IN THE

Supreme Court of Virginia

RECORD NO. 090947

AVALON KIMBLE,

Appellant,

v.

CHARLES CAREY,

Appellee.

BRIEF OF APPELLEE

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

AVALON KIMBLE,	*	
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Appellant,	*	
	*	
v.	*	Record No.: 090947
	*	
	*	
CHARLES CAREY,	*	
	*	
Appellee.	*	

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STATEMENT OF THE CASE

This case is before this Court on appeal from the Trial Court's dismissal of the personal injury claim filed by plaintiff/appellant, Avalon O. Kimble ("Kimble"), against defendant/appellee, Charles Carey ("Carey"). On the evening of September 25, 2006, Carey was involved in a collision on Interstate 64 while traveling westbound from Williamsburg, Virginia to Charlottesville, Virginia. Carey struck a large construction truck in the rear, which caused his vehicle to become wedged under the rear portion of the construction truck. Additionally, as a result of the impact, Carey was unable to exit his vehicle as he had become pinned down underneath his dashboard.

At the time of the accident, Carey's blood alcohol concentration was above the legal limit for the Commonwealth of Virginia. Subsequently, Carey was charged with driving under the influence, a charge to which he pled guilty to in Henrico General District Court.

On that same evening, Kimble was also traveling westbound on Interstate 64 en route to Richmond, Virginia from Charles City, Virginia. During her trip, Kimble began to experience engine trouble and pulled over as her check engine light had illuminated. (App. At 130) Kimble was aware that the car had engine problems and likely needed oil or transmission fluid, both of which she kept in the trunk for such occasions. (App. at 137) Kimble then pulled her vehicle onto the shoulder approximately one hundred (100) yards past the site of the accident Carey was involved in so that she could address such matters. (App. at 152) At some point, after alighting from her vehicle, Kimble became aware of the initial accident in which Carey was involved.

Despite the fact that the roadway was extremely dark, Kimble alighted from her vehicle, and proceeded to stand in the middle of the road. (App. 146) At which point, she was struck by a vehicle being operated by Michael Preusser. ("Preusser") Kimble was unable to

recall anything after she alighted from her vehicle. (App. at 134) She has asserted that she was struck as she attempted to cross the highway to render aid to Carey (App. at 123), despite the fact that she could not see Carey from her location. (App. at 123, 131) Kimble was unable to discern how she knew she was attempting to aid Carey.

MATERIAL PROCEEDING BELOW

Kimble's complaint was filed on February 5, 2007. Carey filed his answer on March 5, 2007. After the discovery process, Kimble filed a Motion for Leave to File Amended Complaint as well as an Amended Complaint, both on October 18, 2007. Kimble sought to amend her Complaint by adding a count alleging willful and wanton conduct of Carey and to increase the *ad damnum* by incorporating punitive damages. Kimble then filed requests for admission on November 19, 2007. Carey's responses were filed on December 11, 2007. Kimble then filed a Second Amended Complaint on December 11, 2007. Following a hearing, the Court issued a letter opinion regarding the Plaintiff's Motion for Leave to File Amended Complaint. The opinion, which denied the Kimble's Motion, was issued on December 21, 2007 and stated in relevant part:

> 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 contributorily under the rescue doctrine.

In response, Kimble filed a Motion for Reconsideration and Brief In Support of Her Motion for Reconsideration on May 16, 2008. Kimble's motion was again denied in an opinion letter dated August 18, 2008. The letter stated in relevant part:

> The degree of the defendant-victim's negligence which resulted in his being in peril still seems to me to be immaterial to an inquiry as of this defendant's negligence,

> for the case is about injury plaintiff is said to have received after the rescue attempt began as to the co-defendant and the defendant-victim's negligence in making for a dangerous circumstance in the first instance. It does not seem that the degree of the defendant-victim's conduct that put him in a position of peril is material and relevant because whether by slight or gross negligence, his condition of peril was what it was.

This matter proceeded to trial on January 12, 2009 before a jury in the Circuit Court for the City of Richmond. At the onset of the trial, the Court ordered the exclusion of all evidence relating to the circumstances which put the Carey in a position of peril, relying largely on the previous opinions issued. After the presentation of evidence by both parties, the Court granted the Carey's Motion to Strike based upon the Trial Judge's ruling that Kimble's attempt to assist Carey was so rash and reckless that she could not recover under the rescue doctrine as a result of being contributorily negligent. An Order granting the Motion to Strike was entered on February 11, 2009. (App. at 196-197) This Court granted Kimble's appeal on July 22, 2009.

