2012 IL App (1st) 111983-U

THIRD DIVISION
June 6, 2012

No. 1-11-1983

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRETT E. CORWIN, Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
v.	)	No. 08 L 002244
INVESTIGATIVE PROTECTION AGENCY and PETER SURDYK, Defendants-Appellants	)	HONORABLE PATRICIA BANKS, JUDGE PRESIDING.
(Julie Corwin, Plaintiff; Thomas J. Cavallone, Defendant).	)	

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

O R D E R

¶ 1 *HELD*: The circuit court did not err in not barring a plaintiff hotel guest from claiming a defendant security guard was the aggressor in a physical struggle giving rise to plaintiff's personal injury suit by reason of his conviction of disorderly conduct. The circuit court also did not err in analyzing the case as one of negligence. Further, the circuit court did not make a clearly evident, plain, and indisputable error in its assessment of damages. The judgment of the circuit court is affirmed.

¶ 2 Plaintiffs Brett E. and Julie Corwin (Corwins) filed suit against defendants Thomas J. Cavallone, Peter Surdyk and Investigative Protection Agency (IPA) (under the theory of *respondeat superior*) for personal injuries related to the ejection of the Corwins from the pool area at the Marriott Midway hotel in March 2007. The Corwins were guests at the hotel; Cavallone and Surdyk were employed by IPA to provide security for the hotel. Following a bench trial in the circuit court of Cook County, the trial court entered judgment in favor of Brett on his negligence claim against Surdyk and IPA and awarded him $130,899.25 in damages. Surdyk and IPA now appeal, arguing: (1) the trial court erred by not giving collateral estoppel effect to Brett's prior conviction for disorderly conduct; (2) the trial court erred in entering judgment on Brett's negligence claim while finding Surdyk intentionally tackled Brett from behind; and (3) the damages awarded are excessive and against the manifest weight of the evidence. For the following reasons, we reject these arguments and affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. On February 28, 2008, the Corwins filed this lawsuit against Cavallone, Surdyk and IPA, alleging claims of negligence and intentional battery.

¶ 5 On December 20, 2008, following a bench trial in the circuit court of Cook County, the Corwins were both found guilty of disorderly conduct in connection with the incident at the Marriott Midway hotel. The transcript of the Corwins' criminal trial shows that the State initially

deleted language from the complaint alleging the Corwins became physically combative toward Cavallone and Surdyk while being escorted from the pool area at the hotel.

¶ 6 Cavallone testified that on March 4, 2007, at approximately 12:15 a.m., he was working as a security guard at the Marriott Midway Hotel. Cavallone observed the Corwins attempting to enter the pool area at the hotel, although a posted sign indicated the pool area was closed from 11 p.m. to 5 a.m. When Cavallone entered the pool area, Julie was already in the hot tub, while Brett sat in a chair above the hot tub area.

¶ 7 Cavallone testified he told the Corwins the pool was closed and asked them to leave the area three or four times, but the Corwins failed to comply. Cavallone called Surdyk, the other security officer on duty, who also informed the Corwins the pool area was closed. According to Cavallone, Julie got out of the hot tub, telling her husband they did not have to listen to the security guards. However, the Corwins began leaving the pool area.

¶ 8 Cavallone further testified that Julie then threw a punch at him, which he blocked with his right forearm. According to Cavallone, Brett then approached him with his hand clenched in a fist. Cavallone and Surdyk told Brett to leave the area and return to his room. The Corwins exited the lobby area and began walking down a hallway, with Julie continuing to insult the security guards. Julie then turned around and attempted to kick Cavallone, who put his hand out to block the kick. Cavallone told her to return to her room and the Corwins resumed walking back toward the hotel lobby.

¶ 9 According to Cavallone, "[t]he next thing you know," Brett was wrestling with Surdyk. Cavallone, after pushing Julie back, assisted Surdyk in handcuffing Brett. Cavallone and Surdyk

then called the Bedford Park police. Cavallone stated that after the police arrived, Julie said things like "you guys are pieces of shit" and told her husband not to talk to the police. Cavallone did not recall Brett saying anything. During the incident a wedding party was exiting the hotel and another group of guests was entering the hotel. Cavallone testified that he was alarmed and disturbed by the incident.

