2015 IL App (5th) 140141-U

NO. 5-14-0141

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JANET BIGGS and MICHAEL ALLEN BIGGS,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Madison County.
	)	
v.	)	No. 10-L-956
	)	
ELISABETH R. WYATT and SHERYL SCHEIBAL,	)	Honorable
	)	David A. Hylla,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Cates and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Court did not abuse its discretion in excluding evidence that the plaintiff received social security disability benefits. Court did not abuse its discretion in admitting evidence of the plaintiff's preexisting medical condition where evidence showed it was exacerbated by the accident. Court did not abuse its discretion in sustaining an objection to questions regarding a defense expert's refusal to supply a list of previous depositions during cross-examination in a recent unrelated case. Court did not abuse its discretion in dismissing for cause a juror who was falling asleep during *voire dire* or in refusing to dismiss for cause three other jurors. Defense attorney's isolated remark during closing was not sufficiently prejudicial to warrant reversal. Verdict against husband on loss-of-consortium claim was not inconsistent with verdict in favor of wife for her injuries.

¶ 2 The plaintiffs, Janet and Michael Allen Biggs, filed a personal injury action against the defendants, Elisabeth R. Wyatt and Sheryl Scheibal, for injuries Mrs. Biggs

sustained in an automobile accident. The jury awarded damages to Mrs. Biggs for her injuries, but entered a verdict in favor of the defendants and against Mr. Biggs on his loss-of-consortium claim. The plaintiffs appeal an order of the trial court denying their posttrial motions requesting a new trial on the question of damages and Mr. Biggs's claim for loss of consortium. They argue that the court abused its discretion by (1) excluding evidence that Mrs. Biggs had been awarded disability benefits by the Social Security Administration; (2) admitting evidence of prior medical conditions; (3) refusing to allow plaintiffs' counsel to cross-examine a defense expert witness regarding his bias; (4) dismissing a juror for cause due to the juror's fatigue; (5) refusing to dismiss three other jurors for cause; (6) allowing defense counsel to make improper, prejudicial remarks during closing arguments; and (7) submitting a verdict form and jury instructions on Mr. Biggs's loss-of-consortium claim that allowed jurors to render inconsistent verdicts. We affirm.

¶ 3 This case arises from a motor vehicle accident involving Mrs. Biggs and both defendants. On August 9, 2010, Mrs. Biggs was stopped at a red light at the end of an exit ramp from Interstate 55/70 waiting to turn onto State Route 157. Wyatt and Scheibal were traveling in opposite directions on Route 157. Their vehicles collided when Wyatt attempted to make a left turn in front of Scheibal's vehicle. Both vehicles then skidded towards Mrs. Biggs's vehicle, and one or both vehicles collided with hers.

¶ 4 Mrs. Biggs filed a complaint alleging that, as a result of the collision, she suffered neck and back injuries resulting in neck and lower back pain and headaches. She alleged that these symptoms precluded her from returning to her job as a medical coder and that

she was permanently disabled as a result. The plaintiffs subsequently filed an amended complaint adding a claim for loss-of-consortium on behalf of Mr. Biggs.

¶ 5 Mrs. Biggs applied for disability benefits from the Social Security Administration. That application was granted while this matter was pending. Both defendants filed motions *in limine* seeking to exclude evidence that Mrs. Biggs was found to be eligible for disability benefits. The court granted these motions. The plaintiffs filed a motion *in limine* seeking to bar evidence of Mrs. Biggs's preexisting medical conditions affecting her neck and lower back. The court denied this motion.

¶ 6 The matter proceeded to trial. Dr. Syed Ali, a neurologist who treated Mrs. Biggs, testified for the plaintiffs. Dr. Ali acknowledged that Mrs. Biggs was referred to him by her attorney, but stated that he also provided ongoing care to her. Dr. Ali testified that Mrs. Biggs complained of headaches, neck and back pain, and depression and anxiety. He opined that all of these symptoms were related to the accident. He testified, however, that MRI and X-ray images of Mrs. Biggs's cervical and lumbar spine (that is, her neck and her lower back) showed degenerative changes to the discs which were caused by the normal aging process and likely predated the accident. Dr. Ali opined that the accident caused the disc degeneration in her neck to become symptomatic and exacerbated the lower back pain Mrs. Biggs experienced prior to the accident. He further testified that Mrs. Biggs experienced muscle spasms and strain, which he believed were caused by the accident. In addition, he testified that she suffered contusions to her left elbow and right knee, which were also caused by the accident.

¶ 7 Dr. Ali further testified that Mrs. Biggs suffered from anxiety and depression as a result of her injuries. He acknowledged that he was not a psychiatrist, but he testified that developing these conditions is common in patients who have been in accidents. Dr. Ali opined that Mrs. Biggs's symptoms were permanent, and they prevented her from returning to her job as a medical coder.

