

14-1332

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

JOSEPH DATTOLI and  
KERRY DATTOLI, his wife,  
Plaintiff

Vs.

CIVIL ACTION NO. 09-C-274

WHEELING PARK COMMISSION,  
Defendant

CIRCUIT COURT  
OF OHIO COUNTY  
2014 DEC 3 AM 10 59  
BRENDA L. NEELEY

DECISION AND ORDER

This is a decision about inadequate damages. Plaintiffs are asking this court to set aside the damages awarded by a jury and grant the plaintiff a new trial on the limited issue of damages because no money was awarded by the jury for Joseph Dattoli's claimed injuries for past and future pain and suffering, past and future mental and emotional pain, past and future loss of enjoyment of life, past and future loss of household services, and permanency of injuries and for the spousal consortium claim of plaintiff Kerry Dattoli.

The record of the evidence presented in this case establishes that liability and damages were both seriously contested. The pertinent facts for the purpose of the motion before the court, are not complicated. While visiting in Oglebay Resort, a park maintained by the Wheeling Park Commission, Joseph Dattoli was either sitting or leaning against a fence, the fence collapsed, and he was injured. His damage claim includes a request for compensation for permanent injuries.

Plaintiffs' negligence claim is that Wheeling Park Commission was negligent when it failed to maintain that fence so that it wouldn't collapse when somebody

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was leaning or sitting on it. In addition the defendant was also negligent when it failed to provide additional seating in the area where the plaintiff was injured. There was no evidence that the defendant had any notice that the fence was flawed or needed any repair and there were benches in the area of the park where the plaintiff was injured. These facts demonstrate that the jury could have decided the question of liability either way.

The plaintiff suffered a left shoulder rotator cuff tear requiring surgical repair caused from his fall when the fence collapsed. The plaintiff claimed at trial that he was still suffering from pain in his shoulder and was still limited in his day-to-day life. That claim was not supported by the testimony of his treating physician Dr. Demeo who testified that in 2008 the plaintiff resumed all daily activities without any discomfort. Dr. Demeo's testimony was consistent with the plaintiff's medical records that did not support plaintiff's claim that he still was suffering pain and limited in his day to day activities.

Even the plaintiff acknowledged that he told his medical care providers that he returned to work without any discomfort and resumed his daily living activities without discomfort. In fact, plaintiff's medical records show that he resumed all daily activities without discomfort in 2008 and he had a 100% range of motion and symmetric strength in his left shoulder. Thus, the jury heard conflicting evidence concerning plaintiff's claim of permanent injuries.

West Virginia law is clear: a party cannot recover the future permanent consequences of the negligent infliction of a personal injury unless the evidence

presented at trial is sufficient for the jury to conclude that with reasonable certainty, the plaintiff would suffer future permanent consequences as a result of, in this case, his shoulder injury. Contingent or merely possible future injurious effects are too remote and speculative to support a lawful recovery in West Virginia. See, Syllabus point 7, Jordan v. Bero, 158 W.Va. 28, 210 S.E.2d 618 (1974).

The court's decision on plaintiff's permanency and future damages claims is that the plaintiff did not prove he would suffer future permanent consequences as a result of his shoulder injury. Therefore, the jury's decision on this issue will not be reversed.

In considering the plaintiffs' motion that addresses claimed injuries existing at the time of trial, the court must address three basic principles of law:

1. This court cannot find a jury verdict to be inadequate unless it is a sum so low that under the facts of the case reasonable men cannot differ about its inadequacy. See, Syl. Pt. 2, Fullmer v. Swift Energy Co., Inc., 185 W.Va. 45, 404 S.E.2d 534 (1991) .
2. When considering a motion for a new trial on the issue of damages pursuant to Rule 59(a)(1) of the West Virginia of Civil Procedure the evidence concerning damages is to be viewed most strongly in favor of the defendant. See, Syl. Pt. 1, Kaiser v. Hensley, 173 W.Va. 548, 318 S.E.2d 598 (1983).
3. "In a civil action for recovery of damages for personal injuries in which the jury returns a verdict for the plaintiff which is manifestly inadequate in amount and which, in that respect, is not supported by the evidence, a new trial may be

granted to the plaintiff on the issue of damages on the ground of the inadequacy of the amount of the verdict." Syl. Pt. 3, Biddle v. Haddix, 154 W.Va. 748, 179 S.E.2d 215 (1971).

