

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 13-0089

LINDSEY M. ARTHURS, DEFENDANT, BELOW
PETITIONER,

v.

EILENE R. POWNELL, PLAINTIFF, BELOW
RESPONDENT.

Circuit Court of Monongalia County, Civil Action No. 10-C-743

PETITIONER'S BRIEF

W. GUS SAINES, ESQ. (#5961)
McDERMOTT & BONENBERGER, PLLC
53 Washington Avenue
Wheeling, WV 26003
304/242-3220
wgsaines@mandblaw.com

Counsel for Petitioner

CHRISTOPHER M. WILSON (#8204)
LAW OFFICES OF CHRISTOPHER M.
WILSON, PLLC
300 Adams Street
Morgantown, WV 26554
304/333-1500
cmw@cmwilsonlaw.com

Counsel for Respondent

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I. ASSIGNMENTS OF ERROR

I. **The Trial Court Abused Its Discretion By Acting Under A Misapprehension Of The Law And The Evidence When It Ordered A New Trial On Damages For Respondent Eilene R. Pownell Based On Findings That Medical Specials Were Not Contested And The Verdict Was Inadequate.**

A. The Trial Court abused its discretion in granting a new trial on damages based on the inadequacy of the award of special damages as the damages were fairly contested by Petitioner and the Trial Court's finding that the special damages were not contested was clearly erroneous.

B. The Trial Court abused its discretion when it ordered a new trial on damages as the damage award was supported by the evidence that Respondent had a pre-existing condition and was only entitled to damages for the aggravation of that condition.

C. The grant of a new trial on damages was an abuse of discretion as the jury awarded damages consistent with evidence of a pre-existing condition and proper instructions from the Trial Court.

D. The grant of a new trial on damages based on a finding that the specials were uncontested was an abuse of discretion in that a reasonable juror could conclude otherwise evidenced by a failure to move or enter judgment as a matter of law on the issue of Respondent's special damages.

II. STATEMENT OF THE CASE

The subject automobile accident occurred on October 15, 2009 when the Respondent suddenly and without necessity stopped short on the entrance ramp to I-79 N. at Westover, Monongalia County, West Virginia, and the Petitioner, unable to stop, struck Respondent from behind.

The Respondent, a female in her mid-50's, suffered from a severe chronic impingement with full thickness tears of two tendons in the rotator cuff of her left shoulder before the accident. The condition was so bad that there was significant muscle atrophy as evidenced by an MRI scan completed approximately two months after the accident. (Appendix, pp. 67-103 and 157)

The Respondent claimed she had no pain in her left shoulder before the accident and that the condition of her shoulder and the need for treatment, including two surgical procedures, was caused by the negligence of the Petitioner.

From the inception of the case at bar the Petitioner disputed the extent of the injury actually caused by the accident as compared to the pre-existing and chronic condition of Respondent's shoulder before the accident. (Appendix, p. 4)

Prior to trial the Trial Court entered a Pretrial Order which specifically set forth the parties' contentions including that the accident may have been partially caused by Respondent's sudden/abrupt stop on the entrance ramp to I-79 and that the rotator cuff injury may not have been the result of the accident, but, instead, was pre-existing and chronic before the accident.

(Appendix, p. 4) The parties and the Trial Court were clearly apprised that Petitioner was disputing Respondent's claimed injuries and that Respondent may have been partially responsible for whatever injury she sustained.¹

A jury was empaneled without objection by either party. In fact, during the two-day trial there were no more than a few objections to the evidence proffered. There were no objections to evidence of Respondent's pre-existing shoulder condition and no objections to the instructions to be applied by the fact finders concerning Respondent's injuries and claimed damages.

The evidence presented by Petitioner and Respondent followed the predictable pattern set forth in the Pretrial Order, through the presentation of evidence, including expert testimony presented by both parties. There was no dispute that the medical specials were reasonable and necessary, only that the damages were not proximately caused by an injury sustained in the accident.

The Respondent's expert witness/treating surgeon, testified that there were chronic changes in Respondent's shoulder; that it is possible they were there before the accident; but, that in his opinion they were caused by the accident and that that Respondent needed surgery to correct the conditions. (Appendix, pp. 104-117) The first surgery was successful, as it fixed Respondent's shoulder, but adhesions developed from the first surgery and a second surgery was needed. The Respondent's expert considered

¹ The Petitioner admitted negligence in her Answer to Respondent's Complaint and at no time did Petitioner claim or argue that Respondent's negligence was greater than Respondent's.

