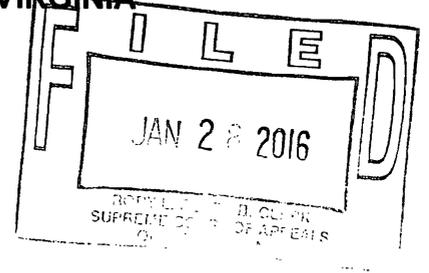


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0825



ASHLEY GUNNO,

Petitioner,

v.

KEVIN MCNAIR

Respondent.

**RESPONDENT KEVIN MCNAIR'S OPPOSITION TO
PETITIONER'S BRIEF IN SUPPORT OF APPEAL**

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III. STATEMENT OF THE CASE

The Defendant, Kevin McNair disagrees with the Plaintiff's statement that "the testimony at trial provided undisputed evidence that Plaintiff Gunno suffered a painful injury as a result of the accident." Rather, after consideration of all the evidence, including the testimony of defendant's expert witness, Dr. Bruce Guberman, the jury concluded that the Plaintiff failed to prove by a preponderance of the evidence that she was entitled to any compensation for non-economical damages as a result of the accident. (JA 763, 764).

While the Defendant, at trial, did not dispute the reasonableness and necessity of some of Plaintiff's medical bills, the Plaintiff made a strategic decision not to admit into evidence those medical bills nor seek recovery for the same. (JA 404, 413).

Both the Plaintiff and Dr. Guberman provided testimony establishing that all of the objective medical diagnostic testing performed on the Plaintiff following the accident were normal. Significantly, Dr. Guberman testified that the nature of the Plaintiff's subjective complaints changed after a fall which happened less than one month after the accident. Interestingly, the Plaintiff failed to reveal to Dr. Guberman during his independent medical examination the fall she sustained after the accident. Dr. Guberman testified that while Plaintiff voiced subjective complaints of pain, when he examined her, all of the objective testing was normal.

At trial, the Plaintiff acknowledged that the x-ray taken of her neck following the accident in the emergency room was normal. (JA 217) She, likewise, acknowledged that an MRI of her neck was completely normal. (JA 217).

The Plaintiff testified that Dr. Matthew Walker, an orthopedic surgeon, examined her and recommended that she return to work with no specific limitations within five weeks after beginning physical therapy. (JA 218). Dr. Walker explained the Plaintiff's complaints did not warrant epidural injections, and she only needed to do at home exercises. (JA 453-454).

During her testimony, the Plaintiff admitted she sustained a fall wherein she caught herself less than a month after the motor vehicle accident. She acknowledged that after this fall she reported to the physical therapist as follows: "Reports yesterday she tripped and fell, bracing herself not falling all the way to the ground, but increased pain on both sides of neck so severe she cried. She was up all night. Patient reports that she awoke at some point in the night with bilateral upper extremity, completely numb from shoulder to fingertips and it lasted fifteen minutes." (JA 236).

As noted, Dr. Guberman provided testimony in this case. He explained he found no objective evidence during the Plaintiff's examination which substantiated an objective injury. Specifically, range of motion testing as well as other neurological testing showed no abnormal findings regarding the neck. (JA 505) Furthermore, Dr. Guberman testified that the Plaintiff's current symptoms were subjective, meaning that they were based upon what she told him not actual physical findings. (JA 517).

Dr. Guberman confirmed that the Plaintiff's soft tissue injury really did not show up on any test but instead was based entirely upon her own report. (JA 528) Finally, Dr. Guberman noted there was no objective medical evidence of any injury to Ashley Gunno from the September 13, 2011 accident at the time he examined her. Her exam was entirely normal. (JA 544).

Importantly, Dr. Guberman noted that Ashley Gunno did not report to him that she fell in October 2011 less than one month after the motor vehicle accident. (JA 518). Dr. Guberman stated, in his opinion, based upon a review of the records, the character of the Plaintiff's pain complaints changed after this fall. (JA 520). The Plaintiff failed to inform her own treating chiropractor, Dr. Jay McClanahan, that she sustained this subsequent fall which produced severe pain less than a month after the accident. (JA 339).

The Plaintiff had a lumbar MRI, which did not reveal any accident-related injury. The MRI showed degenerative disc disease which, both Dr. Guberman and Dr. Walker, the Plaintiff's treating orthopedic surgeon, concluded pre-existed the accident. (JA449-450). Also, the MRI revealed lumbarization of the sacral vertebra, a congenital condition, not accident related. (JA 450-451).

