

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 15-0825

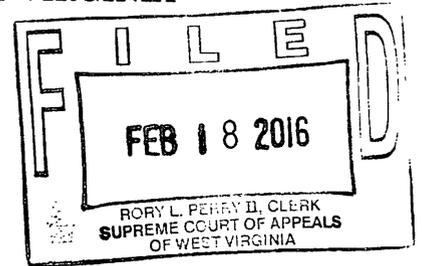
ASHLEY GUNNO,

Petitioner,

v.

KEVIN McNAIR,

Respondent.



PETITIONER'S REPLY BRIEF

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STATEMENT OF CASE

After hearing the testimony in this case, the jury made an explicit finding that Ms. Gunno sustained an injury as a proximate result of the September 13, 2011 accident at issue in this case.¹ While there was a dispute over whether her injuries were permanent, there was no dispute she was injured and suffered pain as a result of the accident.

While disputing Petitioner's assertion that "the testimony at trial provided undisputed evidence that Plaintiff Gunno suffered a painful injury as a result of the accident," Respondent relies heavily on its expert, Dr. Bruce Guberman, for that analysis. Dr. Guberman performed a one-time independent medical examination of Plaintiff Gunno on May 29, 2013, approximately a year and a half following her injuries in the automobile accident of September 13, 2011. Notwithstanding his failure to conclude that the injuries were permanent, he repeatedly acknowledged that she was injured as a result of the accident. Examples, of which there are many more, include:

- In response to defense counsel's question regarding "[w]hat injury was caused in the accident," Dr. Guberman testified, that he diagnosed cervical spine strain/sprain and lumbar spine strain/sprain.²

¹ JA:762.

² JA:526.

- He responded “Yes” when asked by defense counsel whether he was “telling the Jury you think she [Ms. Gunno] had a soft-tissue injury in the accident.”³
- He similarly agreed with defense counsel when he stated: “I think your conclusion that is she had a real injury, it was a soft-tissue injury. . .”⁴
- Dr. Guberman repeatedly testified that her treatments for pain were appropriate. For example, he agreed that her injections were necessary as a result of the pain from the accident.⁵
- On cross-examination, Dr. Guberman admitted: “I think to a reasonable medical probability that her pain is from this injury...”⁶
- He further admitted that, “Ashley suffered a decrease of her overall quality of life as a result of the injuries she sustained in this accident” and that “[w]hen she lives her life, as she did before, she has pain.”⁷

Contrary to the defendant’s suggestions, there was undisputed objective evidence of plaintiff’s injury and pain. At trial, Dr. McClanahan testified that her condition as of April 24, 2013, the last day he treated Plaintiff Gunno and

³ JA:535.

⁴ JA:546.

⁵ JA:559.

⁶ JA:580.

⁷ JA:588-89.

approximately one month prior to Dr. Guberman's examination, there was still objective evidence of Plaintiff Gunno's injury⁸:

Q Did you physically lay hands on her lumbar spine and feel those muscle spasms?

A Yes.

Q An objective indicator of injury?

A. Yes.

Dr. McClanahan testified further as to the permanency of Ms. Gunno's injuries⁹:

Q In your opinion as a chiropractor, do you – or have you formed any opinions as to what's going on in her lower back and whether she's going to carry deficiencies in the future?

A She suffered an injury, and she will not regain 100 percent improvement back to where she was. She'll still have flare-ups and she'll still continue to have that pain.

Q Those flare-ups, do those flare-ups involve having spasms in the lower back?

A Yes.

Q Spasms in the neck?

A Yes.

Q Is there anything she can do to prevent those spasms?

A To prevent? Once they come on, she can – she can stretch. She can seek other types of treatment, but to totally prevent them from coming on, no.

Q So, the only way she can keep herself from having these is to alter how she lives her life?

A Yes.

⁸ JA:324.

⁹ JA:328.

Indeed, even Dr. Guberman acknowledged that her past medical records contained objective evidence of her pain and injury.¹⁰

The defendant places great weight on the supposed fall that occurred after the automobile accident in question. After initially concluding that the fall at work was “relatively minor that, like a jarring that didn't cause any additional permanent injury -- affect, or permanent injury,” at trial for the first time Dr. Guberman testified that, “If you look over her records from therapy, it looks like the character of her pain changed a bit before then, her symptoms were both arms and legs, but much more the right side; and after that, the left side became -- certainly, immediately after the injury, the left side became more of an issue.”¹¹ Of course, even if the jury believed Dr. Guberman regarding her left side pain becoming more of an issue, such a conclusion does not support a verdict that she had no pain as a result of the accident. Indeed, the pain after the accident and before the fall could not have been caused by the fall!

