STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Mary McPherson and Thomas McPherson,
Plaintiffs Below, Petitioners

vs) No. 11-0287 (Mercer County 07-C-813)

Betty Sue Bolen, as Administratrix of the Estate of Larry E. Bolen, Sr., Defendant Below, Respondent

FILED
May 24, 2012
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Mary McPherson and Thomas McPherson appeal from the Circuit Court of Mercer County's Order denying their Motion to Set Aside Verdict and Grant New Trial. Upon careful review, this Court finds no substantial question of law and, after consideration of the applicable standard of review and the record presented, we find no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On July 8, 2006, petitioner Mary McPherson [hereinafter "Mrs. McPherson"] was a passenger in a vehicle operated by her husband, petitioner Thomas McPherson, when it was rear-ended by Larry Bolen, Sr. [hereinafter "Mr. Bolen"]. Mrs. McPherson claimed soft tissue neck and back injuries as a result of the accident. Petitioners filed suit and liability for the accident was admitted by then-defendant, Mr. Bolen. Mr. Bolen passed away during the pendency of the suit and his wife, Respondent Betty Sue Bolen, Administratrix of the Estate of Larry Bolen, Sr., [hereinafter "Mrs. Bolen"] was substituted as the defendant. On October 12-13, 2010, the case was tried to a jury solely on the issue of damages. The jury returned a verdict in favor of petitioners in the amount of $11,190.60.[1]

During the trial, both petitioners testified as well as Mrs. McPherson's treating chiropractor, Dr. Randy Maxwell. Dr. Maxwell testified that it was his opinion that Mrs. McPherson had suffered

---

[1]The jury initially awarded medical bills in the amount of $9,018.60 and $288.00 in lost wages–less than the stipulated amount–with no pain and suffering award. The parties agreed to amend the jury's verdict to conform to the evidence to reflect the stipulated amount of lost wages ($672.00) and the court sent the jury back to deliberate on pain and suffering. The jury returned an award of $1,500 for pain and suffering. The jury declined to award damages for loss of consortium to Mr. McPherson.

permanent neck and back injuries in the accident. In support of his opinion on permanency, he testified that "the literature" indicates that if a person has symptoms for three months following an accident, ninety percent of the time they will have suffered a permanent injury. Mrs. McPherson had treated with him on and off for approximately a year.

On cross-examination, Dr. Maxwell indicated that Mrs. McPherson had denied any prior neck or back injuries during her medical history and that, as a result, he would "have to assume" that her injuries were from the accident at issue. Defense counsel again elicited the testimony from Dr. Maxwell that three months of symptoms resulted in a permanent injury ninety percent of the time and asked, hypothetically, if he learned that Mrs. McPherson had been in three prior accidents whether that would affect his opinions. Dr. Maxwell responded simply that prior accidents would make Mrs. McPherson more susceptible to re-injury.

Mrs. McPherson testified that she had been in only one prior accident ten to fifteen years ago. Defense counsel then impeached Mrs. McPherson with medical records reflecting treatment for neck and back injuries sustained in rear-end accidents in 1993, 1999, and 2003 (just three years prior to the subject accident). The records reflected five months of treatment for the 1999 injury. Petitioners' counsel made no objection during the cross-examination of Mrs. McPherson utilizing the medical records as impeachment.[2]

Subsequent to Mrs. McPherson's testimony, petitioners' counsel asked to approach the bench and indicated that he wanted to call Mrs. Bolen to the stand. When counsel and the court asked what information she could possibly have about the case, petitioners' counsel replied, "I'm going to ask her why she didn't call any doctors to say this wasn't a permanent injury and she could testify to that." The court replied, "I think that you can argue that but I think that's improper to question her about that." Petitioners' counsel noted his objection and offered no further areas upon which he wished to question Mrs. Bolen nor persisted in his request to call Mrs. Bolen as a witness.[3]

During closing argument, defense counsel suggested that Dr. Maxwell's permanency theory should apply equally to Mrs. McPherson's prior accidents and injuries, arguing that either Mrs.

---

[2]At the close of Mrs. McPherson's testimony, the records were moved into evidence over the objection of petitioners' counsel, who stated: "Note our objection for the reason previously stated." Neither parties' briefs reference the objection or reflect what the "the reason previously stated" was, although during discussion about jury instructions, petitioners' counsel objected to instructions regarding pre-existing injuries on the basis that respondent "just simply didn't present any evidence that any pre-existing conditions existed at the time of this impact."

[3]Neither the record nor the parties' briefs reflect whether Mrs. Bolen was ever noted as a potential witness in either party's "Disclosure of Fact Witnesses"; however, when petitioners' counsel asked the court if he could call her, defense counsel replied, "For what reason, she's not a witness?" It is unclear if he was referring to Mrs. Bolen being a witness to the accident or a disclosed witness.

McPherson's complaints and treatment could just as likely be the result of the permanency occasioned by the 1999 accident or that Dr. Maxwell's testimony on that issue was simply not credible. Petitioners' counsel made no objection during this portion of defense counsel's closing. During petitioners' closing argument, counsel noted the defense's failure to retain a medical expert as well as the defense's failure to call the doctors who treated Mrs. McPherson for the prior accidents to testify regarding permanency.