Pursuant to the framework for analysis of inadequate jury awards of damages established in Freshwater v. Booth, 160 W.Va. 156, 233 S.E.2d 312 (1977) it must first be determined whether a verdict is indeed inadequate. After considering the arguments of counsel and a review of the evidence presented to the jury, it is the court's opinion that the jury's failure to award any damages for past pain-and-suffering and/or past mental and emotional pain was an inadequate damage award - but the court also concludes that the sums awarded or not awarded by the jury for all of the other claimed damages were not so low under the contested facts in this case to cause reasonable men to differ about the adequacy of the award or the failure to award damages. Consequently, except for past pain and suffering and past mental and emotional pain suffered by the Plaintiff, the verdict returned by the jury was not an inadequate award for all of the damages claimed by the plaintiffs.

Having concluded that the failure of the jury to award the plaintiff damages for past pain-and-suffering and past mental and/or emotional pain was an inadequate award, the Freshwater analysis next requires that the court determine whether a new trial should be granted on liability and/or damages or whether the verdict should be upheld as a defendant's verdict perversely expressed. In this case the jury could not have been confused about liability because it found the defendant

to be 100% liable. However the court must weigh this factor with the fact that damages as well as liability were vehemently contested

The facts in this case do not fit into any of the four types of cases set forth by Justice Neely in the Freshwater case.

A Freshwater type 1 case "is where the plaintiff would have been entitled to a directed verdict on liability as a matter of law, and the damages are inadequate even when viewed most strongly in favor of the defendant." Id. at 160, 233 S.E.2d at 315. Although the jury found the defendant to be 100% responsible the court was never in a position to direct a verdict on liability as a matter of law based upon the evidence introduced at trial. Therefore this is not a type I case.

It is not a type 2 case because, as stated, the total award of damages was not clearly inadequate as an award for the damages suffered by the plaintiff.

It cannot be a type 3 case – the defendant's verdict perversely expressed because the total award of damages is not so inadequate as to be nominal under the evidence in the case.

A type 4 case is where the plaintiff would not be entitled to a directed verdict on the matter of liability, but the issue of liability has been so conclusively proven that an appellate court may infer that the jury's confusion was with regard to the measure of damages and not to liability. The Court cannot, based on the conflict in the evidence introduced by the plaintiffs on their damages claims, conclude that the jury was confused. There is no basis for this court to conclude that the jury was confused about liability or damages. Just the opposite is true. The court does not

believe that the jury was confused on the damage claim-it knew what it was doing but did not understand that it had to consider the value of plaintiffs past pain and suffering and emotional pain when it awarded damages to the plaintiff.

It would be injudicious for this court to express what it believes the jury wanted to do in this case, but based upon the evidence presented by counsel in this trial, the court is satisfied that the verdict was not returned by confusion, caprice, or incompetence.

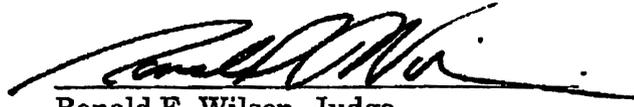
“While reasonable minds may differ on the ‘correctness’ of nearly every jury verdict, as long as a jury has deliberated with a understanding of the law and communicated its true intent to the court, its verdict should stand. However, when we allow a lack of understanding of the law to thwart the will of the jury, we serve poorly the interests of justice” *Vargo v. Pine*, 208 W.Va. 416 (2000). Concurring and Dissenting Opinion of Justice McGraw.

