2012 IL App (5th) 100359-U

NO. 5-10-0359

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LORI A. ISOM, Administrator of the Estate of JERRY W. ISOM, Deceased, JORDAN A. ISOM, a Minor, by her Mother and Next Friend, LORI A. ISOM, and LORI A. ISOM,	)	Appeal from the Circuit Court of Saline County.
Plaintiffs-Appellees,	)	
v.	)	No. 00-L-63
WILLIAM R. BARHAM,	)	Honorable Ronald R. Eckiss,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly determined as a matter of law that the decedent was not in the scope of his employment at the time of the accident; the circuit court properly allowed evidence that the defendant had requested an attorney; the alleged evidentiary errors regarding alcohol consumption and lay witness testimony did not unfairly prejudice the defendant and did not require reversal; and the circuit court properly instructed the jury regarding the presumption of vehicle ownership.

¶ 2 The plaintiffs, Lori A. Isom, individually, as next friend, and as special administrator of the estate of Jerry W. Isom, the decedent, and Jordan A. Isom, filed wrongful death and survival actions in the circuit court of Saline County against the defendant, William R. Barham. After trial, the jury returned a verdict for the plaintiffs pursuant to the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2000)), returned a verdict for the defendant

under the survival count (755 ILCS 5/27-6 (West 2000)), and found in favor of the plaintiffs under the Family Expense Act (750 ILCS 65/15 (West 2000)). The circuit court entered judgment on the verdict.

¶ 3 On appeal, the defendant argues that the circuit court erred in summarily determining that the decedent was not in the scope of his employment at the time of the accident, permitting evidence of the defendant's alcohol consumption, allowing lay witness testimony, instructing the jury that the car was presumed to have been the defendant's, and allowing evidence that the defendant declined to answer questions without an attorney present. We affirm.

¶ 4 FACTS

¶ 5 On October 14, 2000, the defendant, who was at the time the warden of the Shawnee Correctional Center, in Vienna, Illinois, and the decedent, Jerry Isom, the dietician at the Shawnee Correctional Center, were returning to the correctional center from Harrisburg. The defendant and the decedent were riding in the State of Illinois Chevrolet Impala assigned to the defendant as warden. The Impala had front bucket seats, a steel box bolted to the floor between the front seats, and a bench backseat.

¶ 6 The defendant had been directed to pick up the Director of the Department of Corrections at the airport in Harrisburg, take the Director and his entourage to a political event at Southeastern Illinois Community College, and then return them to the airport. After doing so, the defendant drove the decedent to the Lakeside Bar and Grill in Harrisburg, and the two left this restaurant at around 10 p.m. Sometime around midnight, while traveling from the restaurant to the correctional center in Vienna on a rural two-lane road, the vehicle left the roadway and struck a tree. The defendant and the decedent were injured. Within minutes after the accident, the decedent died from his injuries.

¶ 7 In their second amended complaint filed on October 25, 2001, and again amended

April 28, 2010, the plaintiffs alleged that the decedent was the passenger in the automobile driven by the defendant and that the defendant was negligent in failing to keep a proper lookout, failing to maintain proper control of the vehicle, driving too fast for conditions, failing to reduce speed to avoid an accident, and failing to keep his vehicle entirely within his lane of travel. In count I, the plaintiff sought recovery pursuant to the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2000)). In count II, the plaintiff alleged negligence under the Survival Act (755 ILCS 5/27-6 (West 2000)). In count III, the plaintiffs sought recovery under the Family Expense Act (750 ILCS 65/15 (West 2000)).

¶ 8 Prior to trial, the defendant filed a motion *in limine* to bar evidence of the defendant's consumption of alcohol on the evening of the crash. In a hearing prior to opening statements at trial, the court considered the defendant's motion *in limine*. The plaintiffs argued that because the defendant was prohibited from driving his state vehicle after consuming alcohol, without regard to intoxication, the evidence of alcohol consumption should be allowed to show that the defendant had a motive to lie about whether he was driving the vehicle, to avoid disciplinary issues and perhaps criminal proceedings. Thus, the plaintiffs argued, the evidence of the defendant's alcohol consumption was admissible as a means of attacking his credibility. The circuit court denied the motion *in limine* and ruled that the evidence would be allowed, provided that the plaintiffs demonstrate that there was an applicable state regulation imposing a duty on the defendant not to drive a state vehicle after consuming alcoholic beverages. The plaintiff showed that the disciplinary rule had previously been admitted in the defendant's workers' compensation case, and the circuit court held that the evidence concerning the regulation would be included in an instruction to the jury.

¶ 9 Before trial, the plaintiffs moved for summary determinations that the defendant was the driver of the car during the accident and that the driver was negligent. The circuit court determined that there was a material question of fact regarding whether the defendant or the

decedent was driving the car at the time of the accident. However, the circuit court granted the plaintiffs' motion for summary determination on negligence, stating, "I don't think there is any issue of fact that the vehicle was operated in a negligent manner at the time of this occurrence."