The Court gave Instructions to the jury prior to their deliberation which were not objected to by the Plaintiff. Specifically, the trial judge advised the jury as follows:

"You are to determine the facts from the evidence in this case alone. That is, from the testimony of the witnesses and any exhibits that have been admitted into evidence." (JA 609).

The Court instructed the jurors that:

"You are the sole judges of the credibility of the witnesses and the weight of the evidence. As used in these instructions, the credibility of the witness means the believability or lack of believability of the witness. The weight of evidence means the extent to which you are or are not convinced by the evidence." (JA 610)

The Court advised the jury that:

"The burden of proof in a civil action, such as this, is upon the party asserting the claim by a preponderance of evidence. To establish by a preponderance of the evidence means to prove that something is more likely said than not so." (JA 161).

Since the Plaintiff acknowledged that she was not seeking any damages for economic losses including recovery of medical bills or lost wages, the Court instructed the jury as follows:

“In this case you will hear instructions on compensatory damages. Compensatory damages consist of non-economic damages. If you award damages, you should only award the Plaintiff such a sum in compensatory damages as we 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 for such harms, losses and injuries. This amount is for you, the jury, to determine. (JA 619).

The jury was instructed as follows:

“You are instructed that the law cannot give you a precise formula or a yardstick by which you can fix with any degree of exactness compensation for such an intangible item as emotional suffering, but the law does contemplate the syncs intelligent jurors exercising common sense and calling upon their experience in life can satisfactorily fix and determine a proper award of money for this item of damages under proper instructions from the Court.” (JA 620).

The jury was properly instructed as to non-economic damages. The Court defined non-economic damages as: “past and/or future physical pain and suffering, past and/or future mental pain and suffering, and past and/or future reduced enjoyment of life.” (JA 620).

The Court instructed the jury:

“that in considering damages to be awarded to Plaintiff, Ashley Gunno, if any, it is proper for you to take into consideration the extent of the Plaintiff’s injuries including physical pain and suffering and mental anguish endured by her as a result of the injuries sustained, and any injury to her health that resulted from the accident.” (JA 621).

Finally, the Court instructed the jury that “Again, nothing said or done by the attorneys who try this case is to be considered by you as evidence of any fact.” (JA 664).

The Plaintiff chose not to admit into evidence any medical bills or lost wages she allegedly incurred as result of this accident. Indeed, the Plaintiff’s counsel acknowledged that they had abandoned any claim for special or economic damages. In fact, Plaintiff’s counsel noted “There will not be a single dollar on any line or asking for it or anything.” Plaintiff’s counsel confirmed that they were seeking general compensatory damages only for pain and suffering, mental anguish, and loss of enjoyment of life. (JA 403-404).

IV. SUMMARY OF ARGUMENT

This personal injury case was tried before a jury on May 5-7, 2014, and, after presentation of all of the evidence including the testimony of the Plaintiff, the Plaintiff’s husband, the Plaintiff’s treating physician Dr. Jay McClanahan, as well as the Defendant’s medical expert Dr. Bruce Guberman, the jury considered all of the evidence and returned a verdict finding in pertinent part that she failed to prove, by a preponderance of the evidence, that she was entitled to any award of damages for general compensatory damages such as pain and suffering.

This jury verdict was proper and supported by the evidence, and, should be upheld. This Court has repeatedly cautioned that the verdict of a jury is entitled to great weight and deference and should be only set aside when there is clear error. In this case, the Plaintiff chose not to present any testimony or introduce any evidence concerning specific pecuniary losses such as medical expenses or lost wages. Any undisputed testimony as to these amounts or the Defendant’s lack of challenge to these amounts, is irrelevant. Rather, the Defendant presented evidence showing that the Plaintiff’s injuries were

subjective in nature and that she had a subsequent fall that according to the defense medical examiner, changed the nature and character of the Plaintiff's complaints. The verdict of the jury was proper and should be upheld. Moreover, the trial court judge carefully considered the *Motion for New Trial* filed by the Plaintiff and based upon the existing law in West Virginia and the great deference afforded a jury's decision, denied the Motion for New Trial. This order of the lower court should be upheld.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 and Rule 19, *West Virginia Rules of Appellate Procedure*, the Defendant requests a Rule 19 oral argument in this case. In this regard, this case involves an allegation of error where there is well-settled law. The Defendant cites many prior decisions of this Court which stress the critical importance of upholding the jury verdict absent extraordinary circumstances. The Defendant believes there is controlling case law which negates the issues raised in the Plaintiff's appeal; thus, oral argument pursuant to Rule 19 is appropriate as well as issuance of a Memorandum Decision.

