Court of Appeals, State of Michigan

ORDER

Yolanda Larry v Hurley Medical Center

Docket No. 323504

LC No. 12-099049-CL

Christopher M. Murray
Presiding Judge

Patrick M. Meter

Michael J. Riordan
Judges

The Court orders that the December 15, 2015 opinion is hereby AMENDED. The opinion contained the following clerical error: Wayne Circuit Court is corrected to read Genesee Circuit Court.

In all other respects, the December 15, 2015 opinion remains unchanged.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

FEB 29 2016
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

YOLANDA LARRY, Plaintiff-Appellee,	UNPUBLISHED December 15, 2015
v	No. 323504 Wayne Circuit Court
HURLEY MEDICAL CENTER, Defendant-Appellant.	LC No. 12-099049-CL

Before: MURRAY, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendant Hurley Medical Center appeals as of right the trial court's amended judgment awarding plaintiff Yolanda Larry damages of $183,625 in accordance with a jury's revised verdict for plaintiff on her wrongful discharge claim. We vacate in part the trial court's judgment and remand for entry of a new judgment consistent with the jury's initial award of $56,000 in past economic damages and $83,577 in future economic damages, for a total damage award of $139,577.

I. FACTUAL BACKGROUND

This action arises from defendant's termination of plaintiff's employment in September 2012. On September 25, 2012, plaintiff filed a complaint alleging wrongful discharge in violation of a just-cause employment contract (count I), violation of the Michigan Whistleblowers' Protection Act ("WPA"), MCL 15.361 *et seq*. (count II), and retaliatory discharge in violation of the Elliott-Larsen Civil Rights Act ("CRA"), MCL 37.2101 *et seq*. (count III).

Questions 1, 2, and 3 on the jury's verdict form asked, respectively, if the jury found for plaintiff on her wrongful discharge, WPA, and CRA claims. If the jury answered "Yes" to any of these questions, it was to consider Questions 4 and 5, which required the jury to determine, respectively, the amount of plaintiff's past economic damages and the amount of her future economic damages. Questions 6 and 7 asked the jury to determine past and future mental distress damages, specifically, damages "for mental anguish,[1] denial of social pleasures and

[1] "Shock" was also included in the list under Question 7 for future mental distress damages.

enjoyments, embarrassment, humiliation and mortification." However, because such damages are not recoverable for breach of an employment contract, see *Valentine v Gen American Credit, Inc*, 420 Mich 256, 263; 362 NW2d 628 (1984), the verdict form instructed the jury to answer Questions 6 and 7 *only* if it answered "Yes" to either Question 2 or Question 3. In other words, the verdict form permitted the jury to award noneconomic damages only if it found in favor of plaintiff on either or both of the statutory claims.

The jury found for plaintiff on her wrongful discharge claim, but found for defendant on her CRA and WPA claims. The jury found that plaintiff sustained past economic damages of $56,000, and future economic damages of $83,577. The jury's negative answers to Questions 2 and 3 should have precluded it from answering Questions 6 and 7 regarding noneconomic damages. However, the jury provided answers to Questions 6 and 7, finding past noneconomic damages of $31,875, and future noneconomic damages of $18,238 in 2014, $17,409 in 2015, $16,652 in 2016, $15,958 in 2017, and $15,320 in 2018.

Plaintiff's counsel requested a sidebar conference concerning the jury's erroneous answers to Questions 6 and 7, suggesting that the trial court order the jury to resume its deliberations. Defendant's counsel argued that the trial court should accept the verdict but strike and disregard the jury's answers to Questions 6 and 7. The trial court rejected defendant's argument and ordered the jury to resume its deliberations. After restating the jury's answers to the questions on the verdict form, the trial court stated:

> So, the verdict is not correct. You need to go back and revisit these decisions and comply with the instructions that are on the verdict form. So, I'm not going to accept your verdict at this time.
>
> When you get back to the jury room, you can read your questionnaire and see what I'm talking about. So, I'm going to send you back in for further deliberations.

When the jury returned and presented its second verdict, it again found that plaintiff prevailed on her wrongful discharge claim, but did not prevail on her WPA and CRA claims. The jury also found, once again, that plaintiff sustained past economic damages of $56,000. However, it concluded that plaintiff sustained future economic damages of $127,625, an increase of $44,048 from its first verdict. Consistent with the instructions on the verdict form, the jury did not make any findings regarding noneconomic damages.

Defendant filed a motion to set aside the jury's second verdict under MCR 2.610, arguing that the trial court erred in treating the original verdict as an inconsistent verdict requiring further deliberations rather than simply disregarding the "surplusage" category of noneconomic damages awarded by the jury. The trial court denied defendant's motion and entered a judgment awarding plaintiff a total of $183,625 in damages, in accordance with the jury's second verdict.

II. MOTION TO SET ASIDE JURY VERDICT

On appeal, defendant argues that the trial court erred when it ordered the jury to resume its deliberations instead of striking the unnecessary findings regarding noneconomic damages, and by allowing the jury to revise its finding regarding future economic damages. We agree.

