

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**LINDSEY M. ARTHURS, Defendant Below,  
Petitioner**

vs.) No. 13-0089

**EILENE R. POWNELL, Plaintiff Below,  
Respondent**

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**FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA  
CIVIL ACTION NO. 10-C-743  
HON. RUSSELL M. CLAWGES, JR.**

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**RESPONSE OF EILENE R. POWNELL TO PETITION FOR APPEAL**

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## I. QUESTIONS PRESENTED

The questions presented, as framed by the Petitioner, are as follows:

**I. Whether 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. Whether 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. Whether 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. Whether 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. Whether 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.

## STATEMENT OF THE CASE

The automobile collision at issue in this matter occurred on October 15, 2009, on the entrance ramp to I-79N at Westover, Monongalia County, West Virginia. At the time of the collision, the Respondent was attempting to enter the lanes of traffic when she was prohibited from doing so by traffic in both the travel lane and the passing lane at the point of entry. Additionally, there was a disabled vehicle on the right shoulder of the interstate so the Respondent had no alternative but to decrease her speed and nearly stop at the end of the entrance ramp. The Petitioner was traveling in a position directly behind the Respondent and was unable to stop. Consequently, the Petitioner's vehicle struck the Respondent's vehicle from behind. The Respondent's vehicle was pushed out into the lanes of traffic and she came to rest with her vehicle facing oncoming traffic in the northbound lanes.

From the first contact of the emergency response officials on scene, the Respondent's only complaint was that of left shoulder pain. Accordingly, the Respondent was transported via ambulance to Ruby Memorial Hospital where she was evaluated and treated. Ultimately, the Respondent was treated by the Department of Orthopedics at West Virginia University. After first attempting to address her injury with non-surgical measures, it was decided that surgery would be performed to correct what the treating physician, Dr. George Bal, characterized as a "large tear" involving two of the four tendons that comprise the rotator cuff. (Appendix, p. 110)

The first surgery was performed on February 5, 2010. (Appendix, p. 110) Following the first surgery the Respondent was off from work for a period of time during which she was undergoing a course of physical therapy as prescribed by Dr. Bal. In assessing the Respondent's post-operative progress, Dr. Bal determined that, despite the fact that the

Respondent was compliant with the physical therapy regimen, it would be necessary to perform a second surgery designed to alleviate “adhesive capsulitis”, or adhesions, that had developed following the first procedure. Dr. Bal opined that the necessity for the second surgery was derived solely by virtue of having undergone the first surgery and that there was no action or inaction on the part of the Respondent that had caused the development of the adhesions. (Appendix, p. 111) The second surgery was performed by Dr. Bal on October 19, 2010. The Respondent again participated in a course of physical therapy and was ultimately released from Dr. Bal’s care in February 2011. (Appendix, p. 111)

During the trial of this matter, the jury heard the testimony of the parties, the investigating officer, an EMS worker, the Respondent’s treating physician (Dr. Bal), the Respondent’s treating physical therapist, the Respondent’s work supervisor and the Petitioner’s expert witness (Dr. Agnew). The Respondent testified that, prior to the collision on October 15, 2009, she had never suffered from left shoulder pain. It is important to note that, despite the Petitioner’s contention that the injury to the Respondent’s shoulder pre-existed the collision, Dr. Bal testified that the Respondent stated that she had not suffered from shoulder pain prior to October 15, 2009, (Appendix, p. 113) and that, had the shoulder injury pre-existed the collision, the Respondent would most likely have been symptomatic. (Appendix, p.115) With regard to the Respondent’s injuries, the treating physician (Appendix, p. 112) and treating physical therapist both testified that the Respondent was compliant with her treatment regimen. Indeed, even the Petitioner’s expert witness testified that the Respondent seemed to have been compliant during the recovery process. (Appendix, p. 101)

The Petitioner's expert, Dr. Kelly Agnew, testified that both the first and second surgical procedures were necessary following the October 2009 collision:

- Q. So there is no—there is no dispute, the fact that Ms. Pownell did not have any pain prior to the accident then had pain in the shoulder immediately after the accident, then with the degenerative changes that were noted that even predated the accident, that the surgical procedure was necessary.
- A. I don't dispute that at all. The surgical procedure was absolutely necessary and well performed.
- Q. As well as the second?
- A. Yes.

