2017 IL App (1st) 170271-U

FIRST DIVISION
December 26, 2017

No. 1-17-0271

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH LeSANCHE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 12 L 12470
ADAM TROY, Individually and as agent of	)	
HUSSMANN CORPORATION, a foreign	)	
corporation,	)	Honorable
	)	Thomas Lipscomb,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Pierce and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate the trial court's remittitur order and reinstate the jury's verdict for plaintiff, where the evidence does not support the trial court's finding that the verdict was influenced by passion and prejudice, and the jury's awards did not exceed the flexible limits of fair and reasonable compensation.

¶ 2 Defendants, Adam Troy and Hussmann Corporation, appeal the order of the circuit court denying defendants' motion for a new trial and its order for plaintiff, Joseph LeSanche, to remit a

portion of the jury's verdict deemed to be excessive damages. On appeal, defendants contend the trial court erred in (1) denying their motion for a new trial where the court found that the jury's verdict was the product of passion and prejudice, and a remittitur cannot cure such a verdict; (2) denying their motion for a new trial where the court made evidentiary errors that affected the verdict; and (3) denying defendants' post-trial motion to further reduce plaintiff's compensatory damages award to $923,499. For the following reasons, we vacate the trial court's remittitur order and reinstate its judgment on the jury's verdict.

¶ 3 JURISDICTION

¶ 4 The trial court entered judgment on the jury's verdict on April 25, 2016. The trial court entered judgment on the remitted amount on December 28, 2016, and defendants filed their notice of appeal on January 27, 2017. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. May 30, 2008), governing appeals from final judgments entered below.

¶ 5 BACKGROUND

¶ 6 On May 22, 2012, plaintiff Joseph LeSanche, age 22, was driving his father's company truck on I-294 when he was stopped in heavy traffic. While stopped, plaintiff's truck was rear-ended by a vehicle driven by Aaron Swenson. Swenson's vehicle, in turn, had been rear-ended by a van driven by defendant Troy within the course and scope of his employment with Hussmann Corporation. Swenson died as a result of the accident and his wife, Theresa (Tracy), who was pregnant at the time, subsequently miscarried. Tracy, however, was not involved in the accident nor was she present when the accident occurred. The plaintiff had his head smash through the rear window before flying forward into the steering wheel of the truck he was driving. He was taken away by ambulance.

¶ 7 On November 2, 2012, plaintiff filed a two-count complaint against defendants alleging negligence on the part of Troy and vicarious liability for Troy's negligence on the part of Hussmann Corporation. Tracy Swenson, as special administrator for Aaron's estate, filed a wrongful death action. Swenson filed a second amended complaint, adding claims that Troy's negligence caused the death of "Baby Doe A," and that Tracy suffered personal injuries when she miscarried. The trial court denied defendants' motion to dismiss these newly raised claims.

¶ 8 On May 14, 2015, the trial court entered an order setting both cases for trial together. Defendants subsequently filed a motion for partial summary judgment against Swenson on claims related to the death of Baby Doe A and Tracy's personal injuries, which the trial court denied. Over defendants' objections, the trial court granted both Swenson and plaintiff leave to file an amended complaint adding claims for willful and wanton conduct and for punitive damages.

¶ 9 In their answer to plaintiff's first amended complaint, defendants admitted that (1) Troy acted negligently; (2) his negligence proximately caused plaintiff to sustain injuries; and (3) Hussmann was vicariously liable for Troy's negligence. Defendants, however, denied that Troy's conduct was willful or wanton, or that plaintiff was entitled to punitive damages. They also filed motions to dismiss Swenson's claims for Tracy's personal injury and the death of Baby Doe A, and to strike the claims for punitive damages. The trial court denied defendants' motions.

¶ 10 At trial, Michael Walker testified that he was traveling on May 22, 2012, when he witnessed the accident. Prior to the collision, Walker did not see Troy's brake lights and he did not hear screeching tires or the sound of a horn, nor did he observe Troy maneuver to try to avoid the collision.

¶ 11 LaTonya Anderson testified that on May 22, 2012, she and her husband James were traveling when they saw some vehicles that looked like they had been in a bad accident. James used a crowbar to break the window of Swenson's vehicle and he found Aaron's phone and dialed the last person called. James spoke with Tracy Swenson and informed her of the accident. James then threw down the phone and joined LaTonya in assisting Aaron. LaTonya testified that she saw Troy at the scene walking around, looking flushed, and sweating. He was pale and did not look well. She had difficulty understanding what he was saying and she "suspected something."

¶ 12 Troy Huisman stated that while driving by the accident, he saw a person wearing a gray t-shirt and jeans walk across traffic and throw something over the guardrail. Huisman informed police about what he witnessed and they later showed him some pill bottles.

¶ 13 Timothy Moore testified that he is a police sergeant. On the day of the accident, he was informed that a witness saw someone discard objects that may be pertinent to his investigation. He searched the area and located three pill bottles a few feet from the accident scene. Officer Moore stated that he opened the bottles and observed a green leafy substance that appeared to be marijuana. He placed the bottles in an evidence bag. Officer Moore followed Troy as he was transported to Hinsdale Hospital. After his discharge at 6:55 p.m., Troy was arrested for driving under the influence of drugs. He was later transported to Ingalls Hospital, where Officer Moore was told that the hospital would not take blood or urine samples from Troy. At 10:35 p.m., Troy was transported to Silver Cross Hospital where a blood draw was ultimately done.

¶ 14 Troy's five convictions for speeding, which he received prior to the accident, were published before the jury. These convictions occurred on December 30, 2005, January 23, 2007, January 29, 2008, January 6, 2009, and August 17, 2009.

