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SECOND DIVISION  
FEBRUARY 1, 2011

1-09-2957

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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TIANA LEWIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
FRANCO AVILA,	)	
	)	No. 07 L 003905
Defendant-Appellee,	)	
	)	
and	)	
	)	
CORY ROBINSON,	)	Honorable
	)	Carol P. McCarthy,
Defendant.	)	Judge Presiding.

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PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justices Karnezis and Connors concurred in the judgment.

**ORDER**

*Held:* The evidence presented at trial did not warrant the granting of a judgment notwithstanding the verdict (JNOV) or a new trial on the issues of liability and damages. The trial court properly exercised its discretion in instructing the jury and did not err in making certain evidentiary rulings.

Following a jury trial in the instant personal injury lawsuit, the circuit court of Cook County entered judgment against the plaintiff, Tiana Lewis (Tiana), in favor of one of the defendants, Franco

Avila (Franco). However, the trial court entered judgement against one of the defendants, Cory Robinson (Cory), in favor of Tiana in the amount of \$69,531.85. On appeal, Tiana argues that: (1) she is entitled to a judgment notwithstanding the verdict (JNOV) in her favor, and that alternatively, a new trial should be granted on the issue of Franco's liability and a new trial should be granted on the issue of damages regarding both Franco and Cory; (2) the trial court erred in overruling objections made by Tiana's attorney at trial regarding matters relating to Franco's personal background; (3) the trial court erred in failing to properly instruct the jury on the applicable law regarding Tiana's damages; and (4) the trial court erred in making certain evidentiary rulings at trial which substantially prejudiced her and affected the outcome of the case. For the following reasons, we affirm the judgment of the circuit court of Cook County.

#### BACKGROUND

On December 16, 2006, Tiana was a front passenger of a vehicle driven by Cory when it collided with a vehicle driven by Franco at the intersection of Kostner Avenue and Cermak Road in Chicago, Illinois. Tiana was seriously injured in the accident.

On April 16, 2007, Tiana filed the instant personal injury lawsuit against both Franco and Cory, alleging that the negligent operation of their vehicles proximately caused her to sustain permanent injuries and damages. The complaint requested that Tiana be awarded "a sum in excess of [\$50,000] plus costs." On July 17, 2007, Franco filed a "counterclaim for contribution" against Cory, alleging that he be "entitled to contribution" from Cory in the event that Franco was found liable to Tiana.

On August 13, 2007, the trial court entered an order granting Tiana's motion for default

judgment against Cory.<sup>1</sup>

On May 18, 2009, Tiana filed several motions *in limine*,<sup>2</sup> the contents of which did not bear on the issues before us on appeal.

On that same day, May 18, 2009, a jury trial commenced during which Franco and Tiana testified. Franco testified as an adverse witness that on December 16, 2006, at approximately 2 a.m., he left his place of work at Lalos Restaurant, located at 500 N. LaSalle Street in Chicago, where he worked as a security guard. Franco then drove southbound on Kostner Avenue. As he arrived at approximately one-half of a block north of Cermak Road, Franco observed that the traffic light was red at the intersection. Franco, still traveling southbound in the far right lane on Kostner Avenue, stopped for the red traffic light at the intersection of Kostner Avenue and Cermak Road. While stopped at the red traffic signal, Franco looked to his left and saw Cory's vehicle traveling westbound on Cermak Road. At that point, Cory's vehicle was approximately one-quarter of a block away from the intersection of Kostner Avenue and Cermak Road. Franco characterized the speed of Cory's vehicle as "fast," although he could not estimate Cory's exact speed of travel. Franco testified that he did not look to his left a second time, and that once the traffic light turned green in his direction of travel, he entered the intersection at approximately 6 to 8 miles per hour, where he

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<sup>1</sup>Although the record is unclear as to the reason Tiana's motion for default judgment against Cory was granted, both Tiana and Franco represented to this court that a default judgment was entered against Cory because he failed to "appear and answer" Tiana's complaint.

