

No. 1-11-1837

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARTHA JOHNSON, Individually,)	
and as administrator of the Estate of)	
MARCUS SMITH,)	Appeal from the
)	Circuit Court of
Plaintiff/Counter-Defendant/Appellee,)	Cook County.
)	
v.)	
)	09 L 9455
BEST WESTERN CORPORATION, a,)	
corporation, and BEST WESTERN RIVER)	
NORTH, et al.)	The Honorable
)	Jennifer Duncan-Bryce,
Defendants/Counter-Plaintiffs/Appellants.)	Judge Presiding.
)	

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

HELD: The trial court did not abuse its discretion in denying plaintiff's post-trial motion for a new trial on damages in a wrongful death action brought as administrator of the estate of her deceased son. First, the jury's damages award of nearly \$200,000 for loss of

society was not against the manifest weight of the evidence, and there is no indication in the record that the jury failed to consider any proven element of damages. Second, there was no evidence that there was a compromise verdict in this case due to the contributory negligence of the beneficiaries. Third, although the parties both agree that contributory negligence jury instructions based on the pre-1999 version of section 2 of the Wrongful Death Act applied and that the wrong jury instructions based on the 1999 amendment were given, in fact the correct instructions were given, as the amendment itself specifies that it applies to all actions pending on the effective date (Pub. Act 91-380 (eff. July 30, 1999)), and this action was pending on the effective date. In any event, we find that plaintiff waived her argument regarding the jury instructions by not only failing to object but in tendering the allegedly erroneous instructions herself.

¶ 1

BACKGROUND

¶ 2 Plaintiff, Martha Johnson, brought the instant wrongful death action for the death of her son, decedent Marcus Smith, who drowned while in a swimming pool on the premises of defendant Best Western River North Hotel (Best Western). Marcus was 13 years old when he died. The following facts are from the trial testimony in this case.

¶ 3 On May 5, 1996, Marcus was at the Best Western for a family party in one of the hotel's rooms. Four of seven of Marcus' half-siblings attended: Anthony Smith, Myrdess Jenkins, Ronald Smith, and Willie Bernard Johnson. The half-siblings were all older and ranging in age from 21 to 39, were at the hotel, along with their wives, husbands, and other friends in the rented room. Curtis Smith, Sr. drove Willie Bernard Johnson and Marcus to the party at the hotel and then went to church. The men at the party were watching television and playing games. Myrdess Jenkins' son Nathan Jenkins was 13 years old and was friends with Marcus.

¶ 4 Marcus, Nathan Jenkins, and another boy, Charles Malone, who was 9 years old, told everyone in the hotel room that they wanted to go see the pool on the roof, which was one floor above the party room. Anturronette Smith, who was 19 years old and Marcus' step-sister, and her

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friend Sophia Stevens, who was 28 years old, decided to go up to the pool with the boys. They left the room to explore the hotel and found the pool on the hotel's top floor. Willie Bernard Johnson was aware that Marcus and the other children left the room and began to play chess with Ronald Smith. Myrdess Jenkins also knew that the boys had walked out of the hotel room but did not ask where they were going. Anthony Smith was playing Chess with Willie Bernard Johnson and was not aware of anyone coming or going from the hotel room. Ronald Smith knew that Nathan Jenkins, Marcus, Charles Malone, and Anturronette Smith left the room but had no knowledge of where they went.

¶ 5 When Marcus, Nathan Jenkins, Charles Malone, Anturronette Smith, and Sophia Stevens got to the pool, the boys said they wanted to get in the pool. Marcus and Charles Malone said they were going to swim in their underwear, and Nathan Jenkins said he was going to see if he could find some shorts. Anturronette Smith and Sophia Stevens stayed at the pool for about four minutes and then left the hotel to get food for the party. Nathan Jenkins left the pool, went back to the hotel party room and asked if anybody had some swim trunks so he could go swimming. Willie Bernard Johnson said that he had swim trunks in the car but that he wanted to check out the pool first, so Nathan and Willie Bernard Johnson left the party room to look at the pool. At this point, Ronald Smith knew when Willie Bernard and Nathan left the room to go to the pool that Marcus and Charles were at the pool alone. During this time, Ronald Smith was still playing chess with Anthony Smith.

¶ 6 Marcus, Nathan, and Charles were left alone in the swimming pool area. Best Western did not have a lifeguard or any employee attending the pool area, but did have a security camera

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in the swimming pool room. The monitor showing the swimming pool area was located to the right of the check-in desk. The monitor showed rotating images from three cameras, one of them being the camera from the pool room, the second from the first floor of the garage, and the third from an upper level of the garage. The Best Western clerks were expected to periodically keep surveillance on the swimming pool area via the security camera monitor. There was also safety equipment located near the swimming pool, including a ring life preserver.

