NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

HOLLY ANN KUCHWARA AND ROBERT J. KUCHWARA,

Appellee

v.

THEODUS WILLIAMS AND VALVANO CONSTRUCTION, INC.,

APPEAL OF: THEODUS WILLIAMS

DOREEN MAZUR AND STEPHEN MAZUR, HUSBAND AND WIFE, AND AZURE MAZUR,

Appellee

v.

THEODUS WILLIAMS AND VALVANO CONSTRUCTION, INC.,

Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 508 MDA 2013

Appeal from the Judgment Entered February 19, 2013
in the Court of Common Pleas of Luzerne County
Civil Division at No.: 7040-2010

BEFORE: PANELLA, J., OLSON, J., and PLATT, J.* **FILED MAY 12, 2014**

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* Retired Senior Judge assigned to the Superior Court.

MEMORANDUM BY PLATT, J.

Appellant, Theodus Williams, appeals from the judgment entered following the denial of his motions for post-trial relief, new trial, and remittitur, and the grant of delay damages to Appellees, Holly Ann Kuchwara and Robert J. Kuchwara. We affirm.

On May 7, 2010, Holly Ann Kuchwara was injured in a motor vehicle accident in Scranton, Pennsylvania, involving Valvano Construction, Inc. (Valvano)'s dump truck and a third vehicle driven by Doreen and Steven Mazur.[1] Appellant was driving Valvano's truck when he became lost, the brakes failed, and the truck barreled down a hill in excess of forty-five miles per hour, striking the Mazurs, who rear-ended Mrs. Kuchwara. Mrs. Kuchwara sustained numerous injuries, including lacerations to her face and fractures to her leg, ankle, and back. She has since undergone multiple surgeries and has been left with pain, permanent, visible scars, an altered gait, and a significant limp. (***See*** Trial Court Opinion, 1/31/13, at 11-12).

A month-long jury trial commenced on August 27, 2012, where it was established that, at the time of the accident, Valvano had been operating its trucks without the certifications required by the Public Utilities Commission

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[1] The Mazurs' litigation was initially consolidated with this action, but they ultimately reached a settlement agreement with Valvano and Appellant. (***See*** Appellees' Brief, at 13 n.12). Valvano has separately appealed the underlying judgment at No. 494 MDA 2013.

(PUC) and the Federal Motor Carrier Safety Regulations. ***See*** 66 Pa.C.S.A. § 1101; 52 Pa. Code § 31.32. Appellant failed to perform a pre-trip inspection of the truck before leaving Valvano's garage on the morning of the accident. In addition, the complaint alleged that the truck's faulty brakes had not been properly inspected and only three out of eight brakes were functioning, it was not operating with a tag axle as required, the steering wheel had at least seven and a half inches of play, and its speedometer and many of the safety alarms were inoperable, among other maintenance issues. (***See*** Amended Complaint, 8/10/11, at 9-14). On September 24, 2012, the jury returned a verdict in favor of Appellees, awarding them $9,100,000.00 in compensatory damages and $1,025,000 in punitive damages.[2] Appellant filed motions for post-trial relief, and Appellees filed a motion for delay damages. On January 31, 2013, the court denied Appellant's post-trial motions and granted Appellees' motion for delay damages in the amount of $386,717.98, and filed an opinion. The trial court entered final judgment on February 19, 2013. Appellant timely appealed.[3]

Appellant raises four questions for our review:

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[2] The jury specifically found that Appellant's conduct was negligent and recklessly indifferent to the safety and wellbeing of Mrs. Kuchwara, and that he was twenty percent liable. (***See*** N.T. Trial, 9/21/12, at 1642-45).

[3] The trial court did not order Appellant to file a concise statement of errors, and did not file an additional opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925. ***See*** Pa.R.A.P. 1925(a)-(b).

