2016

Garth Gines Appellant/Plaintiff, v. Sean Edwards, Appellee/ Defendant.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

GARTH GINES, *Appellant/Plaintiff,* v. SEAN EDWARDS, *Appellee/Defendant.*	**REPLY BRIEF OF APPELLANT** Case No.: 20150259- CA Civil No. 120400620 ORAL ARGUMENT REQUESTED

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT FOR PROVO, STATE OF UTAH
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RULES

I. THIS COURT HAS SUFFICENT INFORMATION TO REVIEW THE COURT'S DECISION

The record contains the factual contentions and legal arguments of the parties and the findings and order of the court.(for example R.78, R. 174-170, R.378,)[1] The Court has adequate information regarding what facts the trial court had access to in rending its decision. The fact the court held a hearing on the matter and the transcript of that hearing was not provided should not automatically be dispositive in whether or not the court can review the underlying decision. If there was no record to supply the court with what facts were presented and arguments made, the trial court's decision would indeed be entitled to a presumption of correctness.

On another issue in this case, the plaintiff's motion for a direct verdict JNOV and Motion for a New Trial, the trial court ruled without a hearing. Under the defendant's analysis, that decision should be reviewable, although there is even less information available for this court to determine exactly what the trial courts basis for decision actually was. In that instance, this court simply has no other option that to relying upon the briefing submitted and the trial court's

[1] The pagination of the record is not completely sequential.

Spartanly worded order denying the plaintiff's motion for a new trial. It is arbitrary to say that only written briefs are an inadequate record in one instance, and adequate in another similar instance in the exact same matter.

This issue is relatively simple. Was the extremely late disclosure of Dr. Goldman's reports harmless to the plaintiff? This court has the entire record of the trial and more than 2,000 pages of record materials available to make that determination.

II. CITATION TO EVIDENCE FOR SUMMARY JUDGMENT PURPOSES IS NOT AFFIRMATIVE RELIANCE

In the defendant's brief, the defendant alleges that the plaintiff affirmatively relied upon Dr. Goldman's opinions. (Edwards Br. at pg 25). The plaintiff did not rely on Dr. Goldman's opinions. Under a summary judgment analysis the trial court's task is to, "ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. Utah R. Civ. P. 56(d). In a given case, the claims and assertions of the plaintiff if not contradicted or disputed by the defendant are deemed to be true.

Plaintiffs are only required to produce affirmative evidence on contested issues. *See* Utah R. Civ. P. 8(d).

Citing to Dr. Goldman on certain issues is not a ringing endorsement for him or his opinions, but rather merely a recognition that certain issues have not been controverted by the defendant through his testimony. Just because Dr. Goldman does not contradict the plaintiffs' claims in some areas, does not mean that late disclosure or non-disclosure of his opinions is not prejudicial to the plaintiff's ability to prepare and present evidence at trial.

III. SOPHISTICATION OF COUNSEL SHOULD NOT BE CONSIDERED BY THE COURT IN DETERMINING HARMLESSNESS

In determining whether certain omitted opinions from Dr. Goldman's report were harmless, the court considered the level of sophistication of the plaintiff's attorneys. (R.1693 at 415:24-416:1-2). This court should find this notion deeply disturbing. In order to retain any sense of legitimacy, courts must apply the rules of procedure and evidence uniformly among all parties, regardless of who their attorney happens to be. The standard for determining surprise, should not be, "Well Counsel, now that you are informed of this expert's opinion, are

you surprised that the actual figure he supplied was reasonable?" The correct standard is and should be, "Counsel, was this opinion fairly disclosed in discovery? Has that failure to disclose hurt your ability to rebut this expert's opinion in any way?" In order to be adequately prepared for trial, litigants need to know in advance what the opinion is. Trial testimony absent prior disclosure, is anything but predictable. Like children, witnesses have been known to "say the darndest things."

IV. THIS IS AN APPORTIONMENT CASE

In his brief, the appellee/defendant argues that the instant case does not involve apportionment at all, as Dr. Goldman's apportionment opinion was that the plaintiff only suffered a temporary injury and therefore 0% should be apportioned to the accident. (Edwards Br. at 30). This is nothing more than circular reasoning.

Dr. Goldman was undertaking to allocate causative percentages between pre-accident and post-accident pathology, his opinion is without a doubt an attempt at apportionment. The fact that his opinion ultimately states that Mr. Gines' permanent impairment was 100% pre-existing and 0% caused by the accident, does not alter the species of

his opinion. Dr. Goldman is attempting to apportion between pre-accident pathology and post-accident pathology.

It is factually undisputed that on the date of Dr. Goldman's examination of the plaintiff, Mr. Gines qualified for an 19% whole person permanent impairment rating on the applicable guidelines. (R.230). To be clear, Dr. Goldman's assignment of an impairment rating is not arbitrary, and is governed and guided by established professional guidelines such as guides published by the American Medical Association or the Utah Labor Commission. The resulting impairment rating is not, "a number picked out of the air" with "no recipe." (R.1693 at 408:5-14).