(Appendix, p. 81)

Upon further questioning of the Petitioner, Dr. Agnew repeated his opinion during the following line of questioning:

- Q. After—after your examination of Ms. Pownell, as well as your review of the records, including the photographs of the accident, the accident report, the records of Doctor Monteleone, the physical therapist records for about 11 months, Doctor Manchin's records just recently, Doctor Bal's records, the operative notes and all of that, your opinion concerning Ms. Pownell's condition today is what, Doctor?
- A. Ms. Pownell was most appropriately treated for the pain she developed after the motor vehicle accident. The surgeries performed in her case appear to have been performed expertly. Healing was proven at the time of the second surgery as it pertains to the torn rotator cuff. And I would consider her clinical result to be excellent.

(Appendix, p. 84)

Lastly, the Petitioner's expert testified that the Respondent's pain was caused by the October 15, 2009, collision and that the treatment rendered was both medically necessary and reasonable:

- Q. With regard to the treatment that was rendered to her by the orthopedics department here at the University, is it your opinion that that treatment was medically necessary?
- A. Yes.
- Q. And that it was reasonable in nature?
- A. Yes, and well executed.
- Q. And, again, just to make sure, you do believe that the pain with which Mrs. Pownell presented subsequent to October 15<sup>th</sup> 2009 was caused by the collision itself?
- A. Yes, I think that is fair. Anyone with that MRI appearance who is involved in a collision could be expected to have shoulder pain. I think it is a very reasonable conclusion.

(Appendix, p. 103)

During the course of the trial, the jury was presented with an itemized statement of special damages that included \$62,236.21 in medical bills and \$5,710.43 in lost wages. (Appendix, pp. 118-119) The Respondent made no claim for future damages.

During closing arguments, the Petitioner discussed the Respondent's first surgery as follows: "We are not disputing the fact that she needed the surgery. We are not disputing the fact of the cost of the surgery, even though Doctor Bal didn't know what it was. We are not disputing the cost of the physical therapy. We are not disputing the cost of any of that. (Appendix, pp. 151-152)

With regard to the second surgery, the Petitioner stated the following: "And the second surgery was needed and Doctor Agnew, who had all of the information in that book, all of it, not just his visits with her, not just that, everything. He said it was necessary and reasonable as a result of the adhesions. We are not blaming her for those." (Appendix, p. 148)

The Petitioner summed up the trial with the following:

Ladies and gentlemen, again, I understand that closing arguments certainly aren't evidence. The judge instructed you that as opening were not, either. The bottom line is, I told you exactly what the case was about on opening. It was undisputed as to the charges. It was undisputed what treatment that she got. It was undisputed that it was reasonable and necessary for what she had, which was an aggravation of a condition that she had before the accident that led to her surgeries. It did. We told you all of that. It is undisputed.

(Appendix, p. 152)

The jury then proceeded to deliberate the case. After an hour and twenty-five minutes, the jury posed three questions to the Court regarding the applicability of insurance to the verdict, to which the Trial Court correctly advised them that they were not to consider such issues in answering the questions in the verdict form. (Appendix, pp. 37-39) After only several additional minutes of deliberation, the jury ultimately returned with a verdict in which they apportioned twenty percent fault to the Respondent and proceeded to award the Respondent the sum of \$38,000.00 in specials and \$12,500.00 in general damages. (Appendix, pp. 39-42)

The Respondent filed a Motion for New Trial within the time period prescribed by the West Virginia Rules of Civil Procedure (Appendix, pp. 43-47) to which the Petitioner filed a Response in Opposition (Appendix, pp. 48-52). After convening a hearing upon the same, the Trial Court entered an Order Granting Plaintiff's Motion For New Trial<sup>1</sup> on December 13, 2012. (Appendix, pp. 1-3) It is from that Order that the Petitioner now appeals.