¶ 7 John Hopkinson was working as a desk clerk for Best Western on the day Marcus drowned. Hopkinson had been working for the hotel for about a year and knew the pool did not have lifeguards. Hopkinson was aware of the monitor at the right of the check-in desk. It was Hopkinson's practice to look at the monitor periodically when he was working the front desk. Hopkinson was familiar with the rules and regulations regarding the use of the swimming pool. Children were not allowed to swim without adult supervision. Also, the life ring was not to be played with. Hopkinson testified that if he saw children breaking the rule by swimming without adult supervision, or if he saw someone playing with the life preserver, he would do something about it.

¶ 8 On May 5, 1996, Hopkinson started working at approximately 3:00 p.m. The monitor was on that evening and he was checking it periodically as part of his routine practice. Hopkinson saw three children swimming in the pool but could not recall what time it was when he first observed the children. Hopkinson testified that two of the boys were smaller and looked to be under ten years old but the third boy, later identified as Marcus, was taller and appeared to be 12 or 13 years old. Hopkinson believed he saw the boys talking to a man in street clothes

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standing to the right side of the pool. After watching the children in the pool for 15-20 seconds, Hopkinson turned back to doing work at the front desk. A few minutes later, he looked back at the monitor and saw the three boys still playing in the water. However, this time he did not see the adult male he saw previously. The nine-year-old boy who was with Marcus, Charles Malone, was playing with the ring life preserver. Hopkinson did not notify his supervisor or his co-worker, Akilah Armand, that he saw three children in the pool with no adult supervision.

¶ 9 Hopkinson looked at the monitor a third time about two to five minutes later and saw only one child in the water. However, Hopkinson was impeached with his prior deposition testimony that more than 10 minutes had elapsed before he looked at the monitor the third time. The child who was in the pool was in the mid to deep area of the pool and the water was about chest-high on him as he was jumping up and down in the water. Hopkinson again turned away from the monitor and when he looked back the boy was floating on his back toward the shallow end of the pool.

¶ 10 Another 15 minutes went by before Hopkinson looked at the surveillance monitor a fourth time. This time he saw the other two young boys jump in feet first and fully dressed. This time Hopkinson told his supervisor what he saw because people jumping in the pool with street clothes on can damage the pool's filtration system.

¶ 11 Ronald Smith testified that shortly after Nathan Jenkins and Willie Bernard Johnson left the room, Nathan Jenkins came back to the party room and said that Marcus was at the bottom of the pool. Anthony Smith and Ronald Smith and two others ran up the stairs to the pool and pulled Marcus out of the water.

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¶ 12 Hopkinson looked at the monitor again and this time saw people fully clothed jumping into the pool and pulling Marcus out, so he told his supervisor, who called 911. Hopkinson's supervisor left and started running up the stairs to the pool. Paramedics came. Marcus' father, Curtis Smith, Sr., also came to the hotel. Marcus was taken to Northwestern Memorial Hospital where he was later pronounced dead.

¶ 13 Plaintiff Johnson filed suit on October 15, 1997 against Best Western and its parent company, as well as other individuals and entities involved in owning, managing, or constructing the pool. Plaintiff alleged that Marcus suffered a fractured neck which resulted in his drowning, based on the post-mortem report of the Cook County Medical Examiner's Office. Defendants moved for summary judgment, arguing that the risk of diving into a swimming pool was open and obvious. The trial court granted the motion and plaintiff appealed. We reversed and remanded to the circuit court for trial.

¶ 14 The paramedics were then deposed and testified there were no indications that Marcus had suffered a broken neck as a result of this incident. Hopkinson was then also deposed, and his version of events also did not support plaintiff's initial diving theory. Therefore, plaintiff then alleged that Best Western was negligent in permitting underage children to swim alone in the pool without adult supervision. Best Western answered with several affirmative defenses, including that Marcus was guilty of comparative negligence by swimming in the pool without adult supervision when he knew or should have known of the risk of drowning. Best Western's second affirmative defense was that Marcus' adult siblings who were at the hotel were guilty of comparative fault by failing to properly supervise Marcus.

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¶ 15 Regarding damages, plaintiff testified that Marcus was born in 1982 and he lived with both her and his father, Curtis Smith, Sr., for about six years until 1989. At trial, the following testimony was adduced regarding the loss of society claim by plaintiff: Marcus' parents, plaintiff and Curtis Smith, Sr., were never married but lived together for approximately nine and a half years. At the time of Marcus' death they were separated but lived within a few blocks of each other. Marcus would stay with his mother overnight until he went to school in the morning, and then after school he would go to Smith's house. Plaintiff would pick up Marcus from Smith's home after work. Marcus and plaintiff would go out to see movies every other weekend and would occasionally go out to dinner. Marcus liked to cook with his mother. Plaintiff and Marcus frequently went to Detroit, Michigan, to visit plaintiff's sister. Also, plaintiff and Marcus would go to Mississippi over the summers to visit other relatives. Marcus frequently called his mother to talk to her, reporting about his school day and his activities. Marcus always told his mother how much he loved her at the end of their calls. Marcus was very affectionate toward plaintiff. Sometimes plaintiff would wake up to find Marcus in bed sleeping with her. Marcus comforted plaintiff when she found out she had lumps in her breasts and would remind her about her doctor's appointments. Marcus was also protective of his mother and would tell someone to leave her alone or watch their language if they spoke improperly to her.

