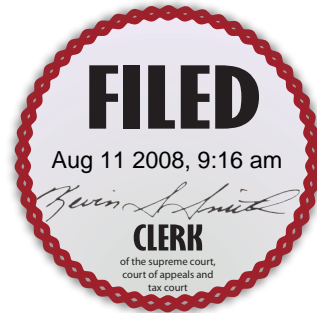


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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID M. WOLF,)
)
Appellant/Cross-Appellee/Plaintiff,)
)
vs.) No. 46A03-0711-CV-542
)
RICHARD OGLE,)
)
Appellee/Cross-Appellant/Defendant.)

APPEAL FROM THE LaPORTE SUPERIOR COURT
The Honorable William J. Boklund, Judge
Cause No. 46D04-0512-CC-401

August 11, 2008

MEMORANDUM DECISION—NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Cross-Appellee/Plaintiff David Wolf appeals following a trial in which the jury found him to be zero percent at fault and awarded him damages of \$1,050,000 against Appellee/Cross-Appellant/Defendant Richard Ogle, after which the trial court, in response to Ogle's motion to correct error, upheld the damages award but ordered a new trial on the single issue of fault apportionment upon determining that the jury's verdict was against the weight of the evidence. Upon appeal, Wolf challenges the trial court's determination that the verdict was against the weight of the evidence. On cross-appeal, Ogle claims that the trial court erred in upholding the damages award, which Ogle claims was excessive. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On April 8, 2004, at the intersection of Highway 12 and Pine Street in Michigan City, Ogle, who was driving his motor vehicle eastbound on Highway 12, struck Wolf, who was riding his bicycle southbound on Pine Street. (Tr. 22, 48, 50) The parties' versions of the events at issue differ. Wolf contended that he approached the intersection, stopped and observed that the traffic light for Highway 12 was red, and then attempted to cross Highway 12 by riding his bicycle in the crosswalk, at which point Ogle's vehicle sped up. (Tr. 71, 74) Wolf attempted to motion to Ogle to stop, but Ogle was looking in the back seat, did not stop, and proceeded to hit him. (Tr. 76) Wolf estimated that Ogle was traveling approximately forty miles per hour, fifteen miles faster than the twenty-five-mile-per-hour speed limit, at the time of the accident. (Tr. 76)

Ogle, on the other hand, contended that the traffic light for Highway 12 was green when he crossed into the intersection at a speed of twenty-five miles per hour or less, and that he simply did not see Wolf, who was riding his bicycle against the direction of traffic—which is one-way northbound on Pine—at the time of the accident. (Tr. 28-29, 31) Ogle denied that he had been looking in the back seat at the time of the accident. (Tr. 32)

Witness Kerri Martin, who was stopped at a red light on Pine Street at the time, watched Wolf approach the intersection of Highway 12 and Pine Street, enter the crosswalk, observe Ogle's oncoming vehicle, and attempt to evade Ogle's vehicle before being hit. (Tr. 38-42; 45) Martin estimated Ogle was traveling at least thirty miles per hour and that he picked up speed as he approached the intersection. (Tr. 44-45) According to Martin, Ogle did not attempt to avoid the accident by braking or swerving. (Tr. 44)

Witness accounts of the traffic lights were conflicting. Martin testified that she saw Wolf enter the intersection against the red light, and at some point during the above events, the light on Pine Street turned green. (Tr. 41, 45-47) Martin's passenger, Krisandra Carr, testified that the Pine Street light was red and the Highway 12 light was yellow at the time of the accident, but acknowledged that she had indicated in an earlier statement that the Highway 12 light was red when Ogle entered the intersection, and that Ogle had accelerated in order to "try and catch the light." Tr. p. 58. (Tr. 52, 58)

As a result of the accident, which caused Wolf to fly into the air and land on his neck and back area, Wolf suffered injury to his neck, back, arms, and legs. (Tr. 43, 67). Wolf sought medical care and other treatments, and he underwent cervical and lumbar

dissectomies, among other procedures, which caused him to incur over \$100,000 in medical bills. (Dr. Paul Madison Depo.) Wolf was also placed on prescription medication, including hydrocodone. (Tr. 93-94) According to Wolf's treating physician, Dr. Paul Madison, Wolf faced future medical care for his injuries. (Dr. Paul Madison Depo.) Wolf was no longer able to work in his field of construction and began painting for employment. (Tr. 97-98) Wolf further testified that he could no longer engage in certain sporting activities such as golfing and bicycle jumping.¹ (Tr. 97-98) Wolf's relationship with his girlfriend suffered because he was unable to support himself. (Tr. 98) Accordingly, Wolf sought damages, including for pain and suffering, from Ogle.