¶ 10 Surdyk also testified about the incident. Surdyk testified that Brett agreed with some of Julie's insults, but did not say much himself during the incident. According to Surdyk, Brett charged him after Julie attempted to kick Cavallone. Surdyk stated he took Brett to the ground and restrained him with his hands behind his back. Cavallone then handcuffed Brett. Surdyk further testified that the wedding party stopped to observe the disturbance, while limousines and taxis waited outside. Surdyk stated he was also disturbed by the incident.

¶ 11 Tim Ribich, the front desk manager at the hotel, testified he witnessed the confrontation between the Corwins and the security guards. Ribich saw Julie try to kick Cavallone and observed Brett having a scuffle with Surdyk. According to Ribich, Julie lost her balance and fell, and was yelling. Ribich stated there was a lot of commotion as two wedding parties were gathering around the area. Ribich also stated that after the police arrived, Brett kept getting out of a chair and the police kept asking him to sit and tried to get his statement.

¶ 12 The State rested its case. The trial court denied a defense motion for a directed finding. The defense rested its case without presenting any evidence. The trial judge found the Corwins guilty of disorderly conduct, stating "the way they treated these officers was ridiculous."

¶ 13 On February 25, 2009, the Corwins amended their civil complaint, withdrawing the battery claims. The case proceeded to trial on October 29, 2010. Prior to hearing testimony, the trial judge heard argument on several motions *in limine*, including a motion by defendants for an order barring the Corwins from contesting they were the aggressors in the incident at issue, based on the Corwins' convictions for disorderly conduct in the prior criminal proceedings. The defendants attached the charging instruments, criminal convictions, and the transcript of the Corwins' criminal trial as exhibits to the motion. The trial judge denied the motion *in limine* to bar the Corwins from contesting they were the aggressors in the incident at issue.

¶ 14 At trial, Surdyk again testified that Brett charged him and he wrestled Brett to the ground. Surdyk added that when the Corwins were leaving the pool area, Brett stayed behind momentarily and not only put down Surdyk verbally, but also postured, flexed his muscles and took an almost confrontational stance toward Surdyk.

¶ 15 Cavallone testified that Brett took an aggressive "come on, let me have a piece of you" stance toward Surdyk when the Corwins left the pool area. Cavallone also testified that when Brett later approached him with a clenched fist, the fist was at Brett's waist-level. Cavallone further testified that at some point, he passed Brett as they walked toward the lobby and did not see Brett lunge at Surdyk.

¶ 16 Brett denied approaching the officers with a clenched fist or demonstrating any physical or emotional aggression towards them. He also denied that Julie had raised her fist or punched either officer. Brett testified that Surdyk made rude comments as the Corwins walked back to their rooms. In response, Brett went back briefly to tell Surdyk they were going to the front desk

to tell the manager what Surdyk did. After Julie verbally confronted the guards, the Corwins resumed going to the front desk.

¶ 17 According to Brett, as he was walking down the hallway, Surdyk told him to go ahead and call the police and Brett assured him they would. Brett testified that shortly thereafter, Surdyk tackled him from behind, with a knee in his back and a forearm at the back of his neck. Brett stated he later became frustrated with the Bedford Park police questioning because the officers assumed he was the aggressor. Brett added that he sat back down when the police threatened him with a taser, but he refused to answer questions without an attorney present.

¶ 18 Brett further testified that immediately after he was tackled, he felt pain in his neck which went down to the middle of his back. Upon returning home on a Sunday, he went to a chiropractor the next Monday or Tuesday. The chiropractor told Brett to see a medical doctor right away. Brett scheduled an appointment with his doctor, who told him he possibly had a problem with his neck and to return in a week, when his swelling would be reduced. Over the course of the week, Brett's pain increased, including pain in his left arm and tingling and numbness in two fingers. After the follow-up appointment, Brett's doctor scheduled an MRI, which occurred 10 to 14 days after the incident at the hotel.

