2012 IL App (1st) 112241-U

FIRST DIVISION
June 29, 2012

No 1-11-2241



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| PATRICK SULLIVAN, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 L 8599 |
| | ) | |
| TWELVE PINS (Chicago), INC., d/b/a | ) | |
| THE IRISH OAK, | ) | Honorable |
| | ) | Lynn M. Egan, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

**ORDER**

¶ 1 *Held*: The jury verdict in favor of plaintiff was affirmed where: (1) defendant was not prejudiced by the trial court's deeming certain facts admitted pursuant to Illinois Supreme Court Rule 216; (2) defendant was not denied a fair trial by plaintiff's comments during closing arguments; (3) the award of disability damages was not against the manifest weight of the evidence; and (4) there was no cumulative error necessitating reversal.

¶ 2 Plaintiff, Patrick Sullivan, filed a complaint against defendant, Twelve Pins (Chicago), Inc. d/b/a the Irish Oak, alleging that defendant's negligence in failing to properly operate, manage, maintain, and control the stairwell leading from the Irish Oak bar's main floor to the bathroom in the

basement caused him to fall down the stairs and injure himself. A jury returned a verdict in favor of plaintiff and awarded him $335,137.56, consisting of $35,137.56 in medical expenses, $100,000 for disability, and $200,000 for pain and suffering. Defendant appeals, contending: (1) the trial court erred in deeming certain facts admitted pursuant to Illinois Supreme Court Rule 216 (Ill. S. Ct. R. 216 (eff. Jan. 1, 2011)); (2) plaintiff denied defendant a fair trial by making improper remarks during closing arguments; (3) the award of disability damages was against the manifest weight of the evidence; and (4) the cumulative effect of the errors deprived defendant of a fair trial. We affirm.

¶ 3 On August 12, 2010, the trial court entered an order setting the matter for trial on February 22, 2011. On January 20, 2011, plaintiff filed a request, pursuant to Supreme Court Rule 216 (Ill. S. Ct. R. 216 (eff. Jan. 1, 2011)), that defendant admit the following bills were for charges rendered to plaintiff, that the services were reasonable and necessary, and the charges were fair and reasonable charges: (1) the $333 ambulance bill; (2) the $1,388 bill from the emergency room physicians; (3) the $3,357 bill of Advocate Illinois Masonic Medical Center for emergency room care; (4) the $301 bill of Advocate Illinois Masonic Medical Center for hospital laboratory services; (5) the $23,349.56 bill of Advocate Illinois Masonic Medical Center for hospital outpatient surgery services; (6) the $371 bill of Advocate Illinois Masonic Medical Center for radiological imaging; (7) the $4,321 bill of Doctor David Beigler for orthopedic surgery care; (8) the $44 bill of Midwest Diagnostic Pathology, S.C., for pathology services; (9) the $1,600 bill of Lakeview Anesthesia, L.L.C., for anesthesia services; and (10) the $73 bill of Wellington Radiology Group, S.C. for diagnostic radiology services.

¶ 4 Plaintiff also requested that defendant admit: (1) the call summary for plaintiff's cellular

phone represents calls made and received from plaintiff's cellular phone from March 10, 2006, to March 16, 2006, and is a true, correct, and complete copy of the original document; (2) the Chicago Fire Department incident report is a true, correct and complete copy of the original document, there is no indication of alcohol consumption or intoxication in the report, and the report indicates the patient was oriented, his eyes responded spontaneously, and he obeyed commands; and (3) the Illinois Masonic emergency room records are a true, correct, and complete copy of the original documents, there is no indication or diagnosis of alcohol intoxication, and the records indicate the patient was brought in after slipping on metal stairs, his pain level was at 10, he was cooperative, alert and oriented, and he was given narcotic-pain medications which are contra-indicated with alcohol.