Following a trial, the jury determined that Ogle was one hundred percent at fault and awarded damages to Wolf in the amount of \$1,050,000. (App. 55-56) Ogle filed a motion to correct error requesting a new trial or, in the alternative, remittitur, on the grounds that the award was excessive. The trial court granted Ogle's motion in part and denied it in part, determining that the apportionment of fault was against the weight of the evidence but that the damages award was not excessive. Accordingly, the trial court ordered a new trial on the apportionment of fault. This appeal follows.

DISCUSSION AND DECISION

On appeal, Wolf challenges the trial court's determination that the jury's apportionment of fault was against the weight of the evidence, warranting a new trial on the

¹ Wolf raced BMX bicycles as a child and has participated in bicycle competitions as an adult. (Tr. 67)

question of fault. Ogle cross-appeals, claiming that the trial court erred in determining that the jury's damages award was not excessive.

I. Fault Apportionment

Pursuant to Indiana Trial Rule 59(J), a trial court is required to take such action as will cure any “prejudicial or harmful error,” to grant a new trial on a motion to correct error if the court determines that the jury verdict is “against the weight of the evidence,” and to enter judgment if it determines that the jury verdict is “clearly erroneous as contrary to or not supported by the evidence.” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1055 (Ind. 2003) (quoting Ind. Trial Rule 59(J)). The standard of appellate review of trial court rulings on motions to correct error is abuse of discretion. *Id.*

For purposes of Rule 59(J) review, the trial court serves as a “thirteenth juror” and has an affirmative duty to weigh conflicting evidence. *Indian Trucking v. Harber*, 752 N.E.2d 168, 178 (Ind. Ct. App. 2001). As the thirteenth juror, the trial court (1) hears the case along with the jury; (2) assesses the credibility, intelligence and wisdom of the witnesses; and (3) determines whether the verdict is against the great weight of the evidence. *Id.* If the trial court determines that the verdict is against the weight of the evidence, it has a duty to grant a new trial. *Id.* A trial court is advised to use great caution in substituting its evaluation of the evidence for a contrary evaluation made by the jury. *See id.*

Appellate courts review the grant of a new trial under an abuse of discretion standard. *Weida v. Kegarise*, 849 N.E.2d 1147, 1154 (Ind. 2006). The “strong presumption” of correctness that underlies that review, however, “arises only when the trial court, acting as a

thirteenth juror, sets aside a jury verdict as against the preponderance of the evidence and supports such decision with special findings of fact as required by [current Trial Rule 59 (J)(7)].” *Weida*, 849 N.E.2d at 1154 (quoting *Lake Mortg. Co. v. Fed. Nat’l Mortg. Ass’n*, 262 Ind. 601, 605-06, 321 N.E.2d 556, 559 (1975)).

In contesting the trial court’s grant of a new trial on the issue of fault apportionment, Wolf argues that the trial court failed to comply with the requirements of Trial Rule 59(J)(7). Trial Rule 59(J)(7) provides the following with respect to granting a new trial when the trial court determines that the verdict does not accord with the evidence:

In its order correcting error the court shall direct final judgment to be entered or shall correct the error without a new trial unless such relief is shown to be impracticable or unfair to any of the parties or is otherwise improper; and if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair. If corrective relief is granted, the court shall specify the general reasons therefor. When a new trial is granted because the verdict, findings or judgment do not accord with the evidence, *the court shall make special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted. Such finding shall indicate whether the decision is against the weight of the evidence or whether it is clearly erroneous as contrary to or not supported by the evidence; if the decision is found to be against the weight of the evidence, the findings shall relate the supporting and opposing evidence to each issue upon which a new trial is granted; if the decision is found to be clearly erroneous as contrary to or not supported by the evidence, the findings shall show why judgment was not entered upon the evidence.*

(Emphasis supplied).

