith. Instead, the majority has based its decision upon the fact that Mr. Smith informed Mr. Withrow that it was clear to proceed across the intersection. This statement, standing alone, is not sufficient evidence to warrant a jury instruction on contributory negligence. At a minimum, there must have been evidence of reasonable reliance on the statement by Mr. Withrow. However, Mr. Withrow testified that he did not hear Mr. Smith tell him the road was clear. Incredibly, the majority concluded that Mr. Withrow's testimony of not hearing Mr. Smith presented a credibility issue for the jury to decide. This conclusion is wrong. To warrant an instruction on contributory negligence requires *evidence* of fault on the part of the plaintiff. To allow the jury to speculate as to what Mr. Withrow heard does not constitute evidence of contributory negligence. Moreover, such a ruling is inconsistent with our longstanding principle that "'[a] jury will not be permitted to base its findings of fact upon conjecture or speculation.'" *Lacy v. CSX Transp. Inc.*, 205 W. Va. 630, 642, 520 S.E.2d 418, 430 (1999) (quoting Syl. pt. 1, *Oates v. Continental Ins. Co.*, 137 W.Va. 501, 72 S.E.2d 886 (1952)).

"This Court has held repeatedly that questions of . . . contributory negligence are for the jury, when the evidence is conflicting or when the facts, though undisputed, are such that reasonable men may draw different conclusions from them." *Shields v. Church*

Bros., Inc., 156 W. Va. 312, 321, 193 S.E.2d 151, 155-56 (1972). *Accord* Syl. pt. 5, *Kendall v. Allen*, 148 W. Va. 666, 137 S.E.2d 250 (1964) ("The questions of negligence, contributory negligence, assumption of risk and proximate cause are questions of fact for the jury where the evidence is conflicting or where the facts, though undisputed, are such that reasonable men may drawn different conclusions therefrom."). Here, there was no conflicting evidence regarding Mr. Smith's conduct as a passenger. Moreover, there was no evidence of undisputed facts showing fault on the part of Mr. Smith. In spite of the lack of *any* evidence of contributory negligence, the majority has granted a new trial on this issue. Our law is quite clear in holding "that an instruction should be given only when it addresses an issue reasonably raised by the *evidence*." *State v. LaRock*, 196 W. Va. 294, 308, 470 S.E.2d 613, 470 (1996) (emphasis added).

Based upon the foregoing, I respectfully dissent.