¶ 19 After the MRI was taken, Brett consulted with Dr. Ongkiko, a neurosurgeon. After the consultation, Brett understood he had a disc lodged into his spine between C6-C7 and required immediate surgery. Brett had surgery three days later, within a month of the injury. After the surgery, Brett felt much better, but experienced weakness in his left tricep. Brett testified that despite exercise, his left tricep remained only 75% as strong as his right tricep, though they had

been equally strong before the injury. Brett no longer rides rollercoasters with his kids or goes water-skiing as a result of the remaining risks after surgery. Brett added his range of motion is not as good as it was before the injury. Brett also testified regarding certain medical bills.

¶ 20 The Corwins introduced the evidence deposition of Dr. Carlos Ongkiko, the neurosurgeon who treated Brett. Dr. Ongkiko testified Brett presented a herniated disc or nerve root impairment at the C6-C7 level of the spine. On March 30, 2007, Dr. Ongkiko performed anterior cervical fusion surgery on Brett. According to Dr. Ongkiko, patients typically lose around five degrees of flexion and extension from this sort of fusion. The degree of axial rotation lost is very minimal. However, lateral bending of the neck would diminish.

¶ 21 Dr. Ongkiko stated the loss of range resulting from a fusion at C6-C7 is a permanent condition. He also opined Brett has a high incident of requiring another operation in the future, based on expected degeneration and Brett's preexisting degeneration. A second operation would in turn increase the risk of further subsequent surgery being necessary. Dr. Ongkiko added that the greatest likelihood of future surgery would develop within two to five years, but more than ten years with some cases if they involve a prior degenerative process. Dr. Ongkiko further testified that on April 7, 2007, Brett was doing remarkably well, asymptomatic and not taking medication. However, Dr. Ongkiko later advised Brett to wear a soft collar as a preventative measure when lifting significant weight and when sleeping.

¶ 22 Ribich again testified at the civil trial, for both plaintiffs and defendants, but stated he did not see who initiated the scuffle between Brett and Surdyk. Bedford Park Police officers Chris

Woods, Anthony Thibault and Gerald Krawczyk testified regarding both Corwins' loud, belligerent and noncompliant behavior at the hotel prior to their arrest for disorderly conduct.

¶ 23 Dr. Herbert Engelhard III, a neurosurgeon, also testified for the defense. After reviewing Dr. Ongkiko's deposition and Brett's medical records, Dr. Engelhard stated he did not expect that the injury and surgery would cause any future problems for Brett. Dr. Engelhard also did not expect that Brett would experience any noticeable loss of range of motion. Dr. Engelhard opined that Brett should be able to participate in all normal activities of someone his age. Dr. Engelhard acknowledged he had not personally examined Brett, but stated it would not have assisted him in forming his opinions, based on the records he reviewed and his experience with similar patients.

¶ 24 At the close of the evidence, the trial court granted Brett's motion to conform his complaint to the evidence, adding additional allegations of negligence.

¶ 25 On May 27, 2010, the trial court entered a memorandum opinion and order finding in favor of the defendants on Julie's claims, but in favor of Brett on his claim against Surdyk. In its order, the trial court also reserved the issue of damages. On June 13, 2011, the trial judge awarded damages to Brett in the following amounts: (1) $20,899.25 for medical bills; (2) $50,000 for pain and suffering; (3) $50,000 for disability; and (4) $40,000 for future pain and suffering, reduced to $10,000 based on a 25% probability that future injury would occur. On July 13, 2011, Surdyk and IPA filed a timely notice of appeal to this court.

¶ 26 DISCUSSION

¶ 27 On appeal, Surdyk and IPA argue: (1) the trial court erred by not giving collateral estoppel effect to Brett's prior conviction for disorderly conduct; (2) the trial court erred in

entering a judgment on Brett's negligence claim while finding Surdyk intentionally tackled Brett from behind; and (3) the damages awarded are excessive and against the manifest weight of the evidence. We address their arguments in turn.

