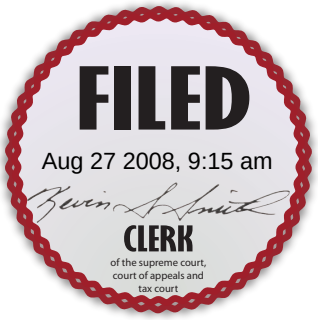

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IN THE
COURT OF APPEALS OF INDIANA

CAROLYN S. KANE and RICHARD KANE,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 19A05-0803-CV-132
WIBBELER DISTRIBUTORS, INC., and JERRY WIBBELER,	)	
Appellees-Defendants,	)	

APPEAL FROM THE DUBOIS SUPERIOR COURT
The Honorable Hugo C. Songer, Senior Judge
Cause No. 19D01-0205-CT-68

August 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Carolyn S. Kane ("Carolyn") and her husband, Richard Kane (collectively, "the Kanes"), appeal the trial court's denial of their motion to correct error after the jury returned a verdict finding that Jerry Wibbeler ("Wibbeler") was not liable for the damages they allegedly sustained after a van negligently driven by Wibbeler struck the truck driven by Carolyn.

We affirm.

ISSUES

1. Whether the trial court erred in denying the Kanes' motion to correct error because the jury's verdict was inadequate as a matter of law, and a new trial is required on the issue of damages.

2. Whether the trial court erred in failing to present the Kanes' claim to the jury as a case of comparative fault.

3. Whether the trial court erred by granting judgment on the evidence in favor of the defendant Wibbeler Distributors, Inc. ("Wibbeler, Inc.")

FACTS

On May 23, 2000, a van driven by Wibbeler struck the rear of the truck being driven by Carolyn; the impact caused her truck to rotate and hit another vehicle. At the scene, Carolyn "told [Wibbeler she] was fine," and she rode away from the scene in the tow truck. (Tr. 104). Several hours later, a family member took Carolyn to the local hospital. The Memorial Hospital report reflects that Carolyn complained of knee pain, but that she reported no "loss of consciousness, no headache, no double vision or blurred

vision" or any difficulty in turning her neck. (Ex. 6[1]). Carolyn missed four days of work at her son's business after the accident and then returned to work. On June 6, 2000, Carolyn saw her physician, Dr. Patterson, about "a dull frontal headache" she had been suffering since the accident, and Dr. Patterson ordered radiological tests. *Id.* Memorial Hospital's cervical spine x-rays and CT scan of Carolyn's head on June 9, 2000, reflected "[n]o signs of trauma or other abnormality." (Ex. A[2]). There is no evidence that Carolyn sought any further treatment for headaches during the following eight months.

On February 23, 2001, Carolyn was in another accident, wherein her automobile was struck from behind with such force as to flip it over.[3] An emergency rescue crew placed Carolyn on a backboard and transported her by ambulance to the hospital, where she was examined and then released, with orders to take ibuprofen. Subsequently, she saw various providers as follows:

- On March 23, 2001, she saw Dr. Waflart to complain of "pain in the posterior neck muscles . . . since she had a motor vehicle accident about a month ago." *Id.* Dr. Waflart referred her for physical therapy.

- At her March 27, 2001, Deaconess-St. Joseph's Hospital appointment for physical therapy, Carolyn's "chief complaint" was "of cervical pain." *Id.* Carolyn reported to the physical therapy clinician that she "was involved in a motor vehicle accident on 02/23/01," and had suffered this cervical pain

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[1] Exhibit 6 consists of multiple medical provider reports as to Carolyn dating from May 23, 2000 through August 8, 2006. Pages within this approximately one-inch stack of medical reports are not numbered. Hence, the location of the specific quoted material within Exhibit 6 cannot be referenced except as to the date and identity of the provider.

[2] Exhibit A is a nearly one-inch collection of medical records as to Carolyn dating from May 23, 2000, through December 17, 2006. Thus, again, the location of specific quoted material can only be referenced as to the date and identity of the provider.

[3] In her account to one medical provider, Carolyn indicated that the vehicle which struck hers was traveling about eighty-five miles an hour. Ex. A, Walden Chiropractic, Nov. 19, 2001.

"beginning after the accident." *Id.* Carolyn received treatment at this physical therapy facility for several weeks.

