THIRD DIVISION
September 30, 2019

No. 1-16-0782

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALEJANDRO VAZQUEZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 L 7436
	)	
ANTHONY WALKER and CHICAGO TRANSIT	)	
AUTHORITY, a municipal corporation,	)	Honorable
	)	James P. McCarthy,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County entered on February 16, 2016 denying plaintiff's motion for new trial on disability damages is affirmed; the jury verdict awarding money damages for past pain and suffering as well as past and future medical costs, but nothing for disability did not ignore a proven element of damages nor were the damages awarded internally inconsistent.

¶ 2 Following a jury trial, judgment and damages were entered in favor of plaintiff Alejandro Vazquez and against defendants, Anthony Walker and the Chicago Transit Authority (CTA), in this personal injury case. The jury awarded money damages for past pain and suffering as well as past and future medical costs, but nothing for disability. Plaintiff filed a posttrial motion requesting a new trial on the issue of disability damages. The trial court denied plaintiff's

motion. On appeal, plaintiff contends that this cause must be remanded for a new trial as to the disability element of his damages arguing the trial court erred when it denied plaintiff's motion for a new trial where the jury verdict awarded money damages for past pain and suffering as well as past and future medical costs, but nothing for disability because (1) in doing so the jury ignored a proven element of damages and, in the alternative, (2) the damages awarded were internally inconsistent. For the following reasons, we affirm the trial court's order denying plaintiff's posttrial motion.

¶ 3 BACKGROUND

¶ 4 On July 2, 2012, plaintiff filed a personal injury complaint against Walker and the CTA (defendants), alleging that he was injured on August 15, 2007 when the vehicle he was driving was involved in a collision with a CTA bus operated by Walker. The parties engaged in discovery and the matter proceeded to a jury trial.

¶ 5 Trial

¶ 6 Witness testimony at trial included: defendant Walker, plaintiff, Jennifer Kent, Doctor Terry Lichtor, Doctor Jeffrey Coe, Martha Vazquez-Weber (Weber), and Maria Rose.

¶ 7 Defendant Anthony Walker's Trial Testimony

¶ 8 Walker testified that he was employed as a bus operator for the CTA and on August 15, 2007 he was driving his CTA bus northbound on Lake Shore Drive. Walker was unaware of any accident that occurred between his CTA bus and plaintiff's car until after he finished his route and was instructed by a supervisor to report to Congress Terminal Parkway. Once there, Walker was informed of the accident and met with a supervisor and plaintiff.

¶ 9 Walker testified that at the meeting, plaintiff did not mention he was injured nor did he ask for medical attention. Plaintiff did not appear injured. Walker also stated that he did not see any damage to his bus or paint from plaintiff's vehicle on the passenger side of his bus.

¶ 10 Plaintiff Alejandro Vazquez's Trial Testimony

¶ 11 (a) The Collision

¶ 12 Plaintiff testified that on August 15, 2007 he was involved in a car accident with a CTA bus while driving Jennifer Kent, a friend's girlfriend, to the hospital. Earlier that morning he had been laying kitchen flooring in a three-story building owned by his sister, but left when a friend called and asked plaintiff to drive the friend's girlfriend, Kent, to the hospital to see her friend who was having a baby. While driving with Kent northbound on Lakeshore Drive, a CTA bus merged lanes and collided with his car. The bus made contact with the front driver's side of his car causing his car to hit the guardrail. Plaintiff acknowledged that he "might have" said to the treating physician that the accident was a "head on collision" but that this characterization was not true. After the accident, the CTA bus operator did not stop so plaintiff followed the bus to a CTA location where he reported the accident to a supervisor and showed him his vehicle and the bus that struck him. When plaintiff saw the bus he observed scrapings of green paint from his vehicle on the passenger's side of the bus. Plaintiff did not request medical attention at that time. He drove to the hospital where he dropped Kent off and then continued on about thirty minutes to his sister's house and from there drove to his mother's house. Less than two hours from when the accident occurred, plaintiff left his mother's house and walked five blocks to his girlfriend's residence.

¶ 13 Plaintiff testified he fell asleep at his girlfriend's home and woke up the following day experiencing back pain and numbness in his legs. Later that day plaintiff testified he went to Trinity Hospital's emergency room where he reported his symptoms. Plaintiff was given a couple of pain pills and a fabric "girdle brace" that could be tightened around his back with strings and was told to follow up with a Dr. Patel.

¶ 14 (b) Plaintiff's Life and Employment Prior and Subsequent to the Accident

¶ 15 Plaintiff testified that prior to the accident he did "multiple jobs at multiple times" working in construction, tattooing, tiling, and murals "basically whatever I can get my hands on." He testified that he worked on construction projects for his sister and periodically for her husband. He testified that the construction work he did was seasonal and included laying foundation for a house, framework, drywall, siding, roofing, tuck pointing, electrical, and duct work. Plaintiff also testified that he enjoyed activities such as Jeet Kune, Jui-Jitsu, Muay Thai, wrestling, and yoga. Plaintiff also testified that he is not able to pick up his daughter who was almost five at the time of trial. He had tried when she was one or two years old and it hurt. Plaintiff testified that prior to the collision he had no pain in his back, legs, or body and his ability to perform his job tasks and enjoy recreational activities was not limited in any way.

¶ 16 Plaintiff testified that following the accident, in December of 2007, he started working in a shoe store tracking stock, stocking shoes, and helping to organize and clean the store including dusting, and vacuuming. Plaintiff ultimately quit after approximately three months describing the work as tedious and "seemed to bother his back" and caused him pain. Plaintiff testified that he had no intention of trying to find any other employment.

¶ 17 At the time of trial, three years after his second back surgery, plaintiff stated that he continued to suffer from lower back pain and could not work or get back to his "normal activities" including carpentry, painting artistic murals, and tattooing. Plaintiff testified he had to stop making murals because he had chronic migraines caused by the pain medication he had been taking. However, he also admitted that after the accident he painted a Mickey Mouse mural in his daughter's bedroom.

