

15-0825

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ASHLEY D. GUNNO,

Plaintiff,

2014 MAY 30 AM 8:35

COPY-CLERK
KANAWHA COUNTY CIRCUIT COURT

v.

Civil Action No. 12-C-1188

(Judge Carrie Webster)

KEVIN C. McNAIR

Defendant.

JUDGMENT ORDER

This matter came on for trial on the 6th day of May, 2014. The parties appeared in person and by Counsel Jonathan Mani, Damon L. Ellis and Mani, Ellis & Layne, PLLC for the Plaintiff Ashley D. Gunno, and Geoffry A. Haddad and Martin & Seibert L.C. for the Defendant Kevin C. McNair. The court selected, empaneled, and swore a jury of six (6) persons and one (1) alternate. After opening statement by counsel for the parties, counsel for the Plaintiff called Plaintiff Ashley D. Gunno to testify.

Plaintiff continued to present evidence on May 7, 2014. Plaintiff's counsel called Chiropractor Dr. J. McClanahan to testify. Plaintiff next called Plaintiff Ashley D. Gunno's husband Richard A. Comer, II to testify. Plaintiff then rested her case.

At the close of Plaintiff's case, counsel for Defendant moved the Court for Judgment as a Matter of Law. Plaintiff Ashley Gunno through counsel acknowledged on the record that they presented no evidence on, and withdrew claims for, any and all past and future special damages. The Court therefore then partly GRANTED Defendant Kevin C. McNair's Motion for Judgment, and ENTERED JUDGMENT as a Matter of Law in favor of the Defendant Kevin C. McNair and against Plaintiff Ashley D. Gunno on the issue of past medical specials, past lost wages, past

vocational loss, future medical specials, future lost wages, and future vocational loss. The Court DENIED Defendant's Motion for Judgment as a matter of law regarding Plaintiff Ashley D. Gunno's claim for future non-economic damages.

The Defendant began presenting Defendant's evidence on May 8, 2014. Defendant Kevin C. McNair called Defendant's medical expert Bruce Guberman, M.D., who testified on behalf the Defendant. The Defendant through counsel then rested Defendant's case. Defendant Kevin C. McNair renewed his Motion for Judgment as a matter of law on the question of Plaintiff's claim for future non-economic damages. The Court DENIED Defendant's Motion for Judgment as a matter of law on the issue of future non-economic damages.

The Court next instructed the jury and counsel delivered their closing arguments. The jury began deliberating. Following deliberations the jury returned its verdict as follows:

VERDICT FORM

1. Do you find by a preponderance of the evidence that Ashley D. Gunno was injured as a proximate result of the accident of September 13, 2011?

 X Yes No

If your answer to Question #1 is "No" please have your jury foreperson sign and date the form and inform the bailiff that you have reached a verdict. If your answer to Question #1 is "Yes," please proceed to Question #2.

2. We, the Jury, find from a preponderance of the evidence that Ashley D. Gunno, is entitled to compensation for the injuries and damages she suffered as a result of the September 13, 2011 motor vehicle accident in the following amount:

Harms and losses, including, but not limited to past and/or future physical and mental pain and suffering and reduced ability to enjoy life. \$ 0

We, the jury do unanimously agree on the foregoing verdict.

Norman Lindell
JURY FOREPERSON

May 8, 2014
DATE

Counsel for Defendant moved that the jury be polled; whereupon each juror affirmed that he/she agreed with the aforementioned verdict.

The undersigned thereafter **ORDERED** that the verdict be filed in the Office of the Circuit Clerk of Kanawha County.

It is therefore **ORDERED, ADJUDGED, and DECREED** that **JUDGMENT** is herewith, and shall be entered in favor of the Defendant Kevin C. McNair, and it is further **ORDERED** that the Plaintiff Ashley D. Gunno shall not recover damages from the Defendant.