VI. ARGUMENT

A. The Standard of Review for Challenging a Trial Court's Denial of Motion for New Trial is an Abuse of Discretion

As her first assignment of error, the Plaintiff notes an order denying a new trial is subject to review under an abuse of discretion standard. The Defendant agrees that this is the applicable standard of review. This Court has explained that "we review the ruling of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and review of the circuit court's underlying factual findings under a clearly erroneous standard. See, *Syl. Pt. 3, State v. Vance*, 207 W. Va. 640, 535 S.E. 2d 484 (2000).

Furthermore, this Court has repeatedly recognized that the ruling of a trial court granting or denying a motion for new trial is given great weight and respect and will only be reversed when the trial court acted under a misapprehension of the law or evidence. See, *Sanders v. Georgia Pacific Corp.*, 159 W. Va. 621, 225 S.E. 2d 218 (1976).

B. The Trial Court Properly Denied the Plaintiff's Motion for New Trial Based Upon the Controverted Evidence of the Plaintiff's Claimed General Damages

As her second assignment of error, the Plaintiff argues that the Circuit Court abused its discretion in refusing to grant the Plaintiff a new trial on damages. The Defendant disputes this contention and points out that the lower Court correctly applied the well-settled standard for determining whether a new trial should be granted and properly denied the Plaintiff's motion based upon the jury's carefully considered verdict.

As the Plaintiff aptly notes in her *Brief for Appeal*, a court, in determining whether to grant a new trial based upon an assertion of inadequate damages, must view all evidence most strongly in favor of the defendant. As the Plaintiff points out, this Court in *Walker v. Monongalia Power Company*, 174 W. Va. 825, 131 S.E. 2d 736 (1963) explained that:

“In determining whether the verdict is supported by the evidence every reasonable and legitimate inference, fairly arising from the evidence in favor of the verdict for whom the party was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.”

Moreover, this Court in *Toler v. Hager*, 205 W. Va. 468, 519 S.E. 2d 166 (1999) emphasized the vital role of the jury in assessing damages. Specifically, this Court in *Toler* 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.” *Id. at* 173.

This Court in *Toler* reinstated a jury verdict, wherein the Plaintiff was awarded \$0.00 damages for pain and suffering. 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.” *Id. at* 174 citing, *Floyd v. Chesapeake & Ry. Co.*, 112 W. Va. 66, 164 S.E. 2d 28 (1932).

“It is the general rule that where damages are indeterminate, a mere difference of opinion between the court and the jury as to what the verdict should be will not justify the court disturbing the verdict.” “A jury’s verdict is accorded great deference when it involves a jury weighing conflicting evidence.” *Toler, Id. at* 174.

Significantly, this Court in *Marsch v. American Electric Power Company*, 207 W. Va. 174, 530 S.E. 2d 173 (1999), addressed precisely the issue of a new trial where a jury awards \$0.00 dollars for pain and suffering. The *Marsch* Court, in upholding the verdict, explained 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 injuries is left for 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 the jury was influenced by improper motives.” *Id. at* 181 citing, *Richmond v. Campbell*, 148 W. Va. 595, 136 S.E. 2d 877

(1964). The *Marsch* Court emphasized that when the jury is presented with conflicting evidence and there is some degree of difficulty in separating the causes of any pain and suffering endured by a plaintiff, an award of \$0.00 dollars for pain and suffering is appropriate. The *Marsch* Court cited, with approval, the holding of the Supreme Court of Illinois in *Snover v. McGraw*, 172 Ill. 2d 438, 217 Ill. Dec. 734, 667 N.E. 2d 1310 (1996). The *Snover* Court held that “a jury may award pain related medical expenses and may simultaneously determine that evidence of pain and suffering was insufficient to support a monetary award.” The *Snover* Court concluded “that a determination of damages is within the discretion of the jury and that the element of pain and suffering is especially difficult to quantify. *Id.*, 667 N.E. 2d 1315.

Also instructive, this Court recently reversed the decision of the Circuit Court of Wood County wherein a plaintiff was granted a new trial on the issue of damages because the jury awarded the plaintiff past and future medical expenses but failed to award any compensation for pain and suffering. See, *Big Lots v. Arbogast*, 228 W. Va. 616, 723 S.E. 2d 846 (2012). In reversing the lower court’s decision, the *Arbogast* Court stressed its prior holdings that explained “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. Thus, the amount of compensation for such injuries is left to the sound discretion of the jury.” *Id.*, 850-851.

The Court in *Arbogast* found significant the fact that the jury placed “\$0.00” in the corresponding blank on the verdict form for past and future pain and suffering and future loss of enjoyment of life; thus, supporting the conclusion that they considered the conflicting evidence, and after careful deliberation determined the evidence did not

support an award for pain and suffering.” *Id.*, 849. The *Arbogast* Court highlighted the fact that the Plaintiff had preexisting and subsequent injuries which may have made it difficult for the jury to distill the amount of pain and suffering specifically attributable to the subject injury. Simply stated, an award of damages is a factual determination reserved exclusively for the jury. *Id.*, 850.

