In The

Supreme Court of Virginia

RECORD NO. 141096

GLEN COSBY,

Appellant,

v.

SUSAN CLEM,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. There was credible evidence for the jury to conclude that the stimulator malfunction was unrelated to the accident

Clem states repeatedly that her damages were "uncontroverted." This is not accurate. While Cosby did not contest the *cost* of Clem's medical bills, in all three trials Cosby argued that the bulk of Clem's claimed damages were not related to the accident.

A defendant can dispute damages in a number of different ways. He can rely on evidence he presents or evidence presented by the plaintiff. He can rely on circumstantial evidence. He can cross-examine the plaintiff's witnesses and call into question their credibility. It is not necessary for the defendant to present his own expert testimony; he can attack the opposing expert's qualifications or the basis for the expert's opinions. In fact, a defendant can present no evidence *at all* and argue that the plaintiff failed to meet her burden of proof.

Here, Cosby argued that the accident did not cause Clem's spinal cord stimulator to malfunction and, therefore, any bills related to the stimulator were not related. In support of this position, Cosby relied on the following evidence:

- Clem had a long prior history of back pain. In 1999, she broke her back, requiring multiple surgeries. [App. 144, 164; 279; 292; 417]. Over the years, she reported at times that the pain

was “unbearable” or “excruciating.” [App. 108 - 109; 321 – 322; 451 – 452, 456].

- Prior to the accident, Clem complained to her doctors that the stimulator did not work as well as she hoped. [App. 158, 166 – 167, 183 – 184; 295 – 296]. She was “in pain most of the time,” but she could function through it. [App. 150 - 151].

- Clem was involved in a motorcycle crash in 2006 and she fell down a flight of stairs in 2008. [App. 184 – 187; 324; 328; 415, 419 - 420].

- Cosby testified that the impact from the accident was minimal, like getting bumped in a parking lot. [App. 204, 210; 348; 474].

- The photographs taken after the accident showed little visible property damage. [App. 206 - 207; 288, 348 - 349; 475 - 476]; [Trial I Defendant’s Exhibit Nos. 1, 2A and 2B; Trial II Defendant’s Exhibit Nos. 1 and 2; Trial III Defendant’s Exhibit No. 1].

- In Trial No. 2, Clem was impeached with her deposition testimony. Although she claimed she told the hospital on the day of the accident that her spinal cord stimulator was not working, in her deposition she testified that she did not know her spinal stimulator was broken until the day *after* the accident. [App. 299; 349].

- In Trial No. 2, Cosby testified that Clem said she was okay after the accident. [App. 349].

- In Trial No. 3, Clem was impeached with her deposition testimony where she testified that she only went to the hospital after the accident as a “precaution” because of her history of back problems. [App. 457 - 458].

- Michael Decker, M.D., Clem’s physical rehabilitation and pain management doctor, could not say “what was broken or what didn’t work.” [App. 69 - 70].

- Dr. Decker conceded that he had no knowledge about Clem's usage of the spinal cord stimulator prior to the accident. [App. 74].

- During cross-examination, Dr. Decker was impeached with his deposition testimony where he conceded that when the stimulator battery is dying, "just about anything could happen." [App. 75].

- Dr. Decker testified that the accident caused a broken wire or a wire to become loose, but he admitted did not see any broken or loose wires either on the x-ray or after he surgically removed the device. [App. 70 - 71].

- Dr. Decker did not have the device tested to determine the cause of the malfunction. [App. 72].

Clem's counsel may not have been persuaded by Cosby's defense, but three different juries were. Based on any one or a combination of the above factors, a jury could reasonably conclude that the accident did not cause the malfunction in Clem's spinal cord stimulator. The jury's opinion in the first two trials was not plainly wrong or without evidence to support it. In addition, in the third trial, there were material facts in dispute and, adopting all inferences from the facts most favorable to Cosby, a reasonable jury could conclude that any damages related to Clem's spinal stimulator malfunction were unrelated to the accident. Therefore, it was improper for the trial court in Trial No. 3 to grant partial summary judgment to Clem.

Clem also cites several cases for the proposition that a verdict in the exact amount of the special damages is inadequate as a matter of law.