Following the jury's verdict, petitioners filed a Motion to Set Aside Verdict and Grant New Trial. In support, petitioners argued, 1) that it was improper for respondent to argue that Mrs. McPherson's medical records demonstrated that she had pre-existing conditions and permanent injuries therefrom without a defense expert to establish permanency; and 2) that it was error for the court to refuse to allow petitioners to call Mrs. Bolen. Petitioners argued, as to the first issue, respondent needed an expert to testify that Mrs. McPherson had pre-existing permanent conditions before properly arguing that point to the jury. As to the second issue, petitioners argued simply that this Court has recognized that a party has a right to call an adverse party, citing Syllabus Point 1 of *Gable v. Kroger Co.,* 186 W. Va. 62, 410 S.E.2d 701 (1991), which states: "Under Rule 611 of the *West Virginia Rules of Evidence* [1985], a party is entitled to call an adverse party and interrogate that party by leading questions."

In response, respondent argued that defense counsel simply "connected the dots" between plaintiffs' own expert's testimony (about permanency resulting if symptoms continue after three months) and the undisputed evidence that Mrs. McPherson had three prior accidents with similar injuries, at least one of which she treated for more than three months. As to the trial court's refusal to allow Mrs. Bolen to testify, respondent argued that petitioners' offer of proof demonstrated that the only proposed area of inquiry would improperly inquire about "matters of trial strategy" which are not for jury consideration and represented that Mrs. Bolen would have had no knowledge of why an expert was not utilized.

The trial court denied the motion, finding that as to the pre-existing condition, counsel simply "argued a reasonable inference to the jury based upon [the] uncontradicted evidence." As to the refusal to allow Mrs. Bolen to testify, the trial court noted that liability had been admitted and that Mrs. Bolen would have no factual information as to damages. The court found further that

> [a] decision to obtain or not to obtain an independent medical evaluation goes to trial strategy and her interrogation on that issue may have led to the introduction of impression's [sic] of defendant's counsel with regard to how the case should be tried, none of which would have been proper for jury consideration and would have been irrelevant to any of the issues being tried. The Court notes that plaintiffs' counsel did argue to the jury that defendant had an opportunity to obtain an IME, but did not do so.

This appeal followed.

This Court has held that "'[a]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.' Syl. pt. 4, *Sanders v. Georgia-Pacific Corp*., 159 W. Va. 621, 225 S.E.2d 218 (1976)." Syl. Pt. 1, *Adams v. Consol. Rail Corp*., 214 W. Va. 711, 591 S.E.2d 269 (2003). Moreover, it is well-established that "'[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.' Syl. pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998)." Syl. Pt. 3, *Adams*.

In this appeal, petitioners argue that the trial court erred in finding that it was proper for defense counsel to argue the existence of pre-existing, permanent injuries without a defense expert. Of paramount importance to the analysis of this assignment of error, is the fact that the only objection lodged by petitioners remotely touching on this issue was as to the admission of the medical records into evidence. *See supra* n.2. However, petitioners did not assign the admission of the records as error. Rather, their error is directed toward the allegedly improper *argument of counsel* that the records demonstrate a pre-existing condition. There was no objection during defense counsel's closing argument or even during impeachment of Mrs. McPherson with the medical records. West Virginia Rule of Evidence 103(a) states:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
> (1) Objection. – In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]

In addition, this Court has held that "'[a] litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.' Syllabus point 1, *Maples v. West Virginia Department of Commerce*, 197 W. Va. 318, 475 S.E.2d 410 (1996)." Syl. Pt. 6, *Page v. Columbia Natural Resources, Inc*., 198 W. Va. 378, 480 S.E.2d 817 (1996).

Notwithstanding their failure to properly preserve the issue for appeal, petitioners' argument is without merit. Petitioners argue simply that in order to attack their contention that Mrs. McPherson's complaints were the result of the accident at issue, respondent needed an expert to opine that her complaints were from a prior injury. Petitioners cite to *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974) which they contend is "instructive and applicable." In particular, petitioners contend that *Jordan's* requirement that "medical or other expert opinion testimony is required to establish the future effects of an obscure injury to a degree of reasonable certainty[]" should be equally applicable to respondent. Syl. Pt. 11, in part, *id.* Obviously, however, this analysis overlooks the fundamental understanding that it is the plaintiff who has the burden of proof and it is that burden and the standard required to prove future damages to which *Jordan* speaks. Nothing in *Jordan* or any other case cited by petitioners stands for the proposition that a defendant cannot

discredit a claim of causation or permanency by arguing the existence of prior accidents and/or injuries.

As to petitioners' second assignment of error–the trial court's purported refusal to allow them to call respondent as a witness–we find that it is equally without merit. The only area of inquiry which petitioners' counsel proffered was one that the trial court found to be inappropriate for interrogation of a witness.[4] In particular, the trial court found that asking Mrs. Bolen why a defense expert had not been called to testify that Mrs. McPherson suffered from permanent, pre-existing conditions "goes to trial strategy" and would delve into defense counsel's mental "impressions." The court further noted in its order that such inquiry would be irrelevant given that the trial was on damages only and that petitioners were nevertheless permitted to argue this issue during closing, suffering no prejudice.