¶ 8 Dr. Brian Walsh is a chiropractor who treated Mrs. Biggs for a few months following the accident. He treated her for neck and back pain, numbness and tingling, headaches, and muscle spasms. He opined that her neck and back pain was caused by the accident because the level of pain she experienced was consistent with an automobile accident. He was aware, however, that Mrs. Biggs had a history of a bulging disc which predated the accident. Dr. Walsh opined that, during the time he was treating her, Mrs. Biggs could work only with certain restrictions: (1) she could not lift items heavier than 15 pounds, and (2) she could only work at her desk job if she had the ability to get up and move around for 15 minutes of every hour. When Dr. Walsh saw Mrs. Biggs on November 8, 2010, he estimated that he would be able to lift these restrictions on December 6. However, when he saw her on December 6, he did not lift those restrictions. Dr. Walsh did not see Mrs. Biggs after December 6, 2010. Thus, he did not offer any opinion as to her current condition or whether her symptoms were likely to be permanent.

¶ 9 Dr. Matthew Gornet is an orthopedic surgeon whose specialty is spine surgery. He examined Mrs. Biggs once in October 2010. He testified that he ordered X-rays of her spine which showed "no real significant bony abnormalities." Dr. Gornet attributed

Mrs. Biggs's neck pain and headaches to structural problems related to the discs in her spine ("discogenic pain"). He explained that disc degeneration is a normal process that occurs in most people over time. He testified that it may lead to symptoms such as pain, but does not always do so. Dr. Gornet testified that he recommended physical therapy and chiropractic care. He opined that Mrs. Biggs was able to return to work. Dr. Gornet did not give an opinion regarding the cause of the symptoms.

¶ 10 Dr. Mitchell Rotman is an orthopedic surgeon specializing in the treatment of the hands and upper extremities. Like Dr. Gornet, Dr. Rotman examined Mrs. Biggs one time in October 2010. She came to see him due to pain in her elbow and numbness in her hands. Dr. Rotman diagnosed Mrs. Biggs as suffering from borderline carpal tunnel syndrome and a mild case of lateral epicondyle, or tennis elbow. He opined that the tennis elbow was caused by the accident, but the carpal tunnel syndrome was idiopathic and was not caused by the accident. He testified that the normal recovery time for tennis elbow was one to three months. Dr. Rotman did not believe that either of these issues precluded Mrs. Biggs from returning to work. However, he noted that he did not know whether doctors treating her for other problems placed restrictions on her ability to perform her job.

¶ 11 Dr. Bernard Randolph testified as an expert witness for the defendants. He conducted a one-hour examination of Mrs. Biggs and reviewed her medical records, including MRI and X-ray images. Dr. Randolph opined that as a result of the accident, Mrs. Biggs suffered soft tissue strain injuries to her neck and lower back as well as contusions to her left elbow and her right knee. He testified that such injuries typically

resolve within "a few days to a few months in most cases," and opined that Mrs. Biggs's injuries had fully healed. He further testified that that he believed the degenerative changes to her spine and knees were all caused by the normal aging process.

¶ 12 The jury returned a verdict in favor of Mrs. Biggs and awarded her $33,850 in damages. This included $8,250 for lost earnings, a figure apparently based on a finding that Mrs. Biggs was disabled from work for a period of four months. The jury returned a verdict in favor of the defendants on Mr. Biggs's loss-of-consortium claim. The court subsequently entered a judgment on these verdicts. The plaintiffs filed a motion for a new trial on damages only on Mrs. Biggs's claims and a motion to set aside the verdict against Mr. Biggs on his loss-of-consortium claim and/or for a new trial on damages. The plaintiffs' motions raised the same issues they raise in this appeal. The court denied both motions, and the plaintiffs filed the instant appeal. We will discuss additional facts as necessary to our determination.

¶ 13 The plaintiffs' first two arguments on appeal concern rulings on motions *in limine*. Trial courts have broad discretion in ruling on motions *in limine* as part of their inherent authority to determine the admissibility of evidence. *Hawkes v. Casino Queen, Inc.*, 336 Ill. App. 3d 994, 1005 (2003) (quoting *City of Quincy v. Diamond Construction Co.*, 327 Ill. App. 3d 338, 342-43 (2002)). On appeal, we will reverse a trial court's decision to grant or deny a motion *in limine* only if there has been a clear abuse of that discretion. *Hawkes*, 336 Ill. App. 3d at 1005. An abuse of discretion occurs "only where no reasonable person would take the view adopted by the trial court." *Ford v. Grizzle*, 398 Ill. App. 3d 639, 646 (2010).

¶ 14 The plaintiffs first argue that the court abused its discretion in granting the defendants' motions *in limine* to exclude evidence that Mrs. Biggs was awarded disability benefits by the Social Security Administration. They further contend that this error was compounded when the defendants were allowed to question her regarding the fact that she did not attempt to seek other employment.

