STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Karen Johnson, individually and
Halford T. Johnson d/b/a Dual Air Refrigeration,
Defendants Below, Petitioners

vs) No. 11-0060 (Wood County 09-C-390)

Andrew J. Buckley,
Plaintiff Below, Respondent

FILED
November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Karen Johnson, individually, and Halford T. Johnson d/b/a Dual Air Refrigeration, petitioners herein and defendants below, appeal the circuit court's order denying their motion for judgment as a matter of law after a jury verdict in favor of Andrew J. Buckley, respondent herein and plaintiff below. In response to the petition for appeal, Mr. Buckley filed a response brief and, thereafter, the Johnsons filed a reply brief.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On January 8, 2009, Petitioner Karen Johnson was driving a vehicle and attempted a left-hand turn across a lane of traffic in which Rejena Buckley was driving. The Buckley vehicle struck the Johnson vehicle. Mrs. Buckley and her husband, Respondent Andrew Buckley, who was a passenger in her vehicle, were injured. At trial, Mr. Buckley's treating medical providers testified that he suffered cervical spine fractures that required surgery and the installation of permanent metal screws and pins. Mr. Buckley also underwent a lengthy period of hospitalization and rehabilitation. Mr. Buckley asserts that he is permanently impaired as a result of this accident.

The vehicle Mrs. Johnson was driving was owned by Dual Air Refrigeration, which is a d/b/a for her husband, Respondent Halford T. Johnson, and Mrs. Johnson was driving in the course of her employment with Dual Air Refrigeration. The Buckleys sued Mrs.

Johnson and Mr. Johnson d/b/a Dual Air Refrigeration asserting negligence and negligent entrustment.

At trial the jury found Mrs. Johnson 100% liable for the accident. The jury awarded Mr. Buckley $536,978.89 in medical expenses; $400,000 in past and future pain and suffering; $250,000 for loss of ability to enjoy life; $0 for loss of spousal consortium; $50,000 for loss of consortium with family; $100,000 for emotional distress and mental anguish; and $150,000 for the present value of reasonable household services. [1] This appeal concerns Mr. and Mrs. Johnsons' assertions that Mr. Buckley failed to properly prove his damages claims, and the circuit court's denial of the Johnsons' motion for judgment as a matter of law or for new trial.

"The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998] is *de novo*." Syl. Pt. 1, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009). The evidence is to be viewed in the light most favorable to the nonmoving party. Syl. Pt. 2, *Id.* " '[T]he ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence.' Syl. pt. 4, in part, *Sanders v. Georgia–Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976)." Syl. Pt. 2, *Estep v. Mike Ferrell Ford Lincoln–Mercury, Inc.*, 223 W.Va. 209, 672 S.E.2d 345 (2008).

I.

As a stay-at-home parent for fourteen years, Mr. Buckley pursued a claim for the value of his lost household services. Mr. Buckley presented testimony from Daniel L. Selby, CPA, establishing a range of dollar amounts, reduced to present value, for the household services he can no longer perform. Mr. Selby's calculations were based upon information provided by the Buckleys as to the household services performed, and the number of hours spent on these services, before and after the accident. Mr. and Mrs. Buckley explained that because of the cervical fracture that Mr. Buckley suffered in this accident, he has difficulty using his left arm and has little strength in that arm. Mr. Buckley is left-handed. He cannot, *inter alia*, reach up with his left arm to retrieve something from a shelf; lift groceries or heavy laundry; vacuum or push a shopping cart with his left arm; cook in the same way that he did before the accident; or do "handyman things."

[1] Rejena Buckley and the Buckleys' children were awarded separate damages. Those awards are not at issue in this appeal.

The Johnsons assert that the circuit court erred in allowing Mr. Selby's testimony about the value of the lost household services because there was no medical predicate to support this claim. They assert that the Buckleys did not present expert medical or vocational testimony to support the permanency and vocational effect of the injury to a reasonable degree of medical certainty. They argue that because the Buckleys quantified their alleged loss by placing a monetary value on it, they were required to produce expert testimony. They analogize this lost household services claim to a loss of earning capacity claim as addressed in Syllabus Point 2 of *Liston v. University of West Virginia Bd. of Trustees*, 190 W.Va. 410, 438 S.E.2d 590 (1993), and in *Cook v. Cook*, 216 W.Va. 353, 607 S.E.2d 459 (2004).

Upon a review of the record on appeal and the parties' arguments, we reject this assignment of error. Mr. Buckley presented extensive testimony from his treating healthcare providers about his injury, surgery, and rehabilitation, and the impact these had upon him. For example, there was medical testimony about the fractures and surgery; the rods and screws attached to his cervical spine during the surgery; and to the differences in his spine before and after this injury. Dr. Barton testified that before the accident, Mr. Buckley led a relatively active lifestyle but is no longer able to do the same things, and that he expected Mr. Buckley to suffer pain for the rest of his life. Mr. Buckley and his wife also testified about Mr. Buckley's household services before and after the injury, and they were in the best position to know what work Mr. Buckley is able to perform around their own home. The obvious conclusion that a reasonable jury would draw from all of this evidence is that Mr. Buckley's injury is permanent and it has negatively impacted his ability to perform household services.

