



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDREW P. RASH and :
APRIL RASH, :
 : No. 214, 2016
Plaintiffs Below, Appellants/ :
Cross-Appellees :
 :
v. : Court Below - Superior Court
 : of Delaware
JUSTIN C. MOCZULSKI and :
DIAMOND MATERIALS, LLC, : C. A. No. N13C-06-068
 :
Defendants Below, Appellees/ :
Cross-Appellants :

**APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-
APPELLANTS' OPENING BRIEF ON CROSS-APPEAL**

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¹ 622 A.2d 655 (Del. Super. 1992) aff’d, 632 A.2d 63 (Del. 1993).

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NATURE OF PROCEEDINGS

Appellants Andrew and April Rash, Plaintiffs below, filed a complaint in Superior Court for personal injuries arising from a car accident. Prior to the trial, Appellees Justin C. Moczulski and Diamond Materials, LLC, Defendants below, admitted that Defendant Moczulski was negligent. A two-day jury trial took place beginning September 14, 2015. The jury found that Plaintiff Andrew Rash (“Rash”) suffered injuries caused by the September 22, 2011 car accident (“the Accident”), but awarded no damages. Plaintiffs filed a motion for a new trial pursuant to Superior Court Civil Rule 59, which was denied by the Court through its April 25, 2016 Opinion and Order. The Court, however, granted additur in the amount of \$10,000.00. Appellants appeal the Court’s Order on grounds the Court abused its discretion by not granting a new trial, and for awarding damages wholly insufficient to compensate Appellants.

SUMMARY OF ARGUMENT

I. THE TRIAL COURT SHOULD HAVE DENIED PLAINTIFFS' MOTION FOR A NEW TRIAL IN ITS ENTIRETY.

1. The Trial Court did not follow this Court's holding in *Grand Ventures, Inc. v. Whaley*,² because the Court disturbed the jury's verdict when there was one possible method of reconciling the apparent inconsistency in the jury's verdict.
2. A zero verdict was possible under the facts of this case because any award to which Plaintiff was entitled was offset by Plaintiff's gross failure to mitigate.

RESPONSE TO APPELLANTS' ARGUMENT

- I. Denied that the Trial Court's denial of Plaintiffs' Motion for a New Trial was an abuse of discretion.
- II. Admitted that the Trial Court's award of \$10,000 for additur was unreasonable, but only because the Court should not have disturbed the jury's award.

² *Id.*

STATEMENT OF FACTS

Defendants adopt and incorporate, as if set forth herein in their entirety:

- (1) The Statement of Facts set forth in the Superior Court's April 25, 2016 Opinion and Order (the "Opinion")(Docket Item "D.I." 57 of the Record);³ and,
- (2) Paragraphs 1-3 of Defendants' Response to Plaintiff's Motion for a New Trial. (D.I. 49).⁴ Defendants also submit the following additional facts for consideration.

With respect to the Court's obligation to attempt to reconcile an internally inconsistent verdict, the Court found *possible*, Defendants' proposed explanation of how the jury could have reasonably reached its decision.

The Court appreciates Defendants' position that one possible interpretation of the verdict is that the jury could have determined even if Plaintiff sustained injuries as a result of the accident, any continuing injury was the result of Plaintiff's failure to follow his doctors' medical advice and recommendations, thus reducing his damages to zero."⁵

Immediately after acknowledging the jury may very well have reached its verdict in that manner, the Court dismissed the jury's rationale in deference to Delaware precedent that a zero dollar verdict is against the great weight of the evidence, where medical experts agree the accident caused an injury.⁶ It does not appear the Court factored in the significance of Defendants' substantial proof that

³ Opinion, D.I. 57; (B-1-11).

⁴ Response, D.I. 49; (B-12-53).

⁵ Opinion, D.I. 57; (B-7).

⁶ *Id.*

Rash substantially failed to mitigate his damages, and its impact on the jury and its verdict.⁷

The Court was unable to reconcile Rash's complete failure to mitigate his damages with his claim that he was entitled to a new trial, especially when Defendants' counsel made no pre-trial requests to withhold evidence from the jury, nor objected at trial to any evidence offered by Rash. The Court observed that nothing "prevented Plaintiff from stating his case as forcefully and completely as he could."⁸

With respect to the Court's attempt at valuing Rash's injury for purposes of additur, the Court acknowledged its obligation to grant Defendants every reasonable factual inference and award the lowest amount supported by the evidence.⁹ In its examination of the conflicting evidence of Rash's alleged injuries, the Court found the jury could have reasonably inferred that Rash failed to prove his fractured tooth and headaches were caused by the accident, as both were pre-existing. The Court also concluded the jury was free to reject Rash's claim he suffered from TMJ, leaving only his claim of tinnitus, which the Court noted was "a stretch."¹⁰

⁷ In their Opening Brief, Plaintiffs make no attempt to discuss the mitigation issue or the fact that none of the cases relied upon by the Court and Plaintiffs do so either.