The Indiana Supreme Court has held to a fairly strict interpretation of the above requirements. The *Weida* court, observing that adherence to the substantive and procedural requirements of Rule 59(J) was “paramount,” emphasized the language in Rule 59(J) requiring that, in cases where the trial court orders a new trial because the verdict is against

the weight of the evidence, the court *shall* relate the supporting and opposing evidence to each issue upon which the new trial is granted. 849 N.E.2d at 1151-52. As observed by the *Weida* court, such a thorough evidentiary analysis by the trial court was necessary because the power to overturn jury verdicts is ““ extraordinary and extreme”” and can properly be used ““only if it is based upon a complete analysis of the relevant facts and applicable law, and sets out on paper the constituent parts of that analysis.”” 849 N.E.2d at 1153 (quoting *Nissen Trampoline Co. v. Terre Haute 1st Nat’l Bank*, 265 Ind. 457, 464, 358 N.E.2d 974, 978 (Ind. 1976)). The *Weida* court further observed that complete analysis under the Rule, while “arduous and time-consuming,” is necessary in order to provide “assurance to the parties and the courts that the judge’s evaluation of the evidence is better than the evaluation of the jury.” 849 N.E.2d at 1153 (quoting *Nissen*, 265 Ind. at 464-65, 358 N.E.2d at 978).

Of course in *Weida*, contrary to the case at hand, the trial court overturned a jury verdict without including special findings or explanation of any kind, easing the task of determining that such was not in compliance with Rule 59(J). But *Weida*, by its own reasoning, should not be read so narrowly. Indeed, in *Weida*, the Supreme Court relied in large part upon *Nissen*, a products liability case where it had similarly determined that the trial court, which had included certain special findings in its order overturning a jury verdict, had nevertheless failed to comply with Rule 59(J).

At issue in *Nissen* was the alleged defectiveness of a product, called an aquadiver, which was designed to propel an individual into a body of water. The aquadiver, which was accompanied by no warnings or instructions, caused injury to the plaintiff. Following trial,

the jury found that the product was not defective and returned a verdict for the defendant. The trial court overturned this verdict and awarded the plaintiff a new trial based upon its determination that the product was defective. In support of its judgment, the trial court found, *inter alia*, that (1) there was undisputed evidence that the product lacked warnings or instructions; (2) the defendant was aware that the product user's foot could slip; and (3) the "greater weight" of the evidence, including expert testimony, demonstrated that instructions should accompany the product. *Nissen*, 265 Ind. at 462, 358 N.E.2d at 977.

On appeal, the Supreme Court reversed the trial court, in spite of its findings, due to the court's failure to indicate in its findings a particular warning or instruction without which the product was defective, or to set forth supporting and opposing evidence relevant to the determination of what a proper warning or instruction should state. *Id.* at 463-64, 358 N.E.2d at 977-78. The Supreme Court determined that such findings and "collation of evidence" were indispensable to a rational conclusion that the product was defective or that this defective condition was the proximate cause of the injury. *Id.* at 464, 358 N.E.2d at 978.

Here, in ordering a new trial on the issue of liability, the trial court stated the following:

The Defendant also argues that the jury verdict apportioning 100% of the fault to him is against the weight of the evidence. As to this contention the Trial Court agrees. Several pieces of evidence establish that the Plaintiff was at least partially at fault for the accident. First, the uncontroverted testimony establishes that the Plaintiff rode his bicycle in the cross walk across Highway 12 rather than dismounting and walking it across. Second, it is also uncontroverted that although Mr. Wolf was traveling in the crosswalk, he was doing so against the flow of vehicular traffic on a one-way street as he entered the intersection of Pine Street and Highway 12. Third, although there is some doubt about the color of the traffic lights at the time of the accident, the weight

of the evidence at least establishes that the light for traffic on Pine Street was red at the time the Plaintiff entered the intersection. Finally and perhaps most telling, the Plaintiff testified that he saw the Defendant's car coming the entire time he was crossing Highway 12 up until the accident. These facts establish that at the very least the Plaintiff was partially to blame for [the] accident. Therefore, the court has the duty to order a new trial as to the respective fault of the Plaintiff and Defendant.

