

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WESLEY CROSS,

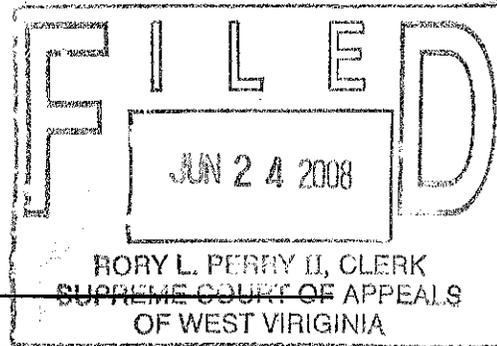
Appellee/Plaintiff below,

v.

Docket No. 34147

MARK E. SMITH,

Appellant/Defendant below.



**BRIEF ON BEHALF OF APPELLANT
MARK E. SMITH**

Donna S. Quesenberry (#4653)
MacCorkle, Lavender & Sweeney, PLLC
300 Summers Street, Suite 800
Charleston, WV 25301
(304) 344-5600

Monica N. Haddad (#5835)
MacCorkle, Lavender & Sweeney, PLLC
6000 Hampton Center, Suite B
Morgantown, WV 26505
(304) 599-5600

Counsel for Appellant

TABLE OF CONTENTS

KIND OF PROCEEDING AND NATURE OF
CIRCUIT COURT'S RULING 1

STATEMENT OF FACTS 1

ASSIGNMENTS OF ERROR 5

POINTS AND AUTHORITIES 6

DISCUSSION OF LAW 6

RELIEF PRAYED FOR 12

KIND OF PROCEEDING AND NATURE OF CIRCUIT COURT'S RULING

This action was filed in the Circuit Court of Brooke County, West Virginia, as a result of a motor vehicle accident which occurred on August 10, 2004, in Wellsburg, West Virginia. The case proceeded to trial and the jury returned a verdict finding that Defendant Mark E. Smith was *not* guilty of negligence which was a proximate cause of the motor vehicle accident. Over the objections of the Defendant, the Circuit Court granted Plaintiff's Motion for a New Trial finding that Defendant Smith was negligent as a matter of law. It is to this ruling that Mr. Smith files his Appeal.

STATEMENT OF FACTS

According to the undisputed facts elicited at trial, the motor vehicle accident at issue occurred on August 10, 2004, when Appellee Wesley Cross was a passenger in a motor vehicle operated by James Yost. At the time of the accident, Mr. Yost was traveling west on Washington Pike, a two-lane road near Wellsburg, West Virginia. Appellant Mark Smith was also traveling west on Washington Pike, near Wellsburg, when the Yost vehicle approached his vehicle from the rear. The Yost vehicle, while attempting to pass the Smith vehicle in a no-passing zone, collided with the Smith vehicle as Mr. Smith attempted to make a left-hand turn, across the east-bound lane, into a nearby driveway.

While Mr. Cross testified that Mr. Yost began his pass of the Smith vehicle at the beginning of a passing zone, it is undisputed that the point of impact between the two cars occurred in a no-passing zone. [Trial Tr. at pp. 322, 325-327, 348, 350]. Corporal Richard J. Gibson of the West Virginia State Police investigated the accident and testified that the distance from the beginning of the no-passing zone for westbound traffic to the point of

impact was 151 feet.¹ [Trial Tr. at p. 417]. Corporal Smith further testified regarding the West Virginia Uniform Crash Report completed as a result of the accident and noted that a contributing factor to the accident was improper passing on the part of Mr. Yost.² [Trial Tr. at p. 395].

Mr. Smith testified that, prior to beginning his left-hand turn, he looked into his mirrors but did not see the Yost vehicle until immediately prior to impact. When asked how the collision occurred, Mr. Smith testified as follows:

A. Well, I pulled out onto Washington Pike and I was driving up to my friend's house. I looked in my rearview mirror when I pulled out onto the highway, because it kind of comes up - - you know, people can come flying up from behind you and you not know it until once you get out there. And I was going up and right before I pulled into his driveway, I looked in my middle rearview mirror and then I looked in my side view mirror. I didn't see nobody.

Q. Had you slowed your vehicle just before - -

A. I started slowing down when I got towards my friend's house, yet.

Q. And had you begun your turn into the driveway?

A. I started to turn in and I heard ski mark - - or I heard squealing, the tires. And then I heard a horn. And at that time that's when we collided.

Q. Where did the collision occur in relationship to the driveway that you were intending to go into?

A. Just right there in front of the driveway.

¹It was estimated that the beginning of the passing zone to the point of impact in the no-passing zone was approximately 300 feet.

