NO. 4-10-0607 Order Filed 4/4/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

AARON LEISCHNER,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	McLean County
ADVANCE STORES COMPANY, INC., d/b/a ADVANCE AUTO PARTS,	)	No. 07L175
Defendant-Appellee.	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

Held: In a civil case, a trial court does not abuse its discretion by refusing to dismiss a prospective juror if, despite the prospective juror's initial claims of being biased, the prospective juror, in response to further questioning, assures the court that he will be fair to both sides and that he will render a decision based on the evidence, faithfully applying the legal principles that the court will provide him.

A jury does not have to believe a treating physician over a physician who merely reviewed the medical records. As long as the physician has a factual basis for his opinions, it is solely the jury's prerogative to assess the credibility of that physician's testimony and to decide what significance to attach to any discrepancies.

The jury's finding of contributory negligence in this case is not against the manifest weight of the evidence, considering that plaintiff had worked at the store for several years and, arguably, should have been familiar with the uneven surface of the cracked sidewalk outside the doorway and considering that, by his own admission, he was not watching where he was walking when he stepped off the threshold.

In this premises-liability case, plaintiff, Aaron Leischner, won a verdict

against defendant, Advance Stores Co., Inc., doing business as Advance Auto Parts, but the jury awarded him only $1,972. And to make matters worse from plaintiff's perspective, the jury reduced this award by 40% because it found him to be 40% at fault.

Plaintiff appeals on three grounds: (1) the trial court abused its discretion by refusing to excuse a prospective juror who admitted outright that he was biased against plaintiffs in general, (2) the award of $1,972 was so low as to be against the manifest weight of the evidence, and (3) the finding of comparative negligence was against the manifest weight of the evidence.

Considering the *voir dire* of the prospective juror in its entirety, we will not go so far as to say that his inclusion in the jury was arbitrary or beyond the bounds of reason. Nor do we find the verdict to be against the manifest weight of the evidence, either in the assessment of damages or the apportionment of fault. Therefore, we affirm the trial court's judgment.

I. BACKGROUND

A. The *Voir Dire* of David Kirkwood

During *voir dire*, one of the potential jurors, David Kirkwood, disclosed he had been a defendant in a civil case involving an automobile accident, in which his 16-year-old daughter had rear-ended a car while picking up her cell phone. His insurer had settled the case by paying some amount to the plaintiffs. When the trial court asked Kirkwood if there was anything about that experience that would affect his ability to be fair in the present case, he answered, "Oh, yeah." He said: "I have got to tell you, I would probably have a natural bias against the plaintiff ***."

Kirkwood recounted his experience as follows:

"So I was about to take my daughter and go home, and I knew the deputy that was handling the accident, and he took me aside and he said, you're going to get raped. And I said, what do you mean? He said, you know who we are dealing with here? And I won't go into any specifics, but it was a car load of people, and they knew what they had, and he said, you're going to go through the shoot. He said, I hope you've got really good insurance, because he went on to tell me what was going to happen.

***

[A]s it turns out, *** there was a large settlement made, that's all [State Farm] would tell me, to the plaintiffs, none of whom, in my opinion, were hurt at the time. And, in fact, they were pretty mad at my daughter, so--

THE COURT: Who was pretty mad at your daughter?

MR. KIRKWOOD: The plaintiffs. There was nothing wrong with these people; nothing whatsoever wrong with them."

The trial court asked Kirkwood:

"THE COURT: Again, I don't want to put words in your mouth, but I'm getting the impression here that that was a bad experience for you?

MR. KIRKWOOD: Oh, yeah.

THE COURT: But my reverse question is, acknowledging that it was a bad experience for you, do you think that every case should be decided on its own merits?

MR. KIRKWOOD: Let me put it to you this way. You would have to go further to prove to me liability--negligence, now, than you would have in the past. It would take a lot more for me to buy into somebody being injured now than it would have five years ago, which is when this happened.

THE COURT: Remember, you haven't heard any evidence in this case nor has any been submitted--

MR. KIRKWOOD: I understand, and the only thing I've got is that lingering thought in the back of my mind. You know, it's like, come on, level with me here, what's going on? That's the kind of attitude I would have going in. That's not that I wouldn't try to make a fair decision, but I would have that kind of attitude.

I would also, in terms of monetary damages, having been through what we went through, you know, you'd have to do a whole lot to convince me about, you know, the amounts, and what's fair and what's not fair, so I don't know whether that would be, you know, a bias or not.

THE COURT: You recognize what I've already mentioned before, which is the plaintiff would bear the burden

of proof, which is a preponderance of the evidence, more probably true than not. Are you indicating that you would hold the plaintiff to a higher standard?