It is further **ORDERED** that the parties shall have such time as is prescribed by the West Virginia Rules of Civil Procedure to file post-trial motions. The objections and exceptions of each party as made of record in this case are deemed preserved.

Entered this 29 day of May, 2014.



Carrie Webster, Circuit Judge

Prepared by:

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Counsel for the Defendant Kevin C. McNair

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 2nd
DAY OF JUNE 2014
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Approved as to Form by:



Damon L. Ellis, Esquire (WVSB #8802)

Jonathan Mani, Esquire (WVSB#8824)

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Counsel for Plaintiff Ashley D. Gunno

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
2015 JUL 28 PM 3:30
K. G. SMITH
KANAWHA COUNTY CIRCUIT CLERK

ASHLEY D. GUNNO,

Plaintiff,

v.

Civil Action No. 12-C-1188
(Judge Webster)

KEVIN C. McNAIR

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL

On the 9th day of December, 2014, came the Plaintiff, Ashley D. Gunno, by and through her counsel, Damon Ellis and Jonathan Mani and the law firm of Mani, Ellis & Layne, PLLC, and came the Defendant, Kevin C. McNair by and through his counsel Michelle Roman Fox, Geoffry A. Haddad and Martin & Seibert, L.C., all pursuant to Plaintiff's Motion for New Trial.

Thereupon, the Court heard the argument of Plaintiff in support of a new trial. In this regard, the Plaintiff asserted the verdict was in error since the jury failed to award any amount of money to the Plaintiff for past and future pain and suffering as a result of the accident even though the jury found that she was injured as a proximate result of the September 13, 2011 accident. Specifically, the Plaintiff argued that the verdict was inconsistent. The Plaintiff acknowledged that she did not seek any amount of compensation for medical bills or lost wages.

Thereupon, the Defendant, by counsel argued that the verdict was not inconsistent but supported by the Defendant's evidence regarding the Plaintiff's claims for injuries, including testimony produced regarding both past and subsequent medical issues of the Plaintiff. Furthermore, the Defendant stressed that the determination of the amount of damages is for the jury to decide and the jury's decision should be given great deference. Furthermore, the Defendant argued that when there is no specific rule for compensation for intangible damages, such as pain and suffering; thus, the jury's finding of \$0.00 damages was conclusive.

Thereupon, the Court, after review of the Plaintiff's Motion for New Trial and Memorandum in Support of Motion for New Trial and Defendant Kevin McNair's Response to Plaintiff's Motion for New Trial does hereby make the following Findings of Fact and Conclusions of Law.

Findings of Fact:

1. A trial by jury was commenced in this matter on May 6, 2014.
2. The Plaintiff, Ashley Gunno argued that she sustained injuries and damages as a result of the motor vehicle accident which occurred on September 13, 2011 involving the Defendant Kevin C. McNair. The Plaintiff presented testimony of Dr. Jay McClanahan, DC in support of her allegations that she sustained injuries, including pain, as a result of the subject accident.
3. Defendant McNair, while admitting liability for the accident, challenged the nature and extent of the Plaintiff's claimed injuries as proximately resulting from said motor vehicle accident. In response to the Plaintiff's claims the Defendant presented the testimony of Dr. Bruce Guberman, MD. Dr. Guberman testified that there was no objective evidence of an injury as a result of the accident, but the Plaintiff made subjective complaints of pain, which he had no reason to disbelieve. In addition, Dr. Guberman testified that in his opinion the nature and severity of the Plaintiff's complaints changed and increased after a subsequent fall that occurred on October 7, 2011.
4. On May 8, 2014 the jury after hearing all the evidence and being instructed on the applicable law, returned a verdict finding that "the Plaintiff Ashley D. Gunno was injured as a proximate result of the accident of September 13, 2011."
5. The jury further found with respect to damages as follows:

“We, the jury, finds from the preponderance of the evidence that Ashley D. Gunno is entitled to compensation for the injuries and damages she suffered as a result of the September 13, 2011 motor vehicle collision in the following amount:

Harms and losses, including, but not limited
to past and/or future physical and mental pain
and suffering, and reduced ability to enjoy life. \$ 0

6. The jury verdict was properly executed and dated by the jury foreman.

7. During the course of the trial, the Plaintiff chose not to seek any amount of damages for *actual* past medical expenses or future medical expenses either incurred or alleged to be incurred in the future, and as such presented no testimony as to the amount of medical bills and damages reasonably and necessarily incurred as a result of the September 13, 2011 motor vehicle accident.

