

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
NORTHERN DIVISION

NO. 2:11-CV-44-FL

BEACH MART, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 L&L WINGS, INC., )  
 )  
 Defendant. )

MEMORANDUM OPINION

This matter came before the court for trial commencing November 2, 2020. The court memorializes herein reasons for denying Beach Mart Inc.’s (“Beach Mart”) request for a jury instruction and verdict form question on punitive damages.

**COURT’S DISCUSSION**

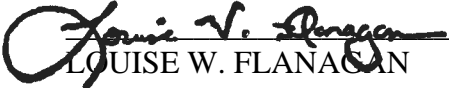
Although Beach Mart requested punitive damages in its operative amended complaint, it did not include its request for punitive damages in its pretrial order, trial brief, or proposed jury instructions. On November 12, 2020, after Beach Mart had finished its case-in-chief, and L&L Wings, Inc. (“L&L Wings”) had called its final witness, Beach Mart requested a jury instruction and attendant verdict form question on punitive damages. The court denied this request, finding that Beach Mart waived punitive damages by failing to include them in its pretrial order. See Fed. R. Civ. P. 16(d) (“[The pretrial] order controls the course of the action unless the court modifies it.”); Rockwell Int’l Corp. v. United States, 549 U.S. 457, 474 (2007) (“[C]laims, issues, defenses, or theories of damages not included in the pretrial order are waived even if they appeared in the complaint, and, conversely, the inclusion of a claim in the pretrial order is deemed to amend any

previous pleadings which did not include that claim.”) (internal citation omitted) (emphasis added); McLean Contracting Co. v. Waterman Steamship Corp., 277 F.3d 477, 480 (4th Cir. 2002) (“Failure to identify a legal issue worthy of trial in the pretrial conference or pretrial order waives the party’s right to have that issue tried.”); Morales v. Turman, 535 F.2d 864, 868 (5th Cir. 1976), rev’d on other grounds, 430 U.S. 322 (1977) (“The pretrial order supersedes the pleadings and becomes the governing pattern of the lawsuit. It may thus be relied upon as an indicator of the nature of the relief sought for purposes of determining whether a three-judge court is required.”). At this late stage of the proceedings, allowing Beach Mart to pursue punitive damages would result in substantial prejudice to L&L Wings, where L&L Wings tried this case under the reasonable belief that Beach Mart was not seeking punitive damages. Accordingly, Beach Mart’s request is denied.

### CONCLUSION

Based on the foregoing, Beach Mart’s request for a jury instruction on punitive damages and a related verdict form question is DENIED.

SO ORDERED, this the 16th day of November, 2020.

  
LOUISE W. FLANAGAN  
United States District Judge