

NOTICE  
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2012 IL App (4th) 120125-U

NO. 4-12-0125

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
November 2, 2012  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

RONALD K. KNOLLENBERG,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Menard County
EDWARD E. KINCADE,	)	No. 10L2
Defendant-Appellee.	)	
	)	Honorable
	)	Alan Tucker,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Justices Appleton and Cook concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The trial court did not abuse its discretion in refusing plaintiff's jury instructions for future damages less than 50% likely to occur.

(2) The trial court erred in failing to grant a judgment notwithstanding the verdict for future medical expenses where plaintiff proved expenses were more likely to occur than not and the exact amount of expenses was also proved.

¶ 2 Plaintiff, Ronald Knollenberg, brought an action to recover damages resulting from the negligence of defendant, Edward Kincade, following an automobile accident. Plaintiff injured his wrist, aggravating a previous injury and causing him increased loss of range of motion and increased pain. The recommendation for his pain was to have fusion surgery, which would cause him to lose all movement in his wrist. At the time of the November 2011 trial, plaintiff had not had the surgery, having elected to live with some pain rather than have his wrist fused. Plaintiff testified the probability he would eventually have the surgery was 75 to 100%. His

doctor testified it was more probable than not plaintiff would eventually have the surgery.

¶ 3 At trial, plaintiff offered jury instructions relating to increased risk of future medical procedures and pain and suffering. The trial court refused the instructions because the instructions dealt with the probability of future medical expenses or future pain and suffering at less than 50% probability. The jury verdict awarded no damages for future medical expenses or future pain and suffering. Plaintiff appeals the refusal of his jury instructions and further argues he is entitled to judgment notwithstanding the verdict, a new trial, or an additur to damages for future medical expenses and future pain and suffering. We affirm the trial court's refusal of the jury instructions, reverse the trial court's denial of a judgment notwithstanding the verdict, and grant plaintiff's motion that he was awarded \$22,217 as future medical expense damages.

¶ 4

#### I. BACKGROUND

¶ 5 In February 2008, plaintiff and defendant were in an automobile accident. Defendant turned in front of plaintiff and their two vehicles collided. At the time of the accident, plaintiff's hands were on the steering wheel. Immediately after, plaintiff noticed a lump on his right wrist. He did not seek medical treatment until the next day when he went to the emergency room. X-rays were taken but no therapy or wrist splints were prescribed. Plaintiff was told to follow up with his own doctor. After about two weeks, the swelling reduced but pain and loss of function remained.

¶ 6 Plaintiff injured the same wrist about 25 years earlier at work, resulting in lunate prosthesis surgery in 1983 or 1984. As a consequence of that injury and surgery, plaintiff already had restrictive movement in his wrist and had pain when the wrist was bumped or jammed. He felt no numbness or tingling in his wrist.

¶ 7 After the accident in 2008, plaintiff began to experience numbness in his wrist when working at a computer and tingling when driving his automobile. He lost grip strength and had difficulty writing for prolonged periods. Plaintiff also noticed a further reduction in range of motion.

¶ 8 On January 28, 2010, plaintiff filed suit against defendant for damages for injuries suffered in the automobile accident. On November 11, 2011, after defendant admitted negligence, the trial court held a hearing to determine damages.

¶ 9 Plaintiff testified he saw Dr. Mark Greatting, an orthopedic surgeon with a specialty in hands and wrists. He saw Greatting numerous times during 2008 and 2009 with respect to obtaining relief for the pain in his wrist. Greatting explained surgery would relieve the pain. The major drawback to the surgery was it entailed a fusion of plaintiff's wrist, resulting in total loss of movement in the wrist. Plaintiff was not yet ready to give up the ability to use his wrist in exchange for reduction of the pain. However, plaintiff stated in the two years since he had last seen Greatting, the pain had become a little worse and, although he could presently still tolerate the pain, he believed there was a 75 to 100% likelihood he would need to have the surgery in the future.

