IN THE

Supreme Court of Virginia

RECORD NO. 141096

GLEN COSBY,

Appellant,

v.

SUSAN CLEM,

Appellee.

BRIEF OF APPELLEE

William E. Glover, Esquire (VSB # 25965)
Jeannie P. Dahnk, Esquire (VSB # 25825)
GLOVER & DAHNK
1103 Princess Anne Street
Post Office Box 207
Fredericksburg, Virginia 22404-0207
(540) 373-8600
(540) 373-8629 (Facsimile)
weg@gloveranddahnk.com
jpd@gloveranddahnk.com

Counsel for Appellee

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

STANDARD OF REVIEW, ARGUMENT AND AUTHORITIES..... 7

Response to Assignment of Error I: In Trial 1, the trial court properly set aside the inadequate jury verdict and granted additur 7

A. Standard of Review. 7

B. In Trial 1, the trial court properly found that no credible evidence supported the amount of the jury's award, and that the award was therefore contrary to the law and the evidence 8

C. In Trial 1, the trial court properly considered the question asked by the jury in determining if the jury had based its decision on something other than the law and the facts of the case..... 16

Page No.

Response to Assignment of Error III: In Trial 2, the trial court properly set aside the inadequate jury verdict and granted additur. 18

A. Standard of Review..... 18

B. In Trial 2, the trial court properly found that no credible evidence supported the amount of the jury's award, and that the award was therefore contrary to the law and the evidence. 19

C. In Trial 2, the trial court properly considered the misconduct of Cosby's counsel..... 19

Response to Assignment of Error IV: In Trial 2, the trial court was required to award a new trial at the request of an underinsurance carrier..... 20

A. Standard of Review..... 20

B. The participation of the Underinsurance Carrier in the case, expressly permitted by statute, includes the right to demand a new trial instead of accepting additur. 20

Page No.

Response to Assignment of Error VII: In Trial 3, the trial court properly granted partial summary judgment to Clem for her medical expenses. 21

A. Standard of Review 21

B. There was no material fact in dispute as to the amount and causation of Clem's special damages 21

Response to Assignment of Error VIII: In Trials 1, 2 and 3, the trial court ruled properly, and on at least five separate occasions, that Dr. Decker's testimony was competent and admissible 22

A. Standard of Review. 22

B. Dr. Decker was qualified to offer an opinion concerning the technical and mechanical aspects of the spinal cord stimulator 22

C. Dr. Decker's opinion on causation was based on facts known to him and rendered to a reasonable degree of medical certainty 25

CONCLUSION 28

CERTIFICATE 29

TABLE OF AUTHORITIES

Page No.

Baird v. Dodson Brothers Exterminating,
217 Va. 745, 749, 232 S.E.2d 770, 773 (1977) 7

Bradner v. Mitchell,
234 Va. 483 (1987) 10

Cheatham v. Gregory,
227 Va. 1, 4 (1984) 9

DeWald v. King,
233 Va. 140 (1987) 9,10

Dominquez v. Pruett,
(Va. 2014, Record No. 131091) 17

Glass v. David Pender Grocery Co.,
174 Va. 196 (1939) 9,10

Graves v. National Cellulose Corporation
226 Va. 164, 169, 306 S.E.2d 898, 901 (1983) 7

Hunley v. Osborne,
256 Va. 173, 178 (1998) 12

Orthopedic & Sports Physical Therapy Associates, et al.
v. Summit Group Properties, LLC,
238 Va. 718, 724 S.E. 2d 718 (2012) 16,17

Rome v. Kelly Springfield,
217 Va. 943 (1977) 9,10

Rutherford v. Zearfoss,
221 Va. 685, 689, 272 S.E.2d 225, 227-28 (1980) 8,15

TABLE OF AUTHORITIES (CONTINUED)

Page No.

Rutherford v. Zearfoss,
221 Va. 685, 689 (1970) 8,15

Smithey v. Sinclair Refining Co.,
203 Va. 142, 146, 122 S.E.2d 872, 876 (1961) 8

Supinger v. Stakes,
255 Va. 198, 495 S.E.2d 813 (1988) 8

Walker v. Mason,
257 Va. 65 (1999). 10

RULES, STATUTES AND OTHER AUTHORITIES

Va. Code Sec. 8.01-383.1 (B) 10

STATEMENT OF THE CASE

Plaintiff Susan Clem ("Clem") prevailed in each of the three (3) successive trials against Defendant Glen Cosby ("Cosby"). At the end of the third trial, the final judgment of the Spotsylvania Circuit Court awarded Clem $182,814.98.