<sup>2</sup>Tiana filed a total of 10 motions *in limine*, the contents of which related to the issues of alcohol consumption, a party, unpaid medical bills, traffic citations, alleged threats made against Franco at the accident scene and seatbelt restraints. The record before us is unclear as to whether the trial court granted Tiana's motions *in limine*.

collided with Cory's vehicle. Franco noted that Cory's vehicle hit the front left part of his vehicle. Franco estimated that he stopped at the red traffic light for a total of ten seconds.

Franco testified that at the time of impact, Cory's vehicle, which was traveling westbound on Cermak Road, had already entered the intersection and crossed the northbound lanes and left-turn southbound lane of Kostner Avenue. Upon impact, Franco's vehicle "spun around," "ended up in the median" and was "totaled." Franco stated that at the time of the accident, there were streetlights in the area and that visibility was "good." Franco denied seeing Cory's vehicle "while it was in the intersection," and denied having any warning that this collision would occur.

On cross-examination by Franco's attorney, Franco testified that a Citgo gas station (gas station) was located on the southeastern corner of the intersection. As the traffic light changed from red to green in Franco's direction of travel, Cory's vehicle was "at the edge of the [gas station]," and Cory had "enough time to stop" if he had chosen to obey the traffic lights. Franco's attorney then solicited responses from Franco regarding his background. Franco testified that he was 32 years old, married with one child, and was a 1996 graduate of Steinman High School. Over objections by Tiana's attorney, Franco testified that after high school, he joined the Marines Corp, from where he was honorably discharged. Tiana's attorney again objected to the relevancy of this testimony, which the trial court overruled, stating that "[b]oth [Tiana] and [Franco] will be able to give evidence about themselves as they address the jury." Franco then testified that while he served in the Marines Corp, he received several medals of honor.

On redirect examination by Tiana's attorney, Franco, when shown photographs of his vehicle, stated that there was damage "from the left to the right" front parts of his vehicle. Franco then stated

that the traffic light in his direction of travel was green at the time he spotted Cory's car one-quarter of a block away from the intersection at issue. Tiana's attorney then impeached Franco with his deposition testimony, after which Franco responded that the traffic light was red in his direction of travel at the time he saw Cory's vehicle one-quarter of a block away from the intersection.

Tiana testified at trial that she was 24 years old and worked as a dental assistant. On December 16, 2006, at approximately 2:30 a.m., Tiana was riding in the front passenger seat of Cory's vehicle. Cory's vehicle was traveling westbound on Cermak Road in the traffic lane closest to the curb. When Cory's car was approximately one-half of a block away from the intersection of Kostner Avenue and Cermak Road, Tiana noticed that the traffic light in her direction of travel was green. As Cory's vehicle crossed the pedestrian walkway at the intersection, the traffic light turned yellow, at which point Cory decelerated from 35 to 10 miles per hour. Cory's vehicle then crossed the northbound lane of Kostner Avenue and into the southbound lane of Kostner Avenue before colliding with Franco's vehicle. Tiana did not see Franco's vehicle until immediately prior to the collision in the intersection.

Tiana testified that the impact of the collision was "very heavy," as a result of which Cory's vehicle spun 360 degrees and "wound up on the opposite side of the street." Tiana testified that she was pinned inside the car, and that the passenger-side window shattered from the impact of the accident. Tiana experienced "excruciating pain," could not move her right leg and was bleeding from her mouth and arm. Tiana was also unable to talk or close her mouth, and sustained other injuries such as lacerations and lost teeth. At the accident scene, the fire department "cut" her out of Cory's vehicle and an ambulance transported Tiana to a hospital where she remained for 11 days.

At the hospital, Tiana received jaw surgery and, as a result, her mouth was wired shut for two months and she was unable to eat solid foods. She suffered from “TMJ” and frequent headaches. Tiana also received surgical treatment to insert a rod into her femur, and was required to undergo physical therapy to re-learn how to walk. Subsequently, Tiana was confined to a wheelchair at home, where she needed assistance for daily activities such as eating and showering. Tiana testified that from the time of the accident until February 2007, she was unable to search for employment. Tiana stated at trial that she continued to suffer pain throughout parts of her body and that she could not “run around and jump around like [she] used to with [her] [9-year-old] son.”