- On May 25, 2001, Carolyn sought treatment at a different physical therapy facility, HealthSouth. Carolyn reported to the therapist that she was injured on February 23, 2001, and she had suffered "constant headaches" since the accident on that date. *Id.*

- Upon a referral from Dr. Waflart, on September 7, 2001, Carolyn saw Dr. Kovacs, a neurologist. Carolyn reported to Dr. Kovacs that she "had a motor vehicle accident on 2/23/2001," in which her car "was flipped several times" after being "rear-ended." Dr. Kovacs specifically noted that Carolyn "complained of a bilateral, posterior headache of fluctuating intensity since a motor vehicle accident in February of this year." *Id.*

- On November 9, 2001, Carolyn went to Walden Chiropractic, where she wrote on the patient information form that she sought treatment for daily headaches that began "Feb. 23, 2001" and were "due to an accident" on "2-23-01." *Id.* The initial patient history reflects that she reported being "rear ended in auto acc. in Feb. '01", with her "car flipped 2X." *Id.* Carolyn is quoted as saying that she had constant headaches "since the accident." *Id.*

- In July of 2002, Carolyn reported to her gynecologist, Dr. Gray, that she "was in an auto accident approximately one year ago and ha[d] had recurrent headaches since then" on a daily basis. *Id.* Dr. Gray referred Carolyn to Dr. Tiwari, with the Pain Management Center in Bloomington.

- On July 20, 2002, Carolyn went to Dr. Tiwari. She reported "a history of neck pain for 1 ½ years," after being "involved in an MVA where her car was flipped upside down." *Id.*

- On April 8, 2004, Carolyn met with Dr. Toothman, an acupuncturist. Carolyn reported "chronic problems with headache" after she "was in a car accident 3 years ago." *Id.*

- On August 16, 2004, Carolyn saw Dr. Fleck about her headaches. She reported that the "headaches started over three years ago and after a motor vehicle accident" in which "her car was flipped over." *Id.* "Since that time, she has had a headache typically in the upper neck and bioccipital head region." *Id.*

- On November 15, 2004, upon a referral from Dr. Fleck, Carolyn saw Dr. Alexander Nitu for evaluation.

In the meantime, on May 22, 2002, the Kanes filed a complaint against Wibbeler and Wibbeler, Inc. regarding the vehicle accident on May 23, 2000. They sought compensation for the injuries they suffered "as a direct and proximate result of the careless operation by [Wibbeler] of a motor vehicle owned by [Wibbeler, Inc.]." (App. 17). At a motion[4] hearing held on December 6, 2006, the Kanes argued "that the defendants should be precluded from introducing at trial any evidence that Mrs. Kane was involved in [a] second accident" because the defendants had not asserted a non-party defense as required by the Indiana Comparative Fault Act. (Tr. 4). Wibbeler agued that the issue was not whether Wibbeler caused the May 23, 2000 accident, but whether that accident was the cause of Carolyn's headaches. The trial court denied the Kanes' motion "for the reason that the comparative law applies to fault and not to causation for these injuries." (Tr. 16).

Trial by jury took place October 22-23, 2007. At the outset, counsel for Wibbeler advised the trial court that Wibbeler had "stipulated to being at fault for causing the accident." (Tr. 20). Also, in his opening statement, counsel advised the jury that the May 23, 2000 "accident was Mr. Wibbeler's fault." (Tr. 68). Further, Wibbeler testified that he "was at fault" in the May 2000 accident. (Tr. 72). In essence, Wibbeler admitted fault for the accident but denied causation for Carolyn's headaches.

Carolyn confirmed the accuracy of above-cited references in her numerous medical reports, which were introduced into evidence and reviewed by the jury.

[4] The hearing indicates that this was a motion in limine by the Kanes, but there is no such motion in the Appendix.

However, she testified that she had actually suffered the headaches since the May 2000 accident. Carolyn acknowledged that she had returned to work within several days of the May 2000 accident, but had not returned to work for several months after the February 2001 accident. Carolyn testified that after Dr. Nitu evaluated her in late 2004, he recommended that she have a sleep study, but she failed to do so.

A letter dated October 8, 2002, written by Carolyn's counsel regarding the accident of "2-23-01," was introduced in to evidence. (Ex. C). The letter enumerated specific medical expenses incurred and wages lost since the February 2001 accident, and asserted that Carolyn "still suffer[ed] from constant headaches even though the accident occurred well over a year and a half ago," and the headaches were affecting her ability to work. *Id.* Carolyn testified that the bills and damages asserted in the October 8, 2002 letter regarding the February 2001 accident were the same as those for which she now sought to hold Wibbeler responsible. Carolyn further testified that she had "received a lot of money for [the February 23, 2001 accident] claim." (Tr. 131).

