2018 IL App (1st) 180422-U
No. 1-18-0422
Order filed December 31, 2018

FOURTH DIVISION

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

GENE A. SCOW, SR., as Independent Administrator of the Estate of Gene A. Scow, Jr., Deceased,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 15 L 12140
CLAUDE A. BERRIEN, Individually and as Agent of RICE TRANSPORT SERVICES, LTD.,	)	The Honorable Clare E. McWilliams, Judge, presiding.
Defendants-Appellants.	)	

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The jury's verdict was not against the manifest weight of the evidence, where defendants' own accident reconstruction expert testified that defendants' tractor-trailer truck "ran over the [decedent's] body"; where a finding that defendants' truck did, in fact, strike the decedent's body and/or the bicycle that he was riding was further supported by the testimony of two other accident reconstruction experts, one hired by plaintiff and one employed by the State of Illinois; and where the jury could have found that the driver's denial of hitting the decedent was self-serving.

¶ 2 On October 12, 2017, a jury returned a verdict in plaintiff's favor and against defendants for $1.925 million, in connection with a vehicular accident on November 12, 2014, in which plaintiff, the decedent's father, claimed that a tractor-trailer truck driven by defendant Claude A. Berrien as an agent for defendant Rice Transport Services, Ltd., struck and killed Gene A. Scow, Jr., age 46, who was on a bicycle. At trial, defendant Berrien testified that his truck never made contact with the decedent and that he did not observe the decedent until noticing his body in the road in his mirror. However, defendants' accident reconstruction expert opined that the fourth and fifth axles of the truck's trailer ran over the decedent's pelvis. The medical examiner who performed the autopsy testified that the decedent died as the result of his multiple injuries and that it was "impossible to say which injury occurred first and which one killed him." The jury found the decedent to be 30 % comparatively negligent, and the trial court entered judgment on the verdict on that day. On January 30, 2018, the trial court denied defendants' posttrial motion, and defendants appealed on February 26, 2018.

¶ 3 On appeal, defendants claim: (1) that the trial court erred in refusing to submit defendants' special interrogatory to the jury; (2) that the trial court erred in not granting a remittitur of the awards of damages for grief, sorrow and lost society where the decedent had little contact with his father and brother during the four years prior to his death; (3) that the verdict was against the manifest weight of the evidence; (4) that the trial court abused its discretion by allowing plaintiff to introduce accident reconstruction testimony without an adequate foundation; (5) that the trial court erred in granting plaintiff's motion *in limine* no. 24 and barring defendant Berrien from testifying that decedent's neck felt cold when he checked for a pulse. Although the result is tragic, the event itself is a fairly straight-forward vehicular accident and, thus, we discuss the facts relating to each claim in the respective sections below. For the following reasons, we affirm.

¶ 4 I. Special Interrogatory

¶ 5 First, defendants claim that the trial court erred by refusing to submit defendants' special interrogatory to the jury.

¶ 6 A trial court's denial of a request for a special interrogatory is a question of law that is reviewed *de novo*. *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 38 (2008); *Hooper v. County of Cook*, 366 Ill. App. 3d 1, 6 (2006).

Section 2-1108 of the Code of Civil Procedure governs special interrogatories and provides as follows:

> "Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly." 735 ILCS 5/2-1108 (West 2014).

¶ 7 Our supreme court has found that "[t]he principles to be applied with respect to special interrogatories are well settled," and that they were definitively "articulated" by the court in the case of *Simmons v. Garces*, 198 Ill. 2d 541, 555-56 (2002). *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 111 (2005) (discussing *Simmons*). In *Simmons*, the supreme court found that: "A special interrogatory is in proper form if (1) it relates to a an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be

returned." *Simmons*, 198 Ill. 2d at 555. Defendants argue that their proposed interrogatory would have been controlling on an ultimate issue.