Mr. Comer, Plaintiff Gunno's husband, confirmed that at the time of trial, Ms. Gunno was still having flare-ups. Her back hurt quite a bit and the pain was pretty constant.¹² This is all in addition to the testimony of Plaintiff Gunno herself in which she testified regarding the injuries, the medical treatment she sought, the restrictions

¹⁰ JA:582.

¹¹ JA:519-520.

¹² JA:385.

of regular activities of daily living, even her pregnancy following the automobile accident.

ARGUMENT

I. An order denying a new trial is subject to review for abuse of discretion.

Petitioner argues an order denying a new trial is subject to review under an abuse of discretion standard, to which the Respondent agrees that this is the applicable standard of review.

II. The Trial Court Improperly Denied the Plaintiff's Motion for New Trial Based upon Undisputed Evidence Establishing Proximate Causation and Substantial Damages.

Respondent seems to muddy the issue as to damages and refers only to general damages. While Plaintiff's counsel made the tactical decision to not introduce medical bills or evidence of future lost wages as determined and calculated by an economic expert, Plaintiff's counsel never veered from the course of introducing general damages, including pain and suffering.

In fact, both Petitioner and Respondent reference, "In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true."¹³ What must be construed is the fact that the verdict was returned in favor of Plaintiff Gunno, and those facts which the jury found under the evidence must also be assumed as true.

¹³ *Walker v. Monongahela Power Company*, 147 W.Va. 825, 131 S.E.2d 736 (1963).

Petitioner argues that in addition to the exhaustive testimony of Plaintiff Gunno as to the pain and suffering she endured as a result of the automobile accident, the adjustments she made to her activities of daily living as a result of the automobile accident, and the permanency of her condition, testimony was also offered by her husband, Richard Comer, and Jay McClanahan, D.C., who treated Plaintiff Gunno on 45 different occasions. Respondent fails to address the fact that Dr. McClanahan offered expert opinion as to the permanency of her injuries as a result of the objective findings found during his examinations. Instead, Respondent relies upon the one-time examination by their expert, Dr. Bruce Guberman, who opined there was no permanent injury.

However, despite the exhaustive testimony presented in Plaintiff's case-in-chief regarding her pain and suffering, despite the fact that defense counsel admitted in opening statement and closing argument that Plaintiff Gunno was entitled to compensation for her injuries, despite the jury verdict in favor of the Plaintiff, the jury awarded no money for "harms and losses, including, but not limited to past and/or future physical and mental pain and suffering, and reduced ability to enjoy life."¹⁴

Respondent continues to cite to and rely on *Toler v. Hager*, in which the *Toler* Court noted the disparity among the testimony, including the lack of objective evidence of injury and the expert testimony in conflict with the plaintiff's claims.¹⁵

¹⁴ JA:762.

¹⁵ 205 W.Va. 468, 519 S.E. 2d 166 (1999).

In the appeal at hand, there is no disparity among the testimony of Plaintiff Gunno, Plaintiff Gunno's husband, and Plaintiff Gunno's treating chiropractor. Even defense counsel stated she was entitled to compensation for her injuries.

Respondent's continued reliance on *Marsch v. American Electric Power* is also improper.¹⁶ Again, the Marsch evidence was also conflicting.

Petitioner argues that Plaintiff Gunno's injuries were obvious and were reasonable common knowledge as evidenced through her sworn testimony and that of her husband.

“Where an injury is of such a character as to be obvious, the effects of which are reasonably common knowledge, it is competent to prove future damages either by lay testimony from the injured party or others who have viewed his injuries, or by expert testimony, or from both lay and expert testimony, so long as the proof adduced thereby is to a degree of reasonable certainty. But where the injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable or subject of common knowledge, mere subjective testimony of the injured party or other lay witnesses does not provide sufficient proof; medical or other expert opinion testimony is required to establish the future effects of an obscure injury to a degree of reasonable certainty.” [Citing Syl. Pt. 11, *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974)].

