STATE OF MICHIGAN

COURT OF APPEALS

BRADLEY ROSS, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v DAVID CINQUE PLUNKETT and PRO-MED DELIVERY, INC., Defendants-Appellants.	No. 293195 Oakland Circuit Court LC No. 08-090202-NI

BRADLEY ROSS, Plaintiff-Appellant/Cross-Appellee,	
v DAVID CINQUE PLUNKETT and PRO-MED DELIVERY, INC., Defendants-Appellees/Cross-Appellants.	No. 295225 Oakland Circuit Court LC No. 2008-090202-NI

Before: CAVANAGH, P.J., and FITZGERALD and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 293195, defendants appeal as of right from a judgment for plaintiff following a jury trial. In Docket No. 295225, plaintiff appeals by delayed leave granted from the trial court's order partially granting defendants' motion for a new trial. Defendants have filed a cross appeal in Docket No. 295225, challenging the trial court's refusal to grant additional relief. We affirm the judgment for plaintiff and vacate the order partially granting defendants a new trial because the trial court lacked jurisdiction to enter that order.

I. FACTS AND PROCEEDINGS

This case arises from an automobile accident that occurred on I-696 on the evening of February 14, 2006. Plaintiff was driving a Dodge minivan that collided with the rear of a truck

driven by defendant David Plunkett and owned by defendant Pro-Med Delivery, Inc. Plaintiff's theory at trial was that defendants' truck swerved into plaintiff's lane of traffic and stopped suddenly in front of plaintiff, and that there was nothing plaintiff could do to avoid striking defendants' vehicle. By contrast, Plunkett testified that he had sufficient room to move into plaintiff's lane and that he was able to safely stop his vehicle when the vehicle in front of him suddenly slowed. A defense witness, Amy Sheena, testified that another "phantom" vehicle, a Cadillac, suddenly cut in front of defendants' truck, forcing Plunkett to suddenly stop. Defendants' theory was that plaintiff violated MCL 257.627(1) by operating his vehicle at a speed greater than that which would permit him to stop his vehicle within the assured, clear distance ahead.

Plaintiff's minivan had been substantially modified by Creative Controls, Inc., to accommodate his physical limitations from muscular dystrophy. Creative Controls removed the airbag when it made the modifications. Consequently, plaintiff was not protected by an airbag during the collision, which resulted in serious injuries.

The jury found that plaintiff and Plunkett were both 50 percent at fault for the accident, and that each driver's negligence was a proximate cause of plaintiff's injuries. The jury found that the driver of the Cadillac was not negligent. The jury awarded plaintiff damages for future lost wages for each year from 2010 to 2026, starting with a loss of $38,000 for 2010, increasing each year until reaching a peak figure of $46,321 for 2020, and gradually declining thereafter, with a figure of $17,469 for 2026. The jury also awarded plaintiff $70,000 for pain and suffering for each year from 2010 to 2026. After adjusting the future damages award to present value, the trial court entered a judgment for plaintiff in the amount of $1,109,108.40, plus prejudgment interest of $47,251.31, for a total judgment of $1,156,269.70. Defendants' motion for a new trial or judgment notwithstanding the verdict was denied on July 1, 2009.

On July 21, 2009, defendants filed their claim of appeal from the trial court's judgment in Docket No. 293195. Defendants thereafter discovered that plaintiff had brought a separate action against Creative Controls, Inc., arising from the same accident, which was filed before plaintiff filed his lawsuit against defendants. Defendants then filed a motion for a new trial under MCR 2.611 or relief from judgment under MCR 2.612, arguing that they were prejudiced by plaintiff's failure to disclose the prior action. Despite plaintiff's argument that the trial court lacked jurisdiction over defendant's motion, the trial court granted defendants' motion for a new trial in part, limited to a determination of "how much, if any, of [p]laintiff's damages were caused by non-party Creative Controls through its installation of handicapped driving equipment." This Court granted plaintiff's delayed application for leave to appeal the latter order in Docket No. 295225, and consolidated the two appeals.

