EFiled: Aug 08 2016 02:04PM EDT
Filing ID 59389187
Case Number 214,2016

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	:	

CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

MINTZER, SAROWITZ, ZERIS, LEDVA & MEYERS, LLP

/s/ Richard D. Abrams
Richard D. Abrams
919 North Market Street, Suite 300
Wilmington, DE 19801
(302) 655-2181
Attorneys for Defendants Below, Appellees/ Cross-Appellants, JUSTIN C. MOCZULSKI and DIAMOND MATERIALS, LLC
MSZL&M File No. 006843.000023 (19227)

Dated: August 8, 2016

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

SUMMARY OF ARGUMENT

I. PLAINTIFFS' REQUEST FOR RELIEF FROM THE TRIAL COURT'S APRIL 25, 2016 ORDER SHOULD BE DENIED, BECAUSE PLAINTIFFS' ARGUMENTS RAISED IN THEIR ANSWERING BRIEF IGNORE AND MISTATE THE RECORD, FINDINGS, AND RULINGS SET FORTH IN THE ORDER.

ARGUMENT

I. PLAINTIFFS ARGUMENTS RAISED IN THEIR ANSWERING BRIEF IGNORE THE RECORD BELOW, FINDINGS, AND RULINGS SET FORTH IN THE TRIAL COURT'S APRIL 25, 2016 OPINION AND ORDER AND THEREFORE MUST FAIL.

Cross-Appellees' ("Plaintiffs") Answering Brief sets forth numerous arguments which contradict the Record below and findings in the Trial Court's April 25, 2016 Opinion and Order (the "Order"), and relies upon non-existent facts in Plaintiffs' attempt to refute Defendants' Cross-Appeal. For the reasons set forth below, Plaintiffs' arguments fail to support their request for relief from the Order, and such relief should be denied.

What follows is a summary of each argument/assertion raised by Plaintiffs, followed by Defendants response thereto. It should be noted that in most instances Plaintiffs' individual arguments/assertions were not numbered or set forth separately, apart from Plaintiffs' other numbered arguments.

A. Plaintiffs contend the Trial Record does not support Defendants' argument that Mr. Rash failed to mitigate his damages.[1]

This assertion is incorrect. The Record is replete with evidence Mr. Rash failed to mitigate his damages. As the Trial Court noted in its Order,

> On Cross-Examination, Plaintiff admitted that he only attended one cognitive behavioral therapy appointment despite several doctors' opinions that psychological treatment would help the tinnitus…

[1] Plaintiffs Below, Appellants' Reply Brief On Appeal And Cross-Appellees' Answering Brief On Cross-Appeal, (hereinafter, "Ptfs. Ans. Br."), at p. 4.

> Plaintiff explained that he could not make the time commitment needed for therapy sessions.[2]

The Trial Court noted on further occasions the record supported Defendants' contention that Mr. Rash failed to mitigate his damages, thus removing any doubt Defendants met their burden of proof on the mitigation element of their defense.

For example, the Trial Court observed, "…Plaintiff's failure to mitigate his injuries through treatment made identifying and compensating the injury quite problematic."[3] Further, the jury heard testimony about the various medical treatments recommended for Mr. Rash. The Trial Court observed further,

> Defense counsel noted that Plaintiff's doctors repeatedly recommended psychotherapy to help not only his emotional concerns, but also his tinnitus. Plaintiff simply did not have the time. Dr. Townsend [Plaintiff's treating physician] highly recommeded the Neuromonics Program. Again, Plaintiff could not commit the time for the Program.[4]

"Plaintiff also acknowledged that he would *not be eligible* for the Neuromonics Program *unless and until* he received cognitive therapy.[5] Thereafter,

> Plaintiff was evaluated for the Neuromonics Program, and testified he experienced improvement with his tinnitus *right away*.[6] [Notwithstanding,] Plaintiff [claimed he] chose not to participate in the Program [due to time constraints and] only completed an

[2] Order, at (B-5).
[3] *Id.,* at (B-8).
[4] *Id.*
[5] *Id.,* at (B-5). (Emphasis added).
[6] Plaintiff testified "that he instantly felt relief when he tested the device." *Id.,* at (B-11)(Emphasis added).