> 1. Did the trial court commit reversible error in allowing [Appellees] to introduce, during the compensatory phase of the trial, a legal definition of "reckless indifference" and allowing [Appellees] to elicit and introduce opinion testimony from its lay and expert witnesses on the question of whether or not conduct on the part of [Appellant] constituted "reckless indifference"?
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> 2. Did the trial court commit reversible error in instructing the jury on negligence *per se* as against [Appellant] and, further, in failing to identify a single specific statute, regulation, or ordinance which [Appellant] allegedly violated?
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> 3. Did the trial court commit an abuse its discretion [sic] in refusing to grant a new trial in this matter when it allowed [Appellees'] counsel, over objection, to argue in his closing that the jury should "send a message" with its compensatory award verdict and failed to provide any curative instruction to the jury regarding [Appellees'] argument?
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> 4. Did the trial court commit reversible error in allowing for two separate lines on the verdict slip in connection with [Appellee] Robert Kuchwara's loss of consortium claim?

(Appellant's Brief, at 4).

Appellant claims that he is entitled to a new trial. (***See id.*** at 44). Our standard of review of this challenge is well-settled:

> Our review of the trial court's denial of a new trial is limited to determining whether the trial court acted capriciously, abused its discretion, or committed an error of law that controlled the outcome of the case. In making this determination, we must consider whether, viewing the evidence in the light most favorable to the verdict winner, a new trial would produce a different verdict. Consequently, if there is any support in the record for the trial court's decision to deny a new trial, that decision must be affirmed.

Grossi v. Travelers Pers. Ins. Co., 79 A.3d 1141, 1148 (Pa. Super. 2013) (citation omitted).

In his first issue, Appellant asserts that the trial court erred "in allowing [Appellees] to introduce, during the compensatory phase of the

trial, a legal definition of 'reckless indifference' and allowing [Appellees] to elicit and introduce testimony from its expert witnesses and from [Appellant] on the question of whether or not conduct on the part of [Appellant] constituted 'reckless indifference.'" (Appellant's Brief, at 15). He contends that "in the Commonwealth of Pennsylvania there is no support in any of the appellate courts to allow for either a lay witness nor [sic] an expert witness to provide opinion testimony on a legal conclusion, such as the trial court in this matter allowed." (***Id.*** at 28). We disagree.

At the time of trial, Pennsylvania Rule of Evidence 704 provided: "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Pa.R.E. 704.[4]

"Pennsylvania law allows expert opinion testimony on the ultimate issue. As with lay opinions, the trial judge has discretion to admit or exclude expert opinions on the ultimate issue depending on the helpfulness of the testimony versus its potential to cause confusion or prejudice." ***McManamon v. Washko***, 906 A.2d 1259, 1278-79 (Pa. Super. 2006), *appeal denied*, 921 A.2d 497 (Pa. 2007) (citations omitted); ***see also*** Pa.R.E. 701(b) (providing that lay witnesses may give opinions "helpful to

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[4] Rule 704 was rescinded and replaced, effective March 18, 2013, to provide: "An opinion is not objectionable just because it embraces an ultimate issue." Pa.R.E. 704.

clearly understanding the witness's testimony or to determining a fact in issue"). "Therefore, the trial court will not be reversed in ruling upon the admissibility of testimony to the ultimate issue in the case unless the trial court clearly abused its discretion and actual prejudice occurred." ***Houdeshell v. Rice***, 939 A.2d 981, 986 (Pa. Super. 2007) (case citations and internal quotation marks omitted).

Here, Appellant objects to Appellees playing, during opening statements, deposition video of himself agreeing with counsel's statement, "[Trooper Astolfi] opined that permitting this vehicle with those defects on the roadway constituted reckless indifference towards the safety of those on the roadway." (Appellant's Brief, at 16 (citing N.T. Trial, 8/28/12, at 118)). Counsel for Appellees introduced the video clip by telling the jury, "I said to you some time ago that the Judge will have to decide if the issue of reckless indifference is a question you have to decide[.]" (N.T. Trial, 8/28/12, at 118). Appellant also objects to his trial court testimony on cross-examination in which he affirmed deposition testimony that he had previously quit his job at Valvano over safety concerns, and that "allowing [the dump truck] on the roadway constituted reckless indifference to the safety of the motoring public[.]" (N.T. Trial, 9/11/12, at 1444; ***see also id.*** at 1442-44; Appellant's Brief, at 25).