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<sup>1</sup> The Order specifically states that the new trial is granted solely on the issue of damages.

## **SUMMARY OF ARGUMENT**

The Trial Court did not err in granting the Respondent's Motion for New Trial in this matter. The Trial Court entered an Order permitting a new trial on the issue of damages only and ruled that the findings of the jury with regard to the issue of fault would stand. In doing so, the Trial Court correctly considered the evidence presented at trial and found that the verdict returned by the jury on the issue of damages was contrary to the clear weight of the evidence.

Accordingly, the Trial Court did not abuse its discretion in granting the requested relief.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to West Virginia Rules of Appellate Procedure 18(a)(4), the Respondent submits that 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.

## ARGUMENT

### **I. The Trial Court Did Not Abuse Its Discretion When It Ordered A New Trial On Damages For Respondent Eilene R. Pownell Based On Findings That The Jury Verdict Was Inadequate.<sup>2</sup>**

Rule 59(a) of the West Virginia Rules of Civil Procedure provides that “[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law....” In determining whether to grant a new trial, the trial judge has authority to weigh evidence and consider the credibility of witnesses. Coleman v. Sopher, 459 S.E.2d 367, 194 W.Va. 90 (1995).

It is well established that [a] motion for new trial is governed by a different standard than a motion for a directed verdict, and when a trial judge vacates a jury verdict and awards a new trial, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses; if the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. W.Va. Rules of Civ. Proc., Rule 59; Shiel v. Ryu, 506 S.E.2d 77, 203 W.Va. 40 (1998); Summers v. Martin, 486 S.E.2d 305, 1999 W.Va. 565 (1997), rehearing refused; Witt v. Sleeth, 198 W.Va. 398, 481 S.E.2d 189 (1996); Morrison v. Sharma, 200 W.Va. 192, 488 S.E.2d 467 (1997).

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<sup>2</sup> The four subparts to the question presented as framed by the Petitioner require the same analysis by the Respondent in this section. Accordingly, rather than repeat the analysis under each subpart, the Respondent intends for the entirety of this section to be equally applicable to the four subparts listed by the Petitioner.

The circuit court's role in determining whether sufficient evidence exists to support a jury's verdict was set forth in Syllabus Point 5 of Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1984), wherein this Court held:

In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

In addition, this Court has previously held that:

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

Now that the matter is before this Court, the standard of review of the 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.*

The Petitioner argues that the Trial Court erred by acting under an erroneous view of the evidence presented at trial and also by abusing its discretion by applying a misapprehension of the law to its decision to permit a new trial on the issue of damages. It is imperative to note that the Trial Court had the benefit of hearing the testimony of all of the witnesses presented at trial and not just the two physicians, Drs. Bal and Agnew, with regard to the role of any possible pre-existing condition on the part of the Respondent. The Respondent, the Respondent's husband, and the Respondent's co-worker all testified that the Respondent had never experienced- or complained of experiencing- pain in her left shoulder prior to October 15, 2009. The Petitioner's own expert agreed that there was no indication of prior complaints and/or treatment involving the Respondent's left shoulder in any of her medical history. (Appendix, p. 99)

Despite the overwhelming evidence produced at trial to the contrary, the Petitioner now attempts to justify the misguided verdict of the jury by relying upon pure speculation as to whether or not the Respondent had a pre-existing shoulder condition prior to the collision on October 15, 2009.

The only suggestion of a pre-existing condition with the Respondent's left shoulder comes from the interpretation of Dr. Agnew of the following finding in the Respondent's MRI report dated December 13, 2009: "A large full thickness tear of the supraspinatus and infraspinatus is present with tendon retraction of 3.2 cm. This is likely chronic as seen by the significant muscle atrophy." (Appendix, p. 157).

Keeping in mind that this observation is made nearly two months following the date of the collision, the reference to a chronic condition is explained by Dr. Bal as follows:

- Q. Can you explain for us what the word “chronic” means in that context?
- A. That means that they see atrophy and fatty degeneration in the muscles of those two tendons. So the tendons had torn and retracted back and then the muscles had atrophied. Any, typically, that requires a period of time to pass before it occurs.
- Q. And in patients such as Mrs. Pownell, what is generally that time period?
- A. In studies it’s been shown four to six weeks.

