2013 IL App (1st) 1112077-U

FIRST DIVISION
FILED: FEBRUARY 11, 2013

Nos. 1-11-2077 and 1-11-2136, consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHELLE KENNEDY, special administrator of the Estate of AMANDA SANTOS, deceased, Plaintiff-Appellee, v. GARFOOT TRUCKING, INC., a Wisconsin Corporation, and ROBERT E. OLSON, special representative of the Estate of WAYNE GARFOOT, deceased, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 05 L 3393 The Honorable James P. McCarthy, Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment was affirmed where the defendants' many assertions of trial error were without merit, forfeited, or harmless.

¶ 2 In separate appeals, the defendants, Garfoot Trucking, Inc. (Garfoot Trucking) (appeal number 1-11-2077) and Robert Olson as special representative of the estate of Wayne Garfoot (the estate) (appeal number 11-2136), appeal the circuit court's entry of judgment on a jury's verdict finding them liable to the plaintiff, Michelle Kennedy (as special administrator of the estate of

Amanda Santos), in the amount of $2,275,000 after remittitur, for Amanda Santos's death in an automobile accident. In their appeals, the defendants argue that (1) the evidence was insufficient to support the jury's verdict, principally due to defects in the testimony of the plaintiff's main witness, Illinois State Trooper Bradley Bastian; (2) the trial court erred in allowing evidence of the good driving habits of Amanda's father, Richard Santos, who was driving the automobile that carried Amanda; (3) the jury's verdict was tainted by the plaintiff's improper opening and closing argument; (4) the court tendered improper jury instructions and refused to tender proper ones; (5) the trial was unfair due to improper evidence of Richard and Maryann Santos's medical problems following the accident; (6) a release signed by the plaintiff precludes judgment against them; (7) Wayne Garfoot, the driver in the accident, was an agent of another entity and thus neither defendant can be liable for the accident; (8) the damages awarded by the jury were excessive; and (9) the liability of Garfoot Trucking should be limited by statute to the extent of Wayne Garfoot's insurance coverage, which is zero. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 On March 25, 2005, the plaintiff filed a complaint against the defendants for damages stemming from a January 24, 2005, three-car automobile accident that caused the death of two-year-old Amanda Santos. The plaintiff eventually filed a fourth amended complaint, which alleged that Garfoot negligently drove his truck into the Santos automobile and that Garfoot Trucking owned and controlled the truck.

¶ 4 Prior to trial, the defendants filed several motions in limine, including a motion to bar the plaintiffs from presenting Trooper Bastian's accident reconstruction testimony. The motion argued that, from Bastian's deposition testimony, it was clear that he could not provide a competent accident

reconstruction. The motion pointed out that Bastian had been unable to determine the speed of Garfoot's truck, had not performed a crush analysis of the Santos car, could not say whether the Santos car had switched lanes just prior to the accident, and had not been able to examine the brake lights of the Santos car. The motion argued that "the opinion of a reconstruction expert" should be admissible only if it is "based upon undisputed physical evidence sufficient to provide the basic data" needed for a reconstruction, and it asserted that Bastian's opinions were not supported by such evidence. During a hearing on that motion, defense counsel further noted that Bastian had "black box" data regarding the Santos vehicle but had no such data for the Garfoot truck. During that argument, plaintiff's counsel pointed out that the defendant's motion did not suggest that Bastian was "not qualified as a reconstructionist." The trial judge responded that Bastian's "qualifications as a traffic reconstruction expert weren't being criticized to the extent of precluding him from *** being able to render opinions on accident reconstruction" and that the defendants' motion was limited to challenging the basis for Bastian's opinions. Defense counsel agreed with the court's characterization. The trial judge then asked if Bastian's opinions had been disclosed, and plaintiff's counsel responded affirmatively but nonetheless repeated that Bastian would opine that skid marks at the scene indicated that Garfoot was traveling at an excessive speed or following too closely. Based on that explanation, the trial court denied the defendants' motion in limine.

¶ 5 At trial, both sides presented opening statements, and the plaintiff began her case by presenting a coroner, who introduced evidence of Amanda Santos's death and autopsy. Glenn Garfoot, the brother of the deceased Wayne Garfoot, next testified that Wayne had been the president of Garfoot Trucking, which owned the truck Wayne was driving when the accident occurred.

¶ 6 Bastian, the plaintiff's next witness, testified that he was called to the scene of the accident to perform an accident reconstruction for the Illinois State Police. After answering questions regarding his experience in accident reconstruction and authenticating photographs of the accident scene, Bastian offered his opinion regarding the events that led to the crash:

> "[The Santos car] was traveling in the right-hand lane *** with the Garfoot vehicle behind it.
>
> At some point in time the driver of the Garfoot vehicle applied its brakes and made an attempt to avoid the slower traffic in front of him. He made a steering input to the right in an effort to aim toward the right-hand shoulder.
>
> He did not do this in time. The front driver's tire and the front portion of [Garfoot's] semi rolled onto and through the back portion of the [Santos car]. The [Santos car] was then pushed over to the left into the center lane.
>
> The semi continued going in a westerly direction towards the right shoulder, catching the rear passenger side of the trailer [of a third car] driven by Mr. [Carl] Plot."

