

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Thomas A. Shoemaker Jr., by Hilda Grace Shoemaker,
Personal Representative of Thomas A. Shoemaker Jr.,
Plaintiff Below, Petitioner**

FILED

November 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-1652 (Mineral County 09-C-114)

**Matthew Collin Everett,
Defendant Below, Respondent**

MEMORANDUM DECISION

Petitioner Hilda Grace Shoemaker, plaintiff below, as Personal Representative of Thomas A. Shoemaker Jr., appeals from the decision of the Circuit Court of Mineral County in her wrongful death and negligence lawsuit. The appeal focuses on two orders: (1) the November 12, 2010, adverse partial summary judgment order dismissing her wrongful death claim; and (2) the November 2, 2011, order denying petitioner's motions for new trial and additur on her negligence claim. Petitioner is represented by Harley O. Staggers Jr. Respondent Matthew Collin Everett, defendant below, is represented by Tiffany R. Durst and Nathaniel D. Griffith.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On October 19, 2007, Respondent Everett was driving when he lost control of his vehicle, crossed the center line, and came to rest in the lane of travel of a vehicle driven by Thomas Shoemaker. Mr. Shoemaker's vehicle collided with respondent's vehicle. No serious injuries were apparent at the scene of the accident. However, Mr. Shoemaker reportedly suffered orthopedic injuries that were caused or aggravated by this collision. Mr. Shoemaker was seventy-nine years old at the time of the collision.

Twenty-two months after the collision, on August 21, 2009, Mr. Shoemaker died from a heart attack. The cause of death listed on his death certificate was "acute myocardial infarct" caused by "years" of "coronary artery disease."

Thereafter, petitioner, as Mr. Shoemaker's personal representative, filed suit against respondent asserting (1) negligence for causing the car accident and (2) wrongful death. With regard to the wrongful death claim, petitioner asserted that the bodily injuries Mr. Shoemaker received during the car accident limited his ability to be physically active, and this lack of physical activity contributed to his subsequent heart attack and death.

By order entered November 12, 2010, the circuit court granted partial summary judgment for respondent on the wrongful death claim. The court found that petitioner failed to produce evidence to rebut the cause of death listed in the death certificate or to present a genuine issue of material fact that could causally link Mr. Shoemaker's death by heart attack with the orthopedic injuries he allegedly sustained in the auto accident almost two years earlier.

Petitioner's claim of negligence in causing the collision went to a two-day jury trial in July of 2011. Respondent argued that his vehicle had malfunctioned, causing it to unexpectedly downshift and causing him to lose control while approaching a curve on the wet road. The responding police officer did not issue any citations. Respondent further argued that Mr. Shoemaker's alleged pain and suffering, loss of enjoyment of life, and many of his medical bills, were the result of Mr. Shoemaker's pre-existing medical conditions or his advancing age—not this accident.

The jury found that respondent was fifty-five percent negligent and Mr. Shoemaker was forty-five percent negligent for the collision. The jury awarded petitioner \$9,000 for past medical expenses that the jury found Mr. Shoemaker had incurred as a proximate result of the injuries received in the collision. The jury awarded zero damages for pain and suffering, mental anguish, and loss of enjoyment of life, and the jury found that respondent had not engaged in wanton, willful, or reckless conduct. After trial, the court apportioned the award to reflect Mr. Shoemaker's comparative negligence and accordingly awarded petitioner \$4,950 in damages and \$1,300.75 in pre-judgment interest, plus post-judgment interest. In a lengthy post-trial order, the circuit court denied petitioner's motions for new trial and for additur.

Wrongful Death Claim

In her post-trial "Plaintiff's Motion for a New Trial" filed with the circuit court on August 26, 2011, petitioner challenged various issues arising from the trial and verdict on her negligence claim, and she also challenged the November 12, 2010, partial summary judgment order that had dismissed her wrongful death claim. In its post-trial order, the circuit court declined to revisit the partial summary judgment order. The circuit court concluded that petitioner was really asking for an order to alter or amend the partial summary judgment order, which the court concluded should have been filed within ten days of entry of that order per Rule 59(e) of the West Virginia Rules of Civil Procedure.