Given the above, it appears that the trial court determined that Wolf had comparative fault on the following grounds: (1) he rode, rather than walked, his bicycle in the crosswalk; (2) he traveled in the crosswalk against the flow of traffic; (3) the weight of the evidence established that Wolf's light was red when he entered the intersection; and (4) Wolf saw Ogle's vehicle coming toward the intersection when he entered it.

With respect to points (1), (2), and (4), apart from apparently concluding that these facts established Wolf's comparative fault, the trial court failed to specify, as required by Rule 59(J), how these facts related to each material issue or element of the defense of comparative fault. For Wolf to have had comparative fault, he must have breached his duty of care. *See Gyuriak v. Millice*, 775 N.E.2d 391, 394-95 (Ind. Ct. App. 2002) (observing that there is no occasion to invoke comparative fault principles when there is no breach of a duty of care), *trans. denied*. Even if these facts were undisputed, the trial court failed to demonstrate how Wolf's riding a bicycle in a crosswalk, even against the flow of traffic, or his entering an intersection aware of an oncoming vehicle, established his breach of duty, a necessary element of Ogle's comparative fault defense. Indeed, while the jury instructions stated, and Ogle argues, that pursuant to Indiana Code section 9-21-11-2, a bicyclist has all of the duties that the driver of a motor vehicle has, here Wolf was apparently crossing the street

in the crosswalk and therefore was not subject *per se* to the rules of the road. Furthermore, to the extent that Wolf's entering a crosswalk while aware of an oncoming vehicle suggests a possible breach of his duty of care, there was evidence suggesting that Wolf fully expected the vehicle to stop at what he claims was a red light, and that the vehicle unexpectedly accelerated instead. (Tr. 74) The trial court made no mention of this seemingly contradictory evidence. The trial court, in concluding that points (1), (2), and (4) demonstrated Wolf's comparative fault, failed to relate its factual findings to material elements of this defense or to base these findings on a full evaluation of the evidence.

Like with point (4), the trial court simply concluded that point (3) demonstrated comparative fault without listing the supporting and opposing evidence. According to the trial court, the weight of the evidence established that Wolf had entered into the crosswalk against the red light. Yet there was a great deal of conflicting evidence regarding the color of the traffic signals just prior to and at the time of the accident. Wolf testified that the light on Highway 12 was red. Ogle testified that it was green. Martin testified that Wolf's traffic light on Pine Street was red when he entered the intersection but that at some point shortly thereafter, it turned green. Carr testified that the Highway 12 light was yellow at the time of the accident, but acknowledged having stated earlier that Ogle's Highway 12 light was red. Given this conflicting evidence and the Supreme Court's determination in *Nissen* that a simple conclusion referencing the "weight of the evidence" without a recitation of the supporting and opposing facts is inadequate to overturn a jury verdict, we conclude the trial court's reasoning did not comply with Rule 59 and was inadequate to support a new trial.

We recognize, as Ogle points out, that this court has held that evidentiary summaries adequately comply with Rule 59 if they facilitate appellate review. *See Barnard v. Himes*, 719 N.E.2d 862, 866 (Ind. Ct. App. 1999), *trans. denied*. In contrast with *Barnard*, where the trial court listed supporting and opposing evidence before granting a new trial, the trial court's evidentiary summary in the instant case did not list and evaluate such evidence and was therefore inadequate to facilitate appellate review. In addition, in *Weida*, which postdates *Barnard*, the Supreme Court, specifically distancing itself from Court of Appeals decisions interpreting Rule 59(J), discussed the requirements of Rule 59(J) and placed special emphasis on the language in the rule indicating that the requirements of the rule *shall* be followed. *Weida*, 849 N.E.2d at 1152. To the extent that *Barnard* remains authoritative, it does not render the trial court's judgment in the case at hand compliant with Rule 59(J).