Because Plaintiff Gunno's injuries were obvious and common knowledge, Petitioner met her burden by providing both lay testimony from Plaintiff Gunno and her husband who viewed the injuries, and by the expert testimony of Dr. McClanahan who opined the permanency of her injuries by a reasonable degree of certainty. The

¹⁶ 207 W.Va. 174, 530 S.E. 2d 173 (1999).

jury verdict of \$0.00 based upon the lay and expert testimony, after finding in favor of the Plaintiff, is cause for a new trial.

III. Plaintiff's Decision Not to Seek Recovery of Lost Wages or Medical Bills Does Not Change the Analysis.

Respondent continues its recitation that based upon holdings in *Toler, id.*, *Marsch, id.* and *Big Lots v. Arbogast*¹⁷ the jury's verdict in this case should be maintained and the decision of the lower court denying Plaintiff's motion for a new trial upheld. Respondent continues to cite to cases with conflicting evidence regarding damages.

Petitioner would also point to *Talkington v. Barnhart*, 164 W.Va. 488, 264 S.E.2d 450 (1980). This is a case in which Mrs. Talkington operated a vehicle by which Mr. Barnhart struck while leaving a parking lot. Mrs. Talkington was taken to a hospital for bruises and contusions, and suffered from cervical and shoulder pain. All parties stipulated to the damages to the Talkington car, and that any verdict in favor of Mr. Talkington, as owner of the car, would be paid to him on behalf of the defendant. Testimony was given by medical providers that Mrs. Talkington had crepitus in her shoulder and would suffer continuous pain, and further evidence that she could no longer engage in regular activities of daily living. The jury found for the Talkingtons, but awarded Mrs. Talkington no damages and only awarded Mr. Talkington the exact amount for the cost of his automobile repair. Their motion to set aside the verdict and award a new trial was denied, and the case was appealed.

¹⁷ 154 W.Va. 748, 179 S.E.2d 215 (1971).

The *Talkington* Court agreed that the verdict was inadequate as a matter of law. “We have consistently held that where there is uncontroverted evidence of damages, a verdict not reflecting them is inadequate.” Also, her testimony about pain and suffering was supported by testimony by both physicians.

In fact, the *Talkington* Court did an extensive analysis of jury verdicts in *Freshwater v. Booth*, 160 W.Va. 156, 233 S.E.2d 312 (1977) in which jury verdicts were classified into four types:

“(1) the plaintiff would be entitled to a directed verdict on liability as a matter of law, but the damages were inadequate even when viewed most favorably to defendant; (2) liability is contested, but damages were inadequate if liability were proven; (3) liability is tenuous or contested, but the jury held for the plaintiff and only awarded nominal damages; and (4) liability has been conclusively proven, but damages alone need to be retried because of the inadequacy.”

The *Talkington* Court found the jury failed to assess damages for proven medical expenses, pain and suffering, or for loss of consortium, and the Court found the damages should be recompensed. The verdict was reversed and the case remanded for another trial on liability and damages.

When comparing the case at-hand to *Talkington* and *Freshwater*, there is no dispute or question as to the liability of the defendant. Plaintiff Gunno should have been recompensed for pain and suffering by the jury. The jury’s award was inadequate even when viewed in a light most favorable to the Defendant.

The fact that the jury did not have before it the amount of the medical bills or the lost wages is completely irrelevant and is nothing more than a rabbit hole to

distract this Court. The medical treatment of Plaintiff Gunno is in the record, by medical records and by medical expert testimony. Plaintiff Gunno and her husband both testified as to the general damages. Just because dollar amounts were not attached to the treatment by medical providers, nor a piece of paper indicating a lost wage claim, that does not permit the jury to issue an award of \$0.00 after finding in favor of the Plaintiff.

The evidence establishes that every witness at trial testified that the plaintiff suffered an injury and was in pain. The jury concluded that the plaintiff was injured as a proximate result of the accident. Under these circumstances, the verdict was against the clear weight of the evidence and a new trial is required.

CONCLUSION

The jury's zero dollar verdict, after a three-day trial, was not supported by the evidence presented through exhibits and testimony. The Court should reverse the denial of Plaintiff's Motion for a New Trial and remand this action for a new trial on damages.

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By Counsel



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CERTIFICATE OF SERVICE

On this the 18th day of February, 2016, the undersigned does hereby certify that a true copy of the foregoing Petitioner's Reply has been served upon the following known counsel of record to the following address by USPS, postage pre-paid:

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