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In The  
**Supreme Court of Virginia**

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**RECORD NO. 090947**  
\_\_\_\_\_

**AVALON KIMBLE,**

*Appellant,*

v.

**CHARLES CAREY,**

*Appellee.*

\_\_\_\_\_  
**BRIEF OF APPELLANT**  
\_\_\_\_\_

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VIRGINIA:  
IN THE SUPREME COURT OF VIRGINIA

AVALON KIMBLE,

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v.

CHARLES CAREY,

Appellee.

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Record No.: 090947

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**STATEMENT OF THE CASE**

Plaintiff/Appellant Avalon O. Kimble appeals the trial court's dismissal, on Defense Motion to Strike, her personal injury claim against defendant Charles Carey.

As stated in her Complaint<sup>1</sup>, defendant Charles Carey was involved in a fiery collision on September 25, 2006 at approximately 7:35 p.m. with a construction vehicle on Interstate 64 west bound at the 100 mile marker in Eastern Henrico County, Virginia when his Chevrolet Malibu. Carey vehicle struck the construction vehicle in the rear as the construction vehicle slowed preparing to turn left into a crossover. The impact of collision caused Carey's vehicle to become extensively damaged and wedged beneath the construction vehicle and catch a fire. (App. at 15-16). Carey

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<sup>1</sup> Plaintiff filed an original and two subsequent amended complaints.

was severely injured in the collision and was unable to get out of the burning vehicle. (App. at 107-108). The plaintiff, Avalon Kimble, came upon the scene while traveling westbound on the same Interstate highway on her way to the burning Carey vehicle and tried to help Carey. (App. at 114, 116).

Carey was driving his personal vehicle on Interstate 64 westbound from Williamsburg, Virginia to Charlottesville, Virginia, a distance of more than 90 miles. (App. at 18 & 24; Req. no. 17). Prior to embarking on the road trip from Williamsburg, Virginia to Charlottesville, Virginia, Carey drank 3 to 4 beers between 11:00 a.m. and 3:00 p.m. Carey drank, prior to embarking on the road trip alcohol, beverages known as Jell-o shooters. (App. at 13, 23; Req. no. 4).

Carey was charged with a DWI and subsequently in March of 2007 pled guilty in Henrico County General District Court in Henrico, Virginia Traffic Division to driving while under the influence of alcohol on the date of the crash, September 25, 2006. (App. at 18, 24; Req. no. 18). Carey admitted that his Blood Alcohol content, or B.A.C, at the time his vehicle crashed into the rear of the construction vehicle it was .15. (App. at 18, 24; Req. no. 19).

Carey also admitted that he knew at the time he began drinking alcoholic beverages in Williamsburg, Virginia that his ability to operate a motor vehicle was, or would be impaired as a result of that consumption. (App. at 19, 22; Req. no. 22).

Carey further admitted that he knew his ability to operate a motor vehicle was impaired while he was actually operating the vehicle on September 23, 2006 on his drive to Charlottesville, Virginia. (App. at 20, 24; Req. no. 24). At the time of the Carey's crash into the construction vehicle on Interstate 64, Carey's vehicle was traveling at 80 miles per hour. (App. at 21; Req. no. 25).

Virginia Code Section 8.01-44.5, 1950, as amended allows a plaintiff in any action for personal injury arising from the operation of a motor vehicle to seek and award of exemplary damages if the defendant's Blood Alcohol Level is .15 or greater and that the plaintiff further establishes the defendant's requisite state of mind at the time he began drinking and driving. Of course, plaintiff would have the traditional burden of proving causation and injury.

Such are the facts here. By its very language Code section 8.01-44.5 applies to any action for personal injury arising from the operation of a motor vehicle. Under these circumstances, this would also include a claim

brought by a rescuer against the victim under the Rescue Doctrine. A victim has a duty to exercise reasonable care so as not to increase the risk of harm to a rescuer. Plaintiff states a cause of action for imposing liability on defendant for exemplary damages for his willful and wanton conduct in voluntarily deciding to drink and try to drive, at a high rate of speed, from Williamsburg to Charlottesville, Virginia.

Logic, legal prudence and public policy demand that the question, “were the facts of Carey’s conduct that brought him into peril before plaintiff initiated a rescue material and a relevant” in her rescue doctrine injury claim against him, must be answered in the affirmative. It would be nonsensical to argue otherwise. Indeed, “whether a defendant acted willfully and wantonly in conscious disregard for the safety of others, involves the consideration of the entire conduct of the defendant”. Allstate Insurance Company v. Wade, 265 Va. 383, 427 S.E.2d 357 (2003).

