

11-0960

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

BONNIE TOOTHMAN and  
GARY TOOTHMAN,

Plaintiffs,

v.

CIVIL ACTION NO. 08-C-204  
(Judge David R. Janes)

KARI LYNN JONES,

Defendant.

RECEIVED  
IN  
CIRCUIT CLERKS OFFICE  
2011 MAY 9 PM 3:23  
BARBARA A. COOPER  
CIRCUIT CLERK

ORDER ON POST TRIAL MOTIONS

CAME THIS DAY, April 19, 2011, Plaintiffs, Bonnie Toothman and Gary Toothman, personally and by counsel, Roger D. Curry and J.C. Amos, and came Defendant Kari Lynn Jones, by her counsel, Jeffery L. Robinette, pursuant to Plaintiffs' Motion for a New Trial. In support of their motion, the Plaintiffs assert four arguments: the Court incorrectly denied the Plaintiffs' motion during trial to reveal the presence of insurance coverage for the Defendant; the Court incorrectly required that future pain and suffering be proven to a "reasonable medical certainty;" the jury verdict was inadequate as a matter of law; and the jury failed to award any general damages even though medical damages were found.

*Exclusion of Defendant's Insurance Coverage*

The Court, upon mature consideration of Plaintiffs' motion to reveal liability coverage, finds that this basis for a new trial is contrary to law. Rule 411 of the West Virginia Rules of Evidence permits the introduction of such evidence only under very limited circumstances, (i.e. to show agency, ownership, or control), in order to prevent prejudicial arguments alluding to the insurance company's ability to pay for the plaintiff's damages. *Moorefield v. Lewis*, 96 W.Va. 112 (1924). Plaintiffs argue that the Defendant's counsel was permitted to question the gaps in

Plaintiffs' treatment, but Plaintiffs' counsel was not permitted to offer rebuttal argument that the gaps were due to the insurance company's refusal to pay for the Plaintiffs' treatment. The Defendant maintains that Rule 411 and prior case law prevents the very argument that Plaintiffs make in this case – that the insurance company is capable of paying for the damages. The Court sees no reason to change the longstanding evidentiary rule prohibiting the introduction of a defendant's insurance coverage into evidence at trial, and hereby denies the Plaintiffs' motion for a new trial on this basis.

*Requirement of Reasonable Medical Certainty*

The Court, upon mature consideration of Plaintiffs' motion for a new trial on the basis that future pain and suffering be proven to a reasonable medical certainty, finds that this argument is also contrary to law. The Plaintiffs argue that the requirement to prove future pain and suffering to a reasonable medical certainty is antiquated; and that even Dr. P. Kent Thrush's commentary during trial, concerning the general impossibility of predicting what would happen to anyone medically in the future, is evidence of a need to change the evidentiary rule. The Defendant maintains that the longstanding reasonable medical certainty standard is necessary in order to protect defendants from unjustly bearing the burden for future costs which may never materialize. *Hovermale v. Berkley Springs Moose Lodge No. 1483*, 165 W.Va. 689, 696-697(1980). The Court sees no reason to change the rule requiring that future pain and suffering be proven to a reasonable medical certainty, and hereby denies the Plaintiffs' motion for a new trial on this basis.

*Inadequacy of the Jury Award*

After mature consideration of the issue, the Court finds that the jury award was inadequate, but also finds that a new trial is not merited on that basis. In their motion and argument, the Plaintiffs relied on the fact that the jury's award of \$5,373.35 for past medical expenses was not

accompanied by any monetary recovery for general damages, specifically past pain and suffering. In response, the Defendant maintained that a jury verdict was not inadequate as a matter of law when the jury foreperson enters "\$0" in the blanks accompanying certain damages on the verdict form, which shows evidence of the jury's deliberation as to these damages. *Wade v. Chengappa*, 207 W.Va. 319 (1999). After consideration of the Plaintiffs' motion and argument, and the Defendant's response, the Court hereby finds that the jury verdict was inadequate pursuant to *Gebhardt v. Smith*, 187 W.Va. 515 (1992). The Court denies the Plaintiffs' motion for a new trial on this basis, however, finding that the appropriate remedy for the inadequate jury award is a post trial additur.

*Appropriate Remedy for the Inadequate Jury Award*

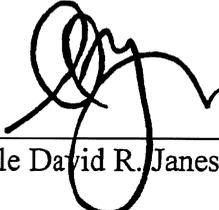
The Court, after mature consideration, finds that a post trial additur is the appropriate remedy for the inadequate jury award, and that a new trial is not merited based upon the jury's failure to include a general damages award. Plaintiffs, having waived their right to have the jury redeliberate as to the jury award after the verdict had been read, argue that a new trial is the only valid remedy to correct the inadequate jury award. Defendant maintained that a party contesting the jury verdict must object to the verdict when it is returned, prior to the jury's discharge, *Combs v. Hahn*, 205 W.Va. 102 (1999), and that an additur is a valid and favorable substitution for a new trial. Syl. Pt. 1, *Alkire v. First National Bank of Parsons*, 197 W.Va. 122 (1996). Upon consideration of the issue, the Court hereby denies the Plaintiffs' motion for a new trial, finding that a \$2,000 post trial additur for past pain and suffering is the appropriate remedy for the inadequate jury verdict in this case. The Court hereby orders that a \$2,000 additur for pain and suffering be added to the jury verdict.

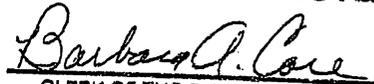
ACCORDINGLY, the Plaintiffs' Motion for a New Trial is hereby DENIED. The respective objections of the parties are hereby saved.

The Court further directs the Clerk of the Circuit Court of Marion County to distribute certified copies of this order to the parties and/or counsel of record at the following address:

Roger D. Curry  
Curry Amos & Associates,  
LC  
1414 Country Club Road  
P.O. Box 3040  
Fairmont, WV 26555  
*Counsel for the Plaintiffs*

Entered 5/9/11

  
\_\_\_\_\_  
Honorable David R. Janes, Judge

A COPY      TESTE  
  
\_\_\_\_\_  
CLERK OF THE CIRCUIT COURT  
MARION COUNTY, WEST VIRGINIA