Following Tiana’s testimony, a sidebar conference was held outside the presence of the jury:

“MR. HARDIMAN [Tiana’s attorney]: Judge, I made objections to certain information regarding [Franco] being a serviceman, being in the Marines. And then, furthermore, there was questioning regarding commendations he gave, regarding if he was honorably or dishonorably discharged. That had nothing to do with the case. I think all that [Franco] is trying to do is gain some kind of sympathy or prejudice so that my client would have a problem getting a fair trial in this case.

THE COURT: Well, I honestly think that this is standard operating procedure in any trial for the defendant and plaintiff to introduce themselves and give some background information of themselves. [Tiana] was certainly able to say that she was a dental

hygienist, that she has a child who is nine years old. None of that is really relevant except to what kind of lifestyle she leads. And I point you to the instructions that say, '[t]he jury is the judge of the credibility of the witnesses. And in evaluating the credibility, you have to consider the witness's ability and opportunity to observe, memory [*sic*], manner, interest, bias, qualifications, experience, et cetera.' So the experience in life is, I think, relevant and the jury will be instructed on it. And I believe that both [Franco] and [Tiana] will be most able to introduce themselves to the jury. And I think that's something that the jury is allowed to take into consideration, at least if you read that instruction. So that's why I overruled your objection."

Dr. Andrew Dennis (Dr. Dennis) testified by way of deposition testimony<sup>3</sup> that on December 16, 2006, he was an attending trauma surgeon at the hospital where Tiana was being treated. Dr. Dennis testified that Tiana sustained fractures to her right mandible and her right femur, as well as a blood clot in her neck and broken glass embedded in her right forearm. Tiana underwent surgeries to insert a rod into her right femur, which was broken in several places, and to repair her facial fractures. Dr. Dennis testified that Tiana's jaw was wired shut and that patients typically undergoing

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<sup>3</sup>Although the record does not explicitly state that Dr. Dennis' deposition testimony was admitted at trial before the jury, the record does show that during closing arguments, both parties alluded to Dr. Dennis' testimony regarding Tiana's medical treatment.

this type of surgery would have their jaws wired shut for 4 to 6 weeks. Dr. Dennis stated that Tiana was prescribed two types of pain killers, as well as a blood thinning medication, and underwent physical therapy to “regain her abilities to ambulate.” Although Dr. Dennis did not perform either of the two surgeries on Tiana, he examined her when she arrived at the hospital and coordinated the recommended follow-up treatments after discharge. Dr. Dennis observed that the doctors’ notes contained “a discharge summary from the orthopedic surgeons, a discharge summary from the physical therapists, and a couple of outpatient progress notes.” In Dr. Dennis’ opinion, the injuries sustained by Tiana were proximately caused by the motor vehicle collision, and that those injuries caused her physical pain and suffering. He stated that Tiana’s injuries also caused “some disability or loss of a normal life” for a “finite period of time.” Any scarring Tiana received from the glass lacerations and surgical incisions was permanent.

Subsequently, the jury found Franco not liable to Tiana, but found Cory liable to Tiana for a total of \$69,531.85 in damages. The jury itemized the damages as follows: \$34,531.85 for “[r]easonable expense of necessary medical care and treatment and services received;” \$5,000 for “[d]isfigurement resulting from the injury;” \$25,000 for “[p]ain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries;” and \$5,000 for “[d]isability experienced and reasonably certain to be experienced in the future.”

On May 19, 2009, the trial court entered judgment on the verdict. On that same day, May 19, 2009, the trial court granted Franco’s oral motion to withdraw the July 17, 2007 “counterclaim for contribution” against Cory.

On July 13, 2009, Tiana filed a post-trial motion for a JNOV and a new trial (post-trial

motion). On October 6, 2009, the trial court denied Tiana's post-trial motion. On October 26, 2009, Tiana filed a notice of appeal before this court.

### ANALYSIS

We determine the following issues: (1) whether a JNOV should be granted in Tiana's favor, or alternatively, whether a new trial should be granted on the issue of Franco's liability and a new trial be granted on the issue of damages regarding both Franco and Cory; (2) whether the trial court erred in overruling objections made by Tiana's attorney at trial regarding matters relating to Franco's personal background; (3) whether the trial court erred in failing to properly instruct the jury on the applicable law regarding Tiana's damages; and (4) whether the trial court erred in making certain evidentiary rulings at trial.