ASSIGNMENTS OF ERROR AS PRESENTED IN KIMBLE'S OPENING BRIEF

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 AS POSED IN KIMBLE'S OPENING BRIEF

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.)

All questions are answered in the negative.

STATEMENT OF FACTS

On September 25, 2006, Defendant Charles Carey was involved in a collision at approximately 7:35 p.m. The collision occurred on Interstate 64 west bound in Henrico County. As a result of the collision, Carey's vehicle was pinned beneath the rear portion of a large construction truck. Sometime later that evening, the Plaintiff, Avalon Kimble passed the accident while en route from Charles City, Virginia to Richmond, Virginia. After passing the scene of the accident, Kimble stopped her vehicle because the check engine light within Kimble's vehicle illuminated, indicating the vehicle was having mechanical troubles. Kimble, who had previously addressed this very issue, was aware that the car most likely needed oil or transmission fluid, both of which she kept in the trunk for such occasions. Kimble stopped her vehicle approximately 100 yards past the scene of the Carey accident. Thereafter, Kimble noticed the Carey vehicle.

Kimble has stated that after stopping her vehicle, she attempted to make her way to the scene of Carey's accident, as well as flag down other vehicles for assistance. Kimble was struck by a vehicle being operated by Michael Preusser as she was standing in the

middle of the roadway, approximately 20 yards away from the scene of Carey's accident. Kimble was unable to recall anything after she exited her vehicle. She was unaware as to whether she ever made it to the scene of the Carey accident or if she even made it across the interstate highway.

PRINCIPLES, ARGUMENT & AUTHORITIES

I. SUMMARY OF ARGUMENT

Kimble filed an appeal regarding the denial of her Motion to Amend Complaint. Concurring with the two opinions issued previously, the Trial Court also refused to allow Kimble to introduce evidence of Carey's conduct which may have contributed to the initial accident. Kimble, despite three separate rulings to the contrary, continues to assert that facts which may have contributed to Carey's accident are somehow material or relevant to a case based on a completely separate and factually independent accident, one in which Carey was not involved. Carey's negligence for the initial accident was clear, was not directed toward Kimble and had ended. Therefore, the facts which brought him into such peril are immaterial when making a determination as to Kimble's negligence with regard to the second accident. Kimble's rash and reckless behavior contributed to her injury to such a large degree that it prevents any recovery under the Rescue Doctrine. Accordingly, the Trial Court's decision should be upheld.

All of plaintiff's assignments of error are based upon one basic premise: evidence regarding defendant's intoxication and negligence

should have been admitted and any contributory negligence of plaintiff would have been measured against the conduct of the defendant. The decisions of the trial judge at trial and by the judge on motions to amend were correct and not abusive of their discretion in determining what evidence is material, relevant; and, therefore admissible.

II PRIOR TO TRIAL, THE COURT CORRECTLY DENIED KIMBLE'S MOTION TO AMEND HER COMPLAINT

Kimble has relied on Ford Motor Co. v. Benitez, 273 Va. 242 (2007) in her assertion that a court's refusal to allow an amendment of pleading is, in ordinary circumstances, an abuse of discretion. However, the Kimble has omitted a key requirement in this assertion. In Ford, the court stated that "a trial court's decision refusing leave to amend *after a showing of good cause* is, in ordinary circumstances, an abuse of discretion. (emphasis added) Ford at 252, citing Mortarino v. Consultant Eng'g Servs., 251 Va. 289, 295-96, 4676 S.E.2d 778, 782 (1996) Kimble failed, on two separate occasions, to provide good cause as to why the court should allow her to amend her Complaint. Absent this showing, the court has no reason to amend.

Kimble's proposed amendment to include an allegation of willful and wanton conduct and request an award of punitive damages would have allowed the introduction of evidence which was not material or relevant. The only effect such evidence would have in the proceedings would be to inflame the jury, and thereby prejudice Carey. "In deciding whether to grant the amendment of a pleading to

increase the amount sought in the *ad damnum* clause, 'a circuit court must consider whether the defendant will be prejudiced' by allowing the amendment, and 'whether such prejudice will affect the defendant's ability to have a fair trial." Whitaker v. Heinrich Schepers GMBH & Co. KG, 276 Va. 332, 336, 661 S.E.2d 828, 829 (2008); citing Peterson v. Castano, 260 Va. 299, 303, 534 S.E.2d 736, 738 (2000). Evidence pertaining to Carey's actions prior to the initial crash was immaterial to the facts concerning Kimble's accident. Carey's condition had been created by his actions before Kimble had even recognized that Carey was in peril, even if she ever had such recognition. All factors leading to that condition were irrelevant when weighing matters of contributory negligence or punitive conduct as Carey's previous negligence had ceased and was not directed at Kimble. The Court, acting as the gatekeeper of evidence, acted appropriately in refusing to allow the amended pleading.