Second, he contests testimony by Walter Guntharp, who was admitted as an expert witness in safety practices, compliance with state and federal

regulations, maintenance programs, and operation of vehicles similar to Valvano's trucks. (***See*** N.T. Trial, 9/06/12, at 596-97).

In light of evidence that Appellant and Valvano failed to comply with commercial driver's license requirements, Mr. Guntharp testified:

> The very fundamental foundation of a safe operation is the qualification of the drivers and making sure that you hire safe, qualified drivers. The only way to do that is to go through the qualification process we just talked about with the background checks and everything else. A company that fails to do that clearly is showing a reckless indifference for safety because they are just putting virtually anybody with a driver's license behind the wheel.

(***Id.*** at 708-09).

"A legal conclusion is a statement of a legal duty without stating the facts from which the duty arises." ***Mellon Bank, N.A. v. Nat'l Union Ins. Co. of Pittsburgh, PA***, 768 A.2d 865, 869 n.1 (Pa. Super. 2001) (citation omitted). Here, the trial court determined that "because this case involved the operation of a 1979 Mack Tri Axle dump truck with self (driver) adjusting brakes," opinion testimony was probative in determining the ultimate issue of whether the condition of Valvano's truck and Appellant's conduct rose to the level of reckless indifference. (Trial Ct. Op., at 6); ***see also McManamon***, ***supra*** at 1278-79. In furtherance of this goal, the court required the witnesses to develop the factual bases for their opinions. (***See, e.g.***, N.T. Trial, 9/10/12, at 1343). Thus, the trial court did not abuse its discretion in permitting lay and expert witnesses, including Appellant, to opine on the ultimate issue. ***See Houdeshell***, ***supra*** at 986.

Furthermore, the record supports the trial court's observation that Appellant was not prejudiced by this testimony. (***See*** Trial Ct. Op., at 6). Valvano's witness, John Valvano, Jr., conceded that "the company was indifferent to the safety of the vehicles[.]" (N.T. Trial, 8/30/12, at 544). Appellant did not object to this testimony. (***Id.***). Another Valvano employee, Anthony Tunis, agreed that knowing failure to keep vehicle reports, certify the trucks with the PUC, or to inspect vehicles was "indifferen[t] to the safety" of the vehicles and the motoring public. (N.T. Trial, 9/05/12, at 505; ***see id.*** at 504-09, 518-20). Appellant did not object to these statements, either. Thus, where Appellant failed to object to testimony by other witnesses who also conceded the level of indifference exhibited by Valvano and its agents, including Appellant, he has failed to prove that "actual prejudice occurred" by admitting his own and Guntharp's testimony on the ultimate issue of reckless indifference. ***Houdeshell***, ***supra*** at 986. Appellant's first issue does not merit relief.

In his second issue, Appellant contends that the trial court erred "in instructing the jury on negligence *per se* as against [Appellant] and, further, in failing to include in such instruction a single specific statute, regulation, or ordinance which [Appellant] allegedly violated." (Appellant's Brief, at 30). Specifically, he argues that none of the statutes at issue apply to him, and that the court was required to cite the statutes in its charge to the jury. (***See id.*** at 30-36). We disagree.

> Under Pennsylvania law, our standard of review when considering the adequacy of jury instructions in a civil case is to determine whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. It is only when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue that error in a charge will be found to be a sufficient basis for the award of a new trial.
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> Further, a trial judge has wide latitude in his or her choice of language when charging a jury, provided always that the court fully and adequately conveys the applicable law.

Smith v. Morrison, 47 A.3d 131, 134-35 (Pa. Super. 2012), *appeal denied*, 57 A.3d 71 (Pa. 2012) (citations and quotation marks omitted).