whether Respondent's second surgery was a result of Respondent's failure to completely adhere to rehabilitation procedure as evidenced by the medical records, but in his opinion the second surgery was a result of the first surgery and ultimately of the subject motor vehicle accident. (Appendix, pp. 104-117.) Finally, he testified that all Respondent's injuries and treatment were related to the motor vehicle accident although he conceded that the chronic condition of Respondent's shoulder may have pre-existed the accident and that a statistically significant number of individuals in Respondent's age group had degenerative changes in the shoulder joint whether or not involved in an automobile accident. He also testified that post-surgical protocol was for six weeks off work, but Respondent took three months off work. The Petitioner argued that this was consistent with Respondent's refusal to adhere to the rehabilitation protocol which ultimately led to the second surgery on her shoulder. (Appendix, pp. 104-117 and 142-153)

Most important, considering the Trial Court's finding that damages were not contested, was the testimony of Petitioner's expert witness who testified the conditions for which Respondent treated pre-existed the accident and that the accident aggravated the pre-existing conditions as Respondent complained of pain after the accident. He also testified that Respondent would have needed surgery on her shoulder at some time in the future even if she had not been involved in the accident. Lastly, Dr. Agnew testified that failure to follow rehabilitation protocols could

lead to adhesions for which the Respondent had a second surgery. (Appendix, pp. 67-103 and 157)

During the trial, there were other issues raised by the testimony concerning Respondent's alleged pain, including failure to take pain medication; those issues were related to Respondent's credibility.

At no time in the trial of this matter through post-trial motions did the Respondent request or the Trial Court consider a motion for judgment as a matter of law on the issue of the special damages (medical bills and lost wages) pursuant to W.V.C.R. 50, although post-verdict, Respondent moved and the Court granted a new trial on the basis that the verdict was inadequate as special damages were not contested. (Appendix, pp. 1-3 and 43-47)

There was expert witness testimony presented at trial by Petitioner disputing the extent of Respondent's injury and supporting her position that it was nothing more than an aggravation of a pre-existing condition and not a new injury. (Appendix, pp. 72, 73, 79, 80, 85, 142-153 and 157)

In accordance with Petitioner's theory of the case, supported by evidence disputing the Respondent's special damages, the Trial Court properly instructed the jury not only on the eight different categories of losses that it should consider regarding Respondent's claims, but that if they find that Respondent had a pre-existing condition that the Petitioner was liable only for the aggravation. (Appendix, pp. 25-29)

The case was submitted to the jury on all issues, including the amount of Respondent's special damages and on Petitioner's defense of an aggravation of the pre-existing condition without a finding that the special damages were undisputed, uncontested, stipulated or that the same were found to be related to the accident as a matter of law.

Before the jury deliberated, the parties had the opportunity to argue their positions and again the differences in their two positions were discussed, i.e., whether the Respondent was entitled to all her damages or whether the Respondent had nothing more than an aggravation of a pre-existing condition. (Appendix, p. 145)

In order to highlight the reasonableness of her position, the Petitioner asked the jury to give the Respondent the entirety of her claimed lost wages even though the Respondent had been off work almost twice as long as usually recommended by Respondent's expert. (Appendix, pp. 146-147) The jury presumably awarded those damages, i.e., \$5,710.43. (The jury awarded another \$32,289.57 in special damages, for a total of \$38,000.00 in special damages.) (Appendix, p. 10) Respondent conceded that she had no future damages, so the jury was sent to deliberate on the disputed evidence of the parties on the issues of past damages and the comparative negligence of the Respondent.

The jury deliberated for approximately two hours before reaching a verdict. The jury verified that the verdict apportioning negligence 80% to Petitioner and 20% to Respondent and awarding special damages in the amount of \$38,000 and \$12,500

in general damages was correct. (Appendix, pp. 13-42) The jury was not convinced that the Respondent's husband had a loss of consortium claim. (Appendix, pp. 10-12)

The Respondent and her husband filed a timely motion for new trial on the basis that the special damages presented by Respondent were not disputed and as such the verdict was against "the clear weight of the evidence." (Appendix, pp. 43-47) The Respondent made no reference to the fact that the special damages were contested or that the position of Petitioner had always been that Respondent suffered nothing more than an aggravation of a pre-existing condition and Petitioner had presented expert testimony which disputed the injury sustained in the accident and the bills related thereto.

The Petitioner responded to the Respondent's motion by asserting the same position she had taken through trial that Respondent's medical condition pre-existed the subject accident, and that the jury award reflected that position. (Appendix, pp. 48-56)

The Trial Court granted the Respondent Eilene R. Pownell a new trial on damages with a finding that the medical specials were "uncontested" at least as to the first surgery, and the full amount of those medical specials were not awarded. The Trial Court made no mention of Petitioner's position through the litigation concerning the disputed special damages or that there was evidence contesting Respondent's damages. (Appendix, pp. 3, 72, 73, 79, 80, 85, 157 and 142-153)

The jury simply validated Petitioner's position with a verdict consistent thereto in awarding special damages for an aggravation of a pre-existing condition, awarding the Petitioner approximately half of Respondent's medical specials (taking into account Respondent's pre-existing condition) and Respondent's lost wages as well as a proper award for general damages.

