215 Va. 407

CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 740053

RAY EDISON DAVIS

V.

JOYCE ANNETTE MAYNARD

APPENDIX

ROBERT T. WINSTON
COUNSEL FOR APPELLANT

CARL E. MCAFEE and
EDWIN C. GILLENWATER,
COUNSEL FOR APPELLEE

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VIRGINIA

IN THE CIRCUIT COURT FOR BUCHANAN COUNTY

JOYCE ANNETTE MAYNARD PLAINTIFF

VS: MOTION FOR JUDGMENT

RAY EDISON DAVIS
Rte 3, Box 57B
Stacy, Virginia DEFENDANT

TO: THE HONORABLE GLYN R. PHILLIPS, JUDGE OF SAID COURT

The undersigned plaintiff, Joyce Annette Maynard hereby moves the Circuit Court of Buchanan County Virginia for a judgment against the defendant, Ray Edison Davis, for the sum of THIRTY FIVE THOUSAND ($35,000) Dollars which sum is due and owing to the plaintiff from the defendant for the following damages, wrongs and injuries hereinafter set forth, to-wit:

I.

That on the 16th day of February, 1973 at about 805 p.m. and at the time of the happening of the grievances hereinafter complained of the defendant, Ray Edison Davis, was the owner, driver and operator of a 1972 Ford automobile and was driving and operating said Ford automobile over and along U. S. Route 460, .3 of a mile west of Oakwood, Buchanan County, Virginia and was traveling in an easterly direction and at the same time and place, your undersigned plaintiff was the driver and operator of a 1970 Dodge automobile and was traveling in the same direction as that of the defendant.

II.

That it thereupon became and was the duty of the defendant, Ray Edison Davis, to drive and operate the said Ford automobile in a non-negligent manner, to drive the said Ford automobile in such a way and manner as to keep the said Ford automobile under proper control and in proper mechanical condition, to keep a proper lookout, to obey the traffic

laws of the Commonwealth of Virginia, to drive at a lawful and/or reasonable rate of speed commensurate with the circumstances then and there existing, to drive and operate the said Ford automobile in such a way and manner as not to cause injury to your undersigned plaintiff.

III.

Notwithstanding the aforesaid duties incumbent upon the defendant, Ray Edison Davis, the defendant did violate each and every one of the aforesaid duties and as a result of the negligence and carelessness of the defendant, Ray Edison Davis, the defendant did run into and collide with your undersigned plaintiff's automobile with great force and violence and as a result thereof your undersigned plaintiff received severe, permanent injuries.

IV.

That as a direct result and proximate cause of the negligence and carelessness of the defendant and as a result thereof your undersigned plaintiff did received severe, permanent injuries in and about her body including, severe permanent injuries to her neck, back and spine, did agrivate a pre-existing brain tumor and did receive bruises, contusions and abrasions about her body and was forced to seek the services of a medical doctor and was hospitalized and has incurred numerous medical and hospital expenses and will in the future expend divers sums in an endeavor to be cured of her injuries and will be permanently disabled and has incurred loss of wages and will in the future sustain loss of wages.

WHEREFORE, as a result of the aforesaid neglifence and carelessness of the defendant, Ray Edison Davis, the plaintiff hereby moves the Circuit Court of Buchanan County Virginia for a judgment against the defendant for the sum of THIRTY FIVE THOUSAND ($35,000) Dollars together with interest from the date of the wreck and cost expended.

Joyce Annette Maynard

By Counsel

CLINE, McAFEE, ADKINS & GILLENWATER
Attorneys at Law
Professional Arts Building
Norton, Virginia

BY _____
COUNSEL FOR PLAINTIFF

FILED: March 22, 1973

IN THE CIRCUIT COURT OF BUCHANAN COUNTY, VIRGINIA

JOYCE ANNETTE MAYNARD, PLAINTIFF

VS. GROUNDS OF DEFENSE

RAY EDISON DAVIS DEFENDANT

To the Honorable Glenn R. Phillips, Judge of said Court:

Your defendant, Ray Edison Davis, states that the plaintiff is not entitled to a Judgement in any amount and for the Grounds of Defense to the Motion for Judgement filed against him states:

I.

