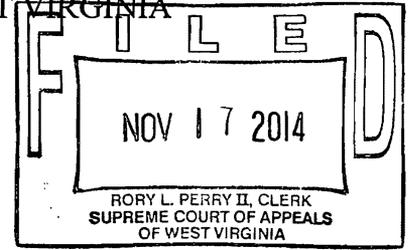


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0662



TERI SNEBERGER,

Plaintiffs Below, Petitioner,

VS.

Appeal from Final Orders of the
Circuit Court of Randolph County
(No. 11-C-148)

JERRY MORRISON d/b/a JERRY MORRISON
CONSTRUCTION and JAMES PHILLIPS,

Defendants Below, Respondents.

RESPONDENT JERRY MORRISON'S BRIEF

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STATEMENT OF THE CASE

This appeal arises from the August 14-16, 2013 trial of a defective primitive log home construction case in the Circuit Court of Randolph County, West Virginia before Judge Jaimie Wilfong. The primitive log home was partially constructed for the Appellant, Teri Sneberger, by Appellees, Jerry Morrison and James Phillips d/b/a Phillips Masonry, and various other parties employed by Teri Sneberger during the construction of the primitive log cabin. (AR 107-108,529-531).

Teri Sneberger filed suit against Jerry Morrison and James Phillips as joint tortfeasors, alleging various theories of liability grounded in breach of contract including implied warranty of habitability, negligence, fraud, misrepresentation, and outrageous conduct. (See AR 18, 822). Teri Sneberger sought to recover compensatory damages, damages for her annoyance and inconvenience, her loss of use of the log home, and emotional distress, as well as punitive damages against the Respondents, Jerry Morrison and James Phillips. (See AR 834-838).

A pretrial conference was held on January 31, 2013, in the Circuit Court of Randolph County (AR 850-856). At that time, Teri Sneberger's counsel stated that it would take 2-3 days to try the case. (AR 851). Counsel for Jerry Morrison and James Phillips agreed, and the Court set aside three (3) days for a jury trial beginning on Wednesday and continuing on Thursday and Friday. (AR 852).

The evidence at trial was that Teri Sneberger employed Jerry Morrison to help her build a primitive log cabin. Jerry Morrison was not a licensed contractor, and agreed to work by the hour for Teri Sneberger in building the primitive log home. Jerry Morrison testified at trial that he told Teri Sneberger he was not a contractor.

Terry Sneberger employed many different parties, in addition to Jerry Morrison, to perform various tasks in the construction of the primitive log home, and paid cash to each of these parties. Jerry Morrison did not have a payroll account, but did distribute money given to him by Teri Sneberger to pay the workers she employed at various times. Jerry Morrison was terminated by Terry Sneberger midway through the construction of the primitive log home and Teri Sneberger continued in building the log home.

Various witnesses testified at the trial of this matter on behalf of Terry Sneberger as to the stages of construction of the log home. Terry Sneberger asserted that the log home was a teardown to which Jerry Morrison strongly objected and testified differently.

Testimony during the trial showed that Teri Sneberger hired a neighbor to dig the foundation as well as excavate the site for the log home. Teri Sneberger hired carpenters and laborers who reported to her directly and whom she paid. Teri Sneberger did not withhold social security or unemployment and treated these parties as contract labor.

This house was not a log cabin kit but consisted of logs that were not treated. The appearance of the logs in a primitive log home is not straight as in a kit and consists of a process referred to as chinking the logs. There were no house plans or drawings of the primitive log home.

After the termination of Jerry Morrison's employment, Terry Sneberger continued to employ several laborers who had previously worked on the log home to finish the log home.

Jerry Morrison asserted that Teri Sneberger had complete control of the building of the log cabin, and that she changed the initial size and dimensions of the log home,

employed various parties and purchased the majority of materials used throughout the project after hiring Jerry Morrison.

Teri Sneberger entered into a verbal contract with James Phillips to do the block work and chimney, (AR 131, 193, 250-251, 529-530, 559, 589, 681, 726-727). Mr. James Phillips made the decisions about how to construct the chimney and how to install the flues in the chimney. (AR 530-531).

On August 15, 2013, at the conclusion of Teri Sneberger's case-in-chief, Judge Wilfong granted a motion for judgment as a matter of law in favor of James Phillips and dismissed him from the trial of this matter. (AR 698-709, 710-711).

On August 16, 2013, following the conclusion of all evidence the Court denied Teri Sneberger's motion for judgment as a matter of law on her negligence and breach of contract claims against Jerry Morrison (AR 800).

Prior to charging the jury, Judge Wilfong indicated that she would give the "outrageous conduct" instruction tendered in this matter by Jerry Morrison. (AR 783). Jerry Morrison objected to Teri Sneberger's outrageous conduct instruction.

