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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

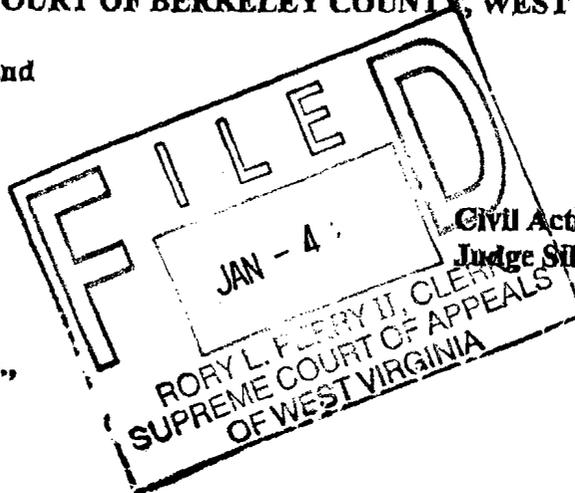
JAMES D. MACDONALD and
DEBBIE MACDONALD,

Plaintiffs,

v.

CITY HOSPITAL, INC.
and SAYEED AHMED, M.D.,

Defendants.



Civil Action No. 07-C-150
Judge Silver

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**ORDER DENYING DEFENDANT CITY HOSPITAL, INC.'S
MOTION FOR JUDGMENT AS A MATTER OF LAW, MOTION FOR
NEW TRIAL AND MOTION TO ALTER OR AMEND JUDGMENT
AND GRANTING IN PART AND DENYING IN PART DEFENDANT
SAYEED AHMED, M.D.'S MOTION FOR NEW TRIAL,
OR, IN THE ALTERNATIVE, MOTION TO ALTER OR AMEND JUDGMENT**

This matter comes on for the Court's consideration this ~~20th~~ day of August, 2009, upon the Court's receipt of Defendant Sayeed Ahmed, M.D.'s Motion for New Trial, or, in the Alternative, Motion to Alter or Amend Judgment filed on May 29, 2009, upon the receipt of Defendant City Hospital, Inc.'s Motion for Judgment as a Matter of Law, Motion for New Trial and Motion to Alter or Amend Judgment filed on June 1, 2009, and upon the receipt of related Responses and proposed Orders.

More specifically, the Court has before it the following Motions, Responses thereto, and proposed Orders for consideration and ruling:

- 1. Defendant Sayeed Ahmed, M.D.'s Motion for New Trial, or, in the Alternative, Motion to Alter or Amend Judgment, and Memorandum of Law in support thereof filed on May 29, 2009.

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2. Plaintiffs' Response and Opposition to Defendant Sayeed Ahmed, M.D.'s Motion for New Trial, or, in the Alternative, Motion to Alter or Amend Judgment, filed on June 18, 2009.

3. Defendant Sayeed Ahmed, M.D.'s proposed Order Granting Motion for New Trial and proposed Order Granting Motion to Amend Judgment filed on June 22, 2009.

4. Defendant City Hospital, Inc.'s Motion for Judgment as a Matter of Law, Motion for New Trial and Motion to Alter or Amend Judgment, and Memorandum of Law in support thereof filed on June 1, 2009.

5. Plaintiffs' Response and Opposition to Defendant City Hospital, Inc.'s Motion for Judgment as a Matter of Law, Motion for New Trial, and Motion to Alter or Amend Judgment filed on July 6, 2009.

6. Defendant City Hospital, Inc.'s proposed Order Granting Defendant City Hospital, Inc.'s Motion for Judgment as a Matter of Law filed on June 22, 2009.

The Court has carefully considered the Motions and grounds set forth therein and the Responses thereto of the parties, the entire record of this case, and applicable legal authority, and makes the following rulings thereon. In support thereof, the Court incorporates herewith all findings of fact and conclusions of law previously made and set forth in all of the Court's prior orders in this case, and in particular the Court's Order Ruling on All Pending Post Trial Motions Necessary Before Entry of Judgment Order entered May 14, 2009. In addition, the Court makes the following findings of fact and conclusions of law:

DISCUSSION

I. DEFENDANTS' MOTIONS REGARDING THE JURY'S VERDICT FOR PAST LOST WAGES

Both Defendants argue that no judgment should be rendered on the jury's verdict for past lost wages as there was no evidentiary basis for this award. In their Response, Plaintiffs assert that there was ample evidence to support the award of \$37,000.00 for past lost wages based on the testimony of James and Debbie MacDonald.

