

STATE OF MICHIGAN
COURT OF APPEALS

LISA MARGARET NAULT and PAUL J.
NAULT,

UNPUBLISHED
November 2, 2004

Plaintiffs-Appellants,

v

DARREN J. WEBB and ACHATZ PLUMBING
AND HEATING, INC.,

No. 251225
Marquette Circuit Court
LC No. 01-038901-NI

Defendants-Appellees.

Before: Murphy, P.J., and Sawyer and Markey, JJ.

MURPHY, J. (*dissenting*).

I respectfully dissent. I would find that the jury's verdict was grossly inadequate with respect to damages and must have been influenced by passion and prejudice, MCR 2.611(A)(1)(c) and (d), and was against the great weight of the evidence and contrary to law, MCR 2.611(A)(1)(e), considering that the failure to award any noneconomic damages absolutely conflicts and is completely contradictory with the jury's own factual finding that Lisa Nault suffered a serious impairment of body function, MCL 500.3135. The finding of a serious impairment of body function necessarily meant that the jury reached the conclusion that Mrs. Nault suffered "an objectively manifested impairment of an important body function that affect[ed] [Nault's] general ability to lead . . . her normal life." MCL 500.3135(7). The necessary factual corollary of the jury's finding that a serious impairment of body function was established is that Lisa Nault incurred noneconomic damages to some extent, even if minimal, and a finding of zero damages had to have been based on something other than the evidence presented and was contrary to law.

While the determination of damages for pain and suffering, or other noneconomic damages, are not measured by an exact rule of law and the determination must be left to the good sense and sound judgment of the jury, the jury's damage award for pain and suffering can be disturbed as when it reflects passion or prejudice, or otherwise falls within the confines of MCR 2.611(A). *Kelly v Builders Square, Inc.*, 465 Mich 29, 35, 38-40; 632 NW2d 912 (2001), quoting *Brown v Arnold*, 303 Mich 616, 627-629; 6 NW2d 914 (1942). The *Kelly* Court left open the

possibility that MCR 2.611 can be utilized to set aside a verdict on the basis of inconsistency as long as the matter is dealt with in the context of the court rule. *Kelly, supra* at 38-41.¹ There is case law support for setting aside a verdict on the basis of evident inconsistency.

In *Granger v Fruehauf Corp*, 429 Mich 1, 9; 412 NW2d 199 (1987), the Michigan Supreme Court definitively stated that, although it is fundamental that every attempt must be made to harmonize a jury's verdicts, where verdicts are so logically and legally inconsistent that they cannot be reconciled, they will be set aside. See also *Beasley v Washington*, 169 Mich App 650, 657; 427 NW2d 177 (1988).² In *Harrington v Velat*, 395 Mich 359, 360; 235 NW2d 357 (1975), our Supreme Court noted:

[T]he general rule is that where a verdict in a civil case is inconsistent and contradictory, it will be set aside and a new trial granted.

“Ordinarily, a verdict may and should be set aside and a new trial granted where it is self-contradictory, inconsistent, or incongruous, and such relief should, as a rule, be granted where more than one verdict [is] returned in the same action and they are inconsistent and irreconcilable.” 66 CJS, New Trial, § 66, pp 197-198.

While the *Kelly* Court rejected the principle that a jury behaves inconsistently when it awards medical expenses but nothing for pain and suffering, *Kelly, supra* at 39, it does not follow that a finding of serious impairment of body function, a significant injury threshold that must relevantly impact one's life, see *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004),³ can likewise be viewed as being consistent with a finding of zero damages.

If the impairment was serious as defined in the statute, some noneconomic damages, such as pain and suffering, must have flowed from the injury. This is especially true taking into account medical evidence showing that Lisa Nault suffered a wrist fracture, shoulder contusion, and knee laceration, which was sutured closed. At the emergency room, Nault's wrist was placed in a temporary splint and she was given some pain medication. The following day, her wrist was placed in a plaster splint and she was prescribed more pain medications; the doctor observed swelling and tenderness of the wrist. Two weeks later, Nault's wrist was placed in a fiberglass cast and pain medications were continued. She wore a cast for a little over three

¹ The Supreme Court declined to address whether an inconsistent or incongruent verdict is “contrary to law” as that phrase is used in MCR 2.611(A)(1)(e). *Kelly, supra* at 41.

² In *Beasley*, the jury found no serious impairment of body function, yet proceeded to award damages. The *Beasley* panel reversed and ordered a new trial on the basis of verdict inconsistency. *Beasley, supra* at 658. I highly doubt that our Supreme Court would reject the *Beasley* ruling on the basis that MCR 2.611(A) does not specifically mention the granting of new trials predicated on inconsistency within the jury's findings.

³ Minor interruptions in a person's life are insufficient, the impairment must affect the course or trajectory of one's normal life. *Kreiner, supra* at 130-131.

months, with the cast being changed from time to time. A few months after the cast was removed, Nault complained about more wrist pain, and eventually arthroscopic surgery was performed. About two years after this surgery, Nault complained to medical personnel of occasional wrist pain. She also complained of knee pain resulting from the accident, attended physical therapy for the knee, and the knee was placed in a brace for a period of time. Nault stated that, at the time of trial, she continued to have problems with wrist and knee pain. She testified that, after the accident, she could not sleep through the night without medication, could not do household chores, slept on a couch for a month, and has pain in her wrist and knee such that she can no longer bike, hike, or spend long periods of time on her feet. Nault also testified that the injuries damaged her sexual relationship with her husband.

This evidence had to have been believed and accepted as true by the jury to some degree in order to support its finding of a serious impairment of body function. By the same token, this evidence would support a finding of some noneconomic damages. I believe the jury's findings are inconsistent and irreconcilable to such a great degree that it must be held that the verdict was grossly inadequate with respect to damages and must have been influenced by passion and prejudice, MCR 2.611(A)(1)(c) and (d), and was against the great weight of the evidence and contrary to law, MCR 2.611(A)(1)(e). I would find that the trial court abused its discretion in denying plaintiffs' motion for new trial. *Kelly, supra* at 34.

I would reverse.

/s/ William B. Murphy