(Appendix, p. 110).

The Petitioner undertook great efforts, both at trial and in the presentation of the instant appeal, to characterize the findings of the December 13, 2009, MRI as “degenerative.” The word degenerative is not found in the MRI report. (Appendix, p. 157) Moreover, Dr. Bal does not characterize the condition as degenerative. In questioning from the Petitioner, Dr. Bal recognizes the existence of a degenerative condition as a possibility but it is important to note that, even in questioning Dr. Bal, assuming arguendo that a degenerative condition existed, the Petitioner recognizes that the collision would have been responsible for making the condition much worse:

- Q. And, again, going back to my earlier question concerning the size and the type of tear, it is reasonable to assume that Ms. Pownell may have had some sort of degenerative condition, including a tear of the rotator cuff that became much larger and symptomatic, after the motor vehicle accident in October of 2009?
- A. That is a possibility.

(Appendix, p. 115)

While the Petitioner's expert witness, Dr. Agnew, may have disputed the timeframe in which chronic changes can appear in a rotator cuff injury, the one thing that he did not dispute was that the Respondent was completely asymptomatic prior to October 15, 2009. At no time does the Petitioner's expert take issue with the Respondent's reports of first experiencing left shoulder pain immediately following the collision. Indeed, Dr. Agnew specifically states, as previously referenced herein, that it is perfectly reasonable to believe that the collision was the genesis of the Respondent's pain and that the treatment rendered to her was both medically necessitated by the collision and reasonable in nature. (Appendix, p. 103)

With regard to proximate cause for the injury sustained and treatment rendered to the Respondent, Dr. Bal opined that, based upon his examination and treatment of the Respondent, as well as the subjective information gleaned from her, the medical condition with which she presented was consistent with an injury sustained in October 2009. (Appendix, p 113). Moreover, Dr. Bal opined that the medical treatment rendered to the Respondent was both medically necessary and reasonable. (Appendix, p. 113) Dr. Agnew's testimony did not dispute Dr. Bal's opinion in that regard. (Appendix, p. 103)

The Trial Court correctly instructed the jury regarding the possibility of a pre-existing injury when it informed the jury that, "[i]f you should believe that the plaintiff, Eilene Renee Pownell, was afflicted with some condition at the time of the injury for which she might have a predisposition to some or all of the troubles from which she is now suffering, but was otherwise in good health and the injury sustained in the collision developed or aggravated this condition and predisposition, then the plaintiff is liable—excuse me, the defendant is liable for the plaintiff, Eilene Renee Pownell's condition or her aggravation." (Appendix, p. 28)

The Petitioner aptly characterized the evidence that would be presented during opening statements when it was stated that the Respondent "...had become symptomatic and it was as a result of the automobile accident." (Appendix, p. 65) Again,

Petitioner argues that the Respondent sought and the Trial Court granted a new trial based upon the inadequacy of the verdict. The Respondent would note that the Motion for a New Trial was filed on the grounds that the verdict rendered by the jury was contrary to the clear weight of the evidence. (Appendix, pp. 43-47)

This Court has previously held that:

When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion. Syllabus Point 3, in part, In re State Public Building Asbestos Litigation, 193 W.Va. 119, 454 S.E.2d 413 (1994).

In granting the Respondent's Motion for New Trial, the Trial Court noted that, at the very least, the combined specials for the first surgery and the lost wages amounted to approximately \$46,000.00. It is imperative to note that the lost wages, which were expressly referenced by the Petitioner at trial when it was stated that the entire amount of the Respondent's lost wages should be awarded, were comprised of time periods after both the

February 2010 and October 2010 surgeries. Despite the Petitioner's contention on appeal that the medical bills were contested, the fact that the Petitioner consistently informed the jury that they were not disputing that the Respondent was injured, that the Respondent sought treatment because of the injury, that the treatment was both necessary and reasonable and that she suffered lost wages- which were comprised of periods of time following both surgeries- highlights the inconsistency of the Petitioner's position on appeal.