> *evaluation* with Bryn Mawr Rehabilitation, but *did not return* for treatment."[7]

Faced with clear evidence of Mr. Rash's failure to mitigate, the Trial Court struggled to reconcile Plaintiffs' request for a new trial. The Trial Court put it this way, "[t]he Court cannot square the evidence of Plaintiff's failure to mitigate his damages with a claim that he is entitled to a new trial on damages…"[8]

Plaintiffs' representation that the record falls "short of supporting the argument that plaintiffs failed to mitigate damages"[9] ignores the Record and the Trial Court's Order. Had Defendants failed to set forth a *prima facie* case demonstrating Mr. Rash failed to mitigate his damages, counsel would have objected to the inclusion of the mitigation instruction in the charge. As such, Plaintiffs' argument that Defendants failed to prove mitigation is arguably waived. In addition, nothing would have prevented the Trial Court from *sua sponte* deciding there was insufficient evidence in the Record to warrant including the instruction in the charge. This did not happen.

B. Plaintiffs contend "there is nothing to suggest that the jury relied on the alleged failure to mitigate in awarding zero dollars in damages."

Plaintiffs suggest that, unless Defendants can establish the jury relied upon Mr. Rash's failure to mitigate as the basis of the jury's zero verdict, the verdict

[7] *Id.*, at (B-4). (Emphasis added).
[8] *Id.*
[9] Ptfs. Ans. Br., at pp. 4-5.

cannot stand.[10] The assertion is legally incorrect and not supported by Delaware law. Plaintiffs cite to no supporting authority. It simply is not possible in this instance to know what evidence the jury relied upon in reaching its verdict, as it is impossible to read the jury's collective mind. The jury did not ask the Court to clarify any instruction or otherwise exhibit confusion, thus providing no insight into the jury's collective thought process. As such, any argument founded upon what the jury considered or did not consider in the absence of evidence providing insight, such as a note from the jury, cannot be considered on a Motion for New Trial, as the Court would be engaging in speculation.[11]

More importantly, Defendants are not required to prove upon which evidence the jury relied in reaching its verdict. All one can do is examine the record to determine whether the verdict was supported by evidence properly before the jury. But to attempt to determine which facts the jury relied upon or rejected is an exercise in futility. Plaintiffs, having *assumedly* read the jury's mind, are asking this Court to do the same. Plaintiffs contend,

---

[10] *Id.*, at p. 5.

[11] See, *Reinco, Inc. v. Thompson*, 906 A.2d 103 (Del. 2006), at footnote 15, where this Court observed it was "unable to find a case in any jurisdiction affirming a trial judge's decision to grant a new trial based on her speculative conclusion that the jury was confused. Other jurisdictions appear to require some evidence, beyond a 'gut feeling' that the jury was in fact confused in order to set aside a verdict supported by the evidence. For example, cases where the jury sends a note to the judge expressing confusion or the jury returns an inexplicably inconsistent verdict might be sufficient to warrant granting a motion for a new trial on the basis of jury confusion." (Citations omitted).

> [Because] there is nothing to suggest that the jury relied on the alleged failure to mitigate in awarding zero dollars in damages[,]… the inconsistent verdict, finding proximate cause between Male Plaintiff's injuries and defendants' negligence, yet awarding zero dollars in damages, warrants a new trial.[12]

With respect to the limits upon the Court's power to disturb a verdict by granting a new trial, the Trial Court noted, "[a]ccordingly, wherever 'there is any margin for a reasonable difference of opinion in the matter, the Court should yield to the verdict of the jury.'"[13] It is clear then, that when asking a trial court to set aside a jury's verdict in favor of a new trial, it is the Plaintiffs' burden to unequivocally demonstrate there exists no margin for a reasonable difference of opinion in the matter.[14] Plaintiffs merely suggest alternative explanations for how the verdict was reached, but have done nothing to extinguish the possibility the verdict was reached as contended by Defendants.[15]

C. Plaintiffs contend Defendants failed to prove Mr. Rash failed to mitigate his damages, because Defendants did not explicitly state in which ways Mr. Rash failed to do so.[16]

In support of this argument, Plaintiffs contend Mr. Rash was unable to participate in the Neuromonics Program due to the time commitment required for