¶ 8 The special interrogatory tendered by defendants asked the following:

"Do you find that none of the tires on the vehicle driven by Claude A. Berrien came into contact with the head of the decedent, Gene A. Scow, Jr., on November 12, 2014?

YES ____ NO____"

¶ 9 When the trial court denied this interrogatory, it observed that "[t]his case *** did not really hinge on whether Gene Scow's head was run over by a truck, because Dr. Helenowski testified to multiple injuries being the cause, not just one." Dr. Marta Helenowski, the assistant medical examiner who performed the autopsy, testified that the decedent suffered multiple injuries, including fractures of the skull, facial bones, ribs, and hips; that all of the injuries could have contributed to his death; that she could not state which injuries occurred first; and that he died as the result of his multiple injuries. Specifically, she testified: "It's actually impossible to say which injury occurred first and which one killed him."

¶ 10 On appeal, defendants argue: "Although all of his injuries contributed to his death, the head injuries alone would have been fatal if he sustained no other injuries ***." Thus, defendants concede, as they must in light of the evidence,

that "all of his injuries contributed to his death." However they argue on the basis of a hypothetical "if," which is not supported by the record. The "if" is contingent on his having "sustained no other injuries," when the undisputed evidence was that he sustained multiple extensive "other injuries."

¶ 11 In addition, plaintiff did not have to prove that it was specifically the tires that made contact with the decedent's body. It could have been the axles, for example. Plaintiff also did not have to prove that the tractor-trailer truck specifically made contact with the decedent's head.

¶ 12 Finally, we observe that the interrogatory's "none of" phrasing is inherently confusing. If the jurors wanted to answer in plaintiff's favor, they would have been required to answer "no," thereby creating a confusing double negative. Thus, we cannot find that the trial court erred by denying defendants' special interrogatory.

¶ 13 II. Remittitur

¶ 14 Second, defendants claim that the trial court erred in not granting them a remittitur. The jury found gross damages of $2 million for grief and sorrow and $750,000 for lost society and found that the decedent was 30 % comparatively negligent, resulting in a net award to plaintiff of $1.925 million. Although the evidence at trial established that the decedent was close to his family until recently, the evidence also established that he had little contact with them for

the last four years. Defendants argue that, in light of the fact that the decedent had no contact with his family for the last four years, the trial court erred by not granting defendants a remittitur.

¶ 15 On appeal, both parties quote from Justice Wolfson's opinion in *Barry v. Owens-Corning Fiberglass Corp.*, 282 Ill. App. 3d 199, 207-08 (1996), as setting forth the governing law. Concerning the standard of review, Justice Wolfson wrote: "What, then is the standard [a reviewing court] must use to determine whether a jury award may stand? The cases tell us a verdict should not be disturbed unless it is so large that it is the apparent result of passion or prejudice, or that it falls outside the limits of reasonable compensation." *Barry*, 282 Ill. App. 3d at 207.

¶ 16 This court explained:

> "Reviewing courts rarely disturb jury awards. For good reason. We are in no better position to judge the appropriate amount of a verdict than are the 12 people who see and hear the arguments and the evidence. They use their combined wisdom and experience to reach fair and reasonable judgment. We are neither trained nor equipped to second-guess those judgments about the pain and suffering and familial losses incurred by other human beings. To pretend otherwise would be sheer hubris.

> There comes a point, of course, where judges must intervene. We do that when we are able to find from a particular record that passion or prejudice must have played a role in reaching the verdict, or that it was so grossly excessive that it may not stand as a matter of law. We are trained and equipped to do that. It is a responsibility we must accept." *Barry*, 282 Ill. App. 3d at 207.

¶ 17 Similarly, this court stated in *Epping v. Commonwealth Edison, Co.*, 315 Ill. App. 3d 1069, 1072 (2000): "The power to order a remittitur of damages—a long recognized and accepted part of Illinois law—should be employed only when an award falls outside the range of fair and reasonable compensation, appears to be the result of passion or prejudice, or is so large that it shocks the judicial conscience." However, "[*r*]*emittitur* should not be applied when the award 'falls within the flexible range of conclusions which can be reasonably supported by the facts.' " *Epping*, 315 Ill. App. 3d at 1072 (quoting *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 470 (1992)).

