No. 26355 -- Kent A. Gerver and Billie Jo Gerver v. Aurelio Benavides, M.D.

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DEBORAH L. McHENRY, CLERK
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OF WEST VIRGINIA

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Starcher, C. J., concurring:

I concur with the majority, and believe that the circuit court overstepped its bounds in this case by setting aside the jury's verdict. The parties in this case fought hard on the issue of liability -- plaintiff Kent Gerver contended that defendant-doctor Aurelio Benavides breached the standard of care, and the defendant responded that while something may have gone wrong during the vasectomy, the procedure was performed normally and within the standard of care exercised by doctors performing vasectomies.

The key here is that the defendant acknowledged that *something* went wrong with plaintiff Kent Gerver's vasectomy. The fight during the trial was over whether the defendant was at fault for what went wrong. The defendant suggested that adverse results happen when surgery is performed. Infections occur, wounds don't heal properly, scarring forms that causes pain, or the plaintiff may have had some other medical problem that was causing his pain. Something went wrong, and the jury had to sort out if the defendant was responsible.

What the defendant never really disputed was *how far* things went wrong. Counsel for the defendant pretty much conceded that the plaintiff was in a lot of pain. Counsel for the defendant never even requested their own medical examination of the plaintiff, or their own functional capacity test to see if the plaintiff's problems were that

severe. Counsel for the defendant put all their eggs in the liability basket. They gave no attention to the issue of damages. In fact, it appears that they offered no evidence regarding the plaintiff's damages.

So when the jury decided that the defendant doctor *was* responsible for the plaintiff's injury, the jury merely looked at the evidence provided by the plaintiffs' counsel to figure out how much money to award the plaintiff. The record contains Mr. Gerver's entire employment file detailing his job as a machinist for General Electric, making over $35,000 a year. It also details the extensive pension benefits he could have received from the company had he not been forced to quit working, and shows that he would have to pay $449.00 per month to continue providing health insurance for himself and his family. The jury was also given detailed lists from numerous drug stores showing the pain-killing drugs purchased by the plaintiff in the past, and the cost of those drugs now and in the future.

And from what I can tell in the record, the defendant never objected to the admission of any of these records. The jury took these records into the jury room when they deliberated.

The jury also heard how the plaintiff walked with pain, sat for long periods with pain, couldn't have intercourse without pain, went from being a machinist at work to sitting at an assembly line packing boxes with a bag of ice in his lap, and later having to stop working because his drug dosage made him unsafe to work around. The jury also heard how he was clinically depressed because of the disastrous impact the pain had on his life.

The jury was therefore not operating in the dark on the issue of damages. The jury worked with what it had, and it had a lot.

The record suggests that the plaintiff offered to settle the case for an amount within the defendant's policy limits, and apparently for an amount well under $2 million. The defendant gambled, believing that he would receive a jury verdict, but he lost.

It was only after the circuit court entered its judgment order that counsel for the defendant began his discovery on the issue of damages. Counsel for the defendant claims that some concerned (probably disgruntled) citizens were upset that the jury awarded Mr. Gerver such a significant sum of money, and called to tell the defendant that the plaintiff was in nowhere near $2.2 million worth of pain. Mind you, these concerned citizens weren't sitting on the jury, and didn't hear the evidence that the jury heard.

So, the defendant hired a post-trial private investigator to follow the lead provided by these "concerned" citizens, and the private investigator proceeded to spy on the plaintiff with a video camera in hand. Much of the videotape taken by the investigator contains footage of the plaintiff sitting in a chair. Sitting in bleachers. Sitting on a riding lawnmower. Shuffling to throw away a piece of trash. Bending over to look underneath a car. And lots of footage of the plaintiffs' son playing baseball. Nothing really remarkable.[1]

[1]Actually, the footage made the hair on the back of my neck go up. To think that for 2 months, a private investigator sat around filming Mr. Gerver wherever he went -- and if he couldn't film Mr. Gerver (because he wasn't around), he filmed Mrs. Gerver, or their children -- it somehow seems almost subversive -- un-American.

Contrary to the suggestions made by my dissenting colleague, the videotape does *not* show the plaintiff doing gymnastics, or doing splits, or springing about -- you should see it! It shows a man obviously in some discomfort, moving very slowly, shuffling about with his family. Shuffling with a weedwacker strapped over his shoulder. Shuffling with plastic chairs in hand that weigh a whopping 7 to 8 pounds. Sitting with his hands tucked between his legs, protecting his "parts." All while under the effects of methadone.

The circuit court felt that the videotape contradicted Mr. Gerver's courtroom testimony, because Mr. Gerver apparently was in great discomfort during the trial, shuffled to the witness stand, and cried when he described his pain. I agree that a trial judge is the best witness of a witness's demeanor, and for that reason this Court usually is highly deferential to a trial judge's decision to grant a new trial.

But the circuit court, in the transcript of the June 8, 1998 hearing, admitted that it didn't have a transcript of the trial, and that fact is important. The trial transcript reveals that Mr. Gerver testified that *he had reduced his dosage of methadone* to help him to testify more clearly. The circuit court apparently never considered this factor when considering why the plaintiff's demeanor was different during trial than on the surveillance videotape. More importantly, the circuit court only looked at the defendant's controversial, disputed video tape evidence, without giving the plaintiffs the opportunity to present rebuttal evidence, contrary to our holding in the Syllabus of *Meadows v. Daniels*, 169 W.Va. 237, 286 S.E.2d 423 (1982).

The circuit court seems to have never even looked at the plaintiffs' video tape, which shows the plaintiffs' counsel's 8-year-old daughter, with her broken arm in a cast, carrying the same chairs and using the same weedwacker used by Mr. Gerver in the defendant's surveillance video. The defendant's surveillance video might have been useful evidence had it been produced prior to trial, which it could have been. By "useful," I mean it might have assisted the jury in its determination of Mr. Gerver's credibility. But, as the majority points out, newly discovered evidence affecting only credibility cannot be the basis for a new trial.

The jury's verdict -- hard fought for by the plaintiff -- is supported by the evidence. Counsel for the defendant simply dropped the ball, and didn't think damages were that big an issue during discovery. The defendant thought damages were important after the trial, but could only come up with the ridiculous surveillance videotape -- which, when viewed with a careful eye, supports the jury's verdict!

To discredit this verdict is to discredit our American jury system, a jury system in which many of our citizens participate each year.

For all of its defects, the jury that our ancestors fought so hard to attain is a remarkable institution. What it actually means is that we have decided to give the ultimate say-so in our justice system to a diverse group of ordinary citizens -- our fathers and mothers, our sisters and brothers, our co-workers, and our friends. We have decided that it is better to place our faith in the common-sense of ordinary citizens than in a trained class of professional jurors.

As a trial judge for 20 years, and as an appellate judge for an additional 3 years, I have watched many juries work, and I share this faith more than ever. I believe that justice is too important to be left to lawyers and judges alone. Justice must remain in the day-to-day hands of ordinary people. This is a an extraordinary idea, deeply rooted in our past -- an idea and a history of which we can be proud. It is an idea that -- if we stick with it -- can give us optimism and confidence for the future.

I believe that the circuit court clearly abused its discretion in granting a new trial, and therefore concur in the majority's opinion.