Carolyn also testified that in August of 2003, she filed an application for Social Security Disability. In her application, admitted into evidence, she stated under oath that she suffered "constant headaches," which had begun on February 23, 2001, and had rendered her "unable to work." (Ex. D, p. 2).

In "late 2006," counsel for Carolyn contacted Dr. Nitu and asked him to provide expert medical testimony. (Depo.[5] 10). Dr. Nitu later "interview[ed]" Carolyn. (Ex. 9).

[5] Dr. Nitu's videotaped deposition was played for the jury at trial.

He "met with [Carolyn] in end [sic] of 2006," and "asked her some questions regarding her medical history." (Depo. 46, 38). Carolyn told him that her headaches had begun after the May 2000 accident. Dr. Nitu opined that Carolyn's chronic headaches were caused by a condition that "was caused by the trauma in the first accident." (Depo. 32). Nitu acknowledged that his information about when Carolyn's headaches began came solely from Carolyn. Nitu further acknowledged that if Carolyn "was pain free" before the second accident, that fact "would probably change [his] conclusion" about what had caused her chronic headaches. (Dep. 67).

At the conclusion of the Kanes' case-in-chief, counsel for Wibbeler and Wibbeler, Inc. moved for judgment on the evidence as to the latter -- asserting the lack of "any evidence that Mr. Wibbeler was operating the vehicle in the course and scope of his employment." (Tr. 194). The trial court granted the motion "on the grounds that there's no evidence that there was an agency relationship between" Wibbeler and Wibbeler, Inc. (Tr. 196).

Carolyn returned to the witness stand. She confirmed that when she did not return to work after February 23, 2001, "it was because of the second accident." (Tr. 198).

The trial court instructed the jury that "[i]f" it found "from the preponderance of the evidence" that Wibbeler "caused the injuries claimed by" the Kanes, it could then determine damages that would "fairly compensate" them. (Tr. 234). It further instructed that any damages awarded -- for necessary medical care, the loss of past or future earnings, pain and suffering, and the value of Carolyn's services -- must be for those effects experienced "as a result of" or "related to the accident of May 23, 2000." (Tr.

234). The trial court provided the jury with "two forms of verdicts": one stating that "we, the Jury, find for the Defendant, Jerry Wibbeler and against the Plaintiffs, Carolyn Kane and Richard Kane," and "the other form" stating that

> We, the Jury, find for the Plaintiffs, Carolyn and Richard Kane, and we further find that the total amount of damages which the Plaintiff, Carolyn Kane, is entitled to recover is the sum of _____; the total amount of damages which Richard Kane is entitled to recover is the sum of _____.

(Tr. 235).

The jury returned a verdict finding for Wibbeler and against the Kanes. The trial court entered judgment accordingly.

On November 26, 2007, the Kanes filed a motion to correct error[6] raising several trial court and jury errors. The trial court held a hearing on the motion on January 3, 2008. The Kanes argued that they were entitled to a new trial based on "an inadequate damage award," (Tr. 240), given the undisputed evidence Carolyn had at least incurred medical expenses and lost wages in the sum of $1,834.36 before she was involved in the February 23, 2001 accident. The Kanes further argued that the verdict "was a result of juror misconduct," referring to an affidavit of a particular juror that indicated that the jurors discussed whether the Kanes might have already been compensated by Wibbeler's insurer. (Tr. 243). The trial court took the matter under advisement, and on February 4, 2008, the Kanes' motion to correct error was deemed denied pursuant to Trial Rule 53.3(A).

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[6] The motion is not included in the Appendix.

DECISION

1. Denial of Motion to Correct Error

The Kanes first remind us that Wibbeler stipulated that he was at fault for the May 23, 2000, accident, and that they incurred special damages from that accident in the undisputed amount of $1,834.36. The Kanes then argue that the jury's verdict "was inadequate as a matter of law," and that the trial court erred when it did not order a new trial on the issue of damages. Kanes' Br. at 7. We disagree.

We review the trial court's denial of a request for a new trial presented by a Trial Rule 59 motion to correct error for abuse of discretion. *Speedway Superamerica, L.L.C. v. Holmes*, 885 N.E.2d 1265, 1270 (Ind. 2008). In *Weida v. Kegarise*, 849 N.E.2d 1147 (Ind. 2006), our Supreme Court extensively discussed Indiana's Trial Rule 59(J), which authorizes a trial court to order a new trial upon a party's motion to correct error, and held that "strict compliance" with the rule was required. *Id.* at 1156.