Cosby now asks this Court to reverse the judgment of the trial court and reinstate a jury verdict from the first or second trial, or, alternatively, to permit Cosby a fourth trial in an attempt to prevail where he failed each of the three times before.

Clem suffered injuries in an automobile accident caused by Cosby. Cosby admitted liability. Clem's medical treatment included the replacement of an implanted spinal cord stimulator. Cosby did not contest the amount or reasonableness of the special damages, but argued that the collision he caused was not the reason that the spinal cord stimulator had to be replaced. The Court found that Cosby had presented no evidence in support of this argument and it granted partial summary judgment to Clem for the special damages associated with her injuries. The jury awarded additional damages for pain and suffering.

At the first trial, Cosby admitted liability and attempted to offer an expert to opine on the issue of causation, but failed to have any of that expert testimony admitted into evidence. Cosby did not challenge the amount of Clem's damages. The special damages proven at the first trial were $188,513.08. The jury came back with a question during its deliberation, asking "how much of these expenses were actually paid out of pocket by the Plaintiff." After deliberating, the jury awarded a verdict of $9,000.00. (App. p. 222). The Court granted Clem's Motion for Additur and entered judgment in the amount of $197,513.08, the amount of the special damages and the amount of the jury's award. (App. p. 237).

Cosby elected to demand a new trial as permitted by the additur statute. At the second trial, Cosby admitted liability and attempted again, by an expert, to present expert testimony on the issue of causation, but failed to have any of that expert testimony admitted into evidence. Cosby's counsel then made improper closing argument to the jury. (App. pp. 351-352). The Court advised the jury that the arguments were improper and a mischaracterization of the evidence, and held Cosby's counsel in contempt for improperly arguing to the jury that counsel had been prevented by the Court from telling the jury facts that they needed to know. (App. pp. 351-352, 356).

Following the second trial, the Court found the jury's verdict inadequate and granted additur, awarding Clem $188,513.08.

One of the uninsured motorist carriers demanded a new trial. Cosby claims that he wanted to appeal the additur judgment but because the uninsured motorist carrier demanded a new trial, the matter was set for a third trial on the merits.

At the third trial, Cosby admitted liability again and this time made no attempt to offer any expert testimony on the issue of causation. Cosby offered no evidence to contest the special damages incurred by Clem. The Court properly granted partial summary judgment in favor of Clem, awarding her uncontested special damages in the amount of $176,814.98, and then instructed the jury to give an award of damages for pain and suffering only. The Court then entered judgment on the jury's verdict for a total judgment amount of $182,814.98.

STATEMENT OF FACTS

Cosby negligently drove his car into the rear of the car in which Clem rode as a passenger, injuring Clem. Clem suffered pain from the impact and from the failure that the impact caused to the medical device in her lower back.

Clem, a disabled police officer, rode as a passenger in a car driven by her husband, Steve Clem. (App. p. 292). It was Sunday morning and Susan and Steve Clem were going to church. (App. p.297). While stopped behind other traffic at a stop sign, the Clems were struck in the rear by a vehicle driven by Cosby.

Clem immediately felt pain in her back. Clem was acutely aware of her back pain because she had been struggling with pain for twelve years since an accident at the police academy fractured her spine. Her pain from that fracture was controlled, in part, by a medical device implanted in her back. The device, a subcutaneous implanted spinal cord stimulator, failed at the moment of the impact.

The spinal cord stimulator had a remote control that allowed Clem to direct the amount of stimulation and corresponding pain relief. Prior to the collision, the remote control permitted Clem to operate the spinal cord stimulator.

Following the collision, Clem attempted to use the stimulator and found that it did not function. (App. p. 300). Clem set about obtaining medical appointments to evaluate the spinal cord stimulator in an attempt to regain the relief provided by the spinal cord stimulator prior to the collision caused by Cosby. (App. p. 301)

Clem was referred to Dr. Decker, a specialist in the use of implanted spinal cord stimulators. When Dr. Decker tried to activate the stimulator unit in Clem's back using an external controller in his office, the stimulator did not function properly and, in fact, gave Clem an excruciatingly painful shock. (App. pp. 303-304). Dr. Decker then determined that the stimulator unit was broken and needed to be removed and replaced.