¶ 18 (c) Plaintiff's Medical Treatment

¶ 19 Plaintiff testified that he was initially treated by Dr. Patel who told him to get an MRI and mentioned the possibility of surgery. He obtained an MRI and sought a second opinion from Dr.

Gireesan, an orthopedic surgeon at Northwestern Hospital. Dr. Gireesan informed plaintiff that he had a herniated disc consistent with Dr. Patel's diagnosis. He told plaintiff that he "would not allow [plaintiff] to get disability" because he was "a young guy, [and] should be able to go back to work." Plaintiff was approximately 30 years old at the time. He gave plaintiff some pain medication, but tried to avoid "the harder medications," gave him a 15 to 20 pound weight restriction which plaintiff testified affected his ability to do carpentry, and recommended that plaintiff receive physical therapy which he did not do until the end of December, 2007, but which plaintiff testified, did not help. Dr. Gireesan also suggested that plaintiff "take it easy" and his pain would go away.

¶ 20 On December 31, 2007, plaintiff twisted his back at home in an unrelated incident and, as a result, went to the emergency room. After this incident, plaintiff had an episode of incontinence and had pain shooting down his leg and began receiving regular treatments for his back. In 2008, plaintiff was referred to Dr. Michael, a neurosurgeon.

¶ 21 (d) Plaintiff's Two Back Surgeries

¶ 22 In 2009, Dr. Michael performed back fusion surgery on plaintiff. Plaintiff testified that he did not remember Dr. Michael telling him not to smoke prior to his first surgery, but that he nevertheless periodically stopped smoking prior to his first surgery. Plaintiff admitted he continued smoking after his first surgery.

¶ 23 Plaintiff testified that immediately following the surgery his mother helped him recover to include helping him use the washroom which made him feel like a baby having to be "taught all over again." Plaintiff testified that it was harder to be romantic with his girlfriend and take her out, although he acknowledged that even after their daughter was born in November of 2010 they would go out "like once a month, if any." Plaintiff testified he continued to have pain and was periodically treated with medication and shots.

¶ 24 After his 2009 back surgery, plaintiff testified he was lying down on the floor and he heard his daughter move on the couch and he "kind of like did a roll like a log" and "a screw broke" in his back. Plaintiff testified that this resulted in pain and a loss of feeling in his right leg and ultimately led to a second surgery in 2012 performed by Dr. Salehi. Plaintiff admitted that Dr. Salehi advised him to stop smoking and that he would not perform the surgery unless plaintiff stopped smoking. Plaintiff testified he stopped smoking for a year, but had resumed smoking and was smoking in 2014 when he was examined by Dr. Coe, the doctor plaintiff hired to perform his independent medical examination (IME).

¶ 25 Plaintiff testified that his second surgery was painful but easier than the first surgery. Plaintiff testified he still could not go back to his carpentry work or "get back to performing any of [his] normal activities." He testified he was not able to do any work during his recovery. He testified he continued to experience pain and received treatment for pain management.

¶ 26 Plaintiff testified that he experienced some relief after his second surgery. While plaintiff testified that he did not resume any of his "normal activities" after the second surgery he admitted that he no longer used a cane, he was able to drive, hang out with friends, shoot pool on one occasion, wash dishes, do minor yard work on one occasion, make himself small meals to include meals on the grill but stated that when other people were around he lets them cook for him.

¶ 27 Plaintiff testified that his doctor suggested further treatment which plaintiff declined to pursue.

¶ 28 Jennifer Kent's Trial Testimony

¶ 29 Kent testified that she and her then boyfriend, now husband, had been friends with plaintiff for approximately seven or eight years prior to the accident. She testified that plaintiff helped build the deck at her family's home and gave her and her husband tattoos.

¶ 30 On August 15, 2007, she was riding in the passenger seat of plaintiff's vehicle but does not recall a CTA bus hitting the vehicle at that time. She testified that she had been drinking and that plaintiff was dropping Kent off at the hospital to see her friend who was having a baby. She did not remember seeing or hearing an accident and she did not recall being thrown around as a result of an accident. She did remember plaintiff pulling over after driving up the block and getting out of the car and taking a walk from which she testified he did not return for a while. Thereafter, Kent testified plaintiff was able to drive her to the hospital. Kent testified that she was not sore later on that evening or the following day. She had no cuts or bruises on her body.

¶ 31 Kent testified that a week following the accident, plaintiff spent time at her in-laws' pool. She testified that more than once she saw him swimming and playing tag in the pool as well as doing cannonballs where "you jump off the top higher decks of the pool and you go in a fetal position and slam into the water of the pool." Plaintiff was wearing his swim trunks and Kent did not see any cuts or bruises on his body. Kent had not been drinking that day.

¶ 32 Approximately a week or two later she observed plaintiff mowing his lawn and playing with his daughter while she and her husband drove past his house. Approximately a week after the accident, Kent also observed plaintiff doing house work for her friend putting up a door and some windows with her husband. "They were working during the summer for her." She had not been drinking that day.

¶ 33 Doctor Terry Lichtor's Trial Testimony

¶ 34 Dr. Lichtor is a neurosurgeon who testified as defendants' medical expert. Dr. Lichtor reviewed plaintiff's neurologic exam, MRI films from December 2007 and April 2008, the depositions of doctors Gireesan and Michael, plaintiff's deposition, and radiologists' reports from two hospitals. He testified he saw no medical records from plaintiff prior to the 2007 accident. Dr. Lichtor testified that he did not need to examine or speak with plaintiff in order to come to

his conclusions in this matter. Dr. Lichtor testified that there were basically no inconsistencies between plaintiff's deposition testimony and his medical records that Dr. Lichtor found significant.

