DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ANDREE LAYTON ROAF, JUDGE

CA 05-975

April 26, 2006

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[CV-04-7715]

LINDSEY R. ROBERTSON

APPELLANT

V.

HONORABLE JAMES M. MOODY, CIRCUIT JUDGE

JIMMY W. PORTER & ARKANSAS SOD & TURF FARMS

AFFIRMED

APPELLEES

Appellant Lindsey Robertson filed suit against appellees Jimmy Porter and Arkansas Sod and Turf Farms for injuries sustained in a motor vehicle accident. Robertson suffered a herniated disc that she claimed was caused by the accident. Porter and Arkansas Sod and Turf Farms admitted liability but argued that Robertson's injuries were not caused by the motor-vehicle accident. The jury rendered a verdict in favor of Porter and Arkansas Sod and Turf Farms on the issue of damages and awarded Robertson nothing. Robertson now appeals the jury's verdict, arguing that it is clearly against the preponderance of the evidence. We affirm the jury's verdict.

On April 2, 2003, Robertson was involved in a motor vehicle collision with Porter, who was driving an eighteen-wheeler hauling sod for Arkansas Sod and Turf Farms. The eighteen-wheeler came to rest on Robertson's vehicle. Robertson indicated that she was not injured at the time of the accident, but, on her witness statement, she left a question mark after the word "no" when asked if she was injured. She refused medical treatment for herself at the scene of the accident.

Later that same evening, according to Robertson, her hips and lower back began to hurt, and she went to the emergency room. She also stated that her shoulders and neck were stiff and sore. She saw Dr. Carfagno two days after she was seen at the emergency room, and he sent her to

physical therapy, where she learned that her pelvis had been "knocked out of alignment." Robertson later had an MRI, which revealed that she had a herniated disc.

In a deposition and in interrogatories, Robertson denied having any previous back problems. When she completed her intake sheets for two separate doctors, she did not indicate any previous back problems. Her medical records, however, indicated previous back injuries in 1995, 1996, and 1999, including disc degeneration and a bulging disc. Her records indicated that in 1999 she suffered from chronic back pain. Robertson testified at trial that the reason she had denied having any previous back pain was because she "didn't remember all that stuff in '95, '96, and '99." She stated that she did not recall ever having any back problems before the motor vehicle accident. Robertson also testified that she did not recall having an MRI done in 1995.

Robertson's medical records indicate that in 1996 she saw a doctor for lower back and neck pain that she suffered as a result of a motor vehicle accident that same year. Robertson, however, had never mentioned this motor vehicle accident. When asked in interrogatories and in a deposition if she had been injured at any time prior to the 2003 accident, Robertson responded in the negative. On cross-examination at trial, Robertson stated that she "[did not] even remember those incidents" where she was treated for back pain following the 1996 accident.

Dr. Peek stated that, in his opinion, Robertson's injuries, including the herniated disc, were caused by the motor vehicle accident. He further stated that Robertson had indicated in her medical history that she had no previous back problems and that he had not reviewed any of her prior medical records. After reviewing Robertson's prior medical records, Dr. Peek maintained his opinion that the motor vehicle accident caused her present back injuries.

Robertson testified that her previous back injuries did not last long and that she "never had an ongoing problem or a back injury." According to Robertson, her present lower back pain is not the same as her previous lower back pain.

Porter and Arkansas Sod & Turf Farms admitted liability at trial. The issue before the jury was whether Robertson was entitled to compensatory damages. The jury returned a verdict in favor

of Porter and Arkansas Sod & Turf Farms. Robertson did not file a motion for a new trial. Robertson now appeals the jury's verdict, arguing that it is clearly against the preponderance of the evidence.