Dr. Decker scheduled the surgery to remove the broken spinal cord stimulator unit and replace it with a new one. The surgery involved incisions in Clem's back to access the device and wires. The spinal cord stimulator unit itself was removed from Clem's back and a new unit put in its place. (App. p. 310-312)

Immediately following the surgery performed by Dr. Decker, Clem began to feel relief from pain for the first time since the accident. Clem recuperated from the surgery and began to recover from the pain that resulted from the collision caused by Cosby. (App. p. 312).

Clem's medical expenses resulting from the collision, including the surgery to replace the spinal cord stimulator unit, totaled $176,814.98.

STANDARD OF REVIEW, ARGUMENT AND AUTHORITIES

Response to Assignment of Error I: In Trial 1, the trial court properly set aside the inadequate jury verdict and granted additur.

A. Standard of Review

Where the appellant asks this court to reverse the trial court and reinstate the jury's verdict, the jury's verdict is not entitled to the same weight as one which was approved by the trial court. Baird v. Dodson Brothers Exterminating, 217 Va. 745, 749, 232 S.E.2d 770, 773 (1977). A verdict set aside by the trial court should only be reinstated if there is credible evidence in the record to support it. Graves v. National Cellulose Corporation, 226 Va. 164, 169 306 S.E.2d 898, 901 (1983).

In Trial 1, the court instructed the jury that it was to give an award that would reasonably compensate Clem for the injury she suffered in this accident, including an award of her medical expenses. The question considered by the trial court before awarding additur, and the question facing this Court is whether there was any evidence which permitted the jury to award an amount less than the medical specials which were introduced without objection.

The trial court found that the jury's verdict in Trial 1 was contrary to the law and the evidence and set it aside and granted additur. Liability was

not contested and Cosby offered no evidence to contradict the causation of Clem's injuries, the necessity of her medical treatment or the expense associated with that treatment.

As this Court has stated in Rutherford v. Zearfoss, 221 Va. 685, 689, 272 S.E.2d 225, 227-28 (1980) inherent in the Court's ruling setting aside a jury verdict is a finding that the jury was influenced by passion, corruption or prejudice, or misconceived or misunderstood the facts or the law and finally, that the jury was not the product of a fair or impartial decision. Supinger v. Stakes, 255 Va. 198, 495 S.E.2d 813 (1988), citing Rutherford v. Zearfoss, 221 Va. 685, 689, 272 S.E.2d 225, 227-28 (1980) and Smithey v. Sinclair Refining Co., 203 Va. 142, 146, 122 S.E.2d 872, 876 (1961).

B. In Trial 1, the trial court properly found that no credible evidence supported the amount of the jury's award, and that the award was therefore contrary to the law and the evidence.

Clem presented the testimony of Dr. Decker who described the nature of her injuries in the collision caused by Cosby, and the steps he took to help her recover and the expenses associated with her recovery. Dr. Decker opined that the collision made the replacement of the spinal cord stimulator necessary. (App. p. 63).

Cosby presented no medical expert testimony and no other evidence with which to challenge or disprove the medical evidence admitted or the costs of the treatment incurred by Clem.

This Court stated in Cheatham v. Gregory, 227 Va. 1, 4 (1984), that

> "we have repeatedly held that although a trier of fact must determine the weight of the testimony and credibility of witnesses, it may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with facts in the record, even though such witnesses are interested in the outcome of the case."

Notwithstanding the weight and effect which is given to the verdict of a jury in cases involving damages for personal injuries and the fact that no standard measure of damages can be arrived at for the pain and suffering of an individual, the finding of a jury is still subject to the control of the Courts. Glass v. David Pender Grocery Co., 174 Va. 196 (1939).

If the amount of the verdict returned bears no reasonable relation to the damages suggested by the facts in the case, and is manifestly out of line and at variance with the facts, Courts must exercise control in the interest of fairness and justice. Id. at 201-02. In DeWald v. King, 233 Va. 140 (1987), special damages were uncontroverted in action to recover for personal injuries. The verdict in approximate amount of special damages held inadequate as ignoring pain and disfigurement. In Rome v. Kelly

Springfield, 217 Va. 943 (1977), the special damages were uncontroverted in action to recover for personal injuries in breach of warranty case; a verdict in exact amount of special damages was held inadequate as ignoring pain..