¶ 10 The plaintiffs also sought a summary determination that the decedent, at the time of his death, was not within the scope of his employment as a dietician for the Shawnee facility of the Department of Corrections. This request followed the plaintiffs' answer to the defendant's affirmative defense that the exclusivity provisions of the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2000)) barred recovery by the plaintiffs because the decedent was working within the scope of his employment when he died. Prior to trial, the circuit court granted the plaintiffs' motion for summary determination and determined that the decedent was outside the scope of his employment at the time of the accident. Despite the parties' contrary positions regarding the decedent's scope of employment, however, the parties stipulated that the defendant was within the scope of his employment at the time of the accident.

¶ 11 The trial witnesses included, among others, the postoccurrence witnesses and the parties, in addition to four accident-reconstruction witnesses and the medical examiner who conducted an autopsy on the decedent.

¶ 12 Pursuant to his evidence deposition, Daniel Stockdale testified that around midnight on October 14, 2000, he was traveling home after a date and noticed a crashed, white car on the right side of the road. He found the car embedded in a tree on the passenger's side and saw the defendant sitting upright in the driver's seat, leaning against the steering wheel. Stockdale at that time did not recognize that there was a second injured man in the front passenger's section. Stockdale returned to his date's house, reporting the accident to Charles James, who called 9-1-1 and returned with Stockdale to the crash site.

¶ 13 Johnson County Deputy Sheriff Brent Schierbaum, who was told by Stockdale and James that there was no passenger, first assessed the defendant. He then with his flashlight inspected the wrecked car and found the decedent, who was trapped from the waist down on the front passenger-side of the car, with his upper body ejecting through the windshield.

¶ 14 Frank Rice, a part-time Johnson County paramedic, also responded to the accident. Rice observed the decedent's position in the vehicle before he was extricated and observed that his upper body was over the dash and through the windshield and his lower body was angled under the dash on the front passenger's side. Rice testified that the decedent "most likely had to be" the passenger in the car because his legs and feet were pinned down in the front passenger area. Rice testified that he had no training in physics or accident reconstruction.

¶ 15 Likewise, David Harrell, a Johnson County emergency medical technician who responded to the accident, testified that when he arrived at the scene, he observed one occupant on the ground and the other leaning over into the windshield from the front passenger's side. Harrell testified that when the fire department cut the car roof, he could plainly see that the decedent's legs were located on the front passenger's side, trapped underneath the dashboard area. Harrell testified that because the decedent's legs were caught between the front passenger's seat and dashboard, he believed that the decedent had been the passenger. Harrell also acknowledged that he had no training in accident reconstruction.

¶ 16 Jamie Price Parker, a Vienna fire department volunteer, arrived at the scene of the crash in the second ambulance and observed that the decedent's upper torso was laid across the dash and that his feet were trapped under the front passenger's dashboard. Parker observed that the roof had crushed in on top of the decedent's shoulders. Parker observed the decedent's extrication from the vehicle. Parker testified that she believed that the decedent had been the vehicle's front passenger because the responders had "to remove his

feet from the passenger floorboard."

¶ 17 Todd Test, who was affiliated with the Johnson County sheriff's department, Johnson County Ambulance service, and the Vienna fire department, arrived at the scene of the crash and observed extensive damage to the passenger's side of the vehicle, which was resting against a tree, with the metal of the car protruding greater than 36 inches into the vehicle. In trying to remove the roof and the decedent, Test found that the decedent's feet were caught underneath the front dash. He took the decedent's right foot up from under the dash into the seat, did the same with his left foot, which then released the decedent and made it possible to remove him from the car. Test testified that he believed the decedent had been the front passenger of the vehicle.

¶ 18 Cheila Ellis, a Johnson County Ambulance paramedic, arrived on the scene and saw the decedent, whose lower extremities were trapped in the front passenger's side of the car, and the defendant, who was lying on the ground near the car. Ellis examined the defendant and then the decedent, found the decedent had a pulse, called for a second ambulance, and returned to the defendant. After the defendant was carried to the ambulance, he was reassessed, alert, and oriented. Ellis detected the odor of alcohol on the defendant's breath and asked if he had been drinking, and he answered that he had. She asked if he had been driving the vehicle, and he did not respond. Ellis testified that the defendant knew he had been in an accident and remained alert and oriented during the trip to the hospital and upon arrival.

¶ 19 Sergeant Jay Hall, who was an Illinois state trooper when he investigated the scene on the night of the crash, testified that he observed the decedent's upper body protruding through the windshield, towards the driver's side, and his legs pinned against the front passenger-side floorboard, between the dash and the passenger's seat. Sergeant Hall believed that the decedent had been the passenger in the vehicle and that the defendant had

been the driver. Sergeant Hall testified that when Ellis asked the defendant if he had consumed alcoholic beverages, he heard the defendant answer in the affirmative. Sergeant Hall testified that he heard the defendant deny that he was driving the vehicle.

¶ 20 On the defendant's arrival to the hospital, he was examined by Dr. Brian Vanderboegh, the emergency room doctor, who noted in the medical records that the defendant had hit the windshield with his face. Medical records of Dr. Mayo, the trauma surgeon who admitted the defendant, stated that the defendant was the driver of a motor vehicle in an accident wherein the passenger had died.