Based on his evaluation, Bastian attributed the accident to "[d]river inattention on the part of the driver of the Garfoot truck" causing the truck to collide with the left rear of the Santos vehicle while angled towards the rear passenger side of the vehicle. Bastian testified that he based his opinions on his evaluation of the accident site and by viewing dozens of photographs of the site.

¶ 7 Bastian said that he was not aware of any fact indicating that the Santos car had made a sudden lane change just before the accident, and, based on the at-rest positions of the vehicles after the accident, he opined that the Santos car had not cut off the Garfoot truck.

¶ 8 Bastian acknowledged that he was unable to determine the vehicles' precise speeds during and before the accident. However, he then agreed that he had obtained information from a black-box data recorder in the Santos vehicle that the Santos car was traveling at 26 miles per hour and steadily braking at the time of the accident. The only defense objections raised during this testimony related to the form of the questions and to the contradiction between this testimony and Bastian's prior testimony that he had not determined the speeds of the cars. Bastian also testified that the speed limit in the area of the crash was 45 miles per hour, because it was a "slow-down area prior to" a toll plaza.

¶ 9 On cross-examination, Bastian agreed that he had discovered no mechanical problems in the truck. When asked whether the angled point of impact suggested that the Santos car was at an angle to the Garfoot truck at the time of the collision, Bastian answered in the negative. Bastian then stated that he could "rule *** out" the possibility that the Santos car turned in front of the Garfoot truck just before the collision. When asked how he was able to rule out this conclusion, Bastian explained as follows:

> "Given the path of the tire tracks left by this Garfoot vehicle, it shows that it drew at an angle from the center point towards the front passenger side of the [Santos vehicle].
>
> In addition to that, had the Santos vehicle been traveling in a left to right fashion, physics indicates that it has motion in that direction unless impacted by an object in the opposing direction, that vehicle should have continued to go in that direction even though it was struck.
>
> In this case, the [Santos vehicle] actually went in the opposite direction, which would

indicate that the vehicle that struck it pushed it over there."

On further questioning from defense counsel, Bastian acknowledged that the 177 feet of tire skid tracks he attributed to the Garfoot truck were continuous, and that a vehicle with an antilock braking system (ABS) will generally leave broken tire skid tracks. Bastian said that he did not know whether the Garfoot truck had ABS.

¶ 10 Bastian also agreed on cross-examination that he did not perform a crush analysis on the vehicle wreckage. He explained that a crush analysis could be used to determine the amount of energy in a collision, and thus the speeds of the cars involved. Bastian further agreed that he did not examine the tail lights of the Santos vehicle, because they had been removed from the vehicle before he did so. He explained that, from examination of the tail lights, he could have determined if "hot shock" had occurred. Bastian described that phenomenon as occurring when a collision takes place while brake lights are illuminated; the collision can cause internal wires and filaments to stretch. However, Bastian said that he had determined by other means that the brakes of the Santos car had been activated.

¶ 11 Defense counsel also cross-examined Bastian regarding his use of black box data from the Santos vehicle. Counsel first asked Bastian to review a print-out of the data, then asked him to read certain parts of the print-out to explain how he determined the speed of the Santos vehicle. During that explanation, Bastian said that he was not certified to download black box data and that another, certified officer downloaded the black box data he interpreted and relied on.

¶ 12 The plaintiff's next witnesses, Amanda Santos's half sisters Victoria and Elizabeth, testified regarding their fond memories of Amanda and the sense of loss they felt after Amanda's death.

Maryann Santos, Amanda's mother, testified that she had no recollection of the accident in this case. She also testified regarding her memories of Amanda, her grief after Amanda's death, and the loss of companionship that Amanda's death caused. During Maryann's testimony, the following exchange occurred:

> Q. "As far as you know, was your address and phone number and information available to everyone [who would want to investigate the accident]?
>
> A. Yes, we got lots of medical bills.
>
> [Defense counsel]: Object–
>
> THE COURT: Objection sustained. Stricken. The jury will disregard it."

¶ 13 At the start of the testimony of Richard Santos, plaintiff's counsel asked about the emergency driving and collision avoidance training Richard had undertaken as a police sheriff in Florida. As Richard detailed his driving training, defense counsel raised objections based on the ideas that some of the questions were leading, that Richard's answers had not been disclosed in discovery, and that counsel had not laid proper foundations for the questions. Those objections were overruled. However, the judge sustained an objection to defense counsel's question as to whether Richard "consider[ed] [him]self a careful driver." After that objection was sustained, counsel asked Richard whether he incorporated his training into his daily driving, and Richard responded affirmatively without objection. When plaintiff's counsel started to ask whether Richard was in the "habit" of using techniques he had learned, the trial judge sustained an objection that the question was leading.

¶ 14 Like Maryann, Richard testified that he could not remember the accident. He also recalled how close Amanda was to him and the rest of the family, and he described his continued grief from

her passing.