¶ 16 Marcus went to church every Sunday with both plaintiff and his father, Smith. Wednesday nights Marcus went to bible class with Smith and also attended church board meetings with Smith. Marcus played basketball for the church team. The pastor of the church they attended testified that Marcus was very affectionate with both parents. When church

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services were over, Marcus would run up to his father and give him a big hug and would sometimes sit on his father's lap in the dining room. The pastor observed that Marcus was also affectionate with his mother, sitting close to her during services and often laying his head on her shoulder.

¶ 17 Marcus' half siblings also testified. Marcus' older brother Curtis Smith, Jr., also testified that Marcus was affectionate with his father and often sat on his lap. Smith testified that their father had a stroke in 2008 and died in 2010. Curtis Smith, Jr., was 35 years older than Marcus. Smith testified that Marcus' half siblings were adults and lived separately in their own homes. Smith would see Marcus on holidays, sometimes on a Sunday and at church.

¶ 18 Myrdess Jenkins was also 35 years older than Marcus. Jenkins testified that she and Marcus had a loving relationship and that he spent a lot of time with her. She and Marcus gave each other gifts for birthdays and would get together as much as they could. Jenkins also testified that the family tried to worship together at the same church.

¶ 19 Ronald Smith was 20 years older than Marcus. He testified that he had a very good relationship with Marcus. He lived with Marcus and their father for one year in 1990.

¶ 20 Anthony Smith was 18 years older than Marcus. He lived in the same house with Marcus for a couple of months when Marcus was about eight years old. Anthony testified that he would do a little homework with Marcus and talk to him about the streets in encouraging Marcus to go a positive way. They played basketball, talked, and watched sports during the months they lived together. They had been living apart for a number of years at the time of the drowning. The parties stipulated that Anthony had no contact with Marcus from 1990 to 1992 because Anthony

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was incarcerated during that time. The court instructed the jury it could consider this information for the loss of society claim by Anthony.

¶ 21 Willie Bernard Johnson was eight years older than Marcus. He testified that he and Marcus lived between plaintiff's and Curtis Smith, Sr.'s house. Johnson testified that he would play games with Marcus.

¶ 22 Marcus' remaining three beneficiaries did not testify at trial. Curtis Smith, Sr., was deceased. Marcus' half brother Lavelle Smith resided full-time in a mental institution. Marcus' half sister Lavette Smith also did not testify.

¶ 23 Plaintiff presented the testimony of expert Dr. Caskey regarding the operation of swimming pools and private facilities such as a hotel. Dr. Caskey testified that pursuant to the Illinois Administrative Code, a hotel with a pool without a lifeguard must ensure that any child 16 or under in the swimming pool area be supervised by an adult 17 or older. Dr. Caskey testified that Best Western did not comply with this requirement when Marcus drowned in the pool unaccompanied by an adult 17 or older. Caskey testified that having signs and a camera in the pool area were insufficient to ensure compliance with the Administrative Code. Dr. Caskey further opined that the training provided by the hotel and the fact that there were multiple entrances to the pool did not comply with the regulations of the Administrative Code.

¶ 24 Dr. Caskey also testified that he was an expert in the design, safety, signage, and constructions of baseball and softball fields, roller skating facilities, ski hills and ski lift equipment, motocross and motorcycle paths, fitness equipment, amusement parks, plastic slides, saucers, toboggans, trampolines, ATVs, snowmobiles, jet skis, and golf courses. Dr. Caskey

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conceded that Best Western complied with the Illinois Administrative Code's signage requirement by posting a sign stating: "No person may enter the pool area alone or swim alone."

Dr. Caskey also agreed that the facts showed the adults left Marcus at the pool and that there was no evidence to show the hotel personnel knew the adults left the children alone in the pool.

