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Torts

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TORTS

ADAMS v. EL-BASH, 338 S.E.2d 381 (W. Va. 1985).

Civil Procedure—Evidence—Patient Need Standard—Physician Disclosure—Torts

In this malpractice action, a jury verdict in the Circuit Court of Cabell County favored the defendant. Appellee, Dr. Omar El-Bash, performed a urethrotomy on appellant Robert Adams. Subsequent to the operation Adams became incontinent to a degree that made it necessary for him to wear diapers. The appellants sued both for negligence and the commission of a battery because the procedure was performed without an informed consent of the patient.

The court addressed two issues in this case: (1) Whether the verdict of the jury, insofar as it found that Adams gave an informed consent to the operation, was contrary to the weight and preponderance of the evidence, so that it should be set aside, and (2) whether the discovery of new evidence entitled appellants to a new trial.

The court discussed the standard for informed consent, and the patient need standard adopted by West Virginia, rather than disclosure standards based upon national or community medical disclosure practice. In addition, the court added to this an objective test relating to proximate cause used in other jurisdictions. In cases applying the doctrine of informed consent, where a physician fails to disclose the risks of surgery in accordance with the patient need standard of disclosure and the patient suffers an injury as a result of this surgery, a causal relationship between such failure to disclose information and damage to the patient, may be shown if a reasonable person in the patient's circumstances would have refused to consent to the surgery had the risks been properly disclosed. In this case the appellants carried their burden of proving informed consent, but there was no direct evidence presented on the causation issue. The jury was properly instructed and free to draw reasonable inferences from the expert's opinions as to the risks of the urethrotomy. The appellants assertion of the relevance of their new evidence did not meet several standards laid down for the granting of a new trial on such a basis. They did not exercise due diligence in locating their new witness, and his testimony would have been cumulative rather than new and material. It was not such evidence as to produce an opposite result at a second trial on the merits. Therefore, trial judge's denial of a new trial on this ground was correct.

CHAMBERLAINE & FLOWERS, INC. v. SMITH CONTRACTING, INC., 341 S.E.2d 414 (W. Va. 1986).

Civil Procedure—Insurance—Nonfeasance

This consolidated action against United States Fidelity and Guaranty Company (USF & G) by Smith Contracting alleged the wrongful refusal to pay an

insurance claim, negligence, and outrage in connection with damages to a Caterpillar tractor. Smith instituted its action fifteen months after USF & G denied coverage, despite a policy provision limiting the time to file suit to one year after the discovery by the insured of the occurrence giving rise to the claim. The Circuit Court of Harrison County granted USF & G's motion for summary judgment.

The issues were: (1) Where a piece of equipment is covered by a personal property floater to a marine insurance policy, and the floater was very similar to casualty insurance, whether the rider should be treated as casualty insurance with its noncommitant limitations period; (2) whether the appellee's refusal to act on an insurance claim creates tort liability herein; and (3) whether a corporation can recover on a claim of the infliction of severe emotional distress.

The court found that the one year filing provision in marine policies are specifically allowed by section 33-6-14 of the West Virginia Code, and the code elsewhere unambiguously provides that a marine policy includes personal property floaters. It would have been incorrect to treat this floater as casualty insurance. In addition, appellant's contract claim was barred by the one year limitation provision. The appellee's refusal to pay on the policy was not a negligent act, but an affirmative refusal to act and as such consitutes nonfeasance, not misfeasance. Unless there is some duty to act apart from the contract, there is generally no tort liability for nonfeasance. "It is difficult to conceive how any conduct, no matter how outrageous, could inflict severe emotional distress on a corporation." Therefore a corporation cannot recover for this tort. The court found that the trial court had properly dismissed all three counts of the appellant's complaint. The award of summary judgment, though, may have been improper, since the court limited its inquiry to the plaintiff's theory of law only. The court must look for other possible causes of action before ruling on a motion for summary judgment, and see whether there are any grounds for an amended complaint.

CRANE & EQUIPMENT RENTAL CO. v. PARK INC., 350 S.E.2d 692 (W. Va. 1986).

Evidence—Negligence—Proximate Cause—Torts

The Circuit Court of Kanawha County had denied motions for a directed verdict and a judgment notwithstanding the verdict in favor of appellant Park Corporation, and the jury found Park ninety per cent negligent and plaintiff Crane Equipment ten percent negligent in a suit brought by Southwestern Engineering Company, Crane, and Louisiana Light against Park Corporation, and a separate suit by Crane against Park for injuries to Crane's equipment, both suits having been consolidated. Plaintiffs maintained that an accident involving a 161 ton condenser being loaded onto a barge at Park Corporation's loading dock in South Charleston became imbalanced and fell onto the barge, causing damage to Crane's equipment. The plaintiffs further maintained the accident was caused by Park's

negligent maintenance of the dock, the concrete of which was cracked and had sunk a number of inches in previous years.