There is no dispute that the Plaintiff Ashley Gunno was involved in a motor vehicle accident on September 13, 2011 and that the Defendant Kevin McNair was liable for this accident. Critical, however, to the analysis as to whether the circuit court erred in failing to grant the Plaintiff a new trial, is the undisputed fact that the Plaintiff made a strategic decision not to offer into evidence the medical bills she incurred or seek recovery for those medical bills and/or lost wages. The Plaintiff asserts, in support of this appeal, that the evidence of her “injuries and damages were uncontroverted”. This statement is not supported by the evidence. Rather, the Defendant did not present evidence contesting the reasonableness and necessity of certain medical bills of the Plaintiff; but, the Plaintiff chose not to seek recovery for these bills. Conversely, the Plaintiff’s claims for general compensatory damages, including damages for pain and suffering were disputed as they related to the motor vehicle accident. During the trial, Dr. Guberman provided specific testimony describing her injuries as subjective, supported only by the Plaintiff’s own recitation of her pain. All of the objective diagnostic tests were normal, and Dr. Guberman’s exam revealed no abnormal objective findings substantiating an injury. The Plaintiff, likewise, acknowledged the lack of objective diagnostic testing substantiating a pain producing injury from the accident.

Significantly, Dr. Guberman testified that within one month after the accident, Ashley Gunno sustained a fall which she failed to report to him during his independent medical examination. The Plaintiff also failed to report this fall to her own treating chiropractor.

Indeed, as admitted by the Plaintiff during her testimony at trial, and as clearly recounted in the physical therapy notes generated the day after this subsequent fall, the Plaintiff stated she tripped and fell bracing herself, which resulted in increased pain in both sides of her neck, so intense and severe that she cried and her sleep was disturbed.

Dr. Guberman opined that the character of the Plaintiff's pain and injury complaints as reflected in the medical records, changed after this subsequent fall. The jury may have questioned why the Plaintiff failed to report this subsequent fall to either Dr. Guberman or Dr. McClanahan in the course of their exams, especially when by her own words, expressed the day after the accident, the resulting pain was so severe it kept her awake and caused her to cry.

The testimony supported the conclusion that the abnormalities found on the lumbar MRI performed on the Plaintiff were pre-existing and not related to the accident. Dr. Walker, the plaintiff's treating orthopedic surgeon, reported in his records that the Plaintiff could return to work within weeks after the accident, with no restrictions and no further treatment except for home exercises. The Plaintiff chose not to call Dr. Walker as a witness at trial.

As highlighted by the instructions given to the jury, the jury was free to disregard the opinion or conclusions of any witness and to render their verdict based upon their own assessment of all the evidence, including the credibility and believability of the witnesses

including the Plaintiff and the treating chiropractor. The lack of objective medical evidence substantiating the pain complaints likely factored into the jury's assessment of the evidence and resulting verdict. The Plaintiff tries to attach great weight to the fact that the Defendant's counsel in his opening and closing statements stated the Plaintiff was injured in the accident and sustained some damage. However, the Court specifically instructed the jury that statements made by counsel are not to be considered evidence, and these statements, cannot be utilized as a basis for overturning the verdict of the jury.

This Court has repeatedly held that an award of damages is for the jury to determine and the Court should not substitute its own judgment for that of the jury. This instruction is particularly applicable when the damages are general damages, in indeterminate amounts, such as those for pain and suffering and loss of enjoyment of life, as are at issue in this case.

The basis for this appeal does not involve a situation where the jury failed to award undisputed concrete amounts for particular medical bills and lost wages; rather, this a case where the jury, after considering all of the evidence, determined that the Plaintiff was not entitled to any compensation for general damages for which there is no precise formula or calculation. This decision was exclusively theirs to determine.

C. The Plaintiff's Decision to Not Seek Recovery for Medical Bills and Lost Wages Does Not Alter the Long Standing Law That an Award of General Damages is the Sole Province of the Jury and Should Not, Absent Limited and Compelling Circumstances Be Disturbed On Appeal.