In Bradner v. Mitchell, 234 Va. 483 (1987), the Court held that where the evidence is uncontroverted and so complete that no rational fact-finder could disregard it (as it was in Glass, Rome and DeWald), it must be considered as a fixed, constituent part of the verdict. In the instant case, the Defendant presented no evidence of causation and failed in cross examination to establish any other factual basis for the causation of the damages. The amount of the damages was not challenged by the Defendant in any fashion.

The evidence presented in the instant case is not susceptible to varying interpretations regarding the extent of the injuries and expenses proximately caused by the automobile accident and, therefore, the verdict was based on an unreasonable interpretation of the evidence or failure to consider elements of damages under the Court's instructions. See Walker v. Mason, 257 Va. 65 (1999).

Va. Code Sec. 8.01-383.1(B) states that in any action at law when the Court finds, as a matter of law, that the damages awarded by the jury are

inadequate, the trial court may (i) award a new trial or (ii) require the Defendant to pay an amount in excess of the recovery of the Plaintiff found in the verdict. If either the Plaintiff or the Defendant declines to accept such additional award, the trial court shall award a new trial.

In the instant case, the proven and uncontroverted special damages of $188,513.08 were required to be awarded by the jury and that under this Code section, the Court properly ordered the Defendant to pay an amount in excess of the recovery awarded in the verdict.

Dr. Decker, the doctor who performed surgery on Ms. Clem to remove and replace her spinal cord stimulator, testified regarding the amount, reasonableness and necessity of the medical treatment provided to Ms. Clem following the accident. His testimony, which is reflected in the Appendix, beginning on Line 17 at Page 65 and continuing to Line 8 on Page 67, recites his expert medical opinion that those medical bills were necessary for the treatment of the injuries suffered by Sue Clem in the automobile accident.

The testimony of Ms. Clem that her total medical costs were $188,513.08 was admitted without objection, and the exhibit (Plaintiff's Exhibit 1) was admitted without objection from the Defendant. (App. 177-178) In addition, the Defendant chose not to cross-examine Clem about

the costs of her medical treatment. It is noteworthy that when the medical costs were raised by Clem's counsel on re-direct, counsel for Cosby objected stating, "Objection. I said nothing about bills, and nothing in my cross-examination brought up her exhibit." (App. p. 190)

The only evidence admitted in the case regarding the medical bills and their causation was the evidence admitted by the Plaintiff. The amount of the medical bills was in no way challenged. The fact that the Plaintiff had the procedures and incurred those costs is not in dispute. Unlike the facts in Hunley v. Osborne, 256 Va. 173, 178 (1998), all of the special damages submitted by Clem had already been incurred and the amounts were fixed and testified to without equivocation, cross-examination or contradiction.

Cosby argues that the "evidence" it relies upon in support of the jury's verdict was the fact that Sue Clem had suffered back pain for a long period of time. Of course, that is the precise reason she had the implanted spinal cord stimulator. The spinal cord stimulator gave her relief from her chronic back pain and stopped giving her that relief when it was broken at the time of the accident. The fact that the spinal cord stimulator did not relieve all of her pain, or that it required periodic evaluation and management by her medical team, does not give the jury any basis to disregard the

straightforward evidence that the spinal cord stimulator stopped working entirely at the moment of the accident.

Cosby argues that the jury could disregard Dr. Decker's testimony because Dr. Decker relied on Clem's statements. Cosby goes as far as to suggest that the jury could conclude from Dr. Decker's testimony that perhaps the battery in the spinal cord stimulator simply died at approximately the time of the accident. This argument is simply not supported by the record. In Cosby's brief, counsel states "He (Dr. Decker) agreed that anything could happen when the battery is dying." In fact, in Cosby's *de bene esse* testimony, on redirect, Decker was allowed to read what he actually said in his discovery deposition,

> "I have never seen a stimulation of this pattern when the battery was running down, that it would all of a sudden turn on is something that we would really expect to be due to a loose wire rather than a battery problem. . . so I think we can say with a reasonable degree of medical certainty that the pattern we saw when we were assessing her electronically was more like we do to a broken wire or something loose somewhere as opposed to the battery running down." (App. p. 77)

As a result, Cosby should not be heard to argue, as he attempts in his brief, that "The jury could reasonably have believed that a dying battery was the cause of the malfunction." There was literally no <u>evidence</u> whatsoever to support that proposition and the sole expert who testified

regarding his evaluation and treatment of Ms. Clem and his long-standing technical knowledge of this device, stated that the malfunction of the spinal cord stimulator observed in this situation did not occur as the result of anything to do with the battery wearing down.