Here, the trial court instructed the jury, in relevant part:

> . . . [Y]ou must decide whether [Appellant] was negligent and whether [his] conduct was a legal cause in bringing about [Appellees'] harm. . . .
>
> In stating that [Appellees'] claims are based upon the alleged negligence of [Appellant], it is necessary for me to define that term. The legal term, negligence, otherwise known as carelessness, is the absence of ordinary care that a reasonably prudent person would use under the circumstances. Negligent conduct may consist either of an act or a failure to act when there is a duty to do so. In other words, negligence is the failure to do something that a reasonably careful person would do or doing something that a reasonably careful person would not do in light of all the surrounding circumstances established by the evidence [in] this case. It is for you to determine how a reasonably careful person would act under those circumstances.
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> Ordinary care, as I have mentioned, is the care a reasonably careful person would use under the circumstances presented in the case. It is the duty of every person to use ordinary care, not only for his or her own safety and the protection of his or her own property but also to avoid injury to others. What constitutes ordinary care varies according to the particular circumstances and conditions existing then and there. The amount of care required by the law must be in keeping with the degree of danger involved.

> The Pennsylvania Motor Vehicle Code, the Pennsylvania Instrastate Motor Carrier Safety Regulations, and the Federal Motor Carrier Safety Regulations also dictate the duty of care required of [Appellant] as a driver of a commercial vehicle. You must decide whether [Appellant] complied with these laws, rules, and regulations. If you find there was a violation of these regulations, that would be evidence that you should consider along with all the other evidence presented on the question of whether [Appellant] was negligent. However, before you answer the question of [Appellant's] liability, you must decide whether that negligence was a legal cause of Mrs. Kuchwara's injuries. If you find by a preponderance of the evidence that [Appellant] violated provisions of the Pennsylvania Motor Vehicle Code, the Pensylvania Intrastate Motor Carrier Safety Regulations, and/or the Federal Motor Carrier Safety Regulations and that such violations were a legal cause of the collision of May 7th, 2010, your verdict must be in favor of [Appellees] and against [Appellant].
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> Members of the jury, I instruct you that the law requires that a driver operating on the roads of Pennsylvania have his vehicle under control at all times so that he can stop before doing injury to any person in any situation that reasonably arises under the circumstances. If you find by a preponderance of the evidence that [Appellant] failed to have Truck 88 in control and that such failure was a legal cause causing the injuries and the harm to Mrs. Kuchwara, your verdict must be for [Appellees].

(N.T. Trial, 9/21/12, at 1508-11); ***cf.*** Pa. SSJI (Civ) 13.10 (standard instructions on negligence).[5] Furthermore, the jury returned the following verdict:

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[5] Appellant did not object to the charge as given, but discussed the issue in the charging conference. (***See*** N.T. Trial, 9/19/12, at 1125-28; N.T. Trial, 9/21/12, at 1547-48). "[A]n exception to the trial court's refusal to charge the jury as requested is sufficient to preserve the issue for appeal even if there is no specific objection to the charge at trial." ***Caldwell v. City of Philadelphia***, 517 A.2d 1296, 1304 (Pa. Super. 1986), *appeal denied*, 535

(Footnote Continued Next Page)

> The Court: . . . No. 1, Do you find that [Appellant] was negligent?
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> The Foreperson: Yes.
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> The Court: Question 2, Was the negligence of [Appellant] a legal cause in bringing about the harm of Holly Ann Kuchwara?
>
> The Foreperson: Yes.

(N.T. Trial, 9/21/12, at 1641-42).

On review, we conclude that this jury instruction more than adequately instructed the jury about the negligence and related sections of the Vehicle Code. ***See Smith***, ***supra*** at 134-35. Furthermore, to the extent that Appellant argues that he was prejudiced, this claim must fail because the jury was not asked to find Appellant negligent *per se*. ***See Grossi***, ***supra*** at 1148. Accordingly, viewing the jury instructions as a whole, we conclude that the trial court did not commit a clear abuse of discretion or error of law where it did not mislead or confuse the jury about the law. Appellant's second issue does not merit relief.

In his third issue, Appellant argues that the trial court abused its discretion "in refusing to grant a new trial in this matter when it allowed [Appellees'] counsel, over objection, to argue to the jury in his closing that they should 'send a message' with its compensatory award verdict and failed

(Footnote Continued) ———————————

A.2d 1056 (Pa. 1987) (citations omitted). Therefore, we conclude that this issue was properly preserved.

to provide any curative instruction to the jury regarding [Appellees'] argument." (Appellant's Brief, at 39). We disagree.