²Corporal Gibson also noted in the accident report that a contributing circumstance to the accident was the failure of Mr. Smith to signal, or give a proper signal, of his left hand turn. The jury, by its verdict, obviously believed the testimony of Mr. Smith who testified that he did, in fact, give a proper signal prior to beginning his turn. Because the judge overturned the jury's verdict based only upon the issue of "looking effectively," the turn signal is not at issue.

[Trial Tr. at pp. 423-24].

At trial, the parties were in dispute as to whether Mr. Smith had his left turn signal on when he attempted to make the left-hand turn, across the eastbound lane, into a driveway. Mr. Cross testified that Mr. Smith did not turn on his left turn signal prior to the accident. [Trial Tr. at pp. 329-30]. Mr. Smith and Corporal Gibson testified that, immediately following the accident, Mr. Smith told the investigating officer that he did not believe his turn signal was on because that is what he had been told by Mr. Yost and Mr. Cross. [Trial Tr. at 397-98; 426-27]. Corporal Gibson testified that during his investigation of the accident, Mr. Smith became uncertain as to whether his turn signal had in fact been on or off. Mr. Smith testified that after all vehicles had left the scene of the accident, and upon returning to his vehicle and turning it on, he saw that his left turn signal was still on. [Trial Tr. at 427].

Prior to the submission of closing arguments to the jury, the trial Court instructed the jury as follows:

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of differing witnesses, should be considered by you, and may or may not cause you to discredit such testimony....In weighing their effect, you should consider whether the inconsistencies or discrepancies pertain to a matter of importance, or an unimportant detail, and whether the discrepancy or inconsistency results from innocent error or willful falsehood.

* * *

The burden of proof is on the plaintiff in a civil action such as this to prove each and every essential element of his or her claim by a preponderance of the evidence. If the proof should fail to establish any element of plaintiff's claim by a preponderance of the evidence in the case, or if the defendant's evidence outweighs the plaintiff's, or if the evidence is evenly balanced in this case, the jury should find for the defendant as to that claim.

The plaintiff has the burden of proving by a preponderance of the evidence that the defendant's negligence was a proximate cause of the plaintiff's injuries.

* * *

The proximate cause of an event is the negligent act contributing to the accident, without which the accident would not have occurred. Proximate cause is any cause which in natural and continuance sequence, unbroken by an efficient intervening cause, produces the injury or damages complained of and without which the damages would not have occurred. The plaintiff does not have to prove that the defendant's negligence was the sole or only proximate cause of the injury, but only it was a substantial factor in causing injury.

* * *

You are instructed that unless circumstances lead the operator of a vehicle to believe to the contrary, he is not required to anticipate a violation of the law or the rules of the road by others, but rather may assume that others will comply therewith and exercising due care. A corollary to this is that an operator of a motor vehicle who is lawfully on a public highway may rely upon the exercise of reasonable care by operators of other motor vehicles. Failure by the operator of the motor vehicle to anticipate the operator of another motor vehicle's lack of due care does not render the vehicle operator negligent.

Under West Virginia Code §17-C-8-8 as amended, a driver shall not make a left turn on a roadway unless until such movement can be made with reasonable safety before making such turning movement. Accordingly, you are instructed that if you find Mark Smith did not look effectively to see the James Yost vehicle passing him before attempting a left turn, then you may find Mark Smith negligent. The Court instructs the jury that a driver of a vehicle must keep a proper lookout, and must avail himself of what the lookout discloses so as to prevent injury to himself and others. The duty to maintain a lookout thus involves not only the physical act of looking, but also a reasonably prudent reaction to what may be seen.

Under West Virginia Code §17-C-8-8, turning movements on a highway require turn signals. It is the duty of the driver to signal an intention to turn right or left continuously during not less than the last one hundred feet traveled by the vehicle before turning. Accordingly, you are instructed that if you find that Mark Smith attempted to turn his vehicle left on Washington Pike, a state highway, and failed to signal an intention to turn continuously

during not less than the last one hundred feet traveled by his vehicle before turning, you may find him negligent.

You are advised that the law permits an individual to allege multiple acts of negligence against a defendant; however, it is not necessary to recover that each act of negligence be proven. In order for the plaintiff to recover in this case, it is only necessary that the plaintiff establish by a preponderance of the evidence that the defendant was negligent in any one particular act and that such act contributed to the injury....

[Trial Tr. at pp. 492-501].