As a preliminary matter, Porter and Arkansas Sod and Turf Farms assert that Robertson's issue is not preserved for appellate review because she took no action to bring this issue to the trial court's attention. Arkansas Rule of Civil Procedure 59(f) states that a party who appeals an error that could have been the basis for granting a new trial is not required to make a motion for new trial to preserve the issue for appellate review if the party has already preserved the issue for appeal. One such basis for granting a new trial is where there is error in the assessment of the amount of recovery, whether too large or too small. Ark. R. Civ. P. 59(a)(5). Another basis for granting a new trial where the verdict is clearly contrary to the preponderance of the evidence. Ark. R. Civ. P. 59(a)(6). In other words, if a party has already properly preserved his or her error concerning any of the grounds listed in Rule 59, that party is not required to make a motion for new trial in order to argue those grounds on appeal. *Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996). Robertson asserts that the jury's verdict was clearly against the preponderance of the evidence and that she was not required to make a motion for new trial to preserve any error.

The question is whether Robertson properly preserved the error regarding the jury verdict as required by Ark. R. Civ. P. 59(f). Porter and Arkansas Sod & Turf Farms argue that Robertson should have made a directed-verdict motion, a motion for judgment notwithstanding the verdict, or a motion for a new trial to properly preserve the error for appellate review. They contend that any error argued on appeal must have first been directed to the trial court's attention in some appropriate manner so that the court has an opportunity to address the issue. *See Stacks, supra.*

Here, Robertson was the plaintiff in the case below, and the only issue before the jury was the amount of damages. This presents the question of how Robertson would have preserved for review or properly brought to the trial court's attention the issue of whether the jury's verdict on

damages was against the preponderance of the evidence and the issue of whether the jury's verdict was inadequate.

In order for a party to challenge the sufficiency of the evidence on appeal, he or she must move for a directed verdict at the conclusion of all the evidence at trial. *Switzer v. Shelter Mut. Ins. Co.*, ___ Ark. ___, ___ S.W.3d ___ (May 26, 2005); *Southwestern Bell Tel. v. Garner*, 83 Ark. App. 226, 125 S.W.3d 844 (2003). This is true even if the party challenging the sufficiency of the evidence was the plaintiff at the trial court level. *Id*.; *Southwestern Bell, supra*. Here, Robertson was the plaintiff and did not make a directed-verdict motion. Her case, however, is distinguishable from the cases cited above because the only issue before her jury was damages. Robertson thus

would have, without moving the trial court to direct a verdict for a specific sum, no reason or basis on which to appropriately make a directed-verdict motion. Such a motion would be an act of futility in a jury trial since the trial court would have neither the power or authority to grant it.

Because this situation is unique in that the only issue before the jury was whether and how much to award as damages, Robertson could not have anticipated or raised the issue of inadequate damages and the issue of the verdict being contrary to the preponderance of the evidence until after the jury rendered its verdict. Clearly, Robertson could have made a motion for a new trial under Ark. R. Civ. P. 59; however, Rule 59 was rewritten in 2003 to state that a party is excused from filing a motion for new trial to preserve the error of which it complains if the party has already properly preserved the error. The revised rule clearly does not contemplate or address the situation in the case before us, which is how Robertson could have raised the issues before the trial court so that she could "properly preserve" them for appeal. The concurring judge does not suggest what post-trial motion cognizable in our Rules of Civil Procedure Robertson might have filed to preserve the error other than a motion for a new trial. However, the rule purports to excuse her from having to file such a motion to preserve the issue. Thus, we conclude that Robertson's appeal should be addressed on its merits.

Robertson's point on appeal makes the argument for both Rule 59(a)(5) and (a)(6): (1) whether the jury's verdict was against the preponderance of the evidence and (2) whether the jury's verdict, zero, was "too small" to compensate her. An admission of fault by a defendant does not automatically entitle the plaintiff to recover damages. *James v. Bill C. Harris Constr. Co., Inc.*, 297 Ark. 435, 763 S.W.2d 640 (1989). Damages must be proven even though fault is admitted. *Id.*

When a motion for new trial is made on the ground that the verdict was clearly against the preponderance of the evidence, then the standard of review is whether substantial evidence supports the verdict. *Machost v. Simkins*, 86 Ark. App. 47, 158 S.W.3d 726 (2004) (citing *DePew v. Jackson*, 330 Ark. 733, 957 S.W.2d 177 (1997)). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or another, beyond mere speculation or conjecture. *Id*. "The verdict is given the benefit of all reasonable inferences permissible in accordance with the proof." *Id*. at 55, 158 S.W.3d at 731. Here, while there was no motion for new trial, the standard is likewise whether the verdict was clearly against the preponderance of the evidence.

