IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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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 REPLY 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. STATEMENT OF THE CASE

The Petitioner's evidence was that Respondent suffered from a pre-existing condition and not a new injury and thus, not all of Respondent's medical treatment was caused by the accident. The jury agreed and awarded Respondent almost one-half of her medical bills and another $12,500 in general damages.

If there was any doubt this was the nature of Petitioner's case, it was made clear in the Court's Pre-Trial Order which reads in pertinent part:

> "The Defendant believes that the injuries alleged by the Plaintiff may not be the result of the subject motor vehicle accident ... [t]he MRI completed seven months after the accident and upon which the Plaintiff's own physicians have relied, reports that the tear of the rotator cuff was 'chronic' 'due to the significant muscle atrophy' and the Plaintiff's own physicians cannot date the time of the injury ..." Appendix, p. 5.

The evidence presented by the Petitioner at trial, elicited from expert witnesses and proffered by uncontroverted objective evidence proved that the Respondent's shoulder (the "only" injury allegedly sustained by the Respondent) had "chronic," "degenerative" tears. (Appendix, pp. 79 and 110). The Respondent's shoulder "had a series of chronic or longstanding changes which are not at all uncommon for Respondent's age." (Appendix, p. 72). The tears to the rotator cuff "had been present long enough that those tendons had pulled back from the normal place ..." (Appendix, p. 73). The MRI findings "were consistent with 'degenerative' changes that had begun ...

before the accident ..." (Appendix, p. 75). "The changes to MRI are not new ... there were no new changes to the MRI." (Appendix, p. 75). "We have a rotator cuff that is no longer functional in total before the accident ... it appears that at least two (tendons) had degenerative tearing." (Appendix, p. 79). "At some point, this rotator cuff would have required repair ..." (Appendix, p. 81). Even the Respondent's expert conceded that Respondent's shoulder condition was "chronic" which "requires a period of time to pass before it occurs" and that conditions could have occurred before the accident. (Appendix, p. 110 and p. 114).

The Respondent now concedes that the pre-existing injury instruction given by the Court was proper; the same having been supported by extensive and credible evidence proffered by the Petitioner. (Respondent's Response, p. 16) However, when Respondent filed her Motion for New Trial, Respondent characterized the evidence presented by Petitioner as "not disputing the $67,946.64 in specials." (Appendix, p. 43) This was an inaccurate characterization and unfortunately led the Trial Court to an erroneous evidentiary finding.

Ultimately the Trial Court misapprehended the evidence presented by Petitioner on the issue of pre-existing condition and abused its discretion in awarding the Respondent a new trial on damages based on the inadequacy of the special damages awarded.

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 pursuant to Rule 19(a)(1-4) of the West Virginia Rules of Appellate Procedure and for Memorandum Decision pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

II. ARGUMENT

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, Elaine R. Pownell, Based on Findings that Medical Specials Were Not Contested and the Verdict Was Inadequate.

The case was fairly tried, virtually without objection, on the theory that Respondent's injury pre-existed the accident and Petitioner was only responsible for an aggravation of that condition. The Trial Court properly instructed the jury concerning pre-existing condition.

Despite spending her entire brief in response arguing that there was no evidence presented on the pre-existing condition or that Petitioner did not try her case based on a theory of pre-existing condition, the Respondent ultimately conceded that the Court properly instructed the jury on the Petitioner's theory of pre-existing condition. (Respondent's Response, p. 16). There was overwhelming evidence cited by Petitioner from the transcript on this issue, that Respondent suffered no new injury in the accident.

Given the objective evidence of the pre-existing condition depicted in the MRI scan that was done seven weeks after the subject accident and given the extensive expert testimony concerning the pre-existing nature of Respondent's only alleged injury from the

accident, the jury simply apportioned damages based on an aggravation of that pre-existing condition.

Seemingly, Respondent's only argument in support of the Trial Court's ruling on the Motion for New Trial is to contrast the use of the words "degenerative" versus "chronic" to characterize Respondent's pre-existing condition. The record is clear that both of those words were used by counsel and witnesses as evidenced by Respondent's question to Petitioner's expert, Dr. Agnew, to wit: "then with the degenerative changes that were noted that even pre-dated the accident ...?" (Respondent's Response, p. 7). The doctor ultimately agreed there were degenerative and chronic tears in Respondent's shoulder that pre-dated the accident. (Appendix, p. 81 and Respondent's Response, p. 7).

