

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

ESTATE OF BURR NEEDHAM, Deceased, by  
ALAN MAY as Personal Representative,

UNPUBLISHED  
October 3, 2013

Plaintiff-Appellee/Cross-Appellant,

v

No. 303999  
Monroe Circuit Court  
LC No. 05-19213-NH

MERCY MEMORIAL NURSING CENTER, a/k/a  
MONROE COMMUNITY HEALTH SERVICES,

Defendant-Appellant/Cross-  
Appellee,

and

ARUN GUPTA, M.D., WILLINE BELOW,  
L.P.N., RETA OBLINGER, L.P.N., S. SCOTT,  
L.P.N., TINA DALE, L.P.N. and JULIE CEBINA,  
L.P.N.,

Defendants.

---

ESTATE OF BURR NEEDHAM, Deceased, by  
ALAN MAY as Personal Representative,

Plaintiff-Appellee,

v

No. 304832  
Monroe Circuit Court  
LC No. 05-19213-NH

ARUN GUPTA, M.D.,

Defendant-Appellant,

and

MERCY MEMORIAL NURSING CENTER, a/k/a  
MONROE COMMUNITY HEALTH SERVICES,  
WILLINE BELOW, L.P.N., RETA OBLINGER,  
L.P.N., S. SCOTT, L.P.N., TINA DALE, L.P.N.

---

and JULIE CEBINA, L.P.N.,

Defendants.

---

Before: MURPHY, C.J., and JANSEN and MURRAY, JJ.

MURPHY, C.J. (*concurring in part and dissenting in part*).

I concur with the majority on all matters, except with respect to the analysis and holding concerning loss of financial support in connection with economic damages, and in regard to the applicable tier in MCL 600.1483 for purposes of the medical malpractice caps and noneconomic damages. On those two matters, I respectfully dissent.

We review for an abuse of discretion a trial court's decision to deny a motion for remittitur. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 522; 780 NW2d 900 (2009). “The power of remittitur should be exercised with restraint.” *Id.* When a trial court is evaluating a motion for remittitur, the court is required to examine all of the evidence in a light most favorable to the nonmoving party in order to determine whether the evidence supported the jury's damage award. *Id.* “If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, it should not be disturbed.” *Id.* (citation omitted). In *Hofmann v Auto Club Ins Ass’n*, 211 Mich App 55, 108; 535 NW2d 529 (1995), this Court outlined some basic tenets regarding damages:

A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate. Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages. [Citations omitted.]

Here, there was evidence that the decedent, Burr Needham, operated his own holistic medicine business in the Gibraltar Trade Center. Needham's step-daughter testified that Needham provided financial support to her mother, Needham's wife Betty who died about five and a half years after Needham. The step-daughter indicated that Needham took care of Betty by paying for gifts, clothing, transportation, groceries, and other things needed by Betty, which all ended upon his death. Previous deposition testimony provided by Betty was read into the record at trial, and she stated that Needham's business generated approximately \$48,000 per year in gross sales during his good years, although it was getting bad towards the end. Betty took over operation of the business for a couple of years following Needham's death before shuttering it. Betty testified that sales went down after she started running the business. Another one of Needham's step-daughters testified that Needham loved the business, that he had “a big customer base,” and that Needham showered Betty with gifts, “always buying her something.” There was no evidence that countered the testimony recited above. While lacking some precision, the

evidence firmly established that Needham had an income flow from his business and that it was used, at least in part, to support Betty.

The majority rejects any claim for economic damages predicated on lost wages, earnings, or financial support on the basis that it was waived. Plaintiff's counsel did state in a pretrial hearing that "we are not going to be asserting a claim for a loss of wages or a loss of earnings." But he then proceeded to state, "I don't want to waive all economic damages until I look at it one more time before trial." Regardless of these pretrial remarks, in closing arguments at trial, plaintiff requested an award of economic damages, including damages for "loss of . . . financial support . . . that . . . Needham was . . . giving Betty." There was no objection to the argument. During defendants' closing argument, defense counsel contended that there was no actual evidence of economic damages, which counsel defined as, "for example, lost wages, you know concrete things." The trial court then instructed the jury that if it decided that plaintiff was entitled to damages, those damages could include compensation for losses suffered by the estate, "including loss of financial support." There was no objection by defendants to this instruction, and the record, which includes a lengthy discussion of the instructions, indeed appears to indicate that defendants specifically agreed to the financial support instruction. Therefore, despite the comments by plaintiff's counsel at the pretrial hearing, neither the parties nor the trial court proceeded or acted as if the issue of damages for lost financial support was waived. The bottom line is that the issue was presented to the jury for resolution and there was some supporting evidence when viewed in a light most favorable to plaintiff. Although the evidence did not support the full \$350,000 in economic damages awarded by the jury, complete evisceration of the award through remittitur is not, in my view, appropriate under the circumstances.

With respect to the noneconomic damages and whether the lower or higher medical malpractice damages cap applies under MCL 600.1483, issues of statutory construction are reviewed de novo on appeal. *Shivers v Schmiede*, 285 Mich App 636, 646; 776 NW2d 669 (2009). "However, in deciding whether plaintiff's injuries qualify for the higher cap, the trial court is the finder of fact with regard to these unique elements of damage." *Id.* (citation and internal quotation marks omitted). The court's factual finding on the matter is reviewed for clear error. *Id.* at 649.

