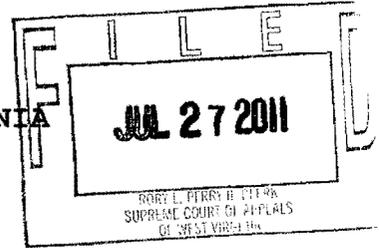


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



MARY MCPHERSON and)
THOMAS MCPHERSON,)

Petitioners,)

v.)

CASE NO. 11-0287

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

Respondent.)

PETITIONER-APPELLANTS'
REPLY BRIEF

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I. Argument

The lower court erred by allowing Defendant's argument that Ms. McPherson had a pre-existing condition.

The defendant justifies the trial court's allowing defendant's argument that Ms. McPherson suffered from a pre-existing condition by saying that the defendant was simply "connect[ing] the undisputed facts" of the plaintiff's evidence. That is not true. The defendant misconstrues the evidence as presented and ignores several other pieces of evidence that were directly contrary to the defendant's argument. First, Ms. McPherson testified that she was completely recovered from the 1999 auto accident at the time of the wreck leading to this lawsuit.

More importantly, the plaintiff's witness, Dr. Randy Maxwell, was not qualified to the trial court as an expert witness. He was called as a witness because he was Ms. McPherson's treating chiropractor. He was neither tendered nor accepted as an expert. Even had he been testifying as an expert he did not testify that Ms. McPherson had a permanent injury from the 1999 wreck. The defendant misconstrues the evidence. Dr. Maxwell did not testify that Ms. McPherson had a pre-existing or per permanent injury from her prior wreck. Instead, on cross-examination, the following colloquy occurred.

Q. Uh, now I think that you said, uh, I don't know if it was your opinion or the literature that you referred to if, uh, if...of course, I think you had already said that anybody that's in a rear end collision you would expect to have affects on the spine?

A. Correct.

Q. And if they have symptoms for three months or more, then they're probably always going to have problems?

A. Correct.

Q. Is that what you said?

A. Ninety percent.

Q. So, okay, hypothetically if...if...if I was to ask you to assume that Mrs. McPherson had been involved in one prior rear end collision before July 8, 2006, would that affect your opinions here today? The ones that you've given today?

A. Please clarify, I mean, a different accident that the one that I'm treating her for?

Q. Yes, if she had been involved in...in...before this accident that you treated her for, if she had been involved in one prior rear end collision before that accident, okay, would that affect the opinions you've given the ladies and gentlemen of the jury today?

A. It would affect my opinion as in that she would be more apt for a re-injury so because she was asymptomatic she reports, or not symptoms before she showed up to my office I have to base my opinion on that...that accident.

Q. Alright, now, she reported no symptoms before she came to your office.

A. Before the accident.

Q. Okay. That's what she reported to you?

A. Right no history of headaches or back pain or anything like that?

(T p 155, line 8-p 156, line 22)

Clearly, the evidence that the plaintiff presented on this issue - and it was all of the evidence given that the defendant did not call any witness did not support the defendant's argument. Dr. Maxwell was asked about the

general proposition that treatment for more than 3 months indicates a permanent injury; he certainly qualified his answer by saying that maybe ninety percent of the time. Dr. Maxwell did not testify that Ms. McPherson had been permanently injured or had a pre-existing condition.

The trial court committed reversible error in allowing the defendant's argument. As such, this court should reverse the trial court's order denying the Plaintiff's motion to set aside the verdict.

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

The defendant in her brief argues that Betty Bolen was only a nominal party and, therefore, not subject to the clear language of Rule 611 which states that "a party is entitled to call an adverse party." Irrespective of whether she was a "nominal party" Ms. Bolen was a party to this case. Although a trial court does have discretion in matters pertaining to the examination of witnesses, Rule 611 does not allow discretion in whether a party gets to call a witness. Rule 611 is very clear on this point. The trial court committed reversible error in refusing to allow Ms. McPherson to call the defendant as a witness.

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.

MARY MCPHERSON and
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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 25th day of July, 2011.



 WILLIAM J. AKERS
 State Bar #20