Your defendant admits that on the 16th day of February, 1973, on U. S. Route 460, that there was a collision between the vehicle driven by your defendant and a vehicle driven by the plaintiff.

II.

Your defendant admits that he had certain duties at the time and states further that he fully performed all of his duties.

III.

Your defendant denies all allegations of negligence contained in paragraph III of the Motion for Judgement, and does state that the collision between the vehicles was caused by the negligence on the part of the plaintiff.

IV.

Your defendant is not advised as to the extent of injuries suffered by the plaintiff, and calls for strict proof of same.

PLEA OF CONTRIBUTORY NEGLIGENCE

Your defendant further states that the plaintiff's cause is barred because of the plaintiff's own contributory negligence, which negligence proximately contributed and/or caused the collision. The plaintiff was negligence in failing to keep a proper lookout for your defendant's automobile, in failing yield the right-of-way to your defendant, in driving her said vehicle out into the highway in front of your defendant, and in negligently causing her vehicle to slow down and/or stop in front of your defendant; which negligence on the part of the plaintiff caused the collision and any of plaintiff's alleged injuries and damages.

Therefore, your defendant moves that the Motion for Judgement be dismissed and that he awarded his cost.

RAY EDISON DAVIS
BY COUNSEL

Roland V. Winston
COUNSEL FOR RAY EDISON DAVIS

CERTIFICATE

The undersigned certifies that he has mailed a copy of the above pleading to Hugh P. Cline, Attorney at Law, Norton, Virginia, Counsel of record for Plaintiff on this _____ day of April, 1973.

Roland V. Winston

FILED: April 16, 1973

PORTIONS OF THE TRANSCRIPT

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3 THE COURT: We are about to hear a Motion for Judgment brought
4 by Joyce Annette Maynard, who is represented by Carl McAfee,
5 against Ray Edison Davis, represented by Robert T. Winston.
6 This is a Motion for Judgment for money damages for alleged
7 injuries sustained in an automobile accident between the
8 plaintiff here in Buchanan County back in February of this
9 year. Are any of you related by blood or marriage to Joyce
10 Annette Maynard or Ray Edison Davis? Have any of you expressed
11 or formed any opinion about this case? Are you aware of any
12 bias or prejudice in this case? Do you know of any reason why
13 you couldn't hear the evidence of the plaintiff and that of the
14 defendant and render a fair and impartial verdict according to
15 the law and the evidence? Any questions, Mr. McAfee?
16 MR. McAFEE: Yes, Your Honor, we have a number of things I would
17 like to take up. I would like to identify each of the jurors if --
18 Gomer Evans. Do you have an extra list of those?
19 CLERK: Oh, do you want one?
20 MR. McAFEE: Yes, Ma'am. O. K. Tommy Bartley, Jerry Boyd, Landon
21 Davis, Carl King, Lonnie Dotson, Grayson Sutherland, Clarence
22 Looney, Fred Clevenger, Robert Yates, James B. Wampler, Thurman
23 Boyd. Frank -- is it Wampler? What is it? Frank E. Morgan?
24 FRANK E. MORGAN: Yes.
25 MR. McAFEE: May it please the Court, gentlemen of the jury, my

