11-1330

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CINDY MOSIER,

Plaintiff,

2011 AUG 25 PM 4: 14

CLERK
CIRCUIT COURT

v.

Civil Action No.: 10-C-383
Judge: Hon. Zakaib

JAMES DENNY and
ORKIN LLC
A Delaware Corporation,

Defendant.

ORDER DENYING DEFENDANTS' MOTION TO VACATE THE PUNITIVE DAMAGES AWARD AND FOR ORDER GRANTING A NEW TRIAL ON COMPENSATORY DAMAGES ONLY: NOTHWITHSTANDING THE FOREGOING DEFENDANTS' REQUEST FOR REMITTIUR OF COMPENSATORY DAMAGES

On the 15th day of July, 2011, came the Plaintiff, Cindy Mosier, by counsel, Warner Law Offices, PLLC, and the Defendants James Denny and Orkin LLC, by counsel, Bowles Rice McDavid Graff & Love PLLC, for a hearing upon Defendants' *"Motion to Vacate the Punitive Damages Award and for Order Granting A New Trial On Compensatory Damages Only ** Notwithstanding the Foregoing Defendant's Request for Remittitur of Compensatory Damages"* (hereinafter "Motion").

The Court has reviewed the record in this case, specifically including, but not limited to, Defendant's Motion and Memorandum in Support of Motion, and Plaintiff's Response in Opposition to Defendant's Motion.

The Court has given due consideration to the pertinent legal authorities and the briefs submitted by each party on the issues raised in the Motion by Defendant. As a result of these careful deliberations, the Court is of the opinion to and does hereby DENY Defendant's "*Motion to Vacate the Punitive Damages Award and for Order Granting A New Trial On Compensatory*

*Damages Only ** Notwithstanding the Foregoing Defendant's Request for Remittitur of Compensatory Damages"* in its entirety. The following findings of fact and conclusions of law are made regarding the Court's ruling in this case:

FINDINGS OF FACT

1. This case arises from an automobile collision that occurred on March 17, 2008 in Kanawha County, West Virginia. At that time, Plaintiff Cindy Mosier was struck by a vehicle operated by Defendant James Denny, while working for Defendant Orkin LLC. The vehicle was owned by Orkin LLC for use in its exterminating business activities.

2. On that date, Plaintiff's vehicle was struck by the Defendants and she sustained bodily injuries. Plaintiff filed the Complaint in this matter alleging negligence against the Defendants, asserting they were at fault for Plaintiff's serious personal injuries, including injury to her neck and back. Subsequently, Plaintiff required a procedure to insert a spinal cord stimulator into her back for controlling back pain, which she claimed was caused by the collision in March of 2008. Defendants' denied that all of Plaintiff's personal injuries were caused by their actions and/or the collision in March of 2008.

3. On May 20, 2011, after a five day trial, the jury returned a verdict for the Plaintiff, finding the Defendants liable to the Plaintiff and awarding her damages. In addition, the jury found that Defendant Orkin, Inc. acted with purposeful, willful or reckless conduct, or disregarded the rights of others, thereby entitling the Plaintiff to an award of punitive damages.

4. The Jury awarded Plaintiff compensatory damages in the following amounts: past medical bills: $123,536.23; future medical bills: $426,245.00; past physical pain and suffering $100,000; future pain and suffering: $ 25,000; past mental anguish $100,000; future mental anguish: $25,000; past loss of enjoyment of life $100,000; future loss of enjoyment of life:

$25,000.

5. The Jury awarded Plaintiff punitive damages against the Defendant in the amount of $500,000. The Court entered the Judgment Order on June 6, 2011.

6. On June 10, 2011, Defendants filed a Motion seeking to vacate the punitive damages award and seeking a new trial and/or remittiur of the compensatory damages awarded by the jury, accompanied by a supporting Memorandum. Defendants contend that Plaintiff failed to establish facts necessary to support a punitive damages instruction and also assert that the evidence does not substantiate the compensatory award in this case. Defendants allege the Court's rulings were in error as to its evidentiary rulings and jury instructions, which would warrant a new trial.

