

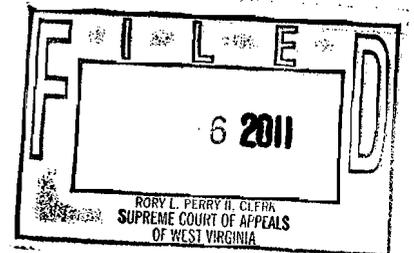
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-

**REBECCA ARBOGAST and KEVIN M. ARBOGAST,
Plaintiffs Below, Respondents,**

v.

**BIG LOTS STORES, INC.,
Defendant Below, Petitioner.**



Hon. J.D. Beane
Circuit Court of Wood County
Civil Action 06-C-609

RESPONSE TO PETITION FOR APPEAL

Counsel for Petitioners

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I. Kind of Proceeding and Nature of Ruling

The underlying action was one based on simple negligence. Respondent Rebecca Arogast was struck in the leg with a furniture dolly by an employee of the Petitioner. Although liability was contested, the Jury found the Petitioner negligent and awarded Respondent her past medical bills of 13,877.46 and future medical bills of \$15,000.00. 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.

Upon motion of the Respondent, the Honorable J.D. Beane found the award to be inadequate and set aside the jury verdict and awarded a new trial solely on the issue of damages.

II. Statement of the Facts of the Case

The Respondent, Rebecca Arbogast was standing at the checkout line of the Petitioner's Big Lots store in Parkersburg, West Virginia when she was struck in the leg by a dolly that was loaded with furniture and being shoved by John Potts, the furniture manager of the Petitioner. Mr. Potts was found to be 100% negligent by the jury.

With regard to the issue of damages, the jury awarded \$13,877.46 for past medical expenses and \$15,000.00 for future medical expenses. The amount of past medical expenses was 100% of the medical bills presented by the Respondents. 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.

During the trial, Respondent presented uncontradicted evidence of past pain and suffering and past impairment of capacity to enjoy life through the testimony of Recca

Arbogast, Kevin Arbogast, Amy Frank (daughter) and Mrs. Arbogast's attending physician, Dr. Michael Shramowiat. Dr. Michael Shramowiat also testified to a Reasonable Degree of Medical Certainty that the Plaintiff, Rebecca Arbogast, would continue to have pain and impairment into the future.

The Petitioner presented no medical experts that contradicted the testimony of Mrs. Arbogast's past or future pain and suffering or impairment of ability to enjoy one's life. In fact, Petitioner's own Independent Medical Examiner, Dr. James Dauphin, supported the existence of such damages by issuing a report which included the following language in the Diagnosis and Conclusion section of his Report:

"First of all I believe that her knee complaints [pain] at this time definitely were caused by the injury, which occurred at Big Lots on November 1, 2004."

"She continues to have instability and pain and I think that there is a possibility that she has synovitis or a minor cartilage fracture on the distal femur. She might benefit from steroid injections, Synvisc injections, or even diagnostic arthroscopy to rule out an internal derangement of the knee"

"I think that her medical treatment up to this time has been medically necessary and appropriate"

"I believe that she has reached maximum medical improvements from the injuries she sustained on November 1, 2004..."

(See Exhibit 1 – Page 5 of Dauphin IME Report)

It should be noted that Dr. Dauphin independent medical examination was conducted 3 years after Mrs. Arogast's injury and he fully supports the existence of pain and limitations within Mrs. Arbogast's knee at the time of her visit. Dr. Dauphin's report

was entered into evidence at the trial as the Petitioner elected not to call him as a witness.

After the jury returned its verdict, Respondent immediately moved for the Court to set aside the verdict as being inadequate.

By Order entered on July 19, 2010, the Court agreed and ordered a new trial on the issue of damages.