¶ 15 Prior to trial, Mrs. Biggs was notified that her claim for disability benefits had been approved by a social security administrative law judge (ALJ). Each defendant filed a motion *in limine* seeking to exclude from evidence the award itself as well as any evidence that the plaintiff qualified for disability benefits. They argued that the award constituted hearsay, and that admitting it would unfairly prejudice them because they had no opportunity to participate in the social security proceedings or depose any of the doctors whose opinions were relied upon by the ALJ. In their response to the defendants' motions, the plaintiffs alleged that the social security disability determination was "very much at odds with" the opinion of the defendants' expert, Dr. Bernard Randolph. They further alleged that the defendants "have clearly contested medical causation issues and have interjected the suggestion of malingering into this action." The plaintiffs argued that the social security award was, therefore, "relevant not only for disability evidence but also for impeachment, rehabilitation, and rebuttal." The court granted the defendants' motions.

¶ 16 At trial, counsel for both defendants asked Mrs. Biggs whether she went back to work as a medical coder or looked for other work after the accident. She was asked if she "even attempted to go back" to her job as a medical coder for one day so she could "see if

[she] could handle the job." She was also asked if she had gone to Walmart or to any restaurants to see if there was some other type of work she could do. She replied that she had not done either of these things.

¶ 17 After this testimony, counsel for the plaintiffs asked the court to revisit its ruling on the motion *in limine*. Counsel argued that this line of questioning "suggested to the jury that Mrs. Biggs should be out looking for work." As such, he argued, "she should be entitled to explain to the jury why she has not done that." The trial judge noted that Mrs. Biggs could refute the defendants' suggestion that she should be looking for work with evidence that two of her doctors told her she was disabled and could not go back to work. He indicated that the ruling on the motion would stand, but allowed the plaintiffs to make an offer of proof.

¶ 18 As an offer of proof, plaintiffs' counsel put Mrs. Biggs on the stand and asked her, "Is one of the reasons why you have not sought work *** because you are getting Social Security disability, you've been approved for that and found to be unemployably disabled by the federal government?" Mrs. Biggs replied, "Yes, sir." She then testified that if she got another job, she would lose both her social security income and her medical coverage. The court denied the plaintiffs' request to change its ruling on the motion *in limine*. The court went on to note that the plaintiffs did not object to the questions regarding whether Mrs. Biggs applied for other jobs. The court stated that, if they had objected, the questions might have been barred. On redirect examination, counsel asked Mrs. Biggs to tell the jury why she had not applied for other jobs. Mrs. Biggs responded, "Due to the injuries and back pain and I had four doctors say that I was not to return to work."

¶ 19 On appeal, the plaintiffs do not explicitly argue that the trial court erred in allowing the defendants to ask Mrs. Biggs whether she sought other employment. Instead, they argue that the line of questioning was prejudicial because the court's *in limine* ruling meant that she was unable to testify that she did not seek other employment because she was receiving disability benefits and would lose her medical coverage if those benefits were terminated. To the extent that this argument may be construed as an indirect challenge to the questions, we find that the plaintiffs forfeited any such argument by failing to object at trial. See *Guski v. Raja*, 409 Ill. App. 3d 686, 697 (2011).

¶ 20 The plaintiffs argue that (1) the disability award was not hearsay because it was not offered to prove the truth of the matter asserted; (2) it was admissible under the business record exception to the hearsay rule; and (3) social security disability awards have been found to be admissible in some cases in which the disability of the recipient is at issue. We find none of these arguments persuasive.

¶ 21 We first reject the plaintiffs' contention that they sought to admit evidence of the social security disability award for purposes other than the truth of the matter asserted. Specifically, they contend that evidence of the award was offered to rebut the defendants' suggestion of "malingering." This claim is belied by the course of action the plaintiffs took at trial. As we have just discussed, they expressly argued in their response to the defendants' motions *in limine* that the award was relevant for purposes of proving disability. They also argued that it was relevant to rebut evidence they anticipated the defendants would present to suggest to the jury that Mrs. Biggs was malingering. However, as the trial court pointed out, the plaintiffs took no steps to try to exclude this

evidence. They did not file a motion *in limine*, and they did not object when defense counsel asked Mrs. Biggs if she had looked for different types of jobs. As such, as previously noted, they forfeited any objection to the questions. See *Guski*, 409 Ill. App. 3d at 697. Moreover, the plaintiffs were able to offer other evidence to rebut the suggestion that Mrs. Biggs should have been looking for other work, and in fact did so–Mrs. Biggs testified that she did not look for work because she was in pain and was told by doctors that she could not go back. We find that the disability award was offered primarily–if not solely–to prove the truth of the matter asserted.

¶ 22 We next reject the plaintiffs' contention that the disability award was admissible under the business records exception. They point to Illinois Rule of Evidence 803 (eff. Jan. 1, 2011). That rule provides that the definition of a business is very broad, encompassing any "business, institution, association, profession, occupation, and calling of every kind." Ill. R. Evid. 803(6) (eff. Jan. 1, 2011). They assert that the Social Security Administration falls within this broad definition. They further assert that a disability award is clearly "a record created and kept in the course of regularly conducted business." We disagree.

¶ 23 We first note that Rule 803 provides a separate hearsay exception for records kept by public agencies. See Ill. R. Evid. 803(8) (eff. Jan. 1, 2011). The Social Security Administration is a public agency. Thus, this exception is more applicable.

