

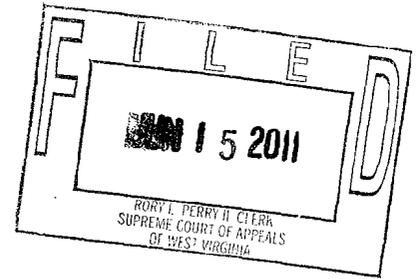
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket Number 11-0287

Mary McPherson and Thomas McPherson,
Plaintiffs Below, Petitioners

vs.) No. 11-0287

Betty Sue Bolen, as Administrator of the
Estate of Larry E. Bolen, Sr.,
Defendant Below, Respondent



RESPONDENT'S BRIEF

FILED BY:

Arthur J. Park (WV State Bar No. 11501)
David M. Kersey (WV State Bar No. 2018)
Brewster, Morhous, Cameron, Caruth,
Moore, Kersey & Stafford, PLLC
418 Bland Street
Post Office Box 529
Bluefield, West Virginia 24701-0529
(304) 325-9177
apark@brewstermorhous.com
dkersey@brewstermorhous.com
Counsel for Respondent

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III. Statement of the Case

Respondent generally agrees with Petitioners' summary of the proceedings in the Circuit Court. However, Respondent does not concede the accuracy of the following statements: (a) Larry E. Bolen, Sr. operated his vehicle recklessly; (b) Mary McPherson was violently thrown about the interior of her vehicle; and (c) Mary McPherson suffered severe and permanent injuries. [See Petitioner-Appellants' Petition for Appeal at 2 (hereinafter "Petitioners' Brief").] Any additional information is included, as necessary, in Respondent's argument section.

IV. Summary of Argument

As to the pre-existing condition issue, Mary McPherson testified on direct examination that she had been involved in only one prior motor vehicle collision, for which she received no treatment. However, Ms. McPherson's own medical records establish that she had been involved in three (3) prior collisions, one of which she treated for at least five (5) months with Dr. Gary Craft and during which time she complained of neck and back pain. The Plaintiffs' own expert, Dr. Randy Maxwell testified that any time a soft tissue injury results in symptoms that persist for more than three (3) months, it would be considered a "permanent injury" which would have continuing consequences to the patient. All Defendant did was simply connect the undisputed facts of Ms. McPherson's prior automobile accidents and Dr. Maxwell's unchallenged testimony regarding injuries from such accidents and made the argument that Ms. McPherson did have a pre-existing condition which the jury should consider or that Ms. McPherson never suffered a permanent injury.

With regard to the Plaintiffs' request to call Betty Sue Bolen as a witness, the only proffered reason was to examine Ms. Bolen about why her attorney had chosen not to call an expert witness or submit Mary McPherson for an independent medical evaluation, under Rule 35 of the West Virginia Rules of Civil Procedure. As the Court properly noted at the time Defendant's objection was sustained, such matters of trial strategy are not proper for jury consideration and were not within the actual knowledge of Ms. Bolen, who did not participate in determining trial strategy. Furthermore, Ms. Bolen was only a nominal party serving in her representative capacity as administrator.

V. Statement Regarding Oral Argument and Decision

Oral argument is unnecessary as the dispositive issues have been authoritatively decided and/or the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. W. Va. Rev. R. App. P. 18(a). A memorandum decision is appropriate under Rule 21(c) as the lower court did not err on a question of law and/or there was no prejudicial error.

VI. Argument

A. First Assignment of Error

The Petitioners' first assignment of error is that "[t]he 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."

[Petitioners' Brief at 3-4.]