---

[12] *Id.*
[13] *Id.*, at p. 6, (quoting *Hagedorn v. State Farm Mut. Ins. Co*, 2011 WL 2416737, at *3 (Del. Super. June 10, 2011)(quoting *Burgos v. Hickock*, 695 A.2d 1141, 1145 (Del. 1997))(quoting *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979)).
[14] *Id.*
[15] See Appellees' Answering Brief on Appeal and Cross-Appellants Opening Brief on Cross-Appeal at pp. 7-8. (hereinafter, "Def's Ans. Br.").
[16] Ptfs. Ans. Br., at p. 5.

work, and the need to care for his wife who was ill. Again, Plaintiffs misstate the Record.

The question of why Mr. Rash failed to participate in the Neuromonics Program was the subject of vigorous cross-examination by Defense counsel, which yielded evidence that told a *very* different story.[17] The jury learned, through cross-examination, that Mr. Rash went to Jefferson Hospital for an eligibility evaluation, a prerequisite to participation in the Neuromonics Program. He met with Alexandra Costlow of Jefferson Hospital's Audiology Department for the evaluation. Because of poor test scores, his ongoing untreated psychological problems, and involvement in ongoing litigation, he was put into the tier three patient category. It was Jefferson's policy not to treat tier three patients due to their record of poor performance in the program.[18] Mr. Rash agreed the Audiologist recommended cognitive behavioral therapy and to wait until his litigation was concluded, because it would improve his chance of success with the program.[19] In other words, cognitive therapy was a condition of future participation. When confronted with the fact that his untreated emotional problems were adversely affecting his recovery, Mr. Rash made clear in no uncertain terms, that he did not agree with his doctors' recommendations he participate in cognitive

[17] See generally and in its entirety, (A-117) – (A-123).
[18] (A-118) – (A-120).
[19] (A-120).

therapy, and further made clear he would never participate in it,[20] thereby foreclosing any opportunity for relief, which he acknowledged he experienced during the evaluation process.

Although the following testimony is contained within Plaintiffs' Appendix to their Opening Brief at A-122, the testimony's gravity and likely impact on Mr. Rash's credibility, requires it appear here in the body of the brief.

* * *

Q. Do you understand as you sit here today that your decision not to participate in this cognitive behavioral therapy is adversely effecting your recovery?

A. To the temper control, yes.

Q. You think that's the only issue that --

A. I have been told by four of the different doctors that the tinnitus is there, period, end of conversation, that I can do all I want about anything, that if it was there after two years that it's permanent, it's not going away, so talking to somebody about it and mapping it out and being able to control my temper is not going to make the fact that that noise is there 24/7, it's not going to make the fact that I can't sleep at night go away, talking about it is only going to be talking about it to resolve my temper issues, but absolutely nothing about what I experience with headaches and jaw pain and tinnitus.

[20] (A-122).

Q. Okay, and you understand that Dr. Costlow said you can't get into the neuromonics program unless you get this therapy, correct?

A. Correct, in conjunction.

Q. And you understand that the neuromonics program has been highly recommended because it has a substantial positive effect on individuals with tinnitus, correct?

A. Correct.

* * *

Contrary to the Record, and to Mr. Rash's expressed clear disdain for psychotherapy, Plaintiffs insist Mr. Rash *did* participate "…in several sessions with Dr. Dettwyler, a psychologist, to help combat the emotional strains associated with the accident and resulting tinnitus.[21] This is simply incorrect. The Record clearly reflects Mr. Rash's emotional problems predated the accident, and more importantly, Mr. Rash agrees he never participated in a course of psychotherapy to combat the emotional strains associated with the accident. Rather, Mr. Rash participated in *one* intake/evaluation session with Dr. Dettwyler, certainly during which no cognitive therapy took place. After the intake/evaluation session, Mr. Rash never returned. The jury heard the following exchange during Mr. Rash's cross-examination,

* * *

[21] Ptfs' Ans. Br., at p. 6.

Q. And just so we're clear, you were not actively or have you ever pursued any course of therapy to address those issues, correct?