¶ 24 Moreover, the disability award does not fall within Rule 803's definition of either a business record or a public record. The rule defines a business record as a "memorandum, report, record, or data compilation *** of acts, events, conditions,

opinions, or diagnoses." Ill. R. Evid. 803(6) (eff. Jan. 1, 2011). Business records are kept for the purpose of aiding " 'in the proper transaction of the business.' " *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 24 (quoting *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 414 (2005)). Rule 803 defines public records or reports as "[r]ecords, reports, statements, or data compilations *** of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law." Ill. R. Evid. 803(8) (eff. Jan. 1, 2011). The disability award does not fit within either of these definitions because it is not simply a memorandum, report, record, statement, or compilation. Rather, it is a determination made after an administrative proceeding to which the defendants were not parties. The disability award was not admissible under either the business records exception or the public records exception.

¶ 25 The plaintiffs' final contention in support of their argument that the court abused its discretion in excluding evidence of the social security disability award is that such awards have been held to be admissible in other cases. This argument is unavailing. The cases cited by the plaintiffs arise under the Americans with Disabilities Act (ADA) and involve a set of issues entirely different from the issues involved in a personal injury case such as this. We thus find them to be inapposite.

¶ 26 In *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998), for example, the issue was whether the plaintiff, who suffered from lupus, was a "qualified individual with a disability" under the ADA. To fit within this definition, a plaintiff must be able to " 'perform the essential functions' " of the position either with or

without reasonable accommodation. *Haschmann*, 151 F.3d at 599 (quoting 42 U.S.C. § 12111(8) (1994)). The employer argued that the plaintiff's disability–specifically, her need to take occasional medical leaves of absence due to flare-ups of lupus–rendered her unable to perform the essential functions of her job. *Haschmann*, 151 F.3d at 599.

¶ 27 After suffering a flare-up and losing her job, the plaintiff applied for disability benefits from the Social Security Administration. Her application was eventually granted. *Haschmann*, 151 F.3d at 603-04. At issue in *Haschmann* was the effect this should be given in her lawsuit under the ADA. The employer argued that because the plaintiff had "represented to the Social Security Administration that she was unable to work," principles of judicial estoppel should preclude her from claiming that she was a qualified individual with a disability under the ADA. *Haschmann*, 151 F.3d at 602-03.

¶ 28 The court rejected this argument, noting that the ADA and social security involve different standards. *Haschmann*, 151 F.3d at 603 (citing *McCreary v. Libbey-Owens-Ford Co.*, 132 F.3d 1159, 1164 (7th Cir. 1997)). The court went on to explain that the "receipt of Social Security disability benefits, while not dispositive, may be relevant to the issue whether a plaintiff under the ADA is a qualified individual with a disability." *Haschmann*, 151 F.3d at 603; see also *McCreary*, 132 F.3d at 1164 (explaining that an ADA plaintiff's "representations to the Social Security Administration are not irrelevant; they are some evidence of the plaintiff's ability to perform the essential functions of a job"); *Weigel v. Target Stores*, 122 F.3d 461, 467 (7th Cir. 1997) (noting that a claimant's representations to social security and the ALJ's eligibility determination are not dispositive but are also not irrelevant).

¶ 29 There are a few key differences between these ADA cases and the instant personal injury case. First, the ADA cases do not involve the issue of causation, which is a key question in the instant matter. The cause of disability is not at issue in a determination of eligibility for social security benefits either. See *Johnson v. American Honda Motor Co.*, No. 10-126, 2012 WL 1067103, at *3 (D. Mont. Mar. 28, 2012) (explaining that the probative value of a social security disability award was outweighed by the potential prejudice to a defendant in a case where causation was at issue for this reason).

¶ 30 Second, the ADA cases are tried by federal judges. This distinction is important because the standards applicable to social security disability claims are different from both the standards applicable in ADA cases and the standards applicable in personal injury cases involving claims of disability. See *Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992) (citing *Garfield v. Schweiker*, 732 F.2d 605, 607 (7th Cir. 1984)) (explaining that a claimant may be found eligible for social security disability benefits upon a finding that he meets the criteria for certain disabilities without a determination of whether there are jobs available that the claimant can perform). Because federal judges are familiar with both federal statutory schemes, they can readily understand this difference and consider a disability award in an ADA case without giving it a dispositive effect, something that may be far more difficult for lay jurors in a personal injury suit to do. See *Johnson*, No. 10-126, 2012 WL 1067103, at *2 (finding that evidence of a disability award would make it difficult for a jury to conduct its own evaluation of the medical evidence).

¶ 31 Third, as discussed, the ADA cases involve representations made by ADA plaintiffs in their applications for disability benefits that may, in some cases, be at odds with the assertions in their ADA cases. Thus, the disability awards are relevant evidence to contradict a claim put forth by a party who was involved in the social security proceedings. As the defendants have argued here, the opposite is true in this case. We find that the court properly exercised its discretion in excluding evidence of the social security disability award.