¶ 15 After the admission of plaintiff's exhibits, including a life expectancy table, into evidence, the plaintiff rested. In its case-in-chief, Garfoot Trucking presented evidence deposition testimony from Commercial Waste Transport's (CWT's) general manager authenticating photographs of the Garfoot truck, and an employee of Commercial Waste Systems (CWS) who testified that Garfoot was hauling cardboard for CWS on the day of the accident. Glenn Garfoot, Wayne Garfoot's brother and the president and sole employee of Garfoot Trucking at the time of the trial, testified that he and Wayne were the company's only employees at the time of the accident. Glenn testified that Garfoot Trucking owned the truck that Wayne drove on that day, that the truck had an ABS system, and that the truck had no mechanical problems. Glenn further testified that, at the time of the accident, Wayne was driving as an employee of Garfoot Trucking, which worked under contracts to haul for CWT.

¶ 16 In the case-in-chief of Wayne Garfoot's estate, Wayne's wife Bonnie testified regarding his driving habits. Following Bonnie Garfoot's testimony, the parties moved to place exhibits into evidence. During that process, counsel for Garfoot Trucking asked that Bastian's testimony be stricken "because he really did not do a reconstruction of the accident" and because "the documents supporting the production of the download data from the other state trooper were never used through anybody including the plaintiff's attorney in the case." The court denied the motion to strike. Counsel for Wayne Garfoot's estate also filed a motion for a directed verdict arguing that Bastian's testimony should be stricken because he was not qualified as an expert witness and because his opinions were not offered as within a reasonable degree of scientific certainty. The court denied the

motion for directed verdict. The trial court also denied the defendants' motion for a directed verdict on the ground that the plaintiffs had signed a release relieving the defendants of liability. In so ruling, the court noted that the release, between the plaintiff and CWT and CWS, specifically stated that it did not apply to the defendants.

¶ 17 Following closing arguments, the jury returned a verdict finding the defendants liable to the plaintiff in the amount of $4 million. The jury also signed a special interrogatory indicating that they found that Wayne Garfoot was acting as an agent of Garfoot Trucking at the time of the accident. The trial court entered judgment on the verdict, but it granted the defendants a remittitur in the amount of $1,275,000, so that the damages awarded fell to $2,725,000. The defendants now timely appeal.

¶ 18 The defendants' first, and most extensive, argument on appeal is that the evidence was insufficient to support the jury's verdict finding them liable, principally due to defects or weakness in Bastian's testimony. We begin by addressing the defendants' assertions that parts of Bastian's testimony were inadmissible.

¶ 19 The first such assertion is the estate's argument that most of Bastian's testimony should have been stricken or deemed inadmissible because he offered expert opinions but was not qualified as an expert. We conclude that this argument has been forfeited. An appellate court may address only arguments that have been properly preserved for review. *In re Estate of Mercier*, 2011 IL App (4th) 110205, ¶ 16. In order to preserve a contention of error for review, an appellant must have made a contemporaneous objection and have identified the same basis for the objection in the trial court as is argued on appeal. *Estate of Mercier*, 2011 IL App (4th) 110205, ¶ 16. "The purpose of the

requirement that a specific objection be made is to allow the [trial court] an opportunity to properly consider and rule upon it." *Gausselin v. Commonwealth Edison Co.*, 260 Ill. App. 3d 1068, 1079, 631 N.E.2d 1246 (1994). Here, all parties were aware well before trial of the content of Bastian's testimony, yet they raised no objections as to his expertise. In fact, in a pretrial conference, the trial judge specifically noted, with no objection from the defendants, that Bastian's expertise to opine on his accident reconstruction was undisputed. Further, during Bastian's testimony itself, the defendants offered no objection to his offering expert opinions. Had the estate raised a timely objection, the plaintiff might have taken steps to clarify Bastian's qualification to offer expert opinions. However, by the time the estate first presented this objection in its motion for a directed verdict, the trial had ended, and the court's and the parties' best opportunity to correct any infirmity in Bastian's testimony had passed. Under these circumstances, we must conclude that the estate has forfeited its contention that Bastian was insufficiently qualified to offer his opinions.

¶ 20 The estate also contends that the plaintiff should not have been allowed to adduce Bastian's testimony regarding data collected from the black box recorder in the Santos car. However, again, the estate has failed to preserve this issue for review. As Bastian recited the speed and braking information he received from the black box to help him form his opinions, the only objections the defendants raised related to the form of the questions presented to Bastian and to the contradiction between his black box testimony and previous testimony that he could not determine the vehicles' speeds. Because the defendants did not raise this issue via a timely objection, they cannot raise it now on appeal.

¶ 21 Garfoot Trucking offers another reason Bastian's testimony should have been stricken; it

contends that "speed reconstruction testimony is well outside the purview of what experts are allowed to provide juries with as far as opinions." We reject this contention, because Bastian did not provide speed reconstruction testimony. Bastian candidly admitted that he could not determine the speed of the Garfoot truck, and he opined on the speed of the Santos vehicle by relying on back box data, not a reconstruction of the accident.

¶ 22 Aside from their arguments that parts or all of Bastian's testimony should not have been admitted, the defendants also assert that Bastian's testimony was insufficient to support the jury's verdict. The defendants ask us to overturn the jury's verdict and order a new trial, or to reverse the trial court's order refusing to do the same. On a motion for a new trial, a court may set aside a jury's verdict only if the verdict is contrary to the manifest weight of the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454, 603 N.E.2d 508 (1992). A verdict is against the manifest weight of the evidence only where the opposite conclusion is clearly evident or where the jury's findings are unreasonable, arbitrary, and not based on any of the evidence. *Maple*, 151 Ill. 2d at 454.