1 name is Carl McAfee. I am an attorney from Norton, Virginia. We
2 represent Mrs. Joyce Maynard, the plaintiff in this case. First
3 of all I will ask you if any of you are personally acquainted
4 with or know Mrs. Joyce Maynard? Her husband is Marvil Maynard,
5 who sits in the first seat directly back of his wife. I will
6 ask you if you are personally acquainted -- you are Mr. Clevenger.
7 Mr. Boyd?
8 MR. BOYD: Yes, I know him.
9 MR. McAFEE: Is the acquaintance you have with him, would it
10 interfere in any way with your deliberations in this case at all?
11 MR. BOYD: No.
12 MR. McAFEE: Now the defendant is represented by Mr. Robert
13 Winston of Norton. His name is Ray Edison Davis. He sits
14 to my left over here. Do any of you know Mr. Davis or are
15 you personally acquainted with him? Are any of you personally
16 acquainted with Mr. Winston, his attorney? I believe you are,
17 Mr. Evans. What kind of acquaintance have you had with him?
18 MR. GOMER EVANS: I have known Mr. Winston several years. He
19 was associated with Tom Bowen, Norton. I worked with compensation
20 and just got acquainted with Mr. Bowen. He represented us. He
21 was associated.
22 MR. McAFEE: I believe he represented you and your companies?
23 MR. GOMER EVANS: Mr. Bowen did.
24 MR. McAFEE: Mr. Winston was a member of that firm?
25 MR. GOMER EVANS: Yes. He never represented us. Mr. Bowen did

1 all the representing.
2 MR. McAFEE: You were in the compensation department of the under-
3 writers, is that it?
4 MR. EVANS: Yes.
5 MR. McAFEE: As such did you come in close contact with Mr. Winston?
6 MR. GOMER EVANS: Just an acquaintance. I had met him through
7 the office, no work relation.
8 MR. McAFEE: I believe that firm represented the insurance carrier
9 that you represented, is that not true?
10 MR. GOMER EVANS: Mr. Bowen.
11 MR. McAFEE: He is a member of that firm?
12 MR. GOMER EVANS: Yes.
13 MR. McAFEE: Do you feel as if the fact that Mr. Winston and Mr.
14 Bowen were partners and represented you and your companies would
15 have any bearing whatsoever on your deliberations? Would you be
16 more prone to lean in his direction by reason of your acquaintance
17 with him and dealings?
18 MR. GOMER EVANS: No. I think I have an open mind and can make
19 my own judgments.
20 MR. McAFEE: Do you feel you know him but yet you can hear the
21 evidence without being embarrassed?
22 MR. GOMER EVANS: Absolutely.
23 MR. McAFEE: Have you ever been on the jury before, Mr. Evans?
24 MR. GOMER EVANS: Yes, sir.
25 MR. McAFEE: This term of court?

1 MR. GOMER EVANS: Yes, sir.
2 MR. McAFEE: This is not the first case you have been on?
3 MR. GOMER EVANS: No.
4 MR. McAFEE: With whom are you employed at the present time?
5 MR. GOMER EVANS: Jewell Coal and Coke.
6 MR. McAFEE: You were employed before with Underwriters, I believe.
7 MR. GOMER EVANS: Five years prior to that, 1960 to 1965, with
8 Underwriters.
9 MR. McAFEE: Do you feel as if your employment with that company
10 of Underwriters would have any bearing whatsoever on your
11 deliberations in this case?
12 MR. GOMER EVANS: None at all.
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1 MR. McAFEE: Is it Dotson?
2 MR. LONNIE DOTSON: Yes.
3 MR. McAFEE: Who do you work for?
4 MR. LONNIE DOTSON: Self-employed.
5 MR. McAFEE: What kind of business?
6 MR. LONNIE DOTSON: Coal mine operator.
7 MR. McAFEE: Coal mine operator?
8 MR. LONNIE DOTSON: Yes.
9 MR. McAFEE: What part of the county?
10 MR. LONNIE DOTSON: Big Rock.
11 MR. McAFEE: Mr. Evans was with Underwriters. Did you ever have
12 occasion to use his services?
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22 MR. GOMER EVANS: Mr. McAfee, your associate, Mr. Cline,
23 represented me in personal dealings when I lived in Norton.
24 MR. McAFEE: I didn't hear.
25 MR. GOMER EVANS: Your associate, Mr. Cline, was my lawyer in

1 some personal dealings, real estate, in Norton. Hugh Cline.
2 MR. McAFEE: Yes, sir. I'm sure we never did represent
3 Underwriters.
4 MR. GOMER EVANS: Represented me personally.
5 MR. McAFEE: Did he represent Underwriters?
6 MR. GOMER EVANS: No.
7 MR. McAFEE: I'm sure of that.
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22 MR. WINSTON: You did, sir? I believe that's all. Thank you.
23 Your Honor, I would like to see the Court in chambers, please.
24 THE COURT: All right. Let me see counsel in chambers.
25 (The Court and counsel retired to chambers.)