III. SUMMARY OF ARGUMENT

The Order of the Trial Court granting the Respondent Eilene R. Pownell's motion for new trial on damages should be reversed. The Trial Court entered an Order for a new trial on damages based upon a misapprehension of the law and evidence in that the Respondent's special damages were contested throughout the litigation process through trial, without objection. The finding of the Trial Court was clearly erroneous and inconsistent with the record herein.

As the damages were properly contested and as the Petitioner presented evidence that the Respondent's medical condition was not caused by the accident, but instead was a pre-existing condition which was aggravated by the accident, the jury award was proper and should be reinstated².

The jury was properly instructed to consider Respondent's special damages in light of the evidence presented concerning Respondent's pre-existing condition and the jury found that only a portion of her medical specials were proximately caused by that aggravation. The instructions were provided to the jury without objection by the Respondent and the jury properly found, as finders of fact, that plaintiff did not prove the full amount of her special damages and that the Respondent should only recover for the aggravation of a pre-existing condition.

Finally, the Trial Court abused its discretion by finding that the special damages alleged by the Respondent were not

² Petitioner has already tendered the jury verdict plus all applicable pre and post-judgment interest to the Respondent.

contested, tacitly finding that no reasonable juror could draw a different conclusion from the evidence presented. Reasonable jurors could draw different conclusions concerning the nature of plaintiff's injuries and damages caused by those injuries, in light of the evidence presented of Respondent's pre-existing condition and evidenced by the fact that no effort was made by a party or the Trial Court to have judgment entered as a matter of law on the alleged "uncontested" damages.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rules of Appellate Procedure 18(a), the Petitioner submits that oral argument is necessary because none of the criteria set forth in the Rule are present at this time. Further, Petitioner submits that should oral argument be granted, it would be appropriate under Rule 19 of the West Virginia Rules of Appellate Procedure pursuant to Rule 19(a)(1-4) and for Memorandum Decision pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

ARGUMENT

I. The Trial Court Abused Its Discretion By Acting Under A Misapprehension Of The Law and Evidence When It Ordered A New Trial On Damages For Respondent Eilene R. Pownell Based On Findings That Medical Specials Were Not Contested And The Verdict Was Inadequate.

The standard of review of Trial Court's Order granting a new trial on damages is as set forth in Syl. Pt. 2 of Beverly v. Thompson, 735 S.E.2d 559, (W.Va. 2012):

We review the rulings of the Circuit Court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the Circuit Court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Id.

Although the ruling of a trial court in granting or denying a motion for new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or evidence.

Syl. Pt. 1, Rohrbaugh v. Wal-Mart Stores, Inc., 212 W.Va. 358, 572 S.E.2d 881 (2002).

After a two-day trial that was tried to the jury virtually without objection, the jury awarded the Respondent special damages, including medical bills and lost wages in the amount of \$38,000 and general damages in the amount of \$12,500. The Respondent sought \$67,946.64 in special damages. (Appendix, pp. 118-119) Respondent's injuries and damages were contested from the outset of the case, through the presentation of evidence, through argument and jury charge. Simply, the Petitioner defended this case based on the pre-existing condition of

Respondent's left shoulder which was the only alleged injury in the case. There was no dispute concerning the reasonable and necessary charges incurred for medical specials related to surgical procedures to plaintiff's left shoulder, but it was disputed whether those medical bills were related to an injury caused by the accident. The Petitioner never wavered from her position.

Petitioner proffered the objective evidence of the MRI done several months after the accident that revealed chronic longstanding injuries which were present long enough for the tendons to be pulled back and the muscles to atrophy. (Appendix, pp. 72, 73 and 157). The evidence was consistent with degenerative changes that were present before the accident of October 15, 2009, although it would be expected that an automobile accident would cause pain from this pre-existing injury. (Appendix, pp. 75 and 79) Finally, Petitioner's expert testified that the Respondent's pre-existing shoulder condition would have required surgery even without the accident. (Appendix, p. 80) Other evidence was presented concerning Respondent's failure to follow rehabilitation protocol and on the issue of lost wages, but the crux of the Petitioner's case at trial was that the Petitioner disputed and contested the medical specials related to Respondent's alleged left shoulder injury as same pre-existed the accident and the special damages were not all related to the aggravation caused by the accident.

The Trial Court's finding that the special damages were not contested was clearly erroneous.

The Petitioner herein consistently disputed the plaintiff's injuries as it related to her special and general damages:

In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered and those facts, which the jury might properly find under the evidence, must be assumed as true.

