

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23 (e) (1).

3--09--0931

Order filed March 21, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2010

LEISA PARKER, as Administrator for the)	Appeal from the Circuit Court
Estate of Nicole Parker, deceased,)	For the 13th Judicial Circuit
)	LaSalle County, Illinois
)	
Plaintiff-Appellee,)	
)	
v.)	No. 2005- L-173
)	
JAMES DONOVAN and JOANNE)	
DONOVAN, d/b/a JIM'S OFFICE)	
LOUNGE, INC.,)	Honorable
)	Joseph P. Hettel,
Defendants-Appellants.)	Judge Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Holdridge specially concurred.
Justice Schmidt dissented.

ORDER

Held: The trial court did not abuse its discretion in ordering a new trial where defense counsel's remarks during closing arguments so prejudiced the plaintiff she was unable to receive a fair trial.

Nicole Parker, the passenger, was killed in a one-vehicle motorcycle accident, plaintiff Leisa Parker, as administrator of Nicole's estate, brought a dram shop lawsuit against the defendants. Parker alleged that before the motorcycle accident, the operator of the motorcycle, Gary Griglione,

became intoxicated from alcoholic drinks he was served at defendants' establishment, Jim's Office Lounge. A trial ensued and the jury returned a verdict in favor of the defendants. Parker moved for a new trial. After finding the defendants had made improper closing remarks regarding the decedent's personal responsibility and inflammatory remarks regarding her character, the trial court granted Parker's motion for a new trial. The defendants followed with this appeal. We find the closing remarks of the defendants denied Parker a fair trial and impaired the integrity of the judicial process. For these reasons, we affirm the trial court.

FACTS

The plaintiff, Leisa Parker, as administrator of the estate of Nicole Parker, filed a complaint against the defendants, James Donovan and Joanne Donovan, d/b/a Jim's Office Lounge, Inc., alleging a violation of the Dram Shop Act (235 ILCS 5/6-21 (West 2004)). In her complaint, Parker alleged that Gary Griglione, the operator of the motorcycle on which Nicole was a passenger, became intoxicated at Jim's Office Lounge and later lost control of the motorcycle, causing Nicole to be fatally injured. The cause proceeded to a jury trial and the following evidence was adduced.

Jared Pratt testified he was a friend of Gary Griglione and that on August 8, 2005, at approximately 8:30 to 9:00 p.m., he witnessed Griglione arrive at Jim's Lounge. Griglione's wife, Roxanne Griglione, and the decedent, Nicole Parker, were in the bar when Griglione arrived. Pratt stated that Griglione, whom he had known for over ten years, did not appear intoxicated when he arrived at the bar. Later, Pratt and Griglione had an argument, an occurrence Pratt attributed to the fact that Griglione became intoxicated. Pratt testified he asked the bartender, Sandy, to stop serving Griglione. Sandy stopped serving Griglione, however, Pratt observed Griglione drinking again for another hour or two. He did not actually see Sandy serve Griglione; however, she told him that she

did. Pratt testified he assumed Griglione was drinking alcohol because he became very intoxicated. Pratt did not know how many drinks Griglione consumed. He witnessed Griglione “staggering and stumbling his words.” Pratt was also “really intoxicated.” Later, Pratt, Roxanne, Nicole and Griglione left the bar and were sitting in Roxanne’s vehicle when Roxanne and Griglione had an argument. The group did not drink while they were in the vehicle. Roxanne told Nicole not to ride with Griglione on the motorcycle. Pratt and Roxanne left together in Roxanne’s vehicle. They heard about the accident approximately two hours after they left Jim’s Lounge. Pratt admitted he was a convicted felon.

Roxanne testified that at the time of the accident she was not living with Griglione. She had gone to Jim’s Lounge with Nicole. Griglione showed up approximately an hour later. He was not “drunk” when he arrived. Roxanne stated Griglione drank a lot of vodka after his arrival at the bar and eventually she and Pratt told the bartender to “cut him off.” Roxanne stated Griglione was refused service because he was “too drunk.” A short while later, Griglione was served again. In Roxanne’s opinion, Griglione was intoxicated when the four of them left the bar. Roxanne did not know how long the group was at the bar; she recalled it was a “long time.” During the 20 or 30 minutes the foursome sat in Roxanne’s vehicle, she and Griglione got into an argument about money. Griglione exited the vehicle as did Nicole. Roxanne told Nicole not to go with Griglione on his motorcycle, however, she did not heed Roxanne’s advice. Roxanne left the area with Pratt. She learned of the accident an hour or two later. Roxanne admitted she had a conviction for possession of methadone.

