

No. 1-11-2149

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

OLGA KWIECIEN,)	APPEAL FROM THE
Plaintiff-Appellant,)	CIRCUIT COURT OF
)	COOK COUNTY
)	
v.)	No. 09 L 2455
)	
JAMES A. GOODMAN,)	HONORABLE
Defendant-Appellee.)	CHARLES WINKLER,
)	JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

ORDER

¶ 1 *HELD:* Plaintiff appeals from an order of the circuit court denying her motion for a new trial on the issue of damages in a negligence case arising from a rear-end automobile collision. The circuit court did not abuse its discretion in denying the motion for a new trial. Defense counsel's argument that the collision was minor was proper and did not warrant a new trial. The circuit court did not err in determining there was no evidence the collision aggravated a preexisting injury. The judgment of the circuit court of Cook County is affirmed.

¶ 2 Plaintiff, Olga Kwiecien, filed a complaint in the circuit court of Cook County claiming damages for personal injuries that occurred when an automobile she was driving was struck in

the rear by an automobile driven by the defendant, James A. Goodman. The defendant admitted negligence. After a trial, the jury returned a verdict awarding Kwiecien \$1,000 for pain and suffering and \$2,300 for past medical expenses, but no damages for lost income, loss of a normal life or future medical expenses. Kwiecien appeals from an order of the circuit court denying her motion for a new trial on the issue of damages only. For the reasons that follow, we affirm the decision of the circuit court.

¶ 3

BACKGROUND

¶ 4 The record on appeal discloses the following facts. Prior to trial, Goodman entered into a pretrial stipulation that he was negligent and would not contest the issue of negligence at trial. Goodman, his spouse and an occurrence witness would not testify at trial. In return, Kwiecien agreed not to depose Goodman, his spouse and the occurrence witness or compel their testimony at trial.

¶ 5 At trial, Kwiecien testified that she was 64 years old. On February 28, 2007, at approximately noon, Kwiecien was stopped in her Volvo station wagon by a red traffic light at the corner of Fullerton and Racine Avenues in Chicago. Kwiecien stated she was stopped for approximately 10 seconds when she felt a "boom" or "bump" in the back of her car that pushed her forward and back. Kwiecien did not know whether she had broken her legs, her neck or her shoulder. According to Kwiecien, she was "silly with shock."

¶ 6 Kwiecien was wearing her seat belt at the moment of impact. She heard no brakes squealing or other sound before the collision. Kwiecien also testified the speed limit in the area was 30 m.p.h. and the impact felt like Goodman's car, a Jeep Wrangler, had exceeded that limit.

¶ 7 The jury was informed that the trial judge took judicial notice of a post-collision evaluation from Goodman's insurance adjuster, stating the estimated cost of repairing Kwiecien's automobile was \$181.00. The jury was shown photographs of the automobile, depicting damage to the area around the rear license plate holder.

¶ 8 Although Goodman came to her car window to exchange information, Kwiecien exited her car to assess the damage, noticing pieces of material and scratches in the middle of her rear bumper. Still shaking, Kwiecien walked to a nearby bank to telephone the police and her employer about the collision. She felt a strong pinch in the top of her left shoulder when she tried to use it to support her purse, so she switched her purse to her right shoulder. She later drove to a nearby police station to file a report and felt a similar pinch in her left shoulder when she tried to use it to support her purse.

¶ 9 Kwiecien then went to her job as an MRI technician at Children's Memorial Hospital. She felt sharp pain, weakness and a burning sensation in her left arm and wrist while attempting to place the MRI helmet on top of a patient. Kwiecien stopped working, telephoned her internist, and went to the emergency room at St Joseph Hospital because Children's Memorial Hospital did not treat adults. Kwiecien testified that she was crying from the severe pain. Kwiecien added that she also missed work the following day. Kwiecien further testified that upon returning to work, she required assistance to perform her duties until her retirement in 2008. Kwiecien also stated she retired approximately three years early due to her shoulder problems and was earning \$74,462.83 annually at the time. Kwiecien acknowledged that her letter of resignation referred to

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her inability to gain accreditation under new requirements for all radiology departments in America and did not specifically mention her shoulder problems.

