

No. 34747 - Andrea Karpacs-Brown, Individually and as Administratrix of the Estate of her Mother, Elizabeth Karpacs, and the Estate of her Father, Andrew Karpacs v. Anandhi Murthy, M.D.

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, dissenting:

There is an old superstition among lawyers that when it comes to jury damage awards, the more lines for a jury to fill in, the greater the damages might be. In the present case, the Appellant made no effort to separate economic and non-economic damages on the jury verdict form in what may have been a strategic gamble made in hopes that the jury would return a lower monetary award. The jury award – which the Appellant argues is too high – makes no distinction between economic and non-economic damages. Non-economic damages are capped at \$1 million.¹ Because the jury combined economic and non-economic damages, this Court has no way to determine if the jury exceeded the non-economic damages cap.

Unhappy with the jury verdict, the Appellant asks this Court to find that none of the damages found by the jury were for economic loss. Yet it is not our proper role to attempt to discern the thinking of the jury, especially where the Appellant made no effort to distinguish the non-economic and economic damages on the actual jury verdict form. The

¹Because the Appellee commenced her action prior to July 1, 2003, the date the 2003 amendments to West Virginia Code § 55-7B-8 went into effect, the \$ 1 million limit on non-economic damages applies to her case. Under the 2003 version of the statute, the maximum amount recoverable as compensatory damages for non-economic loss is \$500,000 where the damages for non-economic loss suffered by the plaintiff are for wrongful death.

Appellant's failure to have the jury distinguish damages has left the Court with a Gordian knot. It is neither appropriate, nor in this Court's best interests to attempt to untie it. Three million dollars for economic loss seems high where the evidence of such loss was not very strong. However, I cannot agree with the Majority that there was no evidence of economic loss.

I. The Jury Considered Economic Issues at Trial

Within the provisions of the Medical Professional Liability Act, West Virginia Code § 55-7B-1 to -12 (2008), "noneconomic loss" is defined as "losses, including, but not limited to, pain, suffering, mental anguish and grief." W. Va. Code § 55-7B-2 (k). Thus, by definition, if the damages sought do not fall into the statutory definition of "noneconomic loss," those damages necessarily are more accurately characterized as economic damages. Consequently, the damages sought by the Appellee for the loss of services and any actual expenses incurred from such loss are economic damages. As the Circuit Court noted in its order on July 26, 2008, Mrs. Karpacs' children testified about the loss of her "services, support and guidance" which include "the loss of her love and advice, the comfort of her presence and her services to her children and grandchildren, including child care and meal preparation." The family testified about the "loss of company of Elizabeth Karpacs, as well as the services she would have provided to her children and her husband while he lived and her support and guidance." I would affirm the circuit court decision that the verdict form's language of "loss of services, protection, care and assistance" encompassed economic

damages under our law.

Moreover, the Appellee testified that her mother's death required her to build a home addition to house her father. It seems that construction costs for a home addition would unquestionably be economic rather emotional damages under the law.

II. The Litigant Bears the Burden of Distinguishing Between Different Types of Damages on a Jury Verdict Form

Even more important, this Court has consistently held that it is the defendant's job to request a jury verdict form which specifies the elements of damages. In *Gerver v. Benavides*, 207 W.Va. 228, 530 S.E. 2d 701 (1999), this Court addressed the situation where a litigant has failed to distinguish between economic and non-economic damages. Specifically, the Court states that it "has held on several occasions that when a litigant seeks to make procedural distinctions between 'special' damages and 'general' damages, that litigant bears the burden of insuring that the circuit court distinguishes between types of damages in the jury's verdict form." *Id.* at 235, 530 S.E. 2d at 708. Much like this case, *Gerver* dealt with a medical malpractice suit where the damage form failed to distinguish economic and non-economic damages. The defendant argued that the damage award amount exceeded the statutory cap on non-economic damages. We noted:

Both the jury instructions and the jury's verdict form merged "special," economic-type damages, such as lost future wages and employment benefits and future medical expenses, with "general," non-economic-type damages, such as past and future pain and suffering and loss of capacity to enjoy life.

The defendant did not object to the circuit court's instructions or verdict form, and did not submit special interrogatories that would allow the jury to segregate “economic” from “non-economic” losses. As there is no means to determine whether the non-economic damages assessed by the jury exceeded the \$1,000,000 statutory limit, this Court will not presume that error occurred.

207 W. Va. at 235, 530 S.E.2d at 708.

In the present case, the Appellee did not object to the verdict form and it is impossible for this Court now to determine what part of the award is economic in nature and what part is non-economic.

III. Remittitur of the Jury Award

The Majority attempts to distinguish *Gerver* by arguing that no evidence of economic damages was presented at this trial. I disagree with the Majority’s decision that the Appellant did not show economic damages. It does appear, however, the award for economic damages may be excessive. Consequently, I would have favored a remittitur² of the award to better comport with the economic damages presented at trial and the statutory cap on noneconomic damages. This Court held in syllabus point six of *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492, 494, 345 S.E.2d 791, 793 (1986), that “[e]ven when there

²The Appellant did not specifically move for remittitur below; however, the Appellant did file various post-trial motions including a motion to alter or amend the jury verdict. According to the Court in *Alkire v. First National Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996), “[t]he motion for a remittitur is technically a motion to alter or amend judgment pursuant to W. Va. R. Civ. P. 59(e).” *Id.* at 127, n.6, 475 S.E.2d at 127 n.6.

are no data by which the amount of excess in a jury's verdict is definitely ascertainable, entry of remittitur is permissible." Unlike what transpired in *Roberts* with this Court determining the amount of the remittitur, I would remand this case to the circuit court which, having heard the live testimony, is in a better position to determine if the jury award is appropriate.

As a result, I must dissent from the portion of the Majority's decision finding no economic damages and directing the circuit court to limit the award to the \$1 million non-economic damages cap.