Sandra Baker testified she was the bartender at Jim’s Lounge on August 8, 2005. She remembered Pratt, Roxanne, Nicole and Griglione were in the bar that night. Griglione arrived after

the others. Griglione, Nicole and Roxanne were drinking together. Sandra served Griglione two or three drinks. An argument broke out between Roxanne and Griglione. Griglione also argued with Pratt. After the arguments, Sandra stopped serving Griglione, however, someone else bought him a drink and Sandra delivered it to him. It was one of the two or three she testified he drank. Around 10:00 p.m., the group left the bar. They returned approximately 45 minutes later seemingly "a lot happier." Sandra refused to serve them and they left.

Joanne Donovan testified that on August 8, 2005, she operated the bar known as Jim's Office Lounge. On that evening she was present at the bar and she witnessed Pratt, Roxanne and Nicole in attendance. Donovan also saw Griglione with the group. She saw Griglione drinking what she assumed was alcohol. Pratt and Griglione got into an argument. The group left the bar and returned approximately 45 minutes to an hour later. Donovan was upstairs when the group returned but she observed them via a closed circuit camera that views the bar downstairs. Donovan's bartender, Sandy, called her because she had instructed the bartender not to serve the group when they returned. Donovan stated she felt the guys were going to be trouble and she did not want them served further drinks. Approximately five minutes later the group left again.

Gregory Jacobsen testified that on the evening of the accident he was employed as a LaSalle County sheriff's officer. He was called to the scene to conduct a traffic accident reconstruction. Jacobsen described the accident as a single-vehicle motorcycle accident involving a passenger and a operator. When he arrived at the scene, he witnessed a deceased male. The female had been removed from the scene. The damage to the motorcycle was "largely insignificant." Jacobsen stated the weather conditions were clear and dry and the roads were dry. Another witness testified there was water on the road. Jacobsen later learned that Griglione's blood alcohol level at the time of the

accident was .218. The blood results also indicated methadone in Griglione's system. Jacobsen opined speed was a factor in the accident and "almost certainly" Griglione's intoxication played a role. Later testimony indicated Nicole never regained consciousness. The accident occurred at 12:14 a.m.

At the conclusion of the evidence, after argument on the subject, the trial court ruled that a jury instruction on the affirmative defense of complicity, that Nicole actively contributed to Griglione's intoxication, would not be given because the evidence did not support the instruction. During closing arguments, the defense argued, in part, that the alcohol from the bar did not cause Griglione's intoxication. The defense asserted there was a strong inference that Griglione and Nicole went elsewhere to drink before the accident. Counsel stated Griglione "tested positive for meth after this accident" and "Roxanne Griglione has been convicted of a meth felony." Counsel referred to Pratt as a convicted felon and Roxanne Griglione as "a drug addict." An objection was sustained, after which the defense stated to the jury: "You could be the judge of whether she's a drug addict. The defense also argued that Nicole was aware of Griglione's condition and that she chose to ride with him anyway. Counsel stated, "[p]eople have to be responsible for their own actions." Later, counsel stated:

"Nicole made a choice. Her blood alcohol was .185. She's running around with two drug addicts on the back of a married guy's motorcycle."

The plaintiff's objection to this statement was sustained and the defense was admonished off the record. Counsel then stated, "[w]e know Nicole wasn't always with her children." Counsel went on to state:

“You heard the evidence. Even if our bar caused Mr. Griglione’s intoxication, Nicole made a choice. She knew what kind of shape he was in. She was warned. She rode with him anyway. People need to be responsible for their own actions.”