¶ 10 In addition, Kwiecien testified that she did not take her prescribed pain medication because she was a person who will never take any pain medicine. According to Kwiecien, she still could not put on her brassiere without assistance from her husband. In addition, Kwiecien claimed she could not sleep on her left side and would regularly wake up screaming, which disturbed her husband. Kwiecien testified that shortly after the collision, her husband began sleeping in a separate bed and the resulting friction in their relationship had them discussing a divorce.

¶ 11 After her emergency room treatment, Kwiecien followed up with her internist, Dr. Marilyn Aden. According to Kwiecien, Dr. Aden prescribed physical therapy and ordered an MRI examination of Kwiecien's shoulder. Kwiecien stated she continued to have pain, weakness and difficulty dressing herself.

¶ 12 Kwiecien testified that Dr. Aden referred her to an orthopedic surgeon, Dr. David Guelich. Kwiecien stated that Dr. Guelich gave her an injection for the pain, which offered only temporary relief. Dr. Guelich also prescribed a second course of physical therapy, which Kwiecien said helped her feel "a touch better," although she continued to have "mostly bad days." Moreover, Kwiecien testified that Dr. Guelich ordered a second MRI examination and recommended surgery. Kwiecien was reluctant to have surgery because the post-surgical pain and medication would have made it difficult to care for her six-year-old niece, whose mother was

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then deployed to Iraq. Kwiecien also acknowledged that surgery would be expensive, but said she probably would have surgery.

¶ 13 Kwiecien further testified that she paid medical bills totaling \$11,060.40.

¶ 14 Dr. Aden testified by evidence deposition regarding her treatment of Kwiecien. Dr. Aden stated that her emergency room findings showed Kwiecien had difficulty in abduction at 70 degrees because of pain. After Kwiecien's follow-up visit on March 9, 2007, Dr. Aden prescribed several months of physical therapy. According to Dr. Aden, after the initial physical therapy, Kwiecien had pain with abduction at 90 degrees when she lifted her left arm. Dr. Aden stated this symptom was common with impingement syndrome or a rotator cuff injury.

¶ 15 On May 3, 2007, Dr. Aden recorded that Kwiecien was approximately 80 percent better after the physical therapy. However, on June 4, 2007, in response to Kwiecien's continued complaints of pain and request for further treatment, Dr. Aden ordered an MRI examination, which showed a bone bruise. Dr. Aden opined the bone bruise was caused by the collision. Dr. Aden stated the MRI also found fluid in the distal rotator cuff consistent with an almost complete thickness tear.

¶ 16 Dr. Aden also testified that in December 2006, Kwiecien had strained muscles in the area of her left scapula while moving a patient. However, Dr. Aden reported that after a brief course of physical therapy, Kwiecien had no pain and excellent strength and mobility with flexion in her shoulder. Dr. Aden stated that there was no sign of an impingement or a rotator cuff tear at that time. Dr. Aden added that before the collision Kwiecien was very active, including biking, hiking and running marathons.

¶ 17 Dr. Aden further testified that she referred Kwiecien to Dr. Guelich in June 2007, and to Dr. Douglas Evans in October 2007 for a second opinion on the need for shoulder surgery. On July 14, 2008, as Kwiecien continued to complain of shoulder pain, Dr. Aden ordered a second MRI examination, which showed a progressive tear in the rotator cuff. Dr. Aden had no explanation for the torn rotator cuff other than the collision. Dr. Aden opined that Kwiecien's injury interfered with her ability to perform as an MRI technician. Dr. Aden also opined within a reasonable degree of medical certainty that Kwiecien's shoulder problems were caused by the collision.

¶ 18 Dr. Guelich, a board certified orthopedic surgeon, testified about his treatment of Kwiecien, which included two multi-month courses of physical therapy and three steroid injections for pain. Dr. Guelich's review of the June 2007 MRI examination confirmed bone bruising and fluid in the area of the rotator cuff, as well as signs of impingement, *i.e.*, pain when eliciting overhead activity. Kwiecien continued to complain of various levels of pain throughout her physical therapy. In August 2007, Dr. Guelich's impression was that Kwiecien likely had rotator cuff irritation with a full-thickness rotator cuff tear.