This argument by Cosby particularly illustrates the fallacy in Cosby's position on appeal. Cosby does not offer actual evidence upon which the jury could have relied to make its finding that some of the medical costs should not be included in its verdict. Rather, Cosby suggests that the jury simply disagree with certain parts of the evidence, in a word, to award a lower amount. Given the evidence in the case, the jury's decision to do so was plainly wrong and contrary to the law and the evidence in the case. As such, the jury's verdict was properly overturned by the court and the additur which was awarded, was appropriate under the law and the facts of the case.

In any civil jury trial, the ambit of the issues decided by the jury is determined by rulings during the trial and ultimately described in the instructions presented to the jury. While a jury verdict is entitled to deference from the Court, a basic requirement for the sufficiency of any jury verdict is that the verdict be consistent with the law and the evidence as presented to the jury. Where the jury's verdict cannot be reconciled with

and is clearly in derogation of the law and the evidence presented to it for its determination, then the jury's verdict should be overruled.

In its examination of the standard upon which a trial court can award additur, this court, in Rutherford v. Zearfoss, stated that the trial court must conclude that the verdict was inadequate as a matter of law and that such conclusion must stem from the court's finding passion, corruption or prejudice to influence the jury, or it based its decision on a misconception or misunderstanding of the facts or the law. Rutherford v. Zearfoss, 221 Va. 685, 689 (1970). In many cases, the only indication that a jury was improperly influenced or that the jury misconceived or misunderstood the facts or the law, is the amount of the verdict itself. On that basis alone, the verdict in Case 1 (and in Case 2) justified additur. However, in Case 1, the jury's consideration of a matter not before them made clear by the question which was asked during their deliberation. Here the trial, in setting aside the verdict, made the specific analysis required by this court in Rutherford v. Zearfoss. The court found that the jury's verdict was inadequate as a matter of law and that the jury had misunderstood the law of the case. The instructions to the jury had included a damages instruction which required the jury to award the Plaintiff her proven special damages.

In this case, the jury's verdict and award of $9,000.00 in damages is manifestly contrary to the instructions given the jury and the uncontroverted evidence presented through testimony and exhibits.

C. In Trial 1, the trial court properly considered the question asked by the jury in determining if the jury had based its decision on something other than the law and the facts of the case.

The trial court did not abuse its discretion when it considered a question asked by the jury before the trial court ruled that the jury verdict in Trial 1 should be set aside and additur granted to the Plaintiff. Having been sent to deliberate with a statement of medical damages totaling $188,513.08, the jury returned with this question:

> "How much of these expenses were actually paid out of pocket by the Plaintiff?" (App. p. 220).

This question, followed by a verdict that bore no rational connection to the unchallenged damages in the case, demonstrates that the jury failed to follow the law and facts presented to them. The question, part of the record of the case, is part of the context in which the Court may consider the motion to set aside the verdict.

In a recent decision from this Court, the jury's question in a civil case was identified as part of the reason for reversal. The opinion in Orthopedic

& Sports Physical Therapy Associates, et al. v. Summit Group Properties, LLC, 238 Va. 718, 724 S.E. 2d 718 (2012), addressed a question asked by a civil jury during deliberations. After being instructed on issues of company liability for actions of individual members, the jury sent in a question:

> "In regard to Instruction 15, 'Do the actions or non-actions of a minority portion of the group represent authority of the group?'"
>
> The Court, in its finding, stated:
>
> "From this question, we can infer that during the deliberations the jury considered whether some members of Summit committed fraud. If the fraud was committed in the ordinary course of the LLC's business, then fraudulent acts by one member of the LLC would bind it. Because we cannot tell whether the jury believed that fraud was committed in the ordinary course of OSC's business or in the ordinary course of Summit's business, we cannot conclusively say that the jury was not misled." Id. at 724 S.E. 718, 722-723.