¶ 18 In support of their argument that the damage award is excessive, defendants cite several cases from the 1990s and earlier that found a $2 million award excessive. *Cartwright v. Goodyear Tire & Rubber Co.*, 279 Ill. App. 3d 874, 881 (1996); *Brown v. Arco Petroleum Products Co.*, 195 Ill. App. 3d 563, 572 (1991); *Bart v. Union Oil Co. of California*, 185 Ill. App. 3d 64, 69 (1989)

(while reversing and remanding for a new trial on other grounds, the appellate court also found that "the trial court's decision to remit" was "well-founded," but should have gone further, in light of "the decedent's age and the emancipation of his children"). For example, in *Cartwright*, the trial court "granted a remittitur based on the testimony regarding" plaintiff's unrelated "reported heroism [in the United States army]" that the trial court found, "resulted in a grossly excessive verdict based on passion and sympathy." *Cartwright*, 279 Ill. App. 3d at 881. However, on appeal, this court never reached the remittitur issue because we reversed and remanded on other grounds. *Cartwright*, 279 Ill. App. 3d at 886. In *Brown*, 195 Ill. App. 3d at 572, this court found "that the record fails to provide a basis for the jury's $2 million award," where "the errors occurring at trial may have resulted in the jury's allocation of only ten percent comparative negligence to decedent." Both cases are inapposite to the case at bar, since the remittitur*s* in both cases were based on specific trial errors and, in the case at bar, defendants do not claim that trial errors were the reason for the claimed remittitur.

¶ 19 Even if we were to find these decades-old cases still informative with respect to dollar amounts, "[c]ourts in this State 'have traditionally declined to make such comparisons in determining whether a particular award is excessive ***.' " *Epping,* 315 Ill. App. 3d at 1072 (quoting *Richardson v. Chaplin*, 175 Ill.

2d 98, 114 (1997)). " '[T]he clear weight of Illinois authority has been to reject the "comparison" concept.' " *Epping,* 315 Ill. App. 3d at 1072-73 (quoting *Tierney v. Community Memorial General Hospital*, 268 Ill. App. 3d 1050, 1065 (1995)). " 'Establishing predictability of outcome for people similarly situated has surface attraction, but the courts of this State never have imposed on juries a requirement of conformity in damage awards.' " *Epping,* 315 Ill. App. 3d at 1073 (quoting *Barry*, 282 Ill. App. 3d at 207). In *Epping*, this court concluded: "We will not compare." *Epping,* 315 Ill. App. 3d at 1073.

¶ 20 In the case at bar, where the evidence at trial established that the 46-year-old decedent had a close and caring relationship with his 75-year-old father and 44-year-old brother for most of his life, although they had little contact for the last four years, and where defendants have not asserted any specific trial errors relating to their remittitur claim, we cannot find that the jury was guided by passion and prejudice when it awarded gross damages of $2 million for grief and sorrow and $750,000 for lost society. *Racky v. Belfor USA Group, Inc.*, 2017 IL App (1st) 153446, ¶ 146 (this court affirmed the trial court's award of damages for grief and sorrow, finding that "[w]hether or not the [plaintiff] daughters had a relationship with their father" at the time of his death was "not dispositive"); *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶¶ 121-124 (where the jury heard and considered the evidence regarding "the

alleged estranged relationship" between the decedent and his children, this court affirmed the jury's $2 million damage award for loss of society).

¶ 21 III. Manifest Weight

¶ 22 Third, defendants claim that the verdict in plaintiff's favor was against the manifest weight of the evidence and, thus, the trial court erred in denying their posttrial motion for a new trial.