¶ 19 According to Dr. Guelich, in July 2008, a second MRI examination showed a worse finding, which was expected because rotator cuff tears typically get larger over time. The second MRI results showed a complete tear of the supraspinatus tendon, which is part of the rotator cuff. In an October 29, 2008, follow-up examination, Dr. Guelich noted weakness previously unnoted and that it would make sense to consider surgery.

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¶ 20 Dr. Guelich next saw Kwiecien on June 7, 2010, recording that Kwiecien still reported pain and significant dysfunction in her shoulder. Dr. Guelich testified that without surgery, Kwiecien's condition was permanent and progressive. Dr. Guelich further testified about the risks of surgery, as well as the cost, then set by Illinois workers' compensation schedules at \$77,505. Dr. Guelich also opined within a reasonable degree of medical certainty that Kwiecien's shoulder problems were caused by the collision. Dr. Guelich added that Kwiecien never told him of any prior shoulder pain.

¶ 21 Dr. Timothy Evans, another board certified orthopedic surgeon, testified about his single consultation with Kwiecien, approximately 10 months after the collision. Dr. Evans also testified that Kwiecien did not report any medical history of a similar problem and did not give him any details of the collision. Dr. Evans opined it was possible that Kwiecien's shoulder problems were caused by the collision. Dr. Evans further testified that if the collision caused an impingement syndrome, it did not automatically mean the collision caused a rotator cuff tear. Dr. Evans added Kwiecien could have had a rotator cuff tear for 20 years that she did not know about. Moreover, there was no way of knowing whether a rotator cuff tear was present between the time of the collision and the time of the MRI examination. Dr. Evans added that Kwiecien was a candidate for corrective surgery at the time.

¶ 22 At the close of the evidence, the trial judge granted Kwiecien's motion for a directed verdict on the issue of proximate cause. However, the trial judge denied Kwiecien's proposed jury instructions on the aggravation of a preexisting condition. Following closing arguments and jury instructions, the jury deliberated and awarded Kwiecien \$1,000 for pain and suffering and

\$2,300 for past medical expenses, but no damages for lost income, loss of a normal life, or future medical expenses. Kwiecien filed a posttrial motion for a new trial on the issue of damages. On June 28, 2011, the trial court entered an order denying Kwiecien's posttrial motion, but awarding her costs on the trial of the matter. On July 26, 2011, Kwiecien filed a timely notice of appeal to this court.

¶ 23

DISCUSSION

¶ 24

I. Motion for a New Trial on Damages

¶ 25 On appeal, Kwiecien first argues this court must order a new trial on damages because the jury verdict was substantially less than her undisputed special damages. A reviewing court will reverse a trial court's ruling on a posttrial motion for a new trial only if the trial court abused its discretion. *Dixon v. Union Pacific R.R. Co.*, 383 Ill. App. 3d 453, 470 (2008) (citing *Snover v. McGraw*, 172 Ill. 2d 438, 449 (1996)). "In determining whether the trial court abused its discretion, the reviewing court should consider whether the jury's verdict was supported by the evidence. ***." *Maple v. Gustafson*, 151 Ill. 2d 445, 455 (1992). In making this determination, we are mindful that "[t]he presiding judge in passing upon the motion for a new trial has the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility." *Id.* at 456 (quoting *Buer v. Hamilton*, 48 Ill. App. 2d 171, 173-74 (1964)). "If the trial judge, in the exercise of his discretion, finds that the verdict is against the manifest weight of the evidence, he should grant a new trial ***." *Id.* at 456. "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 evidence." *Id.* at 454.