¶ 5 On January 27, 2011, defendant filed a motion to strike plaintiff's requests to admit. Defendant argued that plaintiff had made 52 requests to admit, which was contrary to Rule 216's limitation of the number of such requests to 30. Defendant also argued that the requests to admit were untimely. Defendant did not schedule its motion to strike for a hearing.

¶ 6 In response to defendant's motion to strike plaintiff's requests to admit, plaintiff filed an "Emergency Motion to Deem SCR 216 Requests to Admit as Admitted" on February 15, 2011. Plaintiff's motion was heard on February 18, 2011. Following the hearing, the trial court entered an order overruling defendant's objections to plaintiff's requests to admit and ordered defendant to respond to plaintiff's requests to admit by 5 p.m. that evening (February 18, 2011).

¶ 7 Defendant filed its answer to plaintiff's requests to admit on February 22, 2011. As to the medical bills that were the subject of plaintiff's requests to admit, defendant stated it was without

information sufficient to form a belief as to whether the services billed were reasonable and necessary or, whether the charges were fair and reasonable. As for the request to admit regarding the call summary for plaintiff's cellular phone, defendant admitted the document shows cellular services for plaintiff from March 10, 2006, to March 16, 2006, that it represents calls made and received on plaintiff's cellular phone from March 10, 2006, to March 16, 2006, and that the document is a true, correct, and complete copy of the original document. As for the request to admit regarding the Chicago Fire Department incident report and the Illinois Masonic emergency room records, defendant admitted the documents are true, correct and complete copies of the original documents, but it denied plaintiff's conclusion that the documents indicate he was sober at the time of his fall down the stairs; defendant stated there was no indication of plaintiff's sobriety in the documents. Defendant admitted the emergency room records indicate plaintiff was given narcotic-pain medications contra-indicated for alcohol, but denied that the conclusion of the records is that plaintiff was sober.

¶ 8 The trial court entered an order striking all of defendant's answers, which failed to admit the facts that are the subject of plaintiff's requests to admit. The trial court deemed all the facts in plaintiff's requests to be admitted.

¶ 9 At trial, plaintiff testified that on March 11, 2006, he had lunch with his girlfriend, Julie Damore, and then they watched movies together and "hung around." Plaintiff had one beer at around 10 p.m. and then Ms. Damore went out with some of her friends, while plaintiff went out with his friend, Ray Boyle. Plaintiff and Mr. Boyle arrived at the Irish Oak bar at approximately 11:00 or 11:15 p.m. There was a line to get in, and plaintiff and Mr. Boyle waited in line for approximately

20 minutes, before entering the bar at around 11:45 p.m. After having one drink and ordering another, plaintiff needed to use the bathroom. Plaintiff decided to use the downstairs bathroom to avoid the line at the upstairs bathroom. Plaintiff testified he was not intoxicated as he went toward the stairway.

¶ 10 Plaintiff testified the stairwell "was really dark." As he was descending the stairs, he noticed they were sticky and wet. Thereafter, he fell down the stairs, injuring his right-lower leg. As he was lying on the stairs, plaintiff looked around and saw that his jeans were now wet, and that he was lying on a "substance" consisting of beer and vomit. Plaintiff used his cellular phone to call Mr. Boyle, but he did not answer. Plaintiff successfully called Ms. Damore. Plaintiff identified plaintiff's exhibit number 4 as his cell phone records, which reflected the calls he made and received on March 11 and 12, 2006. The trial court admitted the cell phone records into evidence without any objection from defendant.