Human decency and legal consistency cry-out for the recognition that the defendant owed a greater duty to other drivers on the roadway on the day in question than simple negligence.

### **MATERIAL PROCEEDING BELOW**

Plaintiff filed her Bill of Complaint by counsel on February 5, 2007 and defendant filed his Answer, by counsel on March 5, 2007. (App. at 1;

App. at 3). Plaintiff filed an Amended Complaint on October 18, 2007 and a Motion for Leave to File Amended Complaint also on October 18, 2007. (App. at 6, 10). Plaintiff filed a Requests for Admission on November 19, 2007 and defendant filed Responses thereto on December 11, 2007. (App. at 12, 23). Plaintiff filed a Second Amended Complaint on December 17, 2007.<sup>2</sup> (App. at 23). A hearing was held on plaintiff's Motion for Leave to Amend. On December 21, 2007 the Motions Court issued a letter opinion denying plaintiff's Motion to Amend. (App. at 30-31).

In relevant part, the Motion Court stated in its letter opinion:

The parties agree that the rescue doctrine is implicated in the case. They disagree over whether the extent of the victim's negligence which brought him into peril should be part of the case by the addition of facts alleging intoxication and punitive damages. The court agrees with the defendant's view. It is not material or relevant to descend into all facts of Carey's conduct that brought him into peril before plaintiff initiated a rescue.

As the parties seem to agree, Carey's negligence is clear. The analysis then moves forward to determine whether plaintiff was contributory negligent under the rescue doctrine.

On May 16, 2008, plaintiff filed her Motion for Reconsideration and Brief In Support of Her Motion for Reconsideration.<sup>3</sup> The Motion for

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<sup>2</sup> The second Complaint sought a lower amount of compensatory damages in the second court. Both complaints sought statutory and common law punitive damages based upon the defendant's conduct prior and up to the time of his collision with the construction vehicle.

<sup>3</sup> The Motion itself is not a part of this Appendix.

Reconsideration was denied by letter opinion dated August 18, 2007. (App. at 38).

On the January 12, 2009 plaintiff's case against defendant was tried before a jury in the Circuit Court of the City of Richmond.

This Appeal arises from the entry of a February 11, 2009 Order granting the defendant's Motion to Strike plaintiff's personal injury case arising pursuant to the Rescue Doctrine. (App. at 201.)

The February 11, 2009 Order was handed down after a trial before a jury. The trial proceeded over denial of plaintiff's request to the Court to allow certain evidence of the conduct of the defendant before and as to the cause of the defendant's collision with the construction vehicle. The trial Court Ordered the exclusion of all such evidence pursuant to an earlier pretrial ruling by a motions Judge. On July 22, 2009 this Court granted Plaintiff's Appeal of the Trial Court's February 11, 2009 Order.

### **ASSIGNMENTS OF ERROR**

1. The Motions court erred in denying plaintiff's Motion to Amend Her Complaint, because the defendant's actions which placed him in peril were relevant and material to the standard of proof by which plaintiff's own actions should be considered.

2. The Trial court erred in denying plaintiff the right to introduce evidence of the defendant's intoxication at trial because such evidence was material and relevant and allowed the case to go forward on an incorrect standard of proof as to defendant.

3. The Trial court erred in granting defendant's Motion to Strike plaintiff's case because the question of the appropriateness of plaintiff's actions was one for a jury to decide.

### **QUESTIONS PRESENTED**

1. Was the Motions Court denial of plaintiff's Motion to Amend her Complaint an abuse of discretion? (Assignment of Error 1).

2. Is the extent of a defendant-victim's negligence material or relevant in a rescue-doctrine case? (Assignment of Error 2).

3. Should plaintiff's case have been allowed to go to the jury? (Assignment of Error 3).

### **STATEMENT OF FACTS**

The Requests for Admission, and the answers thereto, state that in the evening of September 25, 2006, after a day of drinking alcoholic beverages in Williamsburg, Virginia at a corporate function, Charles Carey started his drive from Williamsburg to his home in Charlottesville, Virginia, a distance of more than 90 miles. (App. at 12, 13, 23; Req. nos. 1-4). Carey

knew that his ability to operate his motor vehicle would be impaired when he started drinking. He also knew that his ability to operate his motor vehicle was in fact impaired once he started his drive back to Charlottesville. (App. at 20, 24; Req. no. 24).

