

NO. 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.

RESPONDENT'S BRIEF

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STATEMENT OF LEGAL ISSUES

(1) Did the trial court abuse its discretion in instructing the jury that damages awarded for future loss of aid, advice, comfort, and companionship in a wrongful death claim were to be adjusted to present value?

Trial Court held: Damages awarded for future loss of aid, advice, comfort, and companionship in a wrongful death claim are a pecuniary loss subject to adjustment to present value.¹

Authority:

Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961);
Turenne v. Smith, 215 Minn. 64, 71, 9 N.W.2d 409, 412 (Minn. 1943);
Minn. Stat. § 573.02, Subd. 1.

STATEMENT OF THE CASE

This is an action for damages arising out of a two-car accident that occurred on November 14, 2000 which resulted in the death of Sheryl Gasner, a passenger in a vehicle being driven by her husband, Frank Gasner. After settling his claims against Mr. Gasner and the other at-fault driver, Herman Eaker, for a total of \$925,000, the trustee for the next-of-kin of Sheryl Gasner sued her automobile insurer, Western National Mutual Insurance Company, for underinsured motorist benefits, claiming Mr. Eaker was underinsured.

Mr. Eaker was insured under a State Farm policy which afforded total liability coverage of \$1.1 million dollars. The matter was tried to a jury in Steele County in August

¹ Appellant states that two issues exist, but the second issue is, in fact, identical to the first.

of 2005, the Honorable Casey Christian presiding. On August 3, 2005, the jury returned a verdict awarding damages totaling \$982,762.69. A. 64. Because the jury's verdict established that Eaker was not an underinsured tortfeasor, the Court entered judgment in favor of Western National. A. 115-117.

Subsequent to the Court's entry of judgment, Appellant moved for a new trial, arguing solely that the Court erred in instructing the jury that any award for loss of future aid, advice, comfort, and companionship was to be adjusted to present value. Upon denial of the motion for redress, Appellant initiated this appeal.

STATEMENT OF FACTS

Respondent takes no issue with the Statement of Facts as recited by Appellant in his brief.

LAW AND ARGUMENT

I. STANDARD OF REVIEW.

When the sole issue before an appellate court is a district court's decision on jury instructions, the trial court will not be reversed absent an abuse of discretion. *Rowe v. Munye*, 702 N.W.2d 729, 735 (Minn. 2005). Further, district courts generally are given considerable latitude in choosing jury instructions. *Morlock v. St. Paul Guardian Insurance Co.*, 650 N.W.2d 154, 159 (Minn. 2002). Consequently, it matters not whether the reviewing court may have chosen to instruct the jury differently, as a trial court abuses its discretion only if its instruction "materially misstates the law". *Rowe*, 702 N.W.2d at 735.

II THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT INSTRUCTED THE JURY THAT FUTURE DAMAGES ARISING OUT OF THE LOSS OF AID, ADVICE, COMFORT AND COMPANIONSHIP IN A WRONGFUL DEATH CASE ARE TO BE ADJUSTED TO PRESENT VALUE.

A. Appellant Fails to Show Instruction Materially Misstated the Law.

As noted above, the trial court's decision must be affirmed unless Appellant can show the instruction materially misstated the law. It seems more than a little noteworthy, then, that 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. That, in and of itself, compels the conclusion that the trial court did not abuse its discretion in instructing the jury as it did. Regardless, because no caselaw exists supporting his position, Appellant's entire argument is that, equitably,

damages for future loss of companionship are akin to non-economic damages for future pain and suffering in a typical tort claim which are not subject to adjustment to present value. As will be discussed below, Appellant's argument ignores Minnesota law and should be summarily rejected.

B. The Wrongful Death Statute and *Fussner v. Andert*.

A review of the legislative and judicial history as it relates to the wrongful death statute is both helpful, and dispositive of the resolution to this appeal. Such a review begins with the statute itself, Minn. Stat. § 573.02, Subd. 1, which reads in relevant part:

The recovery in the [wrongful death] action is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death, and shall be for the exclusive benefit of the surviving spouse and next-of-kin, proportionate to the pecuniary loss severally suffered by the death. (Emphasis supplied).²

Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961), is the seminal case dealing with Minnesota's wrongful death statute. There, the Supreme Court was addressing the wrongful death of a child, and it began its analysis by recognizing that there was no recovery for wrongful death at common law, and that the remedy was therefore solely a creature of statute. *Fussner*, 113 N.W.2d at 358. It explained that, historically, the measure of damages