Following the conclusion of evidence and closing arguments of counsel, the jury was presented with the following question on the verdict form: "Do you find from a preponderance of the evidence that the Defendant, Mark Smith was negligent and his negligence contributed to or was a proximate cause of the accident?" The jury responded in the negative. As such, the jury found, pursuant to the instructions given, that Mr. Smith properly signaled and looked effectively before beginning his left turn.

The Plaintiff subsequently filed a Motion for New Trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure arguing, *inter alia*, that the Defendant Smith was guilty of negligence as a matter of law. Over the objections of the Defendant, the Circuit Court granted Plaintiff's Motion for a New Trial finding that "the Defendant was guilty of negligence as a matter of law by turning left without looking effectively to see the passing vehicle in which the plaintiff was riding as a non-negligent innocent passenger. [Order Granting Plaintiff's Motion for New Trial].

ASSIGNMENTS OF ERROR

The Circuit Court erred by setting aside the jury's verdict in favor of the defendant and finding, as a matter of law, that the defendant was guilty of negligence.

POINTS AND AUTHORITIES

1. Standard of Review.

Price v. Charleston Area Medical Center, 217 W. Va. 663, 619 S.E.2d 176 (2005).

Stillwell v. City of Wheeling, 210 W. Va. 599, 558 S.E.2d 598 (2002).

State v. Vance, 207 W. Va. 640, 535 S.E.2d 484 (2000).

Saunders v. Georgia-Pacific Corp., 159 W. Va. 621, 225 S.E.2d 218 (1976).

Phares v. Brooks, 2145 W. Va. 442, 590 S.E.2d 370 (2003).

Heitz v. Clovis, 213 W. Va. 197, 578 S.E.2d 391 (2003).

Witt v. Sleeth, 198 W. Va. 398, 481 S.E.2d 189 (1996).

2. **The Circuit Court erred by setting aside the jury's verdict in favor of the defendant and finding, as a matter of law, that the defendant was guilty of negligence.**

Howard's Mobile Homes, Inc. v. Patton, 156 W. Va. 543, 195 S.E.2d 156 (1973).

Birdsell v. Monongahela Power Co., Inc., 181 W. Va. 223, 382 S.E.2d 60 (1989).

Adkins v. Minton, 151 W. Va. 229, 151 S.E.2d 295 (1966).

Bradley v. Sugarwood, Inc., 164 W. Va. 151, 260 S.E.2d 839 (1979).

Sydenstricker v. Vannoy, 151 W. Va. 177, 150 S.E.2d 905 (1966).

DISCUSSION OF LAW

1. Standard of Review.

Rule 59 of the West Virginia Rules of Civil Procedure authorizes the filing of a motion for a new trial following an adverse jury verdict. *Price v. Charleston Area Medical Center*, 217 W. Va. 663, 619 S.E.2d 176 (2005). It is well-established that "[a] trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion." *Stillwell v. City of Wheeling*, 210 W. Va. 599, 604, 558 S.E.2d 598,

603 (2002); Syl. Pt. 2, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

Elaborating on this point, the Court has held:

When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

Stillwell, 210 W. Va. at 604, 558 S.E.2d at 603. However, "[a]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court acted under some misapprehension of the law or the evidence." Syl. Pt. 4, *Saunders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976); Syl. Pt. 2, *Phares v. Brooks*, 2145 W. Va. 442, 590 S.E.2d 370 (2003); Syl. Pt. 2, *Heitz v. Clovis*, 213 W. Va. 197, 578 S.E.2d 391 (2003); Syl. Pt. 2, *Witt v. Sleeth*, 198 W. Va. 398, 481 S.E.2d 189 (1996).

In the case at hand, the trial judge has clearly abused his discretion and acted under a misapprehension of law by vacating the jury verdict and awarding a new trial. As demonstrated herein, the issue of negligence was for the jury, not the judge, to determine.

2. The Circuit Court erred by setting aside the jury's verdict in favor of the defendant and finding, as a matter of law, that the defendant was guilty of negligence.

Despite the jury's finding that the Defendant was not guilty of negligence which was a proximate cause of the subject accident, the trial court set aside the verdict and found that "the Defendant was guilty of negligence as a matter of law by turning left without looking effectively to see the passing vehicle in which the plaintiff was riding as a non-

negligent innocent passenger.” The Court noted that its finding was based upon trial testimony of the Defendant Smith:

Q. Can you tell me why you didn't see the Yost vehicle prior to the impact, other than what you've already testified to?

A. I have no idea. I mean, I didn't see it, that's all I know.

See Order Granting Plaintiff's Motion for New Trial entered December 5, 2007. Therefore, the dispositive issue in this case is whether the circuit court abused its discretion and/or acted upon a misapprehension of law in granting Mr. Cross a new trial.