¶ 26 The determination of damages is a question of fact within the discretion of the jury, not the court. *Poliszczyk v. Winkler*, 387 Ill. App. 3d 474, 490 (2008) (citing *Snover*, 172 Ill. 2d at 447)). A jury's award of damages is entitled to substantial deference. "The 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." *Richardson v. Chapman*, 175 Ill. 2d 98, 113 (1997). A trial court can disturb a jury's award of damages only if it finds: (1) the jury ignored a proven element of damages; (2) the verdict resulted from passion or prejudice; or (3) the award bore no reasonable relationship to the loss sustained. *Snover*, 172 Ill. 2d at 447; see also *Stamp v. Sylvan*, 391 Ill. App. 3d 117, 123-25 (2009); *Dixon*, 383 Ill. App. 3d at 470-72.

¶ 27 Kwiecien complains of the inadequacy of the awards for pain, suffering and past medical expenses, as well as the lack of an award for future medical expenses, loss of income and loss of normal life. When addressing a motion for new trial raising such issues, our supreme court has stated:

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

This court has generally observed the distinction between objective and subjective symptoms. In *Giardino v. Fierke*, 160 Ill. App. 3d 648 (1987), the plaintiff and her husband were injured after they were both struck as pedestrians by an automobile driven by defendant. *Id.* at 650. This court found the jury award of \$4,200 in damages inadequate because the evidence showed plaintiff spent nine days in the hospital and endured pain and suffering, including permanent hearing loss and postural vertigo, with objective medical testimony that substantiated the injuries. *Fierke*, 160 Ill. App. 3d at 651-52.

¶ 28 However, in *Pecaro v. Baer*, 406 Ill. App. 3d 915, 919-29 (2010), this court affirmed a jury's decision to award no damages, distinguishing *Fierke* on the grounds that Pecaro had subjective complaints and credibility problems. The *Pecaro* court relied on *Moran v. Erickson*, 297 Ill. App. 3d 342 (1998), in which this court stated:

"[T]he medical professional's determination of the patient's credibility and acceptance of the patient's history and subjective expressions of pain, for purposes of making a medical diagnosis and rendering medical treatment, is not binding on the jury. The jury, which is empowered to make credibility determinations [citation], must make its own assessment of the patient's veracity, not merely with respect to that person's in-court testimony but also with respect to that person's general credibility to the extent that person's credibility is relevant to the ultimate determination in the case. [citations] If the jury finds the patient to be incredible, it can correspondingly disregard the opinions of the medical professionals which are based upon information supplied to them by the patient."

Pecaro, 406 Ill. App. 3d at 921 (quoting *Moran*, 297 Ill. App. 3d at 354).

"[I]t is of no consequence to the validity of an award that it differs from an estimate of damages made by an expert, for a jury may reduce an expert's damage calculation without invalidating its verdict." *Branum v. Slezak Construction Co., Inc.*, 289 Ill. App. 3d 948, 953 (1997). "[T]he mere fact that the verdict is less than the claimed damages does not necessarily mean the award is inadequate since the jury is free to determine the credibility of the witnesses and to assess the weight accorded to their testimony." *Id.* "Depending upon their determinations about credibility and their ordinary experiences in life, jurors must decide whether the plaintiff's complaints are exaggerated or genuine, whether certain treatment was unnecessary or justified, or whether various charges were unreasonable or reasonable." *Baker v. Hutson*, 333 Ill. App. 3d 486, 496 (2002).

¶ 29 In this case, there was medical testimony regarding objective evidence of Kwiecien's injuries, although the testimony from Dr. Evans raised the possibility that the rotator cuff tear was not caused by the collision. However, this is not a case where the jury awarded no damages. Rather, the jury awarded Kwiecien only \$1,000 for pain and suffering and \$2,300 for past medical expenses, a verdict which suggests the jury found Kwiecien had credibility problems on the amount of damages actually and necessarily suffered.