¶ 25 Best Western presented the testimony of its expert, Dr. Thomas John Griffiths, who was an expert in aquatic safety with an emphasis on the interpretation of the standard of care for hotels and motels. Dr. Griffiths is a certified pool operator and instructor, has assisted hotel and motel groups in managing and operating their swimming pools throughout the years, and was familiar with the requirements of the Illinois Administrative Code as it existed in 1996. Dr. Griffiths opined that Best Western acted reasonably in its enforcement of the Illinois Administrative Code and that it complied fully with the standard of care in the hotel/motel industry in 1996. Dr. Griffiths also opined that the warnings on the signs Best Western posted stating that there was no lifeguard on duty, that swimming alone was not allowed, and that swimmers under a certain age had to be accompanied by an adult, as well as the locations of these signs, all met the standard of care in the industry. Dr. Griffiths further testified there was no evidence that anyone affiliated with Best Western knew that Marcus was in the water without an adult present. Dr. Griffiths testified that Hopkinson properly assumed that Marcus was still being safely watched by the adults, and that if the adults were going to leave they would have required that the children get out of the pool. Dr. Griffiths further explained that "nothing can replace close parental supervision around the water," and that the adults in this case who were entrusted with the care and supervision of the children did not exercise supervision around the

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pool.

¶ 26 At the close of trial, the jury returned a verdict in favor of plaintiff and awarded \$18,352 for funeral and medical expenses and \$201,648 for the beneficiaries' loss of society, for a total award of \$220,000. The jury found Marcus was 13% at fault. The jury also found 22% contributory negligence by Willie Bernard Johnson, 17% by Myrdess Jenkins, 16% by Ronald Smith, and 25% contributory negligence by Anthony Smith. On January 31, 2011, the trial court entered judgment in the amount of \$191,400, after reducing the gross award by 13% for the decedent's comparative fault. The trial court noted in its order that the next of kin agreed to divide the award between Marcus' mother and the estate of Curtis Smith, Sr. After a hearing, the court found that the degree of dependency under the Illinois Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 1996)) for plaintiff was 65% and the degree of dependency for the estate of Curtis Smith, Sr., was 35%.

¶ 27 Plaintiff filed a post-trial motion seeking a new trial on damages. Plaintiff argued that the trial court had improperly instructed the jury regarding the effects of its finding allocating the percentages of contributory negligence by the beneficiaries and that the court failed to allow the jury to determine the specific amounts to award to the survivors. Plaintiff also argued that her damage award of \$201,648 for the loss of society was inadequate. Plaintiff further argued in the alternative that the jury award may have been a compromise and therefore a new trial on damages was necessary. The trial court found these arguments to be without merit and denied plaintiff's motion. Plaintiff timely appealed.

¶ 28

ANALYSIS

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¶ 29 Plaintiff argues we should grant a new trial on damages for the following three reasons: (1) that the damages awarded were manifestly inadequate and contrary to the evidence; (2) the damages awarded were the result of a compromise verdict due to the comparative fault of Marcus' half-sibling beneficiaries; and (3) that the court erred in jury instructions. In denying plaintiff's post-trial motion, the trial court specifically made the following findings:

"[T]he verdict in this case was not against the manifest weight of the evidence; the amount of damages to be assessed is a question of fact for the jury to determine; the plaintiff has not presented any evidence that such an award is unreasonable, arbitrary and not based on the evidence; that any error in the jury instruction that may have occurred was invited by the plaintiff and accordingly is waived; and that there was no prejudice to the plaintiff as a result of the jury instruction, which actually favored the plaintiff."

¶ 30 We agree with the trial court's findings. The trial court did not abuse its discretion in refusing to award a new trial on damages. As we explain below, the amount of damages assessed by the jury was not against the manifest weight of the evidence. Also, the court did not err in its jury instructions, and even if there were any error it was waived because it was injected by plaintiff.

¶ 31 I. Damages

¶ 32 Initially Best Western argues that plaintiff waived any argument regarding the adequacy of damages as to Marcus' sibling beneficiaries because plaintiff only argued as to the adequacy of damages for herself and Marcus' father in her post-trial motion. "A party may not urge as error on review of the ruling on the party's post-trial motion any point, ground, or relief not specified

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in the motion." Ill. S. Ct. R. 366(b)(2)(iii) (eff. Feb. 1, 1994). In her post-trial motion, plaintiff only argued that the damages were inadequate for the "parents of the decedent." Accordingly, any argument by plaintiff concerning the damages for the remaining beneficiaries is waived.

¶ 33 The determination of whether to grant a new trial rests within the sound discretion of the trial court, whose ruling will not be reversed unless it reflects an abuse of that discretion.

Snelson v. Kamm, 204 Ill. 2d 1, 46 (2003). A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 106 (1995); *Maple v. Gustafon*, 151 Ill. 2d 445, 454 (1992). Illinois courts have repeatedly and consistently held that the amount of damages is peculiarly a question of fact for the jury to determine and great weight must be given to the jury's decision. *Snelson*, 204 Ill. 2d at 36-37. Under Illinois law there is a presumption that each parent sustained some substantial pecuniary loss of society as a result of their child's death. *Bullard v. Barnes*, 102 Ill. 2d 505, 517 (1984). However, "[t]he determination of damages is a question reserved to the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment rendered in the trial court." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 247 (2006) (quoting *Richardson v. Chapman*, 175 Ill. 2d 98, 113 (1997)).