¶ 28 I. Collateral Estoppel

¶ 29 Surdyk and IPA first argue the trial court erred by not giving collateral estoppel effect to Brett's prior conviction for disorderly conduct. Estoppel effect may be accorded to a prior criminal conviction in an appropriate case. *American Family Mutual Insurance Co. v. Savickas*, 193 Ill. 2d 378, 387 (2000). A court considering whether to give the conviction estoppel effect must at the outset determine that: (1) the issue decided in the criminal case and the one presented in the civil case are identical; (2) there was a final judgment on the merits in the criminal case; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. *Id*. In this case, the parties dispute the existence of the first threshold factor.

¶ 30 For a judgment in a prior proceeding to have collateral estoppel effect in a subsequent action:

> " '[I]t is absolutely necessary that there shall have been a finding of a specific fact in the former judgment or record that is material and controlling in that case and also material and controlling in the pending case. It must also conclusively appear that the matter of fact was so in issue that it was necessarily decided by the court rendering the judgment interposed as a bar by reason of such estoppel. If there is any uncertainty on the point that more than one distinct issue of fact is presented to the court, the estoppel will not be applied, for the reason that the court may have decided upon one of the other issues of

fact.' " *Hammond v. North American Asbestos Corp*., 207 Ill. App. 3d 556, 562 (1991) (quoting *Decatur Housing Authority v. Christy-Foltz, Inc.*, 117 Ill. App. 3d 1077, 1082 (1983)).

In determining what has been adjudicated in a prior proceeding, the court examines the judgment actually entered with respect to the issues presented for review, the opinion rendered, and the proceedings in the earlier case to ascertain what the issues were and how they were resolved. *Hammond*, 207 Ill. App. 3d at 562. The burden of establishing the defense of collateral estoppel is on the party invoking it to show with clarity and certainty the precise issues and judgment in the former action. *Id.* Whether the doctrine of collateral estoppel applies in this case presents a question of law subject to *de novo* review. *Hurlbert v. Charles*, 238 Ill. 2d 248, 254 (2010).

¶ 31 In this case, Brett was found guilty of violating the state statute outlawing disorderly conduct, which provides in relevant part:

"(a) A person commits disorderly conduct when he knowingly:

(1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace ***." 720 ILCS 5/26-1(a)(1) (West 2006).

The offense embraces a wide variety of conduct serving to destroy or menace the public order and tranquility, including not only violent acts, but also acts and words likely to produce violence in others. *In re B.C.*, 176 Ill. 2d 536, 552 (1997). The types of conduct intended to be included under this statute " 'almost defy definition.' " *People v. Davis*, 82 Ill. 2d 534, 537 (1980) (quoting Ill. Ann. Stat., ch. 38, par. 26-1, Committee Comments, at 149 (Smith-Hurd 1977)); see also *People v. McLennon*, 2011 IL App (2d) 091299, ¶ 30 (quoting 720 ILCS Ann. 5/26–1,

Committee Comments–1961, at 200 (Smith–Hurd 2010)). One form of conduct falling within the scope of the statute is " 'indirectly threatening bodily harm (which may not amount to assault).' " *Davis*, 82 Ill. 2d at 537 (quoting Ill. Ann. Stat., ch. 38, par. 26-1, Committee Comments, at 149 (Smith-Hurd 1977)). Culpability for disorderly conduct revolves not only around the type of conduct, but is also dependent upon the surrounding circumstances. *Id.* (quoting Ill. Ann. Stat., ch. 38, par. 26-1, Committee Comments, at 149 (Smith-Hurd 1977)). The instant offense is intended to guard against " 'an invasion of the right of others not to be molested or harassed, either mentally or physically, without justification.' " *Id.* at 538 (quoting Ill. Ann. Stat., ch. 38, par. 26-1, Committee Comments, at 149 (Smith-Hurd 1977)).

