NO. 08-CI-3339

JEFFERSON CIRCUIT COURT
DIVISION TEN (10)
JUDGE IRV MAZE

JOHN L. RUHS — PLAINTIFF

v.

JASON M. ALBERT and PJAX, INC. — DEFENDANTS

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OPINION AND ORDER

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Plaintiff, by counsel, has moved for a new trial pursuant to Rule 59.01 of the Kentucky Rules of Civil Procedure. Defendants, by counsel, have filed a response in opposition. This matter now stands submitted.

FACTS

This case stems from an April 26, 2006 motor vehicle accident in which John Ruhs was struck while crossing the five-point intersection of Highland Avenue, Bardstown Road, and Baxter Avenue on foot. Ruhs alleged that the negligence of the defendants caused his injuries, which included a degloving injury and a comminuted fracture of his large toe.

The case was fully tried in this Court before a jury from May 24, 2011 through May 27, 2011. After careful deliberation, the jury returned a verdict for the Plaintiff. In the damages award, the jury consciously chose to award zero dollars in damages for past and future pain and suffering. Plaintiff has moved for a new trial, alleging that the

award of zero dollars for past and future pain and suffering is inadequate as a matter of law.

OPINION

I. Plaintiff Has Not Waived the Right to Move for a New Trial

Defendants first argue that Ruhs has waived his right to a CR 59.01 motion for a new trial because there was no objection to the verdict at the time it was rendered. Defense counsel directs the Court to *Payne v. Hall*, 423 S.W.2d 530 (Ky. 1968) in support of this argument. However, *Payne* does not require a party to object at the time a verdict is returned in order to move for a new trial. The issue in *Payne* was whether the parties could obtain *appellate* relief when they did not "object to the verdict when the jury returned it" or "file or make a motion for a new trial" so that the trial court could first correct the perceived error. *Id.* at 531. The *Payne* court did not require such a post-verdict objection before allowing a motion for a new trial; it simply recognized that appellate relief could not be granted where a party did not seek post-verdict relief at the trial level (either through an objection or a motion for a new trial).

The plain language of CR 59.01 and 59.02 further shows that no such objection is necessary before filing a motion for a new trial. In the present matter, the Plaintiff's motion is based on "inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). This provision does not require a specific objection to be reconsidered, unlike CR 59.01(h) which allows a new trial for "errors of law occurring at the trial and objected to by the party under the provisions of the rules." If the Plaintiff was moving for a new trial on the basis of improperly admitted evidence which was not

objected to during the trial, as an example, the failure to object prior to the admission of the evidence would be fatal to the motion for a new trial. No such fatal flaw exists in the Plaintiff's current motion.

II. The Jury was Clearly Erroneous in Awarding Zero Damages for Pain and Suffering

While it was once the law that a zero award for pain and suffering was inadequate as a matter of law when medical expenses were awarded by a jury, the Kentucky Supreme Court overruled this position. See *Miller v. Swift*, 42 S.W.3d 599, 602 (Ky. 2001). There is no iron-clad rule demanding the same result from all juries; rather, juries are free to award or not award damages for pain and suffering based upon the evidence presented at trial. To determine whether a jury was erroneous in awarding zero for pain and suffering, the facts must be reviewed. Appellate courts "will not disturb a trial court's order denying [a motion for new trial] so long as the order is supported by evidence and thus is not clearly erroneous." *Bledsaw v. Dennis*, 197 S.W.3d 115, 116 (Ky.App. 2006).

Ruhs argues that because the evidence of his pain was uncontroverted during the trial, the jury clearly erred in ignoring it. In addition to the testimony of Ruhs and his brother, multiple doctors testified regarding the pain associated with the injuries sustained by Ruhs. This Court is aware that it is possible to disbelieve testimony from the plaintiff. "A jury is not bound to believe a plaintiff or her doctors." *Spalding v. Shinkle*, 774 S.W.2d 465, 476 (Ky.App. 1989). If the only evidence of pain was the naked testimony of the plaintiff and his doctors, the jury would be free to weigh their credibility and determine whether there was in fact any pain or suffering caused by the injury.

However, a jury may not ignore the obvious nature of an injury in determining an award for pain and suffering. "While it is true that the jury did not have to believe Hazelwood's testimony regarding the pain he claims to have endured, it was not free to disregard the uncontroverted evidence of the *nature of the accident itself and the medical procedures performed.*" *Hazelwood v. Beauchamp*, 766 S.W.2d 439, 441 (Ky.App. 1989)(emphasis added). In *Hazelwood*, the plaintiff's hand was mangled in a hay baler. The defense offered no evidence contesting the pain suffered by Hazelwood; regardless of this, the jury still awarded zero damages for pain and suffering. The trial judge sent the jury back to reassess the award, at which point the jury awarded nominal damages of $250. The trial judge subsequently denied a motion for a new trial on damages. "[W]e believe the trial court abused its discretion in failing to grant Hazelwood's motion for a new trial. The jury's meager award . . . bears no relationship at all to the losses suffered by the appellant and are not supported by the evidence of record." *Id.* at 440-441.