A. No, I have started but I stopped it.

Q. Dr. Dettwyler?

A. Yes.

Q. There's one office note.

A. That's what I said. I started it, I stopped it.[22]

* * *

Since Mr. Rash's credibility was very much at issue, Defendants' counsel asked Mr. Rash several questions on cross-examination, about a claim he made early in the litigation which Mr. Rash knew to be false, and withdrew prior to trial for obvious reasons. At trial, Mr. Rash admitted he had testified at his deposition, that he was one-hundred percent certain he had been rendered impotent as a consequence of the accident.[23] He also testified he intended to ask the jury to compensate him for the fraudulent claim.[24] In the end, Mr. Rash conceded his testimony was not truthful.

* * *

Q. Okay. Just so we're clear, you can see in April of 2011, which is before the accident, you now were

[22] (A-121). It should also be noted that the jury had multiple opportunities to hear testimony from Mr. Rash, which was shown to be untrustworthy. His credibility issues most certainly would have had an undesirable impact on the jury, and ultimately the verdict.
[23] (A-123), line 25; (A-124), lines 1-5.
[24] (A-125), lines 14-17.

positive for impotence and it was mentioned as one of your diagnoses, organic impotence, you don't dispute that, correct?

A. No.

Q. And you don't dispute it was before the accident that you had that problem, correct?

A. No.

Q. You are agreeing with me?

A. I'm in agreement with that particular case, no, I'm in agreement.[25]

* * *

Q. And at your deposition you testified that you were 100 percent positive that you had this problem as a result of the car accident and that it wasn't pre-existing, correct?

A. Correct.

Q. And it was your intention at the time to tell that to the jury and ask to be compensated for that, correct?

A. Correct.[26]

*** * ***

There on the witness stand was a plaintiff who admitted to the jury that he had no problem making up claims, and asking to be compensated if he could get away with it. Clearly, Defendants more than proved to the extent necessary, that

[25] (A-124), lines 6-17.
[26] (A-125), lines 9-17.

Mr. Rash was not credible, was willing to ask for money for injuries not suffered in the accident, that he failed to mitigate his damages by failing to follow his numerous doctors' reasonable recommendations, failed to treat his emotional problems which predated the accident and which were shown through his own experts to aggravate, worsen, or at least prolong his tinnitus.[27]

D. Plaintiffs contend the jury should not have reduced the verdict to zero, because there was a period of pain and suffering which predated Mr. Rash's doctors' recommendation he participate in the Neuromonics Program.

Plaintiffs' contention is without merit nor supported by the record, and contradicts the findings of the Trial Court, which found "…Plaintiff had failed to prove up whatever damages he may have suffered ***aside from those he failed to mitigate***. The Court will not reward Plaintiff's failure of proof with a 're-do.'"[28] In other words, the Court believed there was a complete failure of proof of damages, notwithstanding the jury's finding of at least some injury. The Court further observed Plaintiffs were given every opportunity to prove their alleged damages at trial. "No evidence was suppressed, no objections were sustained,[29]

[27] Plaintiffs correctly note, on page 7 of their Answering Brief, that Defendants' counsel suggested the Neuromonics Program was an "undisputed cure" for tinnitus. Defendants agree there is no known cure and that counsel's description of the Neuromonics Program being an "undisputed cure" for tinnitus, was inartful, and simply an inaccurate representation of the record. What Defendants' counsel meant to say was that it was *undisputed* that Mr. Rash *experienced immediate relief* during his evaluation for the program, so as to suggest that had he participated in the program, he was guaranteed further relief.

[28] Order, (B-9). (Emphasis added).

[29] Defendants did not object to the admission of any evidence.

and no rulings were issued that prevented Plaintiff from stating his case as forcefully and completely as he could."[30]

In *Mitchell v. Haldar*,[31] a medical malpractice case, this Court considered the implications of a verdict against the defendant on causation, where the jury awarded less than all of plaintiff's claimed medical bills. The issue was whether the verdict was inconsistent, since the jury found causation, but awarded less than all of plaintiff's special damages. This Court found,

> …the jury was persuaded by the plaintiffs' evidence of liability and concluded that Dr. Haldar was negligent. Nevertheless, the jury did not accept the plaintiffs' contention as to damages, *i.e.*, that all of Mr. Mitchell's medical problems following the appendectomy were proximately caused by Dr. Haldar's negligence. The United States Supreme Court has characterized "vigorous cross-examination" as one of the "traditional and appropriate means of attacking shaky but admissible evidence."[32]