The issues were: (1) Whether the evidence was sufficient for the jury to find the appellant guilty of primary negligence, which itself was the proximate cause of the injuries, thus rendering the refusal to direct a verdict for appellant correct; (2) whether an injury, by itself, is sufficient to establish a prima facie case of negligence; and (3) whether the evidence was sufficient to submit the case to a jury.

The court held that the jury could have reasonably inferred from evidence that the dock supporting the downriver crane settled about two inches during the loading operation. However, there was an absence of evidence as to what might have caused the dock to settle. Within a few days after the accident, Crane Equipment used the dock, without incident, to load six condensers onto river barges. It was therefore improper for the trial court to permit the jury to speculate on the cause of the accident. The court erred in not directing a verdict in favor of the defendant.

DELP v. ITMANN COAL CO., 342 S.E.2d 219 (W. Va. 1986).

Civil Procedure—Defective Repairs—Employer—Liability—Evidence—Mandolidis Torts

The appellant, an underground coal miner, was injured when the ripper head of a continuous miner machine swerved to the side and pinned him against a rib of coal. He suffered a broken leg, injuries to the back and chest, and was unable to return to work for almost three years. The control levers of the machine had been improperly bolted, the proper levers or shear pins having been removed. Seeking damages, the appellant labeled his injuries the direct and proximate result of the appellee's willful, wanton, and reckless misconduct in making defective repairs to the machine. The Circuit Court of Wyoming County found insufficient evidence to submit the issue to the jury and directed a verdict for Itmann Coal Company. Delp's motion for a new trial was denied.

The court decided two issues in this case: (1) Whether evidence of willful, wanton, and reckless misconduct was sufficient to warrant a finding of deliberate intent to injure appellant on the part of the appellee; and (2) whether it was error for the trial court to direct a verdict in favor of the appellee in light of those facts which the jury might have properly found under the evidence.

In affirming the judgment of the circuit court, the court found that there was no evidence that the appellee's use of a bolt instead of the proper cotter pin either caused the machine to malfunction or brought about any violation of federal or state safety regulations. Nor was there anything to indicate that the appellee knew that the machine presented a danger to persons working around it. While the appellee may have been negligent in allowing substitution of an improper part

in repairing the machine, such a showing was not sufficient to prove the deliberate intent required under *Mandolidis*. The directed verdict for appellee was properly granted.

HARDMAN TRUCKING, INC. v. POLING TRUCKING CO., 346 S.E.2d 551 (W. Va. 1986).

Civil Procedure—Lost Profits—Measure of Damages—Prejudgment Interest—Torts

The plaintiff, Hardman, had sought damages resulting from a collision between one of its triaxle dump trucks and another such vehicle belonging to James Foltz and lessee Poling, in the form of repairs, loss of profits, towing, lost stone, and inconvenience. The jury in the Circuit Court of Randolph County awarded the plaintiff $56,000. On defendants' motion, the court set aside the verdict and granted a new trial, permitting prejudgment interest only on the damages for towing and lost stone.

The issues addressed by the court were: (1) Whether an improper standard was used for measuring damages resulting from injury to the truck; (2) whether the court's conclusion that plaintiff failed to prove loss of profits was correct; (3) whether the plaintiff failed to mitigate its damages; and (4) whether the court's denial of prejudgment interest on lost profits and repairs, and denial of damages for inconvenience was supported by the evidence.

In affirming in part, reversing in part, and remanding, the court held that there was sufficient evidence to support the verdict on damages to the truck, including testimony on its market value, all repair bills, and attribution as to which flowed from the defendants' negligence. Loss of profits which naturally followed the wrongful act and were certain both in their nature and their cause were also sufficiently demonstrated. The appellant's evidence showed that it was impossible to lease a replacement vehicle. The jury could reasonably have believed this and weighed it in its disposition of the amount awarded for loss of profits, which was lower than the amount claimed by Hardman. Since an award of prejudgment interest on an ascertainable pecuniary loss is a proper element of damages in a tort action, and the damages herein are reasonably susceptible to calculation, they are subject to prejudgment interest. As to inconvenience, the trial judge correctly found that appellant presented no evidence of being inconvenienced, and this award was properly set aside. In sum, the order setting aside the verdict and granting a new trial was reversed, except that portion of the order setting aside the verdict of $2,000 for inconvenience was affirmed. The order denying prejudgment interest was reversed, and the case remanded for further proceedings.