¶ 30 Aside from the jury's general observation of Kwiecien's demeanor while testifying, the jury may have weighed other evidence in assessing the credibility of her claims. For example, Kwiecien testified that the impact of the collision felt like it exceeded 30 miles per hour, but the jury was informed that the estimated cost of repairing Kwiecien's automobile was \$181.00. The jury also was shown photographs of the automobile, depicting damage to the area around the rear

license plate holder. The admission of evidence showing minimal damage to a postcollision vehicle for the purpose of determining a plaintiff's injury, if any, and the nature and extent of that injury, falls within the sound discretion of the trial court. See *DiCosola v. Bowman*, 342 Ill. App. 3d 530, 533-35 (2003); *Cancio v. White*, 297 Ill. App. 3d 422, 433 (1998). Conflicting evidence on the nature and force of the collision was one of the credibility issues identified by the *Pecaro* court. *Pecaro*, 406 Ill. App. 3d at 921.

¶ 31 Kwiecien testified to severe, ongoing pain and suffering, adding that she would probably seek corrective surgery. However, Kwiecien also stated that she was not the type to take pain medication and had not sought surgery for years after the collision (explaining this in part with the need to care for her niece). Indeed, Kwiecien continued to work for years after the collision, ostensibly with assistance, although she called no coworkers as witnesses to corroborate this. Although Kwiecien testified she retired from her job early in part due to her injuries, she admitted her retirement letter referred only to her inability to gain accreditation under new requirements for all radiology departments in America. Kwiecien further acknowledged she did not report the shoulder issue in her medical history to Drs. Guelich or Evans.

¶ 32 Kwiecien's brief focuses on the jury award of \$2,300 for past medical expenses in light of the uncontested testimony that she paid \$11,060.40 in medical bills. Kwiecien primarily relies on *Arthur v. Catour*, 216 Ill. 2d 72, 82 (2005), in which our supreme court stated that payment of a medical bill is *prima facie* evidence of the bill's reasonableness. However, Kwiecien was required to prove that the bills were not only reasonable, but also necessarily incurred because of injuries caused by the defendant's negligence. See *id.* at 82-83. The *Arthur* court was primarily

concerned with the admissibility of such evidence and added "[t]he admission of the bill into evidence simply allows the jury to *consider* whether to award none, part, or all of the bill as damages." (Emphasis in original.) *Id.* at 83 (quoting *Baker*, 333 Ill. App. 3d at 493-94). In this case, the jury had no reason to doubt the medical charges were reasonable, but may have had reason to question whether the entire, largely unitemized amount was necessary.

¶ 33 Kwiecien notes the jury failed to award lost income even for the two days of work she missed immediately after the collision, but cites no evidence in the record that she in fact lost wages for those days. As Goodman notes, Kwiecien's trial argument for lost income centered on her early retirement, which the jury may have attributed to the accreditation issue.

¶ 34 The jury's choice to award no damages for loss of normal life while awarding something for pain, suffering and economic loss is not proof, by itself, that the jury "ignored" that element or rendered an inconsistent verdict. See *Dixon*, 383 Ill. App. 3d at 470-71 (and cases cited therein). Kwiecien asks us to follow *Obszanski v. Foster Wheeler Construction, Inc.*, 328 Ill. App. 3d 550 (2002), but the facts of that case are distinguishable.¹ In *Obszanski*, the plaintiff eventually had surgery requiring an overnight stay in the hospital and was unable to return to work until nearly six months later. *Id.* at 556. Kwiecien also relies on *Barr v. Groll*, 208 Ill. App. 3d 318, 323 (1991), but in that case, seven medical experts testified that Barr could not

¹ We also note that *Obszanski* was not a unanimous decision and was also criticized by this court in *Stift v. Lizzadro*, 362 Ill. App. 3d 1019, 1030 (2005).

return to work as a construction laborer and several testified that he could never return to any type of competitive employment. *Id.* at 16. Kwiecien further relies on *Martin v. Cain*, 219 Ill. App. 3d 110 (1991), where there was uncontroverted evidence that the plaintiff lost jobs due to her injury and medical treatment. *Id.* at 115-16. In this case, Kwiecien continued to work and her claims ultimately depend on her subjective complaints and uncorroborated testimony that she required assistance at home and work. The jury here apparently rejected Kwiecien 's claims that her symptoms caused an ongoing interference with her normal life activities.

