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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KAREN COFFIELD

Defendant Below/Petitioner,

v.

Docket No. 20-0033
Marshall County Civil Action No. 13-C-163

RONALD NEIL ROBINSON, II

Plaintiff Below/Respondent

RESPONDENT'S REPLY TO PETITIONER'S RESPONSE TO RESPONDENT'S CROSS ASSIGNMENTS OF ERROR

NOW COMES the Respondent, Ronald Neil Robinson, II, by and through his counsel, Amy Pigg Shafer, Esq., and hereby replies to Petitioner's response to his cross assignments of error as contained in Petitioner's Reply Brief.

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I. REPLY TO PETITIONER'S RESPONSE TO RESPONDENT'S CROSS-ASSIGNMENTS OF ERROR

In response to Petitioner's Reply Brief setting forth a response in opposition to Respondent's two cross-assignments of error, Respondent replies as follows:

A. The Trial Court Erred in Denying Plaintiff's Motion for New Trial as to Damages Only

In her response to Respondent's first cross-assignment of error, Petitioner does not attempt to distinguish this case as a Type 4 case as delineated in *Freshwater v. Booth*, 160 W.Va. 156, 233 S.E.2d 312 (1977). Instead, Petitioner states, with no citation to the record, that "Respondent paid no child support for the child's 18 years, even though Respondent knew he was the father when the child was approximately 10 years old." *See* Petitioner's Reply Brief at page 1. In fact, in response to being asked by counsel for Ms. Coffield if he paid child support for the first ten years of Savannah's life, Mr. Robinson responded if he had known she was his daughter he would have been happy to have paid child support (SA2 18). The jury also heard Ms. Coffield testify that she "consciously decided" not to make a claim against Mr. Robinson for child support (SA2 2). The jury also heard that after paternity was established in family court that there was a hearing to establish child support and Ms. Coffield agreed that child support was established through SSI as Mr. Robinson was disabled from working and the money being paid through Social Security was a substitute for wages and was paid to support the child (SA2 4-5). In any event, this purported fact was not something heard by the jury that would have in any way influenced their assessment of damages in this case.

Petitioner then posits that Mr. Robinson was told by persons in the community that Ms.

Coffield's child looked a bit like Mr. Robinson and that Ms. Coffield did inform Mr. Robinson that she was pregnant. These issues would go to the fifth special interrogatory that asked the jury to decide whether Mr. Robinson was justified under the circumstances in relying on Ms. Coffield's representations. The jury checked this box and all others "Yes." Petitioner's Reply Brief also states that Ms. Coffield perceived that Mr. Robinson was not "interested" in being a father. *See* Petitioner's Reply Brief at page 1. Ms. Coffield testified that she perceived Mr. Robinson's disinterest from a look on his face when she told him she was pregnant (SA2 8-9). The jury checked all of the elements of fraud with a "Yes." This confirms that the jury believed that Ms. Coffield was liable for fraud despite her unconvincing statements that Mr. Robinson was not "interested" in being a father. By their marks on the verdict form, the jury did not believe that any disinterest perceived by Ms. Coffield somehow excused her false artificial insemination story.

The fact that Ms. Coffield has admitted sexual relations with several other men during the time period that Mr. Robinson was intimate with Ms. Coffield and that he had relations with a woman who then tells him she is pregnant again both go to the element of whether Mr. Robinson was "justified under the circumstances" in relying on Ms. Coffield's representation that she was artificially inseminated. There is no doubt that the jury believed Mr. Robinson was so justified as they checked the fifth special interrogatory "Yes."

Petitioner then states that she could not have known for certain that Mr. Robinson was the father as a reason why the jury awarded no compensation for loss of solace, society, and companionship. Such a conclusion does not logically follow from the assertion. Moreover, the Defendant's credibility was put in serious question from the first few moments of her trial testimony when she was confronted with previous admissions to the contrary made in 2015 and 2017 in her Answer to the Complaint and in her answers to Requests for Admission wherein she admitted that

after she became pregnant, she knew Mr. Robinson was the father. *See,* Trial Transcript Excerpts of Karen Coffield at JA 000488 489 & JA 000506- 000510 and at SA2 at 10-14.. The jury spoke its decision on Ms. Coffield's credibility when it checked the verdict form as it did. Mr. Robinson may have known that Ms. Coffield had sexual relations with several other men in the relevant time period, but Ms. Coffield was in the best position to know her menstrual cycle and whether a form of birth control was used. These were all issues within the purview of the jury and they decided them against Ms. Coffield.