² The term "pecuniary" was added to Minn. Stat. § 573.02, Subd. 1 in 1951 to reflect decades of caselaw establishing that damages in a wrongful death case are limited to "pecuniary" losses. *Fussner* 113 N.W.2d at 358; *Gunderson v. Northwestern Elevator Co.*, 47 Minn. 161, 49 N.W. 694 (Minn. 1891)(damages in a wrongful death action "relate wholly to the pecuniary injury suffered by the next of kin.")

in a wrongful death claim was for “pecuniary” loss, and was limited to “recovery to the [next-of-kin] for the loss of earnings, contributions, and services in terms of dollars which the survivor might have expected to receive during the lifetime of the child.” *Id.* at 358-359. *Fussner* went on to recognize what it perceived as the inequity of only allowing a “pecuniary loss”, as it was then defined, when the claim was for the death of a child. When the statute was originally enacted in the nineteenth century, the Court stated, children provided much more financial support to parents in the form of work around the farm or other family business. *Fussner*, 113 N.W.2d at 359. With the changing times, it continued, children were far less likely to contribute significantly to the household in the form of earnings, contributions and services. As a result, it was possible that the cost of raising the child would exceed the damages allowed under the statute, resulting in no recovery. *Id.*

To remedy this perceived inequity, *Fussner* ultimately held that the definition of pecuniary loss was antiquated, and “did not conform to present-day needs and experience.” *Fussner* at 359. Consequently, *Fussner* expanded the definition of pecuniary loss to include the loss of “advice, comfort, assistance, and protection which the jury might to be of pecuniary value and which the survivor could reasonably have expected if the decedent had lived.” *Id.* at 363. Importantly, *Fussner* did not create a new type of “non-economic” damage resulting from a wrongful death.

C. The Evolution of the Wrongful Death Jury Instruction.

Prior to the revisions that were made to Minnesota's jury instructions in 1999, the wrongful death jury instruction was found in JIG 180, which read in relevant part:

In considering damages for [the claimant], you must determine an amount of money which will fairly compensate the [next-of-kin] for their pecuniary loss arising from the death of the decedent. A pecuniary loss means a loss which has a money value. 4, *Minnesota Practice, Jury Instruction Guides--Civil*, JIG 180 (3rd ed. 1986) (Emphasis Supplied).

The instruction went on to list twelve items a jury could consider when determining the amount of pecuniary loss. Included among the items were the loss of "counsel, guidance and aid", as well as the loss of "advice, comfort, assistance and protection that the decedent would have given had he or she lived." Such items, by definition, were factors encompassed under the umbrella of pecuniary loss. Specifically excluded from items to consider was the grief caused to, or the emotional distress of the surviving next-of-kin. *Id.*

Minnesota's jury instructions were revised in 1999, and the new wrongful death instruction, JIG 91.75, maintained the twelve factors to be considered when addressing damages in a wrongful death claim. Absent from the new instruction, however, was any mention of the term "pecuniary". See, 4A, *Minnesota Practice, Jury Instruction Guides--Civil*, JIG 91.75 (4th ed. 1999 & Supp.2004). The term "pecuniary" was removed, apparently, in the committee's attempt to use "plain language" in jury instructions. Consequently, the jury is no longer even instructed on the very term that defines the loss they

are being asked to determine—a term that has existed in the law for well over a century, and a term that was clearly defined by our Supreme Court in *Fussner*.

D Pecuniary Loss Damages and Adjustment to Present Value

Prior to *Fussner's* expansion of the pecuniary loss doctrine beyond its original form, it was well accepted across the nation that future pecuniary loss damages were subject to adjustment to present value.³ While Minnesota courts did not address the issue directly, *Turenne v. Smith*, 215 Minn. 64, 71, 9 N.W.2d 409, 412 (Minn. 1943) establishes that Minnesota, too, adjusted future pecuniary loss to present value. There, the Supreme Court cited the trial court approvingly when it stated, “I am not prepared to say, as a matter of law, that the parents’ net pecuniary interest in [their son’s] continuing to live was of less present value than \$7,500.” *Id.* (Emphasis supplied).

E. 1985 and the Enactment of the Discount Statute.

In 1985, the Minnesota legislature enacted Minn. Stat. § 604.07. Subdivision 1 of that statute read in relevant part:

(a) For purposes of this section, the following terms have the meanings given to them.

(b) “economic loss” means all pecuniary harm for which damages are recoverable, including, but not limited to, medical expenses, loss of earnings, and loss of earning capacity.

³ See, generally, 154 A.L.R. 796, *Duty to Instruct, and Failure to Instruct, Jury as to Reduction to Present Worth of Damages for Future Loss on Account of Death or Personal Injuries*.