The jury returned a verdict in the defendants’ favor and Parker moved for a new trial. The trial court granted Parker’s motion, finding that the defendants’ improper argument of personal responsibility and the defendants’ inflammatory comments regarding the decedent’s association “with drug addicts” denied the plaintiff the right to a fair trial. In issuing its ruling, the trial court noted that it had refused to tender a complicity instruction, finding that the decedent did not actively contribute to Griglione’s intoxication. After noting the elements of the burden of proof in a dram shop action, the trial court also stated “the only proper argument for the Defendant was whether the liquor consumed at the Defendant bar caused [Griglione’s] intoxication.” The trial court noted that the general theme of the defendants’ closing argument “was not that the Plaintiff failed to meet her burden of proof, but rather that the Plaintiff made her choice to associate herself with drug addicts and ride on the back of [Griglione’s motorcycle].” Citing to *Blake v. Delhotel*, 39 Ill. App. 3d 725, 350 N.E.2d 880 (1976), the trial court stated:

“While the Plaintiff did not object to the Defendant’s improper argument of personal responsibility, it is within the Court’s discretion to grant a new trial based on the impact of said argument on the jury.”

The defendants follow with this appeal.

ANALYSIS

The issue before us on appeal is whether the trial court abused its discretion in ordering a new trial. In determining whether the trial court abused its discretion in ordering a new trial, we consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Bishop v. Baz*, 215 Ill. App. 3d 976, 981, 575 N.E.2d 947, 951 (1991). Because Parker admittedly did not object to the defendants' comments regarding personal responsibility, we must also consider whether the defendants' remarks in this regard constitute plain error and thus are not waived by Parker for purposes of review. In a civil case, "[i]f prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration," we may consider the assignment of error although it was not preserved for review. *Belfield v. Coop*, 8 Ill. 2d 293, 313 (1956).

In our view, the defendants' improper remarks in the instant case were so inflammatory that the jury's verdict could have been the product of biased passion rather than an impartial consideration of the evidence. See *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 375-76 (1990) (stating the waiver doctrine will be strictly applied "unless the prejudicial error involves flagrant misconduct or behavior so inflammatory that the jury verdict is the product of biased passion, rather than an impartial consideration of the evidence"). As the trial court pointed out, the question presented at trial was whether the liquor consumed at the defendants' bar caused Griglione's intoxication. See *Mohr v. Jilg*, 223 Ill. App. 3d 217, 221, 586 N.E.2d 807, 810 (1992) (enumerating the elements of the statutory remedy provided under the Dram Shop Act). The trial court in the instant case specifically prohibited reference to any complicity on the part of Nicole, finding the evidence did not support an instruction that allowed the jury to find Nicole actively contributed to

Griglione's intoxication.

Despite the trial court's ruling, the defendants took great pains to insinuate Nicole's responsibility in her death and in doing so, impugned her character as well. The defense repeatedly referred to Nicole's personal responsibility, her "choice," and the fact that she was "warned." The defense stated:

"Even if our bar caused Mr. Griglione's intoxication, Nicole made a choice. She knew what kind of shape he was in. She was warned. She rode with him anyway. People need to be responsible for their own actions."

The defendants also told the jury that Nicole was running around with drug addicts "on the back of a married guy's motorcycle" and that she "wasn't always with her children." We conclude these remarks of the defendants were so offensive and irrelevant to the issue at trial that we will consider the claim of error despite Parker's failure to object. See *Prairie v. Snow Valley Health Resources, Inc.*, 324 Ill. App. 3d 568, 574, 755 N.E.2d 1021, 1027 (2001), quoting *Gillespie*, 135 Ill. 2d at 377 (plain error has been found in those cases involving " 'blatant mischaracterizations of fact, character assassination, or base appeals to emotion and prejudice' "). Having determined we will consider all of Parker's objections of error, we turn to consider whether the trial court abused its discretion in granting a new trial. As noted above, in analyzing the trial court's discretionary decision, we consider two prongs: whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Bishop*, 215 Ill. App. 3d at 981, 575 N.E.2d at 951.