The fact that the plaintiff has an undisputed permanent, ratable physical impairment, standing alone, implicates apportionment. As Dr. Goldman testified, "You always do apportionment when you do an impairment rating." (R.1693 at 407:25-408:1).

As apportionment is clearly implicated, the defendant carries the burden of proof on the issue. *Harris v. Shopko Stores*, 2013 UT 34 ¶28.

That burden of proof specifically requires the defendant to provide the jury with "a non-arbitrary basis, a reasonable basis for apportioning damages", and "may not be based on pure speculation." *Id* at ¶32. This means the defendant has to provide the jury a sufficient evidentiary basis to apportion the economic damages. This also means that the defendant has to provide the jury with a sufficient evidentiary basis to apportion the non-economic damages.

While Dr. Goldman's impairment rating number was not arbitrary, his apportionment percentage number was. Specifically his number of 0% and 20% respectively, were indeed, "picked out of the air." "There is no recipe. (R.1693 at 408:5-14). There is no guideline to supply those particular numbers. They were arbitrarily picked by Dr. Goldman.

Dr. Goldman's offered the opinion that the injuries Mr. Gines sustained in the subject accident were, "temporary." The word "temporary" implies a time governed concept of measuring something with a fixed and limited duration. Thus by definition a temporary injury should have fixed limits; a beginning and an end.

Dr. Goldman testified that Mr. Gines' aggravated symptoms began with the accident. (R.1693 at 407:6-8)

Dr. Goldman testified he could not identify when Mr. Gines' "temporary aggravation" ended. " ...Oh. I can't tell you when it ended." (R.1693 at 462:3-4).Without that information, the jury is left to speculate when it actually ended. Without the temporal end point, the jury does not enjoy a sufficient basis to determine what economic damages are related to the negligence of the defendant. Without a temporal end point, the jury does not enjoy a sufficient basis to determine what non-economic damages and permanent impairment are related to the negligence of the defendant.

Without any sort of temporal end point, the jury is left to speculate regarding when Mr. Gines actually recovered and returned to baseline. This glaring deficiency makes Dr. Goldman's opinion regarding the temporary nature of Mr. Gine's injuries arbitrary.

Dr. Goldman did supply the jury with information with what an average person's recovery would look like. (R.1693 at 461:24-462:12) Dr. Goldman even attempted to offer an opinion regarding what the

recovery of an average person with a triple neck fusion would look like. Such evidence leads the jury into dangerous territory and forbidden paths.

Dr. Goldman did not provide the jury with an opinion that Mr. Gines was the average person, or even the average triple neck fusion patient. (R. 1693 at 462:8-12). Dr. Goldman also did not provide an opinion of whether or not this particular plaintiff fell within his own cited averages. (R. 1693 at 462:8-12). The moment the trial court prohibited Dr. Goldman from offering the opinion regarding what treatment a person with altered cervical anatomy would need, summary judgment should have been granted to the plaintiff on his claimed medical expenses.

The defendant's burden of proof is not satisfied with merely providing evidence of what happens to average people. This type of opinion cuts to the very core of the eggshell plaintiff doctrine. It is immaterial whether an average person would have sustained injury, or whether the average person would have recovered in a specified amount of time. What is material is whether or not this particular plaintiff was

in fact injured, to what degree, and when this particular plaintiff's impairments caused by the accident ended.

Consider if such a rule as advocated by the defendant were applied to plaintiffs. A plaintiff rear-ended in an accident could merely put on evidence from a doctor testifying regarding the injuries that average people sustain in motor vehicle accidents of the type sustained by this plaintiff in order to satisfy its burden of proof.

Under such a regime, the jury could safely concur and find that this particular plaintiff was in fact injured, because the average person would have been. The plaintiff would then be awarded the average amount of economic damages for medical expenses for the average injuries, regardless of whether they were actually incurred; the average amount of lost wages, regardless of whether or not the plaintiff is employed and the average amount for non-economic damages e.g. pain and suffering, regardless of whether or not the plaintiff actually suffered.

Personal injury litigation typical involves proof that a particular plaintiff sustained particular harms, whether economic or non-

economic. "A plaintiff is required to prove both the fact of damages and the amount of damages." *Stevens-Henager College v. Eagle Gate* 2011 UT App 37,¶16. Plaintiffs are not allowed to resort to speculative averages to sustain their burdens of proof. *See Canyon Country Store v. Bracey* 781 P.2d 414, 419 (Utah 1989). Defendants likewise, when they carry the burden of proof, should be held to the same standard. Fundamental principles of justice require as much.