MR. KIRKWOOD: Yes, I would; yes, I would; and that's why I'm saying, I would have a bias. I would, you know, you would really have to show me that somebody was really hurt, and it was no fault of their own.

THE COURT: And so, regardless of what the law is and the fact that you would be required to follow the law, you're indicating, and tell me if I'm wrong, that you would hold the plaintiff to a higher standard that what the law would require?

MR. KIRKWOOD: I shouldn't say that. You would have to really sell me that it fell within the parameters of the law as stated.

THE COURT: Do you acknowledge that that could occur in this case?

MR. KIRKWOOD: Yes, I could be reasonable in that respect.

* * *

THE COURT: And so while you do have certain predispositions, life's experiences, if you would, as you come into court, do you feel that you would be able to go ahead and divorce yourself from your personal situation and decide this

case solely based upon the facts as you would determine them to be and the law as the court would instruct you?

MR. KIRKWOOD: Yeah, I think I can, if it was well presented. I mean, you've got to sell me, you know? But that's--yeah, I could do that.

THE COURT: You would hold the party to their burden of proof?

MR. KIRKWOOD: Right.

THE COURT: Mr. Gregory [(plaintiff's attorney)]?

MR. GREGORY: Mr. Kirkwood, I guess, are you saying that you believe that you can be fair in this case or that you can not be fair?

MR. KIRKWOOD: I'm saying that you would have to really to [*sic*] a good job of convincing me. I mean, I guess--

MR. GREGORY: Theoretically speaking, if the defendant would come in and try to argue that the plaintiff was not injured, would that affect your ability to be fair in this case?

MR. KIRKWOOD: Not--like I said, both sides would have to make a really good case one way or the other. What I'm saying is, I don't have any sympathy for a plaintiff in a liability case until it's proven to me that it was through no fault of their own. If I can't believe it was through no fault of their own, I'm not going to be inclined to go along with, you know, a plaintiff's

claim.

MR. GREGORY: Okay. If the law says that even if they're partially at fault, they're still entitled to damages, would you be able to follow that?

MR. KIRKWOOD: I could, but, there again, you're going to have to sell me on the level of injury and the amount of damages that justify--the justification for the amount of damages.

MR. GREGORY: When you say sell me?

MR. KIRKWOOD: You've got to convince me. ***

***

*** I'm not going to award somebody a million dollars for a broken foot. I can tell you that right now. That ain't going to happen. I mean, in my personal case, so [*sic*].

MR. GREGORY: So do you have a preset limit in your mind, then, as to what to award people--

MR. KIRKWOOD: No, because, to me--

MR. GREGORY: --because you're saying you wouldn't--

MR. KIRKWOOD: To me, it--I don't consider--I've had a broken foot, so I don't consider that to be worth that kind of money, okay? What I'm saying is, convince me that you've got a claim to begin with; and, then, number two, that the amount of money that you're asking for is corresponding to the injury

that occurred; and if you're telling me that it's only a percentage or a partial, and you still want, you know, this amount of money? No, I'm sorry, I can't go along with that.

MR. GREGORY: That's all I have.

MR. VARNEY [(defendant's attorney)]: Your Honor, I have a few follow-up questions.

THE COURT: Yes.

MR. VARNEY: Mr. Kirkwood, if the plaintiff meets their burden to establish negligence and meets their burden to establish damages, could you be fair in rendering an award in favor of the plaintiff assuming they had met their burden?

MR. KIRKWOOD: Making that assumption, yes.

MR. VARNEY: Okay. The law also says, and the judge has asked, if all the jurors, that you have to put aside your sympathy, bias, and prejudice, to hear all of the evidence, presented by both sides, follow the law instructed by the judge, and you'll deliberate with your jurors--your fellow jurors, take into mind what they hear and what they have to say, and reaching a decision, can you be fair in reaching a decision based on the evidence that's presented and what you hear?

MR. KIRKWOOD: I think I might, yeah, and I would give it my best shot. Let me put it to you that way.

MR. VARNEY: Absolutely. If you approach it with an

open mind, you hear the evidence, determine fault based on that evidence, and make an award based on that evidence on there, that's all we can ask you to do, right? Can you do that?

MR. KIRKWOOD: Yeah, I can go along with that.

* * *

MR. VARNEY: And you could be fair in this case, correct?

MR. KIRKWOOD: I would give, like I said, I would give it my best shot.

MR. VARNEY: That's all we ask, your best shot. You would be fair and give it your best shot, is that a fair statement?

MR. KIRKWOOD: Yes."

At a time when he had one peremptory challenge left, plaintiff objected to Kirkwood and moved to exclude him for cause. The trial court denied the motion. Plaintiff then used his remaining peremptory challenge to excuse a juror other than Kirkwood.