In the instant case, Parker presented substantial evidence to support a finding that Griglione's consumption of alcohol at Jim's Lounge led to his intoxication and that his intoxication was at least

one cause of the accident. See *Mohr*, 223 Ill. App. 3d at 221, 586 N.E.2d at 810 (noting the elements of a dram shop cause of action). The evidence indicated Griglione did not appear intoxicated when he arrived at the defendants' bar. Griglione was observed drinking cocktails throughout the time he was in the bar. Although the bartender at one point stopped serving him because he became argumentative, the bartender admitted to serving Griglione at least one other drink after he was "cut off." The witnesses considered Griglione was "very drunk" after consuming alcohol at Jim's Lounge; he was staggering and "stumbling" his words. Donovan refused to further serve Griglione and the others because she considered the males were going to cause trouble. In contrast to Parker's evidence, the defendants presented no evidence indicating Griglione drank anywhere other than Jim's Lounge prior to the accident. The witnesses testified that when Griglione and the others went outside to sit in Roxanne's vehicle, they consumed no alcohol or drugs and they did not go to any other establishment to drink. The witnesses testified that the next thing they were aware of after Griglione and Nicole left the bar was that Griglione had crashed his motorcycle. Officer Jacobsen testified that Griglione's intoxication "almost certainly" played a part in the fatal accident.

Because Parker presented substantial un rebutted evidence to support a finding in her favor, we must draw the conclusion that the defendants' improper closing remarks led to bias on the part of the jury, which in turn leads us to conclude, in the second prong of our analysis, that Parker was denied a fair trial. As noted above, despite the trial court's admonishment that complicity on Nicole's part was not an issue in the case, the defense repeatedly referred to Nicole's responsibility for her death, the "choice" she made, and the warning she received from Roxanne. The defendants also impugned Nicole's character, stating that she ran around with "drug addicts" and a married man and that she was not always with her children.

Although Parker objected to the references to Nicole's association with "drug addicts," we do not believe the error was cured. See *Belfield*, 8 Ill. 2d at 313 ("in a clear case this court will reverse a judgment because of improper conduct and prejudicial statements of counsel even though the trial court has sustained objections thereto, rebuked counsel, and directed the jury to disregard such statements"). First, despite the trial court's ruling on Parker's first objection to the "drug addict" reference, the defendants ignored the trial court and continued to make the reference. Secondly, we agree with Parker that the defendants' reference to "meth" addiction was misleading, implying a use of methamphetamines as opposed to methadone, which was the drug found in Griglione's system and the drug Roxanne admitted to using. Finally, there was no evidence presented to suggest that either the witnesses or Griglione was a "drug addict." The irrelevant, inflammatory remarks of the defense during closing were highly prejudicial to Parker, inhibiting her right to a fair trial.

Because of the substantial evidence presented by Parker showing that Griglione became intoxicated from drinking at Jim's Lounge, and that his intoxication was a cause of the accident, we must conclude that the remarks made by the defendants during closing arguments prejudiced Parker to the point that she was unable to receive a fair trial. For these reasons, we believe the trial court did not abuse its discretion in granting Parker's motion for a new trial.

For the foregoing reasons, the judgment of the circuit court of LaSalle County is affirmed.

Affirmed.

JUSTICE HOLDRIDGE, specially concurring:

I concur in the judgment of the court affirming the trial court's grant of a new trial.

I write separately to address points raised in the dissent.

I see no indication in the record that the trial court erred as a matter of law when it found that the "only question presented at trial was whether the liquor consumed at the defendant bar caused [Gary Griglione's] intoxication." A review of the record clearly establishes that the trial court correctly determined that, of the five elements of a cause of action under the Dramshop Act, a question of material fact existed only as to the element of causation. Looking at each of the elements of the cause of action: (1) there is no question that Griglione was intoxicated at the time of the occurrence; (2) there is no question that the defendant sold intoxicating liquor which was consumed by Griglione; (3) as the trial court noted, there was a question for the jury as to whether the intoxicating liquor sold to Griglione by the defendant caused his intoxication; (4) there is no question that intoxication, whether caused by intoxicating liquor sold to Griglione by the defendant or someone else, was at least *one* cause of the occurrence; and (5) there is no question that the plaintiff suffered damages.

The trial court correctly determined that the only contested element of the cause of action for the jury to decide was whether the intoxicating liquor sold to Griglione by the defendant caused him to become intoxicated to the point where his intoxication was *one* cause of the fatal accident. With this question in mind, the dissent maintains that the jury could have reasonably concluded that it was not the "two or three" drinks that Griglione had between 9 p.m. and 10 p.m. that led to his intoxication but alcohol he ingested somewhere else between 10 p.m. and 12:14 a.m. The record, however, simply does not support that conclusion.

