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ABSTRACTS

**Civil Procedure—Summary Judgment in Negligence
Case Based on Answers to Interrogatories**

Infant pedestrian and her mother brought an action to recover for personal injuries sustained when the infant was struck by defendant motorist's automobile while attempting to cross a highway. In her answer to defendant's interrogatories the infant admitted being struck by the automobile immediately *after stepping onto the hard surface of the highway*. Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, the defendant filed a motion for summary judgment on the grounds that the pleadings, interrogatories and answers to interrogatories showed there was no genuine issue of material fact as to liability. The trial court sustained defendant's motion for a summary judgment and dismissed the action, finding the infant contributorily negligent as a matter of law on the basis of her answers describing her position on the highway at the time she was injured. The plaintiffs then moved pursuant to Rule 60(b) to be relieved from summary judgment on the grounds that their answers to the interrogatories were inadvertently inaccurate. At the hearing upon the motion the infant and her mother testified that their answers had been changed when the attorney reduced them to typewritten form. They further testified that they did not appear before the notary public whose signature certified that they had appeared before him. The trial court overruled the plaintiffs' motion on the ground that great weight must be given to the certificate of the notary public and that the plaintiffs properly made oath before him as to the truth of the answers contained in the interrogatories. *Held*, judgment reversed and remanded. Although summary judgments may be awarded under the proper circumstances in negligence actions, it is a general rule that summary judgments should be granted with due restraint in such cases since the issues of negligence and contributory negligence are not ordinarily susceptible of adjudication by summary judgment. In the instant case, summary judgment should not have been granted because a jury could reasonably have found that the defendant had the last clear chance to avoid the accident. *Anderson v. Turner*, 184 S.E.2d 304 (W. Va. 1971).

The court relied upon *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 236 (1964), which held that summary judgments should not be granted where there is conflicting evidence or when the

facts, though undisputed, are such that reasonable men may draw different conclusions from them. The summary judgment procedure provided by Rule 56 is not a substitute for a trial by jury or a trial by the court, but is a determination that as a matter of law there is no genuine issue of material fact to be tried. The burden of showing that there are no such factual issues rests upon the movant. *See* Korn and Poley, *Survey of Summary Judgment, Judgment on the Pleadings and Related Pre-trial Procedures*, 42 CORNELL L. REV. 483 (1957).

The plaintiffs contended that the trial court improperly considered their answers to the interrogatories upon defendant's motion for summary judgment because Rule 56(c) does not expressly include answers to interrogatories among the bases for awarding a summary judgment. The court concluded, however, that the trial court *was warranted* in considering the answers in the instant case particularly inasmuch as the answers embodied statements of the parties to the action. *See* Annot., 74 A.L.R.2d 984 (1960). However, in light of the fact that the jury could still have returned a verdict for the plaintiffs under the last clear chance doctrine, the question of negligence should have been tried.

Courts—Declaratory Judgment—Abstention Doctrine in Federal Equitable Relief

Plaintiffs, students of Marshall University, brought a class action seeking a declaratory judgment of unconstitutionality of certain provisions of the Student Code promulgated and adopted by the West Virginia Board of Regents for state colleges and universities, and an injunction against its enforcement. The defendants (the Board of Regents and certain officials at Marshall University) moved—before a three-judge federal district court to dismiss the action because the challenged provisions of the Code had not been enforced against any of the plaintiffs. *Held*, complaint dismissed. There was no allegation of harassment or threat of bad-faith enforcement of the Student Code constituting irreparable harm to plaintiffs; consequently, there was no basis for federal equitable relief or justiciable controversy presented for declaratory judgment. *Woodruff v. West Virginia Board of Regents*, 328 F. Supp. 1023 (1971).