We first determine whether a JNOV should be granted in Tiana's favor, or alternatively, whether a new trial should be granted on the issue of Franco's liability and a new trial be granted on the issue of damages regarding both Franco and Cory.

Tiana argues that a JNOV should be granted in her favor and against Franco because the evidence, when viewed in the light most favorable to Franco, was legally insufficient to support a verdict in Franco's favor. Specifically, Tiana argues that Franco was not "negligence free" because he breached his duty to keep a "continuous and proper lookout" for other vehicles on the morning of the accident. Tiana further contends that Franco had a duty to yield to Cory's vehicle and allow it to "clear the intersection" before proceeding, and that Franco failed to avoid the collision.

Franco counters that Tiana was not entitled to a JNOV in her favor because the jury, as the trier of fact, had determined that there was no evidence to show that Franco was negligent. Franco

argues that evidence presented at trial created a factual dispute regarding the credibility of the witnesses, which was within the jury's province to resolve. We agree.

A JNOV is reviewed *de novo* and should be granted only when all of the evidence, when viewed in the light most favorable to the nonmovant, “ ‘so overwhelmingly favors a movant that no contrary verdict based on that evidence could ever stand.’ ” *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178, 854 N.E.2d 635, 652 (2006), citing *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967). The threshold for a JNOV is high, and a motion for such will only be successful when all of the evidence, together with all reasonable inferences considered in favor of the nonmovant, point to a “total failure or lack of evidence” to prove the nonmovant's case. *Id.*, 854 N.E.2d at 652. For that reason, a JNOV is improper if “ ‘reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.’ ” *Id.*, 854 N.E.2d at 652, quoting *Pasquale v. Speed Productions Engineering*, 166 Ill. 2d 337, 351, 654 N.E.2d 1365, 1374 (1995). A reviewing court may not “ ‘usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way.’ ” *Id.*, 854 N.E.2d at 652, quoting *Maple v. Gustafson*, 151 Ill. 2d 445, 452-53, 603 N.E.2d 508, 512 (1992).

The Illinois Vehicle Code states in pertinent part the following: “[v]ehicle traffic facing a circular green signal may proceed straight through[,] \*\*\* [and] shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited.” 625 ILCS 5/11-306(a) (2006). “Vehicle traffic facing a steady circular yellow \*\*\* signal is thereby warned that the related green movement is being terminated or that a red

indication will be exhibited immediately thereafter.” 625 ILCS 5/11-306(b) (West 2006). All drivers “have a duty, regardless of right-of-way, to maintain a proper lookout and to take all necessary precautions to avoid an accident.” *Nolan v. Elliott*, 179 Ill. App. 3d 1077, 1082, 535 N.E.2d 1053, 1056 (1989).

In the instant case, the jury heard Franco’s testimony that on the morning of the accident, Franco stopped for a red traffic light at the intersection of Kostner Avenue and Cermak Road. While his car was stopped for the red traffic signal, Franco looked to his left and saw Cory’s vehicle traveling westbound on Cermak Road approximately one-quarter of a block away from the intersection. Franco did not look to his left a second time, but proceeded into the intersection once the traffic light turned green in his direction of travel. Tiana, on the other hand, testified that the traffic light in Cory’s direction of travel was yellow as Cory’s vehicle crossed the pedestrian walkway at the intersection. Viewing the evidence in the light most favorable to Franco, we cannot agree with Tiana’s contention that a JNOV should be granted in her favor. Based on the evidence presented, the jury could reasonably have inferred that as the traffic light turned green in Franco’s direction of travel, the traffic light in Cory’s direction of travel was red, and thus, Cory could not have been lawfully in the intersection. The jury heard Franco testimony that as the traffic light changed from red to green in Franco’s direction of travel, Cory’s vehicle was “at the edge of the [gas station],” and that Cory had “enough time to stop” if he had chosen to obey the traffic lights. Because it was within the province of the jury to resolve any conflicting evidence, the jury could reasonably have found Franco to be credible and could have found incredible Tiana’s testimony that the traffic light was yellow as Cory crossed the pedestrian walkway. Moreover, the evidence, viewed

in the light most favorable to Franco, showed that the jury could reasonably have concluded that Franco kept a proper lookout for traffic when he first looked to his left and observed Cory's vehicle one-quarter of a block away from the intersection and that, given Franco's testimony that Cory had enough time to stop at the intersection, Franco had no reason to look to his left a second time. While reasonable minds might differ as to conclusions to be drawn from the facts presented at trial, we will not usurp the function of the jury or substitute our judgment for the jury's on questions of fact. Thus, we find that the trial court did not err in denying Tiana's post-trial motion for a JNOV.