7. At trial, Plaintiff presented evidence that Defendants were at fault for the collision occurring on March 18, 2008. Further, Plaintiff presented evidence that Plaintiff Cindy Mosier suffered personal injuries after the collision, including pain to her neck, shoulders and back which required medical treatment. Plaintiff presented evidence that she had a spinal cord stimulator implanted in her back to treat her pain after the subject collision, and that such implantation would require additional medical treatment in the future for replacing batteries, and other necessary costs. Finally, in support of her punitive damages claim, Plaintiff presented evidence that prior to the time of the collision, Orkin had a Driver Certification Policy and GPS policy used to monitor its employee drivers such as Defendant Denny. Plaintiff presented evidence that Denny had violations under the policy that would warrant disciplinary action as specified in the policy by assessment of penalty points leading to an aggressive driving course and/or termination of the driver's position. The stated purpose of the Driver Certification policy was to protect the public from aggressive drivers and promote public safety through the corporate program to prevent accidents. Specifically, during Plaintiff's case in chief, she

proffered the following evidence:

a) The testimony of David Carraway, M.D., Plaintiff's Treating Physician
b) The testimony of Philip Rubin, M.D., Plaintiff's Treating Physician
c) The testimony of Matthew Walker, M.D., Plaintiff's Treating Physician
d) The testimony of Scott Colias, D.C. , Plaintiff's Treating Physician
e) The testimony of Plaintiff Cindy Mosier
f) The testimony of Mike Gibney, Orkin's Rule 30(B)(7) Representative
g) The testimony of Defendant James Denny
h) The testimony of Roger Griffith, CPA , Plaintiff's Economic Expert

8. Defendants argued that Plaintiff's back injuries that ultimately required the surgical procedure of implanting a spinal cord stimulator to control pain, performed by Dr. Carraway, was not caused by the subject collision. Further, Defendants contended that Plaintiff's injuries from the subject collision resolved within a short period of time after Plaintiff's initial treatment in physical therapy and that no future medical care was required. Finally, Defendants disputed the presentation of evidence by Plaintiff that Orkin failed to adhere to and/or enforce its Driver Certification Policy as to Defendant Denny. Specifically, Defendant offered the following evidence during its case in chief:

a) The testimony of Amber Bays, Plaintiff's Treating Physical Therapist
b) The testimony of Daniel Salmons, Plaintiff's Treating Athletic Trainer (therapy)
c) The testimony of Andrew Rentchler, Defendant's Biomechanical Expert
d) The testimony of Donald Whiting, M.D., Defendant's Medical Expert
e) The testimony of Joseph Mosier, Plaintiff's Husband

CONCLUSIONS OF LAW

1. In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syl. Pt. 5, *Orr v Crowder,* 315 S.E.2d 593 (W.Va. 1983); Syl. Pt.

2, *Bowyer v. Hi-Lad, Inc.*, 131 S.E.2d 895 (W.Va. 2004).

2. "[A] trial judge should rarely grant a new trial. . . .Indeed, a new trial should not be granted 'unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done[.]" *Morrison v. Sharma*, 200 W.Va. 488 S.E.2d 467, 469 (W.Va. 1997) (internal citations omitted.); *Gerver v. Benavides*, 530 S.E.2d 709 (W.Va. 1999).

3. In considering Defendants' motion to vacate the punitive damages award, the Court follows the directives most recently set forth in *Syl. Pt. 6, Perrine v. E.I. du Pont de Nemours & Co.,* 694 S.E.2d 815 (W.Va. 2010): "When this Court, or a trial court, reviews an award of punitive damages, the court must first evaluate whether the conduct of the defendant toward the plaintiff entitled the plaintiff to a punitive damage award under *Mayer v. Frobe,* 40 W. Va. 246, 22 S.E. 58 (1895), and its progeny. If a punitive damage award was justified, the court must then examine the amount of the award pursuant to the aggravating and mitigating criteria set out in *Garnes v. Fleming Landfill, Inc.,* 186 W. Va. 656, 413 S.E.2d 897 (1991), and the compensatory/punitive damage ratio established in *TXO Production Corp. v. Alliance Resources Corp., 187 W. Va.* 457, 419 S.E.2d 870 (1992)."

4. The Court finds that Plaintiff presented sufficient evidence to support the jury's verdict that Defendant Orkin, Inc. acted with purposeful, willful or reckless conduct, or disregarded the rights of others, thereby entitling the Plaintiff to an award of punitive damages. Plaintiff presented evidence that Orkin had a driver certification policy and/or a GPS policy designed to prevent aggressive and unsafe drivers from endangering the public while driving Orkin vehicles. Plaintiff presented testimony that Orkin did not enforce its policy against Defendant James Denny which the jury found posed a danger to society including the Plaintiff.