B. Evidence From the Trial

1. *The Accident*

On November 25, 2005, after getting off work at 1 p.m., plaintiff went to defendant's store to buy some oil, a store he had visited many times in the past. In fact, he had worked at the store from 1998 through November 2003.

Plaintiff went into the store, bought three quarts of oil, and headed out the door, carrying the three quarts without a bag. Outside the doorway of the store, near the threshold, was a hole or depression about 9 or 10 inches long, 2 to 2 ½ inches deep, and 4

to 4 ½ inches wide, by plaintiff's estimate. According to plaintiff's testimony, he could not see this hole from inside the store because a three- or four-inch metal frame at the bottom of the doorway blocked his view. As he stepped out of the doorway, he had the three quarts of oil in his left hand, and he used his right hand to push the door open. He was walking at a normal, unhurried pace, looking straight ahead to make sure he did not run into anyone. His left foot went down into the hole, and he felt a painful "break or crack" in his left ankle. He dropped the oil and grabbed hold of the door to keep from falling to the ground.

Plaintiff testified that before this accident, he was not having any problems with his left ankle and he was not seeing a doctor for his left ankle. Immediately after the accident, however, his left ankle began hurting and swelling, and it was swollen and stiff by the time he arrived home. He went to Prompt Care right away. A physician there took some X-rays, wrapped the ankle in a bandage, and told plaintiff he could not work.

2. *Subsequent Difficulties Working at Target*

At the time of the accident, plaintiff was employed full-time at Target as a "trainee for logistics management." He had been employed there for 2 1/2 months. He missed 7 days of work after the accident, and because he still was in his 90-day probationary period, he was worried about missing any more days. His podiatrist, Carl Cortese, had fitted him with a "Unna Boot" and a "Cam Walker," but Target would not allow him to wear such things in the workplace; he had to be in uniform. On December 5, 2005, plaintiff persuaded Cortese to release him to work, only for the sake of saving his job.

Plaintiff testified that upon his return to work, he had physical difficulties performing the job, which required him to be on his feet eight hours a day--difficulties that

he did not have before the accident.

On December 21, 2005, Target discharged plaintiff. His attorney, William L. Gregory, asked him:

> "Q. And what is your understanding of the reason that you were let go?
>
> A. They decided to give me my 90-day review early. It stated in there that number of days that I missed from work, but there was also some work performance things in there as well, you know, not up to standards at that time, but my not being up to standards, I believe, is because I wasn't at work.
>
> * * *
>
> Q. Had the company expressed any issues with your job performance prior to the accident?
>
> A. They felt I was a little rough with some of the employees and asked me to tone it down a little, so I tried to do that.
>
> Q. Had they given you any indication that you were going to be let go prior to your injury?
>
> A. No.
>
> * * *
>
> Q. What is your understanding of the relevance of your injury to your termination?
>
> A. My understanding was that I had missed so much of

> work, that I wasn't grasping certain outlined aspects of my duties and obligations, so they weren't willing to extend that extra 10 days due to the injury. They were just going to cut me off."

Consequently, plaintiff was off work from December 21, 2005, until he found new employment on approximately February 1, 2006, at Bridgestone/Firestone OTR as a service attendant.

3. *Medical Equipment Plaintiff Has Used*

a. Unna Boot and CAM Walker

Dr. Liu examined plaintiff the day after the accident and after bandaging his ankle and giving him crutches, referred him to Cortese. Cortese placed plaintiff in a Unna Boot and a CAM Walker. A Unna Boot was a soft cast, and a CAM Walker was a boot that was laced over the Unna Boot so as to give greater stability to the ankle. Plaintiff used the Unna Boot and CAM Walker for three weeks, until his visit with Cortese on December 5, 2005, when Cortese removed the Unna Boot and CAM Walker and replaced them with a compression sock.

b. Malleotrain

After December 5, 2005, plaintiff continued having pain in his left ankle as well as a clicking or popping sensation on the outside of the ankle. Because of this ongoing pain and clicking, he returned to Cortese on January 4, 2006, and Cortese gave him a new type of brace, a Malleotrain. Plaintiff described the Malleotrain as follows: "[I]t's more of a fitted, thick, elastic, like slip-on device, and it's got two silicone-like implants where your ankle also would be on either side to help keep everything together. [Cortese] says it's--

when walking, it helps keep everything lined up so things don't move around as much."

Plaintiff testified he had been using the Malleotrain consistently since he received it in January 2006, up through the time of trial--a period of over four years. Nevertheless, he still had pain in his ankle three or four times a week, including intense pain the first 10 steps of the day.

c. AFO Brace

Because the clicking or popping sensation in his left ankle persisted, plaintiff saw Cortese again on May 18, 2006, and Cortese prescribed an AFO brace for him to use at work. Plaintiff testified: "That fits on my foot and goes inside my work boot and that completely isolates my foot from the flexing altogether, so I still have the safety of the boot, and I have the AFO brace which immobilizes pretty much the flexing of my ankle to keep that movement from irritating my foot, my ankle."

