

STATE OF MICHIGAN
COURT OF APPEALS

JOHN SHIVERS,

Plaintiff-Appellee,

v

SUSAN SCHMIEGE, M.D., and VALLEY
ANESTHESIA PC,

Defendants-Appellants,

and

ST. MARY'S MEDICAL CENTER OF
SAGINAW INC., d/b/a ST. MARY'S MEDICAL
CENTER and BAPINEEDU MAGANTI,

Defendants.

FOR PUBLICATION
September 29, 2009

No. 284635
Saginaw Circuit Court
LC No. 05-056430-NM

Advance Sheets Version

Before: Owens, P.J., and Murray and Servitto, JJ.

SERVITTO, J. (*dissenting in part and concurring in part*).

I respectfully dissent with regard to the majority's conclusion that defendants' motion for judgment notwithstanding the verdict should have been granted and that the future economic damages award of \$522,000 should be vacated. I agree with the majority opinion in all other respects.

I first disagree with the majority's conclusion that counsel's reference to attendant care services was a suggestion regarding how to calculate *noneconomic* damages. While counsel's closing argument could certainly have been more precise, the gist of his request of the jury can be gleaned from the argument in its entirety. Counsel stated:

There are two considerations here One consideration is economic and the other consideration is called non-economic. I want to talk about non-economic first.

You've heard testimony regarding what this gentleman has to endure both in terms of pain, but trying to understand his life in terms of calculating, what's a fair way to evaluate how he can be compensated?

Counsel then described what plaintiff was unable do without the assistance of others, and continued:

What the law says he's entitled to recover is compensation for not only the physical pain and suffering but the consequences of these problems. Think about the indignity of having to be dressed by other people

* * *

How do you—how can you calculate items of this type? I'm going to make a couple suggestions. You are not bound by them. . . .

[I]f we were talking about one of the Tiger pitchers or the Tiger catcher and we said to you he suffered an accident, it was as a result of someone's negligence and now for the balance of his life he cannot use his hands and arms in the normal function that you and I use our hands and arms, you wouldn't hesitate to try and calculate his monetary loss based on his annual salary. . . .

Nobody is talking about compensating Mr. Shivers in that type of context. But if you try to put it into real life terms, for example, instead of requiring the assistance of his daughters, if he had an aid, a full-time aid, even at minimum wage and they were with him 16 hours a day, and, remember, he needs care 24 hours a day, you know, it doesn't take long to do a calculation. And if you paid them more than minimum wage, if they are skilled workers, because that's what he needs or could benefit from in order to make his life that much easier than it currently is, those calculations quickly, in the course of a year, are in excess of 50 to \$70,000.

Would that be fair compensation for Mr. Shivers in order to cope for the balance of his life and coping the previous five years with the pain that he suffers?

Counsel then detailed the questions on the jury verdict form, continuing:

And finally there are questions about calculating his economic damages.

So think about things like expenses that he may incur for these braces and expenses that he may incur trying to make sure that his home has rails and handicaps [sic] and a hospital bed.

His non-economic damages leads us back here to this difficult issue. Given the same circumstances, does \$50,000 every year, does \$100,000 every year, is that fair compensation for complete loss of the use of your hands to do the things that we all take for granted or is that too minimal? . . .

The second page of the form deals with the future, and I mentioned to you that part of the damage equation is whether or not he will sustain damages in the future. In the non-economic we know he's not getting well. . . . So his ability to do anything for himself is going to diminish with time, not get better.

And if his wife doesn't survive him, if he survives her, then he's still going to be dependent on his children. He's still going to need or want to access outside help in order to cope with these daily issues that his wife will no longer be able to provide. Or if she becomes ill and can't do it, you have to give consideration to the replacement, and we know he can't get well from this point forward.

Viewing counsel's argument in its entirety, there was no clear distinction between counsel's arguments regarding economic and noneconomic damages. While counsel undoubtedly referenced noneconomic damages, in the same train of thought he also referenced the computation of lost wages—an economic damage. Contrary to the majority's conclusion, there was no true delineation between economic and noneconomic damages in counsel's argument to suggest that counsel was referring solely to noneconomic damages when speaking about the daily care and assistance plaintiff required.

I also disagree with the majority's conclusion that there was no evidence upon which the jury could base its award for future economic damages. As acknowledged by the majority, the evidence unequivocally established that plaintiff required assistance in dressing, using the bathroom, and, among other things, with basic hygiene. As also acknowledged by the majority, the evidence made it clear that plaintiff was reasonably certain to sustain future economic damages as a result of his disability. In the closing argument, plaintiff's counsel suggested that a fair way to measure damages might be to consider a minimum wage payment to a caregiver for 16 hours a day. Plaintiff's counsel did not ask the jury to speculate and award the rate paid to professional attendant care workers. The record supports the reasonable conclusion that counsel, perhaps without precision, requested attendant care services as an element of future economic damages at minimum wage for 16 hours a day. Jurors are free to consider their own general knowledge and intelligence concerning the affairs of life. *Rajnowski v Detroit, BC & A R Co*, 74 Mich 15, 17; 41 NW 849 (1889). Perhaps not all in the general public know with specificity the prevailing minimum wage, but one can safely conclude that the majority of the general public is aware that current minimum wage is less than ten dollars an hour. Moreover, there is no bright-line degree of specificity required in the calculation of damages. Courts allow the reasonable estimation of damages where actual damages are difficult or impossible to calculate. *Cicelski v Sears, Roebuck & Co*, 422 Mich 916, 918 (1985) (statement by Levin, J.). This is not a case where the jury's award of future economic damages exceeded the bounds of reason.

No one disputes that plaintiff requires, and will continue to require, assistance with the most basic tasks of daily living. There is also no dispute that one of the individuals who previously assisted plaintiff with his daily tasks is now deceased, and that plaintiff's elderly wife is finding it more and more difficult to assist him. Clearly, plaintiff will have to look to others for assistance in the future. The evidence at trial established the need for attendant care services as a part of future economic damages. Counsel's request for attendant care services as an element of future economic damages, at the rate of minimum wage, was sufficient to allow the jury to return its award of \$522,000.

We also cannot forget that our circuit courts are courts of equity. Because the evidence clearly established plaintiff's future economic damages (the need for attendant care services), and plaintiff's counsel's closing argument can readily be interpreted as a request for minimum wage compensation for these damages, and the jury, after careful and considered deliberation

determined that plaintiff was entitled to these damages, it would be inequitable to deny these damages simply because counsel bounced back and forth during his closing argument between his request for noneconomic and economic damages. I would affirm the trial court's denial of defendants' request for judgment notwithstanding the verdict with regard to the future economic damages.

/s/ Deborah A. Servitto