¶ 21 The defendant was also examined by Dr. Hogancamp, a neurologist, who treated the defendant at Lourdes Hospital from October 19, 2000 (four days after the accident), until his discharge. In his notes, Dr. Hogancamp referenced a phone conversation of the defendant's, stating, "Apparently he and his passenger had just talked to his passenger's wife on the cellular phone [before the accident]." Pursuant to Dr. Hogancamp's videotaped testimony at trial, the plaintiffs also offered into evidence an exhibit, a medical record referenced by Dr. Hogancamp, which contained the following statement:

> "October 21, 2000, 0800 a.m.–I do not want to talk with anyone without my attorney present, family exempted. Signed William R. Barham."

¶ 22 After the defendant was discharged from Lourdes Hospital, he was examined by Dr. Hansen in Springfield on October 26, 2000. Dr. Hansen's notes indicated that the defendant had a "head injury," had been "charged with reckless homicide," and had a "passenger killed."

¶ 23 At trial, the plaintiffs presented the video testimony of Dr. Mark LeVaughn, an anatomic and forensic pathologist who performed the decedent's autopsy. Dr. LeVaughn testified that the majority of the decedent's injuries were on the right side of his body and were consistent with his opinion that he was in the front passenger's seat of the vehicle at

the time of the impact. Dr. LeVaughn noted that Dr. Hogancamp's medical history for the defendant included a statement that the defendant was the driver of the vehicle and that he and his passenger had spoken to his passenger's wife on the cellular phone before the accident. Dr. LeVaughn testified that, in his opinion, the decedent was sitting in the right passenger's seat at the time of impact and did not move or change from that position between the time the car left the roadway and the time of impact. Dr. LeVaughn acknowledged that he had no training in biomechanical engineering.

¶ 24 Illinois State Police Trooper Barbee Braddy, who had eight weeks of training in crash reconstruction, had acquired Illinois reconstructionist certification in 1994, and had since performed full-time accident reconstruction for the Illinois State Police, testified that when she arrived at the crash site at 4:34 a.m., she observed that the vehicle was against a tree and that both occupants had been removed from the scene. Based on measurements, photographs, and the airbag module printout, she estimated the speed of the car when it struck the tree at 50 miles per hour. She estimated the speed of the car when it left the roadway to be a minimum of 73 miles per hour. In her opinion, the car did not "trip" or "flip" in the 24 feet before it struck the tree.

¶ 25 The defendant had filed a motion *in limine* to prevent Trooper Braddy from expressing an opinion as to the occupancy and location of the driver and passenger, on the basis that she, having only a one-week course in kinematics, did not have sufficient training to give such an opinion, and the court had denied the defendant's motion. Thus, based on the autopsy, which she attended, the injuries, her measurements and observation of the car, and what she was told by others about the postaccident position of the occupants, Trooper Braddy opined that the defendant was the driver and the decedent was the passenger of the vehicle at the time of the crash. Trooper Braddy testified that she did not believe there was enough room, especially with the bucket seats and the smashed roof, for a human of

significant size, such as that of the defendant (and the decedent), to fit between the top of the seat and the roof.

¶ 26 Carley Ward, Ph.D., a biomechanical engineer with extensive experience in her field, testified via video deposition. Based on her review of the evidence, the massive vehicle deformation, and occupant injuries, Dr. Ward testified that the vehicle had to be traveling 35 miles per hour or greater when it collided with the tree. Dr. Ward testified that postcrash photos of the vehicle revealed that although the steering wheel had moved towards the passenger's side, there were structures beneath the steering wheel which would have prevented a driver's movement from the driver's side to the passenger's side. Dr. Ward testified that the extent and angle of contact with the A-pillar, *i.e.*, the structure between the windshield and the passenger door, had caused a great deal of damage to the decedent's arm, almost severing it. Dr. Ward noted that because the split of the decedent's hinge skull fracture was much greater on the lower right side than the left, the blow that produced the fracture came to the decedent's skull came from the right side. Based on the evidence, including the decedent's injuries and the vehicle damage, Dr. Ward opined that the decedent was in the front passenger's seat in the vehicle when it struck the tree. In her opinion, the decedent could not have sustained the injuries that he did if he had been the driver when the car left the roadway and struck the tree. She testified that it was not conceivable that the decedent was the driver of the car and had been thrown across the car to the front passenger's side.

¶ 27 Dr. Ward also reviewed the defendant's injuries, noting that he did not have the severity of injuries that the decedent had and did not have injuries consistent with being in the backseat. Dr. Ward testified that had the defendant's head been positioned to the right in the backseat, he would have died because his neck would have disintegrated upon impact. Dr. Ward testified that had the defendant's feet been to the right in the backseat, he would

have had feet fractures or leg fractures because he would have crumpled on the right-side floor against the panel, which had no evidence of contact. She opined that the defendant was the driver of the vehicle when it left the roadway and crashed into the tree.

¶ 28 The defendant presented as reconstruction experts Dr. John C. Glennon, Sr., and John C. Glennon, Jr. Both testified pursuant to a video deposition. Glennon Jr., a forensic automotive technologist, agreed with Dr. Ward that the car encountered a "tripped roll" or a "flip" after it left the roadway and disagreed with Trooper Braddy who opined that it did not. He also differed with Trooper Braddy as to how the car impacted the tree, in that he opined that the vehicle was seven to eight feet above the ground when it hit the tree. Glennon Jr. testified that the vehicle was traveling between 23 and 30 miles per hour when it collided with the tree.