Judge Wilfong also gave a comparative negligence instruction on behalf of Jerry Morrison to the jury as requested by Jerry Morrison.

The jury returned a verdict in favor of Teri Sneberger and against Jerry Morrison in the amount of \$40,000, and apportioned 60% of the fault to Jerry Morrison and 40% of the fault to Terry Sneberger. (AR 6,842-845).

A "Final Judgment Order" was entered on October 24, 2013, by the Court. (AR 6-7).

On November 8, 2013, Teri Sneberger filed a motion for new trial alleging eight (8) errors which are raised in this appeal. (AR 17-35). Judge Wilfong heard arguments on this motion and denied the motion on March 6, 2014. (AR 41-77). A written order was entered on June 2, 2014. (AR 1-4).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR BY LIMITING TESTIMONY AT THE TRIAL OF THIS MATTER.

A. STANDARD OF REVIEW:

The West Virginia Supreme Court reviews a procedural ruling of a trial court for abuse of discretion, McDougal v McCammon, 193 W.Va. 229, 455 S.E.2d 788 (1995).

B. ARGUMENT:

The Court initially set aside three (3) days for the jury trial of this matter. The Court initially indicated that time may be limited due to the three (3) different parties involved in the case. Teri Sneberger's attorney assertion that he had to retool his examinations or "off the cuff" is not accurate. The Court, after granting James Phillips' motion for summary judgment, gave Teri Sneberger ample time to finish the trial. The Appellant at no time requested to vouch the record and was not prejudiced by any perceived shortness of time. The Court indicated that if the trial went over the three (3) days, another day may be scheduled. There was no request by Appellant's counsel to proceed on Saturday, if necessary, or even another day. The presentation of Appellant's case was never jeopardized

as the Appellant presented all her evidence. The Court did not abuse its discretion in making the statement that it would limit counsel's presentation of evidence.

II. THE TRIAL COURT DID NOT ERR IN PRECLUDING THE USE OF THE WORD "DEFECTIVE" BY A HOME INSPECTOR.

A. STANDARD OF REVIEW:

The Standard of Review on evidentiary issues is an abuse of discretion standard. McDougal v McCammon, 193 W.Va. 229, 455 S.E.2d 788 (1995).

B. ARGUMENT:

Teri Sneberger argues that the Court, by precluding her home inspector from using the word "defective" in her testimony abused the Court's discretion. Ms. Deem, the home inspector, testified that this was her first time testifying about a home inspection as well as her opinion concerning a chimney. W.Va. R. Evid. 702 does state that a witness may provide opinions based on technical or specialized knowledge. Ms. Deem was a general home inspector. In this case the testimony of Ms. Deem was presented to the jury and Ms. Deem was permitted to render her opinion on the condition of the primitive log home. The Court did not abuse its discretion in its interpretation of West Virginia Rule of Evidence 702. The Court did not exclude the majority of Ms. Deem's testimony. The majority of Ms. Deem's testimony was heard by the jury and taken into consideration. The Respondent, James Phillips, was still a defendant at this stage of the trial and the testimony of Ms. Deem was directed toward both parties.

Jerry Morrison contends that the trial court did not abuse its discretion in limiting the use of the word “defective” in the testimony of Ms. Deem, a home inspector.

III. THE TRIAL COURT DID NOT ERR IN PRECLUDING THE TESTIMONY OF TWO (2) LICENSED CONTRACTORS IN THE TRIAL OF THIS MATTER.

A. STANDARD OF REVIEW:

The Standard of Review on the admissibility of expert testimony is an abuse of discretion standard. Watson v Inco Alloys International, 209 W.Va. 234, 545 S.E. 2d 294.

B. ARGUMENT:

The trial court excluded the testimony of Broderick McGlothin and Richard Rockwell as to the very limited issue regarding the issue of utilizing concrete to insulate a wooden beam that protruded into the chimney towards the flue liner. The testimony of Teri Sneberger’s experts as to this issue was mere speculation and was not based on any specific experience or knowledge of either contractor. The trial court ruled that such testimony obviously was outside the general area of knowledge of the two (2) experts as general contractors as the trial record bears out neither party had ever built a primitive log home and neither contractor could discuss how to build a primitive log home. The jury was able to hear both witnesses and the jury would consider their testimony during deliberation. Counsel for Teri Sneberger argued vehemently during trial to the jury as to this perceived fire damage of the beam. The chimney was

torn down and replaced. No prejudice occurred by the trial court limiting such testimony of Broderick McGlothin and Richard Rockwell to the jury.

IV. THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT TERI SNEBERGER'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON HER NEGLIGENCE AND BREACH OF WARRANTY CLAIMS AGAINST JERRY MORRISON.