Plaintiff still uses the AFO brace, per Cortese's recommendation. Even so, he still has pain and a clicking in his left ankle, although the pain and clicking are not as bad as they used to be. He was wearing the Malleotrain at the time of trial, but he testified that when he returned to work on April 19, 2010, he would use the AFO brace again at work. According to plaintiff's testimony, Cortese agreed to his continued use of both the AFO brace and the Malleotrain. Before the accident, he never used an AFO brace or a Malleotrain.

4. *Changes in Plaintiff's Physical Activities*

Plaintiff described himself as physically active before the accident. For example, from September to October 2005, he coached his son's football team. Also, before the accident, he took walks and went on bike rides and hikes with his children. After the

accident, he did not do any of those things anymore, because he was afraid of hurting his left ankle. He tried playing softball with a brace on his left ankle but only succeeded in injuring his knee. He could not risk treading on uneven ground. All the time, he had to be hyper-aware of where he was taking a step, such as when he stepped off a curb.

Plaintiff's wife, Jennifer Leischner, likewise testified that his level of physical activity had declined radically since the accident. She confirmed that plaintiff had no problems with his ankle during the eight to nine years she was married to him before the accident.

5. *Documentary Evidence of Losses*

Plaintiff submitted a document from Target stating he had missed a total of 56 hours of work from November 26, 2005, to December 5, 2005.

He also submitted a bill from Cortese, but it is unclear what the total of that bill is, since the bill is annotated with handwritten notations of "1/2" next to many of the figures.

In addition to Cortese's bill, plaintiff testified he was billed $154 by Prompt Care and $81 by Dr. Liu.

6. *Brady Lange*

In November 2005, Brady Lange was a full-time employee at defendant's store, having been appointed the store manager that month. He had been an employee of defendant since April 2001. Lange recalled that on November 25, 2005, plaintiff came to him and told him he had tripped and fallen. Plaintiff pointed out the area where he had fallen. Lange saw cracks in the sidewalk and loose pieces of concrete, but he saw no displaced pieces of concrete. The crack that Lange saw and in which plaintiff claimed to have turned his ankle was about eight inches long, but it was neither wide nor deep. To Lange's knowledge, the cracks in the sidewalk had existed since 2001, and no one except plaintiff ever complained about the sidewalk.

7. *Timothy Hocking*

Timothy Hocking testified that on November 25, 2005, he was working at the parts counter of defendant's store when plaintiff came up to him, said he had fallen, and asked to speak with Lange. Hocking saw no indication that plaintiff was injured, and plaintiff complained of no injury. Hocking looked at the area where plaintiff said he had

fallen, and he saw some cracks and a piece of wobbly concrete, but none of the pieces of concrete were missing. Even in the areas of the cracks, the sidewalk appeared to be fairly level. Hocking confirmed that the sidewalk had been in the same condition since he began working at defendant's store in 2004.

8. *Testimony of Physicians*

a. Carl Cortese

Plaintiff presented the evidence deposition of his physician, Carl Cortese, and defendant presented the evidence deposition of another physician, Oleg Petrov. Cortese testified that when plaintiff first consulted him on November 28, 2005, he found severe swelling on the outside of plaintiff's left ankle. He could not do a complete orthopedic examination at that time because plaintiff was in so much pain. He diagnosed plaintiff as suffering from a severe inversion sprain and a possible fracture of the malleolus. He stated that the inversion sprain had caused plaintiff's ligaments on the outside of his left ankle to stretch and that this sprain resulted from the accident at defendant's store. Cortese also diagnosed a chip fracture in the exact location of the inversion sprain and opined that it was due to the accident.

On the basis of numerous examinations of plaintiff from November 28, 2005, to December 3, 2009, Cortese's final diagnosis was a subluxation of the peroneal tendon, post-traumatic arthritis of the talofibular joint, and tendinitis of the left ankle. In Cortese's opinion, all those conditions resulted from the accident of November 25, 2005, and they were permanent.

b. Oleg Petrov

On the basis of his review of plaintiff's medical records, Oleg Petrov, a

podiatrist, opined that plaintiff suffered an ankle sprain in the accident and that this ankle sprain resolved by December 5, 2005. Petrov concluded that the ankle sprain resolved by December 5, 2005, because a progress note from that date, from Cortese's office, noted that plaintiff reported he was improving, that he felt no pain, and that the swelling was gone. Because Cortese placed no restrictions on plaintiff on December 5, 2005, and released him to return to work, Petrov assumed that plaintiff's injury had healed by that time, as would be expected of a sprain. Consequently, in Petrov's opinion, the medical treatment that plaintiff underwent after December 5, 2005, had no relation to the accident.