¶ 11 Plaintiff testified that a person who he believed was a security guard eventually came over and helped him up. Plaintiff did not remember any ladies from the bar coming to check on him. Paramedics arrived, placed him on a stretcher, and transported him to Illinois Masonic Hospital. At the hospital, plaintiff had x-rays taken and was told he had broken his tibia and fibula. Medical personnel gave him morphine to ease the pain, put his leg in a cast, and discharged him on March 12. Plaintiff's leg required surgery, which Doctor Beigler subsequently performed. Plaintiff further testified he was unable to walk or perform normal household chores for four months after the surgery. At the time of trial, he continued to have numbness in his leg and he testified he feels sharp pains when "climbing stairs or just doing normal day things." He described his pain level at that

moment as a seven on a scale of zero to ten (with zero being no pain at all, and ten being the worst pain he had ever experienced.) He described the pain at the time of the fall as a ten out of ten. Plaintiff further described his leg the morning before the fall as "100% fine." He described his leg as probably "at 60%" on the day of trial.

¶ 12 Plaintiff was shown a group of exhibits which he identified as being the medical bills he received for his treatment. Plaintiff moved to admit the medical bills into evidence. Defendant replied, "I've seen them. There is no objection." Accordingly, the trial court admitted the medical bills (marked as plaintiff's exhibits numbered 9 through 18) into evidence.

¶ 13 Julie Damore testified she was plaintiff's girlfriend in March 2006. On March 11, 2006, plaintiff came over to her residence and they had lunch and watched movies. She did not see him consume any alcohol and he did not seem drunk or hung over. That evening, Ms. Damore went out with some girlfriends to the Irish Heritage Center. Meanwhile, plaintiff left Ms. Damore's residence at about 10 p.m. to go to the Irish Oak with his friend Ray. She spoke with plaintiff by phone after midnight on March 12, 2006, and he told her had fallen on the stairs and he thought he had broken his leg. She spoke with him again when he was in the ambulance. He did not slur his words or sound like he was drunk. She picked him up from Illinois Masonic Hospital at about 8 a.m. on March 12, 2006.

¶ 14 Ms. Damore testified that after his accident, plaintiff basically lived on her couch for a couple of months. During that time, she helped him get dressed, go to the bathroom, and she brought him food.

¶ 15 Joseph Gleason testified that in March 2006 he was a firefighter/emergency medical

technician (EMT). He had no independent recollection of having seen plaintiff. Plaintiff showed him the Chicago Fire Department incident report which was marked as plaintiff's exhibit number 19. Mr. Gleason testified that according to the incident report, he was dispatched at 2:40 a.m. on March 12, 2006, to 3511 N. Clark Street (the Irish Oak) in response to a call about an injured victim. Mr. Gleason arrived at 2:43 a.m. and spoke with the patient, who stated he had twisted his ankle on the stairs. There was pain and swelling. The incident report indicates the patient was alert, oriented, and obeyed commands. The incident report does not contain any findings of the presence of alcohol or any indication of intoxication. The patient was transported to the hospital without incident. The trial court admitted plaintiff's exhibit number 19 into evidence without objection.

¶ 16 Doctor David Beigler testified he is an orthopedic surgeon licensed to practice medicine in Illinois. Doctor Beigler was shown the Illinois Masonic Hospital chart for plaintiff, and he testified that the chart was a medical record made at or near the time of the examinations by medical professionals, that it was the regular practice of the medical professionals at Illinois Masonic Hospital to make such a record, and that the purpose of the record was to document plaintiff's care and treatment at Illinois Masonic Hospital. Over plaintiff's objection, the trial court admitted the Illinois Masonic Hospital chart (marked as plaintiff's exhibit number 2) into evidence. Doctor Beigler subsequently testified that the chart contains a triage record showing plaintiff had a pain level of ten "after slipping down several metal stairs" and he was administered morphine to treat and mitigate the pain.

¶ 17 Doctor Beigler testified that plaintiff was diagnosed with a closed displaced fracture (a break with separation of fragments) of the right distal tibia (shin bone above the ankle) and proximal fibula

(leg bone below the knee). On March 21, 2006, Doctor Beigler performed an open reduction and internal fixation (hereinafter, referred to as surgery) on plaintiff. He used a scalpel to make surgical incisions along the inside portion of the ankle and the inside portion of the shin bone, and internally fixed a 10-hole distal tibial locking plate and 10 to11 surgical screws implanted with an electric drill and power screwdriver.