Weida noted that under the current rule, trial courts have various remedies to correct error, not only to grant a new trial but also to "direct final judgment to be entered" or "correct the error without a new trial." *Id.* at 1151 (quoting (T.R. 59(J)). Initially, "a trial court must be satisfied that some 'prejudicial or harmful' error has occurred before any remedial action may be taken." *Id.* (emphasis added). Then, "when a court reaches this conclusion, it may take one of two steps: 1) enter final judgment, or 2) correct the error by some measure other than a new trial." *Id.* When the "verdict is clearly erroneous because it is contrary to or not supported by the evidence," the trial court "should enter final judgment unless it would be 'impracticable or unfair' to do so." *Id.*

Under the current rule, the authority to grant a new trial is limited "to those situations where a conclusion was reached that other relief could not effectively or fairly remedy the error." *Id.* at 1150. "If and only if" this alternative relief (by the trial court's entry of final judgment, or the correction of error by some other method than a new trial) "is 'shown to be impracticable or unfair' may the court order a new trial." *Id.* at 1151 (quoting T.R. 59(J)). A new trial "shall" be granted only "when the verdict is clearly erroneous because it is contrary to or not supported by the evidence." *Id.* *Weida* concluded by noting that "proper deference to the decision of the jury requires extreme caution" in application of Trial Rule 59(J). *Id.* at 1156.

The Kanes assert that the facts here are akin to those in *Russell v. Neumann-Steadman*, 759 N.E.2d 234, 238 (Ind. Ct. App. 2001). There, the parties were also involved in an automobile accident. At trial, the defendant admitted liability, and the plaintiff was granted "judgment on the evidence with regard to liability." *Id.* at 236. Thereafter, the jury "returned a verdict in favor" of the plaintiff "but awarded zero damages." *Id.* Upon the plaintiff's motion to correct error, the trial court awarded damages in the amount of $6,300.00. We noted that the evidence had established the plaintiff's undisputed medical damages resulting from the accident were in the amount of $2,100. Therefore, we concluded, the "additional $4200" awarded by the trial court was "presumably for pain and suffering." *Id.* at 238. Noting that damage awards for pain and suffering are matters to be determined by the jury, we reversed and remanded for the "proper remedy": "a new trial on the issue of damages." *Id.* at 238.

However, unlike in *Russell*, the case before us involves two successive accidents and differing inferences as to the injuries resulting from those two accidents. Further, in *Russell*, there was a judgment as to the defendant's liability and then the jury's verdict of no damages therefor.[7] Here, despite the fact that the Kanes' appellate argument for a new trial is premised upon Wibbeler's admission of liability for the May 2000 accident, the record reflects no objection on their part to the verdict forms given to the jury by the trial court. One verdict form allowed the jury to find for Wibbeler and against the Kanes. We find that the Kanes' failure to object to the verdict form, or to offer an alternative verdict form, constitutes a concession that the evidence could support a verdict in favor of Wibbeler.

As the Kanes properly note, we have stated that the trial court may reverse a jury verdict only "when it is apparent from the review of the evidence that the amount of damages awarded by the jury is so small or so great as to clearly indicate that the jury was motivated by prejudice, passion, partiality, corruption or that it considered an improper element." *Dee v. Becker*, 636 N.E.2d 176, 177 (Ind. Ct. App. 1994). We have also stated that a "damage award must be within the scope of the evidence presented to the jury." *Carbone v. Schwarte*, 629 N.E.2d 1259, 1261 (Ind. Ct. App. 1994).

Here, the Kanes asserted to the jury that as a result of the May 2000 accident, Carolyn should be compensated in the amount of $532,894 for medical expenses, lost wages, lost future earnings, and pain and suffering from her chronic headaches. They

[7] Similarly, in *Manzo v. Estep*, 689 N.E.2d 474 (Ind. Ct. App. 1997), on which *Russell* relies, the "jury returned a verdict in favor of the Plaintiffs but awarded the Plaintiffs zero dollars ($0) in damages." *Id.* at 475.

asserted that Mr. Kane should be compensated for his lost wages of $1,997, and that his pain and suffering should be assessed in a range from $20,597 to $205,974. Thus, they argued that they should be awarded compensation in an amount between $555,884 and $740,865.

Carolyn expressly admitted in her testimony that the Kanes had "received a lot of money" for the claim they made on the February 2001 accident. (Tr. 131). The trial court noted at the hearing on the Kanes' motion to correct error that they "chose not to" present evidence of the amount of this settlement at trial. (Tr. 246, 249). The trial court further noted that because there was no testimony elicited from the Kanes that they "had not received anything" for Carolyn's May 2000 accident injuries, "the jury was required to speculate" in that regard. (Tr. 248).