II. DEFENDANTS' FIRST MOTION FOR A NEW TRIAL

We first address defendants' arguments that the trial court erred in denying their first motion for a new trial under MCR 2.611. Defendant sought a new trial on the grounds that the jury's verdict was inherently inconsistent and contrary to the great weight of the evidence, and further, that the jury's awards of future economic damages were improperly influenced by sympathy for plaintiff and not supported by the evidence.

This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich. 598, 603; 719 NW2d 40 (2006).

A. CONSISTENCY OF THE JURY'S VERDICT

Defendants argue that the jury could not have consistently found that both Plunkett and plaintiff were at fault for the accident. Defendants maintain that the jury was required to find either that plaintiff was solely at fault for violating the assured clear distance statute, MCL 257.627(1), or that any violation of the statute was excused because Plunkett's operation of his vehicle was unexpected and created a sudden emergency, thereby relieving plaintiff of any fault.

However, inconsistency of a verdict is not a ground for granting a new trial under MCR 2.611(A). In *Kelly v Builders Square, Inc*, 465 Mich 29; 632 NW2d 912 (2001), our Supreme Court held that a plaintiff was not entitled to a new trial because of an allegedly inconsistent verdict where the jury found that the defendant was negligent but awarded no damages for pain and suffering. The Court held that the trial court abused its discretion in granting a new trial on the grounds that the verdict was "inconsistent" and "incongruous," which are not grounds for a new trial under MCR 2.611(A)(1). *Id.* at 39. The Court further commented, however, that

> even if a jury verdict may be set aside on the basis of inconsistency under our current rule, the trial court did not apply the standard in existing case law for reviewing inconsistent verdicts. If a verdict *appears* inconsistent, a court must make every effort to reconcile the seemingly inconsistent verdicts. . . . A new trial may not be granted if an interpretation of the evidence logically explains the jury's findings. [*Id.* at 41 (citations and internal quotation marks omitted).]

In *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006), this Court implicitly recognized that inconsistency in a jury's verdict may be a basis for granting a new trial, but cautioned that "[o]nly where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside." *Id.*, quoting *Lagalo v Allied Corp*, 457 Mich 278, 282; 577 NW2d 462 (1998). The Court in *Allard* emphasized that the jury's verdict must be upheld if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury. *Allard*, 271 Mich App at 406-407. See also *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 227; 755 NW2d 686 (2008).

MCL 257.627(1) provides:

> A person operating a vehicle on a highway shall operate that vehicle at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing. A person shall not operate a vehicle upon a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead.

The trial court instructed the jury as follows on the effect of MCL 257.627(1) and the issue of proximate cause:

> Now, if you find that the Plaintiff Bradley Ross violated [MCL 257.627(1)] before, at the time or at the time of the occurrence, you may infer that he was negligent. You must then decide whether such negligence was a proximate cause of the occurrence. However, if you do find that the Plaintiff used ordinary care and was still unable to avoid because of certain circumstances you find to be, then this violation is excused. And if you find that the Plaintiff violated the statute, and that the violation was not excused, then you must decide whether such violation was a proximate cause of the occurrence. And when I use the term or words proximate cause, I mean first that the negligent conduct must have been a cause of the Plaintiff's injury; and second, that the Plaintiff's injury must have been a natural and probable result of the negligent conduct.
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> Now ladies and gentlemen of the jury, there may be more than one proximate cause. To be a proximate cause, the claimed negligence need not be the only cause nor the last cause. A cause may be proximate although it and another cause act at the same time or in a combination to produce the occurrence. If you do find that at least one defendant and an unidentified party are at fault, then you have to allocate the total fault among all the parties and identified nonparties who are at fault. And in determining the percentage of fault of each person, you must consider the nature of the conduct of each person, and the extent to which each person's conduct caused or contributed to the Plaintiff's injuries. But the total must add up to a hundred percent.

The jury's verdict can be reconciled with the evidence, the statute, and the trial court's instructions. Plaintiff testified that he was briefly distracted by a car that appeared to be drifting into his lane. When he returned his attention to the traffic in front of him, he saw Plunkett's truck suddenly pull into the lane ahead of him. The jury could find from this testimony that Plunkett was partly at fault for entering plaintiff's lane and stopping suddenly, but that plaintiff was also at fault for his lapse of attention to the traffic ahead of him, which prevented him from realizing soon enough that he needed to slow down to maintain a safe distance. The jury could have consistently found that Plunkett and plaintiff both proximately caused the accident. Thus, the jury's verdict is not irreconcilably inconsistent.