The evidence is overwhelming that Griglione was intoxicated when he left the defendant's bar for the last time at approximately 11 p.m.¹ The record is uncontested that Griglione

¹ The dissent suggests that Griglione's whereabouts were unaccounted for between 10

was refused service due to his being too intoxicated to continue drinking on two occasions while he was at the defendant bar, once before he left the bar at approximately 10 p.m. and once again at approximately 11 p.m. The proposition that Griglione left the defendant bar at 11 p.m. too intoxicated to be served, then sobered up, then got intoxicated again between 11 p.m. and 12:14 a.m. is so unlikely as to be palpably erroneous, wholly unwarranted, and clearly not based upon the evidence. *Doyle v. White Metal Rolling Stamping Corp.*, 249 Ill. App. 3d 370, 380 (1993).

The dissent also maintains that the jury was improperly denied the opportunity to determine that something other than Griglione's intoxication may have caused the accident. According to the dissent, the jury could have found that, based upon the decedent's weight, blood alcohol content, and lack of appropriate attire, she alone must have caused the accident. Assuming, *arguendo*, that the facts cited by the dissent prove that the decedent was an active participant in the incident, these facts in no way negate the conclusion that Griglione's intoxication was at least one cause of the occurrence. The record established that Griglione was operating a motorcycle which was involved in a single-vehicle accident in clear weather, Griglione was intoxicated at the time of the occurrence, and Deputy Jacobsen testified that speed and operator intoxication played a role in

p.m. and 12:14 a.m. However, it is uncontested that Griglione was with witnesses who testified that he consumed no alcohol between 10 p.m. and the time he returned to the bar between 10:45 p.m. and 11 p.m. The record is also uncontested that Griglione left the bar about five minutes after returning around 11 p.m. It is also uncontested that when he returned to the defendants' bar at approximately 11 p.m., he was refused service because the bar owner instructed the bartender not to serve him or his group if they returned out of concern that they were going to be trouble.

the accident. Given this record, which established that an intoxicated operator of a motorcycle driving at an excessive rate of speed was involved in a single-vehicle accident, under clear weather conditions and normal road conditions, the jury had more evidence upon which to base its causation finding than merely "defendant was intoxicated; an accident happened; therefore, defendant's intoxication must have been a cause of the accident." Clearly, the jury's a finding that Griglione's intoxication was ~~not~~ at least one cause of the occurrence was not palpably erroneous, wholly unwarranted, or not based upon the evidence. *Doyle*, 249 Ill. App. 3d at 380.

Lastly, while the dissent correctly points out that the evidence concerning the decedent's actions was properly admitted as to the question of damages, that evidence was improperly argued as to liability. As the judgment of the court points out, defense counsel improperly argued that the decedent, by her own actions, was *responsible* for her own injuries, even if the elements of the cause of action against the defendant bar had been established. This argument was made despite the fact that the trial court had specifically denied the defendant's complicity instruction. I concur in the judgment of the court that this argument was a blatant mischaracterization of the facts and appealed to the emotions and prejudices of the jury, thus resulting in reversible plain error. *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 377 (1990).

JUSTICE SCHMIDT, dissenting:

The trial judge's decision to grant plaintiff a new trial should be reversed for two reasons: (1) the trial court erred, as a matter of law, when it found that the "only question presented at trial was whether the liquor consumed at the defendant bar caused the AIP's intoxication;" and (2) the trial court erred in finding that the introduction of evidence and comments regarding

decident's character and choice to ride on Griglione's motorcycle the night of the accident constituted plain error.

A. Issues at Trial

In granting plaintiff's motion for a new trial, the trial court specifically found that the "only question presented at trial was whether the liquor consumed at the defendant bar caused the AIP's intoxication." This misstates the law. Justice Holdridge's special concurrence, and the trial court's statement, removes the element of causation from the plaintiff's burden of proof.

