INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-64

MICHAEL RODGERS,

Petitioner,

v.

DOCKET NO. 23-ICA-64

(Circuit Court of Kanawha County)
Civil Action No. 19-C-561

JOHN R. ORPHANOS, M.D.,

Respondent.

PETITIONER MICHAEL RODGERS' REPLY BRIEF

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INTRODUCTION

The narrow question on appeal is whether the lower court erred by reducing the jury's verdict award for medical expenses by applying West Virginia Code § 55-7B-9d when Defendant waived any offset under that section prior to trial and when the statute requires post-trial reductions to the verdict be made pursuant to West Virginia Code § 55-7B-9a. Here, the court erred by supplanting the required analysis under Section 9a with a categorical reduction of the verdict under Section 9d, which deprived Plaintiff of the benefit of the more granular collateral source analysis and violated Section 9a's prohibition against reducing the verdict for amounts in excess of benefits paid by a collateral source.

These two separate statutes do not present alternative options for reducing a jury's verdict after trial. Rather, there is only one way these two statutes can coexist without one usurping the other or rendering it superfluous. Section 9d applies to what a *jury* may consider to reach a verdict on past and future medical expenses, and Section 9a governs *post-trial* adjustments to a verdict on medical expenses. The only two courts to have considered the interplay between these two statutes agree that "the plain language of these statutes is clear. Section 55-7B-9a applies only '*after* the trier of fact has rendered a verdict.' W. Va. Code § 55-7B-9a(a). Section 55-7B-9d applies to the verdict itself." *Goodman v. United States,* No. 3:16-5953, 2018 WL 3715740, *10 (S.D.W. Va. Aug. 3, 2018); *see also Vance v. Cohen*, No. 5:18-CV-00888, 2020 WL 3271047, at *1 (S.D.W. Va. June 17, 2020) (explaining that Section 9d merely "limits the verdict to amounts paid or owed," and Section 9a "applies only 'after the trier of fact has rendered a verdict,'" which "allows for a subsequent adjustment of the verdict for collateral source payments").

What is more, West Virginia Code § 55-7B-9a(g)(2) states in no uncertain terms that a court evaluating a jury's award of past medical expenses "may not reduce the verdict rendered by the

trier of fact … to reflect … [a]mounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a collateral source[.]" The circuit court was wrong to disregard the Section 9a framework. Had the court applied that framework in assessing the propriety of the jury's award for medical expenses, it would not have reduced the past medical bill award at all. The Court should reverse these rulings and direct the circuit court to reinstate the jury's award for Plaintiff's past medical expenses in total or, at the very least, reverse and remand for the circuit court to conduct a proper Section 9a hearing in the first place.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Defendant admits this appeal presents an issue of first impression. Resp. Br. 6. Because it involves a narrow issue of law and straightforward statutory interpretation, it satisfies Rule 19 of the West Virginia Rules of Appellate Procedure, and oral argument is thus both necessary and appropriate.

ARGUMENT

I. Judicial estoppel and invited error have no application to this appeal.

Defendant's first argument is easily answered. In three long sentences—and without even bothering to undertake the analyses set forth in the cases he cites for judicial estoppel and invited error—Defendant contends that Plaintiff's motion in limine prohibits the mention of collateral sources at trial and somehow forecloses Plaintiff's argument on appeal. *See* Resp. Br. 8. But Plaintiff has consistently maintained that Section 9a applied to the court's post-trial assessment of the jury's award for medical expenses. *See* JA 2257–71. Extending Defendant's tortured view of judicial estoppel and invited error would be akin to arguing that Defendant's motion in limine prohibits the mention of his medical malpractice insurance and should preclude him from later benefiting from that coverage. JA 1807 (order granting Defendant's motion in limine to preclude

introduction of evidence of insurance). Moving to prohibit evidence of collateral sources *to the jury* does not contradict Plaintiff's position that, *after trial,* the circuit court erred by reducing the verdict for collateral source payments.