¶ 15 John Goebelbecker, an expert in vehicle accident reconstruction, opined that Troy (1) was driving between 57-60 miles per hour in the five seconds before the collision where the posted speed limit for the area was 45 miles per hour; (2) did not touch the brake pedal when he struck Swenson's vehicle; (3) had adequate opportunity to observe and react to the slowed and stopped traffic; and (4) failed to maintain a proper lookout for conditions. He also concluded that Swenson's vehicle had come to a gradual stop when it was struck by Troy's vehicle.

¶ 16 Beverly LeSanche, plaintiff's mother, testified that a few weeks after the accident plaintiff did not leave the house or socialize with others. When physical therapy and injections failed to help with plaintiff's pain, he went to Dr. Jido for treatment. Beverly has not observed plaintiff getting better since his treatments began with Dr. Jido. He has been on pain medications since the accident and he is not as active or social as he had been before the accident. Plaintiff must plan around his pain. Ronald LeSanche, plaintiff's father, testified that after the accident plaintiff walked differently and was no longer active. He used to be a construction worker and he would build cars. After the accident, plaintiff has not been able to work for the construction business and he is now a completely different person.

¶ 17 Plaintiff testified that he was 22 years old at the time of the accident. On the day of the accident, he was working for his father's construction company and was driving the company truck to pick up supplies. When he approached the area where I-294 and I-290 split, the traffic had slowed and eventually came to a stop. "[O]ut of nowhere, ***[he heard] crunching metal and breaking plastic and shattering glass" and he "was whipped back so hard that [his] head broke through the back windshield of the truck." He was then "whipped forward and then [] came to a jerking stop." Plaintiff "was in massive pain." He was taken to a hospital and given "a lot of tests." He was released that night and for the next day and a half, he stayed in bed.

¶ 18 Two days later, plaintiff saw Dr. Mekhail who gave him a body brace to wear while he was awake. The physical therapy Dr. Mekhail prescribed did not help plaintiff. Plaintiff also received an epidural injection in his spine, but it did not relieve his pain. He started radiofrequency ablation treatments with Dr. Jido, and these treatments relieved much of his leg pain and reduced the burning in his back.

¶ 19 After the accident, plaintiff continued his studies at a community college and received an associate's degree in business. Plaintiff also received an EMT certificate prior to the accident, although he never worked as an EMT. He testified that obtaining the certificate was the first step in becoming a paramedic and he "wanted to continue [his] schooling to become a paramedic." Plaintiff began an electrical apprenticeship program after the accident, but had to withdraw because he could not manage the physical aspects. Plaintiff testified that he is "a shadow of the man [he] used to be" and felt "like a burden to people." He "used to be in construction with [his] dad" and was "in good shape." He stated that he takes medication to relieve pain so he can enjoy sexual relations with his girlfriend. He wants a family but worries about his body and whether he will be able to do "the many things [he] wants to do with [his] kids."

¶ 20 Dr. Mekhail, a board certified orthopedic surgeon, testified that he treated plaintiff from May 24, 2012, to August 2012. Plaintiff had pain in his lower back and Dr. Mekhail prescribed pain medication, put plaintiff in a brace, and ordered an MRI to rule out fractures. Dr. Mekhail diagnosed plaintiff as having a chronic back strain caused by the accident. He referred plaintiff to physical therapy to alleviate the pain and improve function.

¶ 21 Dr. Jido, a board certified anesthesiologist and pain management specialist, testified that he is plaintiff's treating physician. He began treating plaintiff in 2013 for chronic pain resulting from the accident. Plaintiff currently receives radiofrequency ablations, which he will continue

until the procedure is no longer effective. Dr. Jido testified that the ablation procedure entails sticking a needle into plaintiff's spine to temporarily impair the nerve responsible for the pain. However, usually after two to six months, the nerve starts to function again and the pain returns. At that point, the procedure is repeated. Dr. Jido described the procedure as "a very painful experience" and that "[s]ome people need to be sedated." Dr. Jido also prescribes plaintiff pain medications. When asked his opinion on whether "a 25-year-old young man shouldn't be on these kind of narcotic medications for the rest of his life" Dr. Jido responded, "I totally disagree with that." He stated that some people need these medications "in order to improve quality of life."

¶ 22 Rebecca Busch, a medical nurse auditor, prepared a life care plan for plaintiff. Her plan provided that plaintiff would receive four radiofrequency ablation procedures each year for the next 52 years, based on the assumption that plaintiff would need these procedures every two to six months. It also provided that plaintiff would receive pain medication for the next 52 years.

¶ 23 Stan Smith, an economist, offered his opinion on plaintiff's reduced earning capacity and the present cash value of plaintiff's future medical expenses. Smith concluded that (1) the present cash value of a career as an EMT was $3,805,995; (2) the present cash value of a career as a union electrician was $6,320,000; (3) the present cash value of plaintiff's likely earnings as a person with disabilities and an associates' degree is $1,580,000; and (4) the total cost of the life care plan proposed by Rebecca Busch in today's dollars is $2,055,000.

¶ 24 The following statements were read to the jury over defendants' objection:

> "Ladies and gentlemen, these were the questions that were posed to Adam Troy in which he refused to answer by asserting the Fifth Amendment:

At the time of the crash on May 22, 2012, were you under the influence of any drug or alcohol?

Mr. Huisman's statement that he signed with the police indicates that he observed a white male, medium build, which he later identified as you, grey tee shirt, with blood splattered and jeans. The male walked from behind the white construction van, crossed all lanes of slow moving traffic, making his way to the right shoulder and talking on his cell phone and that he noticed a handful of orange pill bottles in his hand. As the male approached the shoulder, he discarded all pill bottles by throwing them behind the guardrail. The male proceeded back to the scene talking on his cell phone. Any reason to dispute the statements that Mr. Huisman made in his police recorded statement that I just read to you?