Finally, Petitioner argues that Respondent permitted the child to move to California after he found out he was the father. The trial testimony cited at JA 000520-521 simply states that the child lived in California before the child lived in Philadelphia.

None of the statements[1] cited by Petitioner in response to Respondent's first cross-assignment of error do anything to cast doubt on this case being a Type 4 case under *Freshwater*. Type 4 is described as the "mirror image of the Type 3 case in which, while the plaintiff would not be entitled to a directed verdict on the matter of liability, the issue of liability has been so conclusively proven that an appellate court may infer that the jury's confusion was with regard to the measure of damages and not to liability." *Freshwater v. Booth, supra,* 233 S.E.2d at 317. The jury checked all six boxes "YES" on the six interrogatories setting forth the elements of fraudulent intentional misrepresentation. The jury's belief as to liability is solidified by the fact that they not only awarded the plaintiff the legal fees expended to establish the paternity of his daughter, but they responded with a "YES" when asked if punitive damages should be assessed against the defendant and they awarded money for punitive damages. This is clearly a Type 4 case. The Freshwater Court

[1] Petitioner's Brief and Petitioner's Reply Brief contain reference to the trial testimony of the parties, yet Petitioner's Notice of Appeal stated that a transcript of the proceedings was not necessary for the Court to fairly consider the assignments of error in the case. Respondent requested and paid for the trial transcripts of the parties.

explained, "[i]n this type of case an appellate court can feel justified in remanding the case for a new trial on the issue of damages alone because it would be unfair to put the plaintiff to the expense and aggravation of again proving liability once again when he has been denied a proper and just verdict by the caprice and incompetence of a particular jury." *Id.* The court in *Freshwater* went on to explain, "[w]here liability has been proven once, and where a jury has found liability but not found adequate damages, the plaintiff is placed at a severe disadvantage and the defendant, if the case is remanded for a new trial on all issues enjoys a pure windfall." *Id.* The case before the Court fits squarely within a Type 4 case. Given the inclusion of the special interrogatories setting forth each element of fraudulent intentional misrepresentation and the same each being checked "YES" by the jury, there can be no doubt that liability was proven against the defendant. Petitioner's assertions in response do nothing to undercut the jury's definitive finding of liability for fraud against Ms. Coffield. This is, again, bolstered by the fact that the jury also agreed that punitive damages should be assessed against the Defendant and punitive damages were assessed.

The evidence was uncontroverted that the plaintiff had shock, sadness, joy, anger, and other emotional responses to the revelation following the paternity test results that he was the father of Savannah Rose Coffield. *See,* Trial Transcript Excerpts of Ronald Neil Robinson, II, JA 000517-000526 & Photos at JA 000534-00542. This was confirmed by the testimony of his now wife, Michelle Robinson. *See,* Trial Transcript Excerpts of Michelle Wayne Robinson, JA 000528-000533. There was no contrary evidence that Plaintiff did not have any mental pain and suffering, aguish, and anxiety as a proximate result of the defendant's proven wrongful conduct. Moreover, there was no evidence to refute the testimony that the plaintiff missed every one of the child's firsts, including birthdays and Christmas, and other childhood milestones, not just for one year, but for *ten* years. However, the jury made no award for loss of solace, society, companionship, and services.