Syl. Pt. 3, Walker v. Monongahela Power Co., 147 W.Va. 825, 131 S.E.2d 736 (1963).

The jury is the arbiter of fact, including all reasonable inferences to be drawn from those facts:

It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony is conflicting.

Syl. Pt. 2, Toler v. Hager, 205 W.Va. 468, 519 S.E.2d 166 (1999).

In this case, the plaintiff claimed that all of her medical specials were causally related to the subject motor vehicle accident, specifically the two surgical procedures on her left shoulder, pursuant to the testimony of plaintiff's surgeon and expert, Dr. Bal. In addition, the Respondent cross-examined Petitioner's expert at length regarding his opinions and the evidence that the plaintiff's shoulder condition pre-existed the subject accident and was only aggravated thereby. The jury was clearly presented with a contested case of what injury and what medical bills were related to the specific injury actually sustained by the Respondent. Thus, when the Trial Court specifically found that the first surgery and the medical bills related thereto were undisputed and/or uncontested, the finding

was clearly erroneous and made under a misapprehension of the evidence in the case. The fact that the Petitioner did not dispute the reasonableness and necessity of the medical bills is not the same thing as disputing whether those bills were proximately caused by an injury sustained in the accident.

Even the plaintiff's expert, Dr. Bal, testified that while all of the conditions for which he performed surgery and treated the Respondent were causally related to the accident, that it was possible that the chronic degenerative conditions that were depicted in the MRI scan taken approximately two months after the accident, pre-dated the subject accident. (Appendix, p. 115) Dr. Bal testified under cross-examination that there was "no way to place a timeline on the amount of infiltration or fatty atrophy there" in response to a question concerning the chronic degenerative changes found on the MRI scan which was the gravamen of the Petitioner's defense in this case. (Appendix, p. 115). Dr. Bal testified it was possible that the findings objectively shown in the MRI scan were there before the subject accident. (Appendix, p. 114)

Based on the clear contested nature of Respondent's injuries and damages, the finding of the Trial Court granting the Respondent a new trial on damages was based on the clearly erroneous assumption that since the amount of medical bills presented were not contested that the "cause" of those bills was also uncontested. The evidence presented shows otherwise.

The fact that there was a dispute over the injuries allegedly sustained by Respondent and the concomitant dispute over what special damages related to plaintiff's injuries caused by the accident is nothing more than a classic personal injury case.

This is simply a matter of conflicting evidence regarding the degree of physical injuries suffered by the plaintiff. The jury was presented with adequate evidence from the opposing sides, and arrived at a conclusion.

Pauley v. Bays, 200 W.Va. 459, 464, 490 S.E.2d 61, 66 (1997).
(*per curiam*)

In Pauley, this Court in viewing a Trial Court's grant of a new trial on the issue of damages based on the inadequacy thereof first noted that the jury "was presented with conflicting evidence upon which it founded its conclusions." Id. It further noted, as in this case, the "defense was obviously designed to convince the jury that the Appellee was attempting to blame the ailments upon the accident rather than acknowledging the fact that they pre-existed the accident." Id. In this case, the Trial Court was clearly under a misapprehension of the evidence as the transcript reveals the conflicting evidence concerning Respondent's claimed injury, i.e., whether it was caused by the subject accident or whether it was a pre-existing condition.

"A negligent party cannot be held to respond in compensatory damages for that which was not the proximate result of his tort." Abdulla v. Pittsburgh & Weirton Bus Company, 158 W.Va. 592, 610, 213 S.E.2d 810, 822 (1975). The Trial Court's finding that the evidence concerning the Respondent's special damages was

uncontested was based on an improper and erroneous evidentiary foundation cited by the Respondent in her motion for new trial as evidence was clearly presented that Respondent's special damages were contested.

The Order of the Trial Court granting the Respondent a new trial on damages were based on misapprehension of the law as well.

The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was a proximate cause of the injury."

Syl. Pt. 2, Arbogast v. Ohio Valley Med. Corp., 214 W.Va. 356, 589 S.E.2d, 498 (2003) citing Syl. Pt. 2, Walton v. Given, 158 W.Va. 897, 215 S.E.2d 647 (1975).

This Court in Arbogast, reviewed a two-pronged Order from the lower court granting post-trial motion for judgment as a matter of law on the issue of liability and a new trial on the issue of damages to the plaintiff after a jury verdict for the defendant. This Court found that there was conflicting evidence concerning both the proximate cause of the alleged injury and damages and, with respect to the lower Court's two-pronged Order, found that:

If there is a conflict in the testimony on a material point, or if reasonable men may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony, the trial judge cannot substitute his conclusion for that of the jury merely because he would have voted for a different verdict if he had been on the jury.

Id. at 504.

