

FILED

Maynard, Justice, dissenting:

December 16, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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I dissent because I do not believe the trial court abused its discretion in setting aside the jury's verdict and awarding a new trial based upon fraud.

God forbid that a trial actually be a search for the truth! Even though that is precisely what a trial should be, that is not how we currently think about trials. If you want an eye-opening test of public perception about the justice system, go out on the street and simply ask the first ten people you encounter if they think a trial today is a search for the truth and see what answers you get. In this case, thanks to the use of a video camera, however, the trial court below discovered the truth. Unfortunately, a majority of this Court is not happy with the discovery. Consequently, the majority manipulated some arcane points of law to reinstate a verdict in excess of two million dollars to a plaintiff who most likely is guilty of perpetrating a fraud on the trial court.

The verdict below was set aside and a new trial awarded after the trial court viewed the demeanor of the appellant, Kent Gerver, on surveillance videotape. The trial court found that the appellant's demeanor on videotape contrasted markedly with the appellant's demeanor at trial. According to the trial court, during trial, "Kent Gerver moved

about the courtroom gingerly, projecting very obvious discomfort and pain. When he testified he unsuccessfully fought back tears as he described the devastation this pain had wreaked upon his life, his family, his relationship with his wife.” Specifically, the appellant testified that, as a result of his injury, his life was reduced to feeding his dog, taking short walks, reading the newspaper and watching television. The appellant’s wife testified that she and the appellant no longer socialize because the appellant wants to be alone most of the time. The surveillance videotape, in stark contrast to his testimony, shows the appellant weed-whacking, lawn-mowing, attending sporting events, carrying objects, climbing bleachers and allowing small children to sit on his lap. Accordingly, the trial court concluded that “[t]he person depicted in the video and the person the Plaintiff represented himself to be, through his words and actions before the jury, are two different persons.” The Court’s rejection of this videotape evidence is especially troubling when one considers that the appellant’s entire case was almost wholly predicated on his demeanor and subjective complaints of pain.

Further, while this Court could view the surveillance videotape contained in the record, it did not see the appellant’s demeanor at trial. The trial court, on the other hand, watched the appellant’s behavior throughout the trial and compared it with the contents of the videotape. Obviously, the trial court is in the better position to determine whether the surveillance videotape amounted to proof of fraud. Accordingly, there is absolutely no sound

legal reason for this Court to second-guess the determination of the trial court under the facts of this case.

This is a case in which the appellant was awarded \$2,168,431.11, not including prejudgment interest, for subjective evidence of pain later shown to be fraudulent. So not only will we allow the appellant to present a fraudulent picture to a jury, we will give him a two million dollar reward for so doing.

Based upon the evidence of fraud and other error, the trial court quite properly vacated the verdict and awarded a new trial. There is no reason to reverse this judgment. Accordingly, I dissent.