¶ 35 Dr. Lichtor testified that the objective tests that were performed on plaintiff did not correspond with plaintiff's subjective complaints of pain. Specifically, the MRI scans looked "well within normal limits." The radiologist who had looked at the MRIs had identified a small disc protrusion. However, both the radiologist and Dr. Lichtor identified no nerve compression. As a result, Dr. Lichtor testified that this disc protrusion could not have caused plaintiff's symptoms. Dr. Lichtor testified that it is common to have disc protrusion and to not have any pain and that almost everybody has a protruding disc at some level.

¶ 36 Dr. Lichtor testified that plaintiff had a discectomy and a fusion and that this was treatment for mechanical back pain, a "degenerative wear and tear problem and not something that one could relate to trauma or a car accident." He testified that such wear and tear problems are common in laborers and carpenters.

¶ 37 Dr. Lichtor testified that the accident caused plaintiff to suffer an injury to the muscles and ligaments of his lower back and that such soft tissue injuries should resolve after a few weeks, but at most, three to four months without any other medical treatment aside from over-the-counter pain medication. He testified that all the treatments plaintiff received including injections, pain medicine, and surgery were reasonable treatment options for mechanical back pain. The pain experienced by plaintiff following the two to four month period was due to chronic pain unrelated to any injury sustained to his soft tissue as a result of the accident. He testified that chronic pain is due to years of wear and tear stress and that the accident was one of many events, but would not be anything significant.

¶ 38 Dr. Lichtor also testified that plaintiff's pain remaining after the surgery proved that the disc was not the problem causing plaintiff's pain.

¶ 39 Doctor Jeffrey Coe's Trial Testimony

¶ 40 Dr. Coe specializes in occupational medicine and testified as plaintiff's expert witness. Dr. Coe performed an IME of plaintiff in May 2014. His examination included a review of plaintiff's medical records and an in-person medical examination of plaintiff. He testified that it was his opinion the accident, as it was described to him and all the treating physicians whose records he had, caused plaintiff's back injuries. The basis for Dr. Coe's opinion was the history plaintiff gave him, the lack of any past medical history concerning plaintiff's back, and the nature of the impact as described by plaintiff which he also told to Drs. Michael, Diesfield, and Gireesan. Specifically, that plaintiff suffered a twisting injury when he twisted in the car attempting to hold a passenger back which was found in his back in diagnostic testing at the time of surgery.

¶ 41 Dr. Coe acknowledged that there was no reference to "twisting" in the medical records from the hospital where plaintiff visited the day after the accident though Dr. Coe testified that plaintiff informed him that he experienced a "twisting injury." He testified that the first time "twisting" was mentioned in plaintiff's medical records was in 2007 when plaintiff went to the emergency room and complained that he had twisted his back that day. Dr. Coe also testified that in describing the accident, plaintiff told him it was a "sideswipe" while he told Dr. Michael it was a "head-on collision." Additionally, plaintiff did not tell Dr. Coe that he experienced two impacts with his vehicle and the CTA bus and a third impact with a guardrail.

¶ 42 Dr. Coe testified about his May 2014 examination of plaintiff approximately seven years after the accident. At that point plaintiff had two surgeries on his back and was taking pain medication. Dr. Coe testified that plaintiff reported pain in the midportion of his lower back

which Dr. Coe identified as the L5-S1 portion. Dr. Coe testified that plaintiff reported his pain was made worse when he moved his back to bend, twist, rotary movements, sitting or standing for long periods of time, or walking for many yards. Dr. Coe testified that plaintiff reported the pain interfered with everything he did.

¶ 43 Dr. Coe testified he reviewed plaintiff's medical records and testified about them at trial. Dr. Coe testified that Dr. Gireesan reviewed the September 2007 MRI film scan and noted that the disc at issue, L5-S1, was bad. It was dehydrated meaning that it had shrunken due to a loss of fluid a condition known as desiccation. He agreed with Dr. Gireesan that it was probable that this desiccation was present prior to the accident because this condition occurred over time and could not have manifested in the month period since the accident. Dr. Coe testified "I think it's clear to everybody that there is some preexistent degeneration *** in his spine." He testified the condition gets worse over time and has less flexibility and resilience to absorb shock which can cause pain and is irreversible. He testified that this condition occurs in people who do repetitive lifting and lifting in awkward positions such as individuals who do construction work which plaintiff had done for approximately 14 years.

¶ 44 Dr. Coe testified that the x-rays after the accident did not show much only whether a bone was broken which was not the case here. He testified that MRI scans were done and two discograms. On the MRI scan six weeks after the accident, the radiologist identified a disc protrusion. Dr. Coe testified that the protrusion appeared to run up to and contact the nerve root which was observed by Dr. Gireesan and other doctors. He testified that Dr. Gireesan, a spine surgeon sought out by plaintiff for treatment, opined that the bad disc existed before the accident. He testified that Dr. Gireesan also indicated that the disc exhibited "desiccation," a condition where the disc loses spinal fluid and becomes less weight bearing.

¶ 45 Dr. Coe testified that plaintiff's issue was not a surgical emergency at that point and people usually get better with alternative treatments. He testified that by 2009 plaintiff had not gotten better despite different treatments and so Dr. Michael performed plaintiff's first surgery. Dr. Coe testified that plaintiff experienced about a 50 percent improvement of his symptoms after the first surgery according to Dr. Michael. Dr. Coe testified that there was a problem with the first surgery which was diagnosed in February 2011. He testified that the fusion was not healing meaning the bones were not knitting together the way there were supposed to which is referred to as pseudarthrosis. Dr. Coe testified that Dr. Michael stated to plaintiff that it was important for plaintiff to stop smoking and his failure to do so likely contributed to his pseudarthrosis. Dr. Coe testified that pseudarthrosis is a major cause of disability and impairment and one of the reasons that some people do not get back to work or have difficulty working. Dr. Coe testified that he agreed that smoking was a risk factor for pseudoarthrosis. He testified that the doctors told plaintiff to stop smoking but plaintiff did not stop and was still smoking in 2014 when Dr. Coe examined plaintiff.