* * *

(e) “non economic loss” means pain, disability, and disfigurement. (Emphasis supplied).

In enacting that statute, the legislature overturned judicial precedent which had previously excepted from the adjustment to present value any future, non-economic damages such as pain and suffering, (see, e.g., *Busch v. Busch Construction, Inc.*, 262 N.W.2d 377 (Minn. 1977)), and imposed the duty of adjustment on the courts, not the jury. See 4, *Minnesota Practice, Jury Instruction Guides--Civil*, JIG 162 (3rd ed. 1986). For the period of the statute’s existence, therefore, courts were directed that all jury awards for any future damages were to be adjusted to present value by the court. See, Minn. Stat. § 604.07, Subd. 2.

There were several challenges to Minn. Stat. § 604.07 which reached our appellate courts. See, e.g., *Schreiner v. Schmitz*, 418 N.W.2d 206 (Minn. App. 1988); *Johnson v. Farmers Union Central Exchange, Inc.*, 414 N.W.2d 425 (Minn. App. 1987), rev. denied; *Kleeman v. Cadwell*, 414 N.W.2d 433 (Minn. App. 1987). Those cases held undisputedly that, (1) the statute was constitutional and (2), the failure to instruct the jury that future non-economic damages were to be adjusted to present value constituted reversible error. Consequently, during this period, the law was that the jury should not be instructed to adjust future damages, but should be instructed that such an adjustment would ultimately take place.

In 1988, Minn. Stat. § 604.07 was repealed. However, there is no indication that this action had anything to do with dissatisfaction with the statute. Indeed, the comments to the new jury instruction addressing adjustment to present value specifically state that the effect of the repeal made the discount issue “once again subject to judicial decision.” See “Use Note”, *Minnesota Practice, Jury Instruction Guides--Civil*, JIG 91.25 (4th ed. 1999 & Supp.2004). Importantly, the authority section of the new JIG also cites to *Busch v. Busch Construction, Inc.*, 262 N.W.2d 377 (Minn. 1977) for support of the new instruction that future pain and suffering is not subject to adjustment to present value. Notably absent is any reference to any judicial decision which states that future pecuniary damage attributable to loss of aid, comfort and companionship is similarly exempt from the adjustment.

F. Civ. Jig. 90.25 Does Not Include Future Loss of Aid, Comfort and Companionship Among the Items to be Not Adjusted to Present Value.

The current JIG, 90.25, is quite specific on the damages that are not to be adjusted to present value, and they include only the four items of damage:

- A. Future pain;
- B. Future disability;
- C. Future emotional distress; and,
- D. Any past damages.

The instruction, therefore, recognizes that these non-economic damages are not subject to adjustment based on longstanding case law which predated the discount statute's existence. See, e.g. *Busch v. Busch Construction, Inc.*, 262 N.W.2d 377 (Minn. 1977).

The new instruction on adjustment must be read hand-in-hand with the new wrongful death jury instruction, JIG 91.75, which describes in detail the items to be considered by a jury in awarding damages resulting from wrongful death, and which specifically excludes consideration of loss caused by mental anguish or grief caused by the loss of the decedent. Damages of this type are simply not recoverable. Rather, damages arising out of a wrongful death action are that for pecuniary loss only.

CONCLUSION

A wrongful death claim is solely a creature of statute. Review of the legislative history of the statute, the evolution of pecuniary loss damages, and the current state of law as it relates to adjustment to present value compels a conclusion that loss of aid, comfort and companionship is part and parcel of pecuniary loss which must be adjusted to present value. Had the legislature intended or wished that such damages were not to be subject to the adjustment to present value, then it has had ample opportunity to change the statute.

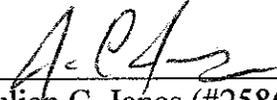
The Court should reject the Appellant's pleas which are based solely on equity, and conclude that pecuniary loss, as defined by the legislature and the courts, is an economic loss not comparable to non-economic damages such as future pain and suffering. Here, neither the trial court nor this court has been presented with case law to support the view that future loss of aid, comfort and companionship was somehow exempt from the adjustment to present value. Judge Christian's instructions did not "materially misstate the law", and his decision should be affirmed.

Dated: 2-7-06

Respectfully submitted,

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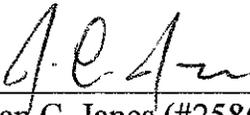
CERTIFICATION

I certify that this Brief conforms to RCAP 132.01 and was prepared as follows:

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