This case was fairly tried to a jury with virtually no objection by either party to either the evidence presented or the legal theories the jury was asked to consider with respect to a verdict. As this Court found in Smith v. Cross, 223 W.Va. 422, 675 S.E.2d 898 (2009):

... A new trial will be reversed by this Court where it appears that the case, as a whole, was fairly tried and no error, prejudicial to the losing party, was committed during the trial.

Id. at Syl. Pt. 3.

Tacitly, the Trial Court found the jury's verdict with respect to special damages to be inadequate. There was no specific finding in the Court's Order concerning inadequacy only a factual finding that the damages for the first surgical procedure were uncontested or undisputed. (Appendix, p. 1)

In Sullivan v. Lough, 185 W.Va. 260, 406 S.E.2d 691 (1991) (*per curiam*), this Court reiterated the standard for considering the alleged inadequacy of a jury verdict, i.e., "A verdict of a jury will be set aside where the amount thereof is such that, when considered in light of the proof, it is clearly shown that they jury was missiled by a mistaken view of the case." Id. at Syl. Pt. 2.

The Trial Court properly instructed the jury without objection with respect to the law to be applied to the facts, including proximate cause, the Respondent's elements of damages, aggravation of a pre-existing condition, and finally that the jury should only consider damages for those conditions caused by

the accident and "not to consider damages for any such condition not so caused." (Appendix, pp. 23-29)

In this case, the Trial Court was under some misapprehension of the law given there was no finding that the jury was misled by a mistaken view of the case. See, Syl. Pt. 3, Marsch v. Am. Elec. Power Co., 207 W.Va. 174, 530 S.E.2d, 173 (1999) (*per curiam*). The jury was provided evidence to suggest that the Respondent had a pre-existing condition of her shoulder that was aggravated by the subject accident and was properly instructed on Petitioner's contentions without objection. The jury simply weighed the evidence and considered approximately one-half of the medical bills incurred by the plaintiff as being proximately caused by the subject accident and awarded the Respondent her lost wages per the Petitioner's argument regarding same. The verdict was for \$38,000 in special damages and \$12,500 in general damages. Thus, the jury award was not "inadequate" as a matter of law.

The first time the Court was asked to consider that Respondent's special damages were "uncontested" or "undisputed" was by motion made pursuant to West Virginia Civil Rule 59. (Appendix, pp. 43-47) The Respondent claimed that the damages were "against the clear weight of the evidence," and that none of the special damages of \$67,946.64 were disputed. (Appendix, pp. 43-47) If indeed that was correct, then Respondent and/or the Trial Court should have moved for and/or granted judgment as a matter of law on those damages. No such motion or ruling was made. In fact, the Court without objection from Respondent

charged the jury to determine what damages the plaintiff had suffered, including special damages.

The jury awarded a substantial amount in special and general damages that were consistent with the Petitioner's contention that the Respondent suffered from a pre-existing condition that was not caused by the accident, but only aggravated. In fact, the only difference in Respondent's condition after the accident was that she complained of pain. (Appendix, p. 79) The Respondent made a nice recovery from her aggravation of a pre-existing condition and was able to attend to her activities after the accident and treatment without restriction.

It was obvious the jury made credibility determinations pursuant to its warrant to do so under the law and found that the Respondent was not damaged as a result of the accident to the extent she claimed. Therefore, the jury verdict should be reinstated and the Trial Court's Order granting the Respondent's Motion for New Trial on damages be reversed.

- A. The Trial Court abused its discretion in granting a new trial on damages based on the inadequacy of the award of special damages as the damages were fairly contested by Petitioner and the Trial Court's finding that the special damages were not contested was clearly erroneous.

The Trial Court's finding that the special damages related to the first surgery were uncontested is clearly erroneous. The special damages related to the Respondent's injury caused by the accident were contested from the inception of the case through trial based on evidence submitted to the jury through the Petitioner's expert who testified that Respondent did not suffer a new injury in the accident, but only suffered an aggravation of

the pre-existing condition as she had subjective complaints of pain. (Appendix, pp. 72, 73, 79 and 80) The pre-existing condition would have resulted in surgery at some later time notwithstanding the subject accident.³

"In an appeal from an allegedly inadequate damage award, the evidence concerning damages is to be viewed most strongly in favor of the defendant." Syl. Pt. 1, Kaiser v. Hensley, 173 W.Va. 548, 318 S.E.2d 598 (1983). In this case, the evidence presented by the Respondent to contest Respondent's claim that all specials were related to an injury caused by the accident include inter alia the MRI depicting chronic changes with muscle atrophy and the testimony of the Petitioner's expert who testified that the MRI:

...revealed a series of chronic or long-standing changes which are not at all uncommon in Mrs. Pownell's age group.