¶ 18 Doctor Beigler testified this kind of injury involving broken bones would be painful and cause swelling. Doctor Beigler testified the slip-and-fall at the Irish Oak was the cause of plaintiff's injuries. He testified that post-surgery, plaintiff would be unable to immediately walk without assistance and would be instructed not to put weight on his leg.

¶ 19 Doctor Beigler testified that two-weeks post-surgery, plaintiff was permitted to barely touch down his foot. By May 3, 2006, plaintiff still could only walk with a crutch. He had a limp through June 5, 2006. Doctor Beigler testified:

> "Severe fractures of this nature commonly have ongoing discomfort, particularly with weather changes, chronic swelling, or–and/or intermittent swelling associated with local vascular changes, which are pretty much routine. In addition, [plaintiff] has a fairly large internal fixation medical plate in the subcutaneous tissues along the inside [of] the shin bone. This piece of metal all by itself can cause chronic, and unless removed, permanent discomfort. Therefore, it is common in circumstances of this type of fracture to have permanent consequences."

¶ 20 Doctor Beigler testified the medical treatment plaintiff received at Illinois Masonic Hospital, and the orthopedic treatment he received from Doctor Beigler's medical group, was reasonable,

customary, and necessary. Plaintiff's surgery and his pre-operative and post-operative care and treatment was reasonable, customary, and necessary. Doctor Beigler further testified to the reasonableness of the following bills: the $333 ambulance bill; the $1,388 bill from the emergency room physicians; the $301 bill for lab work; the $23,349.56 bill for operating room services and related charges; the $371 bill for x-rays at Illinois Masonic Hospital; another x-ray bill for $73 from the Wellington Radiology Group; the $44 bill for lab charges; the $1,600 bill for anesthesia services provided at the time of surgery; and the charges for the treatment rendered to plaintiff by Doctor Beigler on March 15, March 21, April 5, and June 5, 2006.

¶ 21 At the close of plaintiff's case, plaintiff moved to admit into evidence plaintiff's exhibit number 4 (plaintiff's cell phone records), exhibits numbered 9 through 18 (plaintiff's medical bills), and exhibit number 19 (the incident report). All the exhibits were admitted into evidence without any objections from defendant.

¶ 22 Defendant presented the testimony of Officer Joseph Williams. Officer Williams testified he was called to the Irish Oak at closing time in the early morning of March 12, 2006. He was told there was a drunk person who refused to leave the basement area. After entering the Irish Oak, Officer Williams descended the staircase. He testified that he did not recall the stairwell as being dark, nor did he recall the stairs being wet or slippery. When he reached the bottom of the stairs, he saw plaintiff on a ledge. Plaintiff did not want to talk to him, but Officer Williams eventually learned from plaintiff that he had hurt his ankle. Officer Williams determined plaintiff was drunk based on his slurred speech, his glassy eyes, and the strong smell of alcohol on his breath. Officer Williams called for an ambulance.

¶ 23 Amy Lawless testified that on March 11 and 12, 2006, she was a bartender and assistant manager at the Irish Oak. She went up and down the stairwell the evening of March 11, 2006, and she did not see any water or any other "foreign object" on the stairs. She received no complaints that night about the stairs being slippery. At around 2 a.m., on March 12, 2006, a busboy notified her that plaintiff was in the basement. Ms. Lawless descended the staircase; the stairwell was illuminated and she did not feel anything sticky or slippery on the stairs. Ms. Lawless saw plaintiff sitting on the ledge at the bottom of the stairs. She asked him his name and he refused to tell her. Then she asked what had happened, and he told her that he had come downstairs to use the bathroom, and then he "tripped up the stairs." She asked him if he needed help or wanted her to call a cab, but he said no. Plaintiff complained that his leg hurt, then he said his knee hurt, and then he told her his ankle hurt. Ms. Lawless determined that plaintiff was drunk. She was also "kind of afraid of him" because he seemed "a little aggressive."