III THE TRIAL COURT WAS CORRECT TO PROHIBIT KIMBLE FROM INTRODUCING EVIDENCE WHICH WAS IMMATERIAL AND IRRELEVANT

Kimble's analysis fails to recognize that two separate and distinct accidents occurred on September 25, 2006. The initial accident consisted of Carey striking a large construction truck while traveling west bound on Interstate 64. The second accident consisted of a vehicle being operated by Michael Preusser striking Kimble as she stood in the roadway. These two accidents were separated by distance, time and persons involved. Carey was not present at Kimble's accident and Kimble was not present at Carey's. The negligence demonstrated in Carey's accident does not translate to Kimble's, as Carey's negligence in causing the original accident had been completed and was inactive at the time of Kimble's accident.

This is akin to the analysis of proximate cause. In order "[t]o constitute actionable negligence, there must be causal connection by natural and unbroken sequence between the negligence complained of and the injury suffered. There must be an absence of intervening efficient cause or causes." Wallace v. Jones, 168 Va. 38, 42; 190 S.E. 82, 84 (1937) In the present case, Carey had completed his

negligent act at the time Kimble was struck. Kimble was forced to stop her vehicle as a result of mechanical problems; problems for which she was both aware and prepared. Kimble exited her vehicle in order to add either oil or transmission fluid. At some point after, she was struck while in the middle of the interstate highway on a pitch black night. The law is clear that "[w]here there intervenes the independent act of a third party between the negligence of the defendant and the resulting injury, which is its immediate cause, no recovery can be sustained." Id. at 42; citing Virginia Railway & Power Co. v. Godsey, 117 Va. 167, 83 S.E. 1072; Allison v. Fredericksburg, 112 Va. 243, 71 S.E. 525, 48 L.R.A.(N.S.) 93; Chesapeake & O. Railway Company v. Wills, 111 Va. 32, 68 S.E. 395, 32 L.R.A.(N.S.) 280; Davis v. Ellis, 146 Va. 366, 126 S.E. 658, 131 S.E. 815; Winfree v. Jones, 104 Va. 39, 51 S.E. 153, 1 L.R.A.(N.S.) 201. Kimble's act of exiting her vehicle and venturing into the roadway is clearly an intervening act independent of Carey's actions.

In Kaylor v. Quality Bread & Cake Co., 155 Va. 156, 154 S.E. 572 (1930), a collision resulted in two vehicles being stuck together. After the collision, the plaintiff exited his vehicle and attempted to separate the two cars, at which time the plaintiff was injured. In

finding the driver who was negligent for the original accident was not liable for any injuries sustained in the second, the court held "that the probable consequences of the negligent act which caused the collision of the cars had ended before the subsequent attempt was made to separate them, in which attempt the plaintiff received his injury." Wallace v Jones, 168 Va. 38, 42; 190 S. E. 82, 85 (1937); citing Kaylor v. Quality Bread & Cake Co., 155 Va. 156, 154 S.E. 572 (1930). Carey's negligence, which may have risen to the level of willful and wanton conduct, ceased when it resulted in a collision with the construction vehicle. Carey was inactive for the remainder of the events discussed in this case. Therefore, the level of Carey's negligence which resulted in his accident is immaterial.

Furthermore, Carey's actions were not directed toward Kimble and had ended making any conduct of his, whether willful or wanton irrelevant. "Willful and wanton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct would probably cause injury to another." Griffin v. Shively, 227 Va. 317, 321; 315 S.E.2d 210 (1984); citing Friedman v. Jordan, 166 Va.

65, 68; 184 S.E. 186, 187 (1936) Carey could not have reached this level of negligence as he was unaware of his own surroundings much less his actions at the moment Kimble was injured. Kimble's own assertions demonstrate that Carey could not have reached this level as he was supposedly in need of rescue, unable to help himself. He did not have the "actual or constructive consciousness of the danger involved', which "is an essential ingredient of the act or omission." Griffin v. Shively, 227 Va. 317, 321; 315 S.E.2d 210 (1984); citing Boward v. Leftwich, 197 Va. 227, 231, 89 S.E.2d 32, 35 (1955). The trial judge correctly excluded any evidence of Carey's intoxication and/or conduct from this case.