¶ 46 Dr. Coe testified that more treatments were administered, but plaintiff did not heal and in 2012 plaintiff went to Dr. Salehi who performed plaintiff's second surgery necessitated by his pseudarthrosis.

¶ 47 Dr. Coe testified that plaintiff's condition was associated with disability and "he can do some things, but there are many things he can't or should not do" such as construction work, electrical work, plumbing, and painting. He testified that plaintiff needed to limit things like kneeling or squatting, working in awkward positions, crawling, and bending to pick something up from under a shelf or bed. Dr. Coe testified that that this disability plaintiff experienced due to his back injury was permanent. However, Dr. Coe acknowledged that this opinion was based on plaintiff's lack of any rehabilitation, such as therapy or visits with a vocational rehabilitation

specialist. Dr. Coe testified that plaintiff continued to see a pain management specialist where he received a toxicology screen every time he goes in and that some of these screens have been negative for his prescribed medication Oxycodone which could mean plaintiff was not taking the drug or taking it irregularly.

¶ 48 Dr. Coe testified that plaintiff was capable of some work "[i]t's just the question of getting the right situation." He testified that a person with back injuries who wants to work can do a functional capacity assessment to get some measurements which plaintiff had not done.

¶ 49 Martha Vazquez-Weber's Trial Testimony

¶ 50 Weber is plaintiff's sister. She is eleven years older than plaintiff. She saw him on the day of the accident and he said "he had a back pain or something. *** He said it was nothing, *** [he] heard something click," but was okay and would take care of it.

¶ 51 Prior to the accident, Weber testified plaintiff was very active and enjoyed yoga, swimming, dancing, and martial arts. She testified plaintiff did not have a full-time job before or after the accident, though he would help her out by doing some carpentry work for her company, but he was not on her payroll. She testified that following the accident, plaintiff was not able to finish the work he had started on the apartment building she owned and she had to hire someone else to complete the work. She testified that plaintiff was a freelancer or a contractor, he did tattoos and construction which were odd jobs he would do for side money. She testified that after the accident she was able to get plaintiff a job through a friend at a shoe store in the stockroom.

¶ 52 Weber testified that plaintiff's daughter was born after the accident and he could not pick her up, he could not run behind her, or teach her to swim.

¶ 53 Weber testified that prior to the accident she helped take care of plaintiff by cooking for him "because a young person does not cook for themselves." She testified that prior to the

accident, plaintiff lived with his mother and she would do the dishes, cook, and clean for him. After his daughter was born and plaintiff moved in with his girlfriend, plaintiff's mother would go to plaintiff's home and do those same things as well as watch plaintiff's daughter.

¶ 54 She testified that after the accident she would help plaintiff by driving him to doctors' appointments. She testified that she was at the hospital for his first surgery and she took him home when he was released the next day. She testified that plaintiff was advised by the doctor that he should stop smoking prior to the operation because it could be dangerous. She testified that during his recovery period there were times plaintiff had to crawl out of bed to use the bathroom.

¶ 55 She testified that after plaintiff's second surgery it seemed that some of his pain had been relieved. She testified that presently plaintiff could drive, he could help cook, and he was able to move better than he could previously.

¶ 56 Maria Rose's Trial Testimony

¶ 57 Rose is plaintiff's girlfriend and the mother of his daughter. Rose testified that she had been dating plaintiff on and off prior to the accident. She testified the morning after the accident plaintiff stated he was in pain and she drove him to the emergency room. Rose testified that when plaintiff left the hospital he did not have a cane, crutches, a neck brace, or any bandages, but could not remember if he had a back brace. She testified that she and plaintiff were separated for a period of time after the accident.

¶ 58 She testified that prior to the accident plaintiff was very active and loved to play all sorts of sports. She saw him enjoy activities such as baseball, softball, football, and he loved martial arts. She also testified that he was a carpenter, knew how to do electrical work, construction, and was a great tattoo artist. She observed him lift very heavy concrete bags while building a porch in front of her house. She testified that she had never seem him have difficulty doing

construction work prior to the accident. She testified that plaintiff could not get back to his "normal activities" in 2007 and 2008 and his first surgery did not make him better.

¶ 59 Rose testified that their daughter was born in November of 2010. She testified that plaintiff did not run around with their daughter, carry her, put her on his shoulders. She testified that when plaintiff could not do all of these things, he cried.

¶ 60 Rose testified that after the accident, plaintiff got a job working in the stock room of a shoe store. He would take the CTA downtown to work. She also testified that plaintiff did a Mickey Mouse mural on their daughter's wall. She testified that after the accident he was able to hang out at his best friend's house, cook small meals for himself, barbecue for himself, bathe himself, and gather up the clothes for the laundry which she would do. She testified that after his second surgery plaintiff was able to drive. She testified that plaintiff was able to feed his daughter and though he could not play with her like Rose did, he was still able to play and talk with her. She testified that plaintiff enjoyed watching movies and listening to music.

¶ 61 She testified plaintiff continued to smoke after his first and second surgeries. She testified that after the second surgery plaintiff was "doing a lot better" and she had noticed an improvement in his overall disposition.

¶ 62 Jury Verdict

¶ 63 In closing argument, plaintiff's counsel argued the jury should award plaintiff damages in excess of $4,000,000 including $480,000 for past pain and suffering, $1,120,000 for future pain and suffering and $2,000,000 for disability damages. Defendants' counsel argued plaintiff should not be awarded any disability damages.

¶ 64 On November 5, 2015, the jury returned a verdict for plaintiff answering yes to the special interrogatory stating that plaintiff sustained "an injury as a result of an accident with a CTA bus operated by Anthony Walker on August 15, 2007" and assessed damages totaling

$353,901.07 comprised of $323,901.07 for all plaintiff's medical expenses and $30,000 for pain and suffering experienced. The jury did not award any damages for future pain and suffering, "disfigurement resulting from the injury" or "disability experienced and reasonably certain to be experienced in the future." The court entered the judgment that day.

