



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDREW P. RASH and :
APRIL RASH, :
 : No.: 214,2016
Plaintiffs Below, Appellants, :
 :
V. : Court Below Superior Court
 : of Delaware New Castle County
JUSTIN C. MOCZULSKI and :
DIAMOND MATERIALS, LLC, : C. A. No. N13C-06-068 VLM
 :
Defendants Below, Appellees. :

**PLAINTIFFS BELOW, APPELLANTS' REPLY BRIEF ON APPEAL AND
CROSS-APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL**

/s/ LAWRENCE SPILLER KIMMEL
LAWRENCE SPILLER KIMMEL, ESQUIRE
Bar ID: 4725
Kimmel, Carter, Roman, Peltz & O'Neill, P.A.
Plaza 273
56 West Main Street, 4th Floor
Christiana, Delaware 19702
(302) 565-6100
Attorney for Plaintiffs Below, Appellants

DATE: July 26, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF CITATIONS..... ii

NATURE OF PROCEEDINGS..... 1

SUMMARY OF ARGUMENT 2

STATEMENT OF FACTS 3

ARGUMENT 4

 I. THE INCONSISTENT JURY VERDICT CANNOT BE RECONCILED
 AND THUS A NEW TRIAL IS WARRANTED PURSUANT TO
 DELAWARE SUPERIOR COURT RULE OF CIVIL PROCEDURE 49..... 4

 A. Question Presented..... 4

 B. Scope of Review..... 4

 C. Merits of Argument..... 4

 1. Plaintiffs did not fail to mitigate their damages5

 2. Trial Court need not follow this Court’s holding in *Grand Venture*
 as there was no way to reconcile the inconsistent verdicts and
 therefore, should have awarded a new trial.....9

CONCLUSION 13

TABLE OF CITATIONS

Cases

<i>Grand Ventures, Inc. v. Whaley</i> , 622 A.2d 655 (Del. Super. Ct. 1992) aff'd, 632 A.2d 63 (Del. 1993)	4, 10, 11
<i>O'Riley v. Rogers</i> , 2011 WL 3908404 (Del. Super. Ct. Aug. 30, 2011).....	5
<i>Dennison v. Murray</i> , 1995 WL 945547 (Del. Super. Ct. June 23, 1995).....	9

Rules

Del. Supr. Civ. R. 49	4
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Exhibits

<i>O'Riley v. Rogers</i> , 2011 WL 3908404 (Del. Super. Ct. Aug. 30, 2011).....	A
<i>Dennison v. Murray</i> , 1995 WL 945547 (Del. Super. Ct. June 23, 1995).....	B

NATURE OF PROCEEDINGS

Plaintiffs hereby incorporate the Nature and State of Proceedings contained in their Opening Brief.

SUMMARY OF ARGUMENT

I. THE INCONSISTENT JURY VERDICT CANNOT BE RECONCILED
AND THUS A NEW TRIAL IS WARRANTED

1. Plaintiffs did not fail to mitigate their damages
2. Trial Court need not follow this Court's holding in *Grand Venture* as there was no way to reconcile the inconsistent verdicts and therefore, should have awarded a new trial

RESPONSE TO APPELLEE'S ARGUMENT ON CROSS APPEAL

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

STATEMENT OF FACTS

Plaintiffs hereby incorporate the Statement of Facts contained in their Opening Brief.

ARGUMENT

I. **THE INCONSISTENT JURY VERDICT CANNOT BE RECONCILED AND THUS A NEW TRIAL IS WARRANTED**

A. Question Presented

See Plaintiffs' Opening Brief.

B. Scope of Review

See Plaintiffs' Opening Brief.

C. Merits of Argument

Delaware Superior Court Civil Rule 49(b) requires that when the jury's answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall [...] order a new trial. *Del. Supr. Civ. R. 49*. The Court must attempt to reconcile the inconsistencies in a jury's verdict, and, when it can be so reconciled, the verdict will stand. *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655 (Del. Super. Ct. 1992) aff'd, 632 A.2d 63 (Del. 1993). In the present matter, defendants argue that the inconsistent verdicts can be reconciled based on the possibility that the jury determined that the accident proximately caused the tinnitus, determined the appropriate compensation, and then reduced the damages based on an alleged failure to mitigate. Ans. Br. at 7-8. Thus, defendants' argument on appeal is based almost entirely on Male Plaintiff's alleged failure to mitigate damages. However, not only does the record fall short of supporting the argument that plaintiffs failed

to mitigate damages, there is nothing to suggest that the jury relied on the alleged failure to mitigate in awarding zero dollars in damages. Therefore, the inconsistent verdict, finding proximate cause between Male Plaintiff's injuries and defendants' negligence, yet awarding zero dollars in damages, warrants a new trial.

1. Male Plaintiff did not fail to mitigate their damage

While defendants fail to explicitly state in which ways Male Plaintiff's failed to mitigate his damages, it can be assumed that the argument is premised on the fact that Male Plaintiff did not enroll in the Neuromonics program, since this is the only recommended treatment that Male Plaintiff did not exhaust.