¶ 34 In ruling on a plaintiff's post-trial motion, the trial court considers whether the jury's verdict was against the manifest weight of the evidence. *Junker v. Ziegler*, 113 Ill. 2d 332, 339 (1986) (citing *Jardine v. Rubloff*, 73 Ill. 2d 31, 44 (1978), *Mizowek v. De Franco*, 64 Ill. 2d 303, 310-11 (1976), *Bank of Marion v. Robert "Chick" Fritz, Inc.*, 57 Ill. 2d 120, 126 (1974), and

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Voss v. Tune, 121 Ill. App. 3d 692, 694 (1984)). The standard of review for an award of damages where the jury found comparative fault is also manifest weight of the evidence. See *Junker*, 113 Ill. 2d at 339 (declining to adopt a standard different from the manifest weight of the evidence standard for reviewing a jury's apportionment of fault). "Absent a clear indication in the record that the jury failed to follow some rule of law or considered some erroneous evidence, or that the verdict was the obvious result of passion or prejudice, a reviewing court will not upset the jury's assessment of damages. [Citation.]" *Tri-G, Inc.*, 222 Ill. 2d at 247.

¶ 35 As Best Western argues, plaintiff cites to no authority in support of her contention that \$201,648 is an inadequate damage award for loss of society as a matter of law. Plaintiff's citations are distinguishable, in that the amount in the cases cited was significantly less than the damages awarded by the jury in this case. In *Stamat v. Merry*, 78 Ill. App. 3d 445 (1979), the court held that an award of \$1,753.90 for pain and suffering was inadequate to compensate the plaintiff for his extensive facial fractures requiring permanent wiring in his face and resulting in disability including permanent double vision. *Stamat*, 78 Ill. App. 3d at 448. In *Carter v. Chicago & Illinois Midland Railway*, 168 Ill. App. 3d 652 (1988), the court held that the trial court did not abuse its discretion in granting a new trial on damages where the jury awarded damages of only \$2,884 for the decedent's next of kin. *Carter*, 168 Ill. App. 3d at 656. In *Long v. Bennett*, 55 Ill. App. 3d 50 (1977), the court held that an award of only \$5,000 for pecuniary losses for the decedent's next of kin was inadequate as a matter of law. The low amounts of the damages in *Stamat*, *Carter*, and *Long* bear no resemblance to the award of nearly \$200,000 for loss of society in this case.

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¶ 36 Best Western's cited authority, *Dobyns v. Chung*, 399 Ill. App. 3d 272 (2010), is much more similar to the amount of damages awarded below in this case. In *Dobyns*, the court held that an award of \$100,000 for loss of society was not manifestly inadequate.¹ Similar to this case, the jury in *Dobyns* heard testimony of the close family relations between the decedent and her widower and teenaged sons, and there was no particular evidence of loss of specific amounts of money as a result of the decedent's death. Similarly here, the jury heard the evidence of Marcus' close relationship with both of his parents from numerous witnesses, including plaintiff, Marcus' half-siblings, and the pastor of the church Marcus attended with his parents. Also similar to *Dobyns*, here there was no evidence of a loss of a specific amount of economic loss due to Marcus' death. The loss of society damages was reasonable and not against the manifest weight of the evidence.

¶ 37 Plaintiff claims the jury ignored proven elements of damages but does not explain what element was ignored. The jury heard all the evidence and rendered an award for loss of society. Plaintiff asserts the amount of damages is insufficient and believes a greater award should have been given. However, in *Gruidl v. Schell*, 166 Ill. App. 3d 276 (1988), this court stated:

"Awarding a small amount of damages is not the same as disregarding proven elements of damages and it has never been a reason for reversal as such. *** An award of damages is not palpably inadequate just because it was less than generous." *Gruidl*, 166 Ill. App. 3d at 283.

¹ This sum was reduced to \$50,000 due to the jury's finding that the decedent was 50% at fault.

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We have reviewed the record and there is no evidence that the jury ignored a proven element of damages. There is no basis for reversal for a new trial on damages in this case.

¶ 38

II. Alleged Compromise Verdict

¶ 39 A new trial may be ordered on the issue of damages alone only if the court determines the damages awarded are inadequate and the verdict in favor of a plaintiff is fully supported by the evidence on the issue of liability. *People ex rel. Department of Transportation*, 258 Ill. App. 3d 710, 718 (1994). "[A] reviewing court is not justified in ordering a new trial on the issue of damages alone unless: (1) the jury's verdict on the question of liability is amply supported by the evidence; (2) the question of damages and liability are so separate and distinct that a trial limited to the question of damages is not unfair to the defendant; and (3) the record suggests neither that the jury reached a compromise verdict, nor that in some other identifiable manner, the error which resulted in the jury's awarding inadequate damages also affected its verdict on the question of liability." *Kern v. Uregas Service of West Frankfort, Inc.*, 90 Ill. App. 3d 182, 195 (1980) (citing *Robbins v. Professional Construction Co.*, 72 Ill. 2d 215 (1978)).

