

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARY MCPHERSON and
THOMAS MCPHERSON,

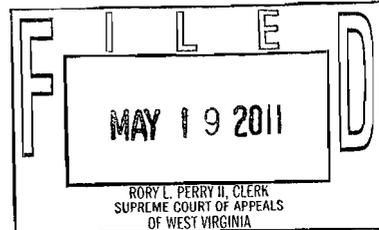
Petitioners,

v.

BETTY SUE BOLEN, as Administrator
of the Estate of Larry E. Bolen,
Sr.,

Respondent.

CASE NO. 11-0287



PETITIONER-APPELLANTS'
PETITION FOR APPEAL

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I. KIND OF PROCEEDING AND NATURE OF THE RULING

This appeal arises from a judgment entered on October 13, 2010 and the trial court's subsequent order entered on January 18, 2011 denying the Plaintiffs' motion to set aside the verdict and grant the Plaintiffs' a new trial. The Plaintiffs' lawsuit sought damages for injuries caused the Decedent, Larry E. Bolen, Sr. The matter proceeded to trial by jury on October 12-13, 2010. The jury returned a verdict for the Plaintiffs in the amount of \$9,306.60.

The Plaintiffs objected to the verdict in that the award for past loss of wages was less than the amount for which unrefuted evidence was presented at trial. With the consent of the Defendant, it was agreed that the verdict would be amended to reflect past loss of wages in the amount of \$672.00. The jury was instructed to continue deliberations regarding past pain and suffering and returned a verdict including \$1,500.00 for past pain and suffering. The trial court entered judgment in the amount of \$11,190.60 (\$672.00 for wages, \$9,018.60 for medical and chiropractic expenses and \$1,500.00 for pain and suffering together with interest).

On November 5, 2010 the Plaintiffs filed a motion to set aside verdict and grant a new trial on the grounds that the verdict rendered by the jury was contrary to the law and

the evidence. The Circuit Court denied that motion on January 18, 2011. In conformance with Rule 3(b) of the West Virginia Rules of Appellate Procedure, the Appellant files this Petition for Appeal.

II. STATEMENT OF FACTS OF THE CASE

On July 8, 2006, on Ambrose Lane, near Princeton, Mercer County, West Virginia, the Plaintiff, Mary McPherson, was a passenger in a vehicle being operated by in a proper and lawful manner by the Plaintiff, Thomas McPherson, when the Decedent, Larry E. Bolen, Sr., negligently, carelessly, and recklessly operated his vehicle by failing to maintain control of his vehicle, causing his vehicle to strike the vehicle with Mary and Thomas McPherson.

In the collision, Mary McPherson was violently thrown about the interior of the vehicle and suffered serious and permanent injuries, including, but not limited to, her neck, back, shoulders and legs. Ms. McPherson presented evidence that she incurred medical damages in the amount of \$9,018.60 and lost wages in the amount of \$672.00. Counsel for the Defendant brought to the court's attention an established principle that if a plaintiff is awarded treatment expenses, there must be some award for past pain and suffering. The trial court instructed the jury to continue their deliberations for the purposes of awarding damages to Mary

McPherson for past pain and suffering and the jury returned a verdict of \$10,806.60 (\$288.00 lost wages, \$9,018.60, medical and chiropractic expenses, \$1,500.00 past and present pain and suffering). With the consent of the parties the trial court amended the lost wages amount to conform with the unrefuted evidence of the Plaintiffs in the amount of \$672.00 and entered a total judgment in the amount of \$11,190.60.

The Plaintiffs filed a motion to set aside the verdict and grant a new trial on the basis that it was prejudicial error for the trial court to allow the Defendant to argue that the Plaintiff's damages were the result of a pre-existing condition without presenting expert testimony to support that contention. The trial court entered an order denying the motion on January 18, 2011.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

The trial court violated the Plaintiffs' due process rights under the Constitutions of West Virginia and the United States of America to a fair trial, as well as the law of West Virginia in the following particulars:

- A. The lower court committed reversible error by allowing the Defendant to use Mary McPherson's medical records to argue that she had

pre-existing conditions from old injuries when the Defendant presented no expert witnesses regarding Ms. McPherson's medical condition.

B. The lower court also committed error in refusing to allow the Plaintiffs to call as a witness Betty Bolen as Executrix of the Estate of Larry E. Bolen, Sr.

IV. Argument

The Defendant argued to the jury that Mary McPherson had been in three prior car wrecks and that she suffered from the effects of injuries received in those prior wrecks rather than from the wreck caused by the negligence of Larry Bolen. The plaintiff, however, had no evidence to support this contention and, instead, argued that a pre-existing condition was shown by Ms. McPherson's medical records.

The Defendant's using plaintiff, Mary McPherson's medical records to show that she had pre-existing conditions from old injuries was in violation of the West Virginia Rules of Evidence. Rule 701 limits the testimony of lay witnesses "to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." By contrast, Rule 702 allows greater latitude by an expert witness.

In this case, the defendant presented no witnesses to testify to the plaintiff's medical condition. The only expert who testified was a witness for the plaintiff, Dr. Randy Maxwell, who testified that the plaintiff's injuries came from the collision. The defense presented no testimony regarding the plaintiff's medical condition and instead just argued an unsupported allegation from the plaintiff's medical records.

The Supreme Court has used an analysis with regard to future damages which should also be instructive and applicable in this situation:

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 injures party or other lay witnesses does not provide sufficient proof; medical or other expert opinion testimony is require to establish the future effects of an obscure injury to a degree of reasonable certainty.

Jordan v. Bero, 158 W.Va. 28, 30, 210 S.E.2d 618 (1974).

In this situation, the defendant did not try to argue the future effects to Ms. McPherson of the wreck caused by Mr. Bolen but instead took the even more tenuous argument of

arguing about the past effects to Ms. McPherson from prior wrecks without the benefit of any expert testimony. This was a violation of the Rules of Evidence and was error.

It was prejudicial error to refuse the plaintiffs' attempt to call Betty Bolen to testify.

The plaintiff's counsel attempted to call as a witness Betty Bolen, as Executrix of the Estate of Larry E. Bolen, Jr. The Supreme Court "has recognized the right, under W.Va.R.Evid. 611 to call an adverse party and interrogate that party by leading questions." *Rine v. Irisari*, 187 W.Va. 550, 559, 420 S.E.2d 541 (1992), *citing*, *Gable v. Kroger Co.*, 186 W.Va. 62, 410 S.E.2d 701 (1991).

In this case, Ms. Bolen was the defendant and the plaintiff had a right to call her as a witness. Certainly, there might have been other objections to be raised and considered by the court as to the admissibility of aspects of her testimony. Her testimony could have been found inadmissible based on hearsay or competency objections; however, the plaintiff was deprived the opportunity to explore these areas and to have the court make specific findings. This ruling deprived the plaintiff of the opportunity to have a fair trial and should result in the court setting aside the verdict and granting the plaintiff a new trial.

CONCLUSION

The Circuit Court of Mercer County committed reversible error by allowing inappropriate arguments to the jury and my refusing to allow the Plaintiffs to present testimony from the Defendant.

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Sr.,)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

I, William J. Akers, counsel for Petitioner-Appellants, Mary McPherson and Thomas McPherson, do hereby certify that today a true copy of the foregoing Petitioner-Appellant's Petition for Appeal was this day mailed to the following:

David M. Kersey
Brewster, Morhous, Cameron, Caruth
Moore, Kersey & Stafford, PLLC
418 Bland Street
Bluefield, WV 24701

This the 18th day of May, 2011.



 WILLIAM J. AKERS
 State Bar # 20