¶ 24 Ms. Lawless testified that her sister, Clodagh, came down the stairs and asked plaintiff his name. He refused to tell her his name, and Clodagh then "went and got Officer Williams on the street."

¶ 25 Clodagh Lawless testified that in March 2006, she was a co-manager of the Irish Oak. At about 2:10 a.m. on March 12, 2006, a busboy notified her that there was customer hurt at the bottom of the stairs. She descended the stairs. The lights were working on the stairway, she did not smell vomit, and she did not feel anything slippery underneath her shoes or see any foreign object on the stairs. Plaintiff was sitting on a ledge at the bottom of the stairs. Her sister, Amy, was with him. Ms. Lawless sent Amy upstairs and spoke with plaintiff. She asked him his name, but he refused

to tell her. She asked him what had happened to him, and he responded that after going to the bathroom, he had hurt his foot while going up the stairs. Later he told her that his ankle hurt. Plaintiff's eyes were glassy and his speech was slurred. Ms. Lawless determined plaintiff was drunk. Ms. Lawless went outside and flagged down Officer Williams and asked him for assistance with plaintiff.

¶ 26 During closing arguments, plaintiff stated in pertinent part:

> "[Plaintiff's] medical bills in this case which were submitted into evidence, read to you by [plaintiff] and Doctor Beigler, total $35,137.56. Okay.
>
> We're also going to talk about this idea of loss of a normal life. That means over the past five years what has it meant to [plaintiff]? What is the loss of the percentage of his life? Remember [plaintiff] talked about that morning when he was 100% and what he lost? What is that loss of normal life? I would submit to you that that loss of a normal life that [plaintiff] had is worth $25,000 a year for each of the last five years; okay? That totals $125,000.
>
> Most significantly, though, is his pain and suffering. Remember I talked about the pebble in the shoe? Think about the pebble in your shoe every day for the last five years, and that pebble's in your shoe every single day going forward for the next four and a half decades of your life. You can't take it out because it's holding your leg together. Doctor Beigler talked about that there really was no other realistic *** option than to surgically take the leg, cut the skin open, put plate, and literally screw it back together. It's the only thing that they could do.

***

But you heard about the extreme pain when he's on the bottom of the stairwell, and that's before he even knew how bad it was. The only time the pain level was better was when he went to the hospital and they gave him the morphine. Remember the drug that you're not supposed to give to intoxicated people?

Afterwards, you heard Doctor Beigler talk about every time he came he had pain. Over time it got better, but there were at least three months where the pain went on and on. You heard [plaintiff] talk about how still today he has pain. *** He's going to continue to have pain. He's going to continue to have that pebble in his shoe.

For the past five years we're going to ask for $125,000. Again, $25,000 a year for each of the last five years for pain that he's experienced. We're also going to ask for $125,000 for the next 44 ½ years. Now, that's a lot of money. It's a serious case and requires a serious amount of money. But I'd like to break down that $125,000 for the next 44 ½ years. That comes to about $2,800 a year, or about $234 a month. It's less than $10 a day. Less than $10 a day for the next 44 ½ years to constantly have that pebble in his shoe, for having that screw and plate in his shin."

¶ 27 Defendant made no objections to this portion of plaintiff's closing argument.

¶ 28 The trial court instructed the jury, in pertinent part, that if it found for plaintiff on the question of liability, it must then "fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted from the negligence of the defendant, taking into consideration the nature, extent, and

duration of the injury: the reasonable expense of necessary medical care, treatment, and services rendered; the disability experienced; the pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries; disfigurement." The trial court did not instruct the jury on "loss of a normal life."

¶ 29 The trial court gave the jury verdict forms allowing it to itemize damages as follows: reasonable expense of necessary medical care, treatment, and services rendered; the disability experienced; pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries; and disfigurement. The trial court gave the jury no verdict forms allowing it to award damages for "loss of a normal life."