As indicated by the majority, this issue comes down to whether Needham had "permanently impaired cognitive capacity rendering him . . . incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living." MCL 600.1483(1)(b). In *Young v Nandi*, 276 Mich App 67, 79-80; 740 NW2d 508 (2007), vacated in part on other grounds 482 Mich 1007 (2008), this Court construed the language in MCL 600.1483(1)(b), and after reviewing dictionary definitions, it ruled:

The meaning of "permanently impaired cognitive capacity" includes damage to or diminishment of one's mental ability to perceive, memorize, judge, or reason that is expected to last forever. Turning back to MCL 600.1483(1)(b), to establish this qualifying injury the plaintiff must suffer damage to or diminishment of his or her mental ability to perceive, memorize, judge, or reason that is permanent "rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living." *Id.* And, this permanently impaired

cognitive capacity must be the “result of the negligence of 1 or more of the defendants . . . .” MCL 600.1483 (1). [Omission in original.]

In *Shinholster v Annapolis Hosp*, 471 Mich 540, 567-568; 685 NW2d 275 (2004), our Supreme Court observed:

[O]n the basis of the statutory language previously discussed, we believe that the better interpretation of the statute is that, as long as a plaintiff suffers, while still living and as a result of a defendant's negligent conduct, one of the enumerated conditions set forth in § 1483, the statute's higher damages cap applies.

Because plaintiff in this case presented evidence from which it could be rationally concluded that, “as the result of the negligence of 1 or more of the defendants,” it could have been said at some time before her death that she “is hemiplegic, paraplegic, or quadriplegic [as a result of] [i]njury to the brain,” or “has permanently impaired cognitive capacity,” we agree with the determination made by the lower courts that the higher damages cap of § 1483 applies under the circumstances of this case.

Dr. Karl Steinberg testified that, based on documented low blood pressure measurements, Needham had been in shock for a significant period, and he then testified:

Q. Okay. And, in fact, when you have blood pressure of the magnitude that we're talking about right now, as low as it is, is there, in fact, brain damage to my client?

A. There is.

Dr. Carl Schmidt, a forensic pathologist, testified that Needham had suffered brain damage before his death. Dr. Schmidt's diagnosis was “[i]schemic brain injury.” He then testified:

Q. And once he had that [ischemic brain injury] on the 30th, how bad was it in terms of future life?

A. Well, it was bad enough that the widow was approached about putting him on end-of-life care.

Q. Okay. And from what you saw, was his brain ever gonna recover at that point?

A. Well, I don't think that he had any hope of recovering.

Q. [W]ould that include an injury to his brain, sir?

A. Sure.

Dr. Schmidt admitted that there was “no diagnostic laboratory data” to support the conclusion of brain damage; however, the doctor indicated that his opinion was supported by clinical impressions. Dr. Bader Cassin, defendants’ expert and a forensic pathologist, testified that Needham was comatose prior to his death, that there was thus at least “a low level of brain damage,” and that “the brain [was] not functioning properly.” Cassin did indicate that Needham’s comatose status did not necessarily mean that he had permanent brain damage. Defendant Dr. Arun Gupta, who was the treating physician, testified that he observed Needham the day before his death and that Needham was unable to respond to any of Dr. Gupta’s questions. Dr. Gupta noted that there had been “mental status changes the night before,” which were consistent with Needham’s inability to respond to the doctor’s questions. At one point in his testimony, Dr. Gupta observed that “[b]rain damage, to me, is an irreversible process.” Dr. Gupta acknowledged a report by another physician who saw Needham the morning of his death, which report contained a notation that Needham was unable to answer questions and was “totally incompetent.” When queried about what being totally incompetent meant, Dr. Gupta stated:

He cannot comprehend, he cannot answer any questions. You know, he’s not able to make any decisions if he can’t communicate with the guy. I mean he could have a head injury, he could be, you know, medicines, whatever the situation is.

Dr. Michael Paletta, an expert testifying on behalf of defendants, acknowledged that Needham’s brain had been negatively impacted at the time he was comatose. There was also evidence that in the days leading up to his death, Needham had been confused, lethargic, disoriented, and experiencing visual hallucinations before he eventually lapsed into a coma and then passed away.

On this record, I cannot conclude that the trial court committed clear error in its factual finding that Needham’s injuries fell within the higher medical malpractice cap. As in *Shinholster*, I would affirm because plaintiff presented evidence from which it could be “rationally concluded” that Needham had “permanently impaired cognitive capacity rendering him . . . incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.” I note that in *Young*, 276 Mich App at 80, the only evidence presented by the plaintiff was that the decedent had been on a ventilator, was medically sedated, and was unable to make medical decisions on her own behalf. Here, we have testimony, relative to the period before his ultimate death, that Needham suffered visual hallucinations and confusion, that his mental processes continued to deteriorate, that he eventually could not respond to questions and was totally incompetent, that he lapsed into a coma, that he suffered brain damage, and that there was no hope of recovery as to the brain injury. I conclude that there was sufficient evidence to show that Needham suffered damage to or diminishment of his mental ability to perceive, memorize, judge, or reason that was permanent.

For the reasons stated above, I respectfully concur in part and dissent in part.

/s/ William B. Murphy