As a threshold matter, we note that although petitioners have framed this issue in terms of the trial court's denial of their right to call Mrs. Bolen as a witness, the record actually reflects that the court merely made an evidentiary ruling, the effect of which was to make calling Mrs. Bolen pointless. Upon requesting the ability to call Mrs. Bolen, the trial court simply ruled that the only question petitioners' counsel intended to ask was improper. Petitioners proffered no other reason to question Mrs. Bolen. Moreover, they cite no support for the notion that, in ensuring a party's "right" to call an adverse witness, the court must go through the pretense of letting the party call the witness to the stand, ask an objectionable question which the court will not require the witness to answer, and then dismissing the witness from the stand. However, the petitioners did not assign as error the trial court's evidentiary ruling as to whether it was proper for counsel to inquire of Mrs. Bolen about the defense's failure to call a medical expert.

Nevertheless, in analyzing this assignment of error as framed by the petitioners, two issues are raised. The first issue is whether the purported "offer of proof" as to the excluded evidence was sufficient to permit appellate review. Secondly, whether any such alleged error was harmless.

Rule 103(a) states:

> Error may not be predicated upon a ruling which admits or excludes

---

[4]During oral argument on the Motion for New Trial, petitioners' counsel also added that he wanted to ask Mrs. Bolen whether she had any conversations with Mr. Bolen about the accident before he died. However, counsel never made such a proffer at the time of trial. Moreover, during oral argument before this Court, petitioners' counsel, for the first time, indicated he wished to inquire of Mrs. Bolen (who was a friend of Mrs. McPherson) whether she had observed Mrs. McPherson suffering from any neck or back complaints prior to the accident. Neither of these "after-the-fact" areas of inquiry are properly before this Court: "Once a party has made a particularized offer of proof under Rule 103(a)(2) of the West Virginia Rules of Evidence, it may not on appeal expand or modify the substance of the evidence put before the trial court." Syl. Pt. 7, *State v. Calloway*, 207 W. Va. 43, 528 S.E.2d 490 (1999).

> evidence unless a substantial right of the party is affected, and . . . *[i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer* or was apparent from the context within which questions were asked.

(emphasis added). In this instance, counsel merely offered what he intended to ask. Nowhere in the record is there any indication of what Mrs. Bolen's response would be inasmuch as counsel did not ask to inquire of Mrs. Bolen outside the presence of the jury to vouch the record, as prescribed by W.V.R.E. 103(b): "The court may . . . direct the making of an offer in question and answer form." The significance of this omission cannot be overstated. In analyzing the sufficiency of offers of proof, this Court has held that "'[t]he purpose of vouching the record is to place upon the record excluded evidence, or to show upon the record what the excluded evidence would have proved in order that the appellate court may properly evaluate the correctness of the trial court's ruling excluding it.' Syllabus point 4, *State v. Rissler*, 165 W. Va. 640, 270 S.E.2d 778 (1980)"; Syl. Pt. 5, *Calloway*, 207 W. Va. 43, 528 S.E.2d 490 (1999). More to the point, as stated in *State v. Blake*:

> The reasons for requiring offers of proof under Rule 103(a)(2) are twofold: They permit the trial judge to reevaluate his or her decision in light of the actual evidence to be offered, and they aid the reviewing court in deciding whether the alleged error was of such magnitude that it was prejudicial to the substantial rights of the defendant.

197 W. Va. 700, 708, 478 S.E.2d 550, 558 (1996).

Petitioners did not request to vouch the record with what the excluded evidence–Mrs. Bolen's response to why a defense expert was not called–would have been, thereby undermining the purpose of 103(a) as stated in *Blake*. Without knowing what Mrs. Bolen's response would have been, the trial court was denied the opportunity to reevaluate whether petitioners should be permitted to examine her and this court is denied the ability to determine whether the exclusion was prejudicial to the substantial rights of petitioners.

Moreover, even in the event this Court were to address this assignment of error under the framework advanced by petitioners, i.e. the court's denial of their "right" to call an adverse party in contravention of Syllabus Point 1 of *Gable*, 186 W. Va. 62, 410 S.E.2d 701 (1991), such ruling would still be subject to harmless error analysis. In that regard, we have stated: "Under Rule 103(a), to warrant reversal, two elements must be shown: error and injury to the party appealing. Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no ways [sic] affects the outcome of the trial." *Reed v. Wimmer*, 195 W. Va. 199, 209, 465 S.E.2d 199, 209 (1995). As noted by the trial court, petitioners' counsel argued the absence of a defense expert to the jury during closing argument and therefore such error, if any, would be "merely academic" and "not prejudicial to the substantial rights of the party." *Id.*

For the foregoing reasons, we find that the trial court committed no abuse of discretion. Therefore, we affirm the trial court's order denying petitioners' Motion to Set Aside Verdict and for a New Trial.

Affirmed.

ISSUED: May 24, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTED IN BY:

Chief Justice Menis E. Ketchum