It is well settled that in a dramshop action, the plaintiff bears the burden of proving, *inter alia*, that defendant's actions were a cause of plaintiff's injuries and as a result of the occurrence, the plaintiff suffered damages. *Krawczyk v. Polinski*, 267 Ill. App. 3d 258 (1994); *Gilman v. Kessler*, 192 Ill. App. 3d 630 (1989). The *Krawczyk* court noted that "Essentially, plaintiff asserts that because [defendant] was intoxicated and his truck crossed the center line on Route 137, intoxication must have been a cause of the accident. We disagree. That [defendant] was intoxicated and an accident occurred while he was intoxicated are insufficient to establish intoxication as a cause of the accident. To hold otherwise would eliminate the causation requirement from the Dramshop Act. Causation would be presumed whenever a plaintiff proved that an accident occurred and the driver at fault was intoxicated. This is not the intent expressed in the Dramshop Act." *Krawczyk*, 267 Ill. App. 3d at 263-64. The trial court, as does Justice Holdridge, engaged in the exact legal analysis rejected by the holding of *Krawczyk*: *i.e.*, defendant was intoxicated; an accident happened; therefore, defendant's intoxication must have been a cause of the accident.

In its order, the trial court acknowledged that plaintiff needed to prove more than

"whether the liquor consumed at the defendant bar caused the AIP's intoxication" when noting:

"Illinois Pattern Instruction 150.04 sets forth the burden of proof in a Dram Shop action. I.P.I. 150.04 was given to the jury. The burdens set forth in the instruction require the Plaintiff to prove that (1) the alleged intoxicated person (AIP) was intoxicated at the time of occurrence; (2) that the Defendant sold intoxicating liquor consumed by the AIP; (3) that said liquor caused the AIP's intoxication; (4) that the intoxication was at least one cause of the occurrence and; (5) that Plaintiff suffered damages."

A trial court abuses its discretion where it improperly applies recognized principles of law, or applies the wrong legal standards, or reaches conclusions unsupported by law. *Boatmen's National Bank of Belleville v. Martin*, 155 Ill. 2d 305 (1993); *People ex rel. Graf v Village of Lake Bluff*, 206 Ill. 2d 541 (2003). The trial court abused its discretion in this matter when it granted plaintiff a new trial based, in part, on its finding that the only question for the jury was whether defendants' alcohol intoxicated Griglione. Moreover, evidence was adduced at trial from which a reasonable trier of fact could have concluded that it was not defendants' liquor that caused Griglione's intoxication and that something other than Griglione's intoxication caused the accident.

The bartender, Sandra, testified that she only served Griglione two or three drinks that night. The majority discounts this testimony but the fact remains the jury was free to conclude that these two or three drinks did not "cause" Griglione's intoxication. All parties agree that, at best,

Griglione was in the bar from approximately 9 p.m. until a little after 10 p.m. The parties also agree that the accident did not occur until 12:14 a.m. and that Griglione's BAC was .218. While there was admittedly no direct evidence adduced at trial that stated Griglione and the decedent ingested alcohol after leaving defendant's tavern, from these facts the jury could have reasonably concluded that it was not the "two or three" drinks that Griglione had between 9 p.m. and 10 p.m. that led to his intoxication, but alcohol he ingested somewhere else between 10 p.m. and 12:14 a.m. The special concurrence states that Griglione was refused service at the bar because he was intoxicated. (Holdridge, J., specially concurring, p. 2). The bartender said she refused to serve him because he was arguing, not because he was intoxicated.

Additionally, evidence was adduced at trial indicating decedent outweighed the 131 pound Griglione by more than 70 pounds, that her BAC was .185 on the night of the crash, and that she was naked from the waste down at the time of the crash. From these facts, the jury could have reasonably concluded that the accident was caused by something decedent did on the back of the motorcycle, and not by Griglione's intoxication. A trial court should set aside a verdict and grant a new trial only if the verdict is contrary to the manifest weight of the evidence. *Doyle v. White Metal Rolling & Stamping Corp.*, 249 Ill. App. 3d 370 (1993). A verdict will be deemed to be against the manifest weight of the evidence only if it is palpably erroneous and wholly unwarranted, clearly the result of passion or prejudice, or appears to be arbitrary, unreasonable and not based on the evidence. *Doyle*, 249 Ill. App. 3d at 380. While the trial court, and the majority conclude that this verdict must have been the result of passion or prejudice, they ignore significant facts upon which a reasonable jury could have concluded that defendants' liquor did not intoxicate Griglione or that something other than Griglione's intoxication caused this accident.