Invited error does not apply because it "prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error." *State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612. Defendant does not even identify a purported error that was induced by Plaintiff, so it is hard to understand this undeveloped argument. Equally confounding is Defendant's contention that Plaintiff "fully benefited from the medical bills being introduced without limitation." *Id.* Never mind that there could be no benefit to the plaintiff when the lower court reduced the portion of the verdict for medical expenses by more than a million dollars—that is, after all, what this appeal is about. Lurking in this confusing argument is Defendant's attempt to brush over his critical mistake leading up to trial: He never moved in limine to limit the presentation of evidence of past medical expenses to the "total amount of past medical expenses paid by or on behalf of the plaintiff" and the "expenses incurred but not paid [that] the plaintiff is obligated to pay," as Section 9d allows. W. Va. Code § 55-7B-9d. Defendant's failure to avail himself of a litigation opportunity does not mean that Plaintiff invited error. Nor is it a defense to a legally erroneous ruling.

Judicial estoppel is likewise inapplicable here because Plaintiff did not "assume[] a position that is clearly inconsistent" with the questions presented in this appeal, which is the threshold requirement for judicial estoppel. Syl. Pt. 2, *West Virginia Dep't of Transp., Div. of Highways v. Robertson*, 217 W. Va. 497, 499, 618 S.E.2d 506, 508 (2005) (setting out four-part test for judicial estoppel). Notably, Defendant does not even attempt to explain how this requirement is met here. Nor does Defendant explain how Plaintiff may have benefited from a purportedly inconsistent

position or how Plaintiff's motion in limine "misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process." *Id.* For these reasons, neither judicial estoppel nor invited error are relevant to the analysis in this appeal.[1]

II. The canons of statutory interpretation require that Section 9d applies to the verdict itself at trial and Section 9a governs post-trial adjustments to the verdict.

"If the text [of a statute], given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424, 438 (1995). The text must be "considered in its proper context and as it relates to the subject matter dealt with." *In re Estate of Lewis*, 217 W. Va. 48, 614 S.E.2d 695, 700 (2005) (internal quotation marks omitted). "[E]very section, clause, word or part of the statute" must, if possible, be given "significance and effect," so that no term is rendered "superfluous." *Ringel-Williams v. W. Va. Consol. Pub. Ret. Bd.*, 237 W. Va. 702, 790 S.E.2d 806, 811 (2016).

Under theses well-established canons of statutory construction, Section 9d governs what a factfinder may consider in determining a medical expense award *at trial*; Section 9a lays out the *post-trial* method of determining what "a defendant who has been found liable to the plaintiff for damages for medical care" must pay after accounting for credits and offsets attributable to collateral sources. W. Va. Code § 55-7B-9a(b). Put another way, Section 9d allows a defendant the

[1] Defendant makes much of his reservation of rights "to present evidence of insurance benefits, write offs, etc. to the Court, after the trial, consistent with W. Va. Code § 55-7B-9a and § 55-7B-9d." Resp. Br. at 15. As stated *infra* at Part II.A, Section 9d applies to the jury's verdict, and Defendant offers no explanation as to how his purported reservation could operate to exempt him from presenting relevant evidence to the jury. To the extent he purports to have reserved rights to present evidence of insurance benefits, etc., after trial under Section 9a, he failed to do so, and in any event, Section 9a(g)(2) prohibits reduction of amounts in excess of benefits actually paid for medical damages.

opportunity to limit what a jury may consider in awarding damages for medical expenses; Section 9a details what a court must do after trial to assess the propriety of a medical expense award.

A. West Virginia Code § 55-7B-9d applies to the verdict itself and does not govern post-trial reductions to the verdict.

Defendant gives short shrift to the question of whether Section 9d applies to the verdict itself and therefore must be invoked prior to the jury's verdict. West Virginia Code § 55-7B-9d limits "[a] verdict for past medical expenses" to "(1) The total amount of past medical expenses paid by or on behalf of the plaintiff; and (2) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay." The plain language of Section 9d reveals it does not apply after the entry of a verdict. Section 9a, on the other hand, expressly governs "after the trier of fact has rendered a verdict, but before entry of judgment." W. Va. Code §55-7B-9a(a). Under "the familiar maxim '*expressio unius est exclusio alterius,*' the express mention of one thing necessarily implies the exclusion of another." Syl. Pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984). Thus, the State Legislature's inclusion of that language in Section 9a and its intentional exclusion in 9d leaves one conclusion: Section 9d is a use-it-or-lose-it mechanism to limit the evidence of medical expenses presented to the jury to those that were "paid by or on behalf of the plaintiff" and those the plaintiff "is obligated to pay." *Id.* It is not a post-trial mechanism to whittle down a jury's verdict after the fact.