This case is similar to *Depew v. Jackson*, 330 Ark. 733, 957 S.W.2d 177 (1997), in which the appellant's vehicle was struck from behind by the appellee, who admitted liability. The case was submitted to the jury on the issue of damages only, and appellant presented evidence of medical and surgical bills totaling over $15,000. *Id*. The jury returned a $1600 verdict. *Id*. The Arkansas Supreme Court affirmed the trial court's denial of appellant's motion for a new trial. *Id*. It held that substantial evidence supported the jury's verdict because there was evidence that the surgery and treatment of appellant's condition was not proximately caused by appellee's negligence but was instead due to a preexisting condition. *Id*.

Here, there was likewise evidence that Robertson's damage was not proximately caused by any negligence but was caused by her preexisting back condition. Medical records revealed that Robertson had experienced back problems before the 2003 motor vehicle accident. Robertson denied having previous back problems, and when asked about these previous back problems at trial on cross-examination, she simply stated that she did not remember them. Robertson had been

involved in a motor vehicle accident in 1996 and another accident in 1996 where she fell off a horse. After both accidents, she sought treatment from physicians for lower back pain. The jury reasonably could have found that, based on this evidence, Robertson's injuries were not caused by the negligence of Porter and Arkansas Sod and Turf Farms.

In *Machost v. Simkins*, 86 Ark. App. 47, 158 S.W.3d 726 (2004), this court reversed a jury's award for the defendant where the defendant had admitted liability and the treating physician testified that the plaintiff's injuries were consistent with the nature of the accident and there was no evidence that the treatment expenses could be attributed to injuries other than those suffered in the accident. The present case, however, is distinguishable from *Machost* because here there was considerable evidence presented to the jury of Robertson's preexisting condition. Accordingly, the jury could have reasonably concluded that her injuries were not caused by appellees.

Turning now to Robertson's other argument, where the primary issue on appeal is the alleged inadequacy of the jury's award, an important issue is whether a fair-minded jury could have reasonably fixed the award at the challenged amount. *Depew*, *supra*. Here, a fair-minded jury could have reasonably refused to award Robertson any damages. The jury obviously accepted Porter and Arkansas Sod and Turf Farm's theory that Robertson's injuries preexisted the motor vehicle accident that involved them and that her injuries were not caused by them. Simply because the plaintiff has incurred medical expenses and the defendant has admitted liability does not entitle the defendant to an award of damages equivalent to those expenses. *Depew*, *supra* (citing *Kratzke v. Nestle-Beich, Inc.*, 307 Ark. 158, 817 S.W.2d 889 (1991)).

Affirmed.

GRIFFEN, J., agrees.

PITTMAN, C.J., concurs.

JOHN MAUZY PITTMAN, JUDGE, concurring. I agree that this case should be affirmed. However, I would do so without reaching the merits because the issue is not preserved for appeal. The majority holds that appellant was not required to raise the issue

of inadequate damages below because she could not have done so until after the jury rendered its verdict, and because Ark. R. Civ. P. 59(f) provides that a motion for new trial is not required to preserve an error if it has already been properly preserved. Their position is not logical and is not the law.