Were you taking any prescription medications at the time of the occurrence?

Had you taken any prescription medications in the 48 hours prior to the occurrence?

Had you ingested any marijuana in the 24 hours prior to the occurrence?

Were you intoxicated by any prescription drug at the time of the occurrence?

Were you intoxicated by any illegal narcotic at the time of the crash?

Had you ingested any legal narcotic within 24 hours of the crash?"

The jury was later given the following instruction: "Because Defendant Adam Troy chose to assert the Fifth Amendment and not to answer the questions read to you from his deposition, you may infer that his answers to those questions would have been adverse to him."

¶ 25 Prior to the State calling their toxicology expert as a witness, defendants moved to bar admission of any evidence relating to tests performed on Troy's urine and blood samples because

the samples were taken in violation of Troy's constitutional right to be free from unreasonable searches. The trial court denied the motion.

¶ 26 Michael McCabe, Jr., a toxicologist, testified that three classes of drugs were found in a urine sample taken from Troy 14.5 hours after the accident: valium, hydrocodone, and delta-9-carboxytetrahydrocannabinol, and his blood tested positive for the presence of diazepam and hydrocodone. McCabe stated that it would be helpful to know when Troy took these drugs prior to the accident and when counsel asked whether it was his understanding that Troy refused to give that information McCabe responded, "he has taken his Fifth Amendment right, is my understanding." McCabe acknowledged on cross-examination that the effects of the drugs found in Troy's urine could have passed by the time testing was performed and he could not determine whether the drugs influenced Troy's behavior at the time of the occurrence. However, McCabe testified that the therapeutic use of diazepam, hydrocodone, and valium each come with the risk of impairment while operating a motor vehicle.

¶ 27 Tracy Swenson testified that she discovered she was pregnant four or five days prior to the accident. She and Aaron had been trying for two and a half years to conceive. Following the accident, when she was at the hospital, Tracy realized that she was spotting. She saw her doctor weekly after the accident and toward the end of June, she miscarried. Dr. Jacobs, an infertility specialist who treated Tracy from January 2012 to June 2012, testified that severe or acute stress can be a risk factor leading to miscarriage, primarily due to the overproduction of cortisol. He opined that the extreme stress Tracy experienced after the death of Aaron "might or could have played a role as a contributing factor to the miscarriage." Dr. Jacobs could not state with a reasonable degree of medical certainty that "stress more likely than not caused [Tracy's] miscarriage."

¶ 28 Dr. Favia testified that Tracy was her patient and she had referred her to Dr. Jacobs. She learned from Dr. Jacobs that Tracy was pregnant, that her husband had been killed in an accident, and that there was no heartbeat. Dr. Favia performed a dilation and curettage procedure to remove the contents of Tracy's uterus. The procedure involved the opening of the cervix while the patient was asleep, and then removing the contents by suction. Recovery from the procedure is painful, and involves light bleeding for two to four weeks with cramping. The cramping is relieved with ibuprofen or narcotic pain medication, depending on the intensity. Dr. Favia opined that the stress Tracy experienced following Aaron's death might or could have played a role in her miscarriage, but could not say with 100% certainty that stress caused the miscarriage.

¶ 29 Dr. Gussow testified for the defense. He specializes in emergency medicine and toxicology, and opined that he could not make any conclusions regarding Troy's intoxication on the day of the accident based on the urine and blood test results. When asked during cross-examination whether dosage, timing, and frequency are elements to consider regarding one's intoxication from drugs, Dr. Gussow answered that they can be taken into consideration but "that information does not exist." Counsel asked him whether anyone other than Troy would have that information and Dr. Gussow responded, "That would be speculation."

¶ 30 Trooper Skertich, a State trooper, testified that he was with Troy for about 15 hours on the day of the accident and Troy did not seem confused or disoriented. He did not have any indication that Troy was under the influence of anything.

¶ 31 Defendants' expert Dr. Hutchinson, an orthopedic surgeon, reviewed plaintiff's medical records and the depositions. He opined that (1) plaintiff suffered bruises and strains in his lower back, and a contusion on his forehead; (2) plaintiff's low back strains would have resolved within four months and his outcome would have been no different if he had simply maintained a

home exercise program along with over-the-counter pain medication. He further opined that plaintiff should not continue use of narcotic pain medication because they are strongly addictive, and that radiofrequency ablation treatments are not intended to be lifelong treatments. Dr. Hutchinson believed that once plaintiff was at maximum medical improvement, he would need only one person for treatment rather than multiple specialists.

¶ 32 Dr. Breeden, a retired economics professor, testified that he calculated the present cash value of plaintiff's projected lost earnings based on employment as an EMT as $223,499.

¶ 33 Dr. Utter, a high-risk pregnancy specialist, reviewed Tracy's medical records and her deposition testimony along with the testimony of her doctors, and concluded that stress did not cause Tracy's miscarriage.

¶ 34 During closing arguments, counsel for Swenson requested $20 million for loss of society and $10 million for grief and sorrow on the wrongful death claim, $50,000 for pain and suffering on Tracy's personal injury claim, and $50,000 in punitive damages. No specific amount was sought for the wrongful death of Baby Doe A.

¶ 35 Counsel for plaintiff requested $2.2 million in past and future medical damages, $1 million for past and future emotional distress, between $3 million and $5 million for past and future pain and suffering, and between $3 million and $5 million for loss of a normal life. Counsel argued that plaintiff "is not looking for punitive damages. He wants you to send a message. I'll leave that up to you. That's up to you."