The only courts to address the question are consistent with this conclusion and have made clear that Section 9d applies to the verdict itself and Section 9a governs post-trial adjustments to the verdict. *See Goodman*, 2018 WL 3715740 at *10 ("[T]he plain language of these statutes is clear. Section 55-7B-9a applies only 'after the trier of fact has rendered a verdict.' W. Va. Code § 55-7B-9a(a). Section 55-7B-9d applies to the verdict itself."); *see also Vance*, 2020 WL 3271047,

at *1 (same). That is the only way Section 9a will "not limit or usurp the authority of Section 55-7B-9d." *Goodman*, 2018 WL 3715740 at *10.

When a medical malpractice defendant fails to avail himself of Section 9d by seeking to limit the evidence presented to the jury on medical expenses, he does not get a second bite at the apple to use that same section post-trial without having to bother with the Rules of Evidence or the scrutiny of a jury. The *Goodman* and *Vance* decisions make clear the only way these two sections of the MPLA that address damages for medical expenses can coexist is where Section 9d applies to the verdict itself by limiting the evidence the jury may consider and Section 9a governs after the verdict and allows the court to complete the complicated analysis to assess various collateral sources.

And that makes good sense: It's simple for a party to avail themselves of Section 9d at trial and limit the evidence of medical expenses to the "total amount of past medical expenses paid by or on behalf of the plaintiff" and the "total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay." W. Va. Code § 55-7B-9d. On the other hand, completing the analysis required by Section 9a is—by statute—reserved for the courts to conduct a mathematical analysis of medical expenses and collateral source benefits. *Id.* § 55-7B-9a(d) ("After hearing the evidence presented by the parties, *the court shall* make the following findings of fact.").

To compound the court's error in applying Section 9d after trial is the fact that Defendant waived any right to seek reduction of the verdict under Section 9d by failing to raise it in a motion in limine or otherwise pretrial. *See Goodman*, No. CV 3:16-5953, 2018 WL 3715740, at *10 (granting motion in limine to limit evidence of medical expenses written off or not paid); *Vance*, 2020 WL 3271047, at *1 (same based on *Goodman*); *Hysell v. Raleigh Gen. Hosp.*, No. 5:18-CV-

01375, 2020 WL 5791350, at *1 (S.D. W. Va. Sept. 28, 2020) (same and rejecting that Section 9d "first requires the existence of a verdict for operation" based on *Vance*). To avoid the fact that he waived any limitations that Section 9d would impose on the verdict, Defendant argues that Section 9d can operate to reduce the verdict at any time, "either pre- or post-trial." Resp. Br. 10. But how could it operate post-trial and not usurp Section 9a? Based on the statutory language and the only court decisions interpreting this interplay, it cannot. The Section 9a analysis would be rendered superfluous because all verdicts could be categorically reduced under Section 9d without having to bother with the more nuanced review required by Section 9a. Defendant's position—and the lower court's conclusion—violate the canon against interpreting any statutory provision in a manner that would render another provision superfluous. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 609 (1998) ("Statutory interpretations that render superfluous other provisions in the same enactment are strongly disfavored.") (internal quotations omitted). The only way that Sections 9d and 9a can coexist without one usurping the other is for the more specific statute (Section 9a) to modify the more general statute (Section 9d) and for them to be applied at different times in litigation.

B. West Virginia Code § 55-7B-9a provides the post-trial framework for deciding whether and how to reduce the jury's award for medical expenses.