Reviewing the specific evidence from the transcript juxtaposed against the specific finding in the Trial Court's Order granting a new trial, i.e., "Defendant did not contest the amount of the medical bills . . . related to the first surgery," reveals there was no evidence presented or concession made by Petitioner concerning the damages allegedly incurred as a result of the first surgery. (Appendix, p. 3) and (Appendix, pp. 72, 73, 75, 79 and 81). Petitioner's expert opined that Respondent's shoulder condition predated the subject accident and that the condition of Respondent's shoulder that pre-dated the accident would have needed surgery

whether or not she was involved in the subject accident. (Appendix, p. 81) Petitioner made no argument and presented no evidence that any particular damages alleged by Respondent (except the lost wages) should be awarded by the jury.

The only matters cited by Respondent from the record reveal that Petitioner did not dispute the cost and necessity of Respondent's medical care. The evidence cited by the Petitioner was that all special damages (save the lost wages of $5,710.43) were not caused by or related to the accident given the Respondent's pre-existing injury. Thus, there is simply no evidence from either party that the cost of the first surgery was uncontested as found by the Trial Court. (Appendix, p. 3).

As set forth in Syl. Pt. 2, Witt v. Sleeth, 198 W. Va. 398, 481 S.E.2d 189 (1996) "... the trial court's ruling will be reversed on appeal when it is clear that the trial court acted under some misapprehension of the law or evidence." Id. The Trial Court in this matter clearly misapprehended the precise evidence presented on the issue of Respondent's pre-existing condition and erroneously adopted Respondent's unsupported version of that evidence; as opposed to the evidence set forth in detail in the transcript, and which was virtually unchallenged by Respondent in her Response herein.[1]

[1] The Trial Court did not have the transcript at the time of the ruling on the Motion for New Trial.

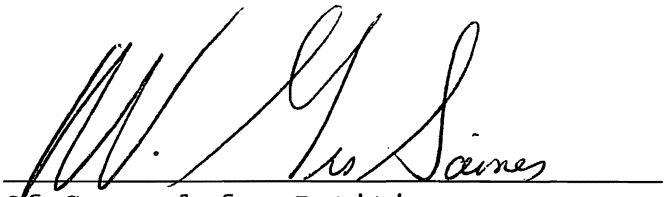
Similarly, Respondent's reliance on argument of counsel as being supportive of the Trial Court's ruling on her Motion for New Trial is misplaced. Argument of counsel is not evidence, i.e., "Your verdict shall be based upon the evidence as you heard it from the witness stand and as you recollect it, not as the lawyers or this Court may recollect it." (Appendix, p. 16) The only concession Petitioner made was to Respondent's lost wages that were presumably awarded by the jury given the $38,000 award to Respondent for special damages with an appropriate amount for general damages in the amount of $12,500. (Appendix, p. 40).

There is no legal or evidentiary basis for a finding that the verdict rendered in this case was inadequate. A verdict in excess of $50,000 in a case where Respondent had a pre-existing, severe, chronic, degenerative, two-tendon tear of the rotator cuff, was not so low that "reasonable men could not differ about its adequacy." Syl. Pt. 2, Fullmer v. Swift Energy Co., 185 W. Va. 45, 404 S.E.2d 534 (1991). The jury was obviously convinced by the evidence presented that Respondent had a pre-existing condition that was aggravated by the accident and awarded her that portion of the special damages actually caused by the accident with an additional award of general damages, including pain and suffering.

Similar to the case of Shoemaker v. Everett, No. 11-1652 (W.Va. Supreme Court, November 26, 2012), this was a case where the bills related to Respondent's treatment were not disputed, just the cause of the bills was disputed, based on evidence of a pre-existing condition. Id. Similarly, Respondent has completely failed to address the clear evidence proffered by Petitioner through her expert, cited herein, and was unable to point to any evidence concerning the "uncontested" special damages. There is no such evidence, as the defense theory was clearly and repeatedly stated from the outset; i.e., the Respondent suffered from a pre-existing condition, not a new injury, and not all of Respondent's medical treatment was caused by the accident.

CONCLUSION

The Trial Court's misapprehension of the evidence and the overwhelming evidence contrary to the ruling made by the Trial Court which was not disputed by Respondent herein, evidences an abuse of discretion which entitles Petitioner to a reversal of the Trial Court's Order granting Respondent a new trial on damages and an Order reinstating the verdict rendered by the jury in this case.



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 REPLY BRIEF** was served upon the following via facsimile and regular U.S. Mail this 19th day of June, 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