¶ 36 The jury found in favor of the estate of Swenson $2,729,371 for loss of money, benefits, goods and services, $10 million for loss of society, and $10 million for grief and sorrow. The jury found in favor of defendants for the wrongful death of Baby Doe A, and for the personal injuries of Tracy. Therefore, the total award for Swenson was $22,729,371. The jury also

answered "no" to the following special interrogatory: "[W]as the May 22, 2012, accident a proximate cause of the death of Baby Doe A and Theresa Swenson's personal injuries?"

¶ 37 In plaintiff's case, the jury found in favor of plaintiff and compensatory damages in the amount of $2.3 million for reasonable expense of necessary medical care, treatment and services received and the present cash value of such expenses to be received in the future, $4 million for loss of a normal life, $3 million for pain and suffering, $1 million for emotional distress, and $2 million for the value of earnings and benefits lost and reasonably certain to be lost in the future, for a total award of $12.3 million. The jury also found that Troy acted willfully and wantonly, and awarded punitive damages in the amount of $100,000.

¶ 38 Defendants filed a post-trial motion seeking a new trial on the issue of plaintiff's damages or, in the alternative, a remittitur to the amount of $923,499. Although the trial court denied the motion for a new trial, it entered an order for a remittitur finding that "the jury awards were excessive and the product of passion resulting from the inadmissible evidence of Theresa Swenson's miscarriage. The prejudicial effect was so serious that it was not cured by a limiting jury instruction or [Swenson's] giving a low priority to damages for the miscarriage and willful and wanton conduct." The trial court further found that "[t]he jury did not hear this case in a vacuum and heard all of the evidence of miscarriage presented by [Swenson]. This Court cannot say it had no prejudicial effect on [plaintiff's] verdict." The trial court remitted $3 million for loss of a normal life, $1.5 million for pain and suffering, and $500,000 for emotional distress. The total award for plaintiff "is now $7.3 million."

¶ 39 Defendants also sought a new trial or remittitur on Swenson's award. The court remitted $5 million from the award to Swenson's estate for loss of society, and $5 million from the award for grief and sorrow. The total award for Swenson "is now $12,729,371." The trial court

informed plaintiff and Swenson that they could accept the remittiturs or have a new trial. They ultimately accepted the remittiturs and defendants appealed the trial court's order only as to plaintiff. Plaintiff responded and in his brief, cross-appealed the trial court's remittitur order.

¶ 40 ANALYSIS

¶ 41 I. DEFENDANTS' APPEAL

¶ 42 The trial court below found that the jury's verdict was the result of passion and prejudice, but denied defendants' motion for a new trial on compensatory damages. On appeal, defendants argue that the trial court erred in denying their motion for a new trial. Initially, plaintiff argues that defendants cannot seek a new trial on appeal because they sought a remittitur as an alternative remedy and the trial court granted the remittitur. Defendants, however, sought a remittitur to $923,499, but the trial court instead remitted plaintiff's compensatory damages award to $7.3 million. Since the remittitur granted was not the amount requested by defendants, they have standing to raise this claimed error on appeal. *Allstate Contractors, Inc. v. Marriott Corp.*, 273 Ill. App. 3d 820, 827 (1995).

¶ 43 Defendants first contend that when the jury's verdict is the result of passion and prejudice, remittitur does not remove the prejudice and a new trial is necessary to achieve due process. As support, they cite to *Loewenthal v. Streng*, 90 Ill. 74, 77-78 (1878), in which our supreme court found that where a verdict "is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion or misconception, the *remittitur* does not remove the prejudice, passion or misconception. These elements may have entered, and probably did enter into the finding of other facts important to the issue, if not the issue itself." See also *Lindenberger v. Klapp*, 254 Ill. App. 192, 198 (1929); *Olson v. North*, 276 Ill. App. 457, 498 (1934); and *Stephans v. Chicago Transit Authority*, 28 Ill. App. 2d 229, 233 (1960).

¶ 44 However, in a more recent case, our supreme court indicated in *dicta* that a remittitur may be used to correct a verdict resulting from passion or prejudice. See *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218 (2006) (stating "where the verdict can be accounted on the sole basis that the jury acted from some improper motive, such as passion or prejudice," the "only alternative to a remittitur" is to order a new trial). We note that the court was merely citing general law as set forth in *Carter v. Kirk*, 256 Ill. App. 3d 938, 947-48 (1993), and *Haid v. Tingle*, 219 Ill. App. 3d 406, 411-12 (1991), and whether the verdict before the court was the product of passion or prejudice was not an issue in *Tri-G*.

¶ 45 In any event, we need not resolve the issue because we find that a new trial is not warranted here. The trial court below found that "the jury awards were excessive and the product of passion resulting from the inadmissible evidence of Theresa Swenson's miscarriage," and this evidence affected plaintiff's verdict because "[t]he jury did not hear [his] case in a vacuum and heard all of the evidence of miscarriage presented by [Swenson]." However, even if evidence of Tracy Swenson's miscarriage was inadmissible and potentially prejudicial, a court will overturn the jury's verdict only if the improper evidence "materially affected the outcome of the trial." *Habitat Co. v. McClure*, 301 Ill. App. 3d 425, 443 (1998).