The court is satisfied that the jury returned the verdict it believed the evidence on damages called for. The problem is that by not awarding the plaintiff any money for pain and suffering when he suffered a left shoulder rotator cuff tear requiring surgical repair, the jury ignored the realities of life. The jury found the defendant negligent and awarded damages to Joseph Dattoli. Thus, having found that the plaintiff was entitled to recover damages caused by defendant’s negligence required a finding that the plaintiff was entitled to recover damages for pain and suffering, the existence of which, if not the degree, was uncontroverted.

The jury was absolutely justified, based upon the evidence in this case, in not awarding the plaintiff any damages for future pain and suffering, for future mental and emotional pain, for future mental anguish and emotional pain, for future loss of enjoyment of life, for future loss of household services and for permanency of injuries. The jury made a decision to not award Kerry Dattoli any spousal consortium and the court has no right to reverse that decision.

Therefore, the new trial will only be upon amount of damages caused by the defendant's negligence that the jury will award for the past pain and suffering Joseph Dattoli suffered and what amount of money, if any, he should be awarded for past emotional pain that was caused by the defendant's negligence.

IT IS SO ORDERED THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2014.

  
Ronald E. Wilson, Judge

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JOSEPH DATTOLI, and  
KERRY DATTOLI, his wife,

Plaintiffs,

vs.

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Defendant.

CIVIL ACTION NO. 09-C-274

CIRCUIT COURT  
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2014 SEP 2 AM 9 17  
BRENDA L. MILLER

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OF OHIO COUNTY

**JUDGMENT ORDER**

ON the 6<sup>th</sup> day of August, 2014, came the plaintiffs, Joseph Dattoli and Kerry Dattoli in person and by counsel, Ron Zavolta, Esquire and Brent Robinson, Esquire as well as came the defendant, the Wheeling Park Commission, by its representative and by counsel Thomas E. Buck, Esquire and Bruce Clark, Esquire, at the time scheduled for the Trial of this Civil Action. A jury of six, three women and three men, were empaneled. Prior to the commencement of the trial, plaintiff's counsel informed the Court that plaintiffs were no longer seeking damages in the form of "future medical expenses" or "future lost wages" and said claims were withdrawn.

The plaintiffs then presented their case in chief and introduced exhibits and called witnesses. The plaintiffs then rested.

The defendant made a Motion for a Directed Verdict in regard to liability, which was denied. The defendant also made a Motion for Directed Verdict in regard to claims for pain and suffering, and this Motion was denied. Thereafter, defendant called no witnesses and introduced no additional exhibits other than those, which it had previously entered during plaintiffs' case in chief. The defendant then rested.

Whereupon, following deliberations, the jury returned a Verdict in favor of the plaintiff for the following damages:

- A. Past Medical Bills: \$36,894.47.

B. Past lost wages: \$19,000.00.

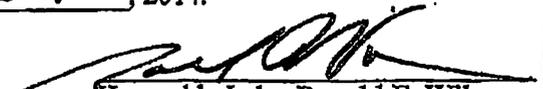
No other sums were awarded by the jury.

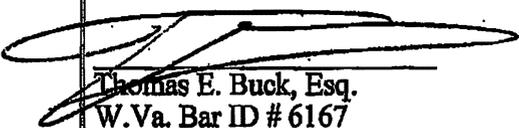
Therefore, it is **ORDERED, ADJUDGED and DECREED**, that the plaintiffs be awarded **JUDGMENT** against the defendant in the sum of \$36,894.47 for past medical expenses, and \$19,000.00 for past lost wages, plus Court costs and appropriate prejudgment and post-judgment interest at the legal rate per annum until paid.

All objections and exceptions are preserved and saved.

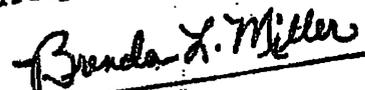
The Clerk is directed to forward attested copies of this Order to all counsel of record.

Entered this 28 day of AUGUST, 2014.

  
Honorable Judge Ronald E. Wilson

  
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A copy, Teste:

  
Brenda L. Miller  
Circuit Clerk