A. STANDARD OF REVIEW AND APPLICABLE LAW

Issues involving an inconsistent or defective jury verdict are reviewed *de novo*, as questions of law. See *Lagalo v Allied Corp*, 457 Mich 278, 282-285; 577 NW2d 462 (1998). Likewise, "[t]his Court reviews de novo a trial court's ruling on a motion for [judgment notwithstanding the verdict]" under MCR 2.610. *Attard v Citizens Ins Co of Am*, 237 Mich App 311, 321; 602 NW2d 633 (1999).

The proper remedy for a defective verdict depends on the kind of defect present. *Ass'n Research & Dev Corp v CNA Fin Corp*, 123 Mich App 162, 167-168; 333 NW2d 206 (1983). In *Ass'n Research*, this Court explained:

> Where a verdict is defective because it contains mere surplusage the court may remedy the problem by deleting the surplusage from the final judgment. *Robertson & Wilson Scale & Supply Co v Richman*, 212 Mich 334; 180 NW 470 (1920); *Rawson v McElvaine*, 49 Mich 194; 13 NW 513 (1882). Even if the defect is not due to the presence of surplusage, the court may still alter the verdict itself so long as the court can ascertain the intent of the jury and the court's final judgment implements that intent. *Naccarato v Grob*, 384 Mich 248; 180 NW2d 788 (1970); *Rabior v Kelley*, 194 Mich 107, 116-117; 160 NW 392 (1916). In other situations, however, such as where the verdict is inconsistent, *Harrington v Velat*, 395 Mich 359; 235 NW2d 357 (1975); *Farm Bureau Mutual Ins Co v Sears, Roebuck & Co*, 99 Mich App 763; 298 NW2d 634 (1980), or contains a remedy not authorized by law, *McCormick v Hawkins*, 169 Mich 641; 135 NW 1066 (1912); *Rathbone v Detroit United Railway*, 187 Mich 586; 154 NW 143 (1915), the trial court must either reinstruct the jury or order a new trial. [*Ass'n Research & Dev Corp*, 123 Mich App at 167-168.]

More recently, this Court has stated, "Where the intention of the jury is ascertainable despite ambiguities in its verdict, the court may amend the verdict, correcting manifest errors of form, and sometimes matters of substance, to make it conform to the intention of the jury." *Johnson v Auto–Owners Ins Group,* 202 Mich App 525, 528; 509 NW2d 538 (1993).

Inconsistent verdicts exist when the verdicts are contradictory or incongruous, or when the jury returns more than one verdict in the same action, and the verdicts are inconsistent and irreconcilable. *Beasley v Washington*, 169 Mich App 650, 657-658; 427 NW2d 177 (1988). A court must make every attempt to harmonize a jury's verdict. *Allard v State Farm Ins Co*, 271 Mich App 394, 407; 722 NW2d 268 (2006). "Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside." *Id*. (quotation marks and citation omitted).

In *Ass'n Research*, 123 Mich App at 165-166, the plaintiff brought multiple claims against the defendants on breach of contract and business tort theories. The only claims submitted to the jury were a breach of contract claim against one defendant and an intentional interference with a business relationship claim against the other defendant. *Id*. at 166. The jury returned a verdict for the plaintiff on both claims, and awarded damages of $80,000 "plus one-half court costs, attorney fees and costs" on the first count, and $2 "plus one-half court costs,

attorney fees and costs" on the second count. *Id*. The trial court entered judgment on the verdict, but struck the award of attorney fees and costs. *Id*. This Court agreed that "[t]he award of attorney fees and costs was indeed beyond the power of the jury" and, therefore, was improper. *Id*. at 167. However, this Court held that the trial court erred in regarding the award of attorney fees and costs as surplusage, stating:

> The trial court apparently believed that the award of attorney fees was surplusage and could be disregarded in entering the judgment. If the jury intended the award to compensate plaintiff only for its legal costs, the award would indeed be surplusage. However, the jury may have intended that the award ensure that plaintiff would have received the full amount of its compensatory damages, undiminished by legal costs. It is reasonable to suppose that, if the jury had been informed that it could not award attorney fees, it would have increased plaintiff's compensatory damages. For this reason, we do not believe the award of attorney fees and costs was surplusage. Nor do we find that the jury's intent was ascertainable. It is equally reasonable to assume that the jury, correctly informed, would have stuck to its original damage award in the conviction that that was all plaintiff deserved. The trial court, therefore, did not have the authority to delete the attorney fees and costs in the final judgment as either surplusage or consistent with the jury's ascertainable intent. The correct response was either to reinstruct the jury or order a new trial. The only available appellate remedy is to reverse the judgment and order a new trial. [*Id*. at 168-169.]