IV THE TRIAL COURT DID NOT ERR IN GRANTING THE DEFENSE MOTION TO STRIKE AS REASONABLE MINDS COULD NOT DIFFER THAT KIMBLE WAS CONTRIBUTORILY NEGLIGENT UNDER THE RESCUE DOCTRINE

Kimble's case was struck at the conclusion of all the evidence because her conduct was so rash and reckless that, even under the rescue doctrine, Kimble was contributorily negligent. The Trial Court relied on Lassiter v. Warriner, 235 Va. 274; 368 S.E.2d 258 (1988) in reaching this decision. Lassiter provides unique insight in that, unlike most cases invoking the rescue doctrine, Lassiter involved a situation in which the rescued person may be liable to the rescuer.

Simply put, the rescue doctrine limits contributory negligence as a defense as public policy dictates the promotion of rescue attempts. Under the facts of any particular case, the conduct of the rescuer is measured against a higher standard—that of rash and reckless behavior. Lassiter, at 277; 368 S.E.2d at 260.

Kimble's assertions that Carey's negligence should be measured as willful and wanton due to Carey's intoxication so that any negligence on the part of Kimble would be measured on the same standard is a misunderstanding of the rescue doctrine. The rescuer's conduct is already measured against a standard of rash and reckless and not the usual reasonable man standard. One need

only look at the Virginia Model Jury Instruction 7.020 entitled "Rescue" for this definition:

> The plaintiff contends that he was not contibutorily negligent when he exposed himself voluntarily to danger because he was attempting to rescue (name of person). A plaintiff who risks injury while attempting to rescue someone from an imminent and serious danger that the plaintiff did not create is not negligent unless the plaintiff's conduct was rash and reckless under the circumstances of this case.
>
> If you believe from all the evidence:
>
> (1) that (name of person) was in imminent and serious danger;
>
> (2) that plaintiff did not create the danger; and
>
> (3) that the plaintiff did not rashly and recklessly disregard all considerations for his own safety in attempting to rescue (name of person),
>
> Then the plaintiff was not contributorily negligent in exposing himself to danger. Id. at 276-277; 368 S.E.2d at 260.

The evidence at trial was that Kimble was struck as she stood in the middle of Interstate 64 on a particularly dark stretch of roadway. Kimble found herself in this position as a result of mechanical problems with her vehicle. Kimble testified that she stopped the car because her check engine light came on, which she knew meant she needed to add oil or transmission fluid. At some point thereafter, she was struck while standing in the middle of the road.

When attempting to recover under the rescue doctrine, "a rescuer is justified in exposing himself to danger, in a manner that would deprive him of a recovery for his injuries under other circumstances, if the peril threatening the victim is imminent and real, not merely imaginary or speculative, and the rescuer has not *rashly or recklessly disregarded all consideration for his own safety.* (emphasis added) Lassiter v. Warinner, 235 Va. 274, 277; 368 S.E.2d 258, 260 (1988); citing Andrews v. Appalachian Elec. Power Co., 192 Va. 150, 160 63 S.E.2d 750, 756 (1951)

In the present case, Kimble positioned herself in the middle of a dark highway without being sure if anyone actually needed help. The undisputed facts established that Kimble acted rashly and recklessly

and no reasonable minds could differ based upon those facts. As such, this was a matter for the Trial Court to decide and did not need to proceed to a jury. It is well settled in Virginia law that issues of negligence and proximate causation ordinarily are questions of fact for the jury's determination. A court decides these issues only when reasonable persons could not differ. Atkinson v. Scheer, 256 Va. 448, 453-454, 508 S.E.2d 68, 71 (1998); citing Brown v. Koulizakis, 229 Va. 524, 531, 331 S.E.2d 440, 445 (1985).; Hadeed v. Medic-24, Ltd., 237 Va. 277, 285, 377 S.E.2d 589, 593 (1989). It was proper for the Trial Court to strike the Kimble's evidence prior to presenting the case to the jury.

CONCLUSION

For the forgoing reasons, Appellee, Charles Carey prays this Honorable Court will uphold the judgment below and confirm the Trial Court's ruling

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CERTIFICATE

Pursuant to Rule 5:26(d), I hereby certify that, on this 22nd day of September, 2009, fifteen paper copies of the foregoing Brief of Appellee were hand filed with the Clerk of the Supreme Court of Virginia, and one electronic copy in PDF format by email to the Clerk of the Supreme Court of Virginia and three paper copies of the same were sent via U.S. Mail, postage prepaid to David O. Prince, Esquire, Attorney at Law, 411 East Franklin Street, P.O. Box 23052; Richmond, VA 23219; Telephone (804) 788-4861, Counsel for Appellant.

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