¶ 29 Glennon Jr. testified that the conditions of the accident would have caused unrestrained occupants to move about the vehicle. He testified that the plaintiffs' experts were derelict in failing to follow the scientific methodology established by the Northwestern University Traffic Institute to determine which of the two occupants was in the driver's seat when the event began. Using this methodology, Glennon Jr. opined that "a person sitting in the passenger seat could not be ejected through the windshield [where the decedent's head was located] with the collision angle" of the accident. He concluded that the evidence was insufficient to determine where the occupants of the vehicle were located when the event started or to determine the occupants' movements in the vehicle. Glennon Jr. testified that the analysis of the injuries alone did not allow a conclusion regarding where the individuals were located inside the vehicle.

¶ 30 Dr. John C. Glennon, Sr., also endorsed the Northwestern Traffic Accident Reconstruction manual methodology and agreed with Glennon Jr. that the vehicle had become airborne and rolled over. Dr. Glennon opined that it was not possible to

scientifically determine where the occupants were located when the event began. Dr. Glennon noted that Dr. Ward had overlooked or did not properly consider all the physical evidence, including the decedent's blood found on the left side of the vehicle, the deformation of the steering wheel, the bowing out of the roof and the right rear door, and the decedent's final position through the windshield of the vehicle. Dr. Glennon disagreed with Dr. Ward's conclusion that the bodies could not have moved through the small openings. Dr. Glennon explained that once the bodies struck the roof, headrests or consoles would not have blocked their movement. Dr. Glennon testified that a body will adapt to get through an opening, however small, where the least resistance is.

¶ 31 Dr. Glennon testified that because the decedent went through the windshield rather than through the side door, he more likely came from a position that was left of the seat just before impact. He provided an alternative analysis for the source of the decedent's near-amputation right arm injury. Dr. Glennon testified that the decedent's arm was more likely cut by the pinch weld, *i.e.*, the small, thin, and sharp pieces of metal holding the front windshield. Dr. Glennon reaffirmed the conclusion that the evidence was not sufficient to scientifically conclude who was driving the car when it left the roadway.

¶ 32 The defendant testified that he had a gap in his memory from the period of time when he and the decedent left Harrisburg until perhaps January 2001. The defendant testified that he was driving when he and the decedent left Lakeside Bar and Grill between 10 and 10:30 p.m. The defendant testified that he drove to a convenience store in Harrisburg to purchase a newspaper and that as they left the convenience store, he gave the car keys to the decedent, got into the backseat, and fell asleep.

¶ 33 The defendant testified that he did not remember the accident or being hospitalized. The defendant testified that he did not remember telling Dr. Hogancamp that he had talked to the decedent's wife on the phone. The defendant testified that he also did not remember

signing a note indicating that he did not want to talk to anyone, except for family, without an attorney present.

¶ 34 The defendant testified that as a warden, he had been assigned the take-home car belonging to the State of Illinois and the Department of Corrections that was involved in the accident. The defendant testified that others drove the vehicle, that he drove other vehicles, and that he had, on other occasions, relinquished driving the car to someone else. The defendant acknowledged, however, that he drove the car most of the time. Pursuant to State of Illinois requirements, he also carried liability insurance on the vehicle. The defendant testified that he drank approximately two Miller Lite beers during the four hours or so that they were in Harrisburg. The defendant testified that he had not feared disciplinary action by his employer for drinking alcohol before driving the car.

¶ 35 The plaintiff stipulated that the defendant was not intoxicated. However, during closing argument, the plaintiff's counsel referred to the alcohol consumption evidence, arguing that the defendant's drinking provided him a motive to lie about whether he was driving the car.

¶ 36 Thereafter, the jury was instructed as follows:

> "The evidence concerning consumption of alcohol by the [d]efendant is to be considered by you solely as it relates to whether the [d]efendant, William Barham, may have been in violation of the State of Illinois Rules and Regulations pertaining to the operation of a motor vehicle, which rules prohibit the operation of a motor vehicle after one has consumed alcohol. It should not be considered by you for any other purpose."

Over the defendant's objection, the circuit court also provided the following jury instruction:

> "The law recognizes an inference that if one is in his car at the time of a crash that he is the driver of that car. You may consider that inference if you find: A. That the car

was [the defendant's] car; B. That [the defendant] was an occupant of the car at the time of the crash. If you so find, you may consider this inference along with all other evidence in the case in finding whether the [p]laintiff has met her burden of proving that the [d]efendant, Bill Barham, was the driver." Non-IPI Plaintiff's Instruction No. 20.

¶ 37 The jury returned a verdict of $1 million for the plaintiffs in their wrongful death action (740 ILCS 180/0.01 *et seq.* (West 2000)), a verdict for the defendant pursuant to the survival action (755 ILCS 5/27-6 (West 2000)), and a $12,000 verdict for the plaintiffs under the Family Expense Act (750 ILCS 65/15 (West 2000)). It answered in the affirmative the special interrogatory, "Did the plaintiff meet her burden of proof that [the defendant] was the driver of the automobile at the time of the negligent operation of the automobile?" The court entered judgment on the verdict and added taxable costs for a total verdict of $1,017,574.65. On July 6, 2010, the circuit court denied the defendant's posttrial motion. On July 30, 2010, the defendant filed his timely notice of appeal.

