

CARROLL *v.* TEXARKANA GAS & ELECTRIC COMPANY.

Opinion delivered January 29, 1912.

NEW TRIAL—ERROR IN AWARDING NOMINAL DAMAGES.—Where, in an action for damages to person and property, the jury award merely nominal damages when the undisputed evidence shows that plaintiff is entitled to recover substantial damages, a new trial should be awarded.

Appeal from Miller Circuit Court; *Jacob M. Carter*, Judge; reversed.

## STATEMENT BY THE COURT.

This suit was brought by appellant in the Miller Circuit Court against appellee for damages for personal injuries to him and injuries to his horse and buggy, alleged to have been caused while driving along the street by his horse stepping or falling, in the night time, into an excavation in the street in the city of Texarkana, negligently left open and unguarded by appellee, the damage being alleged at \$1,000 to himself, \$100 to his horse and \$5 to his buggy.

Defendant, after denying it, admitted making the excavation; denied that same was carelessly left open, that the

plaintiff drove his horse into the ditch, and that he or his horse or buggy were injured at all; alleged that the excavation was guarded and protected with red lights, and that plaintiff was guilty of contributory negligence in driving or falling into same.

It was virtually undisputed that appellant was injured by his horse falling into a ditch in the street and throwing or jerking him violently against the buggy, was confined to his bed for several days, suffered great pain, and was not able to perform his usual work for a period of three or four months. He incurred \$10 or \$12 liability for doctors' bills and medicine for being treated for the injury; his horse was damaged in about the sum of \$75 and it had cost him \$4.80 to repair the buggy.

The court instructed the jury, and they returned a verdict in favor of appellant, and assessed his damage at \$1, and from the judgment he appealed.

*L. A. Byrne*, for appellant.

*William H. Arnold*, for appellee.

KIRBY, J., (after stating the facts). No complaint is made of any of the instructions given, nor of the introduction or rejection of testimony, but only that the verdict was contrary to the law and the evidence.

The jury found by their verdict for the appellant that the appellee had negligently left open and unguarded an excavation in the street of the city, into which appellant drove in the night and was injured, but it assessed only one dollar damages for the injury, although the testimony was virtually undisputed that the damages suffered by appellant on account of such injuries amounted to a much larger sum.

If appellant was entitled to a verdict in his favor, as the jury have found upon sufficient testimony that he was, they should not have disregarded the undisputed evidence relative to the damages in fixing the amount thereof and found contrary thereto. Having done so, the court should have granted the motion for a new trial. *Dunbar v. Cowger*, 68 Ark. 446.

The court erred in refusing to sustain the motion, and the judgment is reversed and the case remanded for a new trial.