In a decision from this spring, the Court addressed this part of the decision from OSPTA in a footnote. In Dominquez v. Pruett (Va. 2014, Record No. 131091), the Court acknowledged the ruling from OSPTA:

> "(In OSPTA) we considered a question raised by the jury in determining whether to set aside the verdict due to an erroneous instruction. However, in that case we used the jury's question as proof that we could not conclusively say that the jury had not been misled by the erroneous instruction." Id. at page 16.

In the case at bar, the jury's question reveals its consideration of an award of an amount less than the special damages proved – upon a basis not permitted by the instructions. The $9,000.00 verdict following the question of how much the Plaintiff paid out of pocket establishes that the verdict was contrary to those instructions.

The Court properly instructed the jury that the jury was required to make a determination from the law, as presented in the instructions, and the evidence as presented by the witnesses and through the exhibits. (App. p. 222). The Court's response to the jury's question underscores the requirement that the jury find an award that included, as an element of Clem's damages, the full amount of the proven and uncontradicted medical expenses.

Response to Assignment of Error III: In Trial 2, the trial court properly set aside the inadequate jury verdict and granted additur.

A. Standard of Review

The standard of review on this Assignment of Error is the same as the standard of review for Assignment of Error I.

B. In Trial 2, the trial court properly found that no credible evidence supported the amount of the jury's award, and that the award was therefore contrary to the law and the evidence.

The trial court did not abuse its discretion when it ruled that the jury verdict in Trial 2 should be set aside and additur granted to the Plaintiff. Clem incorporates her arguments made above, inasmuch as the evidence presented and the arguments made in Trial 2 were substantially the same as those made in Trial 1.

C. In Trial 2, the trial court properly considered the misconduct of Cosby's counsel.

In the second trial the evidence was virtually the same as in the first trial. Cosby offered no evidence contesting the causal link between the collision and the damages suffered by Clem. Cosby now posits the remarkable proposition that he should benefit from his own counsel's misconduct. Cosby argues that his counsel attempted to inject proximate cause into the jury's consideration, and that Clem's counsel failed to object when Cosby's counsel violated the prohibitions of the Court. (App. p. 356).

In essence, Cosby asks the Court to reverse and reinstate the verdict because his counsel defied the Court and improperly argued to the jury. This argument fails to recognize the absence of any actual evidence for

Cosby's position, the efforts of his counsel in argument to the contrary notwithstanding.

<u>Response to Assignment of Error IV</u>: In Trial 2, the trial court was required to award a new trial at the request of an underinsurance carrier.

A. Standard of Review

This Assignment of Error raises a question of law and is reviewed by this Court de novo.

B. The participation of the Underinsurance Carrier in the case, expressly permitted by statute, includes the right to demand a new trial instead of accepting additur.

Cosby's argument that the UIM Carrier does not have the same procedural rights as the named defendant finds no support in the statute or in the case law of Virginia. If the UIM carrier decides to participate in the case in its own name, with the potential for an adverse verdict it may be contractually obligated to pay, then it has the same procedural options available to the other parties, including the named defendant.

The statute permits a single party to "veto" the additur and demand a new trial, and it stands to reason that where there are several parties in

interest any one of them can make the decision to demand a new trial. Finally, Cosby has lost nothing because he has his appeal and his arguments, regardless of their merits, from Trials 1,2 and 3.

Response to Assignment of Error VII: In Trial 3, the trial court properly granted partial summary judgment to Clem for her medical expenses.

A. Standard of Review

This Court reviews the grant of summary judgment as a de novo review.

B. There was no material fact genuinely in issue regarding the causation or amount of Clem's special damages.

Cosby argues variously that the testimony of Clem and her witnesses was unreliable or at least subject to various interpretations. "Question everything" his counsel exhorted the jury. But no evidence was adduced by Cosby to put any fact material to the causation and amount of Clem's special damages in issue. Clem testified unequivocally that the spinal cord stimulator stopped working when the collision occurred. Dr. Decker testified unequivocally that the spinal cord stimulator was damaged in the collision and that replacement of the unit was medically necessary. Both

Clem and Decker testified without contradiction—essentially without cross examination—to the amount of the medical specials incurred by Clem. The trial court properly found that as to the special damages, given the admission of liability and the absence of contested fact, summary judgment should be granted.