(Appendix, p. 72)

... but a tear of at least two of the four rotator cuff tendons which had been present long enough that those tendons had pulled back from the normal place where they insert on the top of the humerus.

(Appendix, pp. 72 and 73)

And where not only had the tendons pulled back, but the muscles that attached to those tendons had slowly atrophied, that is, they had become smaller and where there was healthy tissue before, it becomes more of a fatty tissue than a muscular tissue.

...

³ The Trial Court did not have at its disposal the transcript in the case at the time the ruling was made on the Respondent's Motion for New Trial.

These are changes that take years to develop and they are very common.

(Appendix, p. 73)

In response to Petitioner's question, ...

the findings of the MRI were consistent with degenerative changes that had begun and had begun before the accident of October 15, 2009 and had become symptomatic after the accident?

...

Dr. Agnew testified:

I think that fairly summarizes my opinion. The changes on this MRI were not new. In fact, there were no new changes on the MRI.

...

I would expect it to hurt after a motor vehicle accident and that appears to be exactly what happened to Ms. Pownell."

(Appendix, p. 75)

Dr. Agnew further went on to testify that:

From a structural standpoint, the fact that the shoulder has healed rotator cuff tendons now means that the shoulder is better than it was the day before the accident.

...

It has improved by having those degenerative tendons fixed and then having the surgeon prove that they healed.

(Appendix, p. 80)

Lastly and most importantly to Petitioner's defense on special damages incurred by Respondent, Dr. Agnew opined that even without the subject accident, "[t]his rotator cuff would have required repair." (Appendix, p. 80)

The evidence clearly and unequivocally shows that the Petitioner disputed and contested the special damages of the Respondent. The only element of damage to which Petitioner conceded was the Respondent's lost wage claim. (Appendix, p. 146) The Petitioner specifically asked the jury to award the lost wages as a means of establishing her credibility in front of the jury notwithstanding evidence that Respondent should have returned to work in six weeks rather than three months. (Appendix, p. 111) The jury awarded all of the lost wages as it awarded a total of \$38,000 in specials, including lost wages and medical specials. In fact, it appears as though the jury felt that approximately half of Respondent's claimed medical bills were caused as a result of the aggravation of Respondent's pre-existing condition, i.e., \$32,289.57. In addition, the jury properly awarded past pain and suffering in the amount of \$12,500, given the uncontested evidence that the automobile accident caused the Respondent to have pain.

Considering all of the evidence presented by Petitioner contesting Respondent's special damages, as well as the consistent position that the Petitioner took throughout the trial of this matter it is clear that "when every reasonable and legitimate inference in favor of the defendant's position and fairly arising from the evidence is assumed as true," the jury performed the task of attributing only those damages they believe were actually caused by the accident. Fredeking v. Tyler, 224 W.Va. 1, 6, 680 S.E.2d 16, 21, citing Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1983) and Walker v. Monongahela Power Co.,

147 W.Va. 825, 131 S.E.2d 736 (1963). As the Trial Court's finding that the special damages were uncontested is clearly erroneous the Order granting the new trial should be reversed and the jury verdict reinstated.

B. The Trial Court abused its discretion when it ordered a new trial on damages as the damage award was supported by the evidence that Respondent had a pre-existing condition and was only entitled to damages for the aggravation of that condition.

As set forth herein, the Petitioner's position with respect to Respondent's claims herein were consistent. That is, that the Respondent did not suffer a new injury in the accident but, instead, an aggravation of a severe chronic and degenerative pre-existing condition that would have required surgery whether or not the accident occurred. (Appendix, pp. 72, 73, 75, 77 and 80)

The Respondent argued in light of the testimony of Dr. Agnew that given plaintiff's age and the condition of her shoulder that if she would not have had the accident, she still would have had surgery on her shoulder. (Appendix, p. 80) The jury was then instructed that if they found that the Respondent had a pre-existing condition she was entitled to damages only for the aggravation thereof. (Appendix, pp. 28 and 29) These instructions were given without objection by the Respondent. The jury awarded approximately half of the plaintiff's medical specials and an award for past pain and suffering and mental anguish and other general damages. There has been no issue raised that the instructions provided by the Court were improper.

The sole basis of the Court's order concerning a new trial for the Respondent on damages was that the special damages were

inadequate as the evidence of same was uncontested. As this Court recently found in the case of Shoemaker v. Everett, No. 11-1652 (West Virginia Supreme Court, November 26, 2012) (Memorandum Decision), in reviewing an alleged inadequate award wherein the reasonableness of the medical specials was not disputed, but the cause of same was disputed, to the extent that the jury found that the Respondent had pre-existing medical conditions unrelated to the subject accident, an award of less than the stipulated medical bills (approximately one-half) was not inadequate. Id. In essence, we have a replay of the Shoemaker case presented herein in that reasonableness of the bills was not disputed, just the cause of the bills.