1
2 IN CHAMBERS:
3 MR. WINSTON: Your Honor, I move for a mistrial because of the
4 voir dire. The thrust of Mr. McAfee's questioning of Mr. Evans
5 was to show that my firm represents insurance carriers and then
6 he compounded it by later remarking when Mr. Evans stated Mr.
7 Cline represented him, the fact that they did not represent
8 insurance carriers. I say Mr. Evans was with Underwriters and
9 Mr. McAfee knew that and knew my partner represented insurance
10 carriers, Tom Bowen. So really it is for the edification of
11 the jury. Here I am the firm that represents insurance carriers
12 and he doesn't, so he is drawing the battle line on voir dire
13 as it is a case against insurance carriers, and I ask for a mis-
14 trial.
15 MR. McAFEE: Your Honor, in my opinion although Mr. Evans answered
16 questions, from a practical standpoint I don't think in this
17 particular case the dealings we had with Mr. Evans were so strong
18 and so hostile, that I don't even think -- he never did admit it,
19 but from a practical standpoint, I mean I can't prove it, but he
20 has a built-in prejudice against me and the element I represent.
21 And Fred Clevenger -- my client, I represented Marvil Maynard,
22 and we sued Mr. Clevenger's insurance company, and they all sat
23 out there and answered these questions, knowing it disturbs me
24 a bit. Bob knows, I am sure you represented Mr. Evans as much
25 as Mr. Bowen did.
MR. WINSTON: Not as much. That is not my point. Mr. McAfee got

1 up, well aware of the man's relationship with Tom Bowen. It
2 wasn't necessary for him to drag it out in front of the jury
3 for their edification that my firm represents insurance carriers
4 and his firm does not. That's the issue. That is an issue
5 foreign to the case. Telling the jury, "Here is the insurance
6 side on one side and none on the other side."
7 MR. McAFEE: I have one strike when the jury went in the box.
8 THE COURT: That is not what is bothering me. By innuendo you
9 are almost telling the jury that Mr. Winston's firm represented
10 the Underwriters. Most everybody knows the Underwriter is
11 insurance. And in fact one stated to them, either Mr. Evans
12 or you one went so far as to use the word "insurance" in
13 questioning and to be connecting Mr. Winston's firm, not Mr.
14 Winston, but by Mr. Bowen, and I worried right much about it
15 when you were talking about it, but I said, "Well, I'm afraid
16 if I open my mouth I will compound the line of questioning,"
17 which might make it appear that insurance is involved.
18 MR. McAFEE: I would like to say this. All I can say is we are
19 entitled to have voir dire. The mention of insurance or insurance
20 company is not sufficient grounds to declare a mistrial. It has
21 to be such that the jury has to be affected by it. The mention
22 of insurance by a witness, the mention of insurance during the
23 course of a trial is not grounds for a mistrial.
24 THE COURT: Per se, but if it is elicited by the plaintiff it is.
25 MR. McAFEE: Your Honor, I'm not going --