¶ 65 Petitioner's Posttrial Motion

¶ 66 Plaintiff and defendants both filed posttrial motions. Plaintiff's motion for a new trial alleged, *inter alia*, that the jury's award of damages for pain and suffering was legally inconsistent with the jury's failure to award plaintiff disability damages and also ignored a proven element of damages. On February 16, 2016, the trial court denied all posttrial motions including plaintiff's motion for new trial. In support of its denial of plaintiff's motion the trial court stated:

> "Plaintiff asserts that the defendants presented no evidence to rebut plaintiff's claim of disability. That, however, is not the court's recollections of the evidence. This court recalls several witnesses as well as the plaintiff himself providing evidence that undermines his claim for disability. The court notes that the jury instructions contained IPI 3.08 and IPI 15.01, the long form, to help the jury evaluate conflicting opinions and deciding issues of proximate cause.
>
> * * *
>
> Damages are a question of fact that is within the jury's discretion. Damages are the jurors' prerogative. Pain and suffering as well as disability and loss of normal life are damages based on the credibility of the witnesses and in particular the parties. There was evidence [from] one of plaintiff's treating doctors [that] prior to the event in question the plaintiff had degenerative disk disease. The jury could very well have concluded based on that testimony, as

> well as the plaintiff's own testimony, that the plaintiff experienced no disability. *** This court cannot and will not say that their decision was against the manifest weight of the evidence or that their findings are unreasonable, arbitrary, and not based upon any of the evidence or that an opposite conclusion was clearly evident."

¶ 67 Plaintiff then filed a notice of appeal which, in a supervisory order, the supreme court directed this court to treat as a timely-filed notice of appeal.

¶ 68 On appeal, plaintiff contends that this court should remand the cause for a new trial as to the disability element of plaintiff's damages because the jury did not award any disability damages arguing the trial court erred when it denied plaintiff's motion for a new trial where the jury verdict awarded money damages for past pain and suffering as well as past and future medical costs, but nothing for disability because (1) in doing so the jury ignored a proven element of damages and, in the alternative, (2) the damages awarded were internally inconsistent.

¶ 69 This appeal followed.

¶ 70 ANALYSIS

¶ 71 As an initial matter, defendants assert that plaintiff's opening brief filed by counsel failed to comply with Illinois Supreme Court rules of appellate procedure because plaintiff, in his statement of facts, makes conclusory, inaccurate, and unsupported statements which should be stricken. This court also notes that plaintiff's opening brief does not have an appropriate "Points and Authorities" section and his reply brief is less than 12-point typeface and appears to be less than double-spaced with more than 6,000 words.

¶ 72 The rules of appellate procedure are rules and not merely suggestions. *Ryan v. Katz,* 234 Ill. App. 3d 536, 537 (1992). "Lawyers filing briefs in this court must familiarize themselves with [Illinois Supreme Court Rules governing form] and follow them." *Clark v. State,*

Department of Labor, 71 Ill. App. 2d 365, 373 (1966). Rule 341(1) sets forth guidelines as to the form of briefs and provides that the text must be double-spaced and typeface must be 12-point or larger throughout the document with a limit for reply briefs of 20 pages or 6,000 words. Ill. S. Ct. R. 341(1)(a) and (b) (eff. Nov. 1, 2017). Furthermore, Rule 341(h)(1) provides that an appellant's opening brief shall contain a summary statement entitled "Points and Authorities" consisting of the "headings of the points and subpoints as in the Argument, with the citation under each heading of the authorities relied upon or distinguished and reference to the page of the brief on which *** each authority appear." Ill. S. Ct. R. 341(h)(1) (eff. July 1, 2017). Rule 341(h)(6) provides that the brief also must contain a "Statement of Facts" which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal."

¶ 73 As to plaintiff's opening brief, in addition to the issues with its "Points and Authorities," we agree with defendants that the statement of facts included conclusory, inaccurate, and unsupported statements. We highlight just a few of these violations in the below non-exhaustive list of quotes excerpted from plaintiff's opening brief:

- "On July 2nd, 2012, after enduring years of failed conservative and aggressive treatments, Mr. Vazquez brought the action against CTA that underlies this appeal." This characterization of plaintiff's treatment is unsupported by the record and is but one example of improper characterization of the testimony contained in the record.
- "He also loved physically demanding activities such as swimming ***." Here we note that there was no mention of swimming in the portion of the record cited by plaintiff. This is but one example of plaintiff's listing of various

activities that were not specifically referenced in the portion of the record cited.

- "His new life became rife with pain and physical limitation, which not only robbed him of his carpentry work (R. 1228, 1411-12) and artistic endeavors (R. 1225-1226), but also of the recreation he once enjoyed such as martial arts, gymnastics and hiking (R. 74-75; R. 77-28)." The portion of the record cited to by plaintiff does not reference any inability to do carpentry work or engage in artistic endeavors, but rather a general inability to work. In fact, in the portion of the record cited by plaintiff for an inability to perform carpentry work, plaintiff actually admits that, after the accident, he was able to paint a Mickey Mouse mural in his daughter's bedroom. There is also an acknowledgement by plaintiff in the cited portion of the record that plaintiff was able to work in a shoe store for three months following the accident though he later quit. Nowhere in the record cited by plaintiff does plaintiff testify as to his inability to do the recreation he once enjoyed such as martial arts, only that he could not teach martial arts to his daughter who was born after the accident.
- "[Kent] claimed to have seen Mr. Vazquez doing 'cannon balls' in her pool the week following the accident (C. 989); though she admits to being drunk when she allegedly made this observation (C. 994)." However, in the record cited by plaintiff, Kent only admitted to drinking alcohol, not being drunk, on the date of the accident, August 15, 2007 not on the date she observed plaintiff at the pool. Moreover, when asked if she had been drinking when she observed

plaintiff swimming, playing tag, and doing cannonballs into the pool Kent testified "No. I was not drinking that night."