A. STANDARD OF REVIEW:

The West Virginia Supreme Court reviews a trial court's denial of judgment as a matter of law under a *de novo* standard. Gillingham v Stephenson, 209 W.Va. 741, 551 S.E 2d. 663 (2001).

B. ARGUMENT:

Teri Sneberger's argument is that because she submitted the testimony of two (2) general contractors concerning their opinion as to the condition of the primitive log home as well as that of the home inspector that she was entitled to a directed verdict.

The testimony in this case showed that this log home was to be a primitive log home constructed from logs. This was not a log kit home which Richard Rockwell testified that he used in the construction of his log homes. Mr. Rockwell testified that he did not build primitive log homes. Mr. Rockwell compared his knowledge of a log kit house to that of a primitive log home. The trial of this case showed that Teri Sneberger played a very active

role in the building of her log home. She employed people to do various jobs in various stages of construction. She employed a neighbor to do all grading and earth removal for the log home site. Teri Sneberger never consulted anyone, including Jerry Morrison, before she hired parties to work on her primitive log home.

Subsequently Teri Sneberger terminated Jerry Morrison from the job before he could complete the primitive log home midway through the project and employed more parties to finish the work. Testimony during the trial was that Teri Sneberger was limited by money in constructing the log home.

In reviewing all the testimony before the trial court, it was not only appropriate but reasonable that a different verdict could be reached in this matter by the jury.

Jerry Morrison testified that he used care in constructing the primitive log home. Jerry Morrison was concerned about the product he put out and had disagreements with Teri Sneberger as to how to proceed in building the log home. In the end it appears Terry Sneberger was running out of money and terminated Jerry Morrison before he could finish the project.

The Trial Court was correct in denying Teri Sneberger's motion for a judgment as a matter of law on her claims due to the amount of evidence that was introduced to the jury.

V. THE TRIAL COURT ERRED IN GRANTING JAMES PHILLIPS' MOTION FOR A DIRECTED VERDICT.

A. STANDARD OF REVIEW:

The Standard of Review regarding the granting of a directed verdict as a matter of law is under a *de novo* standard of review. Gillingham v Stephenson, 209 W.Va. 741, 551 S.E. 2d 663 (2001).

B. ARGUMENT:

The Respondent, Jerry Morrison, would assert that his Motion for Directed Verdict should have been granted in this matter but the trial court denied such motion.

The evidence in this matter supports the position that Teri Sneberger employed a neighbor to excavate the site upon which the concrete pad was poured for the chimney. That individual did not testify at trial. Jerry Morrison stated that he was told that the machine doing the excavation could go no deeper as it struck solid rock. It would have been appropriate as a matter of law to have granted both motions for a directed verdict if no reasonable person or mind could differ on the sufficiency of the evidence. Brandon v Riffle, 197 W.Va. 97, 475 S.E. 2d 97 (1996).

If the Court had determined that James Phillips and Jerry Morrison were joint tortfeasors then the parties would have been judged by the jury as to their degree of negligence and the respective percentage of fault would have been assigned by the jury in its verdict between the two (2) parties.

None of the experts called by Teri Sneberger were aware where the work that was performed by Jerry Morrison stopped and what work the experts reviewed was performed by other parties employed by Teri Sneberger.

Teri Sneberger asserted that she suffered numerous damages due to the negligence of Jerry Morrison and James Phillips, and that Jerry Morrison's fraud in the construction of the log home contributed to her damages.

As to the tort of outrage, Jerry Morrison did not intentionally cause emotional distress to Teri Sneberger. Teri Sneberger asserted that the chimney pad was not built on solid rock but it was her neighbor, who she hired, who told Jerry Morrison he could go no lower in his excavation as he was on solid rock at that time. James Phillips was an experienced mason and should have known how to build a chimney.

The substance of all the cumulative evidence is that there was insufficient evidence to conclude as a matter of law that judgment in favor of James Phillips was appropriate at this stage of the trial. There was no clear conclusion if reasonable minds could differ on the outcome of the trial. For the reasons advanced, the trial court erred in granting a directed verdict for James Phillips and not granting a directed verdict for Jerry Morrison.

VI. THE TRIAL COURT DID NOT ERR IN GIVING A COMPARATIVE FAULT INSTRUCTION ALLOWING THE JURY TO APPORTION FAULT BETWEEN TERI SNEBERGER AND JERRY MORRISON.

A. STANDARD OF REVIEW

The Standard of Review regarding the granting of a jury instruction is an abuse of discretion standard, Tenant v Marion Health Care Foundation. 194 W.Va. 97, 459 S.E. 2d 374 (1995).

