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Torts--Application of Last Clear Judgement

damage, which was properly the subject of a separate action. The dissent of Judge Calhoun stated the constitution limited eminent domain compensation to land taken (or damaged) only for public use; and since the land was not damaged pursuant to the public use, recovery in eminent domain was barred. The dissent further stated liability in this case should have been based on negligence; and therefore, the Court of Claims was the proper avenue of recovery.

This case is in accord with the trend of West Virginia decisions which have awarded mandamus to compel eminent domain proceedings involving damage to non-residual property. The facts of this case were similar to those in *State ex rel. Lynch v. State Road Commissioner,* 151 W. Va. 858, 157 S.E.2d 329 (1967), which unanimously reached the same result.

Torts—Application of Last Chance Doctrine

Plaintiff was a passenger in an automobile driven by the defendant when it was involved in a collision with a second automobile. Plaintiff instituted an action for the recovery of damages for injuries sustained in the accident. The Circuit Court of Monongalia County directed a verdict in favor of the plaintiff on the question of liability. On appeal the defendant contended that, while she was negligent, the driver of the second automobile had the last clear chance to avoid the collision, and that the plaintiff's cause of action, if any, was against the other driver and not against the defendant. *Held,* affirmed. The defendant's assertion of the last clear chance doctrine was improper and no error was committed in directing the verdict for the plaintiff. *Edwards* v. *Lynch,* 175 S.E.2d 632 (W. Va. 1970).

It is generally recognized that the doctrine of last clear chance arises only when the plaintiff is guilty of contributory negligence. The doctrine cannot be invoked between defendants who were concurrently negligent except in Pennsylvania. *See* 65A C.J.S. *Negligence* § 136(1) at 124-25 (1966). The court in *Edwards,* citing *Greene* v. *Charlotte Chemical Laboratories, Inc.,* 254 N.C. 680, 120 S.E.2d 82 (1961), stated that "[a] defendant may not rely upon the doctrine by asserting the negligence of a joint tortfeasor *who has not been sued by the plaintiff.*" (emphasis added). This statement was apparently phrased to conform to the factual

situation existing in the *Edwards* case, but is somewhat misleading on its face. The *Greene* case held that the doctrine could not be applied as between *co-defendants.* It is clear that if the doctrine cannot be applied to determine ultimate liability between codefendants, it cannot be asserted as a defense where only one of the joint tortfeasors is sued.

Earlier West Virginia decisions have held that the last clear chance doctrine may be invoked where (1) the plaintiff, through his own negligence, has placed himself in a dangerous position, (2) he is either unaware of the danger or unable to escape it, and (3) there is sufficient opportunity for the defendant, by the exercise of due care, to discover the danger and avoid the situation. *See Bowman* v. *Monongahela West Penn Public Service Co.,* 124 W. Va. 504, 21 S.E.2d 148 (1942).