III. Points and Authorities Relied Upon

A verdict which disregards the instructions of the Court or constitutes a mistake, and by virtue thereof, does not cover the actual pecuniary loss properly proved, will be set aside. Richmond v. Campbell 148 W.Va. 595, 136 S.E.2d 877 (1964). Likewise, a jury verdict failing to award damages cannot stand where the preponderance of the evidence or, the uncontradicted evidence, shows injury of a substantial nature, yet no general damages are awarded. Keifer v. Queen, 155 W.Va. 868, 189 S.E.2d 842 (1972). A jury verdict must be set aside where the amount thereof is such, that when considered in light of the proof, clearly shows that the jury was misled by a mistaken view of the case. *Id.* at 845. Moreover, where the question of liability is resolved in favor of the Plaintiff, leaving only the issue of damages, the verdict of a jury may be set aside and a new trial granted on the single issue of damages. Richmond v. Campbell, 148 W.Va. 595, 136 S.E.2d 877 (1964); King v. Bittinger, 160 W.Va. 129, 231 S.E.2d 239 (1976); Gebhardt v. Smith, 187 W.Va. 515, 420 S.E.2d 275 (1992); Linville v. Moss, 189 W.Va. 570, 433 S.E.2d 281 (1993).

The West Virginia Supreme Court of Appeals revisited this issue in the decision of State ex rel Valley Radiology v. Gaughan 220 W. Va. 73; 640 S.E.2d 136 (2006) wherein Justice Albright distinguished between an inadequate verdict and that of an error in the verdict form. The Court distinguished that when a jury leaves blanks upon the verdict form, that the blanks constitute a defect in the verdict form itself. However, when the jury enters a "0" in an element of damage that Plaintiff had proven and was uncontroverted, the inadequacy of the jury award is a matter of law and one that cannot be cured with instruction to the jury to further deliberate on the particular element of damage which the jury had entered a "0" upon. In Gaughan the trial court granted Plaintiffs a new trial solely upon damages when the jury awarded the funeral and medical expenses of the decedent but made no award of general damages for sorrow and mental anguish when the evidence of the Plaintiff was uncontroverted by the defense. The Supreme Court upheld the Circuit Court's award of a new trial solely upon the issue of damages as the Plaintiffs herein are requesting.

In Keifer v. Queen 155 W.Va. 868, 189 S.E.2d 842 (1972), the Supreme Court stated the following:

It is also true that there is no market price or monetary equivalent for pain and suffering or for injuries of a non-permanent 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.

In Syllabus Point 2 in Gebhardt v. Smith 187 W.Va. 515, 420 S.E.2d 275 (1992), the Court reiterated its earlier decisions by stating that "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.” In Gebhardt, the Plaintiff had suffered a leg fracture. The jury awarded special damages of the Plaintiff of \$4,454.35 in medical expenses and \$7,938.00 in lost wages. However, the jury failed to make any award for pain and suffering and loss of enjoyment of life. The trial court in Gebhardt gave the Defendant the option of paying an additur or, in the alternative, to retry the case. Since the Defendant agreed to pay the additur, the Circuit Court denied Plaintiffs Motion for a new trial on damages. The Plaintiffs appealed and the West Virginia Supreme Court of Appeals reversed the Circuit Court’s denial of a new trial by stating that even when the evidence is viewed in a light most favorable to the Defendant, the damages awarded to the Plaintiff were inadequate since the evidence of pain and suffering was uncontroverted. The Gebhardt case is essentially a mirror of what occurred in the present case with the exception that in the present case the jury even awarded \$15,000.00 in future medical expenses, (presumably for future medications). The fact that the future medications were for Plaintiff’s control of pain it is unconceivable that no award was made for past or future pain and suffering.

IV. Discussion of Law

Applying the foregoing case law to the facts of the instant case clearly supports that the trial court correctly set aside the verdict and awarded Respondents a new trial on the issue of damages. Respondent’s evidence on the issue of past pain and suffering, past impairment of capacity to enjoy life, future pain and suffering and future impairment of capacity to enjoy life was uncontroverted. It was established through the

testimony of Rebecca Arbogast, Kevin Arbogast, Amy Frank and Dr. Michael Shramowiat that Rebecca Arbogast, had pain and swelling within her knee during the three and one-half (3 ½) years which she suffered from the injury up to the point of trial. The jury awarded 100% of her past medical expenses and \$15,000.00 for future medications.

The Petitioner presented no medical experts that contradicted the testimony of Mrs. Arbogast's past or future pain and suffering or impairment of ability to enjoy one's life. In fact, Petitioner's own Independent Medical Examiner, Dr. James Dauphin, supported the existence of such damages by issuing his report which included the following language in the Diagnosis and Conclusion section of his Report:

"First of all I believe that her knee complaints at this time definitely were caused by the injury, which occurred at Big Lots on November 1, 2004."

