

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WESLEY CROSS,

Appellee/Plaintiff below,

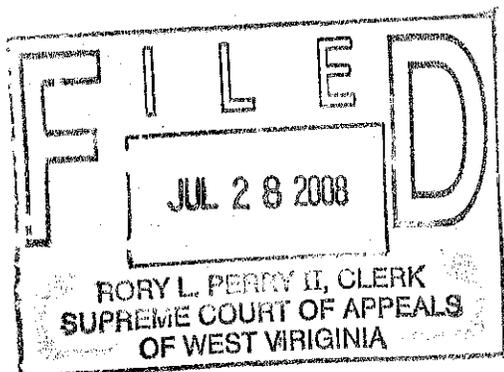
v.

Docket No. 34147

MARK E. SMITH,

Appellant/Defendant below.

REPLY BRIEF ON BEHALF OF APPELLANT
MARK E. SMITH



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COMES NOW the Appellant, Mark E. Smith, by counsel, Donna S. Quesenberry, Monica N. Haddad, and MacCorkle, Lavender & Sweeney, PLLC, in reply to the Brief of Appellee Wesley Cross. This case involves a motor vehicle accident which proceeded to trial on the issue of negligence. Upon consideration of the evidence presented, the jury returned a verdict finding that Appellant Mark E. Smith was *not* guilty of negligence which was a proximate cause of the motor vehicle accident. The Circuit Court, however, granted Plaintiff's Motion for a New Trial and found that Defendant Smith was negligent as a matter of law for failing to "look effectively" before making a left-hand turn. It is upon this sole issue that the appeal is based.

The facts of the case, procedural history and assignments of error have been briefed and are before this Court. Any mischaracterization of the facts presented in the Appellee's brief and replies to the specific arguments of the Appellee are addressed herein.

DISCUSSION OF LAW

1. Appellee's reliance on *Adkins v. Minton* is misplaced.

Though the Appellee repeatedly attempts to make an issue of whether or not Mr. Smith gave a proper turn signal prior to his left-hand turn, this appeal is based solely upon the issue of whether or not Mr. Smith looked effectively prior to beginning his left-hand turn. The jury, by returning a verdict in favor of Mr. Smith, obviously found that he did, in fact, give a proper turn signal, and the trial judge, in granting the Appellee's Motion for a New Trial, relied only upon the issue of "looking effectively."

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 trial 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 turned 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 such, any argument based upon the turn signal issue is completely irrelevant.

With respect to the "looking effectively" issue, the Appellee, in his response to Mr. Smith's appeal brief, relies exclusively on Syllabus Point 5 of *Adkins v. Minton*, 151 W. Va. 229, 151 S.E.2d 295 (1966), which provides in part that:

[i]f the driver of a forward vehicle making a left turn into a passing law 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 overtaking vehicle did not look effectively, which is a requisite in such cases, and would still be guilty of negligence.

Id.

The Appellee asserts that "[t]here are no real distinguishing material factors different in the instant case that would call for deviating from the *Adkins* decision." However, this Court clearly pointed out in *Howard's Mobile Homes, Inc. v. Patton*, 156 W. Va. 543, 546, 195 S.E.2d 156, 158 (1973), that the principles of law set forth in *Adkins* are specific to the facts of that case. The facts of the instant case are strikingly different from the facts in *Adkins* and are, in fact, more akin to those set out in *Howard's Mobile Homes*.

In *Adkins*, the collision occurred when the plaintiff attempted to turn to the left of the road while the defendant was attempting to overtake and pass the plaintiff's vehicle. Unlike the present case, however, both parties in *Adkins* were driving panel trucks which would have obstructed the plaintiff's view of any vehicle attempting to pass. The *Adkins* Court noted that statutory law required "every motor vehicle so constructed or loaded as to obstruct the driver's view to the rear to be equipped with a mirror so located as to allow the driver of any vehicle to be able to view the highway from the rear of such vehicle for a distance of 200 feet." *Id.*, 151 W. Va. at 236, 151 S.E.2d at 301. It was uncontroverted that "the plaintiff's truck was not equipped with any such mirror that would allow a view to the rear of her truck." *Id.* Because the plaintiff could not have ascertained, under any circumstances, if the left turn could have been accomplished with reasonable safety as required by statutory law, this Court found the plaintiff was guilty of negligence as a matter of law.

In the case at hand, no such irrefutable concrete evidence existed. Whether or not Mr. Smith looked effectively prior to beginning his left-hand turn could only be determined through his testimony. Testifying as to the manner in which the collision occurred, Mr. Smith stated 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 on there. And I was going up and right before I pulled into his driveway, ***I looked in my middle rearview mirror and I looked in my side view mirror.*** I didn't see nobody.

