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IN THE
COURT OF APPEALS OF INDIANA

KENNY A. RICE, SR., CITY OF GARY, INDIANA, CITY OF GARY POLICE DEPARTMENT and CITY OF GARY POLICE COMMISSION,	)	
Appellants-Defendants,	)	
vs.	)	No. 45A03-0910-CV-463
HAZEL L. OSBORNE,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Calvin D. Hawkins, Judge
Cause No. 45D02-0611-CT-143

September 2, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Kenny A. Rice, City of Gary, Indiana (the City), City of Gary Police Department (the Police Department), and City of Gary Police Commissioners (when referred to collectively, the Appellants) appeal a jury award against them and in favor of Hazel L. Osborne in Osborne's lawsuit for damages incurred as a result of personal injuries suffered in a traffic accident involving Rice and Osborne. The Appellants present the following restated issues for review:

1. Did Osborne's counsel commit reversible error during closing argument in stating that the Appellants' argument was disingenuous?

2. Was the jury's award so excessive as to justify a new trial or a remittitur?

We affirm.

The facts favorable to the judgment are that shortly after noon on January 23, 2006, Osborne was traveling northbound on Taft Street, approaching 25th Avenue in Gary, Indiana. Officer Rice, while acting within the scope of his employment with the Police Department, was operating his police cruiser eastbound on 25th Avenue when he collided with Osborne's vehicle. As a result of the collision, Osborne suffered a broken rib, rib fractures, a lung contusion, and a broken shoulder blade.

On November 22, 2006, Osborne filed a complaint for damages, naming as defendants Rice, the City, the Police Department, and City of Gary Police Commission, and alleging that the collision and Osborne's injuries were caused by Officer Rice's negligent operation of his vehicle. The Appellants answered, denying that Officer Rice was negligent and setting forth certain affirmative defenses related to immunity and limits on liability as set forth under the

Indiana Tort Claims Act, i.e., Ind. Code Ann. § 34-13-3-3 and -4 (West, Westlaw through 2010 2nd Regular Sess.).

The case was tried by jury on September 8 and 9, 2009. At trial, the parties stipulated that Officer Rice was acting within the scope and duty of his obligations as a police officer employed by the City and any liability attributed to him would be imputed to the City. The parties also stipulated that any liability attributed to the Police Department could be imputed to and chargeable in a judgment against the City. The parties disagreed, however, as to whether Officer Rice's lights and siren were activated at the time of the collision, and which party had the red light at the intersection of 25th and Taft. At the conclusion of the trial, the jury returned a verdict in favor of Osborne, awarding damages in the amount of $750,000.00. On September 9, 2009, the trial court entered judgment on the verdict. On October 8, 2009, the Appellants filed a notice of appeal, as well as "Defendant's [sic] Motion to Vacate Judgment or in the Alternative Remit Jugdment [sic] to Comply with Tort Claim Statute", contending that the award exceeded the statutory limit of $500,000 and asking the court to reduce the award to $500,000. *Appendix of Appellants* at 35. In response to this motion, on December 17, 2007, the parties filed an agreed order stipulating that pursuant to I.C. § 34-13-3-4(a), Osborne could not collect more than $500,000 on her judgment against the Appellants. The Appellants appeal the judgment against them, as well as the amount of the award.

1.

The Appellants contend Osborne's counsel committed reversible error during closing argument in stating on several occasions that certain parts of the Appellants' closing argument were disingenuous. The comments in question were as follows: (1) "The City of Gary in their argument says, she (Osborne) couldn't remember anything about what happened or doesn't know what happened. Now that is disingenuous." *Transcript* at 494. (2) "That's disingenuous to a witness to say when you come out of consciousness you're supposed to sit there and rattle things off." *Id*. at 495. (3) "The City of Gary had you believe that she started calculating that she might file a lawsuit and make some money. Come on. That's disingenuous to a witness." *Id*. Finally, (4)

> Numerous versions, everybody agrees there were no lights and sirens except Sgt. Rice. Disingenuous, quote, counsel for the City of Gary said that Sgt. Rice was the only credible witness. Hazel Osborne is not credit credible [sic], Officer Stroh is not credible, Dan the EMT is not credible, Rachel the EMT is not credible. It's disingenuous. That's what you do when you fight city hall.

Id. at 496.

"It is well-settled that to preserve a ruling with regard to remarks by opposing counsel, a specific objection and a request that the jury be admonished to disregard the remarks are required." *Perez v. Bakel*, 862 N.E.2d 289, 295 (Ind. Ct. App. 2007). The failure to interpose a contemporaneous objection waives the issue for appellate review. *Perez v. Bakel*, 862 N.E.2d 289. At no point during Osborne's final argument did the Appellants' counsel object to the foregoing comments. This argument is waived.

2.

The Appellants contend the jury's award was so excessive as to justify a new trial or a remittitur.

Indiana Trial Rule 59 provides, **"(A) Motion to correct error--When mandatory.** A Motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address … (2) A claim that a jury verdict is excessive or inadequate." (Emphasis in original.) Our court has held that pursuant to Rule 59(A)(2), a party must file a motion to correct error alleging excessive or inadequate damages before we may consider the issue on appeal. *See, e.g., Howard v. Trevino*, 613 N.E.2d 847 (Ind. Ct. App. 1993). In *Tipmont Rural Elec. Membership Corp. v. Fischer*, 716 N.E.2d 357, 358 (Ind. 1999), our Supreme Court indicated that T.R. 59(A)(2) was "designed to govern requests that the trial judge exercise the common law powers of additur and remittitur." The Court distinguished such requests, however, from requests challenging the amount on the basis of the sufficiency of the evidence supporting the award. The Court stated, "By contrast, a claim that the verdict was outside the scope of the evidence presents a more ordinary question about the sufficiency of the evidence supporting the verdict." *Id*. The Court held that the latter claims "may … be presented to the courts of appeal without the need for a motion to correct error." *Id*.