1 THE COURT: Has the statute been changed about not supposed to
2 mention insurance?
3 MR. McAFEE: The statute doesn't say that.
4 THE COURT: Case law -- that has been the policy ever since I
5 have been practicing law, you don't mention insurance.
6 MR. McAFEE: There is a case. Mr. Winston's firm was on the
7 other side. Hugh and I tried it and a woman made a comment
8 during the trial, "Your insurance agent called me up and took
9 a statement from me." We went on and the Judge said, "We are
10 into it. We are going to try the case and I'll look at it
11 after." This is Judge Long. We did research, and the Supreme
12 Court doesn't say the mention of insurance is grounds for a
13 mistrial. It has to be such that it creates prejudice. Can
14 Your Honor presume that this does create prejudice?
15 THE COURT: I think the fact that the law is such -- in other
16 words, if you get up and say, "I am representing Mrs. Maynard.
17 She brought suit against Ray Edison Davis and her insurance
18 company has employed Mr. Winston to defend this case," I think
19 when you get into it and when you are putting that evidence on
20 yourself you are violating case law, that you just can't just
21 go out and say, "I am suing the insurance company." That's why
22 you're suing Ray Edison Davis.
23 MR. McAFEE: I don't think I said that.
24 MR. WINSTON: You said my firm represented insurance companies.
25 THE COURT: You were saying by implication that Mr. Winston's law

1 firm represented Gomer's underwriters.
2 MR. WINSTON: Represented his insurance company.
3 THE COURT: His insurance company. I think you're getting awful
4 close to inviting error. I didn't want to say anything.
5 MR. WINSTON: I saved my objections for in here.
6 THE COURT: I think you are justified in saving it for in here,
7 but I think you are getting awful close to talking about insurance.
8 I'm going to overrule the motion for a mistrial for the time being
9 and reserve the right to change my mind later on.
10 MR. McAFEE: While we're into it, Your Honor, like I said, when
11 that jury was paneled out there I was left with one strike.
12 THE COURT: Why not do this, without anyone saving exceptions
13 with reference to the point we have been arguing, since Fred
14 Clevenger is an insurance agent and since Gomer Evans has been
15 questioned along those lines, would it be agreeable for those
16 to stand aside and instead of each taking three strikes, each of
17 you take two?
18 MR. WINSTON: No, sir. You have got a cross-section here.
19 MR. McAFEE: Sure have. Not only that, there is another guy
20 out there, you ask him a question, and he has got a drunk driving
21 charge against him, involving an accident. I have got to strike
22 him because he is going to be sued. You're complaining about
23 that, Bob, but I don't know why.
24 THE COURT: This has been a plaintiff's jury throughout, as I
25 recall.

1 MR. WINSTON: I am objecting to your characterizing us as
2 representing insurance underwriters.
3 THE COURT: He said, "Mr. Cline represented me in some personal
4 real estate."
5 MR. McAFEE: That's one mistake I want to talk to Hugh about.
6 That guy has done nothing but stick me in the neck ever since I
7 have known him.
8 THE COURT: He was foreman day before yesterday and returned a
9 verdict for $20,000.00.
10 MR. McAFEE: I bet they had to gag him.
11 BEFORE THE JURY:
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(The jury retired to consider the case at 2:07 P. M. and returned at 2:25 P. M. with the following verdict: "We the jury find for the plaintiff in the sum of $7,500.00.")

MR. WINSTON: The defendant renews its motion for a mistrial made before in the trial on the same grounds, and also makes a motion to set aside the verdict of the jury and grant the defendant a new trial, and I would like to assign grounds in writing.

THE COURT: All right. The Court will give counsel for the

defendant ten days in which to assign grounds in writing for setting aside the verdict.

* * * * * * * *

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

JOYCE ANNETTE MAYNARD PLAINTIFF

VS: MOTION FOR MISTRIAL
AND TO SET ASIDE VERDICT
AND TO GRANT A NEW TRIAL

RAY EDISON DAVIS DEFENDANT

TO THE HONORABLE GLYN R. PHILLIPS, JUDGE OF SAID COURT:

Your defendant renews his Motion for a Mistrial in the above cause and for the grounds of his Motion states:

I.

Plaintiff's counsel asked improper questions of a juror during the voir dire, the effect of which was to inform the jury that the firm to which defendant's counsel belonged represented insurance carriers. Plaintiff's counsel further made remarks to the same juror to the effect that he and his firm did not represent insurance carriers. The thrust of which was to get over the point to the jury that defense counsel was an insurance carrier lawyer, all of which was unnecessary, prejudicial and highly erroneous, and defendant should have a mistrial based on this ground and the grounds heretofore made during the trial.