¶ 46 Evidence of the miscarriage was presented to support Swenson's claims for the death of Baby Doe A, whom Tracy miscarried weeks after her husband's death, and for personal injuries Tracy suffered when she miscarried. To prevail on these claims, Swenson had to show that defendant Troy's negligence was the proximate cause of Tracy's miscarriage. In recognition that testimony about the miscarriage could elicit a verdict based on passion or prejudice, rather than on the proper question of proximate cause, the trial court gave the jury a special interrogatory to answer. "A special interrogatory serves 'as guardian of the integrity of a general verdict in a civil

jury trial.'" *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002), quoting *O'Connell v. City of Chicago*, 285 Ill. App. 3d 459, 460 (1996). Its purpose is to test "the general verdict against the jury's determination as to one or more specific issues of ultimate fact." *Id*. Where an answer to a special interrogatory is "absolutely irreconcilable with the verdict, and if the answer to the special finding is not against the manifest weight of the evidence, the special finding controls, and a judgment may be entered based on the special finding rather than on the general verdict." *Ahmed v. Pickwick Place Owners' Ass'n*, 385 Ill. App. 3d 874, 885 (2008).

¶ 47 The jury in this case was presented with the following special interrogatory: "was the May 22, 2012, accident a proximate cause of the death of Baby Doe A and Theresa Swenson's personal injuries?" This special interrogatory was given to ensure that if the jury found Troy's conduct was not the proximate cause of Tracy's miscarriage, a verdict in favor of Swenson's claims for the death of baby Doe A, and for personal injuries Tracy suffered from the miscarriage, would not stand. However, no inconsistency exists here because the jury answered "no" to the special interrogatory and, in line with its answer, the jury returned verdicts in favor of defendants on these claims. The jury clearly did not believe that Troy's conduct caused Tracy's miscarriage and awarded no damages on her miscarriage or personal injury claims. It is even less likely that this evidence influenced plaintiff's verdict, since he was not personally affected by Tracy's miscarriage. Furthermore, the jury was specifically instructed by the trial court that evidence concerning Tracy's miscarriage "is to be considered by you solely as it relates to her claims for, one, the wrongful death of Baby Doe A, two, her personal injury and, three, willful and wanton conduct. It should not be considered for any other purpose or claim." There is no support for the trial court's finding that evidence of Tracy's miscarriage, whether or not it was properly admitted, inflamed the passions of the jury and affected the verdicts in favor of plaintiff

or Swenson. In fact, the verdict finding against Tracy's claims is a clear indication the jury was not inflamed or prejudiced in favor of Swenson.

¶ 48 Defendants also argue that they were denied a fair trial where Troy had blood and urine samples drawn without his consent or a warrant, in violation of his fourth amendment right to be free from unreasonable searches and seizures. Law enforcement obtained these samples pursuant to section 11-501.6 of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501.6 (West 2016). Defendants, however, contend that section 11-501.6 of the Code does not apply because Troy was arrested for driving under the influence (DUI). They argue that section 11-501.6 applies only when the driver is charged with a violation of the Code other than DUI, but provide no citation to authority in support of their argument.

¶ 49 We disagree with defendants' construction of this statute. When interpreting a statute, our primary objective is to ascertain and give effect to legislative intent. *Blum v. Koster*, 235 Ill. 2d 21, 29 (2009). The best indicator of legislative intent is the statutory language, given its plain and ordinary meaning." *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 216 (2008). Courts will not depart from this plain language "by reading into it exceptions, limitations, or conditions that conflict with the legislature's expressed intent." *MidAmerica Bank, FSB v. Charter One Bank, FSB*, 232 Ill. 2d 560, 565-66 (2009).

¶ 50 Section 11-501.6 provides as follows:

> "§ 11-501.6 Driver involvement in personal injury or fatal motor accident; chemical test.
>
> (a) Any person who drives or is in actual control of a motor vehicle upon the public highways of this State and who has been involved in a personal injury or fatal motor vehicle accident, shall be deemed to have given consent to a breath test *** or to a

> chemical test or tests of blood, breath, other bodily substance, or urine for the purpose of determining the content of alcohol, other drug or drugs, or intoxicating compound or compounds of such person's blood *if arrested as evidenced by the issuance of a Uniform Traffic Ticket for any violation of the Illinois Vehicle Code* ***." 625 ILCS 5/11-501.6(a) (West 2016) (emphasis added).

The plain language of section 11-501.6(a) does not limit the applicable arrest to one based on violations other than a DUI, but rather applies to arrests for any violation of the Code. Driving under the influence is a violation under section 11-501 of the Code. See 625 ILCS 5/11-501 (West 2016). Here, Troy was involved in a fatal motor vehicle accident and arrested for DUI just after 6:55 p.m. upon his discharge from Hinsdale Hospital. He was later transported to Silver Cross Hospital where the samples were taken. Therefore, section 11-501.6(a) applies.

¶ 51 In *Fink v. Ryan*, 174 Ill. 2d 302, 307 (1996), our supreme court found that chemical testing done pursuant to section 11-501.6 did not violate the defendant's fourth amendment rights because the statute "falls within the 'special needs' exception to the fourth amendment. The State of Illinois has a special need beyond the normal needs of law enforcement to determine whether drivers are chemically impaired and to suspend those drivers' licenses. Under the limitations contained in the amended statute, drivers are subject to chemical testing only when testing will be minimally intrusive and only after a driver's expectations of privacy have been further diminished by the factors set forth in the statute." *Fink*, 172 Ill. 2d at 312. However, a driver's implied consent to testing under the statute may be revoked if he refuses to consent to a test. *People v. Miranda*, 2012 IL App (2d) 100769, ¶ 20. If a driver refuses testing, the law enforcement officer making the request must submit a sworn report to the Secretary of State "certifying that the test or tests were requested under subsection (a) and the person refused to

submit to a test or tests," and upon receipt of the report, "the Secretary shall enter the suspension and disqualification to the individual's driving record." 625 ILCS 5/11-501.6(d) (West 2016).

