2017 IL App (2d) 160954-U
No. 2-16-0954
Order filed September 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JAIME BEDOLLA,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14-L-53
	)	
MITCHELL D. LAUBER,	)	Honorable
	)	James R. Murphy,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The jury's verdict was not legally inconsistent: although the jury used a verdict form that produced a facially inconsistent verdict—finding defendant mostly at fault for plaintiff's damages yet awarding plaintiff zero damages—the inconsistency was subject to the reasonable hypothesis that the jury properly found that defendant was mostly to blame for the accident but also that the accident did not cause plaintiff's injuries.

¶ 2 Plaintiff, Jaime Bedolla, sued defendant, Mitchell D. Lauber, for damages resulting from an automobile accident. A jury found in favor of plaintiff, determined that plaintiff was 40% contributorily negligent, and awarded zero damages. Plaintiff filed a motion for a new trial, which was denied. Plaintiff timely appeals, arguing that the jury's verdict was legally

inconsistent and that the zero damages award was against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 According to plaintiff's first amended complaint, on September 21, 2012, defendant was driving negligently and was the proximate cause of a collision involving plaintiff. Defendant filed an affirmative defense, asserting that plaintiff was contributorily negligent. A four-day jury trial began on February 29, 2016.

¶ 5 A. Relevant Testimony Concerning the Accident

¶ 6 Defendant testified that, while traveling north, he entered an intersection on a yellow arrow to make a left turn. He attempted to stop when he realized that a crash was about to occur with plaintiff's oncoming southbound vehicle. The road was wet, and his vehicle slid into plaintiff's vehicle. The right front corner of his vehicle impacted the front of plaintiff's vehicle. He was ticketed for improperly turning left into oncoming traffic, and he pleaded guilty to that offense.

¶ 7 Todd Gayhart, a witness to the accident, testified that he was stopped at a stoplight heading south. Plaintiff's vehicle was located in the lane to his left and was also stopped at the stoplight. When the light turned green, Gayhart proceeded slowly into the intersection. Plaintiff entered the intersection in unison with Gayhart. When Gayhart was about a car-length into the intersection, he saw that defendant's vehicle was going to turn in front of him. Gayhart applied his brakes, and plaintiff's and defendant's vehicles collided. Plaintiff was traveling slowly, or was at a complete stop, before the accident.

¶ 8 Plaintiff testified that, when the light turned green, he entered the intersection traveling about 10 miles per hour and was struck by defendant.

¶ 9 B. Relevant Medical Testimony

¶ 10 Prior to the accident, plaintiff had visited Dr. David Grganto with complaints of lower back pain. Although plaintiff presented Grganto's testimony by way of video evidence deposition, the testimony was not transcribed as part of the report of proceedings. (No copy of any transcription or the DVD appears in the record.) Nevertheless, evidence concerning these visits was presented via the video deposition testimony of defendant's medical expert, Dr. Avi Bernstein, an orthopedic spine surgeon, who reviewed Grganto's records. According to Bernstein, Grganto's records showed that plaintiff visited Grganto with complaints of back pain on December 15, 2010, and January 23, 2012. At the January 23 visit, plaintiff stated that he had had the pain for six months. He stated that the pain was intermittent and gradually worsening. Plaintiff told Grganto that he had not suffered acute trauma. He told Grganto that he worked as a plumber and that the pain worsened with activity and when changing position from sitting to standing. The pain was in the sacroiliac (SI) and lower back area. Grganto prescribed an anti-inflammatory pain medication, and he injected a steroid medication into the SI joint.

¶ 11 On the day of the accident, plaintiff visited the emergency room. Testimony concerning this visit was also presented by Bernstein, who reviewed the emergency room records. At the emergency room, plaintiff asserted that the left front end of his vehicle was struck as he entered the intersection traveling 10 miles per hour. He stated that he was wearing his seatbelt and that the airbags did not deploy. Plaintiff complained of lower back pain. Plaintiff was diagnosed with lumbar strain following a motor vehicle collision and released.