¶ 30 During the jury deliberations, the jury sent a note asking, "[w]hat does normal life mean?" In this note, the word "normal" is written above the word "better" which had been scratched out. The trial court responded, "[t]here is no reference to 'better life' in the jury instructions. Please clarify your concern." There is no indication in the record that the jury sent a follow-up note regarding its question on this issue.

¶ 31 The jury also sent a note asking, "[w]hat is the difference between disability experience compensation and pain and suffering compensation?" The trial court responded, "[t]he law does not define these terms."

¶ 32 The jury subsequently returned a verdict for plaintiff, awarding him $335,137.56, consisting of $35,137.56 in medical expenses, $100,000 for disability, and $200,000 for pain and suffering. The jury awarded plaintiff no damages for disfigurement. Defendant appeals.

¶ 33 First, defendant contends the trial court erred when it: (1) overruled defendant's objections

to plaintiff's requests to admit because plaintiff's requests to admit were untimely and failed to conform with the requirements of Rule 216; (2) ordered defendant to answer plaintiff's requests to admit by 5 p.m. on February 18, 2011, which was within eight hours of overruling defendant's objections; and (3) struck defendant's answers to plaintiff's requests to admit and deemed admitted all the facts set forth in the requests.

¶ 34 We need not address whether the trial court committed any errors with respect to its various rulings regarding plaintiff's requests to admit and its ultimate ruling deeming the facts admitted, as defendant has failed to show how it was prejudiced thereby. Specifically, we note that after the trial court overruled defendant's objections to plaintiff's requests to admit, struck its answers, and deemed the facts admitted, plaintiff informed the court that he intended to publish the request to admit to the jury. The trial court informed plaintiff, "[t]he document is not going to be published to the jury," and that plaintiff was "never going to refer to a document called a request to admit." The trial court stated plaintiff could tell the jury during opening statement and closing arguments that "certain things have been deemed admitted as a matter of law." Plaintiff then questioned the trial court as follows:

> "[M]any of the requests dealt with the foundation and appropriate foundation as laid for the medical bills and the other exhibits. I do–I understand that they may not be published to the jury, but I do want to submit them into evidence. And if you don't want me to use the words or the phrase 'request to admit' or anything like that as a practical procedural matter, how do I then–how would you like me to, then, submit them into evidence?"

The trial court ultimately responded, "You just make your motion to have it admitted."

¶ 35 Later, during his opening statement, plaintiff informed the jury that the following facts were

admitted: (1) the Chicago Fire Department incident report reflects plaintiff was alert, oriented and cooperative, that his eyes were responsive to light, and that there was no indication of alcohol consumption or intoxication; (2) the Illinois Masonic emergency room records indicate plaintiff was alert, cooperative and oriented, that his skin was warm and dry, and that there was no diagnosis of alcohol intoxication; and (3) plaintiff was given morphine in the emergency room, which is contra-indicated for someone with alcohol in his system. Plaintiff did not reference any of the other facts deemed admitted.

¶ 36 Subsequently, at trial, plaintiff's medical bills that were the subject of the requests to admit were twice admitted into evidence without objection by defendant after the foundation for those medical bills was laid by plaintiff and Doctor Beigler. The cell phone record that was the subject of a request to admit was admitted into evidence without objection by defendant after plaintiff laid the foundation. The Chicago Fire Department incident report that was the subject of a request to admit was admitted into evidence without objection by defendant after firefighter/EMT Joseph Gleason laid the foundation. The Illinois Masonic Hospital emergency room records that were the subject of a request to admit were admitted into evidence over objection after the trial court found that Doctor Beigler laid the foundation.

¶ 37 During closing arguments, plaintiff stated, "[a] fact deemed in evidence in this case is that morphine is contra-indicated with alcohol." Plaintiff did not reference any of the other facts admitted.