Petrov further opined that the ossicles in plaintiff's left ankle, shown by X-rays, were not chip fractures, as Cortese thought, but likely were congenital because plaintiff had ossicles in his right ankle, too. According to Petrov, plaintiff suffered from a forefoot valgus, which was a congenital condition that could cause instability of the ankle. Petrov testified that neither the Malleotrain nor the AFO brace was required due to the injury resulting from the accident. When he reviewed the X-rays for the right and left ankles, the same condition was present in both ankles. He saw no evidence that plaintiff fractured his ankle on November 25, 2005.

In sum, Petrov testified that plaintiff suffered from forefoot valgus in his left foot and that instead of being caused by the accident of November 25, 2005, this condition predated the accident. Forefoot valgus could cause weakness in the ankle or lateral instability, which predisposed plaintiff to lateral ankle sprain.

In reviewing the medical records generated after December 5, 2005, Petrov noted that plaintiff was physically active after the accident. In fact, after the accident, he suffered several injuries from playing softball. One such injury was a tear in the soft tissue

of his left knee, which required surgery. In preparing for the surgery on the left knee, medical personnel studied plaintiff's gait and thoroughly evaluated his left leg. They noted no problems with his left foot or ankle. Because stress or force was placed on the left ankle with no resulting need for treatment, the left foot and ankle evidently were solid and functioning well, in Petrov's opinion.

9. *Jennifer Hanson*

Jennifer Hanson testified that in the fall of 2005, she was the executive team leader of logistics at the Target store in Bloomington and that she completed a 90-day performance review of plaintiff in December 2005. According to the performance review, plaintiff missed approximately seven days of work in late November 2005 and early December 2005, and he was failing in several aspects of his job performance, including keeping the store clean, leadership, and attendance or punctuality. Hanson testified that although the seven days of work that plaintiff missed would have been considered, those absences were not the reason why he failed to meet expectations in his 90-day review. Rather, Target was concerned that he was doing the physical work himself instead of supervising other employees. Hanson testified that even if plaintiff had not missed the seven days, he still would have been discharged. Target let him go because it considered him to be deficient in leadership skills, not because of his attendance.

10. *The Verdict*

The jury returned a verdict in favor of plaintiff and against defendant in the amount of $1,972, consisting of $150 for pain and suffering, $1,136 for medical expenses, and $686 for lost wages. The jury reduced the verdict by 40%, allocating 40% of the fault to plaintiff.

In its affirmative defense of contributory negligence, defendant had alleged that plaintiff was negligent by failing to watch where he was walking, by walking in an area where he knew the surface was not completely flat, and by carrying quarts of oil in his arms instead of in a grocery sack when he knew or should have known that these items would obstruct his vision of the surface of the concrete.

This appeal followed.

II. ANALYSIS

A. The Trial Court's Refusal To Exclude Kirkwood From the Jury

Plaintiff maintains that the trial court erred in overruling his objection to Kirkwood's serving on the jury, considering that Kirkwood stated outright that he was biased against plaintiffs in general, that his previous experience as a defendant in a civil case definitely would hinder him from being fair in this case, that he would hold plaintiff to a higher standard than proof by a preponderance of the evidence, and that he would not award damages above a preset amount. Plaintiff is skeptical of the suggestion that "Kirkwood was supposedly somehow rehabilitated by the court and defense counsel when he said that he might, or would try, to be fair."

Such skepticism certainly is understandable. After all, Kirkwood stated outright--two times--that he was biased: he was biased against plaintiffs in general, and he

would be biased against plaintiff in the present case. Then the trial court proceeded to question him about those statements. But one might wonder, What parts of those statements by Kirkwood needed clarification? Where was the ambiguity in the words "I would probably have a natural bias against the plaintiff" and "I would have a bias"? It is understandable that plaintiff would consider the real purpose of such questioning to be not clarification but "rehabilitation" in a pejorative sense. To a skeptical mind, the court and defense counsel plied Kirkwood with tendentious questions to persuade him to recant his admissions of bias, and in so doing, they did not spiritually transform him so much as drive his bias underground.

This is not to say that Kirkwood lied when he ultimately acceded to the proper creed: when he duly answered yes, for example, to Varney's question "Mr. Kirkwood, if the plaintiff meets their burden to establish negligence and meets their burden to establish damages, could you be fair in rendering an award in favor of the plaintiff assuming they had met their burden?" Bias, however, need not take the form of deliberate, conscious dishonesty; it can operate under the surface; it can be rationalized and obscured by the proper, self-deluding formulations. Of course, any attorney with an ounce of worldly wisdom will realize this, and if a prospective juror, in an unguardedly candid moment, professes a bias in the client's favor, the attorney will struggle to persuade the prospective juror to "reform" himself by giving acceptable answers to questions that would be awkward to answer in any other way.