¶ 10 Greatting testified, via evidence deposition, he first saw plaintiff on July 10, 2008. Plaintiff informed him of increasing pain and problems with his wrist since the accident in February. An examination showed plaintiff had limited motion of his wrist and positive findings for carpal tunnel syndrome, which Greatting stated probably stemmed from the deformity of the bones in plaintiff's wrist. The flexion and extension of his wrist was only about 25% of normal. Further, the scaphoid bone in his wrist was unstable, causing pain.

¶ 11 Greatting discussed with plaintiff his surgical option of wrist fusion, but plaintiff "wanted to see how long he could live with it before he had any surgery or anything else done." Greatting continued to see plaintiff in October 2008 and March, September, and October of 2009. He has not seen plaintiff again since October 26, 2009. As of that time, there was no change in the condition of plaintiff's wrist and no surgery was scheduled.

¶ 12 Greatting explained the wrist fusion surgery would be performed on plaintiff "if his wrist pain is severe enough." He further explained the carpal tunnel surgery which would alleviate the numbness plaintiff was experiencing. The cost for the two surgeries, as of December 2009 when he first prepared them, along with attendant physical therapy and follow-up radiographs, was \$22,217. Greatting believed plaintiff's symptoms would progress to the point he would undergo surgery. He was not absolutely certain plaintiff would have the surgery as the need was based on pain and pain tolerance before a patient had the surgery but he stated in his opinion it is more probable than not plaintiff will need the surgery to relieve his pain.

¶ 13 Greatting reviewed plaintiff's medical history and was aware of his prior wrist injury and disease. He stated the accident aggravated or caused more damage or more problems making the need for surgery likely. He conceded it was possible future surgery might have been necessary even without the accident but given plaintiff's lack of complaints prior to the accident, he did not know if plaintiff would ever have gotten to the point, without the accident, where he needed something to be done.

¶ 14 Plaintiff and his wife testified to plaintiff's lack of ability to do certain things with his hands since the accident. Plaintiff admitted he had some limitations on these abilities prior to the accident also.

¶ 15 At the jury instruction conference held prior to closing argument, plaintiff offered two instructions and a verdict form dealing with damages for an increased risk of future harm. They were derived from Illinois Pattern Jury Instructions, Civil, Nos. 30.04.03 and 30.04.04 (2006) (hereinafter, IPI Civil (2006) Nos. 30.04.03 and 30.04.04) and included, as an element of damages, an "increased risk of future surgery." After objection from defendant and arguments by both parties, the trial court refused those instructions, finding they applied only in circumstances where the evidence showed it is *less* than 50% likely there will be future medical expenses.

¶ 16 The jury returned a verdict in favor of plaintiff and awarded him \$3,720.84 for past medical expenses and \$3,000 for past pain and suffering. The jury did not award damages for future medical expenses, future pain and suffering, past loss of normal life, or future loss or normal life.

¶ 17 On December 21, 2011, plaintiff filed a posttrial motion asking the trial court to enter a judgment notwithstanding the verdict, order a new trial, or enter additur to the judgment in the amount of \$22,117 and enter an award for future pain and suffering. On January 11, 2012, defendant filed a response to the posttrial motion. On January 19, 2012, the trial court denied plaintiff's posttrial motion, and this appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Plaintiff argues the trial court erred in refusing to instruct the jury on damages for an increased risk of future surgery and in denying his posttrial motion for judgment notwithstanding the verdict, a new trial, or an additur for future medical expenses.

¶ 20 A. Jury Instructions

¶ 21 The decision to give or deny a jury instruction is within the trial court's discretion

and will not be reversed absent an abuse of that discretion. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505, 771 N.E.2d 357, 371 (2002). The standard for determining an abuse of discretion regarding jury instructions is whether the instructions are sufficiently clear so as to not mislead and whether they fairly and correctly state the law. *Id.*