PAINTIFF v. PARKERSBURG, 345 S.E.2d 564 (W. Va. 1986).

Locality Rule Abolished—Medical Malpractice—Torts

The Circuit Court of Wood County had granted a directed verdict in favor of the defendant hospital and defendant physician based upon the plaintiffs' failure to produce expert medical testimony from witnesses who had personal knowledge of the appropriate standard of performance of the average surgeon in good standing in the area of Parkersburg, West Virginia, in September, 1981.

Dr. William Gilmore's performance of a surgical tubal ligation upon Mrs. Paintiff at a time when she was three to four weeks pregnant produced pain, infections, and prompted a therapeutic abortion, but the testimony of both of plaintiffs' witnesses was deemed inadmissible when they could not assert information as to the standard practice of general surgeons in Parkersburg.

The principle issue in this case was whether it was error for the trial court to excuse the testimony of two witnesses competent in the performance of the surgical operation at issue because they were unfamiliar with the peculiarities of surgical practice in Parkersburg.

The court stated that West Virginia had virtually abandoned the locality rule and that much has been written about its obsolescence. Hence, this case abolished the locality rule in West Virginia. The judgment of the Circuit Court of Wood County was reversed and the case remanded for a new trial.

ROBERTS v. STEVENS CLINIC HOSP. INC., 345 S.E.2d 791 (W. Va. 1986).

Civil Procedure—Evidence—Medical Malpractice—Remittitur—Torts— Wrongful Death

A McDowell County circuit court jury awarded $10,000,000 in favor of the parents and two siblings of Michael Joseph Roberts, a two and one-half year old child who died as the result of medical malpractice. In the performance of an authorized biopsy, defendant physician perforated the child's colon, which led to peritonitis. The parents also alleged negligence by the hospital staff in that no antibiotics were administered to the patient for more than seven hours afterwards, or until seven minutes before the final operation took his life. Negligence and liability findings were conceded by the defendant physician (eighty-two percent) but not by the defendant hospital (eighteen percent). Both defendant-appellants asserted that the damage award was excessive.

The court determined five issues in the case: (1) Whether it was error to refuse defendant's instruction to the jury that they should decide the case according to the evidence and that bias, sentiment or feelings of sympathy had no proper legal weight; (2) whether it was error to impanel a jury which included the grandmother of the plaintiff's decedent; (3) whether it was error to allow the plaintiff to inquire of a hospital employee about previous complaints by the nursing staff against defendant Dr. Magnus; (4) whether the court committed error in refusing to recall the jury or to determine the validity of a rumor that an initial vote of the panel was for an award of $250 million; and (5) whether the

admission of a professional videotape of a "theatrical" presentation which artistically highlighted aspects of the deceased child's life and relationship to his mother in an inaccurate way was error.

The court held that nearly all of the defendant's assignments of error relative to instructions and the composition of the jury were not matters of objection at trial. The refused instructions simply repeated other instructions given by the court, and it was not error to refuse an instruction which was adequately covered by another instruction. No objection was made at the time of voir dire to the grandmother's presence, even though the individual voir dire was extensive. Because one of the grounds for the hospital's liability was its possible negligence in allowing Dr. Magnus to practice there, questioning of the staff was proper. Moreover, there was expert testimony in the record that the hospital did not have the type of pediatric care facilities required by West Virginia Department of Health Regulations, that Michael Roberts was not monitored appropriately, that the hospital violated regulations on patient consent in this case, and was negligent in granting Dr. Magnus full surgical privileges in light of his limited surgical background, and the jury's finding of negligence by the hospital was correct. The fact that a higher damages amount was discussed by the jury was irrelevant, and nothing more than a restatement that the final award was excessive. The admissibility of videotapes and films was within the wide discretion of the trial court, and the record shows no abuse of discretion in this respect.

The one meritorious assignment of error was the excessiveness of the verdict. Thus, the court was compelled to reduce the award from $10,000,000 to $3,000,000, although this is unusual in West Virginia when damages in a case do not admit of an exact calculation. The court took the unusual step of asking the parties to describe the pretrial settlement negotiations, as a guide to the court both on this remittitur and in future settlement jurisprudence. Finding that defendant Magnus made a final offer of an unsatisfactory amount only three days before the trial, the court wished to establish a more proper climate and guidelines for out-of-court settlements. While high damage awards must be allowed to cover the enormous cost of litigation by plaintiffs whose cases drag on for years, they must also reflect public policy considerations aimed at preventing the tort system from becoming a lottery where everyone pays high insurance premiums so that enormous windfalls can be allocated randomly. "The sky is not the limit with regard to jury awards." The court reversed and remanded with directions to enter a remittitur of $7,000,000 and judgment on the verdict for $3,000,000, or, in the alternative, at the option of the plaintiff, to award a new trial.