But if a prospective juror, after being sworn, declares that he is biased in favor of one party or the other, why not take him at his sworn word and dismiss him forthwith instead of undertaking the dubious enterprise of talking him out of what he said earlier

(under oath)? It is difficult to understand how this prospective juror, having stated outright that he is biased, would be worth the risk to a fair and impartial trial--a risk that, one might think could never be definitively eliminated.

And yet this is a risk that courts often are willing to take. Judging by the reported decisions, mostly in criminal cases, the rehabilitation of professedly biased jurors is a common and acceptable thing to do. As the First District put it in *Vrzal v. Contract Transportation Systems Co.*, 312 Ill. App. 3d 755, 759 (2000), "further examination" can alleviate concerns of bias. In fact, the "further examination" in *Vrzal* caused outright declarations of bias seemingly to evaporate into insignificance, just as in the present case. The similarities between *Vrzal* and this case are quite striking. Like the present case, *Vrzal* was a personal-injury case (a wrongful-death case), and a prospective juror, Lynn Harris, expressed doubts about her ability to be impartial. *Vrzal*, 312 Ill. App. 3d at 756. Harris told the court: " '[W]hen I sat down I really didn't think I could be a fair and impartial juror. In sitting here all day I really don't think I could be.' " Remarking that her daughter currently was a defendant in a " 'fender bender,' " Harris admitted that her sympathies leaned toward the defendants. She thought that deep-pocketed corporations constantly were being exploited and harassed by litigious plaintiffs. *Id.* After further questions by the court, however, her initial position of bias in favor of the defendants became increasingly tentative, and in the end, she stated: " 'Yes, I can listen to both sides and be fair.' " *Vrzal*, 312 Ill. App. 3d at 756-58. Consequently, the court declined the plaintiffs' request to exclude Harris for cause, a ruling that the plaintiffs challenged on appeal. *Vrzal*, 312 Ill. App. 3d at 758.

The First District observed that in Illinois, there was "a plethora of criminal

cases dealing with the objectivity and biases of prospective jurors, but a dearth of civil cases addressing those issues." *Vrzal*, 312 Ill. App. 3d at 758. From the criminal cases, the First District distilled the principle that "competency to serve as a juror [was] based upon the entire *voir dire* examination rather than upon selected excerpts or statements of that person." *Vrzal*, 312 Ill. App. 3d at 759. When regarding the *voir dire* examination of Harris in its entirety instead of only the selected excerpts in which she admitted being biased, the First District found no abuse of discretion in the trial court's denial of the motion to exclude her for cause. *Vrzal*, 312 Ill. App. 3d at 755-56. At least, we assume the First District reviewed that ruling for an abuse of discretion, because the First District cited several criminal cases holding that abuse of discretion was the standard of review. See *Vrzal*, 312 Ill. App. 3d at 759.

Abuse of discretion is the most deferential standard of review. *People v. Coleman*, 183 Ill. 2d 366, 387 (1998). The trial court abused its discretion only if it made an arbitrary decision, a decision that exceeded the bounds of reason. *Ruback v. Doss*, 347 Ill. App. 3d 808, 811-12 (2004). The court's refusal to exclude Kirkwood from serving on the jury was not random or based on personal whim. The record discloses some rational basis for the decision, namely, Kirkwood's ultimate statements that he would be fair and make an evidence-based decision, faithfully applying the law as it would be presented to him. Therefore, when we consider the entire *voir dire* examination of Kirkwood, we do not find an abuse of discretion in the trial court's ruling--despite the reservations we have expressed for the sake of avoiding an appearance of disingenuousness.

B. The Validity of the Jury's Verdict

1. *Damages*

Plaintiff challenges the jury's decision to award him only $1,972, contending that the award is so low that it "cannot be upheld." *Daly v. Vinci*, 51 Ill. App. 2d 372, 375 (1964). He quotes *Daly* for the proposition that "an award cannot be upheld where serious damages are sustained and a small or a nominal amount is awarded, especially where the injuries are permanent; or where the plaintiff has been injured and has also incurred expenses as a result of the injuries, and an award is made for less than the amount of the expenses." *Id.*