⁸ *Id.*

⁹ *Id.* (B- 9-10).

¹⁰ *Id.* (B-10). The Court put it this way. "Thus, the only remaining injury for which Plaintiff is entitled to compensation – and it is a stretch – is the tinnitus..."

ARGUMENT

I. THE TRIAL COURT SHOULD HAVE DENIED PLAINTIFFS' MOTION FOR A NEW TRIAL IN ITS ENTIRETY.

A. Question Presented

Whether the Trial Court should have denied Plaintiffs' Motion for a New Trial in its entirety.

B. Scope of Review

Where a Trial Judge denies a party's motion for a new trial, the Supreme Court will review the Trial Court's decision under an abuse of discretion standard.¹¹

C. Merits of Argument

In Delaware, a jury's verdict is presumed to be correct.¹² The law mandates that,

[b]arring exceptional circumstances, the court should not set aside a jury's verdict unless it is against the great weight of the evidence.¹³ A jury verdict may also be set aside when it is clear that the jury disregarded the evidence or the applicable rules of law. Delaware Courts have set aside jury verdicts which were logically and/or legally inconsistent or irreconcilable with the facts and law.¹⁴

¹¹ *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979); *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968).

¹² *Cooke v. Murphy*, 2014 WL 3764177, at *2 (Del. July 30, 2014).

¹³ The United States Court of Appeals for the Third Circuit emphasized the danger of the trial judge usurping "the prime function of the jury as the trier of the facts" and suggested that it is error to grant a new trial **only on the basis of the weight of the evidence** where the subject matter of the litigation "is simple and easily comprehended by any intelligent layman." *Lind v. Schenley Industries, Inc.*, *supra*, at 278 F.2d 91. (Emphasis added).

¹⁴ *Cooke v. Murphy, Id.*

Here, as the Trial Court noted in the Standard of Review section of its Opinion,

A verdict should only be set aside when the verdict is so heavily against the weight of the evidence that a reasonable juror could not have reached the result, or for some reason, “justice would miscarry if the verdict were allowed to stand.” Accordingly, whenever “there is any margin for a reasonable difference of opinion in the matter, the Court should yield to the verdict of the jury.” “[A]s long as there is a sufficient evidentiary basis for the amount of the award, the jury’s verdict should not be disturbed by a grant of additur or new trial as to damages.”¹⁵

Most importantly, “[a] verdict will *not* be stricken as internally inconsistent so long as there is *any* possible interpretation or explanation which avoids the inconsistency[.]”¹⁶ In *Grand Ventures, Inc. v. Whaley*,¹⁷ The Supreme Court affirmed the trial Court’s holding that,

[the] Court must try to reconcile any apparent inconsistencies in a jury's verdict. The jury's verdict will stand as long as the Court finds one possible method of construing the jury's answers as consistent with one another and with the general verdict.¹⁸

It is correct that a zero dollar verdict is necessarily against the great weight of the evidence where medical experts agree that the accident proximately caused at least some injury. However, for the Court not to accept a reasonable explanation for a

¹⁵ Opinion, D.I. 57; (B-6).

¹⁶ *Citisteel USA, Inc. v. Connell Ltd. P'ship*, 1998 WL 309801 at *4 (Del. 1998)(emphasis in the original).

¹⁷ 622 A.2d 655, 664 (Del. Super. 1992) *aff'd*, 632 A.2d 63 (Del. 1993)(citing *Atlantic & Gulf Stevedores v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962)).

¹⁸ *Id.*

zero verdict where experts agree there was an injury, is a failure of the Court to attempt to reconcile the inconsistency.

- 1. The Trial Court did not follow this Court's holding in *Grand Ventures, Inc. v. Whaley*,¹⁹ because the Court disturbed the jury's verdict when there was one possible method of reconciling the apparent inconsistency in the jury's verdict.**

At first blush, the Jury's verdict may appear to be internally inconsistent, insofar as the Jury found Rash was injured but awarded no money to compensate him. However, a closer examination of the evidence, and jury instructions, provides a means for logically and coherently reconciling any apparent inconsistency.