Likewise, Tiana was not entitled to a new trial on the issue of Franco's liability. A new trial should be granted "only when the verdict is contrary to the manifest weight of the evidence." *York*, 222 Ill. 2d at 178, 854 N.E.2d at 652. "A verdict is contrary to the manifest weight of the evidence when the opposite conclusion is clearly evident or when the jury's findings prove to be unreasonable, arbitrary and not based upon any of the evidence." *Id.*, 854 N.E.2d at 652. Because the trial court had the benefit of observing the appearance and mannerism of the witnesses who testified at trial, a reviewing court must not make any credibility determinations or resolve any inconsistencies in the testimony in determining whether the trial court's decision to deny a motion for a new trial was an abuse of discretion. *Maple*, 151 Ill. 2d at 455-56, 603 N.E.2d at 513. Based on the evidence at trial, we find no reason to disturb the trial court's decision to deny Tiana's post-trial motion for a new trial. As discussed, the role of the jury, as the trier of fact, was to make credibility determinations and to resolve any inconsistencies in Tiana's and Franco's testimony regarding the events leading up to the collision. Based on our review of the evidence, we cannot say that an opposite conclusion was clearly evident or that the jury's findings were unreasonable, arbitrary or not based upon any

evidence. Thus, the verdict rendered in the instant case was not against the manifest weight of the evidence. Therefore, Tiana was not entitled to a new trial on the issue of Franco's liability.

Tiana further argues, in the alternative, that a new trial should be granted on the issue of damages as to both Franco and Cory. Specifically, she argues that the jury's award of \$35,000 in damages for pain and suffering, permanent disfigurement and disability was manifestly inadequate, and did not bear a "reasonable relationship to the loss suffered."

Franco counters that the damages awarded to Tiana were not manifestly inadequate, noting that Tiana's injuries healed after the accident and that there was "no evidence presented that [Tiana] had treated with a doctor for her injuries \*\*\* shortly after the accident."

"Illinois courts have repeatedly held that the amount of damages to be assessed is peculiarly a question of fact for the jury to determine \*\*\* and that great weight must be given to the jury's decision." *Snelson v. Kamm*, 204 Ill. 2d 1, 36-37, 787 N.E.2d 796, 816 (2003). Courts are not free to reweigh the evidence or substitute its judgment for that of the jury "simply because they may have arrived at a different verdict than the jury," or because of what they think the damages should have been. *Id.* at 37, 787 N.E.2d at 816. Rather, "a court reviewing a jury's assessment of damages should not interfere unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss suffered." *Id.*, 787 N.E.2d at 816.

First, we note that because Franco was not found liable and we decline to grant a new trial on the issue of Franco's liability, no new trial on the issue of damages against Franco is warranted. Second, in the case at bar, the jury awarded a total of \$69,531.85 in damages to Tiana and against

Cory. This total included an award of \$34,531.85 for reasonable medical expenses, which Tiana does not claim to be “manifestly inadequate.” Rather, she only argues that the remaining \$35,000 of the award which is divided as follows, \$25,000 for pain and suffering, \$5,000 for disfigurement and \$5,000 for disability, did not bear a reasonable relationship to the loss suffered. As recounted earlier, the jury heard Tiana’s testimony regarding the circumstances surrounding the accident and the extent of her injuries. Based on our review of the evidence, we cannot say that the jury’s findings on the amount of damages were unreasonable, arbitrary or not based upon any evidence. While we sympathize with Tiana, as having been seriously injured in an unfortunate accident, a new trial is not warranted simply because Tiana believes that a larger award should have been granted. The sole inquiry on this issue is whether the jury’s findings were arbitrary and not based upon any of the evidence presented at trial. In answering that inquiry, we cannot say that the damages awarded to Tiana bore no reasonable relationship to the loss she suffered. Thus, we find no abuse of discretion in the amount of damages awarded by the jury, and find no abuse of discretion by the trial court in denying Tiana’s post-trial motion for a new trial on the issue of damages.

