2018 IL App (2d) 170573-U
No. 2-17-0573
Order filed September 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MATTHEW HOLAVES, Executor of the Estate of CHRIS HOLAVES, Deceased, Plaintiff-Appellant, v. CARDIOVASCULAR INSTITUTE at OSF, LLC, d/b/a ROCKFORD CARDIOVASCULAR ASSOCIATES, a corporation, and JAGDEEP SABHARWAL, M.D. Defendants-Appellees.	)	Appeal from the Circuit Court of Winnebago County. No. 13-L-19 Honorable Edward Prochaska, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not apply an improper standard in ruling on plaintiff's motion for a new trial on damages, and the trial court's denial of plaintiff's motion did not constitute an abuse of discretion; affirmed.

¶ 2 Plaintiff, Matthew Holaves, Executor of the Estate of Chris Holaves, deceased, appeals the trial court's denial of his motion for a new trial on damages. After finding for plaintiff on the issue of liability, the jury awarded plaintiff $125,000 in total "pecuniary loss." This award

consisted of $125,000 for "loss of society" and zero damages for "grief and sorrow." Plaintiff contends that the trial court applied an incorrect standard in ruling on his post-trial motion, and that the jury's award was against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In January 2013, plaintiff filed a complaint naming six defendants for the wrongful death of Chris Holaves. Plaintiff subsequently settled with all of the defendants except Dr. Jagdeep Sabharwal and the Cardiovascular Institute at OSF, LLC, doing business as Rockford Cardiovascular Associates. During a six-day trial conducted in April 2017, plaintiff argued that defendants were negligent in failing to properly diagnose and treat Chris's myocardial ischemia, a type of heart disease, which led to his death.

¶ 5 Relevant here to the issue of damages, the jury heard testimony from Chris's wife, Sharon, and his two sons, Matthew and Peter. Sharon testified that Chris provided her with love, care, attention, guidance, and protection and stated that she misses not being able to speak with and share ideas with him. She testified her sons both feel "a great sadness" about their father's death. Matthew testified that he spoke with Chris daily for advice and he feels sadness whenever he looks at his own son and realizes that Chris will not be able to hold him. Peter testified that he misses his father's sense of humor and wisdom. When questioned about his grief and sorrow, Peter answered, "it's like a hole, and you learn to walk around with it because you can't stop your living."

¶ 6 Among the instructions that were given to the jury, two pattern instructions are relevant to this appeal. The record reflects that both instructions were prepared by plaintiff's counsel. The first pattern jury instruction, Civil, No. 31.04, was on the measure of damages. It was provided to the jury as follows:

"If you find for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate Sharon, Peter, and Matthew Holaves for the pecuniary loss proved by the evidence to have resulted to them. 'Pecuniary loss' may include the loss of money, benefits, goods, services, *and society*.

Where a decedent leaves a wife and children, *the law recognizes a presumption that they have sustained some substantial pecuniary loss by reason of the death. The weight to be given this presumption is for you to decide from the evidence in this case*.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

1. What instruction, moral training and superintendence of education the decedent might reasonably have expected to give his children had he lived;
2. His age;
3. His sex;
4. His health;
5. *The grief, sorrow and mental suffering of Sharon, Peter, and Matthew Holaves*;
6. The relationship between Peter and Matthew Holaves and Chris Holaves;
7. The marital relationship that existed between Sharon Holaves and Chris Holaves." [Emphasis added.] Illinois Pattern Jury Instructions, Civil, No. 31.04 (Supp. 2016) (hereinafter IPI Civil (Supp. 2016)).

The second pattern jury instruction, Civil, No. 31.11, defined the term, "society." It was provided to the jury as follows:

> "When I use the term 'society' in these instructions, I mean the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection." Illinois Pattern Jury Instructions, Civil, No. 31.11 (Supp. 2016) (hereinafter IPI Civil (Supp. 2016)).

¶ 7 The jury was also provided with two verdict forms: form A for a plaintiff's verdict and form B for a defendants' verdict. Verdict form A provided two separate line items: one for "loss of society" and another for "grief and sorrow." The record reflects that form A was prepared by plaintiff's counsel. After instructing the jury on verdict form A, the trial court further explained:

> "Now, there's two lines for you to consider separate damages to the estate if you find for the plaintiff, and those lines say 'loss of society,' that's been defined in the jury instructions, and then 'grief and sorrow.' And if you would consider the evidence, if you find for the plaintiffs, fill in the appropriate amount. If you believe the evidence supports an award for loss of society, you would fill that number in, for grief and sorrow, you would fill that number in, and then you would total those two and put that at the top line. Total damages are at the top line, and these are subcategories."