¶ 12 On September 24, 2012, three days after the accident, plaintiff saw Dr. Freedburg with Suburban Orthopaedics, on the advice of his attorney, who was a close friend. (Freedburg did not testify.) Bernstein reviewed the medical records from plaintiff's visit with Freedburg.

According to Bernstein, plaintiff reported to Freedburg that he had been in an accident and that he had pain radiating down to the lower buttock area. Plaintiff also reported to Freedburg that he had never before seen a doctor for lower back pain. Freedburg diagnosed plaintiff with lumbar sprain/strain. Freedburg did not place plaintiff on any work restrictions, and Bernstein did not see anything in the records that would have warranted work restrictions.

¶ 13 Plaintiff testified that he felt pain immediately upon the impact with defendant's vehicle. He went to the emergency room and was released that same day. Plaintiff saw Freedburg three days later. Although Freedburg made him feel better, the pain never went away. Freedburg gave him a lumbar corset and prescribed physical therapy. Plaintiff went to therapy for about six months. Plaintiff did not tell Freedburg that, prior to the accident, he had been treated for lower back pain, because his back had been feeling good and it did not cross his mind. He stated that the SI injection that Grganto gave him took away his pain completely. According to plaintiff, the back pain that he suffered after the accident was totally different from the back pain that he had prior to the accident. He had a young child at home and his medical treatment had been a big stressor on his home life. He had struggled at his job as a plumber every day since the accident.

¶ 14 Dr. Thomas McNally, an orthopedic spine surgeon with Suburban Orthopaedics, testified that he saw plaintiff on March 28, 2013, May 27, 2014, and July 29, 2014. Plaintiff had been referred to him by Freedburg. According to McNally, plaintiff told him that he had not experienced or been treated for lower back pain prior to the crash. Plaintiff told him that the pain had started after the crash. At the first visit, McNally reviewed an MRI that had been taken in January 2013. He observed "disc herniation at L4-5 and a spondylolisthesis of L5-S1 with narrowing where the nerves exit the spine." He concluded that "the L5 nerve root was being impinged." McNally testified that plaintiff had these conditions before the crash but that the

symptoms from those conditions were aggravated by the crash. McNally testified that, if plaintiff had been treated for SI joint dysfunction with an SI joint injection eight months earlier, his opinion concerning whether the crash could have aggravated a preexisting condition would not change, because the pain that he had been treating plaintiff for and SI dysfunction were two different things. Plaintiff will "more likely than not" require surgery in the future.

¶ 15 Dr. Dmitry Novoseletsky, a physical medicine and rehabilitation specialist with Suburban Orthopaedics, with a subspecialty in pain medicine, testified that he first saw plaintiff on April 9, 2013. Plaintiff told him that he had never seen a doctor for lower back pain in the past. Novoseletsky determined that, based on plaintiff's MRI, plaintiff's pain was being caused by the herniated disc and the spondylolisthesis. Noveseletsky ruled out SI joint dysfunction as a cause of plaintiff's pain. Novoseletsky performed numerous procedures on plaintiff to control his pain, such as a lumbar epidural steroid injection, a lumbar radiofrequency neurotomy procedure, and an SI joint injection. Although plaintiff obtained some degree of pain relief for a short time, eventually Novoseletsky sent him back to see McNally for possible surgery, because he did not have a longer lasting solution for him. After seeing McNally, plaintiff returned and told Novoseletsky that he could not have surgery done, because he could not take time off work. Plaintiff told Novoseletsky that he was in a significant amount of pain and that the pain was interfering with his ability to work and with his daily living. Novoseletsky tried a couple of procedures to reduce the pain, but there was no relief. Novoseletsky testified that, in his opinion, plaintiff's condition was permanent. He also opined within a reasonable degree of medical certainty that the accident was, more likely than not, a cause of plaintiff's condition and of the care and treatment that plaintiff had required. He testified that plaintiff's condition included chronic pain, which directly impacted plaintiff's quality of life in various ways. In addition to

the visit on April 9, 2013, Novoseletsky saw plaintiff on April 25, 2013, April 16, 2014, December 17, 2015, and February 1, 2016. At the December 17 and February 1 visits, plaintiff reported that he was taking over-the-counter Tylenol once a day for pain, as needed. Novoseletsky recommended that he take Advil.