Examining the transcript of the September 21, 2007, hearing on Plaintiff's Motion for a New Trial, Judge Gaughan explained his reasoning for setting aside the jury's verdict as follows:

THE COURT: Okay. I am quite concerned on the looking effectively part of the case. You know, my recollection of the testimony concerning the looking is pretty much what Mr. Cuomo put in his memorandum. That your client said that he looked in his mirror, he didn't see him, and he had no explanation. So I'm concerned that there is no evidence in the case from which the jury could determine whether he looked effectively or not.

I mean, on the other hand, we did that instruction. That not only do you have to look, you have to look effectively. So I'm quite concerned, I honestly believed and fully expected that the defendant would say, he must have been in my blind spot or that arguments would be made that it's common sense that he must have been in the blind spot. . . .

[Transcript of September 21, 2007 hearing at pp. 5-6].

The Judge further explained as follows:

THE COURT: Any that's where my problem is. When it was just - - you know, when it included was the turn signal used or not, the jury made that determination. They very clearly made it. I am concerned about the lack of evidence as to the looking effectively. If he looked, why didn't he see it. You know, he has the obligation to look. He has the

obligation not to make the turn until it can be safely made. But, of course, if he doesn't see the vehicle the he -- it has fulfilled the totality of it.

I don't think there's any more argument. I think what I'm going to do, I'm going to grant the motion for a new trail on that ground and that ground alone. That is, I think that the jury would have to speculate as to whether he looked effectively because the only evidence in the case about the looking is that he looked in his mirror, he didn't -- he said he turn around and looked and that he didn't see it. And he had no explanation as to why he didn't see it. . . .

[Transcript of September 21, 2007 hearing at pp. 9-10].

As is demonstrated by the factually similar case of *Howard's Mobile Homes, Inc. v. Patton*, 156 W. Va. 543, 195 S.E.2d 156 (1973), the trial court's analysis is clearly flawed. In *Patton*, the plaintiff, Ruth Fitzsimmons, was traveling in a southerly direction while the defendant was traveling in the same direction behind Ms. Fitzsimmons. As Ms. Fitzsimmons approached her home, which was located on her left, she slowed her vehicle and turned on her vehicle's directional signal indicating a left-hand turn. Ms. Fitzsimmons testified that she looked into her rear view mirror in the car but did not see the defendant's automobile. She saw it for the first time as she began to turn, at which time the front wheels of her vehicle were "about ready to go off the road and into my driveway when it was hit." The defendant testified that he did not see any turn signal in operation on the plaintiff's vehicle and that he was in the process of passing her when she turned her car to the left. The trial court awarded summary judgment to the defendant finding that Ms. Fitzsimmons was "guilty of negligence as a matter of law; and, that her negligence was a proximate cause of the collision."

On appeal, however, this Court reversed the ruling of the trial court noting that:

Here the plaintiff testified that she looked in the rear view mirror but did not see the defendant's vehicle. This give rise to several questions, which, in the circumstances of this case, **can be answered properly only by a jury.**

Id., 156 W. Va. at 547, 195 S.E.2d at 158 (emphasis added). The Court further noted that:

In the instant case there is evidence that the plaintiff did look to the rear in an attempt to ascertain whether the turn could be made in safety. **Whether or not she looked effectively was determinable by several considerations which should have been submitted to a jury.**

Id., 156 W. Va. at 547, 195 S.E.2d at 159 (emphasis added). The Court's holding in *Patton* is consistent with the long-held proposition that "questions of negligence, due care, proximate cause and concurrent negligence are for jury determination when the evidence is conflicting or when the facts, though undisputed, are such that reasonable men may draw different conclusions from them." *Birdsell v. Monongahela Power Co., Inc.*, 181 W. Va. 223, 382 S.E.2d 60 (1989).

The Plaintiff, in support of his argument before the trial court that Mr. Smith was guilty of negligence as a matter of law, relied exclusively upon this Court's holding in *Adkins v. Minton*, 151 W. Va. 229, 151 S.E.2d 295 (1966). In *Adkins*, the Court held, in Syllabus Point 5 that

[i]f the driver of a forward vehicle making a left turn into a passing lane saw an overtaking vehicle attempting to pass before making the turn and still turned into the left, or passing, lane, and an accident resulted, such driver of the forward or turning vehicle would be guilty of negligence as a matter of law; or if such driver of a forward vehicle looked to the rear when an overtaking vehicle was attempting to pass and did not see the overtaking vehicle, such driver of the overtaken vehicle did not look effectively, which is a requisite in such cases, and would still be guilty of negligence as a matter of law.