¶ 32 The plaintiffs next argue that the court erred in denying their motion *in limine* to exclude evidence that the plaintiff suffered age-related disc degeneration prior to the accident. They argue that the defendants were allowed to inject this prior condition into the proceedings without any expert testimony to explain the causal connection to her injuries. We disagree.

¶ 33 In *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49 (2000), our supreme court explained that evidence of a prior injury or medical condition is admissible only if it is relevant. Such evidence may be relevant for any of three purposes: (1) to negate causation; (2) to negate or reduce damages; or (3) for impeachment purposes. *Voykin*, 192 Ill. 2d at 57. For a prior injury or condition to be relevant to the questions of causation or damages, it "must make it less likely that the defendant's actions caused any of the plaintiff's injuries or an identifiable portion thereof." *Voykin*, 192 Ill. 2d at 58. A defendant is liable even if the only injury his negligence causes is the aggravation of a preexisting injury or condition. *Voykin*, 192 Ill. 2d at 58. In addition, the *Voykin* court held that a defendant seeking to admit evidence of prior injuries or medical conditions must establish the

relevance of the evidence, which generally requires expert medical testimony. *Voykin*, 192 Ill. 2d at 59.

¶ 34 Here, uncontroverted evidence indicated that Mrs. Biggs experienced age-related disc degeneration prior to the accident. Dr. Ali, the neurologist her attorney referred her to, opined that the accident exacerbated symptoms she was already experiencing prior to the accident and caused new symptoms. Although Dr. Gornet, the spine surgeon, did not offer an opinion as to the cause of Mrs. Biggs's symptoms, his testimony provided some support for Dr. Ali's opinion. Specifically, Dr. Gornet testified that disc degeneration is a process that occurs over time and may or may not lead to symptoms. In addition, both plaintiffs acknowledged that Mrs. Biggs had been treated for lower back pain for 10 years prior to the accident, and medical records introduced into evidence also confirmed this. Thus, even viewing the evidence from the plaintiffs' perspective, evidence of Mrs. Biggs's preexisting disc degeneration was relevant and admissible under *Voykin*. We find that the court properly admitted it.

¶ 35 The plaintiffs next contend that the court abused its discretion by not allowing them to fully cross-examine the defendants' expert witness, Dr. Bernard Randolph, regarding his alleged bias in the matter. We disagree.

¶ 36 Plaintiffs' counsel cross-examined Dr. Randolph at length regarding the frequency of his testimony in prior cases in order to show that he regularly testified as an expert witness on behalf of defendants in personal injury cases. Counsel elicited testimony that Dr. Randolph billed $850 per hour for time spent giving deposition testimony and $500 per hour for time spent reviewing medical records, conducting independent medical

examinations, and preparing reports of his findings. He elicited testimony that Dr. Randolph testified in 589 personal injury cases between 2002 and 2009, the vast majority of which were on behalf of defendants, and that Dr. Randolph billed $416,000 for these services in 2008 and 2009 alone. Counsel attempted to question Dr. Randolph about his failure to comply with a request that he provide a list of these cases at a deposition in a recent unrelated case. Both defendants objected to this line of questioning, and the court sustained their objections.

¶ 37 On appeal, the plaintiffs contend that the court abused its discretion in sustaining the defendants' objections. They further argue that they were prejudiced by the exclusion of this "crucial evidence of Dr. Randolph's bias." We are not persuaded.

¶ 38 As the plaintiffs correctly point out, opposing counsel is allowed to cross-examine an expert witness about his bias, financial interest, or partisanship. *Sears v. Rutishauser*, 102 Ill. 2d 402, 407 (1984). As such, counsel may ask a medical expert about "the number and frequency of referrals from an attorney." *Sears*, 102 Ill. 2d at 411. However, this type of cross-examination is generally limited to "the number of referrals, their frequency, and the financial benefit derived from them." *Sears*, 102 Ill. 2d at 411. This limitation is partly to protect the physician-patient privilege–an issue not implicated by the questioning at issue here–and partly to avoid "subtrials on issues remote from the subject of the lawsuit"–a concern which is implicated here. *Sears*, 102 Ill. 2d at 407. Like other evidentiary rulings, a determination of the limits on the cross-examination of a medical expert is a matter within the trial court's discretion. *Sears*, 102 Ill. 2d at 407-08.

¶ 39 Here, the plaintiffs' attorney cross-examined Dr. Randolph extensively regarding the frequency of his referrals from defense attorneys and the financial benefits he derived as a result of these referrals. The testimony elicited on cross-examination established that Dr. Randolph regularly testified as a defense expert and that doing so was quite lucrative. It is worth noting that counsel elicited additional testimony from Dr. Randolph admitting that in previous cases, he had testified somewhat inconsistently when asked what percentage of the depositions he gave were for defendants. His responses ranged from 90% to 99%. Evidence that Dr. Randolph did not comply with a request to supply a list of previous cases when plaintiffs' counsel deposed him in a recent unrelated case was not "crucial evidence" needed to bring home this point. In addition, it was the type of evidence that could lead to a subtrial on a matter that was collateral to the issues involved in the case at hand. We find no abuse in the trial court's decision to limit the cross-examination accordingly.