The Failure to Mitigate instruction informed the Jury that any damages caused by Rash's failure to mitigate were not defendants' responsibility, and were not to be included in the Jury's award.²⁰ One possible method of construing the jury's verdict so as to remove the inconsistency, is to assume the jury determined the accident proximately caused Rash's tinnitus (which is supported by the record), agreed upon an appropriate amount of compensation (based upon the Pattern Jury

¹⁹ *Grand Ventures, Id.*

²⁰ The Delaware Pattern Jury Instruction for Mitigation of Damages provides, [a]n injured party must exercise reasonable care to reduce the damages from the resulting injuries. If you find that Mr. Rash failed to undergo reasonable medical treatment to reduce his damages, or that he failed to follow reasonable medical advice, then any damages resulting from that failure are not the responsibility of [Defendants] and should not be included in your award. §22.4 (D.I. 40); *See also*, §22.1 on Damages.

instruction on Damages), and *then* reduced the award to zero due to Rash's gross failure to mitigate (consistent with the Mitigation instruction). Neither the Damages nor Mitigation instructions state the jury is prohibited from reducing an award all the way to zero. Unless this Court finds the instructions misstate Delaware law, this Court should find the jury correctly applied the facts to the given instructions.

Clearly, such a result is supported by the evidence and consistent with the law as the jury was instructed, and because this result is clearly possible, the jury's verdict should be given the respect it deserves, and found to be correct by this Court.

2. A zero verdict was possible under the facts of this case because any award to which Plaintiff was entitled was offset by Plaintiff's gross failure to mitigate.

It is worth noting that Rash testified in front of the jury and was in a position to be observed, during the entire trial. In addition to weighing and considering the evidence, the jury was in the unique position to observe Rash's demeanor, tone of voice, and body language, in the context of his answers to questions, and then using all of their senses and intelligence, reach a unanimous decision that, in the jury's opinion, was both right and fair.²¹ One need only imagine the jurors' annoyance with Rash for having forced the jury to take two days out of their lives,

²¹ The jury deliberated from 1:29 P.M. until 3:22 P.M. - nearly two hours. (A-283-297).

to listen to him complain about an injury for which there was an undisputed cure, and to which Rash did not avail himself because it was inconvenient. When one considers that the jury was empowered with the right to reduce Rash's award for ignoring the advice of his doctors, the jury's verdict stands to reason. In the jury's collective and agreed upon decision, Rash got what he deserved. *That* is our jury system at work.

It is improper under the unique facts of *this* case to substitute one's judgment for that of the jury's. The "zero dollar" damages cases cited and relied upon by Plaintiffs and the Trial Court do not address a situation, where a plaintiff's failure to mitigate was central to the defense's case, as it was here. Also, in the cases cited, no court was required to consider the effect on a jury's verdict, of a plaintiff's substantial failure to mitigate damages.

Delaware Courts have repeatedly observed that jury trials involve risk,²² and that "those of us involved in the judicial system cannot make litigation risk free."²³ As one Court noted, jury trials require jurors to "interrupt their lives", and require effort and/or expense by judicial and non-judicial personnel and counsel.²⁴ "When the parties activate the jury trial system, they activate the risk inherent in

²² *Galindez v. Narragansett Housing Associates*, 2006 WL 3457628 (Del. Super. 2006); *Dunkle v. Prettyman*, 2002 WL 833375 (Del. Super. 2002); *Esry v. St. Francis Hospital, Inc.*, 2002 WL 558878 (Del. Super. 2002); *Savage v. Cooke*, 1995 WL 945563 (Del. Super. 1995); *Ellis v. Shipe*, 1995 WL 158691 (Del. Super. 1995).

²³ *Hartnett v. Romsper*, 1995 WL 945818 at *1 (Del. Super. 1995).

²⁴ *Dunkle*, 2002 WL 833375 at *2.

the system.”²⁵ “That is the nature of the beast.”²⁶ Plaintiffs chose to take the risk of going to trial. As such, they must accept the outcome in this case as it is mandated by law.

²⁵ *Id.* at *3.

²⁶ *Galindez v. Narragansett Hous. Associates, L.P.*, 2006 WL 3457628, at *2 (Del. Super. 2006).

IV. CONCLUSION

The Trial Court should have denied Plaintiffs' Motion for a New Trial in its entirety. In Delaware a jury's verdict is presumed to be correct. Where a jury's verdict appears to be internally inconsistent, the Trial Court must try to reconcile the inconsistency and should not disturb the verdict, if there is at least one possible method of construing the jury's verdict such that any inconsistencies are removed.

The evidence of Rash's gross failure to mitigate and excuse of "inconvenience", when applied to the Damages and Failure to Mitigate instructions given to the jury, support a zero verdict in this case, particularly where the instructions do not limit to what extent the award can be reduced.

The Trial Court erred by not following the *Grand Ventures* decision, issued by this Court, because the Trial Court disturbed the jury's verdict, when there was at least one possible method of reconciling the apparent inconsistency.

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