The Plaintiff's own expert, Dr. Randy Maxwell testified that any time a soft tissue injury results in symptoms that persist for more than three (3) months, it would be considered a "permanent injury" which would have continuing consequences to the patient. [Testimony of Dr. Randy Maxwell, Trial Transcript at 126-27, 155.] Since Ms. McPherson had symptoms for more than three months following the present accident, Dr. Maxwell opined that she suffered a permanent injury. [*Id.* at 129.] However, Dr. Maxwell's opinion was based on the history provided by Ms. McPherson. [*Id.* at 148.] Ms. McPherson had "explained that she has no prior history of injury to her back or neck" and "[n]o prior incidents of headaches on a regularly [sic] occasion or anything like that." [*Id.* at 96; *see also* 156, 158-59.] Dr. Maxwell could not recall whether Ms. McPherson had reported any prior car accidents in her history. [*Id.* at 145-46.] Dr. Maxwell would "have to assume" that Ms. McPherson's injuries were caused by the present accident because he was unaware of any other possible cause. [*Id.* at 129.]

Ms. McPherson testified on direct that she had been involved in only one prior motor vehicle collision, for which she received no treatment, approximately ten to fifteen years before the present collision. [Testimony of Mary McPherson, Trial Transcript at 191-92.]

On cross, it was pointed out that Ms. McPherson had testified at her deposition that she had been in only one prior accident in 1993. [*Id.* at 236.] Defendant then entered a number of Ms. McPherson's medical records as exhibits in order to impeach the witness. [*Id.* at 237.] One such medical record was Exhibit 18 from Craft Medical Corporation date June 28th, 1999. [*Id.* at 238.] This record indicated that Ms. McPherson had been involved in a rear-end collision. [*Id.* at 238-39.] In the 1999 accident, Ms. McPherson suffered acute cervical neck strain, acute wrist strain, acute left

hand contusion, acute left shoulder strain, and acute dorsal back strain. [*Id.* at 239.] The medical records indicated that Ms. McPherson had received treatment through November 29, 1999, for a total of five months. [*Id.* at 241-42.] Ms. McPherson testified that she was not sure whether she had told Dr. Maxwell about the 1999 car accident or not. [*Id.* at 239-40.] Despite the clear records, Ms. McPherson testified that she had not actually received five months of treatment for her injuries from the 1999 accident. [*Id.* at 242.]

Defendant next entered Exhibit 19, a medical record from Princeton Community Hospital dated September 4, 2003. [*Id.* at 245.] This record indicated that Ms. McPherson had been involved in a rear-end collision and suffered pain in the neck, pain in the right knee, and confusion. [*Id.*] Ms. McPherson testified that she did not remember the 2003 car accident. [*Id.* at 246.] The records indicated that Ms. McPherson complained of headaches, neck pain, low back pain, and feeling confused after the 2003 accident. [*Id.*]

Ms. McPherson then testified that she had not told Dr. Maxwell about any of the three prior car accidents because “that length of time is hard to remember” and because she did not think she had received major treatment for her injuries. [*Id.* at 247.]

Q: You had forgotten about the three other rear end collision[s] that you had been involved in before you sued Mr. Bolen and then his Estate, is that right?

A: No response.

[*Id.* at 248.]

Before closing arguments, the Circuit Court held a hearing on the jury instructions. One of the jury instructions dealt with the pre-existing condition issue. [Trial Transcript at 311.] Defendant argued that the jury could reasonably infer that Ms. McPherson had suffered a permanent injury in 1999 since (a) Dr. Maxwell testified that

any injury that is symptomatic for three months is permanent, and (b) Ms. McPherson was treated for five months after her accident in 1999. [*Id.* at 312.] The Circuit Court ruled that there was sufficient evidence from the impeachment of Ms. McPherson and the three-month test of Dr. Maxwell for the jury to consider whether Ms. McPherson suffered from a pre-existing condition. [*Id.* at 313.]