¶ 40 The plaintiffs' next two arguments concern the court's decision to dismiss one juror for cause and its decision not to dismiss three other jurors for cause. The determination of whether a juror should be dismissed for cause is a matter within the discretion of the trial court. *People v. Lucas*, 132 Ill. 2d 399, 425 (1989); *Magna Trust Co. v. Illinois Central R.R. Co.*, 313 Ill. App. 3d 375, 390 (2000). In exercising this discretion, a court may only dismiss a juror "upon a showing of good cause." *Addis v. Exelon Generation Co.*, 378 Ill. App. 3d 781, 791 (2007). On appeal, we will reverse a trial court's decision to dismiss or refuse to dismiss a juror only if we find that the court abused its discretion. *Lucas*, 132 Ill. 2d at 425; *Magna Trust Co.*, 313 Ill. App. 3d at 390.

In addition, we need only reverse if the party challenging the court's decision can demonstrate prejudice. *Addis*, 378 Ill. App. 3d at 791.

¶ 41 The plaintiffs argue that the court abused its discretion in dismissing juror number 17 for cause. During *voire dire*, juror number 17, Michael Fahey, informed the judge that he worked night shifts at a grocery store. He stated that he worked the night shift before reporting for jury duty that day. Fahey explained that he was working that shift to try to "help out" because many people at his workplace were on vacation, and it would be difficult to get time off from work as a result. Fahey did not know whether working this schedule while serving on a jury would impair his judgment, but he said that he would do his best to follow along and pay attention to the evidence presented if he were chosen to serve on the jury.

¶ 42 In deciding to dismiss Fahey for cause, the trial judge noted that he saw Fahey falling asleep during *voire dire*. He indicated that he did not believe it was possible for him to prevent Fahey from working the night shift while serving on the jury if Fahey chose to do so. The judge therefore dismissed Fahey, citing both concerns for Fahey's safety and concerns over his ability to remain alert during the trial.

¶ 43 The plaintiffs contend this decision constituted an abuse of discretion, arguing that (1) any problems caused by Fahey's fatigue during trial were "too minor" to make the decision to discharge him for cause proper; and (2) any problems could have been cured because the judge had the authority to order Fahey's employer to allow him to take time off to serve on the jury (see 705 ILCS 305/4.1 (West 2012)). We find neither argument persuasive.

¶ 44 In support of their argument that Fahey's expected fatigue during trial was "too minor" an issue to justify dismissal for cause, the plaintiffs point to *Addis v. Exelon Generation Co.* That case involved a challenge to the ability of four potential jurors to be impartial in a retaliatory discharge case. The plaintiff there argued that one juror should have been dismissed for cause because her aunt and nephew worked for an affiliate of the corporate defendant. *Addis*, 378 Ill. App. 3d at 792. She challenged a second juror because the juror stated that she believed that too many people brought unnecessary lawsuits. *Addis*, 378 Ill. App. 3d at 792. The plaintiff argued that a third juror could not be impartial because she had been the supervisor of an employee involved in an employment discrimination case. *Addis*, 378 Ill. App. 3d at 793. Finally, she argued that because she had to use peremptory challenges on these three jurors, a juror was empanelled who could not be impartial because she owned stock in the corporate defendant. *Addis*, 378 Ill. App. 3d at 793. In rejecting these arguments, the appeals court emphasized that each of the challenged jurors testified during *voire dire* that they could be fair and impartial. *Addis*, 378 Ill. App. 3d at 792-93. In addition, the court found that "suspicion of bias is insufficient" to require a court to dismiss a juror for cause; rather, the party challenging the juror "must show actual bias or prejudice." *Addis*, 378 Ill. App. 3d at 793.

¶ 45 The plaintiffs in this case argue that Fahey's likely fatigue was less of a cause for concern than the potential biases of the jurors at issue in *Addis*. Here, the issue was not any potential bias. Instead, the question was Fahey's ability to stay awake and alert enough to hear and remember the evidence presented at trial. Unlike the jurors at issue in

Addis, he did not state unequivocally that he would be able to do so; he stated only that he would try his best. Moreover, the court witnessed Fahey dozing off during *voire dire*. Under these circumstances, it was reasonable for the court to conclude that Fahey would likely be unable to stay awake and alert through the trial, which would obviously impair his ability to reach a decision based on the evidence presented.

¶ 46 We are also not persuaded by the plaintiffs' contention that the court could have mitigated these problems by ordering Fahey's employer to allow him to take time off from work. As noted previously, the court believed that Fahey intended to work the night shift and the court could not order him to do otherwise. We find no abuse of discretion. We also note that the plaintiffs do not explain how the court's decision to dismiss Fahey prejudiced them. See *Addis*, 378 Ill. App. 3d at 791.