¶ 16 Bernstein testified that, in addition to reviewing plaintiff's medical records, he examined plaintiff on May 11, 2015. Plaintiff rated his pain on that day as an 8 out of 10. Bernstein testified that such a rating was on the borderline of incapacitating pain and that he did not see plaintiff display behaviors consistent with his pain rating. Bernstein also reviewed the January 2013 MRI. According to the MRI findings, plaintiff had grade one spondylolisthesis, a possible pars defect, and a small central disc protrusion at L4-5. There were also indications of arthritis. In Bernstein's opinion, all of these conditions existed before the accident. He testified that they were chronic conditions and part of a progressive degenerative process. He testified that spondylolisthesis was the most obvious cause of plaintiff's back pain. Bernstein opined that plaintiff's condition three days postaccident was similar to his condition preaccident with regard to plaintiff's complaints of pain. Bernstein reviewed an MRI that had been taken on June 2, 2014, and it looked the same as the January 2013 MRI. In addition, an X-ray showed spondylolisthesis. Bernstein made the following assessment:

> "A. That, uh, the patient has a chronic, pre-existing degenerative L5-S1 spondylolisthesis; uh, I felt that that particular condition was responsible for the type of pain he had in the past before the accident, and, uh, the type of pain he was complaining of to me after the accident. Um, I noted that he was working full-time as a plumber and in an unrestricted fashion. So because of his high functional ability, it was my opinion that he was not a candidate for any surgery for his condition. Um, another opinion is that

> I didn't feel that the motor vehicle accident caused damage to his low back, that he had a structural injury that would lead to chronic pain or the need of—certain need for surgery. Um, I did feel that he could have had an aggravation, uh, causing a temporary increase in pain complaints. And I felt that after six months, there was no further treatment that was necessary for him for his low back. And I didn't feel that he had suffered a permanent injury.
>
> Q. Okay. And what's the basis for that opinion that he had a, uh—a—a temporary injury?
>
> A. Uh, because he had increase in pain complaint following the accident that was acute, the doctors found some muscle spasm. Uh, that disappeared. I didn't find any on my examination. Uh, sometimes a degenerative condition becomes more painful following a trauma; but this is somebody who is functioning at their job and in an unrestricted capacity. And I felt that actually the patient's job as a plumber was more risky for his low back than this particular motor vehicle incident."

Bernstein testified that he found no evidence of a structural injury to plaintiff's spine.

¶ 17 Gary Skoog, an economist and statistician, testified for the defense. Skoog testified that the accident took place on a Friday and that, in the week that followed, plaintiff missed work only on Monday; he worked the remaining four days of the work week. In the six weeks that followed, plaintiff worked five days per week. During the week of November 16, plaintiff missed two days. The following week, plaintiff worked four days. And in the month thereafter, plaintiff worked five days per week. Skoog did not know why plaintiff missed the days that he did.

¶ 18 No evidence was presented as to any medical expenses incurred since the accident. Prior to trial, plaintiff had moved to bar such evidence, and his motion was granted.

¶ 19 C. Jury Instructions and Verdict

¶ 20 During jury instructions, the jury was given three verdict forms, with respect to which the trial court advised as follows:

> "If you find for Plaintiff Jaime Bedolla and against Defendant Mitchell Lauber, and if you further find that Plaintiff Jaime Bedolla was not contributorily negligent, then you should use Verdict form A.
>
> If you find for Plaintiff Jaime Bedolla and against Defendant Mitchell Lauber, and if you further find that Plaintiff Jaime Bedolla's injury was proximately caused by a combination of Defendant Mitchell Lauber's negligence and Plaintiff Jaime Bedolla's contributory negligence and that Plaintiff Jaime Bedolla's contributory negligence was 50 percent or less of the proximate cause of the injury or damage for which recovery is sought, then you should use Verdict form B.
>
> If you find for Defendant Mitchell Lauber and against Plaintiff Jaime Bedolla, or if you find that plaintiff's contributory negligence was more than 50 percent of the total proximate cause of the injury or damage for which recovery is sought, then you should use Verdict form C."