First, Rule 59(f) makes a motion for new trial unnecessary *only if the issue has already been properly preserved*, a fact that the majority acknowledges but does not apply in its analysis. Appellant had ample opportunity to raise the issue below. Although the inadequacy of a jury's award of damages will not be apparent until after the jury renders its verdict, the rendition of a verdict is not the same thing as entry of judgment. Appellant was present in open court and could have objected to the amount of the award at the time it was rendered; had she done so, the trial court might have granted relief that would have made this appeal unnecessary. That is the essence of and the reason for our longstanding rule requiring a timely and accurate objection below in order to preserve an issue for appellate review. *See, e.g., Holcombe v. Marts*, 352 Ark. 201, 99 S.W.3d 401 (2003). This is so without regard to whether appellant was defendant or plaintiff below. Rule 59 applies to "all or any of the parties." Ark. R. Civ. P. 59(a). Rule 59(f)'s provision excusing the need to file a new-trial motion specifically applies to "[a] party" who has otherwise preserved an issue for appeal; it provides no special treatment for plaintiffs.[1]

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[1] , 317 Ark. 125, 876 S.W.2d 558 (1994); , 85 Ark. App. 212, 148 S.W.3d 792 (2004); , 83 Ark. App. 226, 125 S.W.3d 844 (2003) (Ark. R. Civ. P. 50(e), which similarly requires that "a party" that wishes to challenge on appeal the sufficiency of the evidence to support a jury verdict must first raise that issue in the trial court, applies to both plaintiffs and defendants).

Second, the majority's holding is in direct conflict with both case law and specific rules promulgated by the Arkansas Supreme Court. In *Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996), the majority expressly rejected the notion that Rule 59(f) permits any of the Rule 59(a) grounds for new trial (like error in assessing the amount of the recovery) to be urged on appeal without ever having brought those grounds to the attention of the trial court, and held that any error argued on appeal must first have been directed to the trial court in some appropriate manner. Subsequently, Rule 59(f) was rewritten in 2003 to expressly reflect the holding in *Stacks*, and now provides that *"[a] party who has preserved for appeal* an error that could be the basis for granting a new trial is not required to make a motion for new trial as a prerequisite for appellate review of the issue." (Emphasis added.) *See* 2003 Addition to Reporter's Notes to Rule 59. Both the case and the rule are clear and controlling, and they cannot be ignored. Appellant's failure to raise the damages issue below, by motion for a new trial or otherwise, prevents her from raising it here.

Finally, I must say that I do not understand why the majority has confounded the standard of review in this case. The majority's opinion mentions both the substantial-evidence standard of review and the clearly-erroneous standard, and it is not altogether clear which standard the majority employed in reaching its decision. It is immaterial in any event, because neither standard is applicable to the issue that they address. In *Warner v. Liebhaber*, 281 Ark. 118, 120, 661 S.W.2d 399, 399-400 (1983), Justice George Rose Smith wrote for the court that:

> Under [Ark. R. Civ. P.] Rule 59 (a) (5), the inadequacy of the recovery is a ground for a new trial even in the absence of other error. We sustain the trial judge's denial of a new trial when the verdict is supported by substantial evidence and when, as is the usual case, the

> primary issue is that of liability. *Ferrell v. Whittington*, 271 Ark. 750, 610 S.W.2d 572 (1981). But when the primary issue is whether the award is adequate the test of substantial evidence is hardly appropriate, for even a very small award would ordinarily have at least some basis in substantial evidence. Consequently, when the only argument on appeal is the inadequacy of the award, we think our rule should be to sustain the trial judge's denial of a new trial absent a clear and manifest abuse of discretion, a standard of review similar to that we follow when the primary issue is liability and the trial judge has granted a new trial. *See Landis v. Hastings*, 276 Ark. 135, 633 S.W.2d 26 (1982).

See also Kempner v. Schulte, 318 Ark. 433, 885 S.W.2d 892 (1994).

I would not have addressed the issue of the inadequacy of the award of damages in this case. (If I had, however, I would have analyzed the issue in terms of whether the trial judge would have clearly and manifestly abused his discretion in denying a motion for new trial had the issue been presented to him.) But, because I agree that this case should be affirmed, I concur in the result reached by the majority.