Having determined that the requirements of Rule 59(J) were not met, we reverse the trial court's grant of a new trial on the issue of fault apportionment and remand for reinstatement of the jury verdict. *See Weida*, 849 N.E.2d at 1152 (“[W]hen a court orders a new trial because the verdict is ‘against the weight of evidence,’ but fails to make the required special findings, the proper remedy is reinstatement of the jury verdict.”).

II. Remittitur

Ogle's cross-claim challenges the trial court's denial of his motion for a new trial or remittitur on the grounds that the damages award was excessive. A strict standard of review is applied to an allegation of excessive damages. *Indian Trucking*, 752 N.E.2d at 177. A jury is to be afforded great latitude in making damage award determinations. *Russell v.*

Neumann-Steadman, 759 N.E.2d 234, 237 (Ind. Ct. App. 2001). A verdict will be upheld if the award falls within the bounds of the evidence. *Id.* To warrant reversal, a jury award “must appear to be so outrageous as to impress the Court at “first blush” of its enormity.” *Ritter v. Stanton*, 745 N.E.2d 828, 844 (Ind. Ct. App. 2001) (quoting *Kimberlin v. DeLong*, 637 N.E.2d 121, 129 (Ind. 1994) (internal quotation omitted)), *trans. denied*. Where the damage award is so outrageous as to indicate the jury was motivated by passion, prejudice, partiality, or consideration of improper evidence, we will find the award excessive. *Id.* The jury’s damage award will not be deemed the result of improper considerations if the size of the award can be explained on any reasonable ground. *Id.* (affirming compensatory damages award of \$55 million based upon evidence in record of permanent injury and continued pain and suffering). When the evidence concerning the injury and damages is conflicting, the jury is in the best position to assess the damages, and the jury’s verdict cannot be said to be based upon prejudice, passion, partiality, corruption, or on the consideration of some improper element. *Id.*

In challenging the damages award, Ogle claims that it was based only upon speculation, which he claims is insufficient to sustain a verdict. In support of his claim, Ogle refers to authority indicating that expert medical testimony lacking reasonable certainty cannot, by itself, support a verdict. *See Topp v. Leffers*, 838 N.E.2d 1027, 1033 (Ind. Ct. App. 2005), *trans. denied*.

In denying a new trial or remittitur, the trial court observed that the award of \$1,050,000 was within the bounds of the evidence indicating Wolf’s damages ranged

between \$650,000 and \$1.1 million. The record supports the trial court's determination on this point. Evidence at trial demonstrated that Wolf suffered chronic pain as a result of the accident, and his medical bills were approximately \$137,000. Although certain statements by Dr. Madison indicated, understandably, some uncertainty as to Wolf's future pain prognosis, Dr. Madison testified in large part that Wolf had suffered permanent injury. Dr. Madison testified that although Wolf's injuries were remedied by treatment and might prove minimal if he stayed in shape, he also testified that an injured spine never fully heals, that Wolf would suffer some permanent pain for the rest of his life,² and that he would be more susceptible to re-injury. Dr. Madison further indicated that Wolf would need future medical care and approximated the cost of such care to be \$5000 per month for an unspecified number of months. (Defendant's Exh. B)

Further, Wolf's own testimony supported the jury verdict. Wolf testified that he suffered ongoing numbness in his arm and that he had begun employment as a painter because he was no longer able to do construction work. In addition, Wolf claimed he could no longer participate in sports including bicycle jumping and golf, and he continued to take prescription drugs, including daily doses of hydrocodone, which cost \$45 per month, reinforcing the conclusion that Wolf's injuries, while improved, remain. Given the great latitude afforded the jury in damages calculations and our determination that the jury's award in the instant case was within the bounds of the evidence, we decline to disturb it.

² Wolf, who is thirty-four, has a life expectancy of 42.16, presumably additional, years.

Having determined that the trial court's reasoning in overturning the jury's fault apportionment did not comply with the requirements of Trial Rule 59(J), and having determined that the jury's damages award was within the bounds of the evidence, we reverse the trial court's grant of a new trial on the issue of fault apportionment and remand with instructions to reinstate the verdict.

The judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded with instructions.

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