¶ 21 The jury returned verdict form B, found plaintiff 40% contributorily negligent, and awarded zero damages.

¶ 22 D. Motion for a New Trial

¶ 23 Plaintiff filed a motion for a new trial, arguing that the jury's finding that defendant proximately caused damage to plaintiff was inconsistent with its award of zero damages and,

further, that the jury's finding of zero damages was against the manifest weight of the evidence. The trial court denied the motion. The court stated:

> "I think the intention of the jurors was clear. They wanted to find that there was—there were no medical bills, pain and suffering, or loss of a normal life attributable to the accident or to defendant's fault. But they also wanted to state somehow or make a finding somehow that the accident was mostly defendant's fault, i.e., 60 percent defendant's fault and 40 percent comparative fault of the plaintiff."

The court noted Bernstein's "substantial testimony" regarding the lack of a causal connection and his testimony that plaintiff was receiving lower back treatment before and after the accident. The court also noted that plaintiff was not "upfront about his prior back problems to his own treaters." The court further noted that there was no indication that the jurors were having a hard time or that they were attempting to reach a compromise. The court concluded that the verdict was reconcilable with the evidence and that the jury "found for plaintiff on the question of liability but then they found for defendant on the question of damages."

¶ 24 Plaintiff timely appealed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, plaintiff argues that the jury's verdict was legally inconsistent and that the jury's award of zero damages was against the manifest weight of the evidence. We disagree.

¶ 27 In determining whether a jury's verdict is legally inconsistent, the court will exercise all reasonable presumptions in favor of the verdict, and the verdict will not be found legally inconsistent unless absolutely irreconcilable. *Redmond v. Socha*, 216 Ill. 2d 622, 643 (2005). A verdict will not be considered irreconcilable if supported by any reasonable hypothesis. *Id.* at

644. A trial court's order granting or denying a new trial based on a claim of a legally inconsistent verdict is subject to *de novo* review. *Id.* at 642.

¶ 28 First, we note that there is no question that verdict form B, as completed by the jury, finding "for [plaintiff] and against [defendant]," is facially inconsistent. The jury found that plaintiff's negligence represented 40% of the negligence that "proximately contributed to the plaintiff's damages." Thus, it follows that defendant's negligence represented 60% of the negligence that "proximately contributed to plaintiff's damages." However, by finding that the total damages suffered by plaintiff "as a proximate result of the occurrence" was zero, the jury simultaneously found that defendant caused damages and that plaintiff suffered no damages. Nevertheless, the question is whether the verdict can be supported by any reasonable hypothesis.

¶ 29 Plaintiff relies on *Theofanis v. Sarrafi*, 339 Ill. App. 3d 460 (2003). Defendant relies on *Kleiss v. Cassida*, 297 Ill. App. 3d 165 (1998). We will address each case in turn.

¶ 30 In *Theofanis*, the husband and the daughter of a patient who suffered a stroke brought a malpractice action against a physician and a health care service corporation for failing to inform him of test results that showed a mass in the patient's heart prior to her stroke. *Theofanis*, 339 Ill. App. 3d at 464-65. The jury found both defendants liable but assessed zero damages. *Id.* at 469. All parties filed posttrial motions. *Id.* After denying the plaintiffs' motion for a new trial on damages only, the trial court amended the verdict in favor of the physician, concluding from the award of zero damages that the jury found that the physician's acts did not proximately cause the injury. *Id.* at 469-70. The plaintiffs appealed. *Id.* at 473.