¶ 38 ANALYSIS

¶ 39 Workers' Compensation Act/Scope of the Decedent's Employment

¶ 40 The defendant argues that the circuit court erred in summarily determining that the decedent was not in the scope of his employment at the time of the accident and in concluding that the plaintiffs' suit was therefore not barred by the exclusivity provisions of the Workers' Compensation Act.

¶ 41 "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162 (2007). "A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw

different inferences from the undisputed facts." *Bagent*, 224 Ill. 2d at 162-63. "Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Bagent*, 224 Ill. 2d at 163. "In appeals from summary judgment rulings, review is *de novo*." *Bagent*, 224 Ill. 2d at 163.

¶ 42 Prior to trial, the defendant argued that he was immune from suit by the plaintiffs pursuant to section 5(a) of the Workers' Compensation Act. Section 5(a) provides, in pertinent part:

> "No common law or statutory right to recover damages from the employer *** or the agents or employees of [the employer] for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act ***." 820 ILCS 305/5(a) (West 2000).

¶ 43 "This section operates to make workers' compensation benefits the exclusive remedy of an injured employee against a negligent coemployee acting in the course of his or her employment." *Ramsey v. Morrison*, 175 Ill. 2d 218, 224 (1997) ("a central purpose of the workers' compensation system is to place the cost of employee injuries on the enterprise or the industry, and that purpose is accomplished, in part, by granting immunity to coemployees whose negligence caused or contributed to the injury"). "Under this system, *** the liability of the coemployee is paid by the employer in the form of workers' compensation benefits and the coemployee is immune from suit[,] *** placing the burden of employee injuries on the employer." *Ramsey*, 175 Ill. 2d at 229.

¶ 44 Illinois courts consider three general criteria in determining whether an employee's acts are within the scope of employment. *Bagent*, 224 Ill. 2d at 164. The conduct of a servant is within the scope of employment only if (1) it is of the kind he is employed to

perform, (2) it occurs substantially within the authorized time and space limits, and (3) it is actuated, at least in part, by a purpose to serve the master. Restatement (Second) of Agency § 228 (1958); *Bagent*, 224 Ill. 2d at 164. " 'Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.' (Restatement (Second) of Agency § 228 (1958))." *Pyne v. Witmer*, 129 Ill. 2d 351, 360 (1989). All three criteria of section 228 must be met in order to conclude that an employee was acting within the scope of employment. *Bagent*, 224 Ill. 2d at 165. "Although summary judgment is generally inappropriate when scope of employment is at issue, when no reasonable person could conclude from the evidence that an employee was acting within the scope of employment, a court should hold as a matter of law that the employee was not so acting." *Bagent*, 224 Ill. 2d at 170.

¶ 45 To support his argument that the circuit court improperly ruled as a matter of law, the defendant cites *Stemm v. Rupel*, 68 Ill. App. 3d 211 (1979). In *Stemm*, the assistant manager of an Osco store asked the plaintiff, a part-time stock boy, if he would like to accompany him to attend a seminar on cameras, the plaintiff's attendance at the seminar was not compulsory, and although the plaintiff had no particular duties in the camera department, he felt he would acquire helpful knowledge for the customers. The plaintiff was injured on the return trip. The appellate court concluded that the issue as to whether or not the plaintiff's injuries resulted from an occurrence arising out of and in the course of his employment was not one of law but must one that be decided by the appropriate trier of fact. *Stemm*, 68 Ill. App. 3d at 215.

¶ 46 This case is distinguishable from *Stemm*. Here, the decedent's conduct was, as a matter of law, not within the scope of employment. The record evidence demonstrated that it was different in kind from that authorized, beyond the authorized time or space limits, and

too little actuated by a purpose to serve his employer. See *Pyne*, 129 Ill. 2d at 360. In this case, the defendant, the decedent's supervisor, testified that he did not ask the decedent to accompany him to the fundraiser, that the decedent's attendance at the fundraiser was purely voluntary, and that he, not the decedent, drove the Director and his entourage to and from the event, as directed. The defendant acknowledged that the decedent did not accompany him in an official capacity as the Department of Corrections' dietary manager, whose usual time and space limits would have been at the prison, and that neither his presence during travel nor his conversation with the Director was part of the decedent's duties as a dietary manager. See *Bagent*, 224 Ill. 2d at 169-70 ("an act of an employee, *i.e.*, the particular act of the employee that is at issue, is not within the scope of employment if it is done with no intention to perform it as part of or incident to a service on account of which he or she is employed"). Although the defendant cites evidence that Lori Isom had told investigator Frank Cool that the defendant had ordered the decedent to attend the trip, we find this evidence tenuous, at best, and insufficient to conclude that the circuit court erred.

¶ 47 Because no reasonable person could conclude from the evidence that the decedent was acting within the scope of his employment, the circuit court properly held as a matter of law that he was not so acting. See *Bagent*, 224 Ill. 2d at 170. Accordingly, we find that the circuit court properly granted the plaintiffs' motion for summary determination that the decedent was outside the scope of his employment at the time of the accident and properly determined that the plaintiffs' suit was not barred by the exclusivity provisions of the Workers' Compensation Act. See *Bagent*, 224 Ill. 2d at 170-71.