¶ 52 Here, the record does not indicate that Troy revoked his consent to testing under section 11-501.6. No evidence was presented that Troy refused to submit to testing at Silver Cross Hospital, where the samples were ultimately drawn, and there is no sworn report in the record from a law enforcement officer certifying that Troy refused to submit to testing. Since Troy submitted to the testing pursuant to section 11-501.6, and our supreme court has found the provision constitutional on its face, there was no violation of his fourth amendment rights.[1]

¶ 53 Defendants next contend that they are entitled to a new trial on compensatory damages because numerous errors deprived them of their right to a fair trial. First, they argue that they were denied a fair trial where plaintiffs sought punitive damages solely for the purpose of presenting "prejudicial and otherwise irrelevant evidence to inflame the passions and prejudices of the jury." Specifically, defendants challenge the admission of testimony about Troy's impairment from alleged drug use and Troy's prior convictions for speeding.

¶ 54 Punitive damages are awarded to punish the offender, and to deter him and others from committing such acts of misconduct in the future. *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 89. Such damages are appropriate where "the tort is committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." (Internal quotation

[1] Defendants also appear to argue that because no exigent circumstances existed in this case, applying section 11-501.6 to excuse the warrant requirement is unconstitutional as applied to Troy. However, since the trial court did not address this particular issue in an evidentiary hearing, and therefore made no corresponding findings of fact, we can only address a facial constitutional challenge to the statute. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 228 (2010).

marks omitted.) *Slovinski v. Elliot*, 237 Ill. 2d 51, 58 (2010). "The trial court submits the issue of punitive damages to the jury when it determines that, as a matter of law, the evidence will support an award of punitive damages." *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1138 (2004). Defendants do not argue that the trial court erred in finding the facts of this case justify the imposition of punitive damages, nor do they challenge the punitive damages award. Rather, they argue that the evidence relating to punitive damages inflamed the passions and prejudices of the jury in favor of plaintiff on the issue of compensatory damages, thus requiring a new trial.

¶ 55 However, "case law makes clear that where separate instructions and jury forms are given concerning issues relating to compensatory and punitive damages, no prejudice arises from the fact that after trial it is determined that punitive damages should not have been an issue." *Marston v. Walgreen Co.*, 389 Ill. App. 3d 337, 348 (2009). In *Marston*, this court found that although punitive damages could not be awarded in the case, the introduction of evidence relating to punitive damages was not so prejudicial as to require a new trial where separate jury instructions and verdict forms were given on the issues of compensatory and punitive damages. Here, the record shows that the trial court gave the jury separate instructions and separate verdict forms for compensatory and punitive damages. Following *Marston*, we find that even if the admission of evidence relating to punitive damages was error, no prejudice arose necessitating a new trial.

¶ 56 Defendants disagree, arguing that plaintiffs executed a "bait-and-switch" strategy in order to present inflammatory evidence that would improperly inflate compensatory damages. However, if this evidence did inflame the jury's passions and prejudices, as defendants contend, that fact would be reflected in the award for punitive damages rather than compensatory damages

because the jury was specifically instructed to consider the evidence only for the purpose of punitive damages. "Absent some indication to the contrary, we must presume that jurors follow the law as set forth in the instructions given them." *People v. Wilmington*, 2013 IL 112938, ¶ 49. The jury's award of $100,000 in punitive damages, modest in comparison to the compensatory damages award, reflects that the jury was not unduly influenced by plaintiffs' evidence of willful and wanton conduct.

¶ 57 Defendants next argue that plaintiff improperly focused the jury's attention on Troy's decision not to testify, violating his fifth amendment right to remain silent. Plaintiff points out that defendants failed to make a contemporaneous objection to these comments during trial. "Failure to object at trial results in forfeiture of the issue on appeal." *Baumrucker v. Express Cab Dispatch, Inc.*, 2017 IL App (1st) 161278, ¶ 54. Nonetheless, Troy was the defendant in a civil proceeding. "It is 'the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties in civil actions when they refuse to testify in response to probative evidence offered against them.'" *People v. $1,124,905 U.S. Currency and One 1988 Chevrolet Astro Van*, 177 Ill. 2d 314, 332 (1997) (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)). Furthermore, as defendants acknowledge, evidence of Troy's silence "was relevant only to Plaintiff's punitive damages claims." As discussed above, any evidence relating to punitive damages that may have been improperly admitted did not prejudice defendants. Defendants "are not entitled to an error-free trial, but only a fair one, free of substantial prejudice." *Habitat Co.*, 301 Ill. App. 3d at 443.

¶ 58 Defendants also challenge the trial court's admission of testimony by plaintiff's experts Smith and Busch. Defendants argue that the trial court erred in allowing Smith to give his opinion on plaintiff's future lost earnings as an EMT, when plaintiff never worked as an EMT.

They contend that such testimony is too speculative and cite to *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill. App. 3d 257 (1982). In *Christou*, the plaintiff testified that on the date of his accident he worked as a busboy but was in training to be a bartender. *Id*. at 259-60. The plaintiff also testified that his ambition was to own a restaurant someday. *Id*. at 260. The court found that although it was proper for the plaintiff to testify about his earnings as a bartender, testimony about future earnings as a restaurant owner was "too remote and speculative *** to be competent evidence of reduced earnings." *Id*.