In addition, Clem incorporates her arguments made in response to Assigments of Error I and III, inasmuch as the evidence presented in Trial 3 was substantially the same as that in Trials 1 and 2.

<u>Response to Assignment of Error VIII</u>: In Trials 1, 2 and 3, the trial court ruled properly, and on at least five separate occasions, that Dr. Decker's testimony was competent and admissible.

A. Standard of Review

This Court must determine if the trial court abused its discretion in permitting the testimony of Dr. Decker.

B. Dr. Decker was qualified to offer an opinion concerning the technical and mechanical aspects of the spinal cord stimulator.

The trial court did not abuse its discretion when it ruled that Dr. Decker was qualified to testify. Dr. Decker was duly qualified as an expert in the surgical implantation and monitoring of implanted spinal cord

stimulators. His testimony and his opinions were entirely consistent with his knowledge, experience and training and his evaluation, examination and treatment of Clem.

Dr. Decker's discovery deposition was taken by the Defendant on August 3, 2011. After his discovery deposition was taken, Dr. Decker was designated as a testimonial expert by Clem.The Defendant moved to exclude Dr. Decker's expected testimony on the basis of the testimony Defendant had elicited from him in the discovery deposition.

Defendant's Motion to Exclude was briefed and argued to the Court on October 25, 2011. The Court denied the Motion.

Next, Dr. Decker's trial testimony was taken *de bene esse* on December 13, 2011. His deposition was videotaped and Defendant's counsel participated in that *de bene esse* deposition.

Following the taking of Dr. Decker's trial testimony, the Defendant moved to exclude Dr. Decker's *de bene esse* testimony. That Motion was briefed and argued to the Court on January 17, 2012. The court denied the Motion.

Twice more, at the beginning of trial and during trial, Defendant moved to exclude Dr. Decker's testimony. On each occasion, the Court having heard lengthy arguments from the Defendant and having reviewed

Defendant's pleadings, the case law offered by the Defendant, rejected Defendant's argument and denied Defendant's Motion to Exclude Decker's testimony.

From a substantive standpoint, Dr. Decker is, in fact, an expert "regarding the technical aspects of Ms. Clem's spinal cord stimulator" at least to the extent necessary to give the opinion testimony he offered in this case. A significant aspect of Dr. Decker's background and experience comprising his technical expertise with this device was elicited from Dr. Decker when he was asked questions on *voir dire* during his trial testimony by counsel for the Defendant:

> "Q Okay. Have you – I know you are familiar with implanting spinal stimulators or replacing spinal stimulators, but have you ever fixed the internal workings of the spinal stimulator? Have you taken it apart, rewired one, things of that nature?
>
> A Well, I was a consultant for Medtronic for a number of years and visited with their engineers many times. And we took things apart and looked at them. I have never fixed anything, but I was familiar with the internal workings of their units.
>
> Q Okay. Have you ever built a spinal stimulator or helped any of those engineers build a spinal stimulator?
>
> A Yes, I have.
>
> Q Okay, and where was that at?
>
> A Medtronics up in Minnesota, Saint Paul.

Q Okay. Do you recall what year you helped build or develop --

A It spanned a period of probably five to seven years, and it probably ended five years ago, six or seven years ago, something like that."

12/13/2011 (App. p. 43)

Dr. Decker's knowledge, experience and training with implanted spinal cord stimulators provided him with far greater knowledge of the technical functioning and use of an implanted spinal cord stimulator than the average person.

C. Dr. Decker's opinion on causation was based on facts known to him and rendered to a reasonable degree of medical certainty.

The trial court did not abuse its discretion when it admitted the testimony of Dr. Decker regarding the reason that the spinal cord stimulator failed. Defendant characterizes Dr. Decker's knowledge of spinal cord stimulators as "general" despite Decker's obvious decade's long experience with the devices, including working with the engineers at the offices of the manufacturer. Defendant's argument ultimately devolves to the proposition that unless the exact nature of the mechanical malfunction of the device at the exact moment that it stopped working could be identified with certainty by Dr. Decker that Dr. Decker is unable to give an opinion regarding the causal

connection between the automobile accident and the cessation of function of the spinal cord stimulator.

