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Darlene Beard v. KMart Corporation: Reply Brief

Utah Court of Appeals

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APRIL J. ALVARADO
Clerk of the Court

IN THE UTAH COURT OF APPEALS

DARLENE BEARD,

Plaintiff/Appellee,

v.

KMART CORPORATION,

Defendant/Appellant.

Court of Appeals No. 20000095-CA

Argument Priority 15

REPLY BRIEF OF APPELLANT

**APPEAL FROM A FINAL JUDGMENT OF THE
THIRD DISTRICT COURT
THE HONORABLE TYRONE E. MEDLEY**

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AUG 01 2000

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Clerk of the Court

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ARGUMENT

THE CAUSAL RELATIONSHIP BETWEEN AN INJURY AND THE NEED FOR SUBSEQUENT SURGERIES MUST BE DEMONSTRATED BY EXPERT MEDICAL TESTIMONY.

Plaintiff has asserted that the fact that her surgeon could not form an opinion regarding the cause of her need for neck and wrist surgery should not preclude the jury from finding such a connection based upon plaintiff's own testimony regarding her physical complaints. However, in all but the most obvious of cases, testimony of lay witnesses regarding the need for a specific type of medical treatment is inadequate to permit a jury to consider that question. As stated by the Court in Riggins v. Bechtel Power Corp., 722 P.2d 819, 824 (Wash. App. 1986),

The need for positive expert testimony to establish a causal link between the defendants' negligent act and the plaintiff's injury depends upon the nature of the injury. Where the injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding, there must be expert testimony that the negligent act probably caused the injury.

In the instant case, Ms. Beard had suffered from neck pain and headaches for years prior to the accident. She had also complained of aching in her left arm. Her surgeries took place many months after the accident in question. If her surgeon couldn't determine whether the conditions for which he operated were probably related to her injury at Kmart, how is a lay jury capable of doing so except by pure guesswork? Essentially all courts agree that the "diagnosis and potential continuance of

a disease are medical questions to be established by physicians as expert witnesses and not by lay persons". Eberhart v. Morris Brown College, 352 S.E.2d 832, 834 (Ga. App. 1987).

Dr. Peterson testified that he operated upon plaintiff to attempt to alleviate a severe degenerative disease process which existed prior to plaintiff's accident at Kmart. He also testified that he had no opinion about any connection between the incident at Kmart and Ms. Beard's need for carpal tunnel surgery. In the absence of any other medical testimony on these issues, it was error for the court below to refuse to take the causation question from the jury.

Plaintiff cites a number of cases from other jurisdictions suggesting that medical bills can be admissible and can support a finding that plaintiff incurred special damages for reasonable medical expenses, even without expert testimony that the treatment for which the bills were received was necessitated by the injury in question in the lawsuit. The issue in the instant case does not concern the admissibility of medical bills. It is whether the cause of the need for surgery must be established by a witness with sufficient expertise to form an opinion on that question. Because the issue is one which is beyond knowledge of a layman, expert medical testimony must be offered to support any verdict finding an accident to be the proximate cause of a plaintiff's need for surgery. This requirement can be demonstrated by the cases cited by plaintiff. For example, plaintiff cites Jordan v. Smoot, 380 S.E.2d 714 (Ga. App. 1989), for the proposition that expert testimony is unnecessary to establish a connection between an

injury and its treatment. While Jordan did so hold, it did so because the treatment was a limited amount of chiropractic care which plaintiff received immediately following her accident. This, the court held, distinguished the case from one like Eberhart v. Morris Brown College, 352 S.E.2d 832 (Ga.App. 1987), where a real medical question was presented. In Eberhart, the court upheld a directed verdict against the plaintiff for failing to present any medical testimony establishing the connection between his injury and his subsequent treatment sometime thereafter. Noting that Georgia has a statute that authorizes the admission of medical bills, the court held, nonetheless, that such a statute does not allow a plaintiff to prove medical issues by lay testimony. The court held that it was, therefore, proper to direct the verdict against plaintiff.