8. In addition, the Plaintiff did not seek or present any evidence of any specific amount of actual damages for any past or future lost wages actually incurred or alleged to be incurred as a result of the accident.

9. As a result of the Plaintiff's decision not to present any evidence concerning the reasonable and necessary actual medical bills and lost wages incurred or to be incurred, the Court upon Motion, granted the Defendant a directed verdict with respect to any and all past or future medical bills or lost wages. The Plaintiff did not contest or object to this ruling.

Conclusions of Law:

10. This Court finds that a judge may set aside a verdict and grant a new trial, pursuant to *Rules 59, West Virginia Rules of Civil Procedure* “if the judge finds that the verdict is against the clear weight of the evidence, is based upon false evidence or will result in a miscarriage of justice.”

11. In addition, this Court recognizes that when the verdict does not award the actual pecuniary loss properly proven, and thus, it can be clearly ascertained that the verdict is inadequate, the verdict should be set aside. See, *Richmond v. Campbell*, 148 W. Va. 595, 136 S.E.2d 877 (1964).

12. Furthermore, this Court finds, as set forth in Richmond v. Campbell, Id., that “compensation for pain and suffering is an indefinite and unliquidated item of damage, and there is no rule or measure upon which it can be based. The amount of compensation for such injuries is left to the sound discretion of the jury, and there is no authority for a court to substitute its opinion for that of the jury. A mere difference in opinion between the Court and the jury as to the amount of recovery in such cases will not warrant the granting of a new trial on the grounds of inadequacy unless the verdict is so small that it clearly indicates that that jury was influenced by improper motives.”

13. In addition, this Court recognizes the holding in Sargent v. Malcomb, 150 W. Va. 393, 146 S.E.2d 561, wherein the Court noted that it is a “well-established legal principle that in an action in which the compensation which the plaintiff is entitled to recover is indeterminate in character, the verdict of the jury may not be set aside as excessive unless it is not supported by the evidence or is so large that the amount thereof indicates that the jury was influenced by passion, partiality, prejudice or corruption or entertained a mistaken view of the case. In such a case, a mere difference of opinion between the court and the trial jury concerning the proper amount of recovery will not justify either the trial court or this Court [West Virginia Supreme Court] in setting aside the verdict on the ground of inadequacy or excessiveness.”

14. In addition, this Court finds that the Jury Charge properly instructed the jury that they should consider and award those damages that the Plaintiff reasonably and fairly suffered, as shown by a preponderance of the evidence, and further instructed them not to award any damages based upon speculation. Specifically, the Court instructed the jury that “if you award damages, you should only award the Plaintiff such a sum in compensatory damages as will reasonably and fairly compensate her for the injuries that she has proven, by a preponderance of the evidence, to have actually suffered as a result of the actions of the Defendant, if any. The amount must fairly compensate the Plaintiff, Ashley Gunno for her harms, losses and injuries. This amount is for the

jury to determine.” The Court notes that neither the Plaintiff nor the Defendant raised any objection to the jury charge and instructions given, and the Plaintiff has not raised any objection in her Motion for a New Trial.