After the trier of fact has rendered a verdict, "West Virginia Code § 55-7B-9a requires the Court to determine any collateral source subtractions before entry of judgment." *Goodman v. United States*, No. CV 3:16-5953, 2019 WL 3072594, at *3 (S.D.W. Va. July 12, 2019), *order corrected,* No. CV 3:16-5953, 2019 WL 5682123 (S.D.W. Va. Aug. 6, 2019). Here, the lower court erred by refusing to conduct that post-trial analysis and concluding "that W. Va. Code § 55-7B-9a does not apply, and that W. Va. Code § 55-7B-9d" does. JA 1864. As explained above, Section 9d cannot apply after the entry of a verdict because it applies to the verdict itself and

operates to potentially limit the evidence of medical records presented to the jury, as long as a defendant avails himself of it. *See Goodman*, 2018 WL 3715740 at *10; *see also Hysell*, 2020 WL 5791350, at *1. Had the court conducted this required analysis, it could not have reduced the jury's award because the statute prohibits it.

Defendant recognizes that the plain statutory language prohibits reduction of a verdict "in *any category of economic loss* to reflect … *[a]mounts in excess* of benefits actually paid or to be paid on behalf of the plaintiff by a collateral source in a category of economic loss." Resp. Br. 9 (quoting W. Va. Code § 55-7B-9a(g) (emphasis added)). Yet, Defendant concludes that, "[b]ased on this language," this section "addresses awards for past and future medical care which have been or will be paid by a collateral source that *does not have a right of subrogation or reimbursement from the plaintiff*." Resp. Br. 10 (emphasis added). But the contention of error on appeal is not about subrogation rights or reimbursements, and in any event, Section 9a(g) says nothing about those matters. It is instead a categorical ban on post-trial reduction of verdicts "in any category of economic loss to reflect" "amounts in excess of benefits actually paid . . . by a collateral source."

Defendant also contends that Section 9a addresses only "bills paid by third parties for the plaintiff" and that "no payments from collateral sources were ever reduced from this verdict." Resp. Br. 5. But that also misses the point of Plaintiff's narrow appeal. The question is whether the court erred by failing to conduct a Section 9a hearing to actually make such a determination in the first place and, if so, whether the statute means what it says: "the court may not reduce the verdict rendered by the trier of fact in any category of economic loss to reflect . . . [a]mounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a collateral source in a category of economic loss." W. Va. Code § 55-7B-9a.

Defendant also contends that Section 9a does not apply because he was "not seeking to reduce the damages award by payments made from collateral sources" and rather "seeks to reduce Petitioner's verdict by accounting for the various write offs and discounts applied to Petitioner's medical bills." Resp. Br. 11. But it is irrelevant that "written off or adjusted medical expenses are not collateral source payments," *id.*, because Section 9a(g)(2) categorically prohibits the court from "reduc[ing] the verdict rendered by the trier of fact in any category of economic loss to reflect: … [a]mounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a collateral source in a category of economic loss." West Virginia Code § 55-7B-9a(g)(2). As explained above, if the Defendant wanted to limit the size of the verdict for medical expenses for amounts written off or adjusted, he should have moved in limine and invoked Section 9d, but he did not, and now his desired reductions of the verdict must be considered under Section 9a's framework.

The cases that Defendant cites about write-offs, windfalls, and "phantom damages" do not help his position on the statutory interpretation question posed in this appeal. Resp. Br. 11–12. Those cases are consistent with Section 9d and with the notion that a party must avail itself of a defense to benefit from it in the first place. Here, Defendant could have availed himself of those Section 9d limitations prior to the verdict, but he chose not to. The lower court erred by refusing to conduct the required analysis under Section 9a.

CONCLUSION

For the foregoing reasons, the Court should reverse the circuit court's reduction of the jury's award for medical expenses or, in the alternative, reverse and remand for the circuit court to conduct a proper Section 9a hearing.

Respectfully submitted,

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(On Appeal from Circuit Court of Kanawha County, Civil Action No. 19-C-561)

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2023, I served a true and correct copy of the **PETITIONER MICHAEL RODGERS' REPLY BRIEF** on the following individuals, via electronic mail:

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