B. GREAT WEIGHT OF THE EVIDENCE

Defendants next argue that the jury's verdict is against the great weight of the evidence because there was no evidence that a sudden emergency prevented plaintiff from maintaining a safe distance between his vehicle and defendants' truck.

When a party challenges a jury's verdict as being against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, this Court must defer to the jury's assessment of the witnesses' credibility. *Allard*, 271 Mich App at 406. The jury's verdict must be upheld, even if it is inconsistent, if there is any interpretation of the evidence that could

logically explain the jury's findings. *Id.* at 406-407. This Court must not substitute its judgment for the jury's findings unless the evidence preponderated so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon,* 456 Mich 625, 644-645; 576 NW2d 129 (1998). A narrow exception to this rule applies where "the testimony contradicts indisputable physical facts or laws, where testimony is patently incredible or defies physical realities, where a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror." *Id.* at 643-644.

Defendants rely on *Vander Laan v Miedema*, 385 Mich 226, 231-232; 188 NW2d 564 (1971), in which the defendant was the driver of a vehicle that collided with the rear end of the plaintiff's vehicle. The trial court instructed the jury that if it found that "the defendant was confronted with a sudden emergency, not of his own making, and if you find that he used ordinary care and was still unable to avoid the violation because of such emergency, then, of course, his violation is excused." *Id.* at 230. The jury returned a verdict of no cause of action. *Id.* The Supreme Court discussed the sudden emergency exception to the rear-end collision statute, stating as follows:

> Under the rear-end collision statute a rebuttable presumption arises that the offending driver is prima facie guilty of negligence. . . . However, a violation of the assured-clear-distance statute constitutes negligence per se. . . .
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> However, as we have previously indicated the assured-clear-distance statute must be reasonably construed. As such, it is not applicable under all circumstances where it might otherwise be literally employed. Instead, it is subject to qualification by the test of due or ordinary care, exercised in the light of the attending conditions. . . .
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> One such instance, where this statute is inapplicable, arises when a collision is shown to have occurred as the result of a sudden emergency not of the defendants' own making. . . . Defendants urge us to apply that rule here. But, as far as our disposition of the present case is concerned, it must be recognized from a logical as well as from a legal point of view, that for the emergency doctrine to apply an emergency within the meaning of that rule must have existed. [*Id.* at 231-232 (citations and internal quotation marks omitted).]

The Court stated that for the sudden emergency rule to apply, "the circumstances attending the accident must present a situation that is unusual or unsuspected." *Id*. at 232 (citation omitted). The Court remarked that the term "unusual" referred to circumstances that varied from the everyday traffic routine confronting a motorist, typically an event "associated with a phenomenon of nature." *Id.* The term "unsuspected"

> connotes a potential peril within the everyday movement of traffic. To come within the narrow confines of the emergency doctrine as "unsuspected" it is essential that the potential peril had not been in clear view for any significant length of time, and was totally unexpected. *Id.*

The Court concluded that there was no evidence to support the sudden emergency instruction in that case, explaining:

> The record in the instant case reveals that the accident occurred during daylight hours on a dry, paved highway, thereby precluding the possibility that the surrounding circumstances made the situation "unusual." Just prior to the accident defendant Karsten had been travelling only "two or three car lengths, maybe four" behind the plaintiff, "probably" at a speed of 20-25 m.p.h. Karsten had just turned onto Aberdeen Street, and as indicated by his own testimony, the entire pre-accident setting was in his clear view. This included the hill, the first Miedema truck, which he knew was loaded, and the Vander Laan vehicle.
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> This whole scene continued to be in actual view at all times except for a "second or so" when Karsten glanced in his rearview mirror after hitting a bump in the road. While the process of looking in the rear-view mirror may have interrupted defendant's actual view of the scene, he is still held to have had clear view.
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> Applying these principles of sudden emergency as we have defined it to the instant case, and even upon favorable view to defendants, we are unable to find any "emergency" confronting the defendants such as would entitle them to an instruction. [*Id.* at 233.]