The verdict of the jury in this case was considered and reasonable given the overwhelming evidence of the pre-existing condition from which Respondent suffered prior to the accident and given the testimony of Dr. Agnew that the Respondent would have probably had surgery for her shoulder at a later date notwithstanding the subject motor vehicle accident. As in Shoemaker, there was no dispute over the amount of the medical bills incurred by the Respondent, the dispute being whether plaintiff's injury which led to these bills was caused by the subject accident as opposed to a pre-existing condition.

The Court abused its discretion when it ordered a new trial on damages for Respondent as any finding that the verdict was inadequate was an abuse of discretion.

C. The grant of a new trial on damages was an abuse of discretion as the jury awarded damages consistent with evidence of a pre-existing condition and proper instructions from the Trial Court.

The Trial Court instructed the jury on the burden of proof. (Appendix, pp. 23-24) The mere fact that plaintiff brought suit for damages does not establish the right to those damages. (Appendix, p. 24) The Petitioner admitted she was negligent. (Appendix, p. 25) The jury was to consider eight different items of losses, including the nature of the bodily injury sustained by the Respondent. (Appendix, pp. 26 and 27) Finally, the Court instructed on the nature of any pre-existing condition that may have been aggravated by the accident and that the jury was to award only those damages for an injury or condition proximately caused by the accident. (Appendix, pp. 26, 27, 28 and 29)

Simply, the jury was instructed, per the evidence submitted, to consider what injury the plaintiff suffered in the accident and what damages were attributable to that injury. In accordance with those instructions, the jury considered the evidence presented including the overwhelming evidence that the plaintiff's left shoulder was in a horrible condition prior to the accident and that the only aggravation thereto was pain associated with the accident.

The Petitioner argued, that while the Respondent may have been negligent, the Petitioner was not asking the jury to deny her recovery (Appendix, p. 144) or that she wasn't injured in some way in the accident (Appendix, p. 145). Petitioner asked the jury to consider the pre-existing condition by arguing "that

condition was there before October 15, 2009." (Appendix, p. 145) This was done without objection by the Respondent and the jury properly considered evidence, the inferences that could be drawn from that evidence and fashioned an award that was consistent with the Petitioner's position that not all Respondent's damages were as a result of the injury actually caused by the accident. The Respondent was not entitled to all of her medical specials, only those the jury believed were made necessary by an injury proximately caused by the accident.

The Trial Court abused its discretion in awarding the new trial on damages due to a misapprehension of the law as the jury utilized proper instructions to fashion an appropriate award to the Respondent.

- D. The grant of a new trial on damages based on a finding that the specials were uncontested was an abuse of discretion in that a reasonable juror could conclude otherwise evidenced by a failure to move or enter judgment as a matter of law on the issue of Respondent's special damages.

The Trial Court set aside the verdict of the jury and awarded the Respondent a new trial on damages because, an amount in excess of the jury award was undisputed or uncontested. (Appendix, pp. 1-3) If indeed that were the case, there should have been a motion filed or a ruling made as a matter of law that the special damages were uncontested or undisputed and caused by the subject accident. No such motion or ruling was made in this case, evidencing the fact that reasonable minds could differ concerning the Respondent's injuries and damages caused by the accident in light of the evidence presented by both parties.

A verdict ". . . will not be set aside as inadequate unless the disparity between the amount of the verdict and the evidence makes it apparent that the verdict was not based upon the evidence, but was a result of prejudice, partiality, passion or corruption on the part of the jury or that they were influenced in their conclusions by some mistaken view of the case." Syl. Pt. 2, Coakley v. Marple, 152 W.Va. 68, 159 S.E.2d 378 (1968). In this case, "quite the opposite appears to be true; the trial proceedings, as it relates to the jury's part in it, were unexceptional." Kesner v. Trenton, 158 W.Va. 997, 10110, 216 S.E.2d 880, 888 (1975).

This is not a case where the jury failed to consider evidence in the case, including the medical specials proffered by the plaintiff. As noted above, this was a straightforward, yet subtle personal injury case tried fairly to an impartial, educated and intelligent jury who did the job they were asked to do after considering the evidence and the instructions on the law provided by the Court. It is obvious from the juror's verdict that they considered the medical specials presented in light of the Respondent's condition then considered the degree of pain and suffering caused by the aggravation of the pre-existing condition. The Petitioner did not make any claim for future damages and as such the jury did not consider same. In fact, the Respondent presented evidence that the Respondent's shoulder condition was better after the accident than it was before the accident due to the severe degenerative and chronic changes in

her left shoulder, including the tears in the rotator cuff.
(Appendix, p. 80)

This Court noted in the wrongful death context, "inadequacy" alone is insufficient to overturn a jury's verdict and the meagerness or inadequacy of the verdict is "not sufficient reason to set it aside; to be inadequate at law, a verdict must have resulted from error in the case or from juror's misconduct." Id. at Syl. Pt. 7. This, of course, presumes that there was evidence presented upon which a reasonable jury could make certain conclusions concerning damages. In this case, that evidence was before the jury and as noted herein, there was no argument, finding or ruling regarding the "undisputed" and/or "uncontested" nature of any of plaintiff's damages.