It is true that in *Daly*, the appellate court held the award of damages to be "clearly inadequate and manifestly against the weight of the evidence." *Daly*, 51 Ill. App. 2d at 387. In *Daly*, however, the testimony of the plaintiff's medical experts was uncontradicted. *Daly*, 51 Ill. App. 2d at 384. The appellate court said: "There is *** no reason, either in law or in policy for affirming a verdict grossly below even the provable special damages, particularly where the plaintiff's permanent injuries have been testified to by the *uncontradicted* medical experts whose diagnoses and treatments are based upon both subjective and objective factors." (Emphasis added.) *Daly*, 51 Ill. App. 2d at 386-87. In fact, the appellate court in *Daly* distinguished a previous decision, *Kaptain v. Overgaard*, 19 Ill. App. 2d 483 (1958) (abstract), on the ground that the medical testimony in *Kaptain* was uncontradicted. The appellate court explained that although it affirmed a "low verdict" for the plaintiff in *Kaptain*, that case was different in that "there was a serious conflict in testimony between plaintiff's and defendant's medical witnesses." *Daly*, 51 Ill. App. 2d at 385.

In the present case, there is a serious conflict between the testimony of Cortese and Petrov. Cortese opined that on November 25, 2005, plaintiff fractured his left

ankle and that the injury to the ankle was permanent. Petrov opined, on the other hand, that plaintiff merely sprained his left ankle on November 25, 2005, and that the sprain had healed by December 5, 2005. Although Cortese opined that the clicking of the tendons in plaintiff's ankle was related to the accident, Petrov opined that the clicking was "not a pathological or problematic thing. It happen[ed] in a lot of people in a lot of different joints"; it was comparable to "a cracking of [the] knuckles," a "movement of ligaments or tendons over small prominences of bone." While Petrov agreed with Cortese's opinion that the clicking sensation was a permanent condition, he disagreed with Cortese that the clicking was due to a subluxation, or dislocation, of the peritoneal tendons in the accident.

Even though Petrov, like Cortese, rendered his opinions on the basis of his training and experience as a board-certified podiatrist, plaintiff argues that for several reasons, we should believe Cortese over Petrov--first of all, because Cortese examined and treated plaintiff whereas Petrov merely reviewed the medical records. Petrov testified, however, that it was unnecessary for him to physically examine plaintiff, because the medical records were thorough. We decline to hold, as a matter of law, that a trier of fact must believe an examining physician over a physician who reviews the medical records.

Second, plaintiff points out that the X-rays of his left and right ankles were taken on different dates, and he argues that Petrov therefore could not have arrived at any valid conclusion by comparing them. The X-rays of the left ankle were taken on November 25, 2005, and November 4, 2009, and the X-rays of the right ankle were taken on September 10, 2007. We do not understand what difference this makes. Petrov's reasoning was that, contrary to Cortese, the ossicles, or free-floating pieces of bone, in plaintiff's left ankle were not the result of a fracture that plaintiff suffered on November 25, 2005,

considering that similar ossicles could be found in plaintiff's right ankle and there was no suggestion that he had fractured his right ankle, too. From a purely logical point of view, it is unclear how taking the X-rays on different dates would weaken the force of that reasoning. And if Cortese appeared to be wrong about this supposed evidence of fracture, the jury could wonder about the accuracy of his other opinions as well.

Third, plaintiff argues that we should disbelieve Petrov because he "admitted" that "Plaintiff continued to complain of awkwardness in his ankle and require a brace as of December 5th." Nevertheless, in the page of Petrov's evidence deposition that plaintiff cites, all Petrov does is acknowledge what Cortese says in his office notes. Petrov does not adopt Cortese's office notes as his own opinion. On the cited page, Gregory asks Petrov:

> "Q. Doctor, I think the last thing--I don't know what I did with the December 5. Going back to--I don't know what exhibit it was marked as, but the December 5, 2005--
>
> A. It's marked as Exhibit 1.
>
> Q. --office note.
>
> In reference to that, isn't it true that Dr. Cortese did note that Mr. Leischner still felt awkward while walking?
>
> A. That the patient says, however, he feels a little awkward while walking.
>
> Q. And isn't it true that Mr. Leischner continued to be treated with a compression grip on his left ankle after that visit?
>
> A. Yes."

So, all Petrov does here is admit what Cortese's notes say--nothing more.

Granted, Petrov does not appear to contradict plaintiff's continuing complaints of instability and pain. Nor does he appear to contradict plaintiff's testimony that he had no symptoms in his left ankle before the accident. Nevertheless, Petrov offered an explanation for the instability of plaintiff's left ankle: plaintiff suffered from "forefoot valgus" in his left foot, a condition that predated the accident, and this condition caused weakness of the ankle, or lateral instability, which predisposed him to ankle sprains. Arguably, this explanation does not account for the apparent absence of symptoms prior to the accident--and maybe Petrov's testimony suffers from a discrepancy in that respect. Nevertheless, because our standard of review on factual questions is deferential, we decline to second-guess the jury's evaluation of these discrepancies. "The function of the jury is to weigh the conflicts and discrepancies in the evidence; to determine, if the testimony of witnesses is credible, in whole or in part; and to draw the ultimate conclusions of fact." *Bernardoni v. Johnson*, 28 Ill. App. 3d 726, 729 (1975). In short, the jury was entitled to believe Petrov over Cortese.