¶ 35 Moreover, Kwiecien argues the trial court erred in denying a new trial because the verdict resulted from passion or prejudice. *Snover*, 172 Ill. 2d at 447. Kwiecien points to the purported inadequacy of the award, along with the fact that she is Bolivian, speaks with an accents and "obviously asked for more than the jury felt was appropriate." However, "[t]he mere fact that a verdict is less than claimed damages does not necessarily mean the award is inadequate, even where defendant offered no contradictory evidence. A jury is free to determine credibility of witnesses and to assess the weight to be accorded their testimony." *Moss v. Miller*, 254 Ill. App. 3d 174, 190 (1993). Kwiecien points to nothing in the record suggesting the jury discriminated against her on the basis of her ethnicity or accent. Accordingly, the argument fails.

¶ 36 In short, the objective evidence of Kwiecien's injuries required the jury to award damages (as it did), but the award suggests the jury did not believe Kwiecien's subjective symptoms were as severe or continuing as she claimed, discounted the pain and suffering and past medical expenses claims accordingly, and rejected the remaining claims. Both the jury (*Bazydlo*, 164 Ill. 2d at 214-15) and the trial judge (*Maple*, 151 Ill. 2d at 456) are in a superior position to judge

Kwiecien's credibility. Given the record on appeal, we conclude that the trial court did not abuse its discretion in denying Kwiecien's motion for a new trial on the issue of damages.

¶ 37 II. Defendant's Stipulation to Negligence

¶ 38 Kwiecien next argues that she was denied a fair trial because defense counsel repeatedly argued that Goodman's negligence was minor and insignificant, in violation of Goodman's signed stipulation. This court may reverse and remand for a new trial on damages where an inadequate award is the result of improper defense argument. See *Hollis v. R. Latoria Construction, Inc.*, 108 Ill. 2d 401, 410 (1985). However, a review of the stipulation in this case shows that Goodman merely stipulated to negligence and did not agree to any specific facts regarding the collision. Defense counsel argued the collision in this case was a minor one, but as previously noted, the admission of evidence showing minimal damage to a postcollision vehicle for the purpose of determining a plaintiff's injury, if any, and the nature and extent of that injury, falls within the sound discretion of the trial court. See *DiCosola*, 342 Ill. App.3d at 533-35; *Cancio*, 297 Ill. App. 3d at 433. Defense counsel did not argue that Goodman was not negligent, but that the resulting damages were minor. Accordingly, defense counsel's argument was proper and did not warrant a new trial.

¶ 39 III. Jury Instructions for Aggravation of a Preexisting Condition

¶ 40 Kwiecien further argues the trial court erred in refusing to include in the jury's instructions language informing the jury that she was entitled to be compensated for aggravation of a preexisting injury. Where there is evidence of a preexisting condition that is aggravated by the claimed negligence or that makes the plaintiff more susceptible to the type of injury

complained of, the jury should be instructed the plaintiff is entitled to damages therefor. See *Beard v. Barron*, 379 Ill. App. 3d 1, 21 (2008). In this case, the trial court determined there was no such evidence.

¶ 41 The record shows that in December 2006, Dr. Aden treated Kwiecien for strained muscles in the area of her left scapula while moving a patient, but after a brief course of physical therapy, Kwiecien had no pain and excellent strength and mobility with flexion in her shoulder. Dr. Aden also testified that there was no indication of a rotator cuff tear at that time. Defense counsel was allowed to show Kwiecien did not mention this prior treatment to other doctors to attack her credibility, but was barred by the trial court from arguing a preexisting injury. Accordingly, based on the record, the trial court did not err in determining there was no evidence the collision aggravated a preexisting injury.

¶ 42 **CONCLUSION**

¶ 43 In short, we conclude that the circuit court did not abuse its discretion in denying Kwiecien's motion for a new trial, as the court could reasonably conclude the jury verdict did not ignore a proven element of damages, was not inconsistent, and did not result from passion or prejudice. Defense counsel's argument that the collision was minor was proper and did not warrant a new trial. Lastly, the circuit court did not err in determining there was no evidence the collision aggravated a preexisting injury. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 44 Affirmed.