The Request for Admissions further show that Carey crashed his vehicle into the rear of a large construction truck which was slowing to make a turn into a highway cross-over. The impact of the collision caused the Carey vehicle to become wedged under the rear of the large construction vehicle and catch a fire. (App. at 14, 23; Req. no. 9). The left wheel assembly on the Carey vehicle was broken and its left wheel was broken and its left wheel shock absorber was detached from the vehicle. (App. at 16, 23; Req. no. 12). Carey's vehicle was burned extensively in the front with contact displayed the entire front of the vehicle. The hood of Carey's vehicle was crinkled and pushed rearward toward the windshield, which itself was shattered. (App. at 15, 23; Req. no. 12). The steering wheel and entire front dashboard of Carey's vehicle was buckled. (App. at 16, 24; Req. no. 13). Carey's vehicle caught a fire while he was in it. (App. at 17, 25; Req. no. 15; App. at 107).

Carey suffered severe, and at that time disabling injuries, including broken ribs and multiple contusions. (App. at 16-17, 24; Req. no. 14).

As a direct and proximate result of this collision and the extent of his injuries, Carey was trapped inside of his burning vehicle and could not get himself out of it. (App. at 107 ¶ 2-17). Carey was aware that a lady was at the scene trying to get him out of his vehicle. (App. at 114 ¶ 7-9). Carey pled guilty in March of 2007 in Henrico County Virginia General District Court to driving under the influence of alcohol at the time of his crash into the rear of the construction vehicle with a Blood Alcohol content of .15. (App. at 18, 24; Req. no. 18). Carey was driving his vehicle 80 miles per hour at the time he crashed into the rear of the large construction truck on Interstate 64 in Henrico County, Virginia. (App. at 21, 24; Req. no. 25).

Plaintiff attempted to flash down traffic on the interstate in an effort to assist Carey while he was trapped inside of his burning vehicle. Plaintiff was struck by an oncoming vehicle and was severely injured. (App. 146-147; ¶4-25; App. at 149; ¶ 18-25).

## **PRINCIPLES, ARGUMENT & AUTHORITIES**

### **I. SUMMARY OF ARGUMENT.**

Plaintiff appeals the Motion Court's denial of her Motion to Amend Her Complaint in this rescue-doctrine case. The trial Court followed the Motion's Court's ruling and refused to allow plaintiff to introduce probative evidence of the defendant's alcohol consumption, his Blood Alcohol content

and his vehicular speed which lead to the crash that impaired his life. The error in denying plaintiff's Motion for Leave to Amend led to the error of plaintiff's case being considered and ultimately decided on incorrect principles of law. The facts pled, implicitly and justly inferred, in plaintiff's complaints were legally sufficient to state a cause of action against the defendant. Accordingly, the trial Court's decision should be reversed and the case remanded to the Circuit Court for trial.

**II. THE MOTIONS COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND HER COMPLAINT.**

A court's refusal to allow an amendment of pleading is, in ordinary circumstances, an abuse of discretion. Ford Motor Co. v. Benitez, 273 Va. 242, 252, 639 S.E.2d 203 (2007); citing Mortarino v. Consultant Eng'g Servs., 251 Va. 289, 295-96, 467 S.E.2d 778 (1996). See also Ogunde v. Prison Health Services, 274 Va. 55, 645 S.E.2d 520 (2007).

While amendments are not a matter of right, Rule 1:8 of the Rules of the Virginia Supreme Court provides that leave to amend shall be liberally granted in furtherance of the ends of justice. Kole v. City of Chesapeake, 247 Va. 51, 57, 439 S.E.2d 405 (1994). "That rule takes into account that new evidence may come to light during discovery warranting the assertion of new claims or defense". Ford Motor Co. v. Benitez, 273 Va. 242, 252 (2007).

Here, the motion for leave to amend was asserted after discovery and the plaintiff had not previously amended her motion for judgment. Defendant Charles Carey made no claim of prejudice to allowance of the amendment. In fact, defendant Charles Carey did not file any written opposition to plaintiff's proposed amendment. The plaintiff provided good cause to seek to amend her complaint since the facts alleged were the result of the discovery process.

Further, the Motions Court treated plaintiff's Motion as if she were before the Court on a demurrer, i.e. that a claim for punitive damages, alleging willful and wanton conduct, was not cognizable because such proof was not "material or relevant."