The strategic decision made by the Plaintiff to not seek recovery for medical bills and lost wages is irrelevant to the appropriateness of the jury's verdict and should only be considered for the limited basis of distinguishing the cases cited by the Plaintiff in her

Brief for Appeal. The cases relied upon hold that if uncontroverted evidence of particular and definitive amounts of damages are not awarded, than a new trial should be granted. However, in this case, there were not a specific amount of damages claimed, which were not disputed. Rather, all damages sought were indefinite and unliquidated items of damages for which there is no formula or concrete pattern for calculation. These are the exact types of damages that are left to the sole discretion of the jury to decide based upon their assessment of the evidence and the credibility of the witnesses.

The Plaintiff, in an attempt to distinguish the cases relied upon by the Circuit Court in denying the *Motion for New Trial*, cites *Hagley v. Short*, 190 W. Va. 672, 441 S.E. 2d 393 (1994). In *Hagley*, this Court reversed the lower court's decision and remanded the case for a new trial based upon the sole issue of damages. In supporting its decision in *Hagley*, this Court noted that even when considering the evidence strongly in favor of the defendant, the jury's award of zero damages was inadequate. However, critically distinguishable from the facts in *Hagley* and the facts in the instant case is that the plaintiff in *Hagley* presented uncontroverted evidence of specific lost wages and specific medical expenses incurred as a result of the accident and notwithstanding the specific amount presented and not challenged, the jury awarded no damages.

The Plaintiff in this case sought recovery of only general damages. These general damages, as this Court has repeatedly described, are "indeterminate damages for which the law gives no specific rule of compensation." Thus, based upon the holdings of this Court in *Toler, Id.*, *Marsch, Id.* and most recently in *Big Lots v. Arbogast, Id.*, the jury's verdict in this case should be maintained and the decision of the lower court denying the Plaintiff's Motion for a New Trial, upheld. The Plaintiff has presented absolutely no

evidence to support a finding, sufficient to overturn the jury's verdict, that the verdict was in any way influenced by passion, partiality, corruption or prejudice or mistaken view of the case. The jury's verdict, although disliked by the Plaintiff, was based upon the jury's firsthand assessment of the testifying witnesses, including their demeanor and credibility, the Plaintiff's subjective complaints of pain as she related to the September 13, 2011 motor vehicle accident, and the lack of objective medical evidence supporting the Plaintiff's complaints as related to the accident. The verdict is in no way inconsistent. Instead, it is supported by evidence which supports that while the Plaintiff may have sustained a subjective injury in the accident, there is an admitted lack of evidence of general damages, including pain and suffering, related to the accident when considering the normal findings on the diagnostic testing, the pre-existing lumbar conditions, and the subsequent fall by the Plaintiff, described by her as causing severe pain, but yet, suspiciously withheld by her during her exams with both her own doctor and Dr. Guberman. This Court has unequivocally instructed the verdict of the jury must be given great deference and should not be reversed lightly. The jury, after presentation and consideration of the evidence pertaining to the general, non-specific damages of the Plaintiff, concluded she was entitled to an award of \$0.00 for these damages. This decision of the jury should be upheld.

VII. Conclusion

On May 5, 6, and 7, 2014, this case was fully presented to a jury. After presentation of all the factual evidence, and after being properly instructed by the trial court as to the applicable law, the jury returned a verdict concluding the Plaintiff was

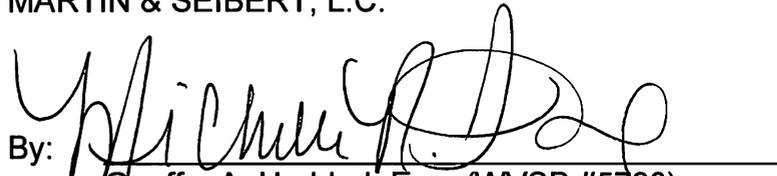
entitled to \$0.00 damages for “harms and losses, including but not limited to past and/or future physical and mental pain and suffering, and reduced ability to enjoy life.”

This verdict is supported by the evidence presented and assessed by the jury and should be upheld. The trial court, likewise, after hearing the argument of counsel, denied the Plaintiff’s Motion for New Trial, by concluding, in part, that “the jury considered all the evidence presented as well as the instructions from the 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.”

The trial court did not abuse her discretion in upholding the jury’s verdict and denying the motion for new trial. Consequently, the Defendant, Kevin McNair, respectfully requests this Court deny the Plaintiff Petitioners Appeal.

**KEVIN C. MCNAIR,
By Counsel**

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CERTIFICATE OF SERVICE

I, Michelle Roman Fox, counsel for the Defendant Kevin C. McNair do hereby certify that service of the foregoing **“Respondent Kevin McNair’s Opposition to Petitioner’s Brief in Support of Appeal”** and supporting memorandum has been made upon the following, by placing true copies in the regular course of the United States Mail, postage prepaid, this 28th day of January, 2016 addressed as follows:

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