

11-1260

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

REBECCA ARBOGAST and  
KEVIN M. ARBOGAST,  
Plaintiffs,

vs.

///

Civil Action No: 06-C-609

BIG LOTS STORES, INC.,  
Defendant.

ORDER

On the 17<sup>th</sup> day of September 2008 this matter came before the Court on Plaintiffs' Motion for New Trial on the Issue of Damages Only or, in the Alternative, For a New Trial on All Issues. The Plaintiffs, Rebecca Arbogast and Kevin M. Arbogast, appeared by counsel, Richard D. Dunbar, and the Defendant, Big Lots Stores, Inc., appeared by counsel, Martin R. Smith, Jr.

Whereupon the Court acknowledged receipt of Plaintiffs' Motion for New Trial on the Issue of Damages Only or, in the Alternative, For a New Trial on All Issues, Defendant's Response to Plaintiffs' Motion for New Trial on the Issue of Damages Only or, in the Alternative, For a New Trial on All Issues, and all accompanying documents. The Court has reviewed the above-mentioned documents, the record of the jury trial of this matter, arguments of counsel, and applicable case and statutory law.

The Plaintiffs move for a new trial as to the issue of damages only on the basis that the jury failed to award any amount for past pain and suffering, future pain and suffering, past loss of enjoyment of life, and future loss of enjoyment of life despite the fact that the Plaintiffs presented uncontradicted evidence of these damages.

This action came on for jury trial on June 25, 2008, and on June 26, 2008, the Court charged the jury and began deliberations. In response to interrogatories contained within the verdict form, the jury determined that the Defendant was liable for the negligent actions of its

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employee, John Potts, which caused injury to the Plaintiff. The liability issue was mostly, if not entirely, uncontested by the Defendant. As a result, the jury awarded \$13,877.46 for past hospital and medical expenses and \$15,000.00 for future medical expenses. The amount of past medical expenses awarded was 100% of the medical bills presented by the Plaintiffs. Despite the award of \$28,877.46 for past and future medical expenses, the jury failed to award any amount for past pain and suffering, future pain and suffering, past loss of enjoyment of life, and future loss of enjoyment of life by indicating “-0-” next to each of these elements of damage on the verdict form.

Plaintiff presented uncontradicted evidence of past pain and suffering and past impairment of capacity to enjoy life. In addition, the medical testimony of Dr. Michael Shramowiat also established the fact that the Plaintiff, Rebecca Arbogast, would continue to have pain and impairment into the future. This testimony was not contradicted by the Defendant.

Plaintiff moves for a new trial on the issue of damages only on the basis that jury’s determination that the Defendant was liable was supported by the evidence and that the jury awarded 100% of Plaintiff’s past medical expenses and \$15,000.00 for future medications (for control of pain) and awarded “-0-” for past pain and suffering, future pain and suffering, past loss of enjoyment of life, and future loss of enjoyment of life.

Rule 59(a) of the West Virginia Rules of Civil Procedure provides and the West Virginia Supreme Court of Appeals has confirmed

[T]hat a new trial may be granted to any of the parties on all or part of the issues, and in a case where the question of liability has been resolved in favor of the plaintiff leaving only the issue of damages, the verdict of the jury may be set aside and a new trial granted on the single issue of damages.

Syl. Pt. 3, *Gebhardt v. Smith*, 187 W.Va. 515, 420 S.E.2d 275 (1992). In this case, the evidence clearly indicated, and the jury properly found, that the Defendant was liable for the injuries

sustained by the Plaintiff. The question of liability was essentially conceded in this case.

Therefore, the liability issue has been clearly established and need not be retried in this case.

With regard to damages, the jury awarded the Plaintiff 100% of her past medical expenses and awarded \$15,000.00 for future medical expenses while providing “-0-” for all other elements of damage sought and indicated on the verdict form. Jury awards for pain and suffering no matter how small are not generally set aside. *Keiffer v. Queen*, 155 W.Va. 868, 873-74, 189 S.E.2d 842, 845 (1972). But, the Supreme Court of Appeals has stated,

It is also true that there is no market price or monetary equivalent for pain and suffering or for injuries of a nonpermanent nature, and that a jury award for these will generally not be disturbed because of the small amount awarded. A different issue is presented, however, where there is uncontradicted evidence that there was substantial injury for which the jury has made no award of damages in any amount.

*Id.* at 873-74, 845. Further, “A verdict of the jury will be set aside where the amount thereof is such that, when considered in light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case.” Syl. Pt. 2, *Keiffer v. Queen*, 155 W.Va. 868, 189 S.E.2d 842 (1972).

“A jury verdict awarding no damages cannot stand where the preponderance of the evidence, or . . . the uncontradicted evidence, shows injury of a substantial nature.” *Id.* at 874, 845.

“Where a verdict does not include elements of damage which are specifically proved in uncontroverted amounts and a substantial amount as compensation for injuries and the consequent pain and suffering, the verdict is inadequate and will be set aside.” *Gebhardt* at Syl. Pt. 2.

In this case, it is clear that the jury was misled by a mistaken view of the case as it awarded 100% of past medical expenses while awarding “-0-” for past pain and suffering and loss of enjoyment of life. The jury also awarded \$15,000.00 for future medical expenses based upon evidence indicating that the Plaintiff would require most, if not all, of that amount for pain

medications while awarding “-0-” for future pain and suffering and loss of enjoyment of life. It is certainly reasonable that medical expenses are incurred precisely because of pain and suffering and the evidence in this case clearly indicates that the \$15,000.00 awarded for future medical expenses was intended for the Plaintiff’s control of pain.

Finally, the Plaintiff presented considerable evidence through the Plaintiffs, Amy Frank, and Dr. Michael Shramowiat that the Plaintiff had pain and swelling within her knee during the three and one-half (3 ½) years up to the point of trial. Additionally, Orthopedic Surgeon, Dr. James Dauphin, who conducted an independent medical examination of the Plaintiff at the Defendant’s request, supported the Plaintiff’s contention of pain and suffering and impairment of Plaintiff’s capacity to enjoy her regular activities. This evidence was uncontroverted by the Defendant and showed injuries to Plaintiff of a substantial nature.

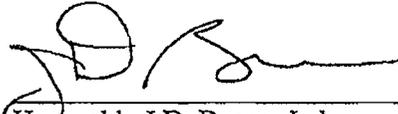
Based upon the foregoing, the Court finds and concludes that the verdict of the jury in this case is set aside and the Plaintiffs are granted a new trial on the single issue of damages.

Therefore, Plaintiffs’ Motion for New Trial on the Issue of Damages Only is GRANTED.

Accordingly, the Court ORDERS:

1. Plaintiffs’ Motion for New Trial on the Issue of Damages Only is **GRANTED**;
2. The jury verdict is **SET ASIDE**;
3. A new trial on the single issue of damages is **GRANTED**; and
4. The Clerk of the Court is directed to deliver a copy to the parties or their respective counsel of record.

ENTER this 16<sup>th</sup> day of July 2010:

  
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Honorable J.D. Beane, Judge