¶ 47 The plaintiffs next argue that the court abused its discretion in refusing to strike jurors number 3, number 28, and number 31 for cause. We disagree.

¶ 48 During *voire dire*, juror number 3, Amanda Prior-Alton, stated that she did not believe that a plaintiff in an automobile accident case should be compensated for "anything over medical expenses and lost wages." However, when Prior-Alton was asked if she would have difficulty applying the law if instructed that pain and suffering is an element of damages, Prior-Alton replied, "I'm not saying I would have a difficult time with following it, but I don't agree with it." Juror number 28, James Pilcher, stated, "I think common sense has kind of gone out the window. There's too many lawsuits on things that are just common sense." Pilcher stated, however, that this viewpoint would

not impact his ability to be fair to the plaintiffs. Juror number 31, Steven Safford, stated that he thought attorneys had "a tendency to ask for more" in terms of damages.

¶ 49 Even assuming these statements demonstrated a bias against the plaintiffs and/or their counsel, we would not find reversal on this basis to be warranted. As stated previously, reversal is only required if a party can demonstrate that prejudice resulted from the court's decision. *Addis*, 378 Ill. App. 3d at 791. Prejudice does not result from even an erroneous ruling when a party uses peremptory challenges to dismiss the biased or impartial juror. *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). Thus, to demonstrate prejudice, a party must show that (1) the party has exercised all of her peremptory challenges; and (2) an objectionable juror was allowed to sit on the jury. *In re Commitment of Trulock*, 2012 IL App (3d) 110550, ¶ 45. Here, the plaintiffs used six of the eight peremptory challenges allotted to them. As such, they are unable to demonstrate prejudice even if we accept their claim that any of the three challenged jurors were biased.

¶ 50 Next, the plaintiffs argue that the court abused its discretion in allowing defense counsel to make improper and prejudicial remarks during closing arguments. Specifically, they complain that Wyatt's attorney told jurors that defense counsel "cannot speak to the plaintiff's doctors unless it's at a deposition and [plaintiffs' counsel] is present." They argue that this remark was prejudicial because it implied to the jurors that the defendants' attorneys were unfairly precluded from learning the opinions of the plaintiff's treating physicians prior to trial. See *Netto v. Goldenberg*, 266 Ill. App. 3d 174, 183-84 (1994) (explaining that a similar statement in a nonpattern jury instruction

was misleading because jurors could not be expected to understand the difference between interviewing a witness and deposing a witness). We do not find the statement prejudicial enough to warrant reversal.

¶ 51 The scope of closing argument is a matter within the discretion of the trial court. *Velarde v. Illinois Central R.R. Co.*, 354 Ill. App. 3d 523, 543-44 (2004). Attorneys are afforded wide latitude in crafting their closing arguments. *Velarde*, 354 Ill. App. 3d at 544. Comments alleged to be improper must be viewed in context of the closing arguments in their entirety. *People v. Blue*, 189 Ill. 2d 99, 128 (2000). In addition, even improper remarks do not warrant reversal unless they are prejudicial. *Velarde*, 354 Ill. App. 3d at 543-44.

¶ 52 Considering the challenged remark in context, we do not find it prejudicial enough to warrant reversal, even assuming it to be improper. In his closing arguments, the plaintiffs' attorney emphasized the testimony that the defendants' expert, Dr. Randolph, had been paid a substantial amount of money to testify as a defense expert in numerous previous cases. In addressing this argument, Wyatt's attorney first acknowledged that the jury heard evidence that Dr. Randolph's work performing medical examinations for lawsuits generated a substantial amount of revenue. She explained that these figures included examinations performed over several years. She further explained that Dr. Randolph did not personally receive all of the money billed by his practice for this service. She then told jurors, "Now, as defendants in a lawsuit, we cannot speak to the plaintiff's doctors unless it's at a deposition and [the plaintiffs' attorney] is present." At this point, counsel for the plaintiffs objected. After the objection was overruled, Wyatt's

attorney continued, explaining to the jury, "These medical examinations Dr. Randolph performed are provided for under the rules of civil procedure, and they're done in order for the defendants to have a way to rebut the medical evidence the plaintiff puts on." When read in context, the primary message sent by the challenged statement is that retaining an expert witness is a normal and necessary part of litigation.

¶ 53 Moreover, to the extent the statement had the potential to suggest that defense counsel is at a disadvantage because they cannot talk to the plaintiff's doctors outside of depositions, it was an isolated remark in a fairly lengthy closing argument. Thus, we do not find reversal warranted on this basis.

¶ 54 Finally, the plaintiffs argue that the court abused its discretion by providing jurors with verdict form D, which allowed them to find for the defendants and against Mr. Biggs on his loss-of-consortium claim, and instructing jurors that if they decided that the defendants had no liability to Mr. Biggs, they would not need to consider damages. According to the plaintiffs, this instruction coupled with verdict form D allowed jurors to reach inconsistent verdicts. We find that they forfeited this argument by agreeing to the submission of the instruction and the form. We further find that an award of zero damages is not against the manifest weight of the evidence.