Justice McHugh, dissenting, felt that the majority's action was an unconstitutional invasion of the province of the jurors, and that article III, section 13 of the West Virginia Constitution expressly safeguards the verdict in addition to guaranteeing the right to a jury trial. Where the jury finds the defendant liable in a wrongful death action, it has virtually absolute discretion, under the express terms of the wrongful death statute, without regard to proof of actual damages,

pecuniary loss, etc., to make any award it deems "fair and just." Moreover, in 1976, the legislature removed the statutory "ceiling" on recovery, and this is reaffirmed by West Virginia Code section 55-7-6(b). According to McHugh, the appropriate remedy for an excessive sum which meets the limited guidelines as such is the award of a new trial, not a remittitur, which is proper only where the excessive portion of the verdict is clearly distinguishable as a matter of law from the remainder of the verdict. The jury award here was not excessive, in McHugh's view, given the enormous tragedy of this child's loss, or that of any child. The money will be divided among four individuals, and the sum is commensurate with malpractice case statistical data. McHugh felt that the validity of the court's use of pretrial settlement information was also highly questionable. McHugh also questioned why the court in such a case should not also have access to the jury's deliberations to assist it in substituting its opinions for the jurors.

Justice McGraw dissenting, found that the degree of malpractice associated with the comission of these acts was nothing short of horrifying. He felt that the jury was unaware of the amount of available insurance coverage (which was $10,250,000 in fact) and understandably shocked by the malpractice of community health professionals, returned a verdict which the majority wished to reduce to a more "reasonable" figure. McGraw discussed the point that in effect, the majority anticipated that the defendants could combine to commit acts more than three times larger than the amount of harm to a single individual than that done to Michael Roberts and his family. McGraw, felt that protection of the profitability of insurance companies is achieved only at the expense of the legal and moral rights of those injured by medical malpractice, and that faith in the ordinary people who make up the jury is at the heart of the American system.

TOTTEN v. ADONGAY, 337 S.E.2d 2 (W. Va. 1985).

Burden of Proof—Evidence—Expert Testimony—Medical Malpractice—Torts

The Circuit Court of Wayne County awarded the physician defendant a directed verdict on the ground that the plaintiff's evidence did not establish a prima facie right of recovery, due to lack of expert medical testimony delineating the pertinent standard of care. After x-raying and examining the plaintiff's injured wrist on two occasions, the defendant ruled out any fracture or dislocation as a source of the plaintiff's pain and discomfort. Examination by a second physician discovered a fracture present for some time, which had produced aseptic necrosis, requiring surgery and physical therapy, with the hand not fully restored at the time of trial.

The three issues in this case were: (1) Whether the plaintiffs met their burden of proof simply by the deposition testimony of the second examining physician; (2) whether expert medical testimony is essential in a medical malpractice action, so as to justify a directed verdict against plaintiffs by its its absence; and (3) whether the "common knowledge" exception to the expert testimony rule is ap-

plicable herein, where a second physician finds a fracture on the x-ray film taken by the physician against whom negligence is sought to be proven.

The court, in reversing the circuit court's decision, held that while the record indicated that additional medical testimony may have been helpful to a jury determination of negligence, the admitted immediate proximity of the actual injury to the point of complaint precluded the need for expert medical testimony as a matter of law in this case. Where lack of care or want of skill is so gross as to be apparent, or the breach relates to noncomplex matters of diagnosis and treatment within the understanding of lay jurors by resort to common knowledge and experience, failure to present expert testimony is not fatal to a plaintiff's prima facie showing of negligence. The testimony was such that the jury further could have concluded that proper diagnosis and treatment by the defendant probably would have prevented the eventual deterioration of the bone fragment in plaintiff's wrist. The directed verdict for the defendant was error.

Justice Neely, concurring in part and dissenting in part, felt that the majority opinion should not be read to authorize submission of malpractice cases to the jury in future cases on the basis of lay evidence alone.

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See also,

CIVIL PROCEDURE:

Grillis v. Monongahela Power Co., 346 S.E.2d 812 (W. Va. 1986).

INSURANCE:

Huggins v. Tri-County Bonding Co., 337 S.E.2d 12 (W. Va. 1985).
Soliva v. Shund, 345 S.E.2d 33 (W. Va. 1986).
Warden v. Bank of Mingo, 341 S.E.2d 679 (W. Va. 1985).

PROPERTY:

Brammer v. Taylor, 338 S.E.2d 207 (W. Va. 1985).