¶ 22 Plaintiff offered two instructions based on IPI Civil (2006) Nos. 30.04.03 and 30.04.04. The first, IPI Civil (2006) No. 30.04.03, states in its Notes on Use it is to be inserted into IPI Civil (2006) No. 30.01 in a case where damages are within the scope of *Dillon*. The supreme court in *Dillon* stated it was now adopting the practice of allowing compensation for increased risk of future injury as long as it can be shown to a reasonable degree of certainty the defendant's wrongdoing created the increased risk. *Dillon*, 199 Ill. 2d at 500, 771 N.E.2d at 368. The court noted this was a break in precedent as, traditionally, Illinois courts were unwilling to permit recovery of damages for future consequences of an injury unless those consequences were proven reasonably certain to occur. *Stevens v. Illinois Central R.R. Co.*, 306 Ill. 370, 377, 137 N.E. 859, 863 (1922). The long-standing rule was a "mere possibility, or even a reasonable probability" future pain and suffering may be caused by an injury was not sufficient to warrant an assessment of damages. *Amann v. Chicago Consolidated Traction Co.*, 243 Ill. 263, 267, 90 N.E. 673, 674 (1909).

¶ 23 In *Dillon*, a catheter fragment had become imbedded in the plaintiff's heart. Several experts testified to possible future injuries due to the fragment remaining in the plaintiff's heart. All of them testified the probability of the risks occurring were 20% or under. *Dillon*, 199 Ill. 2d at 497, 771 N.E.2d at 366. These risks of injury were not compensable due to their less-than-probable chances of occurrence. Under the principle of single recovery, there is no

opportunity for a second look at a damage award and all damages must be recovered at one time, including prospective damages. See *Dillon*, 199 Ill. 2d at 499-500, 771 N.E.2d at 368. The court in *Dillon* held a plaintiff must be permitted to recover for all demonstrated injuries including future injuries not reasonably certain to occur but the compensation must reflect the low probability of occurrence. *Dillon*, 199 Ill. 2d at 504, 771 N.E.2d at 370.

¶ 24 In response to the holding in *Dillon*, IPI Civil (2006) Nos. 30.04.03 and 30.04.04 were adopted. IPI Civil (2006) No. 30.04.04 provided a formula for calculating damages with a less than 50% probability of occurrence. As noted in the Notes on Use for IPI Civil (2006) No. 30.04.04, these two instructions should only be given where the plaintiff seeks compensation for future damages less than 50% likely to occur. They should not be given where the evidence indicates the likelihood of future occurrences is greater than 50%.

¶ 25 In this case, the plaintiff testified he was 75 to 100% sure he would have the fusion surgery some day. Greatting testified it was more likely than not, thus greater than 50%, plaintiff would have the surgery. Therefore, plaintiff was not entitled to have IPI Civil (2006) Nos. 30.04.03 and 30.04.04 given to the jury. There was no abuse of discretion on the trial court's part because the instructions did not fairly and correctly state the law.

¶ 26 Based on *Dillon*, the instructions offered, the Notes on Use, and the theory of the case, we believe this is the correct result. However, we query whether a broader reading of *Dillon* might be considered. A plaintiff might contend there is a probability of future damages greater than 50%. A defendant might concede there is some probability of future damages but that probability is below 50%. The Notes on Use now rely on what plaintiff is seeking to determine which jury instructions to offer, but perhaps the instructions should also reflect what

defendant contends.

¶ 27

#### B. Posttrial Motion

¶ 28

In his posttrial motion, plaintiff argued he should be granted a judgment notwithstanding the verdict in regard to future medical expenses and future pain and suffering because the evidence was overwhelming he would incur both the expenses and the pain and suffering.

Alternatively, he argued he should be awarded a new trial due to the trial court's refusal to instruct the jury as to increased risk of future surgery. Plaintiff contends under the jury instructions he tendered, the jury could have found the probability he would have future surgery was greater than 0% but less than 50%. Because the jury actually awarded him no damages for future surgery, it evidently concluded the probability of him having the surgery was less than 50%.