Here, the Trial Court found Mr. Rash's damages evidence "shaky," and stated as much. "…[T]he only remaining injury for which Plaintiff is entitled to compensation –***and it is a stretch***—is the tinnitus…."[33] It is therefore fair to reason that the cross-examination of Mr. Rash raised questions regarding his credibility, and therefore to what extent if at all, he actually experienced pain and suffering. At one point, the jury heard Dr. Langan describe Mr. Rash's symptoms

[30] Order, at (B-8) – (B-9).
[31] 883 A.2d 32 (Del. 2005).
[32] *Id.*, at p. 43. (Citation omitted).
[33] Order, at (B-10). (Emphasis added).

as "bothersome."[34] It is reasonable to conclude one explanation for the zero verdict was, the jury believed any pain and suffering caused by the accident was nonexistent, grossly exaggerated, de-minimis, and/or not worthy of compensation. It therefore bears repeating that when,

> 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.[35]

E. Plaintiffs contend the Trial Court was not required to follow the *Grand Ventures decision*, as there was no way to reconcile the inconsistent verdict and therefore, should have granted a new trial.

In Delaware, "[a] verdict will *not* be stricken as internally inconsistent so long as there is ***any*** possible interpretation or explanation which avoids the inconsistency[.]"[36] In *Grand Ventures, Inc. v. Whaley,*[37] This 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.[38]

---

[34] (A-031) – (A-032). Dr. Langan was Mr. Rash's own treating physician.
[35] Order, at (B-6).
[36] *Citisteel USA, Inc. v. Connell Ltd. P'ship*, 1998 WL 309801 at *4 (Del. 1998)(Emphasis in the original).
[37] 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)).
[38] *Id.*

Plaintiffs contend the Trial Court was free to disregard this Court's holding in *Grand Ventures* because there was no reasonable way to reconcile the jury's verdict. In support of their argument, Plaintiffs attempted to distinguish *Grand Ventures* by pointing out *every* possible dissimilarity between the two cases, whether factual, procedural, or legal. However, each dissimilarity noted by Plaintiffs is a distinction without a difference. *Grand Ventures* simply states the applicable rule of law – the guiding principle that every Court must apply when confronted with a request for a new trial, based upon what is allegedly an inconsistent verdict. At issue is the applicable rule of law, not the circumstances which arose to invite its application. Defendants contend that although *Grand Ventures* was applicable, the Trial Court did not correctly apply its holding, because despite finding a reasonable way to reconcile the verdict,[39] it disturbed the verdict by granting *additur*.

Plaintiffs have expended considerable effort attempting to rebut Defendants' arguments raised in their Cross-Appeal. However, Plaintiffs' arguments are misplaced. Plaintiffs' entire argument can be summarized as follows. *Mr. Rash did not fail to mitigate his damages, therefore Defendants' arguments are without merit and the Trial Court should have granted a new trial.* Instead of suggesting

[39] The Trial Court said it this way, "[t]he 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." Order, at (B-7).

alternate explanations why the jury awarded zero damages, Plaintiffs should have focused on satisfying their actual burden. Under Delaware law, and as stated previously, Plaintiffs were required to unequivocally demonstrate that there exists no margin for a reasonable difference of opinion, on the matter of whether or not the jury's verdict was reasonable based on the *actual* record, and not one that was apocryphal.

II. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Honorable Court (1) deny Plaintiff's Appeal; (2) affirm the Trial Court's ruling that Plaintiffs were not entitled to a new trial; and (3) reverse the Trial Court's award of *additur* in the amount of $10,000.00.

Respectfully submitted,

MINTZER, SAROWITZ, ZERIS, LEDVA & MEYERS, LLP

/s/ Richard D. Abrams

RICHARD D. ABRAMS, I.D. 2968
919 North Market Street, Suite 200
Wilmington, DE 19801
(302) 655-2181
Attorney for Defendants Below, Appellees/
Cross-Appellants, JUSTIN C. MOCZULSKI and
DIAMOND MATERIALS, LLC

Dated: August 8, 2016