"She continues to have instability and pain and I think that there is a possibility that she has synovitis or a minor cartilage fracture on the distal femur. She might benefit from steroid injections, Synvisc injections, or even diagnostic arthroscopy to rule out an internal derangement of the knee"

"I think that her medical treatment up to this time has been medically necessary and appropriate"

"I believe that she has reached maximum medical improvements from the injuries she sustained on November 1, 2004..."

(See Exhibit 1 – Page 5 of Dauphin IME Report)

Dr. Dauphin independent medical examination was conducted on October 30, 2007, three (3) years after Mrs. Arogast's injury and he fully supported the existence of pain and limitations within Mrs. Arbogast's knee at the time of her visit. Dr. Dauphin's

report was entered into evidence at the trial as the Petitioner elected not to call him as a witness. Thus, in the present case, the evidence submitted by the Respondent was not only uncontroverted, it was supported by Petitioner's own independent medical examiner.

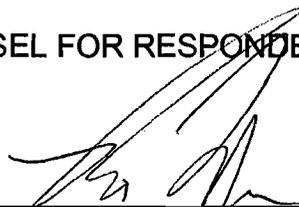
In short, no reasonable person could have sat through the testimony presented by the Respondent and found that there was no pain and suffering or impairment of capacity to enjoy life while at the same time awarding approximately \$29,000.00 in medical expenses. When uncontroverted general damages are not awarded in the context of a personal injury case, a new trial is warranted. *Richmond v. Campbell*, 148 W.Va. 595, 136 S.E.2d 877 (1964); *King v. Bittinger*, 160 W.Va. 129, 231 S.E.2d 239 (1976); *Gebhardt v. Smith*, 187 W.Va. 515, 420 S.E.2d 275 (1992); *Linville v. Moss*, 189 W.Va. 570, 433 S.E.2d 281 (1993).

V. Relief Prayed For

Wherefore, Respondent respectfully request that this Honorable Court Deny Petitioner's Petition for Appeal.

Respectfully submitted,

COUNSEL FOR RESPONDENTS,



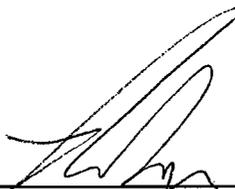
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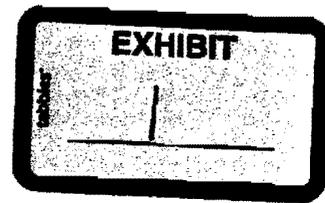
CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that on the 2nd day of SEPTEMBER, 2011, a true copy of the foregoing RESPONSE TO PETITION FOR APPEAL was deposited in the facilities of the United State Postal Service, postage prepaid, addressed to the following at the address last known to the undersigned.

Carol P. Smith
H.F. Salsbery
Frost Brown Todd LLC
Laidley Tower, Suite 401
Charleston, WV 25301



RICHARD D. DUNBAR, (State Bar # 6885)



Dauphin Orthopedics
HealthSouth Western Hills
#3 Western Hills Drive Suite 111
Parkersburg, W.V. 26105

October 30, 2007

Smith Law Offices
Post Office Box 7534
Cross Lanes, W.V. 25356

Re: Rebecca Arbogast
D.O.B. 11-19-1955
S.S. No.: 235-86-7398
D.O.I. 11-01-2004
D.O.E. 10-30-2007

Dear Mr. Smith:

I am writing to you with regard to the above named claimant. She was seen and examined in my office on October 30, 2007 for an Independent Medical Evaluation at your request. Nicole Rinard, transcriptionist was present during the entirety of the examination.

HISTORY OF THE PRESENT ILLNESS:

The claimant was injured at Big Lots when she was stricken in the back of the knee by a dolly loaded with merchandise. She sustained sudden severe pain in the left knee, which she described as explosive in nature. She was seen in the Emergency Room and was treated and released. X-rays of the knee at that time were normal. She was subsequently seen by Dr. Michael Shramowiat who was her attending physician already because of previous injuries.

He saw her on November 8, 2004, examined her and ordered x-ray of the left knee, MRI of the left knee, ice, and continue present medications.

She was seen back for a recheck on November 22, 2004, which revealed on MRI a small indefinite posterior horn tear of medial meniscus. He did not feel that she was a surgical candidate at that time and continued her on therapy, medication, and strengthening.