We next determine whether the trial court erred in overruling objections made by Tiana’s attorney at trial regarding matters relating to Franco’s personal background.

Tiana argues that the trial court erred in admitting irrelevant and highly prejudicial evidence at trial regarding Franco’s prior service in the Marines Corp, medals that he received while in service, and his honorable discharge from the military. Specifically, she argues that “repeated references” to Franco’s military service and background resulted in an “improper verdict based on irrelevant evidence.” Because Franco’s credibility “was of the utmost importance on the issue of

liability,” the irrelevant evidence of Franco’s good character, reputation and honesty as a Marine made him more credible before the jurors and prejudiced Tiana. Tiana then cited *Cartwright v. Goodyear Tire & Rubber Co.*, 279 Ill. App. 3d 874, 665 N.E.2d 365 (1996), and *Vander Veen v. Yellow Cab Co.*, 89 Ill. App. 2d 91, 233 N.E.2d 68 (1967), in support of her arguments.

Franco counters that defense counsel did not make “repeated references” to Franco’s service in the Marines Corp, nor did he allude to Franco’s military experience during closing argument. Rather, references made to Franco’s military service occurred as part of Franco’s testimony relating to his personal background. Moreover, Franco contends that Tiana failed to seek exclusion of this information in any of the motions *in limine* she filed prior to trial.

A reviewing court will not reverse a jury verdict based on an evidentiary ruling unless the trial court abused its discretion and the ruling was substantially prejudicial and affected the outcome of the case. *Taluzek v. Illinois Central Gulf R.R. Co.*, 255 Ill. App. 3d 72, 83,626 N.E.2d 1367, 1376 (1993). “[T]he burden is on the party seeking reversal to establish prejudice.” *Smith v. Baker’s Feed and Grain, Inc.*, 213 Ill. App. 3d 950, 952, 572 N.E.2d 430, 432 (1991).

We find the cases cited by Tiana to be inapposite to the facts of the instant case. In *Vander Veen*, the plaintiff, in an action brought to recover for injuries suffered in a motorcycle accident, introduced *rebuttal* evidence at trial that he lost seven *teeth* in a military service accident, in an attempt to “dispel any impression that [the plaintiff]’s *toe* had been injured in a swimming accident.” (Emphasis added.) *Vander Veen*, 89 Ill. App. 2d at 99, 233 N.E.2d at 72. The *Vander Veen* court held that the introduction of this testimony was error, stating that “proper and effective rebuttal did not require exposure to the jury of this irrelevant and sympathy-provoking information.” In

*Cartwright*, the plaintiff brought a product liability action against a tire manufacturer to recover for personal injuries sustained as a result of a vehicle accident. *Cartwright*, 279 Ill. App. 3d at 876, 665 N.E.2d at 367. The plaintiff testified in detail at trial that he was a Vietnam veteran who had received multiple commendation medals, including the distinguished Purple Heart medal, as a result of his courageous conduct under fire. *Cartwright*, 279 Ill. App. 3d at 877, 665 N.E.2d at 368. In his testimony, the plaintiff recounted one particular incident in Vietnam during which he subjected himself to enemy fire in order to rescue wounded troops, and successfully engaged in hand-to-hand combat with enemy personnel. *Cartwright*, 279 Ill. App. 3d at 877, 665 N.E.2d at 368. Further, the plaintiff's counsel, during opening statement and closing argument, referred to the plaintiff's military heroism and recounted the tale of the plaintiff's valor under enemy fire. *Cartwright*, 279 Ill. App. 3d at 880, 665 N.E.2d at 370. The jury then awarded over \$9 million to the plaintiff for his personal injuries and \$2 million to the plaintiff's wife for loss of consortium. *Cartwright*, 279 Ill. App. 3d at 880, 665 N.E.2d at 370. Subsequently, the defendant filed a petition to set aside the judgments pursuant to section 2-1401 of the Code of Civil Procedure (2-1401 petition), alleging that it had discovered evidence indicating that a letter presented at trial purporting to document the plaintiff's military heroism was fake and that all of the plaintiff's claims of valor were false. *Cartwright*, 279 Ill. App. 3d at 880, 665 N.E.2d at 370. The trial court then granted the plaintiff's motion to dismiss the 2-1401 petition, finding that the testimony as to the plaintiff's military service was irrelevant and immaterial and that members of the jury had been instructed that neither sympathy nor prejudice should influence their verdict. On appeal, the reviewing court held that the trial court erred in dismissing the 2-1401 petition without holding an evidentiary hearing because "the allegations of