In closing argument, Defendant asserted that Ms. McPherson did not sustain a permanent injury in the present accident and compared her current treatment to the treatment she received in 1999. [*Id.* at 386-87.] Defendant further argued that

The only evidence that you heard from the stand that the treatment was related to this accident came from Dr. Maxwell. He said, you know, based upon my education, my experience, and what she told me and what she told me, the history she gave me I think it's related. Of course, we established that she didn't tell him about the accident in 1993 which he asked her about, the injuries. She didn't tell him about the accident in 1999 and her injuries. And she didn't tell him about the accident in 2003 and the injuries. Now, Mr. Akers says well, you know, she's went three years without any treatment and she's fine. Well, she's gone for three years without any treatment now and they say she's permanent injured. I mean, you can't have it both ways. Dr. Maxwell said in his opinion and if you want to accept his opinion, that you get a neck and back injury that you have symptoms for three months you're going to have trouble with that for the rest of your life. Well, she had an accident in June of 1999 that we know that she went to see Dr. Craft, a medical doctor, and was on muscle relaxers and pain medication for five months at least from that wreck. And he said well that wasn't a perman . . . not the same as what Dr. Maxwell says that wasn't a permanent injury. She got over that one. So if it's three months or more from this accident and we should get money for it. But if it's three months or more from a prior accident that by the way I didn't tell my chiropractor about, well, I got over it. It's no problem. It can't be both ways, Ladies and gentlemen, and I think you see that.

[*Id.* at 389-90.]

All Defendant did, in closing argument, was simply connect the undisputed facts of Ms. McPherson's prior automobile accidents and Dr. Maxwell's unchallenged testimony regarding injuries from such accidents. Defendant made the argument that,

based on the evidence, (1) Ms. McPherson did have a pre-existing condition that the jury should consider, or (2) Dr. Maxwell's opinion regarding whether Ms. McPherson had suffered a permanent injury in the subject accident was not credible. As the Circuit Court pointed out, the medical records impeached Ms. McPherson's testimony, and it was reasonable for the jury to conclude that she was not a credible witness regarding the extent of her present injuries. [Rule 59 Hearing (Dec. 10, 2010) at p. 7-8, located immediately after Trial Transcript.]

On this particular issue, the Circuit Court of Mercer County correctly ruled as follows:

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 a 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 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.

[Order Denying Plaintiffs' Motion to Set Aside Verdict and Grant New Trial (Jan. 18, 2011) at Appendix 29.]

None of Petitioners' arguments establish any error, much less reversible error, by the Circuit Court. First, Petitioners assert that the trial court violated West Virginia Rules of Evidence 701 and 702. [Petitioners' Brief at 4.] However, the act of introducing medical records into evidence cannot possibly violate Rule 701 or Rule 702 regarding opinion testimony. Thus, it appears that Petitioners are arguing that Defendant should not have been allowed to ask Ms. McPherson about her prior injuries simply because she is not an expert. Obviously, prior injuries were within Ms. McPherson's personal

knowledge and were admissible, at the very least, to impeach Ms. McPherson's testimony on direct examination that she had been in only one previous accident and received no treatment.

Petitioners next argue that Defendant was required to call an expert witness and could not rely on "an unsupported allegation from the plaintiff's medical records." [Petitioners' Brief at 5.] It is important to note that Petitioners do not deny the authenticity of the medical records or allege that the medical records contain misstatements or typographical errors. An expert witness was not required to analyze the medical records as to the listed dates, the listed injuries, and the listed causes of injury (i.e. rear-end automobile accident). Defendant was also not required to call an expert witness when the jury could reasonably infer that (1) Ms. McPherson suffered a permanent injury in 1999 by receiving five months of treatment under Dr. Maxwell's three-month test, or (2) Dr. Maxwell's three-month test for permanent injury was not credible.

Finally, Petitioners argue that this Court should consider the rule for expert testimony on future damages. [Petitioners' Brief at 5.] However, Petitioners' citation to *Jordan v. Bero*, 158 W. Va. 28, 30, 210 S.E.2d 618, 623 (1974) is unpersuasive. The *Jordan* Court required plaintiffs to provide expert testimony regarding the future effects of an obscure injury. The purpose of the *Jordan* rule is to prevent over-compensating plaintiffs based on mere speculation and conjecture. At no point did the *Jordan* Court require defendants to call expert witnesses. Indeed, the cross-examination of an expert witness remains a key mode of discrediting the expert opinion or reducing the weight that the jury should place on such opinion. See *Gentry v. Mangum*, 195 W. Va. 512, 525-26, 466 S.E.2d 171, 184-85 (1995) (noting the preference for "vigorous cross-examination

. . . and rebuttal evidence” rather than excluding expert entirely). Defendant was simply not required to call her own expert witness and was free to rely on basic information from Ms. McPherson’s medical records and the three-month test espoused by Dr. Maxwell.