Accordingly, the Court remanded the case for a new trial. *Id.* at 233-234.

Defendants contend that the circumstances surrounding the accident here were likewise neither unusual nor unsuspected. They rely on plaintiff's testimony that he was familiar with how traffic on I-696 became slower and backed up near the approach to the I-75 interchange as vehicles moved to the right to exit onto I-75. Plaintiff admitted that he noticed that the traffic ahead of him was slowing down well before the accident. Although plaintiff's testimony supports defendants' argument that the circumstances that led to the accident may not have been unusual, it did not preclude the jury from finding that they were unsuspected. If the jury credited plaintiff's testimony, it could reasonably find that Plunkett suddenly moved into plaintiff's lane without affording plaintiff an opportunity to maintain a safe distance behind him, and then suddenly braked, creating a peril that was totally unexpected. Accordingly, the jury's verdict was not contrary to the great weight of the evidence.

C. DAMAGES

Defendants also argue that the jury's award of future damages was excessive and more likely rooted in sympathy for plaintiff. A new trial may be granted when excessive or inadequate damages were awarded as apparently influenced by passion or prejudice, or when the verdict was clearly or grossly inadequate or excessive. MCR 2.611(A)(1)(c) and (d). Defendants argue that the jury's awards of future economic damages were so excessive that they could only have been influenced by the jury's sympathy for plaintiff.

When a verdict is unsupported by the record or is entirely inconsistent with verdicts rendered in similar cases, a reviewing court may fairly conclude that the verdict exceeds the

amount required to compensate the injured party. *Gilbert*, 470 Mich at 765. This Court's review of jury verdicts must be based on objective factors and firmly grounded in the record. *Id.* at 764. Judicial review of a purportedly excessive jury verdict should focus on the following factors:

> "[1] whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; [2] whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; [and 3] whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions. [*Gilbert*, 470 Mich at 764, quoting *Palenkas v Beaumont Hosp*, 432 Mich 527, 532-533; 443 NW2d 354 (1989).]

The Court in *Gilbert* further stated:

> When a verdict is procured through improper methods of advocacy, misleading argument, or other factors that confound the jury's quantification of a party's injuries, that amount is inherently unreliable and unlikely to be a fair estimate of the injured party's losses. Likewise, when a verdict is unsupported by the record or entirely inconsistent with verdicts rendered in similar cases, a reviewing court may fairly conclude that the verdict exceeds the amount required to compensate the injured party. [*Gilbert*, 470 Mich at 765.]

In this case, defendants do not cite any instances of improper methods, passionate argument, or appeals to the jury's sympathy by plaintiff's counsel. This case is clearly distinguishable from *Gilbert*, in which the plaintiff's counsel gave a dramatic closing argument equating the plaintiff's sexual harassment in the defendant's workplace to the Holocaust and appealed to the jury to "ring the bell of justice" so that the verdict would be heard in Germany. *Id.* at 772-774. The Supreme Court described these tactics as "a naked appeal to passion and prejudice and an attempt to divert the jury from the facts and the law relevant to this case." *Id.* Here, defendants do not contend that plaintiff's counsel engaged in the type of tactics that warranted a new trial in *Gilbert*.

The principal premise of defendants' argument is that plaintiff's situation was itself sufficient to evoke the jury's sympathy and induce the jury to award damages in excess of what was proven. However, the crucial question is whether the damage awards are excessive in relation to the evidence presented. With respect to future economic damages, plaintiff testified that he earned $18.50 an hour in his contract positions through Tech Automotive. The jury's finding that plaintiff would have earned $38,000 in 2010 is not inconsistent with plaintiff's testimony concerning his income-producing capacity at the time of the accident. The gradual increases from 2011 to 2020 are also consistent with this evidence.

Defendants argue that the jury's damage awards are against the great weight of the evidence because plaintiff was able to complete a three-month contract in late 2006 after the accident. They also argue that plaintiff's unemployment since 2006 was not attributable to the accident. Plaintiff admitted that he did not know whether his post-accident condition was the reason that Tech Automotive had not offered him any contracts since 2006. He also admitted that the field of mechanical engineering was adversely affected by the recession. However,

plaintiff also testified that the work habits he was forced to adopt because of his injuries were unsustainable. The jury could objectively find from this evidence that plaintiff could have resumed working but for the injuries he sustained in the accident.