false testimony call into question the veracity of [the plaintiff's] assertions to both liability and damages.” *Cartwright*, 279 Ill. App. 3d at 885, 665 N.E.2d at 373.

Unlike *Vander Veen* and *Cartwright*, Franco's testimony regarding his service in the Marine Corp and his receipt of several medals of honor was presented to the jury as part of his background information. Unlike *Cartwright*, during trial, defense counsel did not make “repeated references” to Franco's service as a decorated Marine, as Tiana claims. Defense counsel neither mentioned Franco's military history during closing argument nor solicited from Franco testimony of heroic war stories. As the trial court correctly noted, Tiana, like Franco, also had the opportunity to provide background information to the jury. Further, although Franco's background information may be irrelevant to the determination of the issue of liability and damages, Tiana has not provided any evidence, and we have found none, that the admission of this testimony substantially prejudiced Tiana and affected the outcome of the case. Thus, based on our review of the record, we find no abuse of discretion in the trial court's decision to admit evidence complained of by Tiana.

We next determine whether the trial court erred in failing to properly instruct the jury on the applicable law regarding Tiana's damages.

Tiana argues that the trial court erred in failing to instruct the jury on the applicable law regarding damages because the jury instructions did not include the value of “lost time” and “loss of a normal life” as compensable elements of Tiana's damages. Specifically, Tiana contends that the evidence “clearly demonstrated [Tiana's] loss of a normal life or enjoyment of life due to her most severe injuries requiring [11] days of in-patient hospitalization,” as well as other injuries to her leg, arm, jaw, face and teeth which prevented her from eating solid foods and performing activities

of a “normal life.” Tiana argues that the trial court should have instructed the jury on Tiana’s proposed Instruction 12, which contained the value of “lost time” and “loss of a normal life,” and on her proposed Instruction 13, which defined “loss of a normal life.”

Franco counters that Tiana’s proposed Instruction 12 was withdrawn and thus, any argument relating to this issue has been forfeited by Tiana on appeal. Further, Franco argues that even if the issue is considered, the trial court did not err in not instructing the jury as to the value of “lost time” because of the speculative nature of the claim. Franco also argues that the trial court did not err in instructing the jury on “disability,” rather than “loss of a normal life” because there was evidence at trial to support using the term “disability.”

Initially, we note that the record is unclear as to whether Tiana’s proposed Instruction 12 was withdrawn. The record shows that on May 19, 2009, prior to closing arguments, the trial court held a conference outside the presence of the jury to address matters concerning jury instructions. Specifically, the trial court noted that “we almost completed our instruction conference yesterday. And today, I’ve been handed some revisions.” Regarding Tiana’s proposed Instruction 12, the trial court stated that, “I sustained the defense’s objection to the value of time lost over the objection of [Tiana’s counsel]. Disability in lieu of loss of a normal life I felt was a better fit in this case.” However, we note that a red “W/D” mark, which Franco interprets to mean “withdrawn,” was handwritten on Tiana’s proposed Instruction 12.<sup>4</sup> The face of Tiana’s proposed Instruction 13, which defined “loss of a normal life,” contained a red handwritten word—“denied.” Because it is unclear

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<sup>4</sup>Tiana’s proposed Instruction 12 is a combination of Illinois Pattern Jury Instructions, Civil, Nos. 30.01, 30.04, 30.04.01, 30.05, 30.06, 30.07 (2009).

whether Tiana's proposed Instruction 12 was actually withdrawn, we will consider the merits of the issue.

