No 26111 - Wilma E. Vargo, Executrix of the Estate of Martha J. Fornari, deceased v. Sandra L. Pine and David J. Pine

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OF WEST VIRGINIA

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McGraw, J., concurring, in part, and dissenting, in part:

Like Justice Starcher has stated, I agree that the jury's verdict suggests possible confusion and a lack of understanding of the law. What especially concerns me is the appearance that this jury failed to grasp the concept of comparative negligence, and how a finding of comparative negligence would affect their award.

In this case, the jury awarded exactly the amount of the medical and funeral expenses, down to the last thirty-six cents, but the victim's family only received 51% of this amount because of the jury's finding of comparative negligence. As the majority opinion suggests, the jury may well have known exactly what it was doing, and believed that the family should have received only half of those expense

I agree that it is quite possible, and not entirely contrary to the evidence, that the jury felt sympathy not only for the victim, but also for the driver who killed her in this tragic accident on a dark night. What seems extremely unlikely to me, is that this jury would award a grieving family its medical bills and funeral expenses down to the last penny, and then, in a cold and calculating fashion, accept the fact that the court would have to reduce the award by 49%.

When we ask a jury to decide damages and comparative negligence we ask them to perform a complex, two part calculation that one doesn't run into often in daily life. Perhaps only in calculating "sale" prices at the store does one have to perform such mental gymnastics, and even then people wonder if the price in red on the tag is the final price, or if the clerk will make the reduction at the register. Thus sometimes it is difficult to say if a jury's damage award is the final number they wish to see a plaintiff recover, or if they have considered how that award will be reduced after a finding of comparative negligence on the part of the plaintiff.

Sometimes courts see verdicts which suggest that juries perform their own deductions, resulting in a double reduction for a plaintiff's award. In our case of *McDaniel v. Kleiss*, 198 W.Va. 282, 480 S.E.2d 170 (1996), a jury found the plaintiff to be 40% at fault and awarded the plaintiff about $150,000 in damages. The trial court then reduced this by 40%, so that the plaintiff received approximately $92,000 in damages (plus some interest).

The plaintiff presented evidence that the jury had actually figured his damages to be close to $260,000, and that they had already made their own deduction of 40% when they submitted the award of $150,000. The circuit court increased the award upon the request of the plaintiff, but this Court reversed, finding that such a modification, "wrongly invades the jury's deliberative process in violation of Rule 606(b) of the West Virginia Rules of Evidence. *Id.*, Syl pt. 4.

In the similar case of *Brooks v. Harris*, 201 W.Va. 184, 495 S.E.2d 555 (1997), the plaintiff presented evidence of $34,171.29 in medical bills. The jury found the plaintiff 40% at fault, and awarded the plaintiff assorted amounts for damages, including exactly $20,502.77 for past medical expenses. In addition to the obvious error suggested by this figure (which is precisely 60% of the first figure) the court also discovered notes from the jury room in which a juror had preformed this very calculation. The circuit court granted the plaintiff a new trial on this basis. This Court, in a per curiam opinion, reversed and reinstated the original verdict.

In some cases, jurors may not make a conscious, direct effort to reduce an award by the amount of the plaintiff's comparative negligence, but still seem to misunderstand that their award will be reduced later by the judge. In the case of *Attridge v. Cencorp Division of Dover Technologies Int'l, Inc.*, 836 F.2d 113 (2d Cir.1987), the plaintiff suffered a severe injury to his hand. The jury found him to be 80% at fault, but awarded him, and his wife $150,000 for his damages and her claim for loss of consortium.

After the trial, conversations between a juror and a bailiff alerted the judge that the jurors had intended that the Attridges receive that entire amount (that is the jury found that the plaintiffs suffered $750,000 in damages, and reduced that amount to $150,000 before rendering a verdict). The judge recalled the jury, and asked each "what was your understanding as to what the verdict was?" All answered that they thought the plaintiffs were to received the full $150,000, and the judge entered a final verdict of that amount.

In this case, the Second Circuit affirmed the decision of the trial court and allowed the corrected verdict to stand for the plaintiff, but reversed the wife's damage award. The court ruled that the interviews "were intended to resolve doubts regarding the accuracy of the verdict announced, and not to question the process by which those verdicts were reached," and thus did not violate the Rules of Evidence. *Attridge v. Cencorp Division of Dover Technologies Int'l, Inc.*, 836 F.2d 113, 117 (2d Cir.1987); *accord*, *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167 (1991).

I concur with the majority that we should not toss aside our long-standing regard for the finality of a jury verdict. However, I suggest that our system needs to do a better job of communicating to the jury the actual impact of a comparative negligence finding, and a better job of allowing a judge the discretion to correct obvious errors in the communication of a jury's intended verdict.

In the instant case it strikes me as far more likely that the jury intended that the full amount of the medial bills and funeral expenses be awarded to the family of the victim, and that the jury simply did not understand the effect their finding of comparative negligence would have upon that award. The troubling aspect of this is that the will of jury may have been thwarted because of their apparent lack of understanding of the law.

While reasonable minds may differ on the "correctness" of nearly every jury verdict, as long as a jury has deliberated with a understanding of the law and communicated its true intent to the court, its verdict should stand. However, when we allow a lack of understanding of the law to thwart the will of the

jury, we serve poorly the interests of justice. For these reasons, and those already articulated by Justice Starcher, I respectfully, dissent.