> Our review of a trial court's decision to grant or deny a new trial is deferential: the power to grant or deny a new trial lies inherently with the trial court, and we will not reverse its decision absent a clear abuse of discretion or error of law which controlled the outcome of the case.
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> . . . It is improper for counsel to present facts to the jury which are not in evidence and which are prejudicial to the opposing party; counsel may not comment on evidence to the effect that it removes an issue of credibility from the jury. Further, whether remarks by counsel warrant a new trial requires a determination based upon an assessment of the circumstances under which the statements were made and the precaution taken by the court and counsel to prevent such remarks from having a prejudicial effect. It is the duty of the trial judge to take affirmative steps to attempt to cure harm, once an offensive remark has been objected to.

Young v. Washington Hosp., 761 A.2d 559, 561-62 (Pa. Super. 2000), *appeal denied*, 782 A.2d 548 (Pa. 2001) (citations, quotation marks, and footnote omitted).

Here, in the context of arguing that Appellant and Valvano's conduct constituted reckless indifference, counsel for Appellees stated:

> For this entire period of time that [Valvano] chose to do this hauling work, [it] ignored the requirements to have a PUC number. And as Mr. Guntharp[, Appellees' expert witness,] said, they ignored the requirement to be registered with the Federal Government Safety Commission to, in fact, assure that they would be monitored, that they would keep a record of what kind of incidents they had. And they deliberately chose not to do that so that we have no record.
>
> And when you ask them for the records with regard to the maintenance of the vehicles, we have none. When you ask them

> for the records of any kind of periodic inspections, we have none. These were deliberate conscious choices they made. We're not going to do anything until we're caught, and then we'll pay as part of the cost of doing business. That was the attitude.
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> And it's you and only you who could say, we're not going to allow that kind of attitude. And in fact, it's you and only you who can say to the good trucking companies and to the good truck drivers—and there are so many of them—that you're doing the right thing. It's important that they get that understanding and that message.
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> [Counsel for Valvano]: Your Honor, objection to the send the message issue.
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> [Counsel for Appellees]: I'm not saying to send the message at all.
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> [Counsel for Valvano]: I apologize. But I heard send the message—
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> The Court: I heard the remark. Move on.
>
> [Counsel for Appellees]: It's important that by your verdict you acknowledge the importance of people complying with regulations and doing the right thing. . . .

(N.T. Trial, 9/20/12, at 1391-93). Appellees' counsel then concluded his argument on reckless indifference, and suggested that "it might be a convenient time [for a break] because I'm going to switch gears if you don't mind." (***Id.*** at 1395). The trial court called a twenty-minute recess. (***Id.*** at 1397). After the parties returned, counsel for Appellees resumed his argument, stating, "before I proceed to talk to you about damages . . . ." (***Id.***).

Appellant argues that the trial court ignored Valvano's objection to Appellees' argument that the verdict "send a message" to Valvano and Appellant. (Appellant's Brief, at 39). However, the record supports the trial

court's conclusion that this single remark, in the context of Appellees' more than three-hour closing argument, "is without question a systemic attack on the issue of reckless indifference." (Trial Ct. Op., at 10). Preliminarily, the actual phrase to which Appellant now objects, that the verdict "send the message", was in fact made by Valvano's counsel. (N.T. Trial, 9/20/12, at 1392). Furthermore, at the time of the remark, counsel for Appellees was discussing Appellant and Valvano's failure to comply with regulatory standards, which he argued supported a finding of reckless indifference, not a damages calculation. (***See id.*** at 1391-92). Despite the twenty-minute recess, Appellant never objected or requested a curative instruction, and on return, Appellees' counsel made it clear that only then would the discussion turn to damages. (***See id.*** at 1397).

Finally, the trial court specifically instructed the jury as to what considerations were permitted in awarding compensatory damages and that they "may not be arbitrary, speculative, or punitive[.]" (N.T. Trial, 9/21/12, at 1526); ***see also Commonwealth v. Huggins***, 68 A.3d 962, 973 (Pa. Super. 2013), *appeal denied*, 80 A.3d 775 (Pa. 2013). Appellant has not shown any prejudice arising from counsel's remarks. Thus, the trial court did not abuse its discretion or commit an error of law by permitting the statement by Appellees' counsel to stand. Appellant's third issue lacks merit.