¶ 32 Surdyk and IPA argue the fact that Brett physically charged at and wrestled with Surdyk was necessarily decided in Brett's criminal trial. They note Brett's initial refusal to leave the pool area at the hotel would not, by itself, support a conviction for disorderly conduct. *People v. Redwood*, 335 Ill. App. 3d 189, 193 (2002); *People v. Bradshaw*, 116 Ill. App. 3d 421, 422-23 (1983). While noting Cavallone and Surdyk testified Brett did not direct verbal abuse toward the security guards, Surdyk and IPA observe that vulgar language, however distasteful or offensive, will not support a conviction for disorderly conduct merely because people standing nearby stop, look, and listen. *People v. Rokicki*, 307 Ill. App. 3d 645, 652-53 (1999); *Bradshaw*, 116 Ill. App. 3d at 422; see *City of Chicago v. Blakemore*, 15 Ill. App. 3d 994, 996-97 (1973) (absent evidence of overt acts by defendant, offensive language addressed to police officer does not cause a breach of peace even when bystanders are present). As with any overt act, a "speaker's 'fighting words'

must contain either an explicit or implied threat *** to trigger the State's prosecutorial powers and criminal sanctions." *Redwood*, 335 Ill. App. 3d at 193.

¶ 33 Surdyk and IPA concede that after leaving the pool area, but prior to any physical contact between Brett and Surdyk, Brett walked back toward the officers with his fist clenched. However, relying on *People v. Gentry*, 48 Ill. App. 3d 900, 906 (1977), they argue that the fact that the guards made no move to defend themselves or to arrest Brett immediately shows that conduct would not support a conviction for disorderly conduct.

¶ 34 We disagree. *Gentry* is a case where the defendant argued with a police officer, but made no threatening act toward the officer prior to the arrest. *Gentry*, 48 Ill. App. 3d at 902. Moreover, the surrounding circumstances in this case differ from those in *Gentry*. The criminal trial transcript here indicates Brett walked back toward the officers with his fist clenched after Julie threw a punch at Cavallone, which Cavallone blocked with his right forearm. The criminal trial judge could have concluded Brett's conduct indirectly threatened bodily harm, even if it did not amount to assault. Surdyk and IPA note there was no evidence others were in the hallway at the time, but assert a threat need not be made in public to constitute a breach of the peace. *In re D.W.*, 150 Ill. App. 3d 729, 731-32 (1986). Thus, the issue of whether Brett later charged Surdyk was not controlling in Brett's criminal trial. Accordingly, the trial judge in this case did not err in declining to estop Brett from claiming Surdyk was the aggressor in the subsequent physical struggle.

¶ 35 II. Negligence vs. Battery

¶ 36 Surdyk and IPA next argue the trial judge erred by entering judgment on Brett's negligence claim against Surdyk after finding Surdyk aggressively tackled Brett. Defendants argue the trial court's findings are consistent with battery, but Brett dropped the battery counts from the complaint. They conclude the trial judge failed to "preserve the important distinctions between negligence, willful and wantonness, and intentionally tortious behavior." *Ziarko v. Soo Line R. Co.*, 161 Ill. 2d 267, 281 (1994).

¶ 37 Defendants' argument overlooks the context of the situation at issue, *i.e.*, an arrest for an alleged violation of the disorderly conduct statute. Security guards occupy the same status as private citizens. *Poris v. Lake Holiday Property Owners Association, Inc.*, 2012 IL App (3d) 110131, ¶ 25; *People v. Perry*, 27 Ill. App. 3d 230, 239 (1975). Section 107-3 of the Code of Criminal Procedure of 1963 authorizes ordinary citizens, including security guards, to make an arrest when they have reasonable grounds to believe "that an offense other than an ordinance violation is being committed." 725 ILCS 5/107-3 (West 2006). Where a security guard or private citizen has authority to arrest, an attempt to arrest and handcuff is not considered a battery. See *Perry*, 27 Ill. App. 3d at 233. Indeed, similar reasoning forms the basis of the shopkeeper's privilege as an affirmative defense to claims of battery, assault and false imprisonment. See *Luss v. Village of Forest Park*, 377 Ill. App. 3d 318, 334 (2007). In this case, for the reasons already discussed, we conclude Surdyk had reasonable grounds to believe Brett had violated the disorderly conduct statute. Accordingly, the trial judge did not err in analyzing the case as one of negligence in the amount of force necessary to subdue and handcuff Brett.