As discussed in Part B, Petitioners were able to fully present Defendant’s lack of an expert witness to the jury in closing argument, further reducing any alleged prejudice. [See Trial Transcript at 365, 370.]

Petitioners have failed to establish any error, much less reversible error, and the Circuit Court’s order must be affirmed.

B. Second Assignment of Error

Petitioners’ second assignment of error is that “[t]he 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.” [Petitioners’ Brief at 4.]

In their brief, Petitioners have correctly stated the general proposition that “[u]nder Rule 611 of the *West Virginia Rules of Evidence* [1985], a party is entitled to call an adverse party and interrogate that party by leading questions.” Syl. Pt. 1, *Gable v. Kroger Co.*, 186 W. Va. 62, 410 S.E.2d 701 (1991). However, the *Gable* rule does not apply to the present situation. First, a nominal party is not an “adverse party” for purposes of Rule 611 and *Gable*. As the federal courts have noted, “the question of who is an adverse party is not to be determined by who is the nominal party.” *Degelos v. Fid. & Cas. Co. of New York*, 313 F.2d 809, 815 (5th Cir. 1963) (analyzing Fed. R. Evid. 611). Specifically, the administrator of an estate is not considered an “adverse party” subject to being called as a witness and to leading questions. See *In re Bannion’s Will*, 162 N.W.

515, 515 (Minn. 1917). “Because a person appears as a party to the record, it does not necessarily follow that he may be called as a witness by any other party to the record in the litigation, and examined as if under cross-examination.” *Id.* “A nominal party, who has no real interest in the issue litigated, is not considered an adverse party to any one of the actual litigants.” *Id.* The rule allowing the calling of an adverse party to the stand was “intended to designate a person who has an actual interest in the event or issue of the litigation adverse to the one calling him for cross-examination, and not to one who is merely a nominal party, or acting in a representative capacity only.” *Id.* at 516. Here, Ms. Bolen was only a nominal party and was acting solely in her representative capacity as administrator of the estate of Larry E. Bolen, Sr.

Second, the right to call an adverse party to the stand is not unqualified and absolute. This Court has long-recognized that the trial court has broad discretion in matters pertaining to the examination of witnesses. *Syl., Dowler v. Citizens’ Gas & Oil Co.*, 71 W. Va. 417, 76 S.E. 845 (1912). Specifically, the trial court must always “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” W. Va. R. Evid. 611(a). In addition, the trial court may exclude relevant evidence when “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” W. Va. R. Evid. 403. Based on Petitioners’ proffer, discussed below, any testimony by Ms. Bolen would have resulted in the needless consumption of time, undue delay, and waste of time. Thus, the trial court did

not abuse its discretion under Rule 611(a) or Rule 403 by precluding Ms. Bolen from taking the stand.

Petitioners' only proffered reason was to examine Ms. Bolen about why her attorney had chosen not to call an expert witness or submit Ms. McPherson for an independent medical evaluation (IME), under Rule 35 of the West Virginia Rules of Civil Procedure.

THE COURT: Specifically what are you going to ask her?

MR. AKERS: I'm going to ask her why she didn't call any doctors to say this wasn't a permanent injury and she could testify to that.

MR. KERSEY: I object.

THE COURT: . . . I think that you can argue that but I think that's improper to question her about that.

[Trial Transcript at 264.]