"Our legal system expressly reserves for the jury 'the right to weigh the testimony of all witnesses, experts and otherwise.'" Bressler v. Mulls Grocery Mart, 194 W.Va. 618, 621, 461 S.E.2d 124, 127, citing Tabor v. Lobo, 186 W.Va. 366, 368, 412 S.E.2d 767, 769 (1991) (per curiam). "Moreover, a jury is not bound to accept as conclusive the testimony even of an unimpeached witness." Tabor, supra, at 368, 769.

As reasonable minds concluded, based on the evidence presented, the Respondent's injury was not wholly sustained as a result of the accident and either were the medical specials claimed. The damages were contested and ultimately the jurors' verdict was not inadequate as it considered all of the elements presented and awarded a substantial amount in both special damages and general damages notwithstanding the claim by the

Respondent after the verdict, that the damages were undisputed or uncontested.

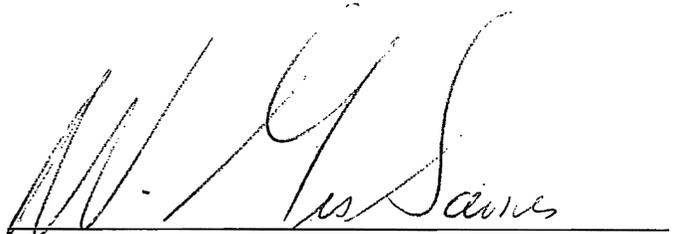
The damages were disputed and reasonable minds could differ, that is why the case was given to the jury to decide as opposed to a judgment as a matter of law on the medical specials presented and thus, the Trial Court's Order granting the Respondent a new trial on damages should be reversed. (See W.Va.R.C.P. 50)

CONCLUSION

The Trial Court was acting under a misapprehension of the law and evidence and abused its discretion when it awarded Respondent a new trial on damages. The record shows that the Petitioner maintained a constant and consistent position that Respondent did not suffer a new injury and only aggravated a preexisting condition that caused her subjective complaints of pain which required some medical treatment. The jury determined past medical specials were approximately one-half of Respondent's claimed medical specials with an appropriate award for general damages for pain and suffering related to her aggravation/pain.

The Trial Court's adoption of Respondent's position that the specials were uncontested or undisputed is clearly erroneous based on evidence presented by Petitioners' expert, the objective diagnostic evidence and partially supported by the Respondent's own expert.

This matter was fairly tried in front of a competent, properly instructed jury without objection and as such this Court should reverse the Trial Court's order granting the Respondent a new trial on damages and reinstate the jury's verdict.

A handwritten signature in black ink, appearing to read "W. Gus Saines". The signature is written in a cursive style with a horizontal line underneath it.

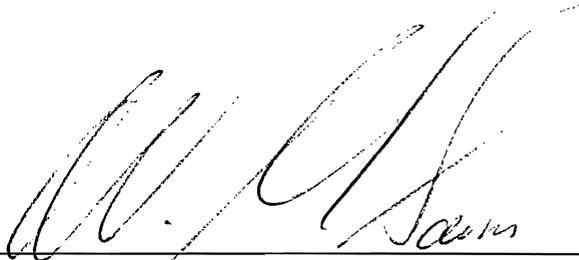
Of Counsel for Petitioner
Lindsay M. Arthurs

W. GUS SAINES, ESQ. (#5961)
McDERMOTT & BONENBERGER, P.L.L.C.
53 Washington Avenue
Wheeling, WV 26003
(304) 242-3220 Phone
(304) 242-2907 Fax
WGSaines@MandBlaw.com

CERTIFICATE OF SERVICE

The foregoing PETITIONER'S BRIEF was served upon the following via facsimile and regular U.S. Mail this 15th day of April, 2013:

Christopher M. Wilson, Esq.
Facsimile: (304) 333-1501
300 Adams Street
Fairmont, WV 26554
(Counsel for Plaintiffs)



Of Counsel for Petitioner
Lindsay M. Arthurs

W. GUS SAINES, ESQ. (#5961)
McDERMOTT & BONENBERGER, P.L.L.C.
53 Washington Avenue
Wheeling, WV 26003
(304) 242-3220 Phone
(304) 242-2907 Fax
WGSaines@MandBlaw.com