The Court is persuaded here by the position of the Plaintiffs. Further, the Court fully considered the arguments made now in the Court's Order Ruling on All Pending Post Trial Motions Necessary Before Entry of Judgment Order entered May 14, 2009, and found that there was sufficient evidence to support the jury's verdict for past lost wages. Based on the findings and conclusions in that Order which are incorporated here as if fully set forth, the Defendants' Motions regarding past lost wages are denied.

II. DEFENDANTS' MOTIONS REGARDING WEST VIRGINIA CODE SECTION 55-7B-8

Both Defendants argue that the Circuit Court erred in its application of West Virginia Code Section 55-7B-8 and further argue \$250,000.00 is the maximum amount that Plaintiffs should recover as compensatory damages for noneconomic loss. This is because, according to Defendants, Mr. MacDonald's injuries do not meet the criteria set forth in West Virginia Code Section 55-7B-8(b) for application of the \$500,000.00 cap for noneconomic damages. In their Response, Plaintiffs take issue with this position and argue that there was ample evidence that Mr. MacDonald was left permanently disabled in a manner that meets the criteria for application of the \$500,000.00 cap set forth in West Virginia Code Section 55-7B-8(b).

The Court is persuaded here by the position of the Plaintiffs. Further, the Court fully considered the arguments made now in the Court's Order Ruling on All Pending Post Trial Motions Necessary Before Entry of Judgment Order entered May 14, 2009, and found that the \$500,000.00 cap set forth in West Virginia Code Section 55-7B-8(b) should be applied here. Based on the findings and conclusions in that Order which are incorporated here as if fully set forth, the Defendants' Motions regarding the application of West Virginia Code Section 55-7B-8 are denied.

III. DEFENDANT SAYEED AHMED'S MOTION THAT THE COURT ERRED IN FAILING TO ADJUST THE ECONOMIC DAMAGES IN ACCORDANCE WITH WEST VIRGINIA CODE SECTION 55-7B-9a

Defendant Sayced Ahmed, M.D. asserts that the Court erred by failing to adjust the economic damages in accordance with West Virginia Code Section 55-7b-9a, arguing that Plaintiffs' award for economic damages should be reduced to reflect the collateral source's right of subrogation. Defendant Ahmed asserts that if this does not occur Defendants could be subject to twice paying the amount of the award, once to Plaintiff and once to PEIA, Plaintiffs' insurer. In its Response, Plaintiffs argue that under the specific language of West Virginia Code Section 55-7b-9a, a jury's verdict shall not be reduced to reflect amounts paid on behalf of a plaintiff that a collateral source has a right to recover from the plaintiff through subrogation. West Virginia Code Section 55-7-9a(g)(1).

This issue was fully considered in the Court's Order Ruling on All Pending Post Trial Motions Necessary Before Entry of Judgment Order entered May 14, 2009, and the Court found that the Court did not have to decide this issue, based on the agreements of the parties made at the hearing on March 4, 2009. Based on the findings and conclusions in that Order which are

incorporated here as if fully set forth, Defendant Ahmed's Motion regarding West Virginia Code Section 55-7B-9a is denied.

IV. DEFENDANT SAYEED AHMED'S MOTION THAT THE COURT ERRED IN ITS ASSESSMENT OF COSTS AGAINST THE DEFENDANTS

In his Motion, Defendant Ahmed asserts that the Circuit Court incorrectly included in its assessment of costs the amount of \$900.00 paid to the MacKenzie Group, Inc., because this was a portion of the expert witness fee required by Rodney Richmond, M.D. for his deposition and was not for a transcript of the deposition. In its Response, the Plaintiffs concur that this amount paid to the MacKenzie Group was for an expert deposition and was not the cost of a transcript.

In consideration of which, the Court reasserts all of its findings and conclusions on the issue of costs set forth in its Order Ruling on All Pending Post Trial Motions Necessary before Entry of Judgment Order entered May 14, 2009 which are incorporated here as if fully set forth, except that this \$900.00 amount shall be subtracted from the amount of \$7,986.11 previously assessed as costs.

Based thereon, Defendant Ahmed's Motion to Alter or Amend the Judgment is granted in part in that costs in the amount of \$7,086.11 are now assessed against the Defendants.

V. DEFENDANT CITY HOSPITAL, INC.'S MOTION THAT THE VERDICT AGAINST DEFENDANT CITY HOSPITAL, INC. IS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE AND A MISCARRIAGE OF JUSTICE WILL RESULT IF THE VERDICT IS NOT SET ASIDE AND A NEW TRIAL AWARDED

Defendant City Hospital, Inc. asserts that the verdict against City Hospital is against the clear weight of the evidence and will result in a miscarriage of justice if not set aside. In contrast, Plaintiffs argue that the verdict was well-reasoned, appropriate, and the only rational verdict the jury could have returned based upon the evidence.