Contrary to the Petitioner's insinuation that invoices for counseling for Mr. Robinson were necessary, the Court in *Kessel v. Leavitt*, 511 S.E.2d 720 (W.Va. 1998)(cert. denied) explained that "[w]e have not required plaintiffs who have suffered emotional distress damages to buttress such claims by corroborative evidence at the peril of having their claims dismissed as a matter of law." *Id.* at 813 (*citing Slack v. Kanawha County Hous. & Redev. Auth.*, 188 W.Va. 144, 152, 423 S.E.2d 547, 555 (1992). This Court further found that a plaintiff's failure to introduce expert witness testimony specifically describing his/her mental anguish, pain, and suffering is not necessarily fatal to a recovery of emotional distress damages if there exists in the record evidence to support the award. *Id.* at 813. The *Kessel* Court found the evidentiary record to be such that the jury properly could have concluded that the Plaintiff Father had sustained mental, emotional, or psychiatric difficulties as a result of the defendants' fraudulent participation in the Canadian adoption of his son.

Common sense and not expert testimony would dictate that missing all of a child's milestone events for the first ten years of a child's life would cause emotional damages. There was uncontroverted evidence of that loss in this case. Petitioner's short and unsupported response on this topic does nothing to distinguish this as a Type 4 case. Plaintiff respectfully submits that the trial court erred in not granting his motion for new trial as to compensatory damages only. In a Type 4 case like this, the solution set forth by this Court is to grant the motion for new trial on the issue of damages alone.

B. *The Trial Court Erred by Awarding Inadequate Attorney Fees When it Failed to Analyze the Pitrolo Factors*

Petitioner's Response to Respondent's second cross-assignment of error as to the awarding of inadequate attorney fees was essentially in the form of a written lecture to the undersigned counsel as to case or client selection and did not cite any case law or really address the analysis of the

Pitrolo factors.

Curiously, Petitioner seems to argue on page 4 of her Reply Brief that an attorney "cannot have it both ways" and must either take a case on contingent fee or on an hourly basis. That is simply not an accurate statement of the applicable law. Here attorney fees are recoverable due to the jury's finding of fraudulent intentional misrepresentation. *See, Yost v. Fuscaldo*, 185 W.Va. 493, 500, 408 S.E.2d 72, 79 (W.Va. 1991); *Bowling v. Ansted Chrysler-Plymounth-Dodge, Inc.*, 188 W.Va. 468, 425 S.E.2d 144 (W.Va. 1992). The test of what should be considered a reasonable attorney fee is not determined solely by the fee arrangement between the attorney and his client. *See, Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156, 161 (W.Va. 1986); *Fauble v. Nationwide*, 222 W.Va. 365, 664 S.E.2d 706 (W.Va. 2008). An analysis of the *Pitrolo* factors is undertaken. A contingent fee as arranged between attorney and client is not a ceiling with regard to the fee award an attorney can receive. *Heldreth v. Rahimian*, 219 W.Va. 462, 637 S.E.2d 359, 366 (W.Va. 2006). Attorney fees were recoverable in addition to the amount of any compensatory or punitive damages.

The trial court's comment about the statute of limitation issue and the Petitioner's failure to raise the statute of limitations for nearly five (5) years is not a factor to be weighed under *Pitrolo*. The trial court found that Ms. Coffield slumbered on her right to raise the statute of limitation as an affirmative defense. The case went to verdict. The jury found fraudulent intentional misrepresentation and awarded punitive damages. The finding of fraud triggered the entitlement to attorney fees to be determined in accordance with the *Pitrolo* factors.

Both the trial court and Petitioner erroneously posit that because Respondent only prevailed on one of his two claims, the number of hours spent on the unsuccessful claim cannot be recouped. As addressed at pages 50-52 of Respondent's Brief and Cross-Assignments of Error, both claims arose from the same set of facts outlining the defendant's wrongful conduct. Both claims

required intent as opposed to negligence. There was no additional evidence developed or work done to support the intentional infliction of emotional distress claim for which the jury did not award damages. None of the briefing done in the case was targeted at the IIED claim. Apportionment of attorney's fees may be appropriate where some of the claims and efforts of a plaintiff were unsuccessful. Here, however, there was no additional work done to support the intentional infliction of emotional distress claim. Neither the defendant nor the trial court enumerated any billing entries that were believed to only support the IIED claim. Moreover, the trial court had already ruled that the Plaintiff could not recover twice for the same damage. *See*, JA 000470-000473.