B. ARGUMENT

It became apparent to the Court as the testimony evolved in this case that Teri Sneberger had assumed a very large role in the planning, design and general building of her primitive log cabin. Counsel for Teri Sneberger suggested throughout the trial that Teri Sneberger totally relied upon Jerry Morrison to construct the log home and she played no role in the building of the log home. Testimony revealed that Teri Sneberger and Jerry Morrison disagreed on many issues involving the construction of the log home including the size and design. Teri Sneberger almost immediately increased the size of log home by excavating for a garage without regard as to the effect it would have on the log home. Teri Sneberger hired individuals as laborers without any consultation with Jerry Morrison. Teri Sneberger subsequently terminated Jerry Morrison and never allowed him to finish the log home.

West Virginia is a comparative negligence state. Bradly v Appalachian Power Co., 256 S.E. 2d 879, W.Va. 332 (1979). The defense of contributory negligence was available to Jerry Morrison based on the testimony given the jury.

If a trial court fails to instruct a jury on the consequences of comparative negligence when such an instruction is requested and evidence supports such request, then it is reversible error. Akins v Whitlen, 279 S.E. 2d 881 (1982). The trial court obviously felt sufficient grounds existed to give the instruction.

Teri Sneberger asserts that the only basis supporting the giving of instruction was speculation by Jerry Morrison about what might have occurred during subsequent construction of the primitive log home by other parties. This assertion is incorrect in light of the evidence presented to the Jury concerning the actions of Teri Sneberger and the different parties building the log home before Jerry Morrison was terminated.

Accordingly, the trial court did not err in giving a comparative fault instruction in this matter.

VII. THE TRIAL COURT DID NOT ERR IN GIVING TO THE JURY AN OUTRAGEOUS CONDUCT JURY INSTRUCTION IN THIS MATTER TENDERED BY JERRY MORRISON.

A. STANDARD OF REVIEW

The Standard of Review in the granting of a jury instruction is an abuse of discretion standard, Tenant v Marion Health Care Foundation, Inc. 194 W.Va. 97 459 S.E. 2nd 374 (1995).

B. ARGUMENT

The working and formulation of a jury instruction is within the broad discretion of the Court. The instruction given by the trial court was clear and unambiguous and only now does Teri Sneberger feel she is aggrieved by the giving of the instruction.

The law in West Virginia has required more than a showing of simple negligence to recover punitive damages. Bennett v 3 C Coal Co. 180 W.Va. 665, 379 S.E. 2nd 388 (1989). This case states that where gross fraud, malice, oppression of willful or reckless conduct (sic) exist the jury may assess punitive damages against a party.

The instruction given in this case by the Court explains to the jury the essential elements of intent and outrage. The jury weighed these issues and elected not to award any punitive damages. Generally punitive damages are not available in a breach of contract case. Berry v Nationwide Mutual Fire Ins. 181 W.Va. 168, 381 S.E. 2d 367 (1989). In this case the Court decided to give

the outrageous conduct instruction over the objection of Jerry Morrison. Teri Sneberger did not suffer any prejudice as a result of such instruction and, in fact, Jerry Morrison was at peril by the giving of such instruction.

The trial court did not abuse its discretion in giving such instruction and no miscarriage of justice occurred.

VIII. THE TRIAL COURT DID NOT ERR IN FAILING TO SET ASIDE THE JURY VERDICT.

A. STANDARD OF REVIEW

The standard of review of a trial court's denial of a motion for a new trial is a clearly erroneous standard.

B. ARGUMENT

The argument of Teri Sneberger is that there was an overabundance of testimony on behalf of Teri Sneberger and therefore, the verdict should have favored Teri Sneberger. It is not the quantity of testimony but the quality of testimony that drives a decision of a jury.

The trial transcript in this case shows that Jerry Morrison began to construct a primitive log home for Teri Sneberger on a limited budget. Teri Sneberger asserted that Jerry Morrison failed to build the log home to a reasonable standard. This issue was submitted to the jury. In order to determine whether there was sufficient evidence to support a jury verdict the court must consider the

following factors: (1) the evidence most favorable to the prevailing party; (2) assume all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts that the prevailing party's evidence tended to prove; (4) and give the prevailing party the benefit of all favorable inferences that may reasonably be drawn from the facts. The jury had before it such evidence and rendered a decision on such evidence.

If a new trial had been ordered, then an abuse of discretion would have occurred by the Circuit Court of Randolph County.

CONCLUSION

Jerry Morris respectfully requests that the West Virginia Supreme Court of Appeals affirm the jury verdict in this matter, or, in the alternative, order a new trial on the sole issue of allocating fault between Jerry Morrison and James Phillips, and for such other relief as may be necessary in this case.

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CERTIFICATE OF SERVICE

I, Pat A. Nichols, Counsel for Respondent, **JERRY MORRISON**, do hereby certify that on this date I served a true and exact copy of the foregoing RESPONDENT, JERRY MORRISON'S BRIEF upon the following individuals

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in an envelope properly addressed, stamped and deposited in the regular course of the United States Mail, this 14th day of November, 2014.

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