If the jury believed Petrov over Cortese, it could have reasonably declined to award plaintiff the full amount of his medical expenses, namely, the total of $5,794 that he incurred in obtaining treatment from Liu, Prompt Care, and Cortese. According to Petrov, the ankle sprain that plaintiff sustained from the accident was healed by December 5, 2005, and therefore any medical treatment he received after that date was unrelated to the accident. Plaintiff must prove a causal relationship between his claimed damages and the wrong of which he complains. See *Taylor v. R.D. Morgan & Associates , Ltd.*, 205 Ill. App. 3d 682, 688 (1990).

Similarly, the jury could have reasonably declined to award plaintiff the full amount of his claim for lost wages, $3,555.93, because according to Hanson's testimony, plaintiff would have been fired from his job at Target even if he had not missed the seven days of work. According to Hanson, Target was dissatisfied with plaintiff's performance because he was supposed to be a supervisor and he was physically doing the work himself instead of ensuring that others did the work. In light of that testimony, the jury might have inferred that Target discharged plaintiff not because an injured ankle caused him to be absent from the workplace or physically hindered him from the doing the work when he was present but, rather, because his physical participation in the manual labor of the store was excessive for a supervisor.

For example, Hanson criticized plaintiff for being in the trucks, unloading freight, when he should have been "out with his team that was already unloading and stocking the shelves." She testified:

> "The overall performance rating was basically a summary of the entire review, and he did not meet expectations because he was not a leader in this store. One of the things I do remember was he was a doer. He would jump in there and it says in here he tried to be one step ahead of the team instead of with the team, so he was not supervising and leading the team, he was doing the jobs for them."

Hanson also recalled that plaintiff "would pull pallets of freight outdoors to *** storage trailers" and that some of the freight weighed 500 to 1,000 pounds. Apparently, this was not commendable for a supervisor, in Target's view. Hanson testified: "[O]ne of his

problems as supervisor, he was doing the work and not supervising the other employees and making sure they were doing they're [*sic*] work ***." Consequently, the jury could have taken the view that it was not plaintiff's bad ankle that cut short his career at Target. Instead, Target actually wanted him to back off the strenuous physical labor and to be more of a supervisor.

In summary, "[t]he assessment of damages is a question of fact and is within the province of the jury," and "[a] jury's award of damages in a particular case is entitled to substantial deference." (Internal quotation marks omitted.) *Torres v. Irving Press, Inc.*, 303 Ill. App. 3d 151, 156-57 (1999). We do not find the damages in this case to be "manifestly inadequate," and we are unconvinced "that the proved elements of damages have been ignored" or that "the amount awarded bears no reasonable relationship to the loss suffered by the plaintiff." (Internal quotation marks omitted.) *Torres*, 303 Ill. App. 3d at 157 (quoting *Hollis v. R. Latone Construction, Inc.*, 108 Ill. 2d 401, 407 (1985)). The jury awarded lost wages of $686, representing the days of work that plaintiff missed from November 25 to December 5, 2005. The award of $1,136 in medical expenses appears to be reasonable if one accepts Petrov's opinion that any medical expenses that plaintiff incurred after December 5, 2005, were unrelated to the accident. As for the $150 for pain and suffering, the jury appeared to adopt plaintiff's suggestion of awarding him $15 a day for that element of damages. November 25 to December 5, 2005, was approximately 10 days, and $15 times 10 was $150. We do not find these damages to be against the manifest weight of the evidence.

2. *Comparative Negligence*

According to plaintiff, the record is devoid of any evidence that he was

contributorily negligent. The argument could be made, though, that he failed to exercise reasonable care by watching where he was stepping when exiting the store, considering that he had visited the store many times in the past. Indeed, he worked there for several years and therefore should have been aware of the cracks and irregularities in the sidewalk. Plaintiff argues he was behaving reasonably in looking straight ahead, to make sure he ran into no one. The jury did not have to believe, however, that it was necessary for him to stare fixedly ahead. Arguably, he could have first ascertained that no one was in his path and then watched where he was stepping onto the uneven sidewalk. The hypothetical reasonable person would have watched where he was walking when crossing the threshold instead of holding three unbagged quarts of oil in his left hand and awkwardly reaching across his body with his right hand to push open a leftward-swinging door--or so the jury might have concluded. This is a factual determination that we decline to commandeer from the jury.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.