15. This Court finds the the West Virginia Supreme Court of Appeals decision in Toler v. Hager, 205 W. Va. 468, 519 S.E.2d 166 (1999) persuasive in considering and denying the Plaintiff’s Motion for New Trial. In Toler, the Court explained that “in an action for personal injuries, the damages are unliquidated and indeterminate in character, and the assessment of such damages is the peculiar and exclusive province of the jury.” The Toler Court reinstated a jury verdict which awarded “\$0.00” damages for pain and suffering to the Plaintiff. The Court explained that “in a case of indeterminate damages for which the law gives no specific rule of compensation, the decision of the jury upon the amount of damages is generally conclusive, unless the amount is so large or small so as to induce belief that they were influenced by passion, partiality, corruption or prejudice, or misled by some mistaken view of the case.”

16. This Court also relies upon the West Virginia Supreme Court’s decision in Marsch v. American Electric Power Company, 207 W. Va. 174, 530 S.E.2d 173 (1999) which upheld an award of the jury awarding \$0.00 for pain and suffering to the plaintiff. The Court in Marsch noted that “compensation for pain and suffering is an indefinite and unliquidated item of damages, and there is no rule or measure upon which it can be based. The amount of compensation for such injuries is left to the sound discretion of the jury, and there is no authority for a court to substitute its opinion for that of the jury. A mere difference in opinion between the court and the jury as to the amount of recovery in such cases will not warrant the granting of a new trial on the ground of inadequacy unless the verdict is so small that it clearly indicates that the jury was influenced by improper motives.”

17. Finally, this Court finds the decision of the West Virginia Supreme Court in Big Lots v. Arbagast, 228 W. Va. 616, 723 S.E.2d 846 (2012) persuasive and controlling. In Arbagast, the jury placed a “\$0.00 in a corresponding blank on the verdict form for past and future pain and

suffering and future loss of enjoyment of life, consequently, the Court reasoned that the verdict was a result of the jury's consideration of the conflicting evidence on damages and was rendered after careful deliberation and a conscious determination that the evidence did not support an award for pain and suffering. The Court noted that there was conflicting evidence as to the amount of pain and suffering specifically attributable to the subject injury and the amount of damages as a factual determination reserved for the jury.

18. The Court finds that those cases cited by the Plaintiff in this case which set aside a verdict are factually and legally distinguishable from the instant case. In this regard, in the cases relied upon by the Plaintiff there was clear uncontroverted evidence presented of actual pecuniary loss, including medical bills and damages. In this case, the Plaintiff made a strategic decision not to present or request any damages for medical bills or other pecuniary loss reasonably and necessarily incurred as a result of the accident. This Court finds that there is a critical and controlling distinction between actual medical damages presented without challenge and indeterminate damages such as pain and suffering. Based upon the cases cited and relied upon by this Court herein, this Court finds pain and suffering such damages are indeterminate and unliquidated, and therefore, the decision of the jury is given great deference and this Court must abide by the Court's decision.

19. The Court finds that there is no evidence that there was a miscarriage of justice or that the verdict is against the clear weight of the evidence or is based upon false evidence.

20. The Court finds that the jury considered all the evidence presented as well as the instructions from this Court and made its decision after careful consideration as illustrated by the fact that they placed \$0.00 on the line awarding damages for harms and losses including pain and suffering. Finally, this Court places significant weight and consideration on the fact that there was an absence of any evidence of actual pecuniary loss sought by the Plaintiff in this case.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that the Plaintiff, Ashley D. Gunno's Motion for New Trial is hereby DENIED. The parties' objections and exceptions to such ruling are hereby noted.

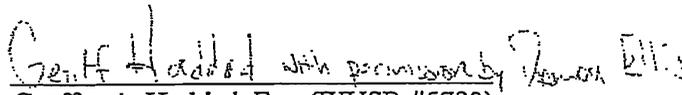
The Clerk is directed to send a certified copy of this Order to counsel of record.

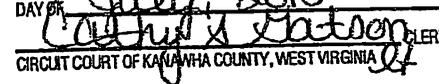
Entered this 27 day of July, 2015.



Honorable Carrie Webster,
Kanawha County Circuit Court Judge

Prepared by:


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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 29
DAY OF July, 2015


CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Approved by:



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