Again, the Trial Court found the verdict to be inconsistent with the evidence adduced at trial and that evidence, again, is clearly summarized by the Petitioner in the following exchange from Petitioner's closing argument:

"It is undisputed that she suffered some injury in this accident. It is undisputed. Not only did I tell you that in opening, I am telling you now in closing, despite what counsel wanted you to believe about our case and to tell you what I said. I am telling you that it is undisputed that Ms. Pownell was injured. She had immediate shoulder pain after the accident and she was treated for that pain." (Appendix, p. 145)

A few minutes later, the Petitioner again addresses the issue of the special damages presented and tells the jury the following:

" We are not asking you anything different than what we told you on opening. It is really undisputed. She missed work. She missed work for three months after this surgery. Doctor Bal testified he usually has them back in six weeks. She took three months.

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The lost wages should be awarded to Ms. Pownell. She lost the work. Even though Doctor Bal's six weeks, forget about that.

She took three months. The lost wages should be awarded. We have no problem with that whatsoever, ladies and gentlemen.

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She was hurt in this accident. There is no question about that. It was undisputed, she was hurt. She had no complaints before and she had complaints later.”

(Appendix, pp. 146-147)

This Honorable Court has a long history of holding that, in considering whether a new trial is warranted, the trial Court is uniquely situated to weigh the evidence presented, and if the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, may set aside the verdict, even if supported by substantial evidence, and grant a new trial. Toothman v. Brescoach, 465 S.E. 2d 866, 195 W.Va. 409 (1995); Lamphere v. Consolidated Rail Corp., 557 S.E.2d 357, 210 W.Va. 303 (2001); Faris v. Harry Green Chevrolet, Inc., 572 S.E. 2d 909, 212 W.Va. 386 (2002).

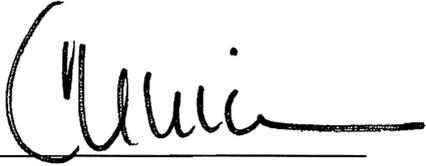
In the matter now before this Court, the Trial Court correctly utilized its unique situation to weight the evidence presented at trial in response to the Respondent’s duly filed Motion for New Trial pursuant to W.Va. R.C.P. 59. In doing so, the Trial Court undertook thorough and thoughtful consideration of the totality of evidence presented at trial and ultimately determined the jury’s verdict to be contrary to the clear weight of that evidence. At no time in its consideration or decision does it appear that the Trial Court operated under a mistaken view of the facts. As a result of its finding, the Trial Court acted well within its discretion in granting the Respondent’s Motion for New Trial and the Order Granting Motion for New Trial should remain undisturbed.

## CONCLUSION

Subsequent to the proper filing of the Respondent's Motion for New Trial, the Trial Court appropriately utilized its authority under Rule 59 of the W.Va. Rules of Civil Procedure as well as the related case law setting forth the reasons for which new trials have been granted pursuant to the Rule in conducting an examination of the evidence presented at trial. Based upon its unique situation, the Trial Court correctly found the jury verdict rendered in this matter to be contrary to the clear weight of the evidence presented. As a result, the Trial Court did not abuse its discretion in granting the Respondent's Motion for New Trial on the issue of damages.

For the foregoing reasons, the Order of the Circuit Court of Monongalia County granting the Respondent's Motion for New Trial should be affirmed.

EILENE R. POWNELL  
Respondent,  
By Counsel,

A handwritten signature in black ink, appearing to read "C. Wilson", with a horizontal line underneath.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LINDSEY M. ARTHURS, Defendant Below,  
Petitioner

vs.) No. 13-0089

EILENE R. POWNELL, Plaintiff Below,  
Respondent

**CERTIFICATE OF SERVICE**

I, Christopher M. Wilson, Counsel for the Respondents, do hereby certify that a true and actual copy of the foregoing "Response of Eilene R. Pownell to Petition for Appeal" was served upon the following via facsimile and U.S. Mail this 30<sup>th</sup> day of May, 2013:

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