¶ 38 Defendant has failed to show how it was prejudiced by the trial court's various rulings on plaintiff's Rule 216 requests to admit, and its ultimate ruling deeming the facts admitted, where the

jury was not informed during opening statement or closing arguments about the majority of the facts deemed admitted, and where plaintiff did not rely on the facts deemed admitted as the foundational basis for the admission of the medical bills and other exhibits. Rather, the medical bills and other exhibits that were the subject of the requests to admit were each independently admitted into evidence after the foundation was laid at trial either by the testimony of plaintiff, Doctor Beigler, or Joseph Gleason. Defendant makes no argument on appeal that the foundation for the admission of the medical bills and other exhibits was not properly laid at trial. In the absence of any prejudice, any errors regarding the trial court's rulings on plaintiff's Rule 216 requests to admit, and its ultimate ruling deeming the facts stated therein to be admitted, was harmless.

¶ 39 Next, defendant contends it was denied a fair trial during closing arguments when plaintiff asked the jury to return damages of $125,000 for "loss of a normal life." Defendant argues that the reference to damages for loss of a normal life was confusing to the jury, which was never instructed that loss of a normal life was a measure of damages. Defendant argues the confusion was evident by the jury note asking, "What does normal life mean?" Defendant waived review by failing to object to the comments during closing arguments. *Cooper v. Chicago Transit Authority*, 153 Ill. App. 3d 511, 523 (1987). Defendant, though, cites *Limanowski v. Ashland Oil Co., Inc.*, 275 Ill. App. 3d 115 (1995), which held, "[a] reviewing court may find error even if the matter was not preserved by the lower court or opposing counsel if prejudicial conduct of one attorney affects the conduct of the case so severely that litigants could not receive a fair trial." *Id.* at 121.

¶ 40 In support of its argument that plaintiff's reference to damages for loss of a normal life denied it a fair trial, defendant cites *Poliszczuk v. Winkler*, 387 Ill. App. 3d 474 (2008), which stated in

pertinent part:

"In *Smith v. City of Evanston*, 260 Ill. App. 3d 925 (1994), the second division of this court held that the term 'loss of normal life' should be utilized as an alternative to a 'disability' instruction, when the term 'loss of normal life' more accurately described the evidence presented at trial. In *Torres v. Irving Press, Inc.*, 303 Ill. App. 3d 151 (1999), the sixth division of this court disapproved of the use of the term 'loss of normal life' in damage instructions, finding that the term 'loss of normal life' was a highly subjective standard making damages especially difficult to quantify.

After *Smith* and *Torres* were decided, the 2000 edition of the Illinois Pattern Jury Instructions was published. [Citation.] Included in that edition is an instruction that gives disability or loss of a normal life as alternatives. Illinois Pattern Jury Instructions, Civil, No. 30.04.01 (2000) (hereinafter IPI Civil (2000)). The notes on use to IPI Civil (2000) No. 30.04.01 direct that the 'loss of normal life' instruction can be used rather than a 'disability' instruction if the trial court determines that *Smith* is applicable and that the term 'loss of normal life' more accurately describes the damages claimed. [Citation.] The addition of instruction IPI Civil (2000) No. 30.04.01, which allows either loss of a normal life or disability to be given as an instruction, depending on the nature of the evidence presented at trial, illustrates that a trial court is to determine, based on the evidence, whether 'loss of a normal life' or 'disability' more accurately describes the evidence at trial, and instruct the jury accordingly.

No Illinois authority, however, authorizes a trial court to give both a disability and

'loss of a normal life' instruction concurrently. As instruction IPI Civil (2000) No. 30.04.01 makes clear, it is either one or the other. Instructing on both disability and loss of a normal life concurrently could lead to jury confusion and to the prejudice of the defendant because of the potential of the award of double damages." *Id*. at 487-88.