¶ 29

A judgment notwithstanding the verdict should not be entered unless the evidence, viewed in the light most favorable to the opponent, so overwhelmingly favors the movant no contrary verdict based on that evidence could ever stand. *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 109, 679 N.E.2d 1202, 1208 (1997). A reviewing court engages in *de novo* review of a trial court's ruling on a motion for judgment notwithstanding the verdict. *Commerce Bank v. Youth Services of Mid-Illinois, Inc.*, 333 Ill. App. 3d 150, 154, 775 N.E.2d 297, 300 (2002).

¶ 30

As for the trial court's decision to grant or deny a new trial, great deference is given to the court. *Bishop v. Baz*, 215 Ill. App. 3d 976, 981, 575 N.E.2d 947, 951 (1991). The court's decision will not be reversed unless there is an abuse of discretion. *Maple v. Gustafson*, 151 Ill.2d 445, 455, 603 N.E.2d 508, 513 (1992).

¶ 31

Plaintiff's motion for a new trial on the grounds of the trial court's failure to give the requested jury instructions fails because he was not entitled to those instructions.

¶ 32 Defendant presented no evidence. The only evidence as to whether plaintiff would be incurring future medical expenses came from Greatting and plaintiff himself. Plaintiff testified although he had not yet had the fusion surgery because he did not want to lose all mobility in his wrist, the pain was increasing and he stated the probability he would have to have the surgery in the future was 75 to 100%. Although he admitted there was a 25% chance he would not have the surgery, he was more than likely going to have it once the pain became too much to bear.

¶ 33 Greatting testified, to a reasonable degree of medical certainty, it appeared "likely," or more probable than not, plaintiff would undergo wrist fusion surgery "at some point in his life." Greatting based his opinion on the fact over time, plaintiff's pain would "progress to the point he will get something done." Further, Greatting stated, based on plaintiff's medical history, the automobile accident aggravated or caused more damage or problems with his wrist. Also in reference to plaintiff's medical history Greatting stated "I don't know if he would have ever, without the accident, gotten to a point where he needed something done, although it's possible."

¶ 34 Defendant admitted his negligence for the accident. Defendant is responsible for damages arising from his negligence. Greatting's testimony established the link between plaintiff's future wrist fusion surgery and the accident.

¶ 35 This uncontradicted evidence overwhelmingly favored plaintiff. A reasonable trier of fact could not come to a contrary verdict based on such evidence. The traditional American rule, followed in Illinois, is recovery of damages based on future consequences may be had if "reasonably certain." To meet this standard, courts require plaintiffs to prove it is more

likely than not (or a greater than 50% chance) the consequence will occur. Once this is proved, the injured party is awarded full compensation for his injuries and they are not reduced even if the probability is less than 100%. *Dillon*, 199 Ill. 2d at 498-99, 771 N.E.2d at 367 (quoting *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982)).

¶ 36 Plaintiff proved it was more likely than not he would have the wrist fusion surgery necessitated by the automobile accident. Although plaintiff requested \$22,117 and an award for future pain and suffering in his posttrial motion, the cost of that surgery and attendant physical therapy and follow-up care, pursuant to Greatting's testimony, would be \$22,217. Plaintiff did not testify to future pain and suffering such as increased pain or further loss of mobility in his wrist. He did not seek the surgery up to the time of trial and had no specific plans to obtain the surgery. This indicates a conscious decision on his part to "tough it out" and a possible jury determination the pain or discomfort was not sufficient for an award. However, the jury was not entitled to ignore the uncontradicted evidence the accident caused more damage to plaintiff's wrist and the likelihood he would have wrist fusion surgery. We see no purpose to send this case back for a new trial on damages. Instead, we reverse the trial court and grant plaintiff's motion for judgment notwithstanding the verdict and order he be awarded \$22,217 in damages for future medical expenses.

¶ 37 III. CONCLUSION

¶ 38 We affirm the trial court's judgment in part as modified and reverse it in part. We affirm the court's refusal to instruct the jury with instructions based on IPI Civil (2006) Nos. 30.04.03 and 30.04.04. We reverse the court's denial of plaintiff's posttrial motion and grant him judgment notwithstanding the verdict in the amount of \$22,217.

¶ 39 Affirmed in part as modified and reversed in part.