Tr. at p. 424 (emphasis added). It should be pointed out that, in the present case, it was stipulated that the collision occurred in a no-passing zone--an area in which Mr. Smith

would not have expected a vehicle to pass him; in *Adkins*, the collision occurred in an area where the defendant could have legally passed the plaintiff. And finally, because the Appellee in the case at hand repeatedly argues that Mr. Smith made a left turn "without warning or signal," it should be noted that the *Adkins* decision, upon which the Appellee relies so heavily, specifically holds that whether the a left turn signal was given for the distance required by statute is a question for jury determination because of the presence of conflicting evidence.

Despite the Appellee's contentions, *Howard's Mobile Homes* is factually similar to the present case.¹ In that case, the collision took place on a straight portion of the highway where the plaintiff's view was unobstructed. Like Mr. Smith, the plaintiff testified that she looked into her rear view mirror but did not see the defendant's automobile until just prior to impact. Also like the present case, an issue existed as to whether the plaintiff properly signaled for a left turn. The Court, in *Howard's Mobile Homes*, as in *Adkins*, held that because the defendant testified that he did not see a left turn signal, a question of fact to be resolved by the jury existed. Finally, and most importantly, like the present case, because there was evidence in *Howard's Mobile Homes*, through testimony, that the plaintiff did look to the rear in an attempt to ascertain whether the turn could be made in safety, this Court decided that whether the plaintiff, in *Howard's Mobile Homes* (and therefore Mr. Smith in the present case) looked effectively was a factual issue to be resolved by the jury. See also *Piper v. Miller*, 154 W. Va. 178, 173 S.E.2d 662 (1970) in

¹Like the Appellee, the defendant in *Howard's Mobile Homes* based his entire case upon the holding in *Adkins*.

which, upon a finding by the trial court that the driving of a turning vehicle was negligent as a matter of law, this Court stated:

The majority of the Court are of the opinion that the facts in the case at bar are different from those contained in the Adkins case with regard to the plaintiff using the required care in the making of a left turn into the private driveway, that this case is not governed by the decision in the Adkins case, that therefore, the entire question of negligence on the part of the defendant and contributory negligence on the part of the plaintiff are questions for jury determination in the instant case, and that if it were not for the cross assignments of error by the defendant they would reverse the judgment of the trial court, reinstate the verdict of the jury and enter judgment for the plaintiff.

Id., 154 W. Va. at 187, 173 at 667.

The decision in *Howard's Mobile Homes* is consistent with the long held principle that “[q]uestions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.” Syl. Pt. 1, *Birdsell v. Monongahela Power Co., Inc.*, 181 W. Va. 223, 382 S.E.2d 60 (1989); Syl. Pt. 3, *Dawson v. Woodson*, 180 W. Va. 307, 376 S.E.2d 321 (1988); Syl. Pt. 5, *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 236 (1964). See also Syl. Pt. 1, *Wise v. Crown Construction Co.*, 164 W. Va. 393, 264 S.E.2d 463 (1980); *Fortner v. Napier*, 153 W. VA. 143, 158, 168 S.E.2d 737, 746 (1969); Syl. Pt. 1, *Sydenstricker v. Vannoy*, 151 W. Va. 171, 150 S.E.2d 905 (1966). Accordingly, whether Appellant Mark E. Smith was guilty of negligence by failing to look effectively before making a left turn and whether that negligence contributed to or was a proximate cause of the subject accident were factual issues which were appropriate for

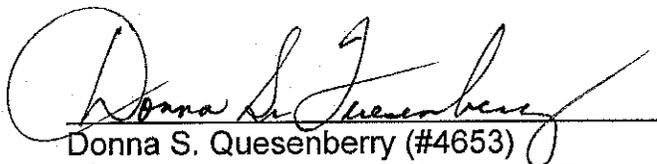
resolution by the jury. As such, the trial court clearly erred by granting the Appellee's motion for a new trial.

CONCLUSION

In his response, the Appellee points out that the driver of the car in which he was a passenger began passing the Smith vehicle in a lawful passing zone, but ignores the stipulated fact that the impact occurred while passing illegally in a no-passing zone. The Appellee further attempts to distinguish the facts of *Howard's Mobile Homes, Inc. v. Patton* from the present case by relying upon points irrelevant to the determination of whether the issue of looking effectively was properly submitted to the jury for resolution. As demonstrated herein, as well as in Mr. Smith's Appeal Brief, the trial court clearly erred by reversing the finding of the jury and granting the Appellee's Motion for a New Trial. Therefore, Appellant Mark E. Smith respectfully requests that the Court reverse the ruling of the trial court and reinstate the jury's verdict.

MARK E. SMITH

By Counsel



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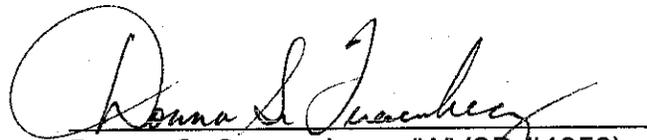
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CERTIFICATE OF SERVICE

I, Donna S. Quesenberry, counsel for Appellant, do hereby certify that I have, on this the 25th day of July 2008, served a true and exact copy of the foregoing **REPLY BRIEF ON BEHALF OF THE APPELLANT MARK E. SMITH** 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:

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