¶ 48 Alleged Evidentiary Errors

¶ 49 The defendant argues that the circuit court erred in permitting evidence that while receiving medical treatment after the accident, the defendant declined to speak to anyone without an attorney present, in allowing evidence concerning the defendant's consumption

of alcoholic beverages, and in permitting Dr. LeVaughn, Trooper Braddy, and six lay witnesses (Rice, Harrell, Hall, Parker, Test, and Ellis) to express their opinions that the decedent was seated in the vehicle's front passenger seat during the accident. The defendant argues that these errors were manifestly prejudicial.

¶ 50 Even relevant evidence may be excluded if its probative value is substantially outweighed by factors such as prejudice, confusion, or potential to mislead the jury. *Gill v. Foster*, 157 Ill. 2d 304, 313 (1993). The danger of unfair prejudice speaks to the capacity of some otherwise relevant evidence to lure the fact finder into fact-finding on an irrelevant ground different from the claimed relevancy. *Petraski v. Thedos*, 382 Ill. App. 3d 22, 32 (2008).

¶ 51 The evidence that the defendant refused to speak to anyone while he was in the hospital was admissible to impeach his credibility, *i.e.*, to challenge the reasonableness of his claim that he had a three-month memory gap after climbing into the backseat of the car at the convenience store prior to the accident. See *People v. Powell*, 301 Ill. App. 3d 272, 278 (1998) (" 'pre-arrest silence not induced by government action may be employed to impeach the criminal defendant [citations], and even post-arrest silence occurring prior to the giving of *Miranda* warnings [citation] may be employed to impeach the criminal defendant' " (emphasis omitted) (quoting M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 802.7, at 680 (6th ed. 1994))); *People v. Eliason*, 117 Ill. App. 3d 683, 698 (1983) ("prosecutor's cross-examination regarding defendant's pre-arrest, pre-warning silence is proper under the authority of" *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980)). We find no unfair prejudice and conclude that the circuit court properly allowed this testimony.

¶ 52 With regard to the defendant's contention that the circuit court improperly allowed evidence that he had consumed alcohol, we recognize that such evidence is extremely

prejudicial in a negligence case. See *Bodkin v. 5401 S.P., Inc.*, 329 Ill. App. 3d 620, 633 (2002). "Illinois courts have thus consistently held that evidence of alcohol consumption is inadmissible absent a showing of intoxication resulting in impairment of mental or physical abilities and a corresponding diminution in the ability to act with ordinary care." *Bodkin*, 329 Ill. App. 3d at 634. In this case, the parties stipulated that the defendant was not so intoxicated.

¶ 53 However, even were we to find that the trial court erred in admitting the testimony and argument at issue, such error would not necessarily require reversal. *Bodkin*, 329 Ill. App. 3d at 638. "Error in the admission of evidence regarding alcohol consumption is grounds for reversal only if such error prejudices the jury's verdict." *Bodkin*, 329 Ill. App. 3d at 637.

¶ 54 Here, negligence was established. The only question before the jurors was whether the defendant was driving the vehicle. The extensive evidence at trial revealed that the two arriving witnesses, Stockdale and James, found the defendant in the driver's seat and that the numerous witnesses arriving thereafter found and extricated the decedent from the front passenger's seat. Ellis testified that at the scene of the accident, the defendant did not respond to her question regarding whether he was driving the vehicle. See *Powell*, 301 Ill. App. 3d at 275 ("In civil cases, the law has long recognized that a party's silence when confronted with a statement made in his presence under circumstances that would normally call for a denial constitutes an admission."). During the defendant's hospitalization, his medical records repeatedly referenced that he was the driver of the vehicle. Dr. Ward described to the jury the mechanics of the vehicle leaving the road on the right side, coming back on the roadway again on the left side after overcorrecting, and crashing down the side of the road. She highlighted to the jury the effect of the damage to the A-pillar between the windshield and the passenger door which caused the decedent's arm to be trapped and almost

severed. She illustrated to the jury how the injury to the arm matched the angle of the impact of the car with the tree to show where the contact occurred and where the decedent was in the car. She also explained that the decedent's skull fracture resulted from a blow from the right side.

¶ 55 Dr. Ward further testified that the defendant's injuries were consistent with his position in the driver's seat. She noted that the defendant did not have nearly the severity of injuries that the decedent had and did not have injuries consistent with being in the backseat. She testified that had the defendant's head been positioned to the right in the backseat, he would have been dead because his neck would have disintegrated in the 35-mile-per-hour impact. She testified that had the defendant's feet been to the right in the backseat, he would have had feet fractures or leg fractures because he would have crumpled upon the right side floor and against the panel, which showed no evidence of contact. Thus, Dr. Ward opined that the defendant was the driver of the vehicle when it left the roadway and crashed into the tree. She opined that it was inconceivable that the decedent could have been driving the car and then been thrown up and over into the front passenger seat so that his legs were trapped on the passenger's side. She opined that it was also inconceivable that the defendant could have been in the backseat and gotten up, over, and into the front seat of the car as a result of the movement of the car after it left the roadway.