This Court discussed the parsing out of fees for unsuccessful claims. The crucial inquiry is whether a separate and distinct factual development was required to support alternative theories of recovery upon which recovery was not obtained. *Id.* at 364-365. No separate and distinct factual development was required in the case at bar to support the alternate IIED theory of recovery. The entire case was based on Ms. Coffield's intentional false assertion that she was artificially inseminated rather than admitting to Mr. Robinson that he was the father when he inquired. A reduction in the fee was not warranted. However, in this case the issue is not that the trial court applied some improper percentage multiplier to arrive at the hours reasonably spent. The trial court did not cite to the *Pitrolo* factors or undertake an analysis of the factors enumerated as proper under *Pitrolo*, *Bishop Coal Co. v. Salyers*, 181 W.Va. 71, 380 S.E.2d 238 (W.Va. 1989), or other similar cases. This was error by the trial court.

Petitioner sets forth the various objections made below to the Petitioner's attorney billings. Respondent acknowledged to the trial court at the hearing on the attorney fee matter that there was no objection to several entries for work that could have been performed by a paralegal being

billed at a lesser hourly rate and the like. However, none of these objections to various billing entries appear to have formed the basis for the trial court's erroneous analysis of the attorney fee award. Additionally, Petitioner asserts that it was improper for Respondent to seek attorney fees for filing the motion for attorney fees. This Court and others have found that if an attorney is put to the burden of proving the reasonableness of his or her fee, he or she obviously must expend time and effort making that proof and that if the attorney was not to receive compensation for those hours, the net effect would be to reduce the attorney's hourly rate for all hours worked on the case. *See, Hollen v. Hathaway Elec., Inc.*, 584 S.E.2d 523, 528 (W.Va. 2003) (holding that "[i]n addition to fees for the substance of the litigation, under West Virginia law an attorney may recoup fees for time expended proving the reasonableness of his or her fee."). Moreover, attorney fees for services rendered on appeal are recoverable. *See, Heldreth v. Rahimian*, 219 W.Va. 462, 637 S.E.2d 359, 370 (W.V. 2006); *Quicken Loans, Inc. v. Brown*, No: 13-076 (W.Va. 2014). However, again, this case is not being appealed due to issues with whether particular time entries or expenses were reasonable and recoverable. The attorney fee issue is before this Court on a cross-assignment of error because the trial court did not go through the *Pitrolo* factors and simply awarded the contingent fee amount as the attorney fee.

Moreover, there is no rule that an award of attorney fees cannot exceed the amount recovered. *See, e.g., Young v. Spencer*, 405 P.3d 701 (Okla. Civ. App. 2017). The additional Oklahoma cases discussed on page 53 of Respondent's Brief illustrate instances where courts have awarded attorney fees several times greater than the amount recovered. Moreover, the United States District Court for the Southern District of West Virginia, applying West Virginia law, awarded over $70,000.00 in attorney fees where the jury awarded damages of only $25,000.00. *See, Beattle v. CMH Homes, Inc.*, Civil Action No.: 3:12-2528 (S.D.W.Va. 2015).

That is, the attorney fees were 2.8 times the amount of the verdict. The trial court was mistaken in its belief that attorney fees cannot exceed the amount of the verdict.

The trial court did not set forth findings as to its analysis of the *Pitrolo* factors when it erroneously decided to cap its attorney fee award at the contingent fee amount. Accordingly, the issue of attorney fees should be remanded to the trial court for calculation in accordance with the *Pitrolo* factors and with guidance that attorney fee awards can exceed the amount of damages recovered.

II. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court (1) remand for a new trial as to compensatory damages only and, (2) remand the issue of attorney fees to the trial court for calculation in accordance with the *Pitrolo* case and other relevant law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing *Respondent's Reply to Petitioner's Response to Respondent's Cross-Assignments of Error* was served on the parties listed below *via hand delivery* this 10th day of August, 2020 as follows:

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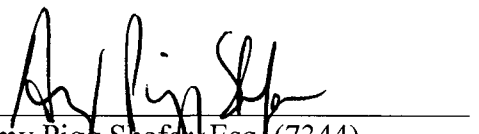

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