B. Plain Error

The trial court found that arguments "of personal responsibility *** coupled with the inflammatory comments regarding the decedent associating herself with drug addicts denied" the plaintiff a fair trial, even though plaintiff failed to object to many of the comments. The trial court further found that the "only possible purpose" for the introduction of evidence concerning plaintiff's choice to associate with Griglione "would be [to call] the decedent's character into question." As the majority notes, the trial court indicated the "general theme" of defendants' closing argument was that "plaintiff made her choice to associate herself with drug addicts and ride on the back of a motorcycle with" Griglione. The trial court found these statements equated to plain error and characterized them as an "improper argument of personal responsibility." Plaintiff put decedent's character at issue. Defendants' arguments concerning the decedent's character were relevant to damages.

In his opening statement, plaintiff's counsel informed the jury:

*** I'm also going to ask you to award damages for loss of society.

At the time of this accident Nicole had two young daughters, Aryah and Renae, and Leisa will tell you about those young ladies and tell you about the relationship they had with their mother and Leisa will also tell you about the relationship she had with her daughter."

During Leisa's testimony in the plaintiff's case-in-chief, she described the decedent's

relationship with her children as follows:

"They were - they were best friends also. They were inseparable. Whatever Nicole did, she more or less did for her children and whatever Aryah did, she was right there with her mom."

The final exchange between plaintiff's counsel and Leisa, plaintiff's last witness, went as follows:

"Q. Nicole appear to be a caring and attentive mother in your opinion?

A. Yes

Q. What role did her kids have in her life?

A. Pardon?

Q. What role did her kids have in her life?

A. Oh, they were number one."

During closing arguments, plaintiff's counsel stated that he did not "know how you can put a price on a mother of a 5-year-old girl and a 2-year-old girl or what services, what benefits that those children would have received from their mother over the course of their lives." Plaintiff asked the jury to award a significant sum for decedent's daughters' loss of society claiming "Nicole was always with these children." Plaintiff's counsel discussed the "crying fits" one of the children went through due to "missing her mom. Or her mom would have done things this way. Her mom would have done things that way." Counsel asked the jury to return a verdict in favor of plaintiff in the amount of \$240,901.62. He noted that verdict form "A" included a separate line for three

different measures of damages: reasonable expense for medical care, funeral expenses and loss of society. He requested an award of \$35,327.69 for medical expenses, \$5,573.93 for funeral expenses, and \$200,000 for loss of society for decedent's mother and two children.

With regard to loss of society, the trial court gave the jury the following instruction:

"When I use the term 'society' in these instructions, I mean the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection."

Illinois Pattern Jury Instructions, Civil, No. 31.11
(2006).

Plaintiff asked the jury to put a dollar figure on decedent's value as a mother. As harsh as it may sound, defendants are correct, if Nicole spent her evenings drinking with felons and drug users, that could affect the jury's determination of her society as a mother. Likewise, decedent's choice to associate herself with married men could certainly affect the jury's award to her mother and daughters for loss of society. The jury could also reasonably find that a woman who thinks it is a good idea to go out at night, get intoxicated, and then climb on the back of a motorcycle operated by an intoxicated man might only be expected to be around to provide society to her children for a limited time. Reasonable people could conclude that such thinking would eventually, and probably sooner rather than later, lead to tragedy and therefore limit damages for loss of society. The trial judge in his order granting a new trial, and the majority herein, criticize defendants' "general theme *** that the plaintiff made her choice to associate herself with drug addicts and ride

on the back of a motorcycle with" an intoxicated married man. However, nowhere do they discuss the relevance of plaintiff's damage claim for loss of society.

To prove this category of damages, the trial court allowed plaintiff to state decedent was "inseparable" from her children and note that everything decedent did, she did for her children. It was certainly not improper to allow the defendants to rebut that evidence. Evidence at trial established that she was not acting in her children's interest at the time of her demise. Defendants were certainly entitled to address what love, affection, care, attention, companionship, comfort, guidance, and protection decedent's children received from her and were likely to receive in the future when she chose to associate with drug users and climb on the back of a drunk man's motorcycle. Defendants were entitled to raise those issues because the plaintiff, not them, demanded the jury to determine a monetary value for loss of decedent's society.