¶ 56 Further, the defendant's experts did not opine that the decedent had been driving the vehicle. They testified only that the evidence was insufficient to determine where the vehicle's occupants had been situated prior to the crash. Accordingly, we find that the evidence supporting the plaintiffs' theory that the defendant was driving the vehicle was compelling. We find that the evidence supporting the defendant's theory that he may have traveled over the backseat onto the front seat, while the decedent left the front driver's seat and crossed over into the front passenger's seat, getting his feet down to the floorboard for

entrapment, was not. Thus, assuming *arguendo* that the circuit court erred in allowing evidence of the defendant's alcohol consumption, we find that the defendant was not unfairly prejudiced by the alleged error. See *Bodkin*, 329 Ill. App. 3d at 638.

¶ 57 Likewise, we find that the alleged errors in the admission of opinion testimony do not require reversal. See *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 536-37 (2007) (not every admission of incompetent evidence requires reversal). "[W]hen an examination of the record as a whole demonstrates that the erroneously admitted evidence is cumulative and does not otherwise prejudice the objecting party, error in its admission is harmless." *Westin*, 372 Ill. App. 3d at 536-37.

¶ 58 The defendant argues that the circuit court erred in permitting lay witness opinion testimony that the decedent was seated in the vehicle's front passenger's seat during the accident by the occurrence witnesses, in addition to Dr. LeVaughn and Trooper Braddy, who were not qualified as experts to give an opinion as to the movement of the bodies in the car during the accident.

¶ 59 "To be admissible, a lay opinion must be based upon the witness'[s] personal observation and recollection of concrete facts; and such facts cannot be described in sufficient detail to adequately convey to the jury the substance of the testimony." *People v. Terrell*, 185 Ill. 2d 467, 497 (1998). Opinion testimony of a lay witness may be admitted whenever the witness cannot adequately communicate to the jury the facts upon which his or her opinion is based, because, wherever inference and conclusions can be drawn by the jury as well as by the witness, the witness's testimony is superfluous. See *Freeding-Skokie Roll-Off Service, Inc. v. Hamilton*, 108 Ill. 2d 217, 222 (1985). A lay witness's opinion, if based upon the witness's observations, is permissible because it is sometimes difficult to describe a person's mental or physical condition, character, or reputation or the emotions manifested by his or her acts. *Freeding-Skokie Roll-Off Service, Inc.*, 108 Ill. 2d at 222.

¶ 60 During trial, over the defendant's objections, the court permitted six emergency responders, in addition to Dr. LeVaughn and Trooper Braddy, to render opinions on behalf of the plaintiff regarding who was driving the car, based on their postaccident observations. The circuit court noted the defendant's continuing objection to such lay witness opinion testimony regarding who was driving the car. The court explained the basis for allowing such testimony:

> "I think that individuals who go to an accident scene and look and see what they do can form opinions. And I don't think they can–you know, it is the issue of the experts. The experts come into these cases now ... But I still believe that people can testify, and they can form their beliefs based upon what they saw and observed ... And that is the basis–and I am doing this for the record, Don, so that, you know, the Appellate Court understands what I am doing and why I am doing it. Even though these guys are EMTs, they are not testifying as experts. I am not giving them expert opinion. But I think the law has always been that people have the right to testify using their common sense. And I personally think if *** somebody drives up to the scene, sees a body in a particular location, sees its condition at the time that they see it, they can state, I think that person was in the passenger's seat at the time this collision occurred."

¶ 61 Similar to the supreme court in *Freeding-Skokie*, we fail to perceive how the lay witnesses' opinions were helpful to a clear understanding of the testimony or determination of the fact at issue. The witnesses' information arose exclusively from postaccident positioning and damage. These witnesses had no firsthand knowledge or observations regarding the position of the occupants in the car prior to the accident. Instead, the witnesses could have adequately communicated to the jury the facts upon which their opinions were based, *i.e.*, the decedent's placement and entrapment after impact, the crush

damage to the vehicle, and the decedent's injuries. Thus, the opinions were superfluous, and their admission was error. See *Freeding-Skokie Roll-Off Service, Inc.*, 108 Ill. 2d at 222 (opinion testimony of lay witnesses that the collision between the automobile and truck could not have been avoided was superfluous, and its admission constituted reversible error).

¶ 62 Nevertheless, evidence that is merely cumulative or duplicates properly admitted evidence is harmless error, at most. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). "The burden rests with the party seeking reversal to establish prejudice." *Watkins v. American Service Insurance Co.*, 260 Ill. App. 3d 1054, 1065 (1994). After reviewing the voluminous record in this case, we conclude that the jury's finding that the defendant was the driver of the vehicle was sufficiently supported by competent evidence so as to render the erroneous admissions harmless. The admission of the lay witness opinion testimony was not prejudicial to the defendant's case and was thus not reversible error. *Freeding-Skokie Roll-Off Service, Inc.*, 108 Ill. 2d at 223; *People v. Crump*, 319 Ill. App. 3d 538, 542 (2001). Because we have ascertained from the entire record that the alleged errors did not affect the outcome of trial, we will not disturb the judgment. *Watkins*, 260 Ill. App. 3d at 1065 ("party is not entitled to a reversal based on ruling on evidence unless the error was substantially prejudicial and affected the outcome of trial").