¶ 23 In support of their arguments that the jury's verdict should be set aside, the defendants note that the plaintiff's case for fault rested largely on Bastian's opinion that the vehicle collision was caused by Wayne Garfoot's inattention, and they highlight several points that they contend demonstrate the weakness of that testimony. Most of these points, however, were raised during the defendants' cross-examination of Bastian. For example, the defendants point out that Bastian attributed continuous skid marks near the scene to Garfoot's attempt to stop, and they argue that such skid marks could not have been left by Garfoot's truck, which was equipped with ABS. They also point out some equivocation in Bastian's testimony, which included his admissions that he was

unable to discern certain aspects of the collision with certainty. The defendant's further note that Bastian admitted that he did not perform a crush analysis and that he was unable to inspect the brake lights of the Santos car to help determine if the brakes had been illuminated.

¶ 24 The defendants are correct that all of these points could be seen to undercut or impeach Bastian's testimony. However, the jury was exposed to these points, and it nonetheless chose to grant credence to Bastian's opinions. Bastian explained that those opinions were based on the arrangement of the vehicles after the crash, evidence regarding the Santos car's speed and consistent braking prior to the crash, and his study of the direction of impact evidenced by the damage to the Santos car. These facts provided ample basis for Bastian's opinions, and ample reason for the jury to believe those opinions even in light of the flaws that the defendants pointed out. As a result, we cannot say that the jury's apparent decision to credit Bastian's opinions was against the manifest weight of the evidence.

¶ 25 In an argument closely related to those we reject above, the defendants also aver that the trial judge erred in denying their motions for a directed finding or for a judgment notwithstanding the jury's verdict, on the ground that Bastian's testimony was insufficient as a matter of law to support a verdict in the plaintiff's favor. Judgment notwithstanding the verdict should be granted only when all of the evidence, viewed in the light most favorable to the winning party, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178, 854 N.E.2d 635 (2006). Likewise, a court should grant a directed verdict to a defendant only where the plaintiff has failed to establish a *prima facie* case. *Sullivan v. Edward Hosptial*, 209 Ill. 2d 100, 123, 806 N.E.2d 645 (2004). For

the same reasons we conclude that the jury's verdict was not against the manifest weight of the evidence, we conclude that the trial court did not err in denying the defendants' motions for a directed finding or for judgment notwithstanding the verdict. Accordingly, we reject the defendant's arguments relating to both the admissibility and the sufficiency of Bastian's testimony.

¶ 26 The defendants' second argument on appeal is that the trial court erred in allowing the plaintiff to present testimony regarding the good driving habits of Richard Santos. According to the defendants, Richard Santos's testimony regarding his driving training was not disclosed during discovery, and, in any event, testimony regarding his careful habits was improper.

¶ 27 We may dispose quickly of the latter contention. During Richard's testimony, aside from objections about disclosure and the form of questions, defense counsel raised only two objections that careful driving habits testimony was improper. The trial court sustained both of those objections before Richard could answer. It is well-established that a trial court's decision to sustain a defense objection, coupled with an instruction to disregard the remark, will cure any prejudicial impact from improper questioning. *Ruffin ex rel. Sanders v. Boler*, 384 Ill. App. 3d 7, 26, 890 N.E.2d 1174 (2008) (quoting *People v. Sims*, 167 Ill. 2d 483, 512, 658 N.E.2d 413 (1995). Because the trial court sustained the defense's objections, and because the court kept the jury from considering any improper testimony by preventing it, we see no reversible error in the careful habits questioning.

¶ 28 As for the disclosure issue, the defendants point out that, pursuant to Supreme Court Rule 213(f)(1) (eff. Jan. 1, 2007), a party presenting lay witness testimony must identify in answers to interrogatories "the subjects on which the witness will testify" so that the interrogatory answer "gives reasonable notice of the testimony." Rule 213 further states that, "[e]xcept upon a showing of good

cause," undisclosed testimony "shall not be admissible upon objection at trial." Ill. Sup. Ct. R. 213(g) (eff. Jan 1, 2007).

¶ 29 Here, the plaintiff's interrogatory answers disclosed that Richard Santos was an expected witness, but they did not disclose that he would testify regarding his driving training. The plaintiff does not assert that it ever supplemented that initial interrogatory response. However, even if we were to accept the defendants' assertion that this portion of Richard's testimony was inadmissible, we would need more to justify reversing the trial court's judgment. "Illinois law is clear that an error is not reversible unless it can be shown that the error was substantially prejudicial and, therefore, unduly affected the outcome of the trial." *Pantaleo v. Our Lady of Resurrection Medical Center*, 297 Ill. App. 3d 266, 281, 696 N.E.2d 717 (1998). In the testimony in question here, Richard explained that he had been trained for emergency driving and collision avoidance. However, he did not explain how either form of training would be relevant to determining whether he recklessly cut off a truck on the highway or was rear-ended by that truck. Indeed, aside from bare statements that Santos's testimony was prejudicial, the defendants offer no explanation in their briefs as to how this particular testimony unfairly prejudiced their case. In the absence of any such argument, and in light of our own assessment of the evidence, we conclude that any error in allowing Richard Santos's testimony did not unduly affect the outcome of the trial. For that reason, we reject the defendants' second argument on appeal.