¶ 59 To recover lost earnings, plaintiff need only present evidence that will establish, with a fair degree of probability, a basis for assessing damages. *Levin v. Welsh Bros. Motor Service, Inc*., 164 Ill. App. 3d 640, 656 (1987). Unlike the plaintiff in *Christou*, who testified about wanting to open a restaurant but had taken no steps toward that goal before the accident, plaintiff here had already earned an EMT certificate and could have worked as an EMT. In fact, the court in *Christou* allowed the plaintiff to testify about earnings as a bartender even though he was only in training at the time of the accident, and there was no evidence that he had worked as a bartender prior to the accident. The trial court did not err in allowing Smith to testify about plaintiff's lost earnings as an EMT.

¶ 60 Defendants also argue that Smith's testimony regarding plaintiff's lost earnings as an electrician was improper, where no evidence was presented that plaintiff thought about working as an electrician before the accident. We find that even if this testimony was erroneously admitted, it did not influence the jury's award. Smith testified that the present cash value of plaintiff's likely earnings as a person with disabilities and an associates' degree was $1,580,000, while the present cash value of a career as an EMT was $3,805,995, or $6,320,000 as a union electrician. The difference is a little over $2 million for a career as an EMT, and almost $5

million for a career as an electrician. The jury awarded plaintiff $2 million for the value of lost earnings and benefits, reflecting its proper consideration of plaintiff's career as an EMT, rather than his career as an electrician. No reversible error occurred here.

¶ 61 Defendants challenge Busch's testimony regarding plaintiff's future medical care, treatment and services, because she was not a medical doctor and her testimony lacked proper foundation. Defendants, however, do not cite any authority in support of their argument in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016). "A contention that is supported by some argument but no authority does not meet the requirements of Rule 341 and is considered forfeited" on appeal. *Crull v. Sriratana*, 388 Ill. App. 3d 1036, 1045 (2009).

¶ 62 Defendants next contend that they were denied a fair trial because the jury used verdict form H, which had separate damages lines for pain and suffering and emotional distress, resulting in an improper double recovery. We find defendants' arguments on this issue unavailing. In closing argument, plaintiff's attorney discussed these categories as separate forms of damages. He described pain and suffering as relating to plaintiff's physical pain and the medical procedures he must undergo, and emotional distress as relating to plaintiff's intimacy issues and fear for the future. Furthermore, in instructing the jury the trial court described pain and suffering and emotional distress as separate forms of damages. It is presumed that the jury understood and followed the court's instructions. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 535 (2000). Defendants do not point to any portion of the record indicating that the jury was confused. In the absence of some supporting evidence that the jury was confused or awarded a double recovery, defendants' argument is "mere conjecture." *Babikian v. Mruz*, 2011 IL App (1st) 102579, ¶ 20.

¶ 63 Defendants also challenge the wording of plaintiffs' joint instruction 1 regarding adverse inferences drawn from Troy's silence. However, the record does not show that defendants offered an alternative instruction to the court. "A party forfeits the right to challenge a jury instruction that was given at trial unless it makes a timely and specific objection to the instruction and tenders an alternative, remedial instruction to the trial court." *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 557 (2008).

¶ 64 For the foregoing reasons, we find that the trial court did not err in denying defendants' motion for a new trial on compensatory damages. Defendants alternatively challenge the amount plaintiff was ordered to remit. We will discuss defendants' contentions in our consideration of plaintiff's cross-appeal.

¶ 65 II. PLAINTIFF'S CROSS-APPEAL

¶ 66 In his cross-appeal, plaintiff contends that the trial court erred in ordering a remittitur and asks this court to reinstate the jury's verdict. Although plaintiff consented to the remittitur, such consent "as a condition to the denial of a new trial does not preclude the consenting party from asserting on appeal that the amount of the verdict was proper. No cross-appeal is required." Supreme Court Rule 366(b)(2)(ii) (eff. Feb. 1. 1994). However, "a party who consents to a remittitur is bound thereby and is precluded from appealing the entry of the remittitur unless the opposing party appeals from the judgment." *Haid v. Tingle*, 219 Ill. App. 3d 406, 415 (1991). Since defendants appealed from the trial court's order below as to plaintiff, he may challenge the remittitur on appeal.[2]

[2] However, since defendants did not appeal Swenson's remittitur order, Swenson cannot (and did not) challenge the remittitur on appeal. *Haid*, 219 Ill. App. 3d at 415; *Anderson v. Greyhound Lines, Inc.*, 34 Ill. App. 3d 643, 645 (1975) (finding that since the defendant has not appealed, the court "cannot review the sufficiency of the jury's verdict since the plaintiff has consented to

¶ 67 "A remittitur is an agreement by the plaintiff to relinquish, or remit, to the defendant that portion of the jury's verdict which constitutes excessive damages [citations] and to accept the sum which has been judicially determined to be properly recoverable damages [citation]." *Haid*, 219 Ill. App. 3d at 411. The determination of damages, however, is a function of the jury as trier of fact. *Kindernay v. Hillsboro Area Hospital*, 366 Ill. App. 3d 559, 572 (2006). Therefore, a court may set aside the jury's verdict only if the verdict "is so excessive that it indicates that the jury was moved by passion or prejudice or unless it exceeds the necessarily flexible limits of fair and reasonable compensation or is so large that it shocks the judicial conscience." *Id*. A court "should not grant a remittitur where the jury's award falls within the flexible range of conclusions reasonably supported by the evidence." *Aguilar-Santos v. Briner*, 2017 IL App (1st) 153593, ¶ 76. We review the trial court's grant or denial of a remittitur under an abuse of discretion standard. *Id*.