She was seen back on December 1, 2004 at which time she was seen for pain in the left arm in which she was having because of a needle stick injury, which she sustained during a phlebotomy.

RE: Arbogast, Rebecca
S.S. No: 235-86-7398

(History of the Present Illness continued)

She was seen back for the knee on December 13, 2004 and was doing better and he recommended that she continue the Celebrex and return in one month.

She was seen back on January 10, 2005 with reference to the left knee and he did not change her management except to change her from Celebrex to Arthrotec. Because of persistent pain in the knee she began using a cane and this caused her right elbow to begin hurting. She has essentially no use of the left arm because of nerve damage and wears a sling at all times when she is traveling about the community. She had a previous history of lateral epicondylitis in the right arm after the injury to the left arm because she used the right arm too much to compensate for the lack of the left arm.

SOCIAL HISTORY:

The claimant is married and her husband is a small business owner. They are having significant financial distress since she is not able to work at the office with him.

PAST MEDICAL HISTORY:

The claimant has a positive history for RSD and nerve damage in the left arm as a result of a Phlebotomy. She sustained nerve and vessel damage in that injury and underwent nerve release in the proximal forearm for that. She also filed a personal injury litigation against the facility that drew her blood. This facility was found negligent but the case was overturned by the Supreme Court of Appeals. She has been left with numbness in the left hand, weakness in the left arm and chronic pain. She has been treated by Dr. Mike Shramowiat with Methadone and other drugs for this. She also had a molar pregnancy in 1975, which metastasized to the lung. She also has a history of chronic mononucleosis.

MEDICATIONS:

1. Ambien 10 mg. qhs.
2. Methadone 10 mg. 2 tabs bid.
3. Lortab 5/500 prn.
4. Celebrex 1 tab qd.
5. Zantac 150 mg. qd.
6. Proventil 4 mg. prn.
7. 5HTP 2-3 tabs qd.
8. Calcium.
9. Garlic.
10. B12 Drops.
11. Oregano.
12. Laxatives.

RE: Arbogast, Rebecca
S.S. No: 235-86-7398

ALLERGIES:

1. QUIBRON.
2. KEFLEX.
3. BIAXIN.
4. CODIENE.

CURRENT SYMPTOMS:

At the present time she has pain in the left knee, which is worse with activity and is worse in the evening. She cannot sit, stand, or walk too long. At the initial time of injury she had a hematoma on the outside of the left knee which was as big as a golf ball and although that has resolved she still has pain in that same area to this day. Her right elbow has flared up and again has tendonitis because she has been using the cane to help her walk due to the left knee injury. At the present time she can only drive locally and usually after driving 5-6 miles she has too much knee pain to continue driving.

She has not applied for Social Security Disability benefits.

REVIEW OF RECORDS:

As mentioned previously there are progress notes from Dr. Shramowiat's office dated November 8, 2004, November 22, 2004, December 1, 2004, December 13, 2004, and January 10, 2005. I have already summarized those for you.

She was seen back for a recheck on February 2, 2005 and was involved in a motor vehicle accident recently and was asking that Dr. Shramowiat sign a statement that cold temperatures and physical stress exacerbate her previous conditions of RSD and medial meniscal injury to the left knee.

She was seen back on February 7, 2005 for follow-up left knee pain and was seeking consultation with an orthopedic surgeon with regard to her knee.

She was seen back on April 6, 2005 with regard to her bilateral arm pain and her plan was continue Methadone, Ambien, and Lexapro. Lodine was changed to over-the-counter non-steroidal drugs.

She was seen back on June 1, 2005 with regard to her arms and was treated for right elbow pain. There was no mention made of her knee in that note.

She was seen back on July 6, 2005 again for the arms and also on August 10, 2005.

She then came in the office on August 29, 2005 with continued complaints of moderate to severe left knee pain and a repeat MRI was ordered.

RE: Arbogast, Rebecca
S.S. No: 235-86-7398

(Review of Records continued)

There is a Board of Pharmacy review report in the file, which was obtained on or about August 31, 2005. Dr. Donna Davis is listed as the prescribing physician as well as Dr. Shramowiat and Dr. Byrd. It reveals that the claimant was obtaining narcotics from Dr. Shramowiat and Dr. Davis in the same facility and also from Dr. Steven Byrd who was not one of her treating physicians.