¶ 30 The defendants' third argument on appeal is that the trial was tainted by improper remarks by plaintiff's counsel during opening and closing arguments. Although the defendants complain of a long litany of comments, we observe that, for the majority of these comments, either the defendants

failed to object, or the trial court sustained the defendants' objections. Where the defendants failed to object, they have forfeited their objections. See *Friedland v. Allis Chalmers Co. of Canada*, 159 Ill. App. 3d 1, 4, 511 N.E.2d 1199 (1987). Where the defendants' objections were sustained, we deem any improper argument harmless. See *Boler*, 384 Ill. App. 3d at 26 (quoting *Sims*, 167 Ill. 2d at 512). With the waived and harmless comments excised from our analysis, we are left with seven comments to examine. The first two comments the defendants identify were offered during the plaintiff's opening argument:

> "What we are going to prove is that on January 24 *** Wayne Garfoot[] was going at a high rate of speed."
>
> "One truck [at the scene of the accident] is owned by a gentleman named Carl Plot who was stopped waiting to pay a toll."

¶ 31 According to the defendants, these comments promised evidence that the plaintiff knew would not be presented at trial, and thus were unfairly prejudicial. An opening statement should "inform the jurors concerning the nature of the action and the issues involved and *** give to them an outline of the case so that they can better understand the testimony." *Gilson v. Gulf, M. & O. R. Co.*, 42 Ill. 2d 193, 196-97, 246 N.E.2d 269 (1969). "Counsel may summarily outline what he expects the evidence admissible at trial will show [citation], but no statement may be made in opening which counsel does not intend to prove or cannot prove." *Gilson*, 42 Ill. 2d at 197. However, although opening statements may not include statements that counsel cannot prove at trial, they "may include a discussion of expected evidence and reasonable inferences to be drawn therefrom." *Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412, ¶ 29. Further, even if an

opening statement is improper, "[r]eversal based on improper comments during opening statement will occur only when the comments *** result in substantial prejudice to the opposing party such that the result of the trial would have been different had the comments not been made." *Klingelhoets,* 2013 IL App (1st) 112412, ¶ 29.

¶ 32 Regarding the first comment the defendants identify–the comment regarding Wayne Garfoot's speed just before the collision–we deem the comment a reasonable inference from the evidence. It is quite true, as the defendants point out, that neither Bastian nor any other witness for the plaintiff was able to determine the speed of the Garfoot truck precisely. However, even so, Bastian opined based on his accident reconstruction that, at the time of the accident, the Santos car was slowing and moving slowly, and the Garfoot truck was moving too quickly to avoid a collision with the Santos car. We view counsel's reference to the speed of the Garfoot truck as a reasonable inference to be drawn from the evidence the plaintiff eventually presented at trial.

¶ 33 As for the second comment the defendants identify, even if we were to agree that counsel's statement that the Plot vehicle was stopped had no evidentiary support, we would see no substantial prejudice from the comment. The crucial disputes at trial focused on the movements of the Santos and Garfoot vehicles just before the collision. The plaintiff argued, at base, that Garfoot was driving too fast and was unable to stop for slowed traffic ahead, while the defendants argued, at base, that the Santos vehicle cut off the Garfoot truck. The question of the speed (or lack thereof) of the Plot vehicle is attenuated from this dispute. Further, to the extent the speed of the Plot vehicle was relevant, the comment in the opening statement could not have misled the jury into overestimating the strength of the plaintiff's proof. At trial, the parties focused the evidence squarely on their

competing theories as to what caused the accident. Thus, the jury was well aware of the strength of each party's proof to support its theory, just as it was aware of the absence of definitive evidence regarding the speed of any vehicle other than the Santos vehicle. Accordingly, we see no prejudice in the plaintiff's counsel's comment regarding the speed of the Plot vehicle.

¶ 34 The remaining five comments were offered during the plaintiff's closing argument. We begin with the first comment, about the defense's argument that Santos's driving caused the accident:

> "They haven't presented to you anything in the way of support for that. No expert testimony, no eyewitnesses.
>
> * * *
>
> They're going to say, well, he said that he was in the middle lane near the sign for Judson College.
>
> * * *
>
> Where is the evidence of a witness coming in here and saying: Here's the sign for Judson College, it's right by the exit."

According to the defendants, this line of argument improperly suggested that the defense was omitting witnesses, or improperly suggested that the defense was required to submit additional witnesses. We disagree. The comments are no more than plaintiff's counsel's attempt to demonstrate the weakness in the defendant's case. The plaintiff presented expert testimony to support its theory of the case, and plaintiff's counsel could very properly point out that the defense did not marshal contrary evidence to persuade the jury.