Plaintiff must exercise reasonable care to reduce damages resulting from an injury including reasonable medical treatment and tests. *O'Riley v. Rogers*, 2011 WL 3908404 (Del. Super. Ct. Aug. 30, 2011).¹ The burden is on the defendant to show both the unreasonableness of the victim's refusal of treatment and the consequent aggravation of injuries. *Id.* In the present case, the defendant failed to satisfy its burden that Male Plaintiff failed to seek reasonable medical treatment based on the following.

In defendants' Answering Brief, defendants allege that Male Plaintiff did not seek the prescribed treatment because the treatment "was inconvenient." Ans. Br. at 9. This statement distorts Male Plaintiff's rationale for not enrolling in the

¹ Unreported decision *O'Riley v. Rogers*, 2011 WL 3908404 (Del. Super. Ct. Aug. 30, 2011) is attached hereto as Exhibit A.

Neuromonics program. Male Plaintiff acknowledged in his testimony that the commitment required for enrollment in the program would be time consuming. (A-85). He further acknowledged that between working full time and caring for his wife who was battling cancer, he was unable to afford the commitment the program required. (A-85-86). However, defendant fails to mention that treating physicians advised Male Plaintiff that the inability to fully invest the time the program required would likely result in the treatment being unsuccessful. (A-94). Accordingly, Male Plaintiff was advised to wait until he could invest the necessary time, and to wait until the instant lawsuit was over, as the stress of litigation could also negatively affect the success of the program, before enrolling. (A-94). Male Plaintiff deferred to his doctor's advice.

While Male Plaintiff did not enroll in the Neuromonics program, he engaged in various other treatment options recommended by several treating doctors in an effort to return to his pre-injury status. Male Plaintiff testified that he took several medications prescribed by Dr. Bianchi and Dr. Townsend to treat a variety of different ailments resulting for the accident. (A-86-87). He also enrolled in several sessions with Dr. Dettwyler, a psychologist, to help combat the emotional strains associated with the accident and resulting tinnitus. (A-89). Additionally, he underwent an extensive procedure with Dr. Langan involving ranges of tests aimed at detecting and treating the neuropathological aspect of the tinnitus. (A-27

at16). Male Plaintiff also went to Jefferson where a follow up study was performed and he was tried for, and fitted with, musician grade ear plugs to help combat the severity of the tinnitus in certain settings. (A-94).

In addition to all of this, the tinnitus persisted, so Male Plaintiff began receiving Botox injections; an uncomfortable procedure involving 29 needle injections which ultimately provided some relief from the otherwise relentless tinnitus. (A-92). Thus, to say that Male Plaintiff failed to mitigate his damages merely because he declined to exercise one of many treatment options recommended to him, would be a disservice to the extensive treatment he did receive.

Defendant describes the proposed treatment as an “undisputed cure.” Ans. Br. at 9. There is no support for this in the record. None of the four testifying medical experts testified that the Neuromonics program would have unequivocally “cured” Male Plaintiff’s tinnitus. In fact, the record suggests that there is no proven “cure” for the type of tinnitus that male plaintiff is suffering from. Male Plaintiff testified that he was told by specialists at Penn Concussion Clinic, that tests were being performed for tinnitus but, at this point in time, there is nothing conclusive as to how to help. (A-92). Moreover, none of the proffered experts testified that Male Plaintiff’s failure to enroll in the program increased or had any other negative impact on the tinnitus.

Failure to obtain a single recommended treatment, after exercising so many alternative avenues of treatment, can hardly be considered unreasonable. This is even more so the case when the treatment has no proven success of curing the ailment or injury.

Assuming *arguendo*, the jury considered the failure to enroll in the Neuromonics program as a mitigating factor, it should not have been a complete bar to recovery. While there was no *per se* instruction prohibiting the jury from reducing the damages to zero dollars, reducing the award to zero dollars is unreasonable based on the instruction given. The mitigation of damages instruction advised the jury to reduce plaintiffs' damages if they found that Male Plaintiff failed to undergo reasonable medical treatment or failed to follow reasonable medical advice as such expenses would not be the responsibility of the defendants. Taking this instruction into consideration, the Neuromonics program was not initially recommended. In fact, the program was not recommended until months after the accident. In the time between the accident and the recommendation of the Neuromonics program, the record is void of any failure to treat or otherwise mitigate damages. Thus, the jury's decision to reduce the verdict to zero dollars, is unreasonable as it fails to compensate Male Plaintiff for the months of pain and suffering he endured prior to the only possible failure to mitigate, namely, enrollment in the program. An award of zero dollars therefore

reduced plaintiffs' damages beyond what was acceptable under the mitigation of damages instruction. At most, the jury could have seen the failure to enroll as an offsetting factor, but the record does not support a finding that it was sufficient enough to bar all recovery. (See *Dennison v. Murray*, in which the Honorable Judge Quillen found that a two year gap in treatment could be considered only a "very modest offsetting factor." 1995 WL 945547 (Del. Super. Ct. June 23, 1995)).²

Not only did the jury's verdict fail to consider the pain and suffering in the time period between the accident and when the Neuromonics program was brought into the equation, but so did the additur. This factor alone makes the jury's decision *and* the additur amount unreasonable, even if we take defendants' position that Plaintiffs failed to mitigate their damages.