¶ 68 As we have already found there is no evidence the jury was moved by passion or prejudice, we agree with plaintiff that the trial court erred in setting aside the jury's verdict and granting the remittitur based on that alleged error. Defendants also argue, however, that the jury's verdict is so large it shocks the judicial conscience and asks this court to further reduce plaintiff's award to $923,499.

¶ 69 In finding the jury award excessive, the trial court looked at approximately 85 verdicts cited by defendants "with similar facts" and found no other case "where the jury awarded similar amount [*sic*] for a back injury that did not require an overnight stay in a hospital." The court also "considered lower awards made in similar cases cited by the defendants" and although the court

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the remittitur rather than to risk a new trial and has therefore waived her right to contest this issue").

found it "arguable whether or not [plaintiff's] verdict is an outlier," it nevertheless determined that "the amount is not fair and reasonable compensation for [plaintiff's] injuries, serious as those injuries may be."

¶ 70 To determine the proper amount for plaintiff to remit, the trial court used the opinion in *Mikolajczyk v. Ford Motor Co.*, 374 Ill. App. 3d 646 (2007) (*overturned on other grounds by Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516 (2008)), as guidance. In *Mikolajczyk*, the court found that the jury's award of $25 million for loss of society "exceeds all fair and reasonable compensation and is so large as to shock the judicial conscience." *Id*. at 674. It remanded the case to the trial court to determine the appropriate amount of remittitur, but warned that it "would certainly find unreasonable an award of any more than one-half of the loss of society award settled upon by the jury." *Id*. The trial court below acknowledged that *Mikolajczyk* "does not present a formula for reducing verdicts." However, it noted that the court in *Mikolajczyk* "did indicate a remittitur to 9 million would be fair on a verdict of 25 million for loss of society." Accordingly, the trial court remitted plaintiff's award for loss of a normal life "from 4 million to 1 million, for pain and suffering from 3 million to 1.5 million, [and] for emotional distress from 1 million to $500,000." The court also determined that the award to Swenson's estate for loss of society should be reduced from $10 million to $5 million, and the award for grief and sorrow should also be reduced from $10 million to $5 million.

¶ 71 The trial court relied on comparisons to other cases cited by defendants in finding that the jury's awards were excessive, and relied on *Mikolajczyk* to determine the proper amounts to remit. Illinois courts generally "have declined to make such comparisons, recognizing there is no mathematical formula for deciding whether an award is fair and reasonable." *Carroll v. Preston Trucking Co., Inc.*, 349 Ill. App. 3d 562, 572 (2004). Rather, an award for a personal injury must

be examined in the light of the particular injury involved, with deference to the discretion of the jurors who apply their combined wisdom and experience in determining an award. *Epping v. Commonwealth Edison Co.*, 315 Ill. App. 3d 1069, 1073 (2000). As we stated in *Barry v. Owens-Corning Fiberglas Corp.*, 282 Ill. App 3d 199, 207 (1996), courts "are neither trained nor equipped to second-guess those judgments about the pain and suffering and familial losses incurred by other human beings."

¶ 72 At trial, Dr. Jido testified about plaintiff's constant pain and described the painful radiofrequency ablation procedure plaintiff must undergo every two to six months to help with the pain. Plaintiff's mother testified that he does not socialize with others as he used to, and his father testified that plaintiff no longer engages in activities he enjoyed before the accident, cannot work in the family's construction business, and is now a completely different person. Plaintiff testified that he used to be a physically active person but now is a "shadow" of his former self, and he feels like a burden to others. Plaintiff's ongoing pain issues also affect his relations with his girlfriend, and being in his early twenties, he worries about his future and what kind of father he will be for the children he hopes to have.

¶ 73 Plaintiff's counsel asked the jury to award $1 million for past and future emotional distress, between $3 million and $5 million for past and future pain and suffering, and between $3 million and $5 million for loss of a normal life. The jury awarded $1 million for emotional distress, $3 million for pain and suffering and $4 million for loss of a normal life. We cannot say that the amounts awarded by the jury exceed the flexible limits of fair and reasonable compensation, or are so large that they shock the judicial conscience. Even the trial court conceded that it is "arguable whether or not [plaintiff's] verdict is an outlier." The trial court's reduction of these awards by about 50 percent, presumably because the court in *Mikolajczyk*

believed 50 percent of the jury award would be a more appropriate award, is no more reasonable than the jury's verdict. We reiterate that the assessment of damages is primarily an issue of fact for the jury and courts must give deference to the careful and deliberative jury process. *Epping*, 315 Ill. App. 3d at 1073. Every indication in the record shows that the jury below conducted itself in a thoughtful, proper manner and took care in arriving at the verdicts. Therefore, we find that the trial court abused its discretion in overturning the jury's award and ordering a remittitur.

¶ 74 Defendants further argue that plaintiff should be awarded only $200,000 for the present cash value of past and future medical care, treatment and services, and $223,499 for the present cash value of past and future lost earnings, based on the opinion of defendants' experts. However, plaintiff's experts had different conclusions, and the trial court found that "the award for economic damages [was] proper" and that "[t]he estate's loss of money and benefits and [plaintiff's] medical expenses and lost earnings were proper as the jury chose to believe plaintiff experts rather than defendants." See *Gulino v. Zurawski*, 2015 IL App (1st) 131587, ¶ 75 (finding that "[t]he mere fact that the jury resolved the conflicting [expert] testimony against defendants does not render the verdict in this case against the manifest weight of the evidence"). We see no reason to disturb the trial court's finding.

¶ 75 For the foregoing reasons, we vacate the trial court's remittitur order of December 28, 2016, as to plaintiff, and reinstate the trial court's order of April 25, 2016, entered on the jury's verdict.

¶ 76 Order vacated; judgment on the verdict reinstated.