¶ 31 The appellate court held that the trial court erred by changing the verdict from one in favor of the plaintiffs on the issue of liability to one in favor of the physician and that thus a new trial was warranted. *Id.* The court noted that " '[a] trial court should not amend a verdict in

order to reach a determination that the court believes the jury ought to have made, and an amendment must reflect only what the jury intended the verdict to be.' " *Id.* (quoting *Crowell v. Parish*, 159 Ill. App. 3d 604, 609 (1987)). The court found that the jury's intent to find in favor of the physician was not clear. *Id.* at 475. The court considered the physician's argument that the jury found in his favor and simply used the wrong verdict form, but stated: "In light of the jurors' use of the proper verdict forms for finding no liability on all other counts, the choice of verdict form B does not appear to result from inadvertent error or confusing trial court instructions." *Id.* at 474. The court noted that another reasonable hypothesis for the jury's verdict was that the jury had intentionally disregarded the trial court's instructions and returned an inconsistent verdict as the result of a compromise, *i.e.*, that "those who believed [the physician] negligently harmed [the patient] gave up the assessment of damages in exchange for the other jurors' signature on a formal finding of negligence and liability." *Id.* The court found that this hypothesis was supported by the fact that, during deliberations, the jury sent a note to the trial court, informing the court that it had tried to reach a compromise, and the trial court ordered the jury to continue deliberating and did not attempt to dissuade them from reaching a compromise. *Id.* at 473. Thus, the court concluded:

> "[T]he hypotheses that the jurors intentionally disregarded the court's instructions and returned an inconsistent verdict as a result of compromise is at least as defensible as the hypothesis that the jury mistakenly signed the wrong verdict form. Because the judgment in favor of [the physician] did not reflect the clear intention of the jury—this internally inconsistent verdict expressed no intention clearly—the trial court abused its discretion by substituting the verdict the court believed the jury should have reached for the verdict the jury actually rendered." *Id.* at 474-75.

The court reversed the judgment in favor of the physician and remanded for a new trial. *Id.* at 475.

¶ 32 In *Kleiss*, a farming couple who had suffered crop damage sued the persons responsible for spraying herbicides on two nearby farms and the manufacturer of an ingredient contained in the herbicides. *Kleiss*, 297 Ill. App. 3d at 167. The jury returned a verdict in favor of the plaintiffs on their negligence claim against one of the spraying defendants (Cassida), but awarded no damages. *Id.* at 173. The jury found in favor of the plaintiffs against the remaining defendants and awarded a variety of damages. *Id.* The plaintiffs filed a motion for a new trial on damages only against Cassida. *Id.* The trial court denied the motion. In so doing, "the trial court hypothesized that the jury found Cassida negligent because he had sprayed *** when the wind was in excess of the recommended amount, but that the jury did not find evidence of either proximate cause or damage to plaintiffs' crops from Cassida's spraying." *Id.* at 175. The plaintiffs appealed. *Id.*

¶ 33 On appeal, the plaintiffs argued that the jury's finding was legally inconsistent, requiring a new trial on damages. According to the plaintiffs, the jury's finding of liability against Cassida included, by definition, a finding of damages. *Id.* The appellate court disagreed with the plaintiffs and affirmed, stating:

> "Plaintiffs would have us assume the only possible interpretation of the jury's verdict was that the jury found plaintiffs had proved each element of their negligence claim, duty, breach of duty, causation, and damages, but the jury mistakenly failed to award damages. The more logical conclusion is that the jury found Cassida had breached his duty to plaintiffs *** but either that Cassida's negligent spraying was not a proximate cause of plaintiffs' injury or plaintiffs did not sustain damage as a result of Cassida's negligence.

In this case, the jury found for Cassida, but simply used the wrong verdict form." *Id.* at 176.

In coming to this decision, the court specifically noted that the jury returned a verdict that was not against the manifest weight of the evidence. *Id.* at 176. The court found that there was sufficient evidence to infer that Cassida's negligence was not a proximate cause of the plaintiffs' injury and to infer that the plaintiffs did not sustain damages as a result of Cassida's negligence. *Id.* at 176-77. The court also noted that the jury had assessed damages against every other defendant, showing that it knew how to assess damages, and had specifically asked during deliberations whether it had to award damages if it found a party negligent, to which the trial court replied " 'No.' " *Id.* at 175. Thus, the appellate court found that the jury's intent to award the plaintiffs zero damages was "crystal clear." *Id.* at 176.