Defendants also argue that there was no basis for the jury's finding that plaintiff had an expectancy of living and working until 2026. The verdict form gave the jury the option of awarding lost future wages up to and including 2039. The trial court discussed the jury instructions and special verdict form with the parties and asked the parties if they wanted "to put a time limit or a limit on that." Plaintiff's counsel replied, "No. It's presented on the verdict form." The trial court replied, "I know it is. But I didn't know whether – just thereafter, then?" Defense counsel replied, "I guess."

In *Hammack v Lutheran Social Servs of Mich*, 211 Mich App 1, 9; 535 NW2d 215 (1995), this Court held that the defendants failed to preserve their claim that the special verdict form did not differentiate between past and future damages where the defendant raised only a general objection to the entire verdict form. This Court recognizes the distinction between forfeiture of an error by failing to object, and waiver of an error by affirmatively expressing satisfaction with the trial court's decision. See *Moore*, 279 Mich App at 224. To the extent that defense counsel's lukewarm reply, "I guess," in regard to the time limit for future damages on the special verdict form is construed as an expression of satisfaction, any error was waived. To the extent it is construed as only a forfeiture, the issue is unpreserved and therefore subject to review for plain error affecting defendants' substantial rights. *Guerrero v Smith*, 280 Mich App 647; 658; 761 NW2d 723 (2008).

In this case, it was not inherently unreasonable for the jury to find that plaintiff, who was 34 years old at the time of trial, could have continued working until he was 51 years old if he had not been injured in the accident. Thus, there was no plain error in the jury's award of future economic damages until 2026.

III. ORDER PARTIALLY GRANTING DEFENDANTS' MOTION FOR A NEW TRIAL

We agree with plaintiff that the trial court lacked jurisdiction to grant defendants' second motion for a new trial, which defendants filed after they filed their claim of appeal in Docket No. 293195. Jurisdictional issues are reviewed de novo by this Court. *Estes v Titus*, 481 Mich 573, 578; 751 NW2d 493 (2008). The interpretation and application of a court rule is also reviewed de novo as a question of law. *Id.* at 578-579.

MCR 7.208(A) provides:

> After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except
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> (1) by order of the Court of Appeals,
>
> (2) by stipulation of the parties,

(3) after a decision on the merits in an action in which a preliminary injunction was granted, or

(4) as otherwise provided by law.

Because none of the exceptions in MCR 7.208(A) were applicable, the trial court lacked jurisdiction to set aside or amend the judgment after defendants filed their claim of appeal. See *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 315; 486 NW2d 351 (1992). Accordingly the trial court erred in granting defendants' motion for a new trial.

We find no merit to defendants' argument that plaintiff's counsel waived the jurisdictional argument at the hearing on defendants' post-judgment motion. Assuming, without deciding, that a party can waive a jurisdictional issue under MCR 7.208, the record does not support defendants' argument that a waiver occurred in this case. On the contrary, plaintiff's counsel explicitly asserted that "this motion is also not properly brought forth pursuant to 7.208, that the Court does not have jurisdiction over this any longer." Defendants' reliance on plaintiff's counsel's statements referring to the different time limitations in MCR 2.611 and MCR 2.612, and counsel's recognition that a motion under the latter rule was not subject to the 21-day period prescribed in the former, is misplaced. Those statements did not relate to counsel's jurisdictional argument under MCR 7.208 and, accordingly, did not operate as a waiver of the jurisdictional argument. Because the trial court was without jurisdiction to enter the order partially granting defendants a new trial, we vacate that order.

In light of our conclusion that the trial court lacked jurisdiction to grant defendants' second motion for a new trial or relief from judgment, it is unnecessary to consider defendants' remaining challenges to that decision.

In sum, we affirm the judgment for plaintiff, and vacate the trial court's order partially granting defendants' motion for a new trial.

Affirmed in part and vacated in part in accordance with this opinion.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Karen M. Fort Hood