

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-022649

05/18/2004

HONORABLE ROBERT L. GOTTSFIELD

CLERK OF THE COURT
M. Johnson
Deputy

FILED: 05/19/2004

RODNEY DE WALT

RODNEY DE WALT
24556 E. FROST DRIVE
AURORA CO 80016

v.

WAL-MART STORES INC

BENJAMIN C THOMAS

MINUTE ENTRY

8:31 a.m. This is the time of pretrial conference and to determine motions in limine. Plaintiff is present telephonically on his own behalf. Counsel Benjamin C. Thomas is present in person on behalf of defendant.

Court Reporter Scott Coniam is present.

After extended argument,

IT IS ORDERED as follows:

1. This court will be in another trial on May 24, 2004 which is a priority matter and therefore this matter will go to case transfer but only when plaintiff signs a pretrial statement as this court will not proceed with the trial without a jointly signed pretrial statement.
2. Taking under advisement the defendant's motion in limine to preclude testimony of plaintiff's expert Larry Tinker.
3. Granting defendant's motion re plaintiff's expert Al Norman who will not be called by plaintiff according to plaintiff.
4. Taking under advisement the loss of income claim and diminution of earning capacity.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-022649

05/18/2004

5. Granting defendant's motion in limine re Golden Rule argument and neither side may use the same.
6. Granting defendant's motion concerning various web site printouts as the court agrees they are irrelevant and not admissible under Rule 403.
7. Granting defendant's motion re accident safety or training at Wal-Mart Stores outside the Garden Center except a general slip and fall video of Wal-Mart referring to such accidents and precautions to be taken in general. The trial judge will have to view this video before it can come into evidence and determine whether it should be redacted or whether the same may be put in evidence.
8. Defendant withdraws any argument to preclude future medicals because no expert is available to reduce to present value. In other words plaintiff may put on such evidence and does not have to have an economist or other expert reduce to present value. Defendant may always do so and there will be an instruction given with respect to the law.
9. Mr. DeWalt advises he now does intend to testify although there is a statement in the joint pretrial that he was not going to testify.
10. The court can not rule on defendant's privilege log until it conducts an in camera inspection of the claims file which Mr. Thomas advises will be given to the court forthwith.

The matter is then continued to 10:00 a.m. this date.

10:00 a.m. Court reconvenes with respective counsel present and plaintiff present telephonically.

Court Reporter Scott Coniam is present.

The court resumes argument in this matter specifically the objections of the defendant to certain exhibits beginning at page 5 of the joint pretrial statement. The court makes the following rulings:

- 12-Defendant waives any objection to the five visits in June 2003 to a chiropractor.
- 13-Defendant Wal-Mart's privilege log of May 2, 2004-objection granted as irrelevant; the court will be making ruling on the privilege log once it receives the claims file from Wal-Mart which is apparently going to be delivered to the court today.
- 14-Defendant withdraws any objections to the three claims already disclosed.
- 15-Photos of damaged automobile involved in accident of June 7, 2001-objection denied and plaintiff may use at trial on assumption defendant will try to show some of plaintiff's injury may come from the June 7, 2001 previous accident.
- 16-Up to trial judge and foundation is also an objection.
- 17-Report prepared by Larry Tinker is inadmissible as hearsay.
- 18-Subpoena dated February 6, 2004-objection granted unless at the trial it becomes important for impeachment for plaintiff to use the same.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-022649

05/18/2004

- 19-Granted as the demand for jury trial is inadmissible and irrelevant.
- 20-Up to trial judge.
- 21-Up to trial judge.
- 22-The court will be doing an in camera inspection and will make a ruling on the same.
- 23-Up to trial judge and foundation objection added.
- 24-Up to trial judge and foundation objection added.
- 25- Granted as settlement negotiations and offers of settlement are inadmissible.
- 27-Objection denied as too general to rule on but can raise at trial.
- 28-Up to trial judge.
- 29-Up to trial judge.
- 30-Up to trial judge.
- 32-Up to trial judge.
- 33-Up to trial judge as court does not know significance of it or relevancy.
- 34-Taken under advisement.

10:45 a.m. Matter concludes.

LATER:

With reference to the matters taken under advisement the court rules as follows:

1. Denying motion of defendant to preclude testimony of Larry Tinker for untimely disclosure. Mr. Tinker was disclosed approximately 60 days prior to trial and notice given that he will be testifying to defendant's safety precautions and procedures in Garden Centers. Admittedly this was not flushed out until a disclosure of May 6, 2004 which is untimely but because of the initial disclosure and in the court's discretion it will permit Mr. Tinker to testify (as limited by the court at the aforesaid hearing). A copy of this court's rulings with respect to what Mr. Tinker may or may not testify to will be prepared by the court reporter, at court expense, and a copy given to both parties as well as to the trial judge and to Mr. Tinker prior to his testimony so he knows what will be permitted and what will not be. The trial judge trying this case may, of course, change any of the court's rulings with respect to Mr. Tinker in the event the trial judge feels there has been a manifest injustice and this court urges the new trial judge to do so in that event.
2. Permitting plaintiff to testify concerning lost wages as well as diminution of earning capacity. An instructive case for the trial judge is Mandelbaum v. Knutson, 11 Ariz. App. 148 (1970) which was a personal injury action which held that an injured plaintiff need merely present evidence of her condition's permanency and that she had a capacity to earn and that would be sufficient to go to the jury. Diminution of the power to earn is based on such factors as plaintiff's age, life expectancy, health and the like. Plaintiff need only show that the damage is permanent and then she need not show proof of wages actually earned nor must she show that she even was previously employed. The court specifically holds there need not be a pecuniary

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-022649

05/18/2004

amount proven on this item of general damage. Loss of earnings on the other hand does require a specific amount of special damage to be pleaded and proved. Loss of earning capacity can be presented to a jury to weigh all of the factors and they by experience and common sense can arrive at a proper monetary value without recourse to actual past earnings is Mandelbaum's holding. It states that all Arizona requires is for plaintiff to show a permanent diminution of earning capacity by the plaintiff's own testimony and his capacity to earn money. Thus a housewife who never earned any wages can receive compensation for loss of her capacity to earn the wages for her skills. In Mandelbaum there was a physician who testified that the injury was permanent and this will be required.

The court notes that it suggested to defendant that it would be entitled to a continuance of the trial in view of the problem of disclosure of Mr. Tinker's full opinions, which was not accepted by defendant.

The court further realizes that defendant admits notice of the condition of water on the floor but the plaintiff will have to prove the water constituted a dangerous condition and defendant's negligence.