

NOTED CIVIL DOCKET  
JAN 18 2011  
JULIE BALL  
CLERK CIRCUIT COURT  
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

MARY MCPHERSON and  
THOMAS MCPHERSON,

Plaintiffs,

vs.

Civil Action No.: 07-C-813-WS

BETTY SUE BOLEN, as Administratrix  
of the Estate of LARRY E. BOLEN, SR.,

Defendant.

**ORDER DENYING PLAINTIFFS' MOTION TO  
SET ASIDE VERDICT AND GRANT NEW TRIAL**

On December 10, 2010 came the plaintiffs, by their counsel William J. Akers and the defendant, by her counsel David M. Kersey for the previously noticed hearing upon Plaintiffs' Motion to Set Aside Verdict and Grant New Trial. Upon consideration of the pleadings filed by the parties and the argument of counsel, the Court is prepared to rule as follows:

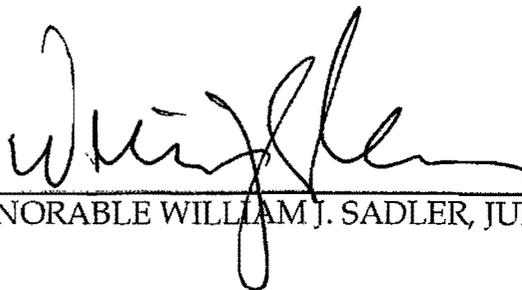
The Court finds that the jury verdict rendered by the jury is not contrary to the law and evidence. In particular, the Court finds that counsel for defendant did not improperly argue to the jury that plaintiff suffered from a pre-existing condition. Plaintiff's own expert testified that any person who experiences symptoms from a soft tissue injury for more than three months has suffered a permanent injury. On cross-examination of plaintiff, defendant's counsel impeached plaintiff and established through her medical records that she had suffered a soft tissue injury prior to the subject accident and that she was symptomatic and received treatment for those symptoms for at least six (6) months. Therefore, defendant's counsel argued a reasonable inference to the jury based upon that uncontradicted evidence. Therefore, such argument was not improper. Further, the Court finds it was not error to refuse plaintiffs' counsel request to call the named defendant as a witness during the trial.

Betty Sue Bolen was a defendant only in her representative capacity of the Estate of Larry E. Bolen, Sr., who was operating the vehicle involved in the accident with plaintiffs. Betty Sue Bolen was not present at the time of the accident and therefore had no information pertinent to the accident itself. Moreover, defendant admitted liability for this case so the only issue for jury consideration was plaintiff's claimed injuries and resulting damages. Betty Sue Bolen would not have any factual information pertinent to the issues being tried. As to plaintiffs' counsel's proffer that she was to be examined upon the decision not to obtain an independent medical evaluation of plaintiff, such interrogation would not have been proper at trial. A decision to obtain or not to obtain an independent medical evaluation goes to trial strategy and her interrogation on that issue may have led to the introduction of impression's of defendant's counsel with regard to how the case should be tried, none of which would have been proper for jury consideration and would have been irrelevant to any of the issues being tried. The Court notes that plaintiffs' counsel did argue to the jury that defendant had an opportunity to obtain an IME, but did not do so. Therefore, it was not error to refuse plaintiffs' counsel request to call the named defendant as a witness at trial.

For the reasons set forth herein and for such other reasons as may have been more particularly explained on the record at the hearing of this matter, it is hereby ORDERED that plaintiffs' Motion to Set Aside Verdict and Grant New Trial shall be, and hereby is, denied and the Judgment Order previously entered by this Court is hereby affirmed. The objection and exception of plaintiffs is noted.

This civil action shall be, and hereby is, DISMISSED from the docket of this Court, with prejudice.

ENTER: This  day of January, 2011.



HONORABLE WILLIAM J. SADLER, JUDGE

PREPARED AND PRESENTED BY:



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THE FOREGOING IS A TRUE COPY OF A DOCUMENT  
ENTERED IN THIS OFFICE ON THE 18<sup>th</sup> DAY  
OF Jan 20 11  
DATED THIS 1<sup>th</sup> DAY OF Feb  
20 11

JULIE BALL, CLERK OF THE  
CIRCUIT COURT OF MERCER COUNTY WV  
BY Fam Isaac  
HER DEPUTY

APPROVED AS TO FORM BY:



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