¶ 8 During closing arguments, plaintiff's counsel explained that verdict form A provided for two "types" of damages. With respect to "loss of society," counsel re-read the jury instruction and stressed the rebuttable presumption that Sharon, Matthew, and Peter had sustained "some substantial pecuniary loss." Counsel argued that the Holaves' family was quite close and still suffering five years after Chris's death. With respect to "grief and sorrow," counsel stated, "the second type is called grief and sorrow. That's the second type of damage. Okay? Now, grief and sorrow is self-explanatory." Counsel proceeded to discuss the life expectancy of men

similarly situated to Chris and then asked the jury to award plaintiff $7.5 million for "loss of society" and $5 million for "grief and sorrow."

¶ 9 Defense counsel (representing both defendants) argued that, if the jury reached the element of damages, it should award nothing for "grief and sorrow." Counsel argued that, because Chris was likely to predecease the rest of his family, the Holaves would inevitably experience the same level of grief at some point in their lives. Counsel concluded by stating, "I don't know if you'll put anything on for that grief and sorrow, if you were to get that far," and argued that the "value of the case" was somewhere between $300,000 and $600,000.

¶ 10 On rebuttal, plaintiff's counsel made no argument with respect to the issue of damages, instead focusing only on the issue of liability.

¶ 11 After finding for plaintiff and against defendants on the issue of liability, the jury awarded plaintiff $125,000 for "loss of society" and nothing for "grief and sorrow."

¶ 12 Thereafter, plaintiff filed a motion for a new trial on damages. Plaintiff again stressed the rebuttable presumption in a wrongful death case that the surviving spouse and next of kin had a reasonable expectation of benefits from the continuation of the life of the deceased. *Watson v. South Shore Nursing & Rehab. Center, LLC*, 2012 IL App (1st) 103730, ¶ 33. Plaintiff acknowledged, however, that the jury may disregard that presumption if it determines that the facts do not support it. *Id.* ¶ 36. "For instance, the presumption may be rebutted by evidence that the next of kin were estranged from the deceased, because, in such a case, there would be no benefits derived from the continuation of his life." *Id.* Plaintiff argued that there was no such evidence in this case, as the jury heard "unimpeached evidence of the strong family connection that was shattered by the premature death of Chris Holaves, which the jury found to have been caused by Defendant's negligence."

¶ 13 At a hearing on plaintiff's post-trial motion, defense counsel argued, "the jury can conclude that witnesses are so over the top with their testimony about damages that they think something's fishy and they decide not to believe them." Counsel added, "you know, as far as the grief and sorrow element of it; I think they absolutely did buy the argument that this, this gentleman was going to die before all the other members of his family regardless of what happened *** with regard to the medical care at issue in the case."

¶ 14 Before rendering its decision, the trial court observed that "pecuniary loss" may include the "loss of money, benefits, goods, services, *and society*." [Emphasis added.] IPI Civil (Supp. 2016) No. 31.04. However, in determining "pecuniary loss," the jury may also consider a different list of factors, including the "grief, sorrow, and mental suffering" of the surviving spouse and next of kin. IPI Civil (Supp. 2016) No. 31.04. The court opined that, because the jury in this case was provided with two separate line items for "loss of society and "grief and sorrow," it could have reasonably considered the elements of "grief and sorrow" in two different contexts. Not only could those elements have been considered as a standalone line item, but they also could have been considered as a component of "loss of society," which, by definition, is factored into "pecuniary loss." Plaintiff's counsel interjected, stating that he "questioned in hindsight why there was even a line for grief and sorrow." The trial court agreed that the decision was questionable and concluded by finding as follows:

> "So in addition to the arguments made by [plaintiff's counsel], I think the jury instruction itself is a little confusing in that it almost says you can consider grief, sorrow, and mental suffering two different ways; once in returning a verdict for loss of society and, oh, by the way, you can also award damages for that separately. Pretty confusing, pretty confusing stuff. But there's nothing about the way the jury was instructed or the

way they reached the verdict to make me believe that they didn't consider grief, sorrow, and mental suffering. There's no way anyone can say that in light of the jury instruction that was given.

So, really, for all those reasons, although certainly the family was probably disappointed in that verdict, I cannot say that it is beyond the ken of the juror. I cannot say that it is against the manifest weight of the evidence. And I do believe the award of damages is entitled to substantial deference, and that's what I'm going to give it in this case. Motion for a new trial is heard and denied."

¶ 15 Plaintiff timely appealed.

¶ 16 II. ANALYSIS

¶ 17 The sole issue in this appeal is whether the trial court erred in denying plaintiff's motion for a new trial on damages. Plaintiff contends that the court erred for two reasons. First, plaintiff argues that the court applied the wrong standard in ruling on the motion. Second, plaintiff argues that the court abused its discretion in denying the motion. We disagree with plaintiff in both instances.