¶ 40 First, as Best Western argues, the jury's verdict on the question of liability was not "amply" supported. The defense expert's testimony was strong and detailed how Best Western met the standard of care in posting the required signs warning not to use the pool without adult supervision. We also note, as does Best Western, that plaintiff admitted that liability was not clear in this case. In her post-trial arguments that "[i]n this case, liability was not necessarily that clear given the defense expert's testimony." In her post-trial motion, plaintiff recounted the strength of the defense expert's testimony:

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"The defense expert, Thomas Griffiths, testified at length about the adequacy of the steps taken by the defendant in enforcing the applicable statute. He opined that the defendants took adequate steps to comply with the applicable code by posting the required signs. He further opined that the hotel acted reasonably in enforcement of the Illinois Administrative Code by posting signs that warn hotel guests, both adults and those under the age of 16 not to use the pool without adult supervision. In his opinion, the defendant actually met and exceeded the standard of care."

Thus, plaintiff herself has conceded that the jury's verdict on the question of liability is not "amply supported" by the evidence.

¶ 41 As to the second and third requirements, plaintiff's own argument that there was a compromise verdict on damages undercuts her argument for a new trial on damages. If there indeed was a compromise verdict, we could not order a new trial on damages alone.

¶ 42 However, we find that here there is no indication in the conduct of the trial or in jury deliberations suggesting that there was a compromise verdict. "[A]n award of damages that does not bear a reasonable relationship to the evidence is an indication of a compromise verdict." *Cardona v. Del Granado*, 377 Ill. App. 3d 379, 385 (2007) (quoting *Winters v. Kline*, 344 Ill. App. 3d 919, 926 (2003)). The damages award bears a reasonable relationship to the evidence presented in this case.

¶ 43 Contrary to plaintiff's assertion, the application of comparative negligence principles does not indicate a compromise verdict. The question of proximate cause is for the jury. *King v. Petefish*, 185 Ill. App. 3d 630, 641 (1989) (citing *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74 (1954), and

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Felty v. New Berlin Transit, Inc., 71 Ill. 2d 126 (1978)). Under comparative negligence, "it is also the fact finder's duty to determine the relative degree of fault of the parties and reduce the plaintiff's award accordingly." *King*, 185 Ill. App. 3d at 641. That is precisely what the jury did here. Plaintiff's argument that the amount of damages itself indicates a compromise verdict is pure speculation. There is no indication in the record that the jury did not follow the jury instructions given. There is no basis for a new trial on damages.

¶ 44

III. Jury Instructions

¶ 45 Plaintiff argues that the instructions on comparative negligence based on amended section 2 of the Wrongful Death Act was error. Best Western argues that plaintiff not only waived any argument as to error in the jury instructions by failing to object, she herself invited any error because she tendered the instructions she now complains of. The trial court found that plaintiff waived, invited, and benefitted from any error in the instructions.

¶ 46 Plaintiff argues that she did not benefit from the error, as the pre-amendment version of section 2 of the Wrongful Death Act would have barred recovery by the other contributorily negligent beneficiaries and therefore most likely increased the damage award to herself and Marcus' father as parents. According to plaintiff, the jury most likely returned a lower amount of damages because they "did not want to enrich the siblings who played a role in causing Marcus' death by failing to supervise him."

¶ 47 The previous version of section 2 of the Wrongful Death Act provided that contributorily negligent beneficiaries were not entitled to any recovery:

"In any such action to recover damages where the wrongful act, neglect or default

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causing the death occurred on or after July 14, 1955, it shall not be a defense that the death was caused in whole or in part by the contributory negligence of one or more of the beneficiaries on behalf of whom the action is brought, but the amount of damages given shall not include any compensation with reference to the pecuniary injuries resulting from such death, to such contributorily negligent person or persons, and such contributorily negligent person or persons shall not share in any amount recovered in such action." 740 ILCS 180/2 (West 1994).

¶ 48 Section 2 was amended in 1995 and now provides for a modified comparative negligence scheme where contributory negligence is only a complete bar to recovery where the jury finds the beneficiary is more than 50% at fault. Section 2 now reads as follows:

"In any such action to recover damages, it shall not be a defense that the death was caused in whole or in part by the contributory negligence of one or more of the beneficiaries on behalf of whom the action is brought, but the amount of damages given shall be reduced in the following manner.