The actual issue upon which Dr. Decker was asked to opine was whether the collision made the replacement of the system necessary. He had both a history from his patient, Clem, and lengthy experience with many aspects of the design and functioning of the system. He was candid in his response that he could not pin-point the precise physical or electronic nature of the fault in the system, but he didn't need to do so. He only needed to know that it stopped at the time of the impact, and was unable to be made to function after that time. Based upon those facts he and his experience he was qualified to and did give an opinion that the collision made the replacement of the implanted spinal cord stimulator necessary.

A physician is entitled to rely upon the factual information provided to him by his patient unless it is obviously false. The information provided to Dr. Decker by Clem was not information of a technical or scientific nature, only that her spinal cord stimulator worked before the accident and failed to work immediately following the accident. Clem was further able to say that when she attempted to cause the normal function of her spinal cord stimulator following the accident, she received painful shocking which Decker testified was indicative of a non-functioning unit. Dr. Decker stated he relied on this

history from Clem, and that he found her to be honest. (App. p. 79). He testified that it was normal for a physician to rely on the history provided by his patient. (App. pp. 78-79).

Further, Dr. Decker specifically testified to a technical, scientific basis for his conclusion that the spinal cord stimulator was damaged in the accident. Dr. Decker rules out a coincidental battery failure and states, to a reasonable certainty:

> "The pattern we saw when we were assessing her electronically was more likely due to a broken wire or something loose somewhere, as opposed to the battery running down." (App. pp.77-78)

This observation, his knowledge, experience and training in both the implantation of the devices, and their technical makeup and operation, added to the history he received from Clem, and supported, from an admissibility standpoint and from a practical standpoint, his opinion of medical causation.

CONCLUSION

For all of the reasons stated herein, Clem respectfully requests that this Court affirm the judgment of the trial court in this case.

RESPECTFULLY SUBMITTED,

William E. Glover, Esq. (VSB No. 25965)
Jeannie P. Dahnk, Esq. (VSB No. 25825
GLOVER & DAHNK
P.O. Box 207
Fredericksburg, VA 22404-0207
Telephone: (540) 373-8600
Fax: (540) 373-8629
Email: weg@gloveranddahnk.com
Counsel for Appellee

CERTIFICATE PURSUANT TO RULE 5:17(e)

The Parties

Appellant: Glen Cosby
Counsel: Danielle D. Giroux (VSB No. 45401)
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
P.O. Box 70280
Richmond, VA 23255
Telephone: (804) 747-5200
Fax: (804) 747-6085
E-mail: dgiroux@hccw.com

and

Jayne B. Randall (VSB No. 28728)
Ryan T. Walker (VSB No. 75544)
OFFICE OF GEICO STAFF COUNSEL
301 Concourse Boulevard, Suite 330
Glen Allen, VA 23059
Telephone: (804) 967-9445
Fax: (804) 967-0205
Email: jrandall@geico.com
rwalker@geico.com

Appellee: Susan Clem
Counsel: William E. Glover (VSB No. 25965)
Jeannie P. Dahnk (VSB No. 25825)
GLOVER & DAHNK
P.O. Box 207
Fredericksburg, VA 22404-0207
Telephone: (540) 373-8600
Fax: (540) 373-8629
E-mail: weg@gloveranddahnk.com
jpd@gloveranddahnk.com

The undersigned hereby certifies that one electronic version and 15 copies of the foregoing Brief Of Appellee are being filed with Patricia Harrington, the Clerk of the Supreme Court of Virginia, 100 North 9th Street, Richmond, VA 23219, by hand-delivery, and that one electronic version and 3 true and exact copies were sent by U.S. Mail, postage prepaid to Danielle D. Giroux, Esq., Harman, Claytor, Corrigan & Wellman, P.O. Box 70280, Richmond, VA 23255 and Jayne B. Randall, Esq. and Ryan T. Walker, Esq., Office of GEICO Staff Counsel, 301 Concourse Boulevard, Suite 330, Glen Allen, VA 23059, counsels for Appellant, on this 30th day of January, 2015.

The undersigned hereby certifies that they requirements of Rule 5:26 have been complied with.

William E. Glover (VSB No. 25965)
Jeannie P. Dahnk (VSB No. 25825)
GLOVER & DAHNK
P.O. Box 207
Fredericksburg, VA 22404-0207
Telephone: (540) 373-8600
Fax: (540) 373-8629
E-mail: weg@gloveranddahnk.com
jpd@gloveranddahnk.com