In *Hensley v. Erie Ins. Co.,* 168 W. Va. 172, 283 S.E.2d 227 (1981), the West Virginia Supreme Court recognized "that punitive damages are also awarded to deter others from

pursuing a like course of conduct", and that "[t]he law accords the plaintiff an extra measure of recovery for any number of reasons where the defendant has been found guilty of *gross, reckless or wanton negligence.*" *Id.* at 184, 283 S.E.2d at 233 *[emphasis added].* Moreover, "The punitive damages definition of malice has grown to include not only mean spirited conduct, but also *extremely negligent* conduct that is likely to cause serious harm." *TXO Prod. Corp., v. Alliance Res. Corp.*, 187 W.Va. 457, 474, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L.Ed. 2d 366 (1993).

Additionally, "It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury on such facts will not ordinarily be disturbed by this Court." *Syl. Pt. 5, Marsch v. American Electric Power,* 530 S.E.2d 173 (W.Va. 1999). Under these legal principles, the Court provided instructions to the jury for the imposition of punitive damages. The jury's factual findings on these issues will not be disturbed by the Court. This Court previously considered evidentiary matters pertaining to the presentation of evidence by Plaintiff to support her punitive damages claim *in limine* and during trial. The Court hereby incorporates its prior rulings for denying Defendant's "Motion *in limine* to exclude Plaintiff's punitive damages claim" and "Motion to exclude Defendant James Denny's driving record" and driver certification policy as relevant evidence tending to support Plaintiff's claim.

5. Defendants' assert that various evidentiary rulings were prejudicial to Defendants. On this issue, the Court notes that "[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion." *Syl. Pt. 4, State Rodoussakis*, 511 S.E.2d 469 (1998). Similarly, the Court's giving of a jury instruction is reviewed under an abuse of discretion standard. *Syl. pt. 6, Tennant v. Marion Health,* 459 S.E.2d 374 (W.Va. 1995).

6. The Court's rulings on admissibility of evidence are harmless error unless the defendant was substantially prejudiced by it. *See State v. Marple*, 475 S.E.2d 47(W.Va. 1996). The Court adequately considered all evidentiary issues raised by the parties prior to and throughout the trial in this matter, including the admission of evidence tending to prove Plaintiff's punitive damages claim. It cannot be said that any of the Court's evidentiary rulings raised by Defendant were erroneous to create substantial prejudice or that the remaining evidence offered did not support the verdict. *See McDougal v. McCammon*, 455 S.E2d 788 (W.Va. 1995).

7. The Court also finds that the Jury was properly instructed as to the purpose and definition of awarding punitive damages under West Virginia law. The Court is mindful that "'a verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.' Syl. Pt. 6, *Tennant v. Marion Health Care Foundation, Inc.*, 459 S.E.2d 374 (W.Va. 1995)." Syl. Pt. 3, *Keesee v. General Refuse Service, Inc.*, 604 S.E.2d 449 (W.Va. 2004). Plaintiff's jury instructions on punitive damages referenced language from the following cases: *Wells v. Smith*, 297 S.E.2d 872 (1982); *Garnes v. Fleming*, 413 S.E.2d 897 (W.Va. 1992); *Boyd v. Goffoli*, 608 S.E.2d 169 (W.Va. 2004), and *TXO v. Alliance Resources*, 419 S.E.870 (W.Va. 1992) *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L.Ed. 2d 366 (1993). The Jury was properly instructed in considering the imposition of punitive damages.

8. The Court finds that the jury's award of compensatory damages was supported by the evidence, and there was no prejudice to Defendants by the admission of punitive damages evidence or arguments by counsel. All evidence regarding Defendants' driving record, driver certification policy and corporate worth were properly admitted for the jury's consideration of Plaintiff's claims. The Court admitted testimony from Plaintiff's expert economist Roger

Griffith, CPA, on the Defendants' corporate worth as relevant evidence to Plaintiff's punitive damages claim. The Court properly admitted this testimony on the corporate worth analysis under the clear authority of West Virginia law, as a factor for consideration by the jury for a punitive damages award: "The financial position of the defendant is relevant." *Syl. pt. 4, in part, Boyd v. Goffoli*, 608 S.E.2d 169 (W.Va. 2004). Therefore, there was no prejudicial error in admitting this evidence, which would require the Court to vacate the jury verdict and order a new trial on compensatory damages only.

9. Defendants contend generally that the award of compensatory damages, including the award of future medical care, was not supported by the evidence. The Court finds that the Jury was presented with evidence that Plaintiff would incur future medical bills for replacing batteries in her spinal cord stimulator as well as other future medical care costs. The testimony of Roger Griffith, CPA, was admitted to inform the jury on the present day value costs of future medical care that Plaintiff will require, as supported by the medical testimony of her treating physician Dr. Caraway and Dr. Bowman. Defendants offered the testimony of their retained medical expert, Dr. Whiting, to rebut the expected future medical care costs presented by Plaintiff. In considering the evidence in the light most favorable to Plaintiff, the Court finds the compensatory award was supported by the evidence. *See Syllabus Point 5 of Orr v. Crowder,* 315 S.E.2d 593 (W.Va. 1983), cert. denied, 469 U.S. 981, 105 S. Ct. 384, 83 L. Ed. 2d 319 (1984).