It is well settled that a demurrer does not allow the trial court to evaluate and decide the merits of a claim. Fun v. Virginia Military Institute, et. al., 245 Va. 249, 252, 427 S.E.2d 181, 183 (1993). Rather, it tests the sufficiency of a complaint in whether it states the essential elements of a cause of action. Lyons v. Grether, 218 Va. 630, 239 S.E.2d 109 (1977). A demurrer admits the truth of all material facts that are "properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred." Cox Cable Hampton Roads, Inc. v. City of Norfolk, 242 Va. 394, 397, 410 S.E.2d 652, 653 (1991). Thus, the Court essential found that

plaintiff's amended complaints did not state a cause upon which relief could be granted.

Clearly, the ends of justice in this Rescue-Doctrine case would have been served by the granting of plaintiff's motion.

**III. THE TRIAL COURT ERRED IN DENYING PLAINTIFF THE RIGHT TO INTRODUCE EVIDENCE OF THE DEFENDANT'S INTOXICATION AT TRIAL BECAUSE SUCH EVIDENCE WAS MATERIAL AND RELEVANT WHICH ALLOWED THE CASE TO GO FORWARD ON AN INCORRECT STANDARD OF PROOF AS TO DEFENDANT'S CONDUCT AND, CONCOMITENTLY, THE TRIAL COURT INCORRECTLY ASSESSED THE PLAINTIFF'S ACTION IN THE RESCUE ATTEMPT.**

In Rescue Doctrine Analysis, simple negligence by the defendant-victim is a limitation on the contributory negligence defense. However, the more egregious the defendant-victim's conduct in creating the peril, the greater the legal protection that is afforded to the rescuer. That is, willful and wanton conduct by the defendant-victim is a complete bar to the contributory negligence defense. Thus, the precise categorization of the defendant-victim's conduct is important. Willful and wanton negligence is a higher degree of negligence than either ordinary negligence or gross negligence. Richmond Newspaper, Inc v. Lipscomb, 234 Va. 277, 362 S.E.2d 32 (1987). A defendant who is guilty of willful and wanton negligence cannot rely upon contributory negligence as a defense. Griffin v. Shively, 227 Va. 317, 322, 35 S.E.2d 210, 213 (1984). As far back as

1934, the Virginia Supreme Court held it important to distinguish between acts or omissions which constitute-degrees of negligence because contributory negligence on the part of the plaintiff will not defeat recovery against a defendant who is guilty of willful and wanton conduct. Thomas v. Snow, 162 Va. 654, 660-61, 174 S.E.2d 837, 840 (1934).

Here, the peril inviting the rescue was created by the defendant-victim, Carey. By his own alcohol fueled negligence, he compelled plaintiff to decide between two options, help or not help. He ought not to be heard to say that the full extent of his recklessness should be, in effect, excluded.

As the Rescuer, plaintiff stands in the same position vis-à-vis defendant-victim as if he had struck her while driving drunk. The defendant-victim's actions in driving while under the influence of alcohol bears directly on the issue of whether or not he would be entitled to an instruction on contributory negligence at trial. Indeed, a per se finding of willful and wanton conduct is mandated by a violation V. C. § 8.01-44.

**III. THE TRIAL COURT ERRED IN GRANTING THE DEFENSE MOTION TO STRIKE PLAINTIFF'S CASE BECAUSE THE QUESTION OF THE APPROPRIATENESS OF PLAINTIFF'S ACTIONS WAS FOR THE JURY TO DECIDE.**

At the conclusion of all of the evidence, the trial court granted the defense motion to strike plaintiff's case, ruling that plaintiff's conduct was so rash and reckless that reasonable minds could not differ. (App. at 201-

202). In other words, the trial court found plaintiff contributorily negligent as a matter of law.

In the case of Andrews v. Appalachian Electric Power Co., 192 Va. 150, 163 S.E.2d 750, 756 (1950), the Court in considering an appeal in a Rescue Doctrine case in which the plaintiff's decedent was instantly killed by coming in contact with a highly charged overhead electric wire, owned and operated by Appalachian Electric Power Co., as he attempted to remove the broken wire from the body of another, enunciated the general rule: Whether a person is guilty of contributory negligence in rushing into a place of danger to save another from imminent death or injury is a question for the jury. 192 Va. 161.

Here, the trial court relied upon the holding in Lassiter v. Warriner, 235 Va. 274, 368 S.E.2d 258 (1988) in reaching its decision. However, the reliance was misplaced because Lassiter was a case of simple negligence by the defendant and a case of simple contributory negligence by the plaintiff.<sup>4</sup> Thus, the trial court should have allowed the case to be submitted to the jury.

