

APPELLATE COURT CASE NUMBER: A05-2362

STATE OF MINNESOTA

IN COURT OF APPEALS

STEVEN YOUNGQUIST, TRUSTEE FOR THE NEXT-OF-
KIN OF SHERYL LYNN GASNER,

Appellant,

vs.

WESTERN NATIONAL MUTUAL INSURANCE COMPANY,

Respondent.

APPELLANT'S REPLY BRIEF

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ARGUMENT

- I. **The trial court erred when it instructed the jury to “adjust,” or determine the present cash value of the loss of future aid, advice, comfort and companionship which decedent would have provided her next-of-kin during the course of the expected lives of decedent and her next-of-kin.**

Respondent argues that since “Appellant has not cited a single case holding that future pecuniary loss damages in the form of loss of aid, advice, comfort and companionship in a wrongful death case are not subject to adjustment to present value,” the trial court did not abuse its discretion in instructing the jury as it did. (Resp’t Br. at 3). Conversely, of course, Respondent does not cite a single case holding that future pecuniary loss damages in the form of loss of aid, advice, comfort and companionship in a wrongful death case are subject to adjustment to present day value. The reason for this lack of citation, of course, is that this is an issue of first impression in this State.

Respondent’s historical analysis, while an interesting read and a restatement of information well known to practitioners in this field, does little to answer the question posed on this appeal. Respondent’s argument seems to focus on the proposition that damages in a wrongful death matter are limited to “pecuniary” losses, which no one disputes. The narrow question raised on this appeal, however, is whether the loss of aid, comfort and advice, a particular measure of “pecuniary” damage in a wrongful death matter, is a loss which is susceptible to reduction to present day value, in the manner of lost future earnings of the decedent for which appellant called an economist at trial.

Damages are adjusted because getting a dollar today is worth more than getting a dollar tomorrow, since the dollar invested today can earn interest over time. Therefore, the whole purpose behind adjustment is to prevent an injured party from getting a windfall in the form of interest accrued from the date of the award for a particular future

expense, such as medical expenses or loss of earnings, until the money is actually used for that particular future expense.

The language of Minnesota Civil Jury Instruction 90.25 is consistent with the reasoning underlying “adjustment” in that it requires adjustment of “damages only for [l]oss/reduction of future earning capacity” and/or “[f]uture health care expenses,” specific, quantifiable future expenses which will become due at a specific time in the future. CIV JIG 90.25 (emphasis added). In contrast, the Jury Instruction specifically precludes adjustment of damages for future pain, disability, and emotional distress. CIV JIG 90.25. “The purpose of giving damages for pain and suffering is to compensate the injured party for his **loss**, not to reimburse him for his future **expenses;**” therefore, the law does not require “an injured plaintiff to invest her pain, suffering and disability awards and use the interest accruing thereon for future medical expenses and wage losses.” Busch v. Busch Const. Inc., 262 N.W.2d 377, 397 (Minn. 1977) (emphasis added). Future pain and suffering damages cannot be adjusted to present day value because no windfall occurs when compensating a plaintiff for a continuing loss which will wax and wane over time.

Although Minnesota Civil Jury Instruction 90.25 is silent with respect to whether damages for loss of future aid, comfort, advice and companionship in a wrongful death matter should be adjusted, these damages are more akin to those for future pain and suffering in a personal injury claim, which are not discounted to present value because such losses are not susceptible to liquidation, as opposed to damages for loss/reduction of future earnings capacity and/or future health care expenses, which are susceptible to a reduction to present day value. CIV JIG 90.25; Busch, 262 N.W.2d at 398. Like pain

and suffering damages, damages for loss of future aid, comfort, advice and companionship in a wrongful death matter cannot be adjusted to present value because no windfall occurs when compensating the next-of-kin for a continuing loss which will wax and wane over time, rather than a cost which will become due at a specific time in the future.

II. The trial court erred when it denied plaintiff's motion for new trial on the issue of damages

Respondent appears to concede that, if the trial court erred in instructing the jury as to adjustment of future losses of aid, comfort, advice and companionship, the result was a reduced verdict which necessitates a new trial on the issue of damages.

CONCLUSION

The trial court erred in instructing the jury to adjust its award for future loss of aid, comfort, advice and companionship to present day value. A new trial on the issue of damages for loss of aid, comfort, advice and companionship is necessary to correct this error.

Dated this 28th day of February, 2006.

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