¶ 55 When one spouse is injured (the impaired spouse), the other spouse (the deprived spouse) may recover damages for loss of consortium. A claim for loss of consortium is a separate cause of action, even though it depends upon the claim of the impaired spouse for her injuries. *Pease v. Ace Hardware Center of Round Lake No. 252c*, 147 Ill. App. 3d 546, 555 (1986). Loss of consortium includes both the loss of the impaired spouse's

support and the loss of her society. Support includes services the impaired spouse can no longer perform, while society includes both companionship and sexual relations. *Pease*, 147 Ill. App. 3d at 555. To be entitled to recovery for loss of consortium, the deprived spouse must establish that he was married to the impaired spouse at the time of her injury. In addition, the defendants must be liable to the impaired spouse for her injuries for the deprived spouse to be entitled to recovery. *Pease*, 147 Ill. App. 3d at 556. Both of these elements of loss of consortium are clearly met in this case. The remaining element is damages suffered by Mr. Biggs as a result of his wife's injuries.

¶ 56 Mr. Biggs testified that prior to the accident, he and Mrs. Biggs did yard work and gardening and "projects around the house" together. He testified that they enjoyed socializing with other family members, going to baseball games, and going fishing. After the accident, however, he testified that Mrs. Biggs's personality changed. She was no longer outgoing and happy. Instead, she was easily agitated, and she did not want to be around people other than Mr. Biggs. He further testified that before the accident, Mrs. Biggs cooked, cleaned the house, helped him mow the yard, and did a lot of gardening. On cross-examination, he acknowledged that Mrs. Biggs still does some of the cleaning, although he does more of it than he used to do. He also acknowledged that Mrs. Biggs's mother, who lives with them, helps with the cooking and housework. In addition, Mr. Biggs admitted that Mrs. Biggs took pain medication for lower back pain for many years prior to the accident.

¶ 57 Although Mr. Biggs's testimony was not contradicted by other evidence, the jury's award of damages to Mrs. Biggs appears to be predicated on a finding that she was

disabled for a period of four months. The evidence at trial clearly established that she suffered strain injuries and contusions as a result of the accident. Even the defense expert opined that these injuries were caused by the collision, and no medical witness contradicted this. However, much of the medical testimony indicated that those injuries healed within a few months, and there was conflicting evidence regarding the severity of her other symptoms (the neck and back pain and headaches) as well as the causal connection between those symptoms and the accident. It was certainly possible for jurors to find that the testimony related to Mr. Biggs's loss-of-consortium claim was simply not credible. His testimony regarding Mrs. Biggs's depression, anxiety, and agitation was particularly vulnerable because no psychiatrist testified about these problems. It was also possible for jurors to conclude that Mr. Biggs's loss was caused by symptoms that were not related to the accident. Either of these findings would support an award of zero damages, and we do not believe these findings would be against the manifest weight of the evidence.

¶ 58 Nevertheless, at least one Illinois court has found that there is a difference between a verdict against the deprived spouse and an award of zero damages for loss of consortium. In *Pease*, the wife was the deprived spouse. There, as here, the jury returned a verdict in favor of the injured husband and a verdict against the wife on her loss-of-consortium claim. *Pease*, 147 Ill. App. 3d at 550. On appeal, the wife argued that a verdict in favor of the impaired spouse required a verdict in favor of the deprived spouse. *Pease*, 147 Ill. App. 3d at 555.

¶ 59 The appeals court rejected this argument, explaining that, although the deprived spouse's "entitlement to recovery is necessarily dependent upon" the defendant's liability to the impaired spouse, a finding of liability to the impaired spouse did not always require a finding of liability to the deprived spouse. *Pease*, 147 Ill. App. 3d at 555. Nevertheless, the court went on to consider cases and annotations suggesting that "verdicts in favor of the impaired spouse and against the deprived spouse might be inconsistent." *Pease*, 147 Ill. App. 3d at 555-56. The court noted that in the case before it, the wife established that she was married to the husband when he was injured and that the jury found the defendant liable to the husband. The court stated that, as such, "she satisfied all the requirements for a verdict in her favor as to liability" and the verdicts were therefore inconsistent. *Pease*, 147 Ill. App. 3d at 556.

¶ 60 The defendant in *Pease* urged the court to construe the verdict against the wife as an award of zero damages. *Pease*, 147 Ill. App. 3d at 556. The appeals court rejected this argument, largely because it found that an award of zero damages would have been against the manifest weight of the evidence, even assuming that was what the jury there intended. *Pease*, 147 Ill. App. 3d at 559. Here, we have reached the opposite conclusion. We need not determine whether this difference requires a different result from the one reached in *Pease*. Plaintiffs' counsel agreed at trial that the instructions and verdict form were proper. If a party does not object to jury instructions or verdict forms at trial, any objections are forfeited on appeal. *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 869 (2004). We thus find that Mr. Biggs was not entitled to a new trial on his loss-of-consortium claim.

¶ 61 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 62 Affirmed.