In seeming contradiction to, or at least inconsistent with, the Supreme Court's interpretation of T.R. 59(A)(2) stands T.R. 50(A), which provides, in relevant part, as follows:

> Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to

> support it, the court *shall* withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. A party may move for such judgment on the evidence.
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> * * * * *
>
> (4) in a motion to correct errors; or
>
> (5) may raise the issue upon appeal for the first time in criminal appeals *but not in civil cases*[.]

(Emphases supplied.) *See, e.g.*, *Prime Mortg. USA, Inc. v. Nichols*, 885 N.E.2d 628 (Ind. Ct. App. 2008) (noting an inconsistency between, on one hand, the Supreme Court's holding in *Freas v. Custer*, 201 Ind. 259, 166 N.E. 434 (1929) that if a party believed some matters were not supported by sufficient evidence, it should have brought it to the trial court's attention or it was waived and, on the other hand, this court's determination in *Jamrosz v. Resource Benefits, Inc.*, 839 N.E.2d 746 (Ind. Ct. App. 2005), *trans. denied*, that a party may raise the sufficiency of the evidence for the first time on appeal). The Supreme Court resolved this apparent inconsistency in *Henri v. Curto*, 908 N.E.2d 196 (Ind. 2009).

In *Henri*, the appellant/plaintiff challenged the jury's verdict in favor of the defendant's counterclaim, contending the evidence was insufficient to establish each of the elements of that claim. This led the Supreme Court "to consider whether an appellate claim of insufficient evidence may be raised for the first time on appeal." *Id*. at 206. Citing *Tipmont*, the appellant argued that such a claim could arise for the first time on appeal. Noting that it had determined in *Tipmont* that an ordinary question concerning the sufficiency of the evidence supporting a verdict could be presented on appeal without the need for a motion to correct error, the Court determined that "in *Tipmont*, however, [it] did not examine

whether a claim of insufficient evidence may first be raised on appeal without being first presented in a Rule 50 motion for judgment on the evidence." *Id*. at 207. The Court determined that the issue was "governed by the interaction of Trial Rules 50 and 59[.]" *Id*. Specifically, the Court concluded:

> Except for matters that fall under Rule 59(A)(1) and (2), a motion to correct error is not a mandatory prerequisite for appeal. But in declaring that all other issues may be presented initially on appeal, 59(A) explicitly requires that they have been "appropriately preserved during trial." This prerequisite condition was not considered in *Walker*.
>
> A strict, literal application of the qualifying phrase "appropriately preserved during trial" in Rule 59(A) would preclude a party from presenting an appellate challenge of insufficient evidence despite the party having raised the issue with the trial court in a motion for judgment on the evidence through a motion to correct error, as authorized by Rule 50(A)(4), or arguably even if the party filed a motion for judgment on the evidence post-verdict but before the entry of judgment, as permitted by Rule 50(A)(3). We decline to employ this construction. Rather, to harmonize Rule 59(A) with Rules 50(A)(4) and 59(J), both of which contemplate a claim of insufficient evidence being presented in a motion to correct error, we hold that such a claim is "appropriately preserved during trial" if it is properly asserted in a motion for judgment on the evidence filed either before the case is submitted to the jury, after submission and before judgment is entered on the verdict, or in a motion to correct error. *We intend the phrase "during trial" to require that a claim of insufficient evidence must be preserved by proper presentation to the trial court. Such a challenge may not be initially raised on appeal in civil cases if not previously preserved in the trial court by either a motion for judgment on the evidence filed before judgment or in a motion to correct error.*

Id. at 208 (emphasis supplied).

Turning now to the instant case, if the Appellants' challenge to the damage award is deemed a request for remittitur, it is waived for failure to file a motion to correct error with

the trial court.[1] *See* T.R. 59(A)(2); *Howard v. Trevino*, 613 N.E.2d 847. If, on the other hand, the Appellants' challenge is deemed a contention that the evidence is insufficient to support the jury's determination with respect to the amount of the award, the issue is waived for failing to file a motion for judgment on the evidence or a motion to correct error on this basis. *See* T.R. 50(A)(5); *Henri v. Curto*, 908 N.E.2d 196. Simply put, the trial court was never asked to evaluate the evidence for the purpose of determining an appropriate amount of damages to award Osborne. The issue is not properly before us. *See Henri v. Curto*, 908 N.E.2d 196.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.

[1] We observe here that the motion filed by the Appellants entitled "Defendant's Motion to Vacate Judgment or in the Alternative Remit Jugdment [sic] to Comply with Tort Claim Statute" does not constitute a motion to correct error for purposes of Trial Rules 59(A)(2) and 50(A)(5). The motion to vacate was premised entirely upon the ground that the award exceeded the statutory limit of the Tort Claims Act and asked the trial court to reduce the award to that amount, i.e., $500,000. Before the trial court ruled upon the motion, the parties filed an agreed order resolving the Appellants' challenge to the award. Such did not implicate the sufficiency of the evidence supporting the award of $750,000, or even of the modified $500,000 award, as the Appellants specifically requested that the award be reduced to that amount.