¶ 74 While this court has the inherent authority to strike plaintiff's opening brief and dismiss the appeal for such deficiencies we recognize that doing so would be a harsh sanction which is only appropriate when procedural violations interfere with or preclude our review. *Moomaw v. Mentor H/S, Inc.*, 313 Ill. App. 3d 1031, 1035 (2000). Here, we believe striking plaintiff's opening brief or dismissing his appeal would be too harsh a sanction as plaintiff's procedural violations did not preclude our review of the issues. That being said, any statement in plaintiff's brief that is argumentative or made without reference to the record will not be considered by this court. *Burrell v. Village of Sauk Village*, 2017 IL App (1st) 163392, ¶ 15.

¶ 75 As to plaintiff's reply brief filed by counsel, we feel further discussion is warranted. Plaintiff's reply brief contains less than 12-point typeface, appears to be less than double spaced and to exceed 6,000 words. This court understands that litigants and lawyers in compliance with the mandatory rules of appellate procedure often must spend substantial time and effort culling their briefs to meet the word, page, typeface size, and spacing requirements set forth in Rule 341. Where, as in this case, the parties are represented by counsel, this time equates to additional legal fees. Further, it is also often the case that arguments or facts may have to be omitted to comply with the rules. Refining and prioritizing these arguments and facts to do so not only takes time, but also may require certain points to be sacrificed and omitted from the brief. A litigant that ignores these rules is not forced to spend this time or omit certain facts or arguments thereby putting himself at an unfair advantage, not to mention increasing the burden on a reviewing court. Here, plaintiff's reply brief flagrantly disregards the rules concerning typeface size, spacing, and word limitations and this glaring violation of the rules would permit this court to strike plaintiff's reply brief. See *Wright v. County of Du* Page, 316 Ill. App. 3d 28, 35-36 (2000)

(reviewing court on its own motion stuck portions of the litigant's brief which violated Rule 341 stating that "parties who ignore the limitations and guidelines set forth in rule 341(a) do so at their peril."). The deficiencies in the briefs do not affect our ability to determine the merits in this case. Therefore, this court will not strike plaintiff's reply brief.

¶ 76 The Jury Verdict

¶ 77 Turning to the merits of plaintiff's appeal, plaintiff argues the trial court erred in denying plaintiff's motion for a new trial on the disability element of damages. Plaintiff argues the trial court erred when it denied plaintiff's motion for a new trial where the jury verdict awarded money damages for past pain and suffering as well as past and future medical costs, but nothing for disability because (1) in doing so the jury ignored a proven element of damages and, in the alternative, (2) the damages awarded were internally inconsistent. We disagree. We address each of plaintiff's arguments in turn.

¶ 78 The Jury Did Not Ignore a Proven Element of Damages

¶ 79 Plaintiff argues on appeal that the jury's verdict was against the manifest weight of the evidence. Specifically, the jury ignored a proven element of damages, namely disability or, if it did not ignore the proven element of disability, the jury's having awarded nothing for this element bears no reasonable relationship to the loss proven.

¶ 80 This court in *Rodriguez v. Northeast Illinois Regional Commuter Railroad Corp.*, 2012 IL App (1st) 102953, ¶ 48, held that this court reviews for an abuse of discretion the trial court's decision on whether to grant or deny a motion for new trial on the grounds that the verdict was against the manifest weight of the evidence. *Id.*

> "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 on the evidence. [Citation.] Specifically, in the context

> of a damages award, we will not upset a jury's verdict unless: (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. [Citation.] The determination of damages is a question of fact for the jury to determine and its award is entitled to substantial deference. [Citation.]" *Id*. at 55.

¶ 81 A jury's choice to "award no money for disability ***, while awarding money for medical expenses and pain and suffering, is not proof, by itself, that the jury 'ignored' that element." *Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 491 (2008). A jury is not required to award anything to plaintiff for disability solely because it awarded damages for pain and suffering and for medical expenses. *Hastings v. Gulledge*, 272 Ill. App. 3d 861, 865 (1995). Moreover, "disability is a separate element of damages, and the jury's decision regarding whether to make any award for disability *** is not dependent upon whether or what amount of other damages are awarded. *Stanford v. City of Florida*, 2018 IL App (5th) 160115, ¶ 33.

¶ 82 Plaintiff has the burden of proving disability damages with reasonable certainty. *Knight v. Lord*, 271 Ill. App. 3d 581, 624 (1995). With respect to disability damages this court has stated:

> "The term 'loss of life' has almost universally been interpreted as a component of disability which compensates for a change in the plaintiff's lifestyle. [Citations.]" *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1135 (2000).

¶ 83 "Whether to instruct the jury on 'disability' or 'los of normal life' depends on the nature of the evidence at trial and on which term more accurately describes the damages evidence and would be less confusing to the jury." *Baker v. Hutson*, 333 Ill. App. 3d 486, 499 (2002). Here, plaintiff strongly objected to the term "loss of normal life" and thus, the term "disability" was used in the jury instructions. Disability damages are appropriate where plaintiff proves that "the

accident caused such loss, damages for 'loss of normal life,' defined as plaintiff's diminished ability to enjoy the life that the plaintiff experienced *** which should include plaintiff's temporary or permanent inability to pursue the pleasurable aspects of life, such as recreation or hobbies." (Internal quotations omitted.) *Knight*, 271 Ill. App. 3d at 623.