Fourth, Appellant asserts that the trial court committed reversible error "in allowing for two separate lines on the verdict slip in connection with

[Appellee] Robert Kuchwara's loss of consortium claim[.]" (Appellant's Brief, at 41). This issue is waived.

Preliminarily, we observe that Appellant relies exclusively on a single citation to ***Anchorstar v. Mack Trucks***, 620 A.2d 1120, 1121 (Pa. 1993), for a boilerplate definition of loss of consortium claims. (***See*** Appellant's Brief, at 42). ***See*** Pa.R.A.P. 2119(a), (b); ***see also J.J. Deluca Co. v. Toll Naval Assocs.***, 56 A.3d 402, 411 (Pa. Super. 2012) (finding that failure to develop an argument waives claim). Thus, Appellant has waived the issue.

Moreover, our standard of review of jury verdicts is clear:

> The Court is not warranted in setting aside, reducing, or modifying verdicts for personal injuries unless unfairness, mistake, partiality, prejudice, or corruption is shown, or the damages appear to be grossly exorbitant. The verdict must be clearly and immoderately excessive to justify the granting of a new trial. The amount must not only be greater than that which the court would have awarded, but so excessive as to offend the conscience and judgment of the Court.

Renna v. Schadt, 64 A.3d 658, 670 (Pa. Super. 2013) (citation omitted).

At the conclusion of trial, the court instructed the jury:

> Members of the jury, a plaintiff's spouse is entitled to be compensated for the past, present, and future loss of the injured party's services to him and the past, present, and future loss of companionship. Consortium claims are losses arising out of the marital relationship and include a loss of support, comfort, assistance, association, companionship and the loss of ability to engage in sexual relations. There is no fixed, infallible, or objective standard with which to measure damages for the loss of Mrs. Kuchwara's service, society, and comfort. Rather, you are to be guided by your good judgment in calculating an award that will fully compensate Robert J. Kuchwara for these losses.

(N.T. Trial, 9/21/12, at 1532).

> The duty of assessing damages is within the province of the jury and should not be interfered with by the court, unless it clearly appears that the amount awarded resulted from caprice, prejudice, partiality, corruption or some other improper influence. In reviewing the award of damages, the appellate courts should give deference to the decisions of the trier of fact who is usually in a superior position to appraise and weigh the evidence. If the verdict bears a reasonable resemblance to the damages proven, we will not upset it merely because we might have awarded different damages.

Hatwood v. Hosp. of the Univ. of Pa., 55 A.3d 1229, 1240-41 (Pa. Super. 2012), *appeal denied*, 65 A.3d 414 (Pa. 2013) (citation omitted).

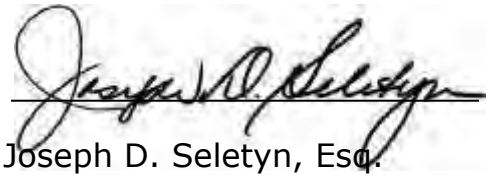
Here, Appellees' expert witness on wage loss, incapacity of earning ability and associated medical costs, Andrew C. Verzilli, estimated that, prior to the accident, Mrs. Kuchwara had provided nearly $700,000 in household services, valued at sixteen to twenty dollars per hour, twenty hours per week. (***See*** N.T. Trial, 9/14/12, at 306-78). Mrs. Kuchwara testified that, since the accident, Robert does "everything," and that her trauma has caused "strain and stress in the marriage[.]" (N.T. Trial, 9/18/12, at 797-98). The jury awarded Robert Kuchwara $400,000 for loss of consortium and $1,065,000 for loss of household services of his wife. (***See*** N.T. Trial, 9/21/12, at 1647-48). The trial court also observed that overall, the jury's award to Appellees was more modest than their experts had calculated. (***See*** Trial Ct. Op., 1/31/13, at 5-6).

Thus, the verdict bears a reasonable resemblance to the damages proven, and we will not upset it. ***See Hatwood***, ***supra*** at 1240-41. This

issue would not merit relief, and Appellant's claim for a new trial lacks merit. ***See Grossi***, ***supra*** at 1148.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/12/2014