Therefore, the record falls short of establishing that plaintiffs did not mitigate their damages, and defendants fail to offer any other explanation upon which this Court can reconcile the inconsistencies in the jury's verdict. Absent reconciliation between the jury's inconsistent verdicts, the verdict cannot stand.

2. Trial Court need not follow this Court's holding in *Grand Venture* as there was way to reconcile the inconsistent verdicts and therefore, should have awarded a new trial

Defendants cite to *Grand Ventures* for the proposition that the jury's verdict

² Unreported decision *Dennison v. Murray*, 1995 WL 945547 (Del. Super. Ct. June 23, 1995) is attached hereto as Exhibit B.

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. However, *Grand Ventures* is distinguishable from the instant matter both factually and in its application. In *Grand Ventures*, the Court considered a motion for new trial based on third party defendant's argument that the jury arrived at inconsistent verdicts by finding that both defendant and the third party defendant were negligent *and* that a principal/agency relationship existed between them. *Grand Ventures*, at *657.

The Court reasoned that the inconsistency was a result of semantics in the instructions and/or interrogatories. The confusion in semantics lead the jury to apportion fault as to each party before concluding that there existed a principal/agent relationship. *Id.* at 665. The Court held that the appropriation of fault was merely an extraneous activity on the part of the jury that the court may properly disregard, thereby reconciling the otherwise consistent verdicts. *Id.*

As an initial matter, *Grand Ventures* is factually inapposite to the present case. *Grand Venutures* deals with a plaintiff's claim for damages against the insurance agency and agent for breach of contract, negligence and fraud. In the instant matter, the issue before the court was proximate cause and damages arising from a motor vehicle accident. Where *Grand Ventures* asked the jury to consider violations of the Consumer Fraud Act and Deceptive Trade Practices Act, the jury in the instant matter was asked to consider medical testimony and determine

damages. Thus, the cases are both factually distinguishable.

Moreover, the inconsistency in the instant matter cannot be so easily reconciled as the Court in *Grand Ventures* was able to do. First, as Plaintiffs argued above, the possibility that defendants offer for the inconsistency, namely, Male Plaintiff's alleged failure to mitigate damages, is not supported by the record. Second, unlike the verdict in *Grand Ventures*, the jury in the present matter were not confused by semantics of the interrogatories nor did they delve further into the interrogatories than was required of them (i.e.: by coming up with a specific damages award for each alleged injury). In the present case, the jury understood the questions for which they were charged, yet came to conflicting conclusions for which there is no apparent explanation.

Plaintiffs are fully aware of, and knowingly assumed, the inherent risks associated with taking a case to trial. What Plaintiffs seek in the instant appeal is not a redo premised on the failure to appreciate the risks associated with trial; rather, it is an award of damages that is consistent not only with the evidence before the jury, but also with the jury's ultimate finding that the injuries were a proximate cause of the defendants' negligence.

Defendants contend that the jury arrived at an award of zero damages because of their "annoyance" with having to sit through a two day trial which included, in defendant's words, "listen[ing] to [plaintiff] complain about an injury

for which there was an undisputed cure, and to which Rash did not avail himself.” This contention should not be given any weight as it has no foundation in law or fact.

As plaintiffs contested above, Male Plaintiff did not fail to mitigate damages nor is there any proof that the treatment could cure his tinnitus. Moreover, if annoyance in performing their civil duty, as defendant contends, is the basis of the jury’s finding awarding zero dollar verdict, then Plaintiffs were not given a fair trial.

Defendants urge this Court to uphold the jury’s verdict because, in the jury’s opinion, the award of a zero dollar verdict was both right and fair. Ans. Br. at 8. While Plaintiffs appreciate the time of each juror and the deference given to a jury’s decision, just because a jury arrived at a conclusion they believe is right and fair, does not mean that the verdict is right and fair in the eyes of the law. As Plaintiffs raised in their Opening Brief on appeal, the practice of overturning a jury’s inconsistent verdicts, while rare, is not novel, and in fact, is appropriate as a matter of law. A verdict awarding zero dollars in damages following a finding of injuries proximately caused by the defendants’ negligence is one of the rare instances where the jury’s verdict, despite great deference, should be overturned.

CONCLUSION

The Court erred as a matter of law in denying Plaintiffs' motion for a new trial when the jury returned a verdict of zero dollars despite finding that Male Plaintiff sustained injuries as a proximate cause of Defendants' negligence. The jury's verdict was inconsistent and cannot be reconciled and therefore, a new trial is warranted. Furthermore, the Court's decision to award additur in the amount of \$10,000 was inadequate and unreasonable as it (1) failed to account for pain and suffering despite the uncontradicted evidence of injuries and (2) granted an unreasonable award for future medical expenses. Therefore, Plaintiffs respectfully request this Honorable Court reverse the decision of the court below granting additur in the amount of \$10,000 and remand the matter for a new trial as to damages only.