¶ 18 The determination of damages is a question of fact within the discretion of the jury, and the jury's award of damages is entitled to substantial deference. *Snover v. McGraw*, 172 Ill. 2d 438, 447 (1996). A new trial on the issue of damages may be warranted if (1) the damages are manifestly inadequate, (2) it is clear that proved elements of damages have been ignored, or (3) the amount awarded bares no reasonable relationship to the loss suffered by the plaintiff. *Gaylor v. Campion, Curran, Rausch, Gummerson and Dunlop, P.C.*, 2012 IL App (2d) 110718, ¶ 59. A trial court's determination of whether a new trial should be granted on the issue of damages will not be reversed absent an abuse of discretion. *Snelson v. Kamm*, 204 Ill. 2d 1, 36 (2003).

¶ 19 Here, plaintiff first contends that the trial court applied the wrong standard in determining whether to order a new trial on the issue of damages. Plaintiff argues that, rather than consider the factors set forth in *Gaylor*, the court instead focused on the "confusing" nature of the pattern jury instruction on the measure of damages. According to plaintiff, the court erred by "speculating" that the jury chose to consider "grief and sorrow" as a component of "loss of society," rather than as a standalone measure of damages.

¶ 20 We agree with plaintiff that the trial court's observations with respect to "grief and sorrow" were misguided. The pattern jury instruction on the measure of damages explains quite clearly that "pecuniary loss" may include both "loss of *** society" and "grief, sorrow, and mental suffering." IPI Civil (Supp. 2016) No. 31.04. However, nothing in the instruction provides, as the court suggested, that "grief and sorrow" may be considered as a component of "loss of society." In fact, there is no mention of "grief and sorrow" in the pattern jury instruction defining the term, "society," which reads as follows: "[w]hen I use the term 'society' in these instructions, I mean the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection." Illinois Pattern Jury Instructions, Civil, No. 31.11 (Supp. 2016) (hereinafter IPI Civil (Supp. 2016)). The court was therefore mistaken in suggesting that the jury was presented with two separate avenues for considering the subcategory of "grief and sorrow."

¶ 21 However, we disagree with plaintiff that the trial court's misguided observations formed the basis for its decision to deny a new trial on damages. The comments were merely offered as an aside—on an issue that plaintiff had not even raised. After making the comments, the court quickly returned its focus to the *Gaylor* factors, considering whether the damages were manifestly inadequate, whether the proved elements of damages had been ignored, and whether

the amount of the award was reasonably related to the loss suffered by the plaintiff. See *Gaylor*, 2012 IL App (2d) 110718, ¶ 59. Specifically, the court found that there was "nothing about the way the jury was instructed or the way they reached the verdict" to indicate that the jurors had failed to consider the Holaves' "grief and sorrow." On that basis, and after noting that the jury's award was entitled to "substantial deference," the court found that the jury's award was not against the manifest weight of the evidence. For these reasons, we reject plaintiff's contention that the court applied an erroneous standard in ruling on the motion for a new trial on damages.

¶ 22 Plaintiff's second contention is that the trial court abused its discretion in denying a new trial on the issue of damages, as plaintiff maintains that "[a] verdict of [$125,000] for the Holaves family's loss of society does not qualify as an award of 'substantial pecuniary loss' under any reasonable definition of that term." Plaintiff argues that the jury arbitrarily rejected the rebuttable presumption of "substantial pecuniary loss" when it returned a zero-damages award for "grief and sorrow." As we will explain, this argument is built on the faulty premise that the rebuttable presumption of "substantial pecuniary loss" necessarily extends to a rebuttable presumption of damages for the subcategory of "grief and sorrow."

¶ 23 Plaintiff relies on *Doe v. Bridgeforth*, 2018 IL App (1st) 170182, to argue that a jury should be barred from awarding zero damages to the decedent's family members for "grief and sorrow" when liability has been found in a wrongful death case. *Bridgeforth* involved a minor's allegations of sexual abuse against her basketball coach. The jury returned a verdict in favor of the plaintiff and against one of the defendants, but awarded the plaintiff zero damages. *Id.* ¶ 40. The plaintiff appealed, arguing, *inter alia*, that she was entitled to a new trial because the jury ignored the proven element of damages. Although the appellate court ruled that the plaintiff was entitled to a new trial on a different basis, thereby rendering the issue of damages moot, the court

decided to address the issue due to the possibility that it would arise upon retrial. *Id.* ¶ 40. Specifically, the court was compelled to discuss the following point of law:

> "In cases in which a plaintiff's evidence of injury is primarily subjective in nature and not accompanied by objective symptoms, the jury may choose to disbelieve the plaintiff's testimony as to pain. In such a circumstance, the jury may reasonably find the plaintiff's evidence of pain and suffering to be unconvincing." *Snover*, 172 Ill. 2d at 449.