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<sup>4</sup> It should be noted that the Supreme Court reversed and remanded the jury verdict in favor of Warriner because of the trial court's error in refusing to apply the Rescue-Doctrine.

Here, the trial court's analysis was truncated. The Rescue-Doctrine was available, but probative evidence of the defendant's alleged willful and wanton conduct was excluded from trial. In the cases of Griffin v. Shively, 227 Va. 317, 322 35 S.E.2d 210, 213 (1984) and Commonwealth v. Millsaps, 232 Va. 502, 352 S.E.2d 311 (1987), the Virginia Supreme Court, citing Thomas v. Snow, 162 Va. 654, 660-61, 174 S.E.2d 837, 840 (1934), reaffirmed the general rule that a defendant who is guilty of willful and wanton negligence cannot rely upon contributory negligence as a defense. The Millsaps Court, quoting Southern Railroad Company v. Baptist, 114 Va. 723, 727-28, 77 S.E. 477, 479 (1913), said: "Under the Rescue Doctrine" persons are justified in assuming greater risks in the protection of human life than would be sustained under other circumstances, without weighing with technical precision the rules of contributory negligence or assumption of risk. 232 Va. 507.

In the Rescue case of Southern Railroad Co. v. Baptist, 114 Va. 723 (1913), the rescuer sought to prevent a horse from moving into the path of an oncoming train with its rider. In the ensuing struggle, the rescuer was thrown into the side of the train's engine and sustained dreadful and permanent injuries.

The Court opined that whether or not a rescuer was guilty of contributory negligence in attempting to save another from injury or death is a question for determination of the jury. 114 Va. 728.

Contrary, to the plaintiff in Commonwealth v. Millsaps, plaintiff here sought to allege willful and wanton conduct by the defendant. Thus, the plaintiff should have been permitted to involve the rule in Griffin v. Shively, 227 Va. 317, 322 (1984). The trial court should have allowed her case to be submitted to the jury.

Under Griffin v. Shively and Commonwealth v. Millsaps on the allegation of willful and wanton conduct, the question then becomes whether contributory negligence is a defense available to Carey. In the proper case the Rescue Doctrine vitiates certain defenses to a claim of negligence, i.e. contributory negligence or assumption of risk. 232 Va. 510.

Thus, plaintiff's case could only be properly submitted to a trier of fact for its consideration as to whether or not her conduct was willful and wanton, not simple contributory negligence. Moreover, once plaintiff contended that the defendant's negligence subjected her to her to an undue risk, the issue of whether she was willful and wanton in her rescue attempt becomes one of the facts for the jury rather than a matter of law.

See also Monette Huffman v. Joseph Love, 245 Va. 311, 427 S.E.2d 357(1993).

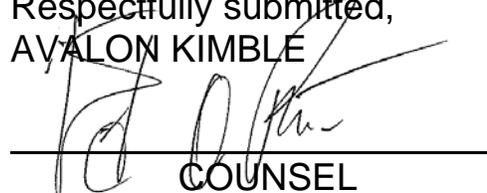
In conclusion, plaintiff sought to plead, and indeed, defendant Carey's responses to Request for Admission fully support, an allegation of willful and wanton conduct by Him. Procedurally, under the particular facts of the case, evidence regarding the extent of Carey's negligence was material and relevant. The issue of alcohol and extent of Carey's intoxication constitutes the genesis of this case. A consideration of this case without this evidence resulted in a ruling more favorable to the defendant than that of which he was entitled.

### **CONCLUSION**

For the foregoing reason, plaintiff prays that this Court reverse the judgment below and remand the case for trial on plaintiff's amended complaint.

Respectfully submitted,  
AVALON KIMBLE

By

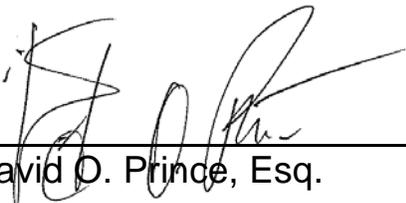


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**CERTIFICATE**

Pursuant to Rule 5:26(d), I hereby certify that, on this 28th day of August, 2009, fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellant and Appendix were hand-filed with the Clerk of the Supreme Court of Virginia, and three paper copies of the same were sent via U.S. Mail, postage prepaid, to Carl R. Schwertz, Duane & Shannon, P.C., 10 East Franklin Street, Richmond, Virginia 23219, (804) 644-7400, Counsel for Appellee.



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David O. Prince, Esq.