The Court finds that there was sufficient evidence presented to support the jury's verdict, and based thereon Defendant City Hospital, Inc.'s Motion is denied.

VI. DEFENDANT CITY HOSPITAL, INC.'S MOTION THAT PLAINTIFFS PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH A *PRIMA FACIE* RIGHT TO RECOVER FROM CITY HOSPITAL, INC., REQUIRING THE COURT TO SET ASIDE THE JUDGMENT AND GRANT CITY HOSPITAL'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant City Hospital, Inc. asserts that Plaintiffs presented insufficient evidence to establish a *prima facie* right to recover from City Hospital and that City Hospital's Motion for Judgment Notwithstanding the Verdict should be granted. According to Defendant City Hospital, Inc., this is because the Plaintiffs did not and could not establish that any action on the part of City Hospital was the proximate cause of Plaintiff James MacDonald's injuries.

Defendant City Hospital, Inc. contends that Dr. Ahmed was clear in his trial testimony that he was already aware of the risks of ordering Lipitor along with other medications for Mr. MacDonald, and that Dr. Ahmed knowingly and purposely ordered and continued the Lipitor with the other medications in order to address medical problems that he believed more likely to result in harm to Mr. MacDonald. Defendant City Hospital, Inc. argues that failure to warn creates no liability where it will be of no avail, where it will be impractical, or where the lack thereof does not contribute to the accident, citing 65 C.J.S. Negligence Section 169 (June 2008).

In response, Plaintiffs contend that sufficient evidence was presented to establish a *prima facie* case of negligence against Defendant City Hospital, Inc. Plaintiffs argue that Defendant City Hospital cannot meet the standard set forth in *Jones v. Patterson Contracting, Inc.*, 524 S.E.2d 915 (W.Va. 1999) that in granting a motion for a directed verdict, "all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be

directed. . . [and] every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to [the other party].” *Jones* at 919. Here, Plaintiffs assert that even though Dr. Ahmed testified that he knew of the possibility of negative drug interactions, the jury could have found that this testimony was not credible. In addition, Plaintiffs contend that the jury could have determined that even if Dr. Ahmed knew that the drugs he was prescribing did interact with each other, he did not understand the severity of the interaction, and that City Hospital’s pharmacy had a duty to warn him of this. Plaintiffs contend that under either scenario a *prima facie* case is established.

The Court is persuaded by the position of the Plaintiffs on this issue and finds that a *prima facie* case of negligence was presented before the jury, and based thereon Defendant City Hospital, Inc.’s Motion is denied.

WHEREFORE, in consideration of all of the foregoing, the Court does hereby
ADJUDGE and ORDER as follows:

1. Defendants’ Motions regarding the jury’s verdict for past lost wages are **DENIED**.
2. Defendants’ Motions regarding West Virginia Code Section 55-7B-8 are **DENIED**.
3. Defendant Sayeed Ahmed’s Motion that the Court erred in failing to adjust economic damages in accordance with West Virginia Code Section 55-7B-9a is **DENIED**.
4. Defendant Sayeed Ahmed’s Motion to Alter or Amend the Judgment on the ground that the Court erred in its assessment of costs against the Defendants is **GRANTED IN PART** in that \$900.00 shall be subtracted from the amount of \$7,986.11 previously assessed as costs leaving the amount of \$7,086.11 now assessed as costs against the Defendants.

5. Defendant City Hospital, Inc.'s Motion that the verdict against Defendant City Hospital, Inc. is against the clear weight of the evidence and a miscarriage of justice will result if the verdict is not set aside and a new trial awarded is **DENIED**.

6. Defendant City Hospital, Inc.'s Motion that Plaintiffs presented insufficient evidence to establish a *prima facie* right to recover from City Hospital, Inc., requiring the Court to set aside the judgment and grant City Hospital's Motion for judgment notwithstanding the verdict is **DENIED**.

7. Any and all other grounds asserted in support of both Defendant City Hospital, Inc.'s Motion for Judgment as a Matter of Law, Motion for New Trial and Motion to Alter or Amend Judgment and Defendant Sayeed Ahmed, M.D.'s Motion for New Trial, or, in the Alternative, Motion to Alter or Amend Judgment not previously ruled upon are found to be without merit based upon the evidence, record, and findings of fact and conclusions of law in this Order, and, therefore, are **DENIED**.

The objection and exception of the parties to any adverse findings or rulings of the Court are noted.

The Clerk shall retire this matter from the active docket and place it among cases ended.

The Clerk shall enter this Order as of the day and date first above written and shall forward attested copies to the following counsel of record:

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Gray Silver III, Judge
Berkeley County Circuit Court