Id. As explained later by the Court in *Patton*, the principles of law set forth in *Adkins* are specific to the facts of that particular case:

We are in agreement with the principles of law stated in *Adkins v. Minton*, *Supra*, as they were applied to the facts of that case. However, the instant case is clearly distinguishable therefrom. The defendant points out that in *Adkins*, the driver of the forward vehicle, the plaintiff therein, testified that she gave a signal for a left turn for 150 to 200 feet. As noted in the opinion of that case, however, the plaintiff's (*Adkins*) testimony was effectively disproved by the physical facts. It was proved that the plaintiff did not look to the rear prior to making a left turn. She was driving an old panel truck which had no rear view mirror, either inside or outside the vehicle. The truck had no mechanical signal device. After the accident, the plaintiff was unconscious and the window on the driver's side was up, in a closed position. In those circumstances the driver could not have looked to the rear or signaled for a left turn prior to making such turn.

Adkins, 156 W. Va. at 546-47, 195 S.E.2d at 158.

In the present case, unlike *Adkins*, there were no physical impediments preventing Mr. Smith from looking effectively. While Mr. Smith had a duty of exercising reasonable and ordinary care for his own safety and the safety of others, he did not have a duty to continuously look for a passing vehicle. He testified, as did the driver in *Patton*, that he looked in the rear view mirror and the side mirror prior to beginning his left turn but did not see the vehicle in which Mr. Cross was a passenger until immediately before the impact. Under these circumstances, it is clearly a jury issue as to whether the driver did, in fact, look effectively. The jury, by its verdict clearly found in this case that Mr. Smith did look effectively. See, e.g., *Bradley v. Sugarwood, Inc.*, 164 W. Va. 151, 153-154, 260 S.E.2d 839, 841 (1979) ("Although the law of this State does impose a duty upon a person to look, and to look effectively, and to exercise ordinary care to avoid a hazard, we have held that a person is not bound to be continuously looking under penalty that if he fails to do so and is injured his own negligence will defeat recovery of damages sustained."); *Sydenstricker v. Vannoy*, 151 W. Va. 177, 150 S.E.2d 905 (1966) (In action for personal injuries sustained by a pedestrian when struck by defendant's automobile, it was proper for the jury

to decide whether the pedestrian was guilty of contributory negligence as to lookout in not seeing defendant's automobile before stepping into street, and as to whether defendant motorist was guilty of negligence as to lookout in not seeing pedestrian before striking him.). The circuit court, therefore, erred by awarding a new trial in this matter.

RELIEF PRAYED FOR

Based upon the foregoing, the Circuit Court of Brooke County erred by granting the Plaintiff's Motion for a New Trial and finding that the Defendant, Mark E. Smith, was negligent as a matter of law. The Appellant, therefore, respectfully requests that this Court reverse the judgment of the Circuit Court as reflected in its November 5, 2007, Order and reinstate the jury verdict in favor of Mark E. Smith.

MARK E. SMITH

By Counsel



Donna S. Quesenberry (#4653)
MacCorkle, Lavender & Sweeney, PLLC
300 Summers Street, Suite 800
Charleston, WV 25301
(304) 344-5600

Monica N. Haddad (#5835)
MacCorkle, Lavender & Sweeney, PLLC
6000 Hampton Center, Suite B
Morgantown, WV 26505
(304) 599-5600

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WESLEY CROSS,

Appellee/Plaintiff below,

v.

Docket No. 34147

MARK E. SMITH,

Appellant/Defendant below.

CERTIFICATE OF SERVICE

I, Donna S. Quesenberry, counsel for Appellant/Defendant, do hereby certify that I have on this the 24th day of June 2008, delivered this original and nine copies of the "**BRIEF ON BEHALF OF APPELLANT/DEFENDANT, MARK E. SMITH**" to the Clerk of the West Virginia Supreme Court of Appeals and have served a true and exact copy of the foregoing upon all counsel of record herein, by Facsimile and by depositing the same in the regular United States Mail, postage prepaid, and addressed as follows:

Frank Cuomo, Jr., Esquire
Jason A. Cuomo, Esquire
1511 Commerce Street
Wellsburg, WV 26070



Donna S. Quesenberry (WV State Bar No. 4653)
MacCorkle, Lavender & Sweeney, PLLC
300 Summers Street, Suite 800
Charleston, WV 25301
(304) 344-5600