10. In considering Defendants' argument that the compensatory damages award to Plaintiff for mental anguish and loss of enjoyment of life is not supported by the evidence, the Court finds that the jury heard testimony that Plaintiff continues to suffer back pain and will have to undergo repeated surgeries every five to seven years. "Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure,

unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption." *Syl. Pt. 6, Skibo v. Shamrock,* 504 S.E.2d 188 (W.Va. 1998). The jury's combined award of $250,000 for past and future mental anguish and loss of enjoyment of life, for the remainder of Plaintiff's life, does not appear to this Court as outrageous, unreasonable, monstrous or enormous, and will not be disturbed by the Court.

11. The Court next considers Defendants' argument that Plaintiff's Jury Instruction No.3 was prejudicial, as it stated that the jury was 'obligated to assess the total amount of damages.' The Court finds the instruction was a proper statement of the law in West Virginia, instructing the jury to disregard any collateral source payments when assessing the total amount of Plaintiff's compensatory damages and the Defendants' were not prejudiced by language of the instruction. The Court provided instructions to the jury that when read in their entirety, were correct statements of the law in West Virginia instructing that before damages were awarded, the jury must find fault on the part of the Defendants. "A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." *Syl. Pt. 6, Tennant v. Marion Health Care Foundation, Inc.*, 459 S.E.2d 374 (W.Va. 1995).

12. The Court finds that the testimony and opinions of Plaintiff's economic expert Roger Griffith, CPA were properly admitted in this case. Specifically, Defendant contends that Mr. Griffiths' opinions constituted unfair surprise at trial. The Court is mindful that the Defendants presented rebuttal evidence to Mr. Griffith's opinions by way of cross examination of the expert witness, thereby curing any perceived notion of unfair surprise. The Court adequately considered all evidentiary issues raised by the parties prior to and throughout the trial in this matter. The Court's evidentiary rulings on admitting expert testimony and opinions were not erroneous to create substantial prejudice requiring a new trial. *See McDougal v.*

McCammon, 455 S.E2d 788 (W.Va. 1995).

13. Finally, in reviewing the Defendants' request for a remittitur of compensatory damages, the Court finds the jury's verdict was supported by the evidence. The jury heard testimony from Plaintiff's treating physicians, including Dr. Carraway, Dr. Collias, Dr. Walker, and Dr. Rubin These physicians provided testimony that Plaintiff had suffered neck and back injuries that required medical treatment, and would require future medical care. The jury heard testimony from Defendant's expert Dr. Whiting to rebut the medical opinions of Plaintiff's treating physicians. The Jury's findings of fact are entitled to great weight in the Court's review upon a motion for new trial and/or remittitur. "It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury on such facts will not ordinarily be disturbed by this Court." *Syl. Pt. 5, Marsch v. American Electric Power,* 530 S.E.2d 173 (W.Va. 1999); *Citing Syl. Pt. 2, Graham v. Crist,* 118 S.E.2d 640 (W.Va. 1961); *Syl. Pt. 4, Wager v. Sine*, 201 S.E.2d 260 (W.Va. 1973).

14. Because the jury was presented with conflicting evidence regarding the nature and extent of Plaintiff's injuries, it cannot be said that the award of compensatory damages was against the clear weight of the evidence that would warrant a remittitur. The general rule with regard to damages is that "such proof can not be sustained by mere speculation or conjecture." *Spencer v. Steinbrecher*, 152 W.Va. 490, 496, 164 S.E.2d 710 (1968). Plaintiff presented sufficient evidence to support the damages awarded in this case.

15. In consideration of the evidence presented in this case, the Jury's Verdict for Plaintiff and damages awarded were supported by the evidence. There is no basis to grant a new trial and/or remit the amount of damages awarded by the Jury.

It is accordingly **ORDERED** that Defendants *"Motion to Vacate the Punitive Damages Award and for Order Granting A New Trial On Compensatory Damages Only ** Notwithstanding the Foregoing Defendant's Request for Remittitur of Compensatory Damages"* is hereby **DENIED** in its entirety.

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

Enter this 26th day of ~~July~~ Aug 2011.

Paul Zakaib, Circuit Court Judge

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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 30 DAY OF Aug 11
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
By C. Wood

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