II.

Next, the Johnsons argue that Mr. Buckley's awards for future pain and suffering and loss of ability to enjoy life were unsupported by the evidence, thus the circuit court erred in even instructing the jury on these issues. They argue that the cervical spine injury was an obscure injury, the future effects of which must be proven by medical or other expert testimony under *Jordan v. Bero*:

> Where an injury is of such a character as to be obvious, the effects of which are reasonably common knowledge, it is competent to prove future damages either by lay testimony from the injured party or others who have viewed his injuries, or by expert testimony, or from both lay and expert testimony, so long as the proof adduced thereby is to a degree of reasonable certainty. But where the injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable or subject of common knowledge, mere subjective testimony of

> the injured party or other lay witnesses does not provide sufficient proof; medical or other expert opinion testimony is required to establish the future effects of an obscure injury to a degree of reasonable certainty.

Syl. Pt. 11, *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974). Mr. Buckley counters that a complex fracture in the neck requiring installation of permanent screws and pins is an obvious injury that may be established by lay testimony. In addition, he argues that he did prove future effects through the testimony of his medical providers. Upon a review of the record and arguments of counsel, we find Buckley's arguments persuasive and reject this assignment of error.

III.

In their third assignment of error, the Johnsons argue that the circuit court erred in allowing the jury to award damages "in the absence of qualified expert medical testimony."

Four treating physicians testified, either by means of playing (or reading) their depositions for the jury, or by testifying in person at the trial. The petition for appeal does not challenge that the providers had specialized knowledge, experience, skills, and training on issues relevant to this case. The physicians' qualifications were established in their testimony and in the curricula vitae that are included in the appellate record. Instead, the Johnsons argue that plaintiff's counsel failed to ask the circuit court to qualify these witnesses as experts, and that the circuit court failed to conduct the inquiry required by *Gentry v. Magnum*:

> In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.

Syl. Pt. 5, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

Mr. Buckley responds that the circuit court did not shirk its "gate-keeping" role and did not abuse its discretion in permitting the physicians' testimony. With regard to the three physicians who testified via deposition, Mr. Buckley states that these depositions were noticed for use at trial. Mr. Buckley argues that defense counsel failed to *voir dire* these experts during the depositions, and failed to object or raise this issue until a motion the day of trial. The circuit court considered and denied the "Defendants' Trial Motion to Exclude

the Testimony of Daniel L. Selby, CPA" that alleged Mr. Selby's opinions lacked a medical foundation. As to the doctor who testified in person at trial, Mr. Buckley argues that defense counsel, again, never asked to *voir dire* the witness and never objected to his testimony.

"'The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.' Syllabus Point 6, *Helmick v. Potomac Edison Co.*,185 W.Va. 269, 406 S.E.2d 700 (1991), *cert. denied*, 502 U.S. 908, 112 S.Ct. 301, 116 L.Ed.2d 244 (1991)." Syl. Pt. 3, *Green v. Charleston Area Med. Ctr., Inc.*, 215 W.Va. 628, 600 S.E.2d 340 (2004) (per curiam). Although the procedures followed could have been better, we conclude that any error was harmless and the circuit court was not clearly wrong. By denying the written motion, and by permitting the admission of the testimony of all four physicians, the circuit court obviously considered whether the providers satisfied the requirements of Syllabus Point 5 of *Gentry* and Rule 702 of the West Virginia Rules of Evidence. Our review of the record shows that the medical providers easily met these requirements.

IV.

In their fourth and final assignment of error, the Johnsons argue that the circuit court erred in admitting into evidence Plaintiffs' Exhibit 19, an aggregate exhibit containing Mr. Buckley's medical bills from multiple physicians and hospitals. "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).

The exhibit was admitted upon Rejena Buckley's testimony that these were the bills incurred for her husband's treatment as a result of this car accident. The Johnsons argue that the testimony of the four physicians did not link the car accident to Mr. Buckley's cervical fracture injury to a reasonable degree of medical probability. However, given the medical testimony about what is depicted on x-rays taken immediately after the accident, and given the Buckleys' testimony about the pain Mr. Buckley suffered after the accident, we find that this argument lacks merit.

The Johnsons also argue that the exhibit was erroneously admitted without any physician testimony about the reasonableness and necessity of the charges. However, West Virginia Code § 57-5-4j provides that "[p]roof that medical, hospital and doctor bills were paid or incurred because of any illness, disease or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable." The Johnsons do not point us to any place in the record where this prima facie evidence was disputed.

Accordingly, we find that the circuit court did not abuse its discretion in admitting this exhibit.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 28, 2011

CONCURRED IN BY:

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