[Brief of Appellee 9 – 10]. However, these cases are inapplicable. This rule applies only applies "to those factual situations in which the jury verdict is identical to the full amount of the special damages." *Walker v. Mason*, 257 Va. 65, 68, (1999). The rule "does not extend to an award which deviates from the amount of all the special damages claimed, even if the amount of the verdict corresponds to an identifiable portion of the special damages." *Id*. Here, the jury rejected The jury in the first two trials awarded Clem what it reasonably believed was a fair amount to compensate her pain and suffering, while rejecting her claim that the stimulator malfunctioned as a result of the accident.

Therefore, it was error for the trial court to set aside the verdict and award *additur* in Trial Nos. 1 and 2, and to grant partial summary judgment in Trial No 3.

II. In Trial No. 1, the trial court improperly relied upon the jury's question regarding insurance as a basis to set aside the verdict

In Trial No. 1, the jury submitted the following question during its deliberations: "How much of these expenses were actually paid out of pocket by the plaintiff?" [App. 220]. With no objection from counsel, the trial court instructed the jury that its verdict must be based upon the evidence presented. After the jury returned a verdict of $9,000.00, the trial court referenced this question and speculated that the jury must have

misunderstood the instructions and considered the existence of insurance in awarding damages.

Clem argues that it was proper for the trial court to use this question to speculate as to the basis for the jury's verdict, citing *Orthopedic & Sports Physical Therapy Associates, et al. v. Summit Group Properties, LLC*, 283 Va. 777 (2012). This case does not support Clem's proposition. In *Summit Group*, the Court held that the trial court improperly instructed the jury on a lessor's liability for a member's fraudulent acts conducted in the ordinary course of the lessor's business. In analyzing whether this was harmless error, the Court stated that it could infer, based upon a question posed by the jury with respect to the specific instruction at issue, that the jury considered whether the members committed fraud. *Id.* at 722 – 723.

Summit Group did not, as Clem suggests, use the question to speculate as to the basis for the jury's verdict. Instead, reliance on the jury's question was limited to the harmless error analysis. This Court recently highlighted this distinction in *Dominguez v. Pruett*, 287 Va. 434 (2014). In *Dominguez*, the Court rejected the defendant's argument that the jury's questions during deliberations suggested that if the jury had been properly instructed, the defendant would not have been convicted of malicious wounding. In so holding, the Court stated that a "question posed

to the court during deliberations . . . could suggest as little as the tentative views of a single juror. It cannot be extrapolated into a binding finding by the jury as a whole." *Id*. at 438 (*quoting Kennemore v. Com*., 50 Va. App. 703, 709 (2007)).

Clem cites *Dominguez* on page 17 of her brief, suggesting it supports her position, despite its holding to the contrary. Curiously, Clem did not include the entire footnote from the portion of the opinion on which she relies. In that footnote, the Dominguez Court expressly stated that in *Summit Group* "[**w]e did not use the question to speculate as to the jury's opinion on any specific issue**, as argued by Dominguez." *Id.* at 443 fn 4 (emphasis added).

Here, there were no substantive instructions given over Clem's objection that would have confused the jury. Unlike *Summit Group*, which analyzed the prejudicial effect of an improper instruction, in the instant case the trial court improperly relied upon the jury's question regarding insurance to speculate as to the basis of the verdict.

III. In Trial No. 2, the trial court improperly set aside the jury's verdict based on closing argument by Cosby's counsel

Contrary to Clem's assertion, Cosby is not suggesting that he should "benefit from his own counsel's misconduct." First, counsel's argument in closing that before the accident the stimulator would "shock" Clem at night was a proper, reasonable inference from Clem's testimony.

Second, counsel's reference in closing to the Court's exclusion of evidence is not a basis to set aside the jury's verdict because (1) the trial court acknowledged it was inadvertent, not made in bad faith, and did not warrant a mistrial; (2) there is no evidence that the statement had any influence on the jury; and (3) Clem did not object to the statement. Clem's Brief does not address these arguments.

IV. In Trial No. 2, the trial court erred in ordering a new trial when the defendant elected to accept *additur* under protest and appeal pursuant to Virginia Code section 8.01-383.1(B)

Clem asserts that because Virginia Code section 8.01-383.1(B) (the "*additur* statute") allows either the plaintiff or the defendant to decline an *additur* award or accept it under protest and appeal, it follows that an underinsured motorist ("UIM") carrier, who has the right to participate in the case in its own name, may "veto" the defendant's election under the statute. However, the *additur* statute expressly limits this election to the

plaintiff or the defendant. While the UIM carrier may participate in the defense, is it not a "defendant."