As Justice O'Brien noted in *Thornton v. Garcini*, 364 Ill. App. 3d 612 (2006), "[w]ithin the concept of loss of society is the notion of the future companionship, guidance, love, advice, affection and comfort that would have been exchanged between the parents and the child but for the defendant's negligence." *Thornton*, 364 Ill. App. 3d at 618. The evidence that the majority finds objectionable, claiming it "impugned" decedent's character, is relevant to what type of guidance, love, advice and comfort expected to be exchanged between decedent and her children. In *Drews v Gobel Freight Lines, Inc.*, 144 Ill. 2d 84 (1991), our supreme court discussed the loss of society claim made by a decedent father's estate. In finding the verdict of over \$8.3 million to be justified, the court noted that "evidence [was] presented that the decedent was an exemplary father and husband." *Drews*, 144 Ill. 2d at 98. The majority's ruling allows for evidence to be introduced indicating that a parent is exemplary but prohibits a defendant from meaningfully

examining that evidence.

Furthermore, I acknowledge that our supreme court allows for the limited application of plain error doctrine in civil cases. See *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 375 (1990). ("*** this court recognizes an exception to the doctrine requiring a party to object to an error during trial in order to preserve it for review. [Citations.] This exception, generally known as the plain error doctrine, finds greater application in criminal cases. [Citations.] However, conditions existing in a civil case may invoke the exception as well.") Nevertheless, plaintiff's counsel did more than just forfeit review of these issues. He affirmatively waived them.

The record on appeal contains a discussion between the court and the parties concerning jury instructions after which the court refused to give defendants' tendered instruction on complicity. It is clear from this discussion that plaintiff's counsel knew the difference between complicity and comparative fault. Nevertheless, it is undisputed, and the majority acknowledges, that plaintiff "did not object to the defendants' comments regarding personal responsibility" during closing arguments. Slip op. at 6. Closing arguments took place moments after this discussion. Such actions reveal much more than mere forfeiture of an issue and evince purposeful and intentional waiver. Tactically, I can understand why plaintiff's attorney would purposefully allow a defense attorney to impugn decedent's character. There is hope and even a probability that if defense counsel goes too far, the jury will punish him for it. Also important is that at the outset of his rebuttal closing argument, plaintiff's counsel immediately told the jury that defense counsel had misstated the law regarding personal responsibility during his closing. This shows an awareness of the law and a calculated decision as to how to present plaintiff's case. I would not apply a plain error analysis.

Finally, I disagree with the majority's characterization of the evidence pertaining to Roxanne and Gary Griglione's drug usage. The second witness of the trial clearly indicated that "methadone" was present in Gary's blood at the time of the accident. Roxanne Griglione, Gary's wife, was asked if she knew that "Gary had methadone in his system" at the time of the wreck. She stated she did not, but acknowledged that she had "been convicted of a felony for methadone" possession. The term methamphetamine was never used once during the trial. Given the prevalence of the discussion of methadone use during the trial, the majority's insinuation that the use of the term "meth" somehow misled the jury into believing methamphetamine was used and not methadone is speculative at best and not based in fact. Also, is there some qualitative difference between methadone, heroine and methamphetamine addicts that is readily apparent to the public? Is it somehow better to be called a methadone or heroine addict than to be called a meth addict? Can one say with a straight face that the use of the word "meth" as opposed to methadone affected the verdict?

Furthermore, I disagree with the majority's assertion that "there was no evidence presented to suggest that either the witness [Roxanne Griglione] or Griglione was a 'drug addict.'" Slip op. at 10. By the plaintiff's own words, methadone "is a prescription medication used to combat heroine *addiction*." (Emphasis added.) Certainly, the facts that Griglione had methadone in his system at the time of the crash and Roxanne has a felony conviction for possession of methadone evidence that suggests the two were drug addicts. This was a reasonable inference from the evidence.

The jury's verdict was not against the manifest weight of the evidence, most of defendants' arguments were proper. Any objection to improper statements was waived. I would

reverse and reinstate the jury's verdict.