The trier of fact shall first determine the decedent's contributory fault in accordance with Sections 2-1116 and 2-1107.1 of the Code of Civil Procedure [735 ILCS 5/2-1116 and 735 ILCS 5/2-1107.1]. Recovery of damages shall be barred or diminished accordingly. The trier of fact shall then determine the contributory fault, if any, of each beneficiary on behalf of whom the action was brought:

(1) Where the trier of fact finds that the contributory fault of a beneficiary on whose behalf the action is brought is not more than 50% of the proximate

cause of the wrongful death of the decedent, then the damages allowed to that beneficiary shall be diminished in proportion to the contributory fault attributed to that beneficiary. The amount of the reduction shall not be payable by any defendant.

(2) Where the trier of fact finds that the contributory fault of a beneficiary on whose behalf the action is brought is more than 50% of the proximate cause of the wrongful death of the decedent, then the beneficiary shall be barred from recovering damages and the amount of damages which would have been payable to that beneficiary, but for the beneficiary's contributory fault, shall not inure to the benefit of the remaining beneficiaries and shall not be payable by any defendant.

The trial judge shall conduct a hearing to determine the degree of dependency of each beneficiary upon the decedent. The trial judge shall calculate the amount of damages to be awarded each beneficiary, taking into account any reduction arising from either the decedent's or the beneficiary's contributory fault.

This amendatory Act of the 91st General Assembly applies to all actions pending on or filed after the effective date of this amendatory Act." 740 ILCS 180/2 (West 2000).

¶ 49 Plaintiff and Best Western both argue that the prior version of section 2 applies to this case, and that the jury instructions based on amended section 2 were incorrectly given. However, the amended language does apply and the correct jury instructions based on the amended language were offered and were relied on by the plaintiff, Best Western, the judge and the jury.

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The amendment by the legislature to section 2 of the Wrongful Death Act clearly specifies that it applies to all actions *pending on* or filed after the effective date of the amendment to the Act.

"When construing a statute, the primary objective is to ascertain and give effect to the intent of the legislature, the language of the statute being the best indicator of such intent." *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204 at ¶ 37 (citing *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009)). There is no bar in the language of the statute to retroactive application of the amendment to the date of the wrongful death in cases where the occurrence took place prior to the amendment. In fact, the opposite is the case, as the legislature made clear the amendment would apply to cases already pending. Section 2 provides: "This amendatory Act of the 91st General Assembly applies to all actions *pending on* or filed after the effective date of this amendatory Act." (Emphasis added.) 740 ILCS 180/2 (West 2000). See also Pub. Act 91-380 (eff. July 30, 1999) (stating that it that the amendment "applies to all actions pending on or filed after the effective date of this amendatory Act "). Thus, we find that even if plaintiff had preserved the issue there was no error.

¶ 50 Curiously, the parties both assume the pre-1999 amended version of Section 2 applies. Neither of the parties addressed the full language of the amendment, either in their briefs or at oral argument before us. However, the instant action was filed on October 15, 1997, and was pending on July 30, 1999, the effective date of the amendment to section 2. Therefore, according to the plain language of the amendment, the amended version of section 2 of the Wrongful Death Act applied to this case and the instructions based on amended section 2 were correctly given. There was no error.

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¶ 51 Plaintiff even cites to *Van Hattem v. Kmart Corporation*, 308 Ill. App. 3d 121 (1999), for the proposition that the version of the statute in effect at the time of filing is applicable.

However, in *Van Hattem* we noted in a footnote that amended section 2 of the Wrongful Death Act, effective July 30, 1999, was applicable to "all actions pending on or filed after the effective date of this amendatory Act" and therefore applied in *Van Hattem* because that action was filed on September 6, 1995, and was pending on the effective date of the amendment. See *Van Hattem*, 308 Ill. App. 3d at 132, fn. 6 (quoting Pub. Act 91-380, eff. July 30, 1999 (amending 740 ILCS 190/2 (West 1996))).

¶ 52 Similarly here, plaintiff filed the instant action prior to the effective date of the amendment, but the case was pending on the effective date of the amendment. Thus, by the plain language of the amendment regarding applicability to all cases pending on the effective date, amended section 2 applied to plaintiff's case. There was no error in giving jury instructions based on comparative negligence principles under the post-amendment version of Section 2 of the Wrongful Death Act.

¶ 53 However, we agree with Best Western that plaintiff waived the issue. "To preserve an objection to a jury instruction a party must both specify the defect claimed and tender a correct instruction." *Deal v. Byford*, 127 Ill. 2d 192, 202-03 (1989) (citing *Saldana v. Wirtz Cartage Co.*, 74 Ill. 2d 379, 387 (1978), 107 Ill. 2d R. 239(b)). "It is the responsibility of the party challenging a jury instruction to submit an instruction to the trial judge that states the law for which he argues on appeal." *Deal*, 127 Ill. 2d at 203. In her reply brief, plaintiff concedes that she herself submitted the instruction. Forfeiture is the failure to make a timely assertion of a

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right, while waiver " 'arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right.' " *Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007). Plaintiff has not only failed to preserve the issue by making a timely objection, but she affirmatively submitted the instruction now alleged to have been erroneous, and therefore has waived her argument.