¶ 23 A trial court will set aside a jury's verdict and grant a posttrial motion for a new trial if the jury's verdict is against the manifest weight of the evidence. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 100-01 (2010); *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based on any of the evidence. *Lazenby*, 236 Ill. 2d at 101; *Maple*, 151 Ill. 2d at 454.

¶ 24 On appeal, a reviewing court will not reverse a trial court's ruling on a motion for a new trial unless the trial court abused its discretion. *Lazenby*, 236 Ill. 2d at 101; *Maple*, 151 Ill. 2d at 455. Our supreme court has described our standard of review as follows:

> "[I]t is important to keep in mind that ' "[t]he presiding judge in passing upon the motion for a new trial has the benefit of his previous observation of the appearance of the witnesses, their manner in testifying,

> and of the circumstances aiding in the determination of credibility." ' (*Buer v. Hamilton*, 48 Ill. App. 2d 171, 173-74 (1964), quoting *Hulke v. International Manufacturing Co.*, 14 Ill. App. 2d 5, 47 (1957)). If the trial judge, in the exercise of his discretion, finds that the verdict is against the manifest weight of the evidence, he should grant a new trial; on the other hand, where there is sufficient evidence to support the verdict of the jury, it constitutes an abuse of discretion for the trial court to grant a motion for a new trial." *Maple*, 151 Ill. 2d at 454.

In determining whether a verdict was contrary to the manifest weight of the evidence, a reviewing court must view the evidence in the light most favorable to the appellee. *Cipolla v. Village of Oak Lawn*, 2015 IL App (1st) 132228, ¶ 60.

¶ 25 Defendants argue that the sole eyewitness, namely, the defendant driver, denied that his truck made contact with the decedent's body and that the jury's verdict was "a product of the speculative accident reconstruction opinions." First, the jury could have found that the driver's testimony was self-serving. Second, one of the accident reconstruction opinions that defendants now find "speculative" was actually put forth by defendants. Third, defendants' own expert contradicted the driver. The expert testified:

"Q. *** Mr. Berrien unequivocally said, you read his testimony, that he never went out of first gear and that's as fast as he can go is seven miles per hour, fair?

A. That's what he said, yes.

Q. And you used that, right?

A. Yes.

Q. Okay. Because that's the only witness to the incident, am I correct?

A. That's correct.

Q. Now, you also read in his deposition that at nowhere, at no time did he run over a body, am I correct?

A. That's correct.

Q. But your simulation says he did run over a body, am I correct?

A. That's correct. The fourth and fifth axles actually did in that simulation ran over the body, yes."

Fourth, defendants' own expert, as the above testimony indicates, concluded that defendants' tractor-trailer truck "ran over the [decedent's] body." Fifth, a finding that defendants' tractor-trailer truck did, in fact, strike the decedent's body and/or the bicycle that he was riding, was also supported by the testimony of two other accident reconstruction experts, one hired by plaintiff and one employed by the State of Illinois. In light of this evidence, we cannot say that

the jury's verdict is not based on *any* of the evidence. *Lazenby*, 236 Ill. 2d at 101; *Maple*, 151 Ill. 2d at 454. Thus, we cannot find that the trial court abused its discretion in denying defendants' motion for a new trial. *Lazenby*, 236 Ill. 2d at 101; *Maple*, 151 Ill. 2d at 455.

¶ 26 IV. Accident Reconstruction Expert

¶ 27 Fourth, defendants claim that the trial court abused its discretion by allowing plaintiff to introduce the testimony of an accident reconstruction expert without first laying an adequate foundation.

¶ 28 A reviewing court will not reverse a trial court's decision to admit expert testimony absent an abuse of discretion. *Petraski v. Thedos*, 382 Ill. App. 3d 22, 26-27 (2008). See also *Jefferson v. Mercy Hospital & Medical Center*, 2018 IL App (1st) 162219, ¶ 39 (a trial court's decision on the admissibility of evidence will not be disturbed absent an abuse of discretion). An abuse of discretion occurs only when the trial court's ruling is arbitrary, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Petraski*, 382 Ill. App. 3d at 26-27. Even if the trial court abused its discretion, we will not reverse if the error is harmless. *Jefferson*, 2018 IL App (1st) 162219, ¶ 39. If the erroneously admitted evidence was merely cumulative and, thus, did not prejudice the objecting party, we will not reverse. *Jefferson*, 2018 IL App (1st) 162219, ¶ 39.