Dr. Goldman's opinion, must provide the jury with a non-arbitrary basis to determine when Mr. Gine's accident-related injuries and impairments ended. Resorting to averages is not sufficient. The defendant's burden involves putting on expert testimony that gives the jury sufficient guidance in determining when Mr. Gine's injuries, impairments and aggravation began and when they ended. Without that, the jury is left to pick an arbitrary number out of the air, without regard to this particular plaintiff and without basis in fact.

The defendant also carried the burden of proof in apportioning the causation of the plaintiff's medical expenses actually claimed and incurred by the plaintiff.

The plaintiff did not know what Dr. Goldman's opinion would be in that regard until the very day of trial. Dr. Goldman testified,

> Q: Okay. And, also, in your report you did not allocate or tell us specifically which medical bills are related to this accident and which ones are not?
>
> A: That's correct." (R.1693 at 407 12:15).

It was clearly the defendant's burden to provide this information and he clearly failed to do so.

The jury's result likewise was arbitrary. It is of little comfort to the plaintiff, that he was awarded $10,000 in medical expenses, presumably attributable to physical therapy care. None of Mr. Gines claimed medical expenses were for physical therapy. As outlined the plaintiff's initial brief, Mr. Gines' medical expenses ordered chronologically, only add up to $10,000 until after Mr. Gines is unconscious on Dr. Reichman's operating table.

The defendant provides some analysis on this point in his brief. (Edwards Br. at pg 28). The plaintiff's reply to the defendant's argument is as follows. Assuming that the defendant's conjecture is

accurate, the number provided by the jury, while close, is still incorrect. The only way the jury gets a nice round number like $10,000 is if they were adopting Dr. Goldman's analysis that a normal average person after this sort of accident with this sort of injury would need only $10,000 of physical therapy. There is little if any doubt, the verdict was materially and adversely impacted by Dr. Goldman's arbitrary apportionment.

If the plaintiff's injuries have a temporal component and limitation as suggested by the defendant, likewise the damages should be tethered to the same temporal component. As Dr. Goldman cannot say when the temporal end point should be, the only result is judgment for the plaintiff for the full amount of stipulated medical expenses incurred.

CONCLUSION

The appeal has provided this Court with several different roads, but all lead to the same destination.

The first road is to hold that the Court abused its discretion in a defendant withholding a Rule 35 examination report during the entire

period of fact discovery. The remedy should be exclusion of Dr. Goldman, which would like to a practical result of awarding the plaintiff result pursuant to *Tingey v. Christensen* 987 P.2d 588, 592 (Utah 1999), is to hold the defendant liable for the entire stipulated amount of $61,296.60 in economic damages and to order a new trial on the issue of future medical expenses and non-economic damages. The plaintiff recognizes that this road is the most severe and judicially disfavored, in this case there are aggravating circumstances including the central importance of the report to the overall resolution of the case and the amount of time the report was not disclosed (more than a year).

The second road is to hold that the Court abused its discretion in permitting Dr. Goldman when his report was not disclosed during expert discovery. The remedy should be exclusion of Dr. Goldman, which would like to a practical result of awarding the plaintiff result pursuant to *Tingey v. Christensen* is to hold the defendant liable for the entire stipulated amount of $61,296.60 in economic damages and to order a new trial on the issue of future medical expenses and non-economic damages. This road is also severe and judicially disfavored,

but in light of the prior instance of non-disclosure, is attended by aggravating circumstances.

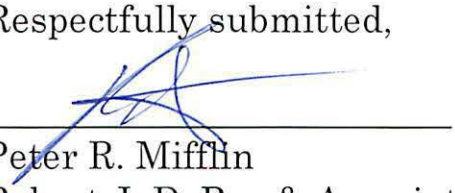
The third road would be to hold that the trial court abused its discretion in permitting Dr. Goldman to testify at trial when his opinion on the apportionment issue, was formed, with " no recipe" and by "pulling numbers out of the air."

The fourth road would be to hold that the trial court erred when it denied the Plaintiff's Motion for a directed verdict on the issue of apportionment, when Dr. Goldman admitted he could not say when the plaintiff's temporary aggravation ended. This is the simplest, cleanest, and least jurisprudentially disruptive road to resolution of this case. If Dr. Goldman, an expert, could not determine when Mr. Gines' injuries from the accident ended, it would be likewise be impossible for a panel of 8 lay jurors to do so in any non-arbitrary fashion.

The only correct and expected result pursuant to *Tingey v. Christensen* is to hold the defendant liable for the entire stipulated amount of $61,296.60 in economic damages and to order a new trial on the issue of future medical expenses and non-economic damages.

DATED this 8th day of January, 2016

Respectfully submitted,



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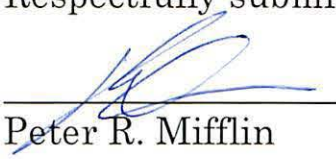
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(5)(B) because it contains 2,709 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14- point Century Schoolbook.

Dated: January 8, 2016

Respectfully submitted



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January , 2016, two copies of the Reply Brief for Appellant Garth Gines were served by overnight and email on each of the following:

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