¶ 84 The trial court's order denying plaintiff's posttrial motion clearly sets forth the court's reasoning for denying plaintiff a new trial:

> "Plaintiff asserts that the defendants presented no evidence to rebut plaintiff's claim of disability. That, however, is not the court's recollections of the evidence. This court recalls several witnesses as well as the plaintiff himself providing evidence that undermines his claim for disability. The court notes that the jury instructions contained IPI 3.08 and IPI 15.01, the long form, to help the jury evaluate conflicting opinions and deciding issues of proximate cause.
>
> * * *
>
> Damages are a question of fact that is within the jury's discretion. Damages are the jurors' prerogative. Pain and suffering as well as disability and loss of normal life are damages based on the credibility of the witnesses and in particular the parties. There was evidence [from] one of plaintiff's treating doctors [that] prior to the event in question the plaintiff had degenerative disk disease. The jury could very well have concluded based on that testimony, as well as the plaintiff's own testimony, that the plaintiff experienced no disability. *** This court cannot and will not say that their decision was against the manifest weight of the evidence or that their findings are unreasonable, arbitrary, and not based upon any of the evidence or that an opposite conclusion was clearly evident."

¶ 85 We do not believe the trial court abused its discretion in denying plaintiff's motion for new trial. The jury heard conflicting evidence as to plaintiff's disability. From the verdict, it is clear that the jury chose to believe the evidence that plaintiff was not disabled as a result of the collision. As noted above, it is within the jury's discretion to award nothing for damages where the evidence supports such an award. See *Hastings*, 272 Ill. App. 3d at 865. We agree with the trial court that the jury's decision was not against the manifest weight of the evidence.

¶ 86 In addition to that cited by the trial court, this court further notes plaintiff's own testimony that he was able to work in the stock room of a shoe store for a period of three months following the accident, he was able to take his girlfriend out and be intimate as evidenced by the birth of their daughter in 2010, and he was able to paint a mural in his daughter's bedroom. Plaintiff also testified that his own treating doctor, Dr. Gireesan, stated he "would not allow [plaintiff] to get disability" because he was "a young guy, [and] should be able to go back to work." Plaintiff also testified he could drive, hang out with friends, wash dishes, make himself small meals, and barbeque for himself on the grill. Notwithstanding, plaintiff testified that he did not intend to seek employment of any kind.

¶ 87 Additionally, Kent testified that on different occasions following the accident, she observed plaintiff playing in the pool and doing cannonballs, doing construction work for a neighbor, mowing his lawn, and playing with his daughter. Kent did not testify that she had been drinking on any of these occasions and plaintiff's contention to the contrary is not consistent with the record. Kent's testimony contradicted that of plaintiff's and could very well have caused the jury to discredit plaintiff's other subjective pain complaints he alleged limited his work and lifestyle activities. See *Snover v. McGraw*, 172 Ill. 2d 438, 449 (1996) (in ruling on a motion for new trial the court should consider the distinction between objective symptoms of injury and

subjective complaints of pain which the jury may choose to disbelieve when not accompanied by objective symptoms).

¶ 88 Plaintiff's sister testified that prior to the accident, plaintiff lived with his mother and she would do the dishes, cook, and clean for him and that she continued doing this for plaintiff at his girlfriend's home when he moved there after his daughter was born and thus nothing had changed for plaintiff in this regard.

¶ 89 Plaintiff's own expert, Dr. Coe, noted the pre-existing desiccation in plaintiff's disc at issue that could cause pain. He testified that while plaintiff continued to see a pain management specialist some of his toxicology screens have been negative for his prescribed medication which could mean he was not taking the medication or was taking it irregularly which would further discredit plaintiff's pain and limitation arguments. Dr. Coe also testified that plaintiff had not taken a functional capacity assessment to see what work he is able to do nor had he engaged in any rehabilitation, such as therapy or visits with a vocational rehabilitation specialist when Dr. Coe deemed plaintiff was disabled. He also identified risks to plaintiff's first and second surgeries due to plaintiff's failure to stop smoking in defiance of his surgeons' directives. Dr. Coe also testified that plaintiff could work doing something though plaintiff had not sought employment beyond the three months he worked in the stock room of the shoe store following the accident.

¶ 90 Moreover, defendants' expert, Dr. Lichtor, testified that the objective tests that were performed did not correspond to plaintiff's subjective complaints. Instead plaintiff's injuries from the accident were the result of injury to his soft muscle tissue which would resolve after a few weeks but at most four months and could be treated with over-the-counter pain medication. Accordingly, plaintiff's subjective complaints about pain and limitation were something the jury

could disregard. See *id*. (a jury may choose to disbelieve subjective complaints of pain when not accompanied by objective symptoms).

¶ 91 Plaintiff relies on *Dixon v. Union Pacific Railroad Co.*, 383 Ill. App. 3d 453 (2008), to support his position. However, in *Dixon*, this court reasoned that because the defendant conceded that the plaintiff was disabled for a period of over a year, the jury verdict awarding the defendant nothing for disability ignored a proven element of damages and must be vacated. *Id*. at 472. Unlike in *Dixon*, defendants in the instant case did not concede any level of physical disability resulting from the accident and thus we do not find *Dixon* instructive.

¶ 92 We also do not find *Torres v. Irving Press, Inc.*, 303 Ill. App. 3d 151 (1999), instructive. In *Torres*, this court found the trial court abused its discretion in denying the plaintiff's posttrial motion because the plaintiff presented sufficient evidence to establish the element of disability and thus the jury's award of zero for disability damages disregarded the evidence. *Id*. at 161. However, in *Torres* this court concluded that the evidence establishing the element of the plaintiff's disability was uncontroverted and the trial court incorrectly interpreted evidence from a medical doctor as stating that the plaintiff "could do everything" when the testimony only established "that plaintiff was able to resume her job." *Id*. at 159-60. As noted above, here there was evidence to controvert the testimony concerning plaintiff's inability to resume his prior employment as well as engage in other activities and hobbies he previously enjoyed and the jury chose to believe the evidence establishing that plaintiff did not suffer any disability.

¶ 93 As we conclude that the jury did not ignore a proven element of the case we need not consider plaintiff's argument that the zero award of disability "bore no reasonable relationship to the loss proven by the testimony."