¶ 35 The second closing argument comment the defendants object to on appeal came during

counsel's argument about Wayne Garfoot's negligence. Counsel stated as follows:

> "What was the negligence of Wayne Garfoot? And the defense will tell you that we can't prove what his speed was.
>
> * * *
>
> *** As if somehow it's okay to drive 45 miles an hour or 40 miles an hour or 35 miles an hour in advance of stopped traffic at a toll plaza. The appropriate speed for the truck in this case is zero."

In the defendants' view, this comment improperly suggested that the plaintiff had proven the speed of the Garfoot truck. We disagree. The comment at issue does not suggest that the speed of the truck was proven with precision. Instead, it begins by acknowledging that the speed could not be determined with precision, and then argues that such a determination is unnecessary. The argument was not improper.

¶ 36 In the third closing argument comment the defendants point out on appeal, the plaintiff's counsel argued that the Garfoot truck was driven negligently, and counsel added, "We're approaching a toll plaza. Richard Santos is going 26 miles an hour. Carl Plot was going zero." The defendants contend that this argument improperly suggested that the plaintiff had presented evidence regarding the speed of the Plot vehicle at the time of the accident. However, just as with opening argument, an improper closing argument does not warrant reversal unless the appellant can show that the argument caused substantial prejudice. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 855, 923 N.E.2d 937 (2010). To the extent this comment was improper, we conclude that it did not cause substantial prejudice to the defendants, for the same reasons we conclude that a similar comment

made during opening statements did not cause substantial prejudice.

¶ 37 The final closing argument comment to which the defendants now object came during the plaintiff's rebuttal. During rebuttal argument, the plaintiff's counsel suggested to the jury that it award damages in the amount of $10 million. The estate asserts that this suggestion violated the trial court's earlier order that the plaintiff refrain from asking the jury for a specific amount of damages. They further assert that they were prejudiced by plaintiff's counsel's suggestion, because it was offered in rebuttal, after they had any chance to respond to it in their own closing argument.

¶ 38 The estate's argument omits a very important step in the sequence of events at trial. The estate is correct that the trial judge ordered the plaintiff's counsel to avoid suggesting a specific dollar amount to the jury. However, after plaintiff's counsel avoided doing that in initial closing argument, counsel for the estate suggested in closing argument that the jury should not award damages over $1 million. In a recess following this argument, the trial court reversed its prior ruling barring the plaintiff's attorney from mentioning a specific dollar amount. As the court explained, the prior ruling was issued "on the assumption that no other dollar amount would be mentioned other than in generic terms." Since the estate had then suggested a specific number, the trial court explained, the plaintiff should be allowed to respond. It was after this ruling that the plaintiff's counsel suggested a specific damages amount in rebuttal. Under these circumstances, we reject the estate's argument that the plaintiff's argument was improper. As a result, we reject the defendants' second argument on appeal, that improper opening and closing argument rendered the trial unfair.

¶ 39 The defendants' fourth argument on appeal is that we must reverse the trial court's judgment because, in six instances, the court tendered improper jury instructions, or failed to tender necessary

instructions. Before addressing each of the purported instructions errors individually, we set out the standards for judging such errors generally.

¶ 40 "Whenever Illinois Pattern Jury Instructions (IPI) contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used, unless the court determines that it does not accurately state the law." Ill. Sup. Ct. R. 239(a) (eff. June 11, 2009). Each party is entitled to have a jury adequately instructed as to its theory of the case if it is supported by some evidence in the record. *Martoccio v. Western Restaurants, Inc.*, 286 Ill. App. 3d 390, 392, 675 N.E.2d 1045 (1997). The decision as to whether to provide a particular instruction to the jury rests within the sound discretion of the trial court, and the trial court's decision will be reversed on appeal only where it constitutes an abuse of discretion. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 203, 854 N.E.2d 635 (2006). A trial court does not abuse its discretion in tendering an instruction, or refusing to tender an instruction, so long as, taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles. *York*, 222 Ill. 2d at 203; *Dabros by Dabros v. Wang*, 243 Ill. App. 3d 259, 267-68, 611 N.E.2d 1113 (1993). In considering whether the trial court erred in tendering, or refusing to tender, any jury instructions, we consider only those objections and issues that the defendants raised at trial; any other objections have been forfeited. See *Kirkham v. Will*, 311 Ill. App. 3d 787, 796, 724 N.E.2d 1062 (2000).

¶ 41 With that, we address the first of the defendants' disputed jury instructions. The defendants assert that the trial court erred in tendering IPI 3.08, which instructs jurors to consider opinion

testimony "about matters requiring special knowledge or skill" "in the same way [they] judge the testimony from any other witness." The defendants argue that this instruction was unwarranted, because Bastian did not provide valid expert testimony. Because we have already rejected the defendants' argument that Bastian was not properly qualified to testify, we likewise reject their argument regarding this jury instruction.

¶ 42 The second instruction the defendants dispute is the so-called "long form" of IPI 15.01, which defines the term "proximate cause." The "short form" of the instruction tells jurors that the term "proximate cause means something that in the natural or ordinary course of events, produced the plaintiff's injury." IPI Civil No. 15.01. The "long form" adds the following:

> "It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury."