¶ 34 The foregoing case law leads us to conclude that the jury's verdict is this case is not irreconcilable. The present case is far more like *Kleiss* than *Theofanis*, as the jury's error was one of form rather than substance. According to plaintiff, the only possible explanation for the verdict was that the jury found that plaintiff proved each element of his negligence claim—duty, breach, causation, and damages—but mistakenly failed to award damages. However, considering the evidence presented, the more reasonable hypothesis is that, although the jury found that defendant was 60% responsible for the accident (indeed he admitted guilt and pleaded guilty), the jury determined either that the accident was not the cause of plaintiff's injuries or that plaintiff suffered no injuries as a result of the accident. As in *Kleiss*, such a conclusion is not against the manifest weight of the evidence.

¶ 35 Here, there was sufficient evidence from which the jury could conclude that the accident did not cause plaintiff's injuries or that plaintiff was not injured. Bernstein testified that there

was no evidence of a structural injury to plaintiff's back. He testified that all of the conditions that he observed on the post-accident MRI existed prior to the accident and that they were chronic conditions and part of a degenerative process. He testified that spondylolisthesis was responsible for the pain that plaintiff complained of both before and after the accident. He testified that plaintiff could have had an aggravation of pain due to the accident, causing a temporary increase in pain, but that no treatment would have been necessary after six months.

¶ 36 Bernstein's testimony supported a conclusion that plaintiff's injuries resulted from his employment. Bernstein testified: "[S]ometimes a degenerative condition becomes more painful following a trauma; but this is somebody who is functioning at their job and in an unrestricted capacity. And I felt that actually the patient's job as a plumber was more risky for his lower back than this particular motor vehicle incident." In addition, the evidence established that plaintiff missed only one day of work, on the Monday following the Friday accident, to visit Freedburg. Freedburg did not place plaintiff on any work restrictions, and in the six weeks that followed, plaintiff worked five days per week.

¶ 37 Further, the jury could have disregarded plaintiff's testimony regarding his injuries. See *Snover v. McGraw*, 172 Ill. 2d 438,448-49 (1996) (where an injury is based on subjective complaints of pain, a jury is free to disbelieve the plaintiff). Plaintiff's credibility was certainly in question. The evidence showed that, although plaintiff was being treated for lower back pain within a year prior to the accident, he told the doctors that he visited postaccident that he did not suffer from lower back pain or receive treatment prior to the accident. As noted, plaintiff continued to work immediately following the accident. There was evidence, based on Dr. Bernstein's examination, suggesting that plaintiff was exaggerating his complaints of pain.

Bernstein testified that, while examining plaintiff, plaintiff rated his pain at a level 8 out of 10; however, Bernstein did not see plaintiff display behaviors consistent with such a pain rating.

¶ 38 We also note that, unlike in *Theofanis*, there is no evidence "strongly suggest[ing]" that the verdict was a compromise. *Theofanis*, 339 Ill. App. 3d at 473. In *Theofanis*, during deliberations, the jury sent a note to the trial court informing the court that it had tried to reach a compromise. Instead of dissuading the jury from doing so, the court simply instructed them to continue deliberating. Here, as the trial court noted, there was no indication from the jury that it was having a hard time or attempting to reach a compromise.

¶ 39 In sum, exercising all reasonable presumptions in favor of the verdict, we find that the jury's verdict can be supported by a reasonable hypothesis, *i.e.*, the jury found that, although defendant caused the accident, either the accident was not the cause of plaintiff's injuries or plaintiff suffered no injuries as a result of the accident. The verdict is supported by the evidence and there is nothing in the record to indicate that it was a compromise. Thus, the verdict is not legally inconsistent. Although the verdict should have been expressed by way of verdict form C, rather than verdict form B, the jury's use of the wrong verdict form under the circumstances does not warrant reversal.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 42 Affirmed.