¶ 38 Surdyk and IPA also claim the trial judge erred in applying *Blackburn v. Johnson*, 187 Ill. App. 3d 557, 562 (1989). However, a review of the trial judge's memorandum order shows that the case was used to analyze Julie's claim, not Brett's claim, against Surdyk. Accordingly, the trial judge's consideration of *Blackburn* does not affect our conclusion on this issue.

¶ 39 III. Damages

¶ 40 Furthermore, Surdyk and IPA also contest the trial judge's awards of damages. In *Richardson v. Chapman*, 175 Ill. 2d 98 (1997), our supreme court observed that "[t]he determination of damages is a question reserved to the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment rendered in the trial court." *Richardson*, 175 Ill. 2d at 113. The rule that a trial court's findings in a bench trial will not be disturbed unless manifestly erroneous applies equally to a trial court's assessment of damages. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 543 (1996); see *Vendo Co. v. Stoner*, 58 Ill. 2d 289, 311 (1974). The law only requires there be an adequate basis in the record for the court's determination, and absolute certainty is unnecessary. *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 147 (1972). "Manifest error" is defined as error which is clearly evident, plain, and indisputable. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009) (quotations omitted). A damage award is against the manifest weight of the evidence only where it is apparent that the trial court ignored the evidence or that its measure of damages was erroneous as a matter of law. *Doornbos Heating & Air Conditioning, Inc. v. Schlenker*, 403 Ill. App. 3d 468, 485 (2010) (quotations omitted).

¶ 41 A. Disability

¶ 42 Surdyk and IPA assert the $50,000 award for disability is against the manifest weight of the evidence because it has no support in the record. However, their argument that the evidence shows the extent of Brett's disability is "very minimal" or not noticeable inherently concedes the evidence does support a damages award for disability. Moreover, we note Dr. Ongkiko testified that patients typically lose around five degrees of flexion and extension from this sort of fusion and that only the degree of axial rotation lost is "very minimal." Dr. Ongkiko also stated the loss of range resulting from a fusion at C6-C7 is a permanent condition and recommended Brett wear a soft collar when lifting weight and when sleeping. Further, Brett testified that despite exercise, his left tricep remained only 75% as strong as his right tricep, though they had been equally strong before the injury. Surdyk and IPA fail to argue the disability award is excessive, thereby forfeiting the issue on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 43 B. Pain and Suffering

¶ 44 Surdyk and IPA next argue the $50,000 award for pain and suffering is against the manifest weight of the evidence because it is excessive and not based on the evidence. The latter claim is based on the trial court's finding that Brett suffered for three weeks following the surgery. This finding as literally stated is incorrect. However, the record shows Brett suffered for three weeks following the *injury*, until he underwent surgery. We can affirm a judgment for any reason the record supports, regardless of whether the trial court relied on that reason. *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 387 (1983). Although the trial

court may have mistakenly referred to "surgery" instead of "injury," the trial court's basic finding, *i.e.*, that Brett experienced pain and suffering for three weeks, is supported by the evidence.

¶ 45 Defendants' argument that the award for pain and suffering is excessive is based on their contention that Brett "did not seek (or receive) medical treatment with the urgency that would be reasonably expected from a person whose pain justifies an award of $50,000." The record shows Brett sought chiropractic treatment within a day or two of returning home and was told to see a doctor. The doctor could not immediately diagnose Brett due to swelling in the affected area. After an MRI was taken, Brett consulted with Dr. Ongkiko and underwent surgery within days. In short, the trial record contradicts defendants. Accordingly, their argument on this point fails.