Although an unemployed plaintiff may testify as to what she would have earned but for the accident that resulted in her injuries, "[t]estimony as to loss of earnings which is merely speculative, remote, or uncertain is improper." *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill. App. 3d 257, 260, 432 N.E.2d 920, 923 (1982). The evidence at trial shows that Tiana was unemployed at the time of the accident. However, Tiana presented no evidence as to what job opportunities she had forfeited as a result of her injuries, nor what she would have earned but for this accident. Rather, she simply testified that from the time of the accident until February 2007, she was unable to search for employment. Thus, we find no error in the trial court's decision not to instruct the jury on the value of "lost time" because there was no competent evidence to support the value of any lost job opportunities and the jury would have been forced to speculate.

Likewise, we find no error in the trial court's decision to instruct the jury on "disability" as an element of damages rather than "loss of a normal life." Illinois law allows the trial court discretion to use either the term "disability" or "loss of a normal life," depending on the nature of the evidence at trial. *Turner v. Williams*, 326 Ill. App. 3d 541, 551, 762 N.E.2d 70, 79 (2001); see Illinois Pattern Jury Instructions, Civil, No. 30.04.01 (2009). In the instant case, the trial court specifically determined that "disability in lieu of loss of a normal life \*\*\* was a better fit in this case." Evidence presented at trial that Tiana sustained multiple injuries which temporarily impaired her ability to walk or eat, and that she was unable to shower without assistance, supported the giving of the "disability" instruction to the jury by the trial court. See *Holston v. Sisters of the Third Order*

of *St. Francis*, 165 Ill. 2d 150, 175, 650 N.E.2d 985, 997 (1995) (“[p]hysical ‘disability’ is defined as ‘absence of competent physical, intellectual, or moral powers; \*\*\* incapacity caused by physical defect or infirmity’). Further, Tiana has not presented any evidence that the trial court abused its discretion in choosing to instruct the jury on “disability” as an element of damage rather than “loss of a normal life.” Therefore, we find no error in the trial court’s instruction to the jury on “disability” as an element of damages, instead of Tiana’s proposed Instruction 13, which defined “loss of a normal life.”

Finally, we determine whether the trial court erred in making certain evidentiary rulings at trial.

Tiana argues that the trial court erred in making certain evidentiary rulings at trial and that “each individual ruling or the cumulative effect of the rulings affected the outcome of the case.” Specifically, she cites to four instances in which her counsel objected and the trial court overruled the objections.

Franco contends that the trial court’s evidentiary rulings were not erroneous and that even if error had occurred, Tiana was not prejudiced by the rulings.

As discussed, a reviewing court will not reverse a jury verdict based on an evidentiary ruling unless the trial court abused its discretion and the ruling was substantially prejudicial and affected the outcome of the case. *Taluzek*, 255 Ill. App. 3d at 83,626 N.E.2d at 1376. “[T]he burden is on the party seeking reversal to establish prejudice.” *Smith*, 213 Ill. App. 3d at 952, 572 N.E.2d at 432.

Here, during Franco’s testimony as an adverse witness for Tiana, counsel for Tiana requested that the trial court strike a non-responsive answer made by Franco, which the trial court denied. The

trial court also overruled an objection by Tiana's counsel that a question posed by Franco's attorney to Franco was "leading." Similarly, the trial court overruled an objection made by Tiana's counsel that Franco's attorney posed a question to Franco that was "argumentative" and "call[ed] for a legal conclusion." Further, during closing argument by the defense, the trial court overruled an objection made by Tiana's counsel, on the ground of speculation, that Tiana had offered no other testimony to corroborate her version of the events leading up to the accident. Based on our review of the record in its entirety and relevant Illinois law, we find no error in the trial court's conduct in each of these four instances cited by Tiana. While the objection made by Tiana's counsel during the defense's closing argument had some arguable merit, we find no error in the trial court's decision to overrule that particular objection because closing argument is not evidence to be considered by the jury. See generally *People v. Faria*, 402 Ill. App. 3d 475, 483, 931 N.E.2d 742, 750 (2010). Further, even if error had occurred, Tiana has failed to show how the cumulative effect of these rulings prejudiced the outcome of the case. Therefore, we find no abuse of discretion in the trial court's evidentiary rulings.

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.