¶ 54 The facts establishing waiver in the instant case are similar to *McMath v. Katholi*, 191 Ill. 2d 251 (2000), where the Illinois Supreme Court held that a party waived any contention of error on appeal where she erroneously requested the trial court apply previous Illinois Supreme Court Rule 220 (134 Ill. 2d R. 220) to the issue of disclosure of expert witnesses, when Rule 220 had been repealed and was replaced with Illinois Supreme Court Rule 213 (Ill. S. Ct. R. 213 (eff. Jan. 1, 1996)). In her post-trial motion, plaintiff wished to raise as error the nondisclosure of an expert witness by the defense under Rule 213. However, at the hearing on her motion *in limine* the trial court specifically asked the plaintiff which rule applied and plaintiff urged the application of Rule 220 and the court made its ruling based on Rule 220 at plaintiff's behest. *McMath*, 191 Ill. 2d at 254. Regardless of the fact that Rule 213 was the correct rule, the Illinois Supreme Court held that plaintiff was barred by her previous inconsistent position from raising the issue on appeal because she herself misled the court and therefore waived the issue. The court held:

"As is clearly set forth above, at the motion hearing the trial court specifically asked plaintiff which rule applied, and plaintiff at first hesitantly volunteered and then assured the court that it was Rule 220. While it is true that Rule 220 had been repealed and that

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Rule 213 had replaced it, plaintiff is barred from raising this issue because her objection misled the trial court as to the law which governed the situation." *McMath*, 191 Ill. 2d at 255-56.

In explaining its holding, the supreme court further explained the rationale of the application of the rule of waiver, especially where the party himself or herself induced any error:

" It is fundamental to our adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding.' *Auton v. Logan Landfill, Inc.*, 105 Ill.2d 537, 543*** (1984). A party cannot complain of error which he induced the court to make or to which he consented. *Auton*, 105 Ill.2d at 543 *** ; *McKinnie v. Lane*, 230 Ill. 544, 548, *** (1907); see also *J.L. Simmons Co. ex rel. Hartford Insurance Group v. Firestone Tire & Rubber Co.*, 108 Ill.2d 106, 116 *** (1985). ' "The rationale of this rule is obvious. It would be manifestly unfair to allow one party a second trial upon the basis of error which he injected into the proceedings.' " ' *Auton*, 105 Ill.2d at 543*** , quoting *Ervin v. Sears, Roebuck & Co.*, 65 Ill.2d 140, 144 *** (1976); see also *People v. McAdrian*, 52 Ill.2d 250, 254 *** (1972) (' "Waiver is particularly pertinent where the conduct of a party before the trial court induced the court to rule as it did" ')." *McMath*, 191 Ill. 2d at 255.

The same rationale applies in the instant case, where plaintiff herself misled the court as to which jury instructions applied and thus waived any contention of error.

¶ 55 Plaintiff invokes the plain error exception to waiver. Under the plain error exception in criminal cases, substantial defects in jury instructions in criminal cases may be reviewed despite

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a failure to make a timely objection, "if the interests of justice require." Ill. S. Ct. R. 451(c) (eff. July 1, 2006). However, this rule applies to criminal, not civil, cases. See Ill. S. Ct. R. 451(c) (eff. July 1, 2006). Plaintiff provides no authority for applying the criminal plain error rule to this civil wrongful death case. Thus, there is no exception to plaintiff's waiver.

¶ 56 Finally, although we agree with defendant Best Western's arguments on appeal, we wish to note that defendant's counsel's comment during oral argument before us that it was time for this case to "be put to rest" and to let Marcus "rest in peace" was gratuitous, callous, and inappropriate. Regardless of what defendant feels are the merits (or lack thereof) of plaintiff's arguments on appeal, the fact remains that plaintiff lost her son tragically. Plaintiff had the right to appeal the verdict which she was entitled to exercise.

¶ 57

CONCLUSION

¶ 58 Plaintiff's arguments on appeal are insufficient to award her a new trial on damages. The trial court did not abuse its discretion in denying her post-trial motion for a new trial on damages. The jury's damages award for loss of society is not against the manifest weight of the evidence, and there is no indication in the record that the jury failed to consider any proven element of damages. Also, we find no evidence that there was a compromise verdict in this case due to the contributory negligence of the beneficiaries. Finally, the jury instructions based on the 1999 amended section 2 of the Wrongful Death Act do not constitute error, as the amendment itself specifies that it applies to all actions pending on the effective date (Pub. Act 91-380 (eff. July 30, 1999)), and this action was pending on that date. We affirm the judgment entered on the jury verdict and damages award, and we affirm the trial court's denial of plaintiff's post-trial motion

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for a new trial.

¶ 59 Affirmed.