Had appellant addressed additional medical testimony that his subsequent physical condition was a possible result of his prior football injury, the jury would perhaps have been authorized to award appellant those medical expenses as special damages that he sought. However, appellant produced no such medical evidence. Accordingly, the trial court did not err in granting a directed verdict in favor of appellee.

352 S.E.2d at 834-35.

The question of whether the need for a surgery is the proximate result of a particular accident is simply beyond the common knowledge of lay people. It was for this reason that in Townsend v. Stamper, 398 S.W.2d 45 (Ky.App. 1965), a case cited by plaintiff, the injured party not only produced medical bills, but also had her treating physician offer his opinion that plaintiff's need for disc surgery was a result of her

injury in the automobile accident which was the subject of her lawsuit. 398 S.W.2d at 49.

In the instant case, the surgeon who performed plaintiff's neck and wrist surgeries was unable to form an opinion that those procedures were causally related to her injury at Kmart. It was, therefore, improper to permit the jury to speculate about the causation issue, and the court below should have instructed the jury that plaintiff had failed to prove that the surgeries were proximately caused by her accident at Kmart, as defendant requested. The failure to so instruct was prejudicial because it allowed plaintiff to suggest to the jury that she should be entitled to substantial compensation simply because she had to undergo these surgical procedures. The holding of the Utah Supreme Court in Moore v. Denver & Rio Grande Western Rd. Co., 292 p.2d 849 (Utah 1956), was precisely that failure to instruct the jury that plaintiff had not proved proximate cause between an injury and a particular medical condition required that the judgment be set aside and the case remanded for trial upon proper instructions. It is always prejudicial to allow a jury to consider claims for which there is no sufficient evidence. See, Mikkelsen v. Haslam, 764 p.2d 1384 (Utah App. 1988).

The failure of the Court to remove the issue of the causation for the neck and wrist surgeries permitted the jury to base its award, to some extent, on the happening of those events. As has been previously noted, it is prejudicial error to allow a jury to consider, in its award of damages, physical problems which have not

been established by expert testimony to have been proximately caused by the accident in issue.

The jury was not instructed that it must find medical evidence establishing that the injury and/or surgery probably caused the hip pain and headaches [of which she was complaining]. This deficiency constitutes reversible error requiring a new trial on the issue of damages.

Riggins v. Bechtel Power Corp., 722 P.2d 819, 824-25 (Wash.App. 1986).

The failure to remove the surgery causation issue from the jury obviously misled them into assuming, as plaintiff's counsel argued, that they were free to consider the need for such surgeries when calculating their damage award. A court's failure to direct a verdict on an issue, or to instruct properly, ". . . is reversible error if it tends to mislead the jury to the prejudice of the complaining party . . .". Mikkelsen, supra, at 1387. Our Supreme Court has expressly held that the failure to take away from the jury consideration of a claimed injury not supported by medical evidence is just such prejudicial error. Moore, supra, at 851.

CONCLUSION

The plaintiff in this case is a woman who underwent numerous surgeries to various parts of her body, including her foot, knee, wrists and neck, after being struck in the head. Her neck surgeon acknowledged that he diagnosed her as having a degenerative disease of the cervical spine which she admitted to another physician had been limiting her activities for nine years. Given these preexisting problems, an

obvious question arose regarding in what way, if at all, the Kmart incident contributed to her need for the various and multiple surgeries. With regard to her neck and wrist surgeries, plaintiff offered no medical evidence that these procedures were the probable result of the Kmart incident. In the absence of such evidence, it was error for the court below to fail to direct the verdict on these issues and instruct the jury that plaintiff had not proved that the challenged surgeries were a proximate result of her injury at Kmart. Accordingly, the judgment entered below should be vacated and the case remanded for a new trial on the issue of damages.

DATED this 27~~th~~ day of July, 2000.

PRINCE, YEATES & GELDZAHLER

By *M. David Eckersley*
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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2000, I caused the original and seven true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to be hand delivered to the Utah Court of Appeals and two copies to be mailed, first-class postage prepaid thereon, to the following:

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A handwritten signature in cursive script, reading "M. David Eckert", is written over a horizontal line.