

# Third District Court of Appeal

State of Florida, July Term, A.D. 2009

Opinion filed August 26, 2009.

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No. 3D07-1501

Lower Tribunal No. 03-29479

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**Big Lots Stores, Inc.,**  
Appellant,

vs.

**Gloria Maria DeDiaz and Jose Diaz,**  
Appellees.

An Appeal of a non-final order from the Circuit Court for Miami-Dade County, Mindy S. Glazer, Judge.

DeMahy, Labrador, Drake, Payne & Cabeza, and Michael T. Tomlin, for appellant.

Wald, Gonzalez & Graff, and Estrella Gonzalez; Barbara Green, for appellees.

Before COPE and SUAREZ, JJ., and SCHWARTZ, Senior Judge.

SUAREZ, J.

Big Lots Stores, Inc., appeals from the trial court's order granting the plaintiffs, Gloria DeDiaz and Jose Diaz, a new trial on future damages and loss of consortium. We affirm.

Gloria DeDiaz tripped over part of a display at Big Lots and fell on her left knee. X-rays revealed no fractures, but did show some early signs of arthritis. A couple of months later, DeDiaz saw an orthopedist and had an MRI. The MRI showed a small tear, and some fluid buildup. Only therapy was prescribed. The following year, DeDiaz went to another doctor for a second opinion. The doctor concluded that DeDiaz had some degenerative arthritis in her knee and an injury to the meniscus, and recommended arthroscopic surgery. DeDiaz had the surgery.

In December, 2003, DeDiaz filed a personal injury claim against Big Lots. Big Lots answered that her injuries were from pre-existing arthritis and/or intervening causes. Three years later, DeDiaz amended her complaint to include a loss of consortium claim on her husband's behalf. Following trial, the jury found in DeDiaz's favor and awarded her past medical expenses and damages for past pain and suffering. The jury did not award damages for future pain and suffering or for future medicals even though there was evidence of the need for future medical treatment. The jury also did not award any damages to the husband for loss of past or future consortium.

After the trial court entered final judgment pursuant to the jury verdict, the plaintiffs filed a motion for new trial solely on the issues of damages for future pain and suffering, future medicals, and the loss of consortium claim, asserting that

the verdict was against the manifest weight of the evidence. After a hearing, the trial court granted the motions, and Big Lots appealed.<sup>1</sup>

We review the trial court's grant of a motion for new trial for abuse of discretion. Southwin, Inc. v. Verde, 806 So. 2d 586, 587 (Fla. 3d DCA 2002) ("The standard of review for the denial of a motion for new trial is whether or not the trial court abused its discretion."). If the appellate court determines that reasonable people could differ as to the propriety of the trial court's action, there can be no finding of an abuse of discretion. Hahn v. Medeiros, 858 So. 2d 1242 (Fla. 5th DCA 2003). The fact that there may be substantial competent evidence in the record to support the jury verdict does not necessarily demonstrate that the trial judge abused his or her discretion. See Baptist Mem'l Hosp., Inc. v. Bell, 384 So. 2d 145, 146 (Fla. 1980) ("The discretionary power to grant or deny a motion for new trial is given to the trial judge because of his direct and superior vantage point. . . . In reviewing this type of discretionary act of the trial court, the appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of

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<sup>1</sup> The panel heard oral argument in April 2008, and in its May 14, 2008 opinion, relinquished jurisdiction to the trial court for entry of an order specifically setting forth the grounds on which the court relied for granting a new trial on future damages and loss of consortium.

an abuse of discretion."); Brown v. Estate of Stuckey, 749 So. 2d 490, 497-98 (Fla. 1999) (same). The trial court's order granting the new trial contains the required detailed specific findings supporting the court's conclusion that the jury verdict on these issues was against the manifest weight of the evidence. Fla. R. Civ. P. 1.530(f); Brown v. Estate of Stuckey, 749 So. 2d at 490 (holding that, in granting a motion for a new trial, the trial court must articulate the reasons for doing so in its order). The trial court's conclusions are supported by our review of the record. Therefore, we affirm the trial court's order.

Further, regarding the loss of consortium issue, we find that undisputed evidence was presented on Mr. Diaz's loss of consortium claim to require an award of at least nominal damages. See Tavakoly v. Fiddlers Green Ranch of Fla., Inc., 998 So. 2d 1183 (Fla. 5th DCA 2009) (holding that where the plaintiff established entitlement to some damages for loss of consortium, a zero verdict is inadequate as a matter of law), and citations therein; Jones v. Double D Props., Inc., 901 So. 2d 929, 931 (Fla. 4th DCA 2005) ("When the claiming spouse presents evidence that is substantial, undisputed, and unrebutted concerning the impact the injury had on the marital relationship, such spouse is entitled to receive at least nominal damages for loss of consortium."); Fleming v. Albertson's, Inc., 535 So. 2d 682, 684 (Fla. 1st DCA 1988); see also Aurbach v. Gallina, 721 So. 2d 756, 758 (Fla. 4th DCA 1998) (on a consortium claim, where sufficient undisputed evidence was presented

that would require an award of at least nominal damages, a zero verdict is inadequate as a matter of law), approved, 753 So. 2d 60 (Fla. 2000); Christopher v. Bonifay, 577 So. 2d 617 (Fla. 1st DCA 1991) (a spouse is entitled to reversal of a zero verdict only if it can be established that the record contains substantial, undisputed evidence of loss of consortium).

We affirm the trial court's grant of new trial on the issue of future damages as well as Mr. Diaz's loss of consortium claim.

Affirmed.

COPE, J., concurs.

SCHWARTZ, Senior Judge (dissenting).

After due consideration of the record and the factors I deem pertinent, see *Montgomery Ward & Co. v. Pope*, 532 So. 2d 722, 722 (Fla. 3d DCA 1988) (Schwartz, C.J., dissenting); *Fla. Power Corp. v. Coppola*, 765 So. 2d 858 (Fla. 5th DCA 2000), I believe that this case falls on the “seventh juror,” rather than, as the majority holds, the “judicial discretion” side of the continental divide between the decisions reviewing new trial orders based on the trial judge’s perception of the weight of the evidence. I would therefore reverse for reinstatement of the verdict reached by the actual jurors.