At the Rule 59 hearing, Petitioners contended that they should have been allowed to ask Ms. Bolen "why they didn't have an expert witness" and perhaps "what discussions did she have with her husband regarding the wreck." [Rule 59 hearing (Dec. 10, 2010) at 4.] Such matters of trial strategy are not proper for jury consideration and were not within the actual knowledge of Ms. Bolen, who did not participate in determining trial strategy. In addition, any statement of Mr. Bolen would have been hearsay and of no relevance to the issues being tried, since his liability for the accident was stipulated.

In their appellate brief, Petitioners do not assert any specific subject of questioning that should have been allowed, but they wanted to "explore these areas." [Petitioners' Brief at 6.] Petitioners also concede that some matters of the proposed testimony would have been objectionable. [Petitioners' Brief at 6.]

Based on Petitioners' proffer at trial, the Circuit Court did not err by excluding the testimony of Betty Sue Bolen. Further, Petitioners' proffers in the Rule 59 hearing

and their appellate brief do not alter this conclusion. These proffers also indicate that a substantial right of the Petitioners was not at issue, so any error by the trial court on this point would not result in reversible error. *See* W. Va. R. Evid. 103(a) (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.”).

Further reducing any alleged prejudice, Petitioners were able to fully present the expert witness and IME issues to the jury in their closing argument.

Now the defense could have brought in here doctors, the same ones that they're trying to do smoke and mirrors on you to confuse you and to try to prove to you that this injury didn't occur this time that she has now, but they didn't. They chose not to do. They didn't bring in anybody. They had no expert. They could have brought these same people in to say it was the same injuries. They did not. They didn't do it because they know that her injuries were resolved . . . You ask yourself why they didn't bring in these experts or these other doctors to say these were the same injuries or that she was injured before this.

. . .

[W]e'd ask you to take all of that into consideration and come back with a verdict that will fully compensate her for the physical pain, the permanent injury, the mental anguish, the loss of her home life, her ability to enjoy her life and to . . . to be comfortable and where she was by . . . by everybody's issue the three years before this. Any issue she had prior to that cleared. Otherwise they'd had somebody in here to say something.

[Trial Transcript at 365, 370.]

Petitioners argued to the jury that Defendant had the opportunity to call her own expert witness and perform an independent medical evaluation but chose not to do so. As such, a substantial right of Petitioners was not affected by the trial court's exclusion of Ms. Bolen as a witness.

On this particular issue, the Circuit Court of Mercer County properly ruled as follows:

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.

[Order Denying Plaintiffs' Motion to Set Aside Verdict and Grant New Trial (Jan. 18, 2011) at Appendix 29-30.]

Ms. Bolen was a nominal party, Petitioners' proffer consisted only of trial strategy, and Petitioners were able to argue the IME issue to the jury in closing. Thus, the Circuit Court properly ruled on this issue, and its Order should be affirmed.

VII. Conclusion

For all the reasons stated herein, Respondent Betty Sue Bolen, as Administrator of the Estate of Larry E. Bolen, Sr. respectfully prays that the judgment of the Circuit Court of Mercer County be affirmed.

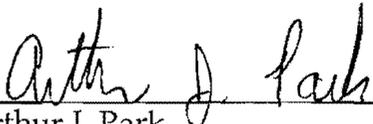
Arthur J. Park

Arthur J. Park (WV State Bar No. 11501)
David M. Kersey (WV State Bar No. 2018)
Brewster, Morhous, Cameron, Caruth,
Moore, Kersey & Stafford, PLLC
418 Bland Street
Post Office Box 529
Bluefield, West Virginia 24701-0529
(304) 325-9177
apark@brewstermorhous.com
dkersey@brewstermorhous.com
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Arthur J. Park, counsel for Respondent, in the above-styled appeal, hereby certify that on the 13th day of June 2011, I served the foregoing RESPONDENT'S BRIEF upon William J. Akers, counsel for Petitioners, by depositing a true copy thereof into the United States mail, postage prepaid, in an envelope addressed as follows:

William J. Akers, Esquire
Akers Law Office
1450 Main Street
Princeton, West Virginia 24740



Arthur J. Park