

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

FEBRUARY 18, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3568

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**ROBERT H. HOLMES, III
and CAROL LYNN HOLMES,**

Plaintiff-Appellant,

v.

**ROFFERS CONSTRUCTION
COMPANY, INC., and
AMERICAN STATES INSURANCE
COMPANY,**

Defendants-Respondents,

HOOD EQUIPMENT COMPANY, INC.

Defendant.

APPEAL from a judgment of the circuit court for Ashland County:
ROBERT E. EATON,¹ Judge. *Affirmed.*

¹ Judge Eaton recused himself after the trial but before judgment was entered. The order for

Before Cane, P.J., Myse and Carlson, JJ.

PER CURIAM. Robert Holmes, III, appeals a judgment finding him 50% causally negligent for injuries he suffered when he knelt in wet cement for two hours causing chemical burns to his knees. Holmes argues that the trial judge should have recused himself, that the court should not have allowed an unlisted defense witness to testify and should not have instructed the jury on contributory negligence. We reject these arguments and affirm the judgment.

Holmes argues that Judge Eaton should have disqualified himself because a shareholder in Roffers Construction contributed \$100 to Eaton's reelection campaign. A judge is only required to disqualify himself when he makes a subjective determination that, in fact or in appearance, he cannot act in an impartial manner. See *State v. American TV & Appliance*, 151 Wis.2d 175, 183, 443 N.W.2d 662, 665 (1989). At a post-trial hearing, the trial judge stated that he was unaware of the contribution at the time of the trial and that he handled the case in an impartial manner. Therefore, the trial judge was not required to recuse himself.

Holmes argues that the trial court erroneously exercised its discretion when it allowed an unlisted defense witness to testify. This argument fails for two reasons: First, Holmes waived this objection by withdrawing his motion for a mistrial, see *Lobermeier v. General Tele. Co. of Wisconsin*, 119 Wis.2d 129, 136, 349 N.W.2d 466, 470 (1984); second, the witness testified regarding punitive damages, an issue that was first pleaded at the start of the trial. Holmes was given an opportunity to cross-examine the witness, voir dire the jury and ask for a continuance. He chose only to cross-examine the witness and withdrew his motion for a mistrial. The trial court properly exercised its discretion when it allowed the defense to present one witness to testify on a matter that had not been pleaded at the time the witness list was submitted.

Finally, the trial court properly exercised its discretion when it instructed the jury on Holmes' contributory negligence. The jury should be

(.continued)

judgment was rendered by Judge Norman Yackel.

instructed on contributory negligence unless the evidence, construed in the light most favorable to the party seeking the instruction, would not support a finding of negligence. See *Valiga v. National Food Co.*, 58 Wis.2d 232, 241, 206 N.W.2d 377, 382 (1973); *Gage v. Seal*, 36 Wis.2d 661, 667, 154 N.W.2d 354, 358 (1967). The evidence that Holmes immersed his knees in wet cement for two hours when he was unaware of the chemical properties of cement constitutes sufficient evidence to present a jury question on his contributory negligence.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.