In the present matter, Ruhs suffered similar injuries to his foot as Hazelwood suffered to his hand. The degloving injury removed all skin on his foot, exposing the bone underneath. He required three separate surgical procedures to treat his injuries. No reasonable jury could find that he suffered no pain from this injury. Additionally, no evidence was offered that his foot would have suffered similar pain even without the acts of the defendants, which would have allowed the jury to award zero damages in spite of the nature of the injury. See *Bayless v. Boyer*, 180 S.W.3d 439, 445 (evidence presented that plaintiff would have experienced serious pain regardless of the treatment option chosen by the doctor).

"[I]f the jury believed [the plaintiffs'] pain was sufficiently serious to warrant extended medical treatment to alleviate such pain and suffering, its failure to award compensation . . . means simply the jury disregarded a proven element of damages." *Falconer v. Penn Maritime, Inc.*, 421 F. Supp. 2d 190, 198 (D. Maine 2006). "Where we are faced with zero dollar awards when damages are clearly evident, however, we have no choice but to declare that the verdicts are inconsistent." *Id.* The plaintiff had his foot ripped open to the bone; no reasonable jury could find, in the absence of countervailing evidence, that he suffered no pain from this.

The Court is extremely hesitant to grant a motion for a new trial. The role of the jury is sacred in our society. They are charged with weighing the evidence and ruling upon it, and a judge should not overturn the decision of a jury simply because he or she disagrees with their decision. Rare is not a strong enough word when describing how often a jury's verdict should be set aside. However, our Rules of Civil Procedure recognize a simple truth – that even the nearly sacrosanct verdict of the jury may be erroneous. When, as in this case, there is evidence of pain which no reasonable person can ignore and a jury, after determining liability, returns a zero award for pain and suffering, that extraordinary situation arises where their verdict must be vacated and a new trial granted.

ORDER

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff's Motion for a New Trial is **SUSTAINED**. The portion of the previous judgment relating to damages for pain and suffering is hereby **VACATED**. A new trial will be scheduled with a new jury empanelled and try the limited question of the appropriate amount of

damages for the pain and suffering endured by John Ruhs as a result of the April 26, 2006 accident. All other matters decided by the previous jury shall be upheld.

IT IS SO ORDERED.

IRV MAZE, JUDGE
JEFFERSON CIRCUIT COURT

7/8/11
DATE

CC: Cara W. Stigger, Esq.
Suzanne M. Bachovin, Esq.
Daniel G. Brown, Esq.

ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
JUL 08 2011
BY: DEPUTY CLERK

NO. 08-CI-3339

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ORDER

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This matter comes before the Court on Plaintiff's Motion to Alter, Amend, or Vacate the Court's Opinion and Order of June 2, 2011.[1] After review of the documents submitted the parties, the Court issues the following amendments to its ruling.

1. One of the Plaintiff's witnesses, Dr. Brian Schulman, was omitted from the list of testifying witnesses. He is hereby recognized as having testified for the Plaintiff.

2. As a clarification to Order #4 of the original order, the following shall be added: Civil Rule 54.04(1) provides that the prevailing party shall be awarded attorney fees "unless the court otherwise directs." In light of the jury's apportionment of responsibility equally between the parties, the Court believes that each party should be responsible for its own expenses.

3. Payment shall include Medicare as a payee in order to properly protect the Defendants from the risk of double damages pursuant to 42 U.S.C. § 1395y(b)(2)(B)(iii).

4. The Court is reserving the issue of the Plaintiff's motion for a new trial pursuant to Rule 59.01 of the Rules of Civil Procedure and will address the same by way of a separate opinion and order.

[1] The original proposed judgment was submitted via a direct letter to the Court tendered by the Defendants' counsel. Plaintiff's counsel subsequently sent the Court a letter stating the grounds for objection to the judgment. Defense counsel sent a follow-up letter contesting the objections listed by the Plaintiff's counsel. Because the proposed judgment was accepted via a direct letter as opposed to a filed motion, the Court has chosen to treat the documents sent directly to the Court as proper filings pursuant to Rule 5.05 of the Kentucky Rules of Civil Procedure.

No other amendments shall be made and the judgment of the Court, with the above amendments, shall be considered final subject to the pending CR 59.01 motion.

IT IS SO ORDERED.

ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
JUL 07 2011
BY _____ DEPUTY CLERK

IRV MAZE, JUDGE
JEFFERSON CIRCUIT COURT

7/7/11
DATE

CC: Cara W. Stigger, Esq.
Suzanne M. Bachovin, Esq.
Daniel G. Brown, Esq.