The Kanes sought damages in the range from $555,884 to $740,865; there was evidence of special damages in the undisputed amount of $1,834.36, a mere .3% of the lowest amount sought; and the Kanes did not object but allowed the jury the option of a verdict form for a defense verdict, with $0 damages. Viewed through the prism of the evidence presented and the circumstances surrounding the trial, we cannot conclude that the jury verdict that effectively awarded no damages for injuries sustained by the Kanes as a result of the May 2000 accident "clearly indicate[s] that the jury was motivated by prejudice, passion, partiality, corruption or that it considered an improper element," *Dee*, 636 N.E.2d at 177, or was not "within the scope of the evidence presented." *Carbone*, 629 N.E.2d at 1261.

Finally, we return to the framework of Trial Rule 59(J), with its "express preference for the use of other remedies before the grant of a new trial." *Weida*, 849 N.E.2d at 1150. At the hearing on the motion to correct error,[8] the Kanes did not seek relief from the trial court in the form of an entry of judgment in the undisputed amount of special damages or the grant of a new trial subject to additur. Nor have they argued on appeal that the trial court erred in not granting such a remedy. Rather, the Kanes' argument to the trial court and on appeal is that the circumstances here mandate the granting of a new trial on the issue of damages. Based on the reasoning above, we do not find that the trial court abused its discretion by not ordering a new trial on the issue of damages.

2. Comparative Fault

Next, the Kanes argue that the trial court erred when it did not present their claim "to the jury as a case of comparative fault" because Wibbeler contended at trial "that the tortfeasor in the second accident . . . caused the majority of the Kanes' damages." Kanes' Br. at 6. They cite Indiana's Comparative Fault Act for the proposition that "[u]nder the Act, the total fault for an accident is apportioned between the plaintiff, defendant, and any other negligent person who is properly named as a nonparty." *Id.* However, their own assertion highlights the flaw in their argument: it applies in apportioning "the total fault for an accident." *Id.* (emphasis added); *see also K-Mart Corp. v. Englebright*, 719

[8] As already noted, the Kanes did not include the motion to correct error in their Appendix.

N.E.2d 1249, 1260 (Ind. Ct. App. 1999) (Act provides for apportionment of "the total fault for an accident"), *trans. denied*.

The accident at issue was that of May 23, 2000 -- the only accident involving both Carolyn and Wibbeler. As the trial court properly noted, Wibbeler admitted his fault for that accident. Therefore, there was no need for the jury to proceed under the Comparative Fault Act with an apportionment of fault.

3. Judgment on the Evidence

The granting of a motion for judgment on the evidence is within the broad discretion of the trial court and will be reversed only for an abuse of that discretion. *Northrop Corp. v. Gen. Motors Corp.*, 807 N.E.2d 70, 86 (Ind. Ct. App. 2004), *trans. denied*. Viewing the evidence in the light most favorable to the non-moving party, judgment is properly granted as to an "issue[] in the case," T.R. 50(A), if there is a lack of "any reasonable evidence" to support the claim on that issue. *Stowers v. Clinton Cent. School Corp.*, 855 N.E.2d 739, 747 (Ind. Ct. App. 2006), *trans. denied*.

Without authority, the Kanes argue that the trial court erred when it granted judgment on the evidence as to Wibbeler, Inc. because there was a stipulation "that the Defendants were at fault." Kanes' Br. at 16 (emphasis added). We find no such stipulation.

At a hearing before the commencement of trial, counsel for the Kanes argued that a preliminary instruction of the trial court did not "quite go far enough" because "this is a case of comparative fault." (Tr. 20). In response, counsel for Wibbeler and Wibbeler,

Inc. stated that this was not "a case of comparative fault anymore" because "[w]e stipulated to being at fault for causing the accident." *Id.*

Subsequently, in its preliminary instructions to the jury, the trial court stated that "[t]he defendant, Jerry Wibbeler, admits that he was involved in an automobile accident on May 23, 2000, with [Carolyn]," and "that the automobile accident was caused by his actions." (Tr. 50). In his opening statement, counsel for Wibbeler asserted that the May 23, 2000, "accident was Mr. Wibbeler's fault." (Tr. 68). Wibbeler then testified that he was at fault for the accident.

We find no stipulation that Wibbeler, Inc. was at fault for the accident. Moreover, as the trial court properly found, the Kanes presented "no evidence that there was an agency relationship between" Wibbeler and Wibbeler, Inc. (Tr. 196). Therefore, the trial court did not err when it granted judgment on the evidence in favor of Wibbeler, Inc.

Affirmed.

NAJAM, J., and BROWN, J., concur.