¶ 63 Jury Instructions

¶ 64 The defendant argues that the circuit court erred in instructing the jury that if one is in his car at the time of a crash, the jury may infer that he was the driver. The defendant argues that because he introduced sufficient evidence to create an issue of fact regarding who was driving the car and because he did not own the vehicle, the presumption disappeared, and there should have been no such instruction given.

¶ 65 The determination of whether to give a specific jury instruction is within the circuit court's discretion, and that decision will not be disturbed absent an abuse of discretion.

Trimble v. Olympic Tavern, Inc., 239 Ill. App. 3d 393, 401 (1993). The standard for determining whether such abuse occurred is whether the instructions given fairly stated the law without having prejudiced a party and depriving him of a fair trial. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505 (2002). "Although jury instructions are generally reviewed for an abuse of discretion, our standard of review is *de novo* when the question is whether the applicable law was accurately conveyed." *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 170 (2008).

¶ 66 Over the defendant's objection, the circuit court provided the following instruction to the jury:

> "The law recognizes an inference that if one is in his car at the time of a crash that he is the driver of that car. You may consider that inference if you find: A. That the car was [the defendant's] car; B. That [the defendant] was an occupant of the car at the time of the crash. If you so find, you may consider this inference along with all other evidence in the case in finding whether the [p]laintiff has met her burden of proving that the [d]efendant, Bill Barham, was the driver." Non-IPI Plaintiff's Instruction No. 20.

¶ 67 The defendant testified that the car in question was titled to the Illinois Department of Corrections and that he was not the owner. The defendant testified that others drove the vehicle, that he drove other vehicles, and that he had, on other occasions, relinquished driving the car to someone else. The defendant acknowledged, however, that the vehicle was assigned to the Shawnee Correctional Center and provided primarily for his use in his capacity as warden. It was his take-home car that he drove most of the time. Pursuant to State of Illinois requirements, he carried liability insurance on the vehicle.

¶ 68 Under Illinois law, "in automobile injury cases, proof of ownership raises a presumption that the owner of the vehicle was in control of the vehicle at the time of the

accident." *Haddick v. Valor Insurance*, 198 Ill. 2d 409, 418 (2001). The burden of rebutting this inference then passes to the defendant. *Tolefree v. March*, 99 Ill. App. 3d 1011, 1014 (1981). "Illinois has generally followed the prevailing view that a presumption ceases to operate in the face of contrary evidence." *Tolefree*, 99 Ill. App. 3d at 1014. "Where there is absence of evidence to the contrary, however, the *prima facie* case created under a rebuttable presumption will support a finding." *Scheibel v. Groeteka*, 183 Ill. App. 3d 120, 139 (1989).

¶ 69 "A rebuttable presumption, such as exists here, is not evidence in itself, but arises as a rule of law or legal conclusion from facts proved." *McElroy v. Force*, 38 Ill. 2d 528, 532 (1967). "These presumptions 'do not shift the burden of proof. Their only effect is to create the necessity of evidence to meet the *prima facie* case created thereby, and which, if no proof to the contrary is offered, will prevail.' " *McElroy*, 38 Ill. 2d at 532 (quoting *Helbig v. Citizens' Insurance Co.*, 234 Ill. 251, 257 (1908)). "Stated differently, the presence of a presumption in a case only has the effect of shifting to the party against whom it operates the burden of going forward and introducing evidence to meet the presumption." *McElroy*, 38 Ill. 2d at 532. Thus, "[t]he owner of the car must bring forth some evidence to show that someone else was, in fact, driving the car." *Bohnen v. Wingereid*, 80 Ill. App. 3d 232, 240 (1979). "Once some evidence is produced, the effect of the presumption is eliminated and only the evidence offered by the parties is considered in reaching the fact-finder's verdict." *Bohnen*, 80 Ill. App. 3d at 240. "In such cases, the jury should not be instructed on the presumption." *Bohnen*, 80 Ill. App. 3d at 240.

¶ 70 In the present case, the defendant acknowledged that the vehicle was his take-home car, that it was provided primarily for his use in his capacity as warden, and that pursuant to State of Illinois requirements, he carried liability insurance on the car. There was no evidence offered by the parties that someone other than the defendant was driving the

vehicle. The defendant's experts opined that such a fact could not be determined pursuant to scientific methodology. Yet, Dr. Ward unequivocally opined that the defendant was driving the vehicle. The defendant testified that he did not remember. See *Haddick*, 198 Ill. 2d at 418 (since alleged driver was unable to recall the accident at the time of plaintiff's settlement demand, he would have been unable to rebut this presumption). Because the defendant failed to offer evidence that someone else was driving the vehicle, we find that the presumption that the defendant was in control of the vehicle is applicable to this case. See *Hall v. Kirk*, 13 Ill. App. 3d 656, 659 (1973) (because Kirk had been given possession of the keys by the owner, was the last person identified as having driven the car, was not shown to have turned over the keys to the other occupant of the car, and was in the car at the time of the collision, presumption that he was in control of the vehicle was applicable to such a situation involving a bailee). Accordingly, the circuit court appropriately instructed the jury, and we find no reversible error.

¶ 71 CONCLUSION

¶ 72 For the foregoing reasons, the judgment of the circuit court of Saline County is affirmed.

¶ 73 Affirmed.