¶ 94 Damages Awarded were Not Inconsistent

¶ 95 We also disagree with plaintiff's argument that the damages awarded were internally inconsistent where the jury awarded money damages for past pain and suffering as well as past and future medical costs, but nothing for disability. Plaintiff argues this internal inconsistency is created because "if the jury concluded Defendants' negligence caused [plaintiff's] need for medical treatment, then logic dictates the disabilities arising therefrom are also compensable."

¶ 96 Whether two verdicts are legally inconsistent is a question of law reviewed *de novo*. *Rodriguez*, 2012 IL App (1st) 102953, ¶ 48. "Where *** a verdict is alleged to be internally inconsistent, we will exercise all reasonable presumptions in favor of the verdict, which will be found legally consistent unless it is absolutely irreconcilable. [Citation.] A verdict is not considered irreconcilably inconsistent if it is supported by any reasonable hypothesis. [Citation.]" *Rodriquez*, 2012 IL App (1st) 102953, ¶ 51. We again reiterate that a jury may choose to disbelieve subjective complaints of pain which are not accompanied by objective symptoms. See *Snover*, 172 Ill. 2d at 449.

¶ 97 Here the jury found that defendants were negligent and awarded damages for past and future medical expenses but nothing for disability. It is entirely reconcilable that the jury believed the accident resulted in plaintiff incurring medical expenses and requiring two surgeries, but that the jury believed plaintiff was not truthful with respect to his pain and inability to work and perform his normal activities both before and after the surgeries.

¶ 98 In fact, there was evidence that contradicted plaintiff's subjective statements of pain limiting his ability to work, live a normal life, and engage in the activities he enjoyed prior to the accident. Specifically, Kent testified that she saw plaintiff engaging in activities following the accident including construction work, playing with his daughter, swimming, and yard work which, if believed by the jury, would suggest that plaintiff was dishonest about what he was able to do following the accident. Plaintiff's own testimony corroborated his ability to do various

activities. Plaintiff testified about working in the stock room of a shoe store for three months, driving, cooking, grilling, having played pool on one occasion, having done yard work on one occasion, and painting a mural in his daughter's bedroom.

¶ 99 Moreover, defendants' expert testified that objective tests performed on plaintiff did not correspondent to plaintiff's subjective complaints. His own treating doctor, Dr. Gireesan, told plaintiff he was not disabled and plaintiff's trial expert also stated that plaintiff could do some work though plaintiff testified that he had no intention of seeking any employment after he quit his job at the shoe store. Based on the evidence, the jury could have reasonably believed that plaintiff incurred medical expenses from the accident, but was capable of living life and obtaining employment consistent with his past activities even after the surgeries, but simply chose not to.

¶ 100 In fact, even prior to the accident there was evidence to suggest that plaintiff's employment was inconsistent and sporadic and he received substantial assistance from his mother. Plaintiff's sister testified that prior to the accident plaintiff lived with his mother and did not have full time employment. She testified that prior to the accident, his mother performed the majority of the household chores such as cooking, cleaning, and doing the dishes which she continued to do for plaintiff once he moved in with his girlfriend. Thus, plaintiff's life had not changed in this regard. Plaintiff testified that the work he previously did was seasonal and that he did multiple odd jobs. Plaintiff's sister testified that plaintiff was a freelancer or a contractor, and that he did tattoos and construction which were odd jobs he would do for side money. It was uncontroverted that, after the accident, plaintiff was able to secure a consistent job at a shoe store which he quit after three months calling the work tedious and stating it "seemed to bother his back" and cause him pain. Plaintiff's own expert testified that plaintiff could work although left open what type of work that would be. He also confirmed that plaintiff engaged in behavior and

failed to take certain actions which could have compromised plaintiff's recovery. The jury could have reasonably believed that plaintiff could obtain employment, even in the same capacity as prior to the accident, but simply did not want to work.

¶ 101 We also note that this analysis is not inconsistent with the jury's award of $30,000 for past pain and suffering where plaintiff requested $480,000 for past pain and suffering and $1,120,000 for future pain and suffering.

¶ 102 Plaintiff cites *Galloway v. Kuhl*, 346 Ill. App. 3d 844, 849 (2004), in support of his position that the jury's verdict in awarding past and future medical expenses is inconsistent with the jury's award of nothing for disability. In *Galloway*, the Fifth District found the jury's verdict awarding damages for disfigurement, pain and suffering, and the value of salaries lost, but nothing for the plaintiff's medical expenses to be internally inconsistent. *Id*. at 850. The court stated that if the jury relied on the fact that the plaintiff's medical bills were paid by insurance, it did so improperly and further reasoned that where the jury's verdict concluded that the plaintiff suffered disfigurement as well as pain and suffering resulting from the injury for which the jury compensated the plaintiff it would be legally inconsistent not to award the plaintiff medical expenses stemming therefrom which were objectively proven. *Id*.

¶ 103 Unlike the instant case which deals with an award of medical expenses and pain and suffering and nothing for disability, *Galloway* deals with an award of disfigurement, pain and suffering, and the value of salaries lost, but no award for medical expenses. *Id.* at 850. Furthermore, *Galloway* focuses on the jury's failure to award objectively proven damages caused by the disfigurement and pain and suffering found by the jury. *Id*. However, here, the court awarded damages for objectively proven medical expenses as well as past pain and suffering which is not irreconcilably inconsistent with a zero award for disability damages. Rather, the award is supported by a reasonable hypothesis – namely that while the jury believed plaintiff

incurred medical expenses they did not believe plaintiff's employment and lifestyle was actually limited by the injuries he sustained as a result of the accident and thus concluded plaintiff suffered no disability. *Rodriquez*, 2012 IL App (1st) 102953, ¶ 51.

¶ 104 CONCLUSION

¶ 105 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 106 Affirmed.