Next in the file is a request for records from Katrina Christ.

Next is a note dated October 3, 2005, which is a follow-up of left knee, and the attempt was made to refer her to Dr. Powers in Columbus.

She was seen back on November 2, 2005 and this referral was unsuccessful. She eventually seen by Dr. Joseph Sneed in Weston who evaluated her, took a history and stated that she had some type of soft tissue injury to the outside of the left knee. This is the area where she was struck by the dolly and therefore was a direct injury instead of an indirect injury. There does not seem to be any ligament or meniscus injury so I am not really sure what the anatomical diagnosis would be in this case. However, she does have some legitimate complaints with this knee characterized by loss of motion, pain, and limp. Since the injury happened 1 ½ years ago her condition is probably permanent. This knee condition certainly would prevent her from doing any kind of work above the sedentary level.

REVIEW OF RADIOLOGICAL STUDIES:

There is an AP and lateral of the knee done on November 8, 2004, which is normal.

There is an MRI of the knee done on November 17, 2004, which states in the body of the report that this may represent meniscal degeneration or an intrameniscal tear speaking of the posterior horn of the medial meniscus.

There is a second MRI done on October 7, 2005, which is normal.

PHYSICAL EXAMINATION:

Reveals a thin white female who is awake, alert and oriented. She attends the visit using a cane in the right arm and has a sling on the left arm and a tennis elbow band on the right arm. Examination of the knee shows range of motion from 30-90 degrees and this does appear to be limited by pain rather than any structural deficit. The knee is stable in all planes and there is no effusion. Measurement of the quadricep shows 38 cm on the right and 36 cm on the left. The calves measured 35 cm on both sides. There is exquisite tenderness on the outer lateral aspect of the knee and no numbness was present. Muscular strength is 4+ in all muscles tested in the lower extremities.

RE: Arbogast, Rebecca
S.S. No: 235-86-7398

DIAGNOSIS AND CONCLUSIONS:

First of all I believe that her knee complaints at this time definitely were caused by the injury, which occurred at Big Lots on November 1, 2004. She sustained a contusion of the knee with a small hematoma in that area. I do not think that her meniscal tear is real. I believe that it was an artifact seen on the first MRI and that is why it did not appear on the second MRI.

She continues to have instability and pain and I think that there is a possibility that she has synovitis or a minor cartilage fracture on the distal femur. She might benefit from steroid injections, Synvisc injections, or even diagnostic arthroscopy to rule out an internal derangement of the knee. Note that an MRI is 96% accurate which means that 4% of the time there could be something left in the knee which is not diagnosed on MRI, although this is rare it is a possibility.

I think that her medical treatment up to this time has been medically necessary and appropriate. However, I think that after the August visit most of her medications have been prescribed for the elbows and the arms. Even some of the medication earlier this year was prescribed for the elbows and the arms as evidenced by the fact that there is no mention of the knee in those progress notes.

There are signs of drug tolerance in this claimant. She has used multiple providers and is taking ~~Ambien, Lortab, Methadone, and Lexapro~~ and is still unable to sleep. One would question why her Methadone would not have been adequate to cover all of her discomfort.

I believe that she has reached maximum medical improvement from the injuries she sustained on November 1, 2004 at Big Lots and if she does not respond to injections and refuses arthroscopic surgery then I believe that she is at maximum medical improvement.

RE: Arbogast, Rebecca
S.S. No: 235-86-7398

DISCLAIMER: The IME process was explained to the claimant and he/she understands that no patient/treating physician relationship exists between his/her and me. Only those parts of the body logically associated with the injury date were assessed and his report cannot be construed as a comprehensive physical examination for general health purposes. The opinions rendered in particular case are the opinions of the evaluator. This evaluation has been conducted on the basis of the medical examination and on the review of records that were provided, with the assumption that the material is true and correct. If more information becomes available at a later date, an additional service, report or reconsideration may be requested. Such information may or may not change the opinions rendered in this evaluation. This opinion is based on a clinical assessment, examination and documentation. This opinion does not constitute per se a recommendation for specific claims administrative functions to be made or enforced. There is no guarantee if the recommendation is for the patient to go back to work that there will not be a re-injury or additional injury once he/she returns to work.

Sincerely,



James M. Dauphin, M.D.
A.B.O.S., C.I.M.E.
55-0742764

D: JMD
T: nar