In her first assignment of error on appeal, petitioner argues that the circuit court erred by ruling that this portion of her post-trial motion was untimely. Upon a review of the appellate record and the parties' briefs, we conclude that this is simply a non-issue for appeal. The partial summary judgment order did not dispose of all claims between the parties; did not state that it was immediately appealable pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure; and did not approximate a final order in its nature and effect. Accordingly, even assuming *arguendo* that the circuit court was incorrect when it declined to reconsider the partial summary judgment order, that procedural ruling could have no effect on petitioner's right to appeal the partial summary judgment order after entry of the final judgment, or on our ability to review that summary judgment order on appeal.¹

¹ We note that although the circuit court did not undertake a reconsideration of its partial summary judgment order, the court nevertheless stated that it was still "confident in the appropriateness" of the order.

We apply a de novo standard of review to the entry of summary judgment. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Upon a review of the parties' arguments and the record on appeal, we find that petitioner simply failed to produce evidence establishing that the automobile accident almost two years earlier was a cause of Mr. Shoemaker's death by heart attack. Petitioner's medical expert opined that the vehicle accident and resultant injuries caused Mr. Shoemaker to be much less physically active, and that the accident resulted in Mr. Shoemaker having "disc bulges" that were the " 'straw that broke the camel's back,' and tipped [Mr. Shoemaker] into a pattern of spinal stenosis." However, petitioner failed to produce evidence suggesting a causal link between the reduced activity and spinal stenosis in a seventy-nine-year-old man, and a fatal heart attack caused by "years" of "coronary artery disease." Accordingly, we find no error in the circuit court's entry of partial summary judgment on the wrongful death claim.

Amount of Damages for Past Medical Expenses

In her second assignment of error, petitioner argues that the jury's award of \$9,000 in past medical expenses caused by respondent's negligence was inadequate and the circuit court should have granted her post-trial motion for additur. Petitioner argues that the parties had stipulated to the authenticity of \$16,430.99 in medical bills, and that she authenticated an additional \$5,312.50 in medical bills at trial. Respondent notes that the parties expressly did *not* stipulate that any of the bills were incurred as a result of injuries allegedly received in the accident. Respondent argues that petitioner failed to prove that a majority of the medical bills were incurred as a result of the accident, particularly in light of Mr. Shoemaker's age and preexisting medical conditions. Respondent argues that petitioner failed to submit into evidence *any* of the underlying medical records that would have shown what medical care had resulted in the bills.

"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). Moreover, "[w]e will not find a jury verdict to be inadequate unless it is a sum so low that under the facts of the case reasonable men cannot differ about its inadequacy." Syl. Pt. 2, *Fullmer v. Swift Energy Co., Inc.*, 185 W.Va. 45, 404 S.E.2d 534 (1991). "An appellate court will not set aside the verdict of a jury, founded on conflicting testimony and approved by the trial court, unless the verdict is against the plain preponderance of the evidence." Syl. Pt. 1, *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720 (1998) (citations omitted). After considering the record on appeal and viewing the evidence most strongly in favor of the respondent, we cannot conclude that the jury verdict was so low that, under the facts of this case, reasonable men could not differ about its inadequacy. Accordingly, we reject this assignment of error.

Jury Instructions

In her third assignment of error, petitioner argues that the circuit court abused its discretion by giving a sudden emergency jury instruction at trial. Respondent argues that the instruction was supported by the evidence, including respondent's testimony that his vehicle had unexpectedly downshifted.

In her fourth assignment of error, petitioner argues that the circuit court erred in instructing the jury, *inter alia*, that petitioner had the burden of showing that Mr. Shoemaker's injuries existed and were the proximate result of the motor vehicle accident. Petitioner argues that this instruction was not warranted because there was no evidence disputing the cause of Mr. Shoemaker's injuries. Respondent argues that causation was very much in dispute.