To challenge the instruction on appeal, the defendants assert that the long-form instruction is appropriate only in cases involving issues of contributory negligence. However, neither defendant addresses the trial court's articulated reason for tendering the instruction. The court explained that it tendered the instruction because "there was a delay in which [Amanda Santos] was found in the car which could lead someone to conclude that perhaps there was some other" cause of her injuries. With no argument from the defendants to refute this reasoning, we cannot say it constitutes an abuse of discretion.

¶ 43 The third instruction the defendant's challenge is IPI 20.01, their own instruction on the issues in the case. On appeal, the defendants argue that their tendered instruction was improper because it told the jury that the defendants could have been negligent for failing to maintain proper

lookout, speeding, or following another vehicle too closely. The defendants assert that none of these bases of liability were supported by the evidence. As with the defendants' first jury instruction, we disagree, based on our above discussion of the evidence.

¶ 44 The defendants' fourth jury instruction objection asserts that the court should not have tendered a jury instruction regarding the life expectancy of Amanda Santos. The defendants argue that the damages to be awarded measured Amanda's family's loss of society, and they point out that that figure is more likely to depend on her family's life expectancy than hers. However, when the defendants raised this objection to the trial court, the court noted that the instruction would also illustrate that Amanda was likely to have outlived her family. Upon hearing that explanation, defense counsel stated, "That's fine. I understand." Neither defendant raised any further objection to the instruction. As a result, we consider the objection to be waived.

¶ 45 The fifth jury instruction the defendants challenge on appeal is IPI 50.05, which was tendered along with IPI 50.06 to instruct the jury on the issue of whether Wayne Garfoot was an agent of Garfoot Trucking. On appeal, the defendants argue that the issue of agency was not properly presented, because there was no evidence that Wayne Garfoot acted as his company's agent. We disagree. During his testimony, Glenn Garfoot explained that Wayne was driving as an employee of Garfoot Trucking at the time of the accident. This testimony established an agency relationship between Wayne and his company. The defendants also argue that the provision of two jury instructions regarding agency was redundant and confusing, but we conclude that any redundancy did not prevent the instructions as a whole from fairly, fully, and comprehensively apprising the jury of the relevant legal principles. See *York*, 222 Ill. 2d at 203. Thus, we see no reversible error as a

result of the agency instructions.

¶ 46 The final jury instruction the defendants challenge on appeal is IPI 60.01, which instructed the jury that, at the time of the accident, Illinois law set forth various restrictions on vehicle speed for purposes of safety. The defendants argue that there was insufficient evidence to support this instruction. We disagree. Bastian opined from his examination of the accident site that the Garfoot Truck was traveling at an excessive speed before the accident, and this testimony set forth an adequate basis for the speeding instruction.

¶ 47 In total, then, we find no abuse of discretion in the trial court's decision to tender all of the jury instructions the defendants identify, and we reject their argument that the trial court's judgment must be reversed due to faulty jury instructions.

¶ 48 The defendants' fifth argument on appeal, urged by the estate only, is that the trial was unfair due to improper evidence of Richard and Maryann Santos's medical problems following the accident. The estate complains of two passages of testimony introduced by the plaintiff. In the first passage, Marryann was asked whether her name and address were available to allow people to contact her after the accident, and she responded that she "got lots of medical bills." However, the trial judge sustained an objection to this testimony and instructed the jury to disregard it. Thus, we see no reversible error as a result of the first passage the estate cites. See *Nickon v. City of Princeton*, 376 Ill. App. 3d 1095, 11103, 877 N.E.2d 776 (2007) ("Generally, any prejudicial impact of an error may be cured if the trial judge sustains an objection and instructs the jury to disregard the objectionable testimony.")

¶ 49 The second portion of testimony the estate argues tainted the trial came during direct

examination of Richard, who told the jury that he had been in the hospital for two weeks after the accident. However, the trial court explained that it allowed this testimony because it helped explain why Richard did not speak with police immediately following the accident, a point the defense emphasized during its cross-examination of Bastian. The estate does not mention, or challenge, this reasoning on appeal, and we therefore have no reason to reverse it.

¶ 50 The defendants' sixth argument on appeal is that the judgment cannot stand against either of them, because both were covered by a release the plaintiff executed prior to trial. We may dispose of this argument in short order. The document to which the defendants refer releases CWS and CWT but clearly states that "[n]othing in [the] Agreement shall be construed as a release of any claim filed or to be filed against any Defendant not herein specifically named, including *** Garfoot Trucking, Inc., *** [and] Robert E. Olson, Special Representative of the Estate of Wayne Garfoot." Because this release by its clear terms does not apply to these defendants, it provides us no reason to disturb the trial court's judgment against them.

¶ 51 The defendants' seventh argument on appeal is that the trial court should have entered a judgment notwithstanding the verdict or ordered a new trial, because Wayne Garfoot was not acting as an agent of Garfoot Trucking at the time of the accident. As noted above, a court should grant a motion for a new trial only if the verdict is contrary to the manifest weight of the evidence (*Maple v. Gustafson*, 151 Ill. 2d 445, 454, 603 N.E.2d 508 (1992)), and it should enter judgment notwithstanding the verdict only when all of the evidence, viewed in the light most favorable to the winning party, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand (*York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178, 854

N.E.2d 635 (2006)).