As a result of the trial court's decision, Cosby was denied his election of remedies and forced to incur the cost of a third trial before he was permitted to appeal. A defendant who faces the risk of subrogation should not be controlled by the actions of the UIM carrier. The trial court erred in ordering a new trial over Cosby's objection.

V. The trial court erred in permitting Michael Decker, MD, a physical medicine and rehabilitation doctor, to testify regarding the technical and mechanical cause of the malfunction of the spinal cord stimulator.

A. Dr. Decker was not qualified to offer an opinion concerning the technical and mechanical aspects of the spinal cord stimulator

Cosby agrees with Clem that Dr. Decker, as a physical medicine and rehabilitation doctor, was qualified as an expert in "the surgical implantation and monitoring of implanted spinal cord stimulators." [Brief of Appellee at 22 – 23]. However, his testimony should have been limited to these areas. Dr. Decker is qualified to opine, for example, how spinal cord stimulators are implanted, how they are used, and how they alleviate back pain. He is not qualified to opine as to how and why the stimulator malfunctioned as a result of the accident.

Clem argues that Dr. Decker was qualified to offer a causation opinion regarding the mechanical failure of the device based on his experience as a consultant for Medtronic, a manufacturer of similar spinal cord stimulators. Being "familiar with the internal workings of these units" after taking them apart and looking at them is not the same thing as being qualified to offer an opinion regarding the cause of a mechanical failure. By way of analogy, one may understand that brakes slow down the speed of a vehicle, but that does not mean one can opine about the cause of brake failure. Likewise, Dr. Decker "visited with their engineers" at Medtronic, but he has no engineering background. [App. 44]. He has never fixed a spinal cord stimulator and he is not familiar with the wiring systems that are used. [App. 43]. It was error for the trial court to allow Dr. Decker to offer a causation opinion outside his field of expertise.

B. Dr. Decker's causation opinion was based on pure assumption and speculation and was therefore inadmissible

Clem contends that Dr. Decker may simply opine that the accident caused the malfunction because Clem said it stopped providing her relief after the accident. Under Virginia law, however, she was required to prove how and why the malfunction occurred. *Weddle v. Draper*, 204 Va. 319

(1963); *Lawson v. Doe*, 239 Va. 477, 482 (1990); *Logan v. Montgomery Ward & Company*, 216 Va. 425 (1975).

In *Logan*, the Supreme Court of Virginia held that the mere fact that a gas stove leaked and exploded was insufficient to establish a *prima facie* case of negligence on the part of either the manufacturer or seller of the stove. Although the plaintiff presented evidence of careful transportation, installation and use of the stove, the Court held that the explosion did not establish that the stove was defective. *Id*. at 428. The Court noted that while "there may be a suspicion that the explosion did occur because of such defect," there was no "proof of a defect, or any reason for a mechanical malfunction of the stove." *Id*.

The principles set forth in *Logan* are equally applicable here. On cross-examination, Dr. Decker admitted that he "can't say what was broken or what didn't work." [App. 69 – 70]. He also was impeached with his deposition testimony where he conceded that when the stimulator battery is dying, "just about anything could happen." [App. 75]. In her Brief, Clem cites to Dr. Decker's testimony on re-direct where he testified that the pattern "was more likely due to a broken wire or something loose somewhere," but she fails to address Dr. Decker's admission that the x-rays and his own observation of the stimulator once removed revealed no

broken or loose wires. [App. 70 – 71]. Nor did Dr. Decker perform any testing on the wires. Thus, Dr. Decker's testimony was without proper foundation and should have been excluded.

CONCLUSION

For all the reasons stated herein, Appellant Glen Cosby, by counsel, respectfully requests this Court reverse the judgment below and reinstate the first jury verdict in the amount of $9,000.00, pursuant to *Richardson v. Braxton-Bailey*, 257 Va. 61 (1999). In the alternative, this Court should reinstate the second jury verdict in the amount of $1,766.25. Should this Court find that these verdicts cannot be reinstated, Cosby requests that the judgment be reversed and the case be remanded for a new trial.

Respectfully Submitted,

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CERTIFICATE PURSUANT TO RULE 5:26(h)

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On February 13, 2015, fifteen copies of this Reply Brief of Appellant and one copy on CD, were hand-filed with the Clerk of this Court. Three copies of the Brief, with one copy on CD, were served, via U.S. Mail, postage prepaid, upon counsel for the Appellee.

Danielle D. Giroux, Esq.