¶ 41 In other words, since "disability damages include damages for loss of a normal life" (*Smith*, 260 Ill. App. 3d at 937), the giving of instructions and verdict forms allowing a jury to return separate awards for both disability and loss of a normal life could potentially lead to the jury awarding a plaintiff double damages for loss of a normal life. No such potential existed here, where the trial court gave the jury instructions and verdict forms allowing it to award damages for disability, but did not give the jury any instructions or verdict forms allowing it to make a separate (and potentially duplicate) award for loss of a normal life. During its deliberations, the jury sent out notes regarding the meaning of "disability" and "loss of a normal life." After receiving the trial court's responses to those notes, the jury continued deliberating and ultimately awarded plaintiff $100,000 in disability damages. It seems clear that the jury equated "loss of a normal life" with "disability" when it awarded plaintiff, as disability damages, almost the full amount which plaintiff had requested in closing arguments for loss of a normal life. The trial court gave the jury no other instructions or verdict forms that would have allowed it to make a separate, second award for loss of a normal life. There was no award of double damages here, and therefore no denial of a fair trial and no cause for reversal of the jury's damages award.

¶ 42 Next, defendant contends it was denied a fair trial during closing arguments when plaintiff improperly asked for "pain and suffering" damages and "loss of normal life" damages using a *per*

*diem* calculation. Defendant failed to make any argument in its appellant's brief as to why a *per diem* calculation was erroneous and deprived it of a fair trial, nor did it cite any authority in support thereof; defendant's argument and citation to authority was made for the first time in its reply brief. The issue is waived. See Illinois Supreme Court Rule 341(h)(7) (Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)) (points not argued in the appellant's brief "are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.")

¶ 43 The issue is also waived because defendant failed to object to the argument at trial. *Cooper*, 153 Ill. App. 3d at 523. Defendant has made no argument in its appellant's brief as to why the waiver rule should be relaxed, other than citing *Limanowski* and cursorily stating plaintiff's closing argument denied it a fair trial. As discussed above, though, defendant failed to make any argument in its appellant's brief as to *how* plaintiff's closing argument regarding the *per diem* calculation deprived it of a fair trial such that the waiver rule should be relaxed.

¶ 44 Next, defendant contends the jury's $100,000 award for disability damages was against the manifest weight of the evidence. A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the jury's findings are unreasonable, arbitrary and not based on any evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). "Reviewing courts will not interfere with the jury's assessment of damages 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." *Gill v. Foster*, 157 Ill. 2d 304, 315 (1993).

¶ 45 Defendant argues only that plaintiff presented evidence of his damages for loss of a normal life, but that he presented no evidence of disability and, as such, that the disability award bears no

reasonable relationship to the loss suffered. However, " 'the term "loss of a normal life" has almost universally been interpreted as a component of disability which compensates for a change in the plaintiff's lifestyle.' " *Burcham v. West Bend Mut. Ins. Co.*, 2011 IL App (2d) 101035, ¶ 19 (quoting *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1135 (2000)). Thus, contrary to defendant's cursory argument, evidence of loss of a normal life may be used to support an award for disability damages (with the caveat, discussed above, that the trial court may not instruct the jury on both disability and loss of a normal life so as to prevent a potential double recovery of damages for loss of a normal life). In this case, plaintiff's evidence of his loss of a normal life included his description of his leg as being only a "60" out of "100", his testimony about his continued difficulty in climbing stairs and doing "normal day things" and, Doctor Beigler's testimony regarding the permanent consequences of his fracture and surgery. Said evidence (which defendant does not in any way contest) was sufficient to support the jury's award for disability damages. The jury's disability damages award was not against the manifest weight of the evidence.

¶ 46 Defendant argues for reversal based on cumulative error. Defendant is rearguing the same alleged errors that we already have found do not necessitate reversal. Accordingly, defendant's contentions are without merit.

¶ 47 For the foregoing reasons, we affirm the circuit court. As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 48 Affirmed.