In her fifth assignment of error, petitioner argues that the circuit court gave an incomplete instruction that harkened back to the concept of contributory negligence as a bar to recovery. Respondent argues that this instruction was supported by case law; that petitioner is arguing the instruction out of context; and that the circuit court gave a separate instruction on the law of comparative negligence. Petitioner acknowledges that immediately before this disputed instruction, the circuit court did instruct on the law of comparative negligence.

In her sixth assignment of error, petitioner argues that the circuit court improperly commented on the evidence, in violation of Rule 51 of the West Virginia Rules of Civil Procedure, when instructing the jury as follows: "in the case before you, you have heard evidence regarding injuries and complaints of other symptoms suffered by the Plaintiff's decedent before the incident that is the subject of this case. Therefore, you may not award the Plaintiff damages for injuries or pain and suffering that were proximately caused by events that occurred before the October 19, 2007[,] incident or are not proximately caused by the October 19, 2007[,] incident." Petitioner argues that there was no medical evidence that Mr. Shoemaker's previous medical conditions were related to his post-accident symptoms. Respondent argues that the court was not commenting upon the evidence, rather, the court was simply providing context for the law that it was setting forth on the issue of preexisting injuries.

In her seventh assignment of error, petitioner argues that the circuit court gave an erroneous instruction on non-economic damages. Mr. Shoemaker was deceased, thus his family members testified at trial about his injuries and damages. The court instructed the jury that they "should not consider the effects that Mr. Shoemaker's injuries had on Mr. Shoemaker's relatives and family" and the jurors were to "only consider the physical and emotional effects that Mr. Shoemaker's injuries had on Mr. Shoemaker himself." Respondent argues that this instruction was legally correct because, after the wrongful death claim was dismissed, only Mr. Shoemaker's injuries were at issue in the case.

We apply the following standard of review to allegations of instructional error:

[t]he formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.

Syl. Pt. 6, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995). Furthermore,

“ ‘ “[i]nstructions must be read as a whole, and if, when so read, it is apparent they could not have misled the jury, the verdict will not be disturbed, through [sic] one of said instructions which is not a binding instruction may have been

susceptible of a doubtful construction while standing alone.’ Syl. Pt. 3, *Lambert v. Great Atlantic & Pacific Tea Company*, 155 W.Va. 397, 184 S.E.2d 118 (1971).” Syllabus Point 2, *Roberts v. Stevens Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791 (1986).’ Syllabus Point 3, *Lenox v. McCauley*, 188 W.Va. 203, 423 S.E.2d 606 (1992).” Syllabus Point 6, *Michael v. Sabado*, 192 W.Va. 585, 453 S.E.2d 419 (1994).

Syl. Pt. 7, *Tennant*. Upon a review of the record on appeal, we find no abuse of discretion in the jury instructions. The instructions were supported by the evidence and the parties’ respective legal theories. Moreover, when read as a whole, the instructions correctly set forth that the law of comparative negligence applies to this case, and correctly set forth that only the decedent’s injuries were to be considered. Finally, we find no improper comments on the evidence.

Closing Argument

In her eighth assignment of error, petitioner argues that respondent’s counsel misquoted evidence during closing argument. The testimony of petitioner’s expert had been presented to the jury through the admission of a deposition transcript, rather than by live testimony.² Petitioner argues that respondent’s counsel displayed a demonstrative exhibit to the jury in the form of an enlarged portion of a deposition transcript, and that counsel gestured toward this exhibit when arguing that there was no evidence that Mr. Shoemaker’s damages were related to respondent’s conduct. Respondent denies that his counsel was misleading in any manner and notes that there were no objections at trial either to the use of the demonstrative exhibit or to any gesturing by counsel.

We have held that “ ‘[t]he discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom.’ Syl. Pt. 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927).” Syl. Pt. 1, *Jones v. Setser, M.D.*, 224 W.Va. 483, 686 S.E.2d 623 (2009). The demonstrative exhibit is not in the record on appeal. However, based upon the parties’ descriptions of what happened, and in light of the failure to make a timely objection, we find no reversible error.

For the foregoing reasons, we affirm.

Affirmed.

² Inadmissible portions of the deposition testimony were redacted.

ISSUED: November 26, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum
Justice Brent D. Benjamin