¶ 46 C. Future Pain and Suffering

¶ 47 Lastly, Surdyk and IPA contest the trial judge's $10,000 award of damages for future pain and suffering. They initially assert the trial judge erroneously based this award on the finding that Brett suffered for three weeks following the surgery. However, defendants concede their assertion is not based on the language of the order, but their inference that the initial, unreduced $40,000 award is "roughly similar" to the $50,000 award for three weeks of pain and suffering they believe to be erroneous. Even assuming for the sake of argument this inference is correct, we again note the record shows Brett suffered for three weeks following the injury, until he underwent surgery.

¶ 48 Surdyk and IPA note any future pain would be the result of degeneration of Brett's spine, rather than the injury from a violent attack. Thus, they argue that it is pure speculation that the future pain and suffering would be similar. Again, this argument is based on defendants'

unsupported inference regarding the trial judge's award. Moreover, as indicated earlier, the law only requires there be an adequate basis in the record for the court's determination, and absolute certainty is unnecessary. *Schatz*, 51 Ill. 2d at 147. Defendants do not dispute the possibility of future pain and suffering from cervical degeneration aggravated by the injury at issue.

¶ 49 In the alternative, Surdyk and IPA argue that even if the evidence justified an award for future pain and suffering, the trial court erred in calculating the proven probability of that pain occurring. They make much of the fact that the trial judge's order states that it is less likely than not that Brett will have future pain and suffering. However, this finding is entirely consistent with *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 504 (2002), which holds that a plaintiff must be permitted to recover for all demonstrated injuries, including the plaintiff's risk of future injuries. The entire point of *Dillon* is to depart from the requirement that plaintiffs prove that it is more likely than not (a greater than 50% chance) that the projected consequence will occur. See *id.* at 498. The analysis undertaken here by the trial judge – multiplying the total compensation to which the plaintiff would be entitled if the harm in question were certain to occur by the proven probability that the harm in question will in fact occur – followed the pattern jury instruction based on *Dillon*. See *Bauer ex rel. Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 919 (2007).

¶ 50 Surdyk and IPA believe the 25% probability assigned by the trial judge is in error, because: (1) Dr. Ongkiko testified there was only a 10% chance Brett would require future surgery; (2) Dr. Ongkiko testified most of the future injuries occurred within two to five years; and (3) the trial court acknowledged Brett had not suffered a subsequent injury within four years.

However, the record shows Dr. Ongkiko testified that Brett had a high probability of having another surgery, based on his preexisting degeneration. Dr. Ongkiko also testified that 10% of the young and healthy patients who required surgery due to trauma would return within two to five years after initial surgery, but might return as late as ten years later, with a few even later if they have a degenerative process. Defendants fail to account for the difference between the probability for young and otherwise healthy patients versus the probability for Brett, whose prior degeneration gave him a high probability of future pain and suffering. Although the trial court correctly noted Brett had not required surgery in the first four years after his initial surgery to conclude a future injury remained less likely than not, the trial court did not make express findings regarding the effect of that fact on the probability of pain and suffering beyond the four years already elapsed. The 25% probability assessed by the trial judge represents the basic judgment that the risk of future pain and suffering was below 50% but above the 10% risk for young and otherwise healthy trauma patients, given Brett's preexisting degeneration. Again, absolute certainty is unnecessary for damages awards. *Schatz*, 51 Ill. 2d at 147. Given the record, we conclude the trial court did not make a clearly evident, plain, and indisputable error in its assessment of damages.

¶ 51 CONCLUSION

¶ 52 In sum, we conclude the trial court did not err in declining to estop Brett from claiming Surdyk was the aggressor in the subsequent physical struggle. The trial court did not err in analyzing the case as one of negligence regarding the amount of force necessary to subdue and handcuff Brett. Lastly, the trial court did not make a clearly evident, plain, and indisputable error

in its assessment of damages. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 53 Affirmed.