Defendant also moves for the Court to set aside the verdict and to grant him a new trial on the same grounds as set out in the Motion for Mistrial and for the following additional grounds:

A.

The Court erred in granting Instruction A.

B.

The Court erred in granting Instruction C.

C.

And other grounds to be assigned at bar.

RAY EDISON DAVIS

BY COUNSEL

Robert V. Winston

COUNSEL FOR DEFENDANT

CERTIFICATE

The undersigned certifies that he has mailed a copy of the above pleading to Carl E. McAfee, Attorney at Law, Norton, Virginia, counsel of record for the plaintiff, on this _____ day of August, 1973.

Robert V. Winston

COUNSEL

FILED: August 7, 1973

VIRGINIA:

IN THE CIRCUIT COURT FOR BUCHANAN COUNTY

JOYCE ANNETTE MAYNARD — PLAINTIFF

VS: — ORDER

RAY EDISON DAVIS — DEFENDANT

This day came again the plaintiff and defendant by their respective attorneys, the Court having maturely considered the motion heretofore submitted to set aside the jury's verdict and to declare a mistrial, is now of the opinion that the motion should be overruled; wherefore, it is considered by the Court that the motion for a mistrial and the motion to set aside the jury's verdict, be and the same hereby are overruled, and that the plaintiff, Joyce Annette Maynard, recover of the defendant, Ray Edison Davis, the sum of $7500.00, in accordance with the jury's verdict with interest thereon from the 3rd day of August, 1973, the date said verdict was rendered, as well as her costs in this behalf expended. To which action of the Court, the defendant, by counsel, excepted, and indicated an intention to apply for a writ of error from the Supreme Court of Appeals of Virginia, and on motion of the defendant execution of said judgment is suspended for 120 days from this date and thereafter until such petition is acted on by the Supreme Court of Appeals of Virginia, if such petition for a writ of error is filed within the time provided by law, and provided the said defendant or someone for him should within 30 days from this order, enter into a suspending bond in the penalty of $8,000.00 with good security to be approved by the Clerk of this Court, conditioned according to law.

This 1st day of October, 1973.

S/ GLYN R. PHILLIPS
JUDGE

FILED: October 1, 1973

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

JOYCE ANNETTE MAYNARD PLAINTIFF

VS. NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

RAY EDISON DAVIS DEFENDANT

TO THE CLERK OF THE CIRCUIT COURT OF BUCHANAN COUNTY:

Counsel for Ray Edison Davis, the defendant in the above-styled case in the Circuit Court of Buchanan County, Virginia, hereby gives notice of appeal from the order entered in this cause on October 1, 1973, and sets forth the following assignments of error:

I.

The Court erred in refusing to declare a mistrial because of questions and statements made by plaintiff's counsel during the voir dire, which questions and statements had the effect of informing the jury that defendant's counsel represented insurance carriers.

II.

The Court erred in refusing to grant a new trial because of the said questions and statements made by plaintiff's counsel during the voir dire concerning defendant's counsel's representation of insurance carriers.

III.

The Court erred in granting Instruction A.

IV.

The Court erred in granting Instruction C.

V.

The Court erred in failing to set aside the verdict of the jury and in failing to grant defendant a new trial.

VI.

The Court erred in failing to strike plaintiff's evidence and in failing to enter judgment for the defendant.

A transcript of the evidence and the incidents of trial is to be hereafter filed with the Clerk.

COUNSEL FOR RAY EDISON DAVIS

CERTIFICATE

I certify that a copy of the foregoing Notice of Appeal and Assignments of Error was mailed to Carl McAfee, Esquire, Norton, Virginia, and Edwin Gillenwater, Esquire, Norton, Virginia, counsel of record for the plaintiff, on the_____day of October, 1973.

COUNSEL

FILED: October 11, 1973