¶ 29 Defendants argue: "For reconstruction testimony to be admissible, there must be sufficient data about the accident in evidence to provide a reasonable basis for the expert's opinion. [Citation.] Thus, there must be sufficient physical evidence present to provide the basic data needed to reconstruct the accident. [Citations.] Here, as the physical evidence was disputed, inconclusive and insufficient for the accident to be reconstructed, the opinions that plaintiff elicited amounted to speculation which did not assist the jury in understanding the evidence."

¶ 30 The first problem with this argument is that defendants offered their own accident reconstruction expert. Obviously defendants believed the physical evidence was sufficient enough for their own expert to testify. Second, the impact of any alleged error in admitting plaintiff's accident reconstruction expert was reduced when defendants' own accident reconstruction expert testified that defendants' tractor-trailer truck struck the decedent's body. Third, any claimed error was further reduced by the testimony of the State's accident reconstruction expert who concluded that defendants' truck collided with the decedent and/or his bicycle. The experts considered the physical evidence found at the scene and the deposition testimony of the defendant driver and the medical examiner, and all of this evidence provided a reasonable basis for their

opinions. All three experts were in agreement that defendants' tractor-trailer struck the decedent's body and/or bicycle.

¶ 31 For the foregoing reasons, we cannot find either that the trial court abused its discretion or that the claimed error requires reversal.

¶ 32 V. Cold Neck

¶ 33 Lastly, defendants claim that the trial court erred by granting plaintiff's motion *in limine* which sought to bar defendant Berrien from testifying that the decedent's neck was cold when he touched it to feel for a pulse. Defendants argue that defendant Berrien was certified as a phlebotomist and trained in how to take a pulse. Defendants argue that, if the decedent's body was cold, this was circumstantial evidence that the decedent may have been struck and killed by another vehicle before defendants' truck entered the intersection. The trial court granted plaintiff's motion. When the trial court revisited this issue when addressing defendants' posttrial motion, the court stated that it found defendants' argument speculative.

¶ 34 On appeal, defendants argue that the proposed testimony was lay opinion testimony. While "a lay witness should not be permitted to testify to a legal conclusion at issue," "a lay witness can express an opinion on an issue in a cause if that opinion will assist the trier of fact." *Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412, ¶ 44. "[A]s long as this opinion is based on

the witness's personal observation, is one that a person is generally capable of making, and is helpful to a clear understanding of an issue at hand, it may be permitted at trial." *Klingelhoets*, 2013 IL App (1st) 112412, ¶ 44. The decision whether to admit lay opinion testimony lies within the sound discretion of the trial court and we will review it only for an abuse of that discretion. *Klingelhoets*, 2013 IL App (1st) 112412, ¶ 44. As stated above, an abuse of discretion occurs only when the trial court's ruling is arbitrary, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Petraski*, 382 Ill. App. 3d at 26-27.

¶ 35 On appeal, defendants argue that they were "not offering expert testimony that fixed a particular time of death or that calculated a body temperature." However, that appears to be exactly what defendants were trying to do, and we cannot find an abuse of discretion by the trial court for finding that was the actual purpose, given defendants' reason for seeking the admission of this evidence in the first place. The coldness of the decedent's neck seems particularly questionable in value as a piece of information considering that it was the middle of November in northern Illinois and the decedent was outside,

riding a bicycle. Thus, we cannot find that the trial court abused its discretion in deciding not to admit this evidence.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we do not find defendants' claims persuasive and affirm the judgment and award below.

¶ 38 Affirmed.