¶ 24 The *Bridgeforth* court noted that this principle seemingly justified the jury's zero-damages award in the first trial. The plaintiff had testified to her subjective feeling that the defendant caused her pain by placing his finger into her vagina, but she had presented no objective evidence to support her claim, such as a doctor's note memorializing a course of treatment. Thus, applying *Snover*, it appeared that the jury was free to reject the plaintiff's testimony. *Bridgeforth*, 2018 IL App (1st) 170182, ¶ 79. However, the *Bridgeforth* court went on to distinguish the injuries at issue in *Snover*, which resulted from a car accident, from those involved with sexual assault. "The harm that results from a sexual assault is categorically distinct from other more common forms of personal injury. A car accident may cause physical injury, but a sexual assault is an affront to the victim's personal dignity and autonomy; the injury is deep-felt and intrinsic." *Id.* ¶ 82. The *Bridgeforth* court opined that, unlike the physical injury contemplated by *Snover*, the injuries related to sexual assault victims are rarely capable of "objective verification." *Id.* ¶ 83. On that basis, the *Bridgeforth* court held that, "in tort cases in which the plaintiff proves that he or she was sexually assaulted by the defendant, testimony by the plaintiff that the act constituting sexual assault caused the plaintiff to experience physical pain is, absent evidence to the contrary, sufficient evidence to necessitate an award of damages for pain and suffering." *Id.* ¶ 82.

¶ 25 Turning back to this case, plaintiff acknowledges the obvious difference between the pain suffered from a sexual assault and the "grief and sorrow" caused by the loss of a family member. Nonetheless, plaintiff maintains that the same rationale from *Bridgeforth* should apply here, arguing that the "grief and sorrow" suffered by Sharon, Matthew, and Peter is not susceptible to "objective verification." Plaintiff therefore asks us to extend the rationale from *Bridgeforth* and hold that jury was presented with sufficient evidence to necessitate an award for "grief and sorrow" for the Holaves. We decline plaintiff's request.

¶ 26 Plaintiff's argument ignores the fact that neither *Snover* nor *Bridgeforth* involved a wrongful death action. Hence, the plaintiffs in those cases did not benefit from the legal safeguard that benefitted plaintiff in this case; namely, the rebuttable presumption that the Holaves sustained "some substantial pecuniary loss" by reason of Chris's death. See IPI Civil (Supp. 2016) No. 31.04. This presumption offsets the need to determine whether the "grief and sorrow" component of "pecuniary loss" in wrongful death cases is susceptible to "objective verification."

¶ 27 Plaintiff argues that, because the jury awarded zero damages for "grief and sorrow," the Holaves family did not benefit from the presumption that they sustained "some substantial pecuniary loss." But this overlooks the jury's $125,000 award for "loss of society." As we explained *supra*, "loss of society" and "grief and sorrow" are both components of "pecuniary loss." IPI Civil (Supp. 2016) No. 31.04. If the jury had awarded zero damages across the board, then we would be inclined to consider whether the jurors were presented with sufficient evidence to rebut the presumption that the Holaves sustained "some substantial pecuniary loss." See, *e.g.*, *Watson*, 2012 IL App (1st) 103730, ¶¶ 37, 46 (holding that the jury's zero-damage award was against the manifest weight of the evidence based on undisputed testimony that the decedent's

daughters had enjoyed his love, companionship, and affection). However, things being as they are, we have no need for such an undertaking, as plaintiff presents no authority to support the notion that a $125,000 award for "loss of society" does not qualify as an award of "substantial pecuniary loss."

¶ 28 In closing, we note that plaintiff's counsel elected to provide the jury with separate line items for "loss of society" and "grief and sorrow," rather than one all-encompassing line item for "pecuniary loss." This tactic was presumably aimed at increasing the total amount of the award by maximizing the amounts for each subcategory. However, it also paved the way for defense counsel's argument that, because Chris was likely to predecease the rest of his family, the jury should award nothing for "grief and sorrow." This argument may seem rather callous, but it remains that plaintiff's counsel made little effort to rebut it. Under these circumstances, although we echo the trial court's sentiment with respect to the disappointment of the Holaves' family, we cannot say that the jury arbitrarily rejected the rebuttable presumption that Sharon, Matthew, and Peter sustained "some substantial pecuniary loss."

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the trial court's denial of plaintiff's motion for a new trial on damages.

¶ 31 Affirmed.