In *McCormick v Hawkins*, 169 Mich 641; 135 NW 1066 (1912), the plaintiff brought an action for libel against the newspaper owned by the defendant. The jury returned a verdict that awarded the plaintiff damages of $1,500 and required the defendant to publish a retraction of the libelous piece for three successive issues. *Id*. at 647. The trial court advised the jury that the plaintiff's only remedy was monetary damages. *Id*. at 648. The jury foreman explained that the jury wanted to vindicate the plaintiff, and the trial court responded that the plaintiff's only vindication was "dollars and cents." *Id*. The court then ordered the jury to resume deliberations. *Id*. The jury subsequently returned a verdict awarding the plaintiff damages of $3,000. *Id*. The Supreme Court held that the trial court correctly rejected the jury's first verdict and ordered further deliberations, stating:

> Should the first verdict have been received by the court and a judgment entered thereon? We are of opinion that in declining to accept it, and in further directing the jury as he did, the learned trial judge acted properly. It is, we think, clear that the jury in rendering the first verdict believed that they had power to compel defendant to publish a retraction and that such publication would be of great value to the plaintiff. That such retraction, had it been published, would have been valuable to the plaintiff, cannot be doubted. We cannot agree with counsel for defendant in their claim that the remarks of the court at this juncture were in effect such as to invite the jury to wreak vengeance upon the defendant. On the contrary, the statements of the court seem to us to be fair and judicial and to indicate no bias on the part of the court.
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> * * *

> . . . It requires no citation of authorities to demonstrate that, when a jury returns to the courtroom and tenders an imperfect, irregular, or defective verdict, it is the duty of the court to further appropriately instruct them, and direct their retirement. Jurors are not learned in the law, and very frequently misapprehend the scope of their powers and duties. Such misapprehensions, when they find expression in improper verdicts, should at one be corrected by the trial judge, and, if possible, a proper verdict secured. [*Id*. at 648-649.]

B. APPLICATION

Ass'n Research and *McCormick* both involved jury verdicts that were ambiguous as to the jury's intentions, which are distinguishable from verdicts that contain unnecessary findings that can be fairly severed from the appropriate findings in a verdict form. In *McCormick*, the Michigan Supreme Court concluded that the trial court acted correctly in ordering further deliberations, instead of severing the injunctive remedy that the jury attempted to append to the plaintiff's monetary damages, because it was unclear whether the jury believed that the intended, but impermissible, injunctive remedy would have independent value in reducing the plaintiff's monetary damages. Under these circumstances, the Court deemed it permissible for the jury to increase its finding of monetary damages to reflect the full share of damages suffered by the plaintiff, which the jury would have preferred to award through an order requiring retraction, a remedy that the law did not permit the jury to impose. Similarly, in *Ass'n Research*, this Court refused to presume that the jury would have assessed the plaintiff's damages at the same amount if it understood that it could not impose attorney fees and costs.

Here, the special verdict form clearly instructed the jury to make separate findings regarding both past and future economic and noneconomic damages. Unlike the attorney fees and costs in *Ass'n Research*, and the retraction direction in *McCormick*, there could be no confusion regarding the jury's understanding and intention with respect to the categories of damages and theories of liability. Any concern by the trial court that the jury might have intended to find for plaintiff on the CRA and WPA claims was not justified. Questions 2 and 3 were clear and unambiguous.

Moreover, the trial court further erred in accepting the jury's increased award of future economic damages. To the extent that the jury's answers to Questions 6 and 7 in the original verdict generated any uncertainty regarding its answers to Questions 2 and 3, the proper response was to ascertain the intent of the jury with respect to Questions 2 and 3. There was no inconsistency or uncertainty concerning the jury's awards of past and future economic damages, and the monetary amount of any future economic loss is entirely unrelated to the amount of any noneconomic damages. By again answering "no" to Questions 2 and 3, the jury dispelled any suspicion that it actually intended to render a verdict in plaintiff's favor on the CRA and WPA claims. That concern dispelled, the trial court should have struck the jury's revised answer to Question 5 because there was no basis for reconsidering Question 5. In contrast to *McCormick*, where the jury was permitted to convert the economic value of a printed retraction to a monetary amount, and *Ass'n Research*, where the jury was permitted to convert legal costs into unspecified compensatory damages, it was impermissible for the jury in this case to convert noneconomic damages to economic damages, because those are distinct categories of damages, and the former category is not recoverable for common-law breach of employment contract claims. See

Valentine, 420 Mich at 258-263; *Stopczynski v Ford Motor Co*, 200 Mich App 190, 196-197; 503 NW2d 912 (1993). As such, there was no legal basis for allowing the jury to reevaluate its finding of future economic damages under the circumstances of this case.

Accordingly, we vacate in part the judgment for plaintiff and remand for entry of a judgment consistent with the jury's initial award of $56,000 in past economic damages and $83,577 in future economic damages, for a total damage award of $139,577.

III. CONCLUSION

Under the circumstances of this case, the jury's initial award of past and future noneconomic damages was surplusage, as the intent of the jury was clear from its unambiguous answers concerning plaintiff's CRA and WPA claims. As such, the trial court erred in ordering the jury to resume its deliberations and accepting the jury's increased award of future economic damages.

Vacated in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Michael J. Riordan