¶ 52 Corporations are subject to vicarious liability for torts committed by their agents. *Buckles v. Hopkins Goldenberg, P.C.*, 2012 IL App (5th) 100432, ¶ 18 (citing *Zahl v. Krupa*, 399 Ill. App. 3d 993, 1020, 927 N.E.2d 262 (2010)). An agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf. *Prodromos v. Everen Securities, Inc.*, 341 Ill. App. 3d 718, 724, 793 N.E.2d 151 (2003). The test of agency is whether the alleged principal has the right to control the manner and method in which work is carried out by the alleged agent and whether the alleged agent can affect the legal relationships of the principal. *Krickl v. Girl Scouts, Illinois Crossroads Counsil, Inc.*, 402 Ill. App. 3d 1, 5, 930 N.E.2d 1096 (2010).

¶ 53 There can be no question that this type of relationship existed between Garfoot Trucking and Wayne Garfoot at the time of the accident. In its own case-in-chief, Garfoot Trucking presented Glenn Garfoot's unequivocal testimony that Wayne was an employee of Garfoot Trucking and was driving as an employee of the corporation at the time of the accident. Based on this evidence, we have no difficulty upholding the jury's finding that Garfoot Trucking could be held vicariously liable for Wayne Garfoot's negligence.

¶ 54 In the alternative to their seventh argument, the defendants argue that the trial court erred in disallowing testimony from three witnesses regarding the relationship between Wayne Garfoot and CWT. The defendants argue that the excluded testimony could have proven that Wayne Garfoot was acting as an agent of CWT, not of Garfoot Trucking. However, even after reviewing that testimony, which was presented in offers of proof, we agree with the plaintiff that there was overwhelming

evidence of Wayne Garfoot's agency for Garfoot Trucking, so that any error in excluding this testimony was harmless.

¶ 55 In testimony to which the defendants refer, Steven Rickard, an accident reconstructionist, offered his opinion that certain federal regulations provide that the trucking company that displays its information on a tractor door is, by law, the exclusive possessor of that truck. Rickard further testified that CWT's information appeared on the Garfoot Truck. However, in their briefs, the defendants neither cite those federal regulations nor offer any precedential authority interpreting them. Instead, they offer a citation to an Illinois Appellate Court case, *Fulton v. Terra Cotta Truck Service, Inc.*, 266 Ill. App. 3d 609, 639 N.E.2d 1380 (1994), that discusses Illinois regulations not mentioned in Rickard's testimony. With no guidance from the defendants as to how the federal regulations Rickard mentioned might affect liability in this case, we cannot say that the trial court erred in excluding Rickard's testimony. The remaining testimony whose exclusion the defendants now contest came from two CWT employees, who described Wayne Garfoot's interaction with CWT. They generally described his working under contract for CWT to carry particular loads. In light of the very clear testimony, however, that Wayne Garfoot carried those loads as an employee of Garfoot Trucking, we conclude that the testimony from the CWT employees could not have changed the jury's conclusion that Wayne Garfoot was an agent of his company.

¶ 56 The defendants' eighth argument on appeal, presented by the estate only, is that the jury awarded excessive damages. The estate acknowledges that the trial court entered a remittitur to reduce the damages from $4,000,000 to $2,725,000, but it argues that the verdict nonetheless constitutes a "staggeringly excessive figure" that should be reduced. Generally, a jury's 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 v. Owens-Corning Fiberglass Corp.*, 282 Ill. App. 3d 199, 207, 668 N.E.2d 8 (1996).

¶ 57 The estate does not dispute that the loss of society between Amanda and her family was compensable in this case. Further, the estate acknowledges Amanda's youth at the time of her death, a factor that greatly exacerbates the loss of society her family experienced. However, after acknowledging these points and reciting general principles regarding the fairness of jury verdicts, the estate offers us no concrete reason to declare the verdict here to be excessive. In light of Amanda's age at the time of her death, her family's testimony regarding their society with her, and the inherently subjective nature of this type of damages award, we find no basis for upsetting the final damages award in this case.

¶ 58 The ninth and final argument on appeal, presented by Garfoot Trucking only, is that the judgment against it should be limited by section 2-1008(b) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1008(b) (West 2008). Section 2-1008(b), which allows actions to proceed against a representative of the estate of a deceased party, adds that "[i]f a party elects to have a special representative appointed ***, the recovery shall be limited to the proceeds of any liability insurance protecting the estate ***." 735 ILCS 5/2-1008(b)(2) (West 2008). Garfoot Trucking represents that the estate has no insurance coverage, and it argues that "[s]ince [the estate] is not liable ***, it follows that [Garfoot Trucking] is similarly limited from any verdict or judgment rendered against [the estate]." However, as the plaintiff points out in her brief, this conclusion does not follow at all. Section 2-1008(b) limits the liability of the estate, not the liability of other defendants. See

Knauerhaze v. Nelson, 361 Ill. App. 3d 538, 564-65, 836 N.E.2d 640 (2005) (explaining the statute's purpose to prevent financial depletion of the estate of a deceased). Simply put, it has no application to Garfoot Trucking.

¶ 59 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 60 Affirmed.