No. 2—09—1178
Order filed March 11, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BRUCE PASSOW, MONICA DUNBAR, and JENNIFER TONEY,[1] Co-Special Administrators of the Estate of Deborah Passow, Deceased,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 04—L—831
SCOTT GLASER, M.D. and PAIN SPECIALISTS OF GREATER CHICAGO S.C.,	)	Honorable Joseph S. Bongiorno,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

Held: Where there was sufficient evidence to rebut the presumption of plaintiffs' substantial pecuniary loss because of decedent's death, the jury's award of no damages for loss of society was not against the manifest weight of the evidence, and the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial on loss-of-society damages.

Plaintiffs, Bruce Passow, Monica Dunbar, and Jennifer Toney, as co-special administrators of the Estate of Deborah Passow, Deceased, brought suit against defendants, Dr. Scott Glaser and

---

[1]At trial, Toney used the last name Groll. For consistency, we will refer to her as Toney.

his employer, Pain Specialists of Greater Chicago, P.C. under the Illinois Wrongful Death Act (740 ILCS 180/0.01 (West 2004)) and Survival Act (755 ILCS 5/27—6 (West 2004)). Passow was the decedent's husband at the time of her death, and Dunbar and Toney were her adult daughters by a previous marriage. The jury returned a verdict in favor of plaintiffs and against defendants and awarded plaintiffs damages as follows: on the survival count, $37,000 for conscious pain and suffering; $58,000 for medical care; on the wrongful death count, $5,000 for funeral expenses; and $0 for loss of society. Plaintiffs appeal from that part of the wrongful death verdict that awarded no damages for loss of society, contending that they are entitled to a new trial on the loss-of-society element of damages. We affirm.

BACKGROUND

Liability is not an issue in this appeal. Consequently, we will set forth that aspect of the case only to provide a background for our discussion of loss of society. In 2000 or 2001, the decedent, who was 48 years old at the time of her death in 2004, had back surgery. Sometime later, the decedent saw defendant Dr. Glaser, a pain management specialist, to deal with ongoing pain as a result of the back surgery. On February 11, 2004, Dr. Glaser administered a nerve block to the decedent by inserting a needle into her abdomen. The needle perforated her bowel, releasing bacteria into her system, which quickly resulted in necrotizing fascitis, a deadly bacterial infection. The decedent died on February 12 or 14, 2004.[2]

[2]The complaint alleged that the decedent died on February 12, 2004, but plaintiff Passow testified that she died on February 14.

At trial, Toney, age 21,[3] testified that her mother was the decedent, Deborah Passow, and she had lived with her mother and her natural father until age 13 when her parents divorced. Right after the divorce, she lived with her father because he was more lenient than her mother, who was a disciplinarian. Toney described her relationship with her mother up until age 13 as "great," and said they did "pretty much" everything together—shopping, cooking, and doing Toney's hair. She did not live with her mother between the ages 13 and 19, but she testified that she talked to her mother every day and spent time with her on weekends. They talked about school and boys, and about Toney's sister, who also spent time with them on weekends. The three of them would talk, take walks, watch movies, and take rides. "It was our time alone," Toney explained. "[I]t was family. And that was all that mattered."

Toney moved back home with her mother when she got pregnant at age 19. Her mother was not happy about the pregnancy, but, she testified, she and her mother became "practically inseparable." Her mother accompanied her to every doctor's appointment and was with her in the delivery room when her son Nathaniel was born. After Nathaniel's birth, the decedent stayed home with him while Toney worked. Her mother was the one who cared for Nathaniel when he was colicky at night. This period of togetherness lasted two and a half years. During that period, Toney observed her mother's relationship with Toney's sister. "They were close," Toney testified. Her sister Monica was a "girly-girl," and their mother could treat her like a princess.

---

[3]Toney gave her numerical age as of the date of trial as 21 years. She testified that her birthdate was September 25, 1979. The date of her testimony was June 17, 2009. Using her birthdate would make her age 30, not 21. The record does not account for this discrepancy.

When Toney was 22, she met her husband and moved from her mother's home in Downers Grove, Illinois, to Bloomington, Illinois, "a ways away." Even so, Toney said that their relationship did not change. They made up for the distance by frequent talks and weekend visits when Toney would drive up to Downers Grove. Toney described those weekends as family time, time for picnics, time to take the kids (hers and her sister's) to the zoo or a water park, and time to work together in her mother's garden. When the kids slept, Toney, her sister, and her mother would sit down and talk about what was happening in each of their lives.

Toney testified about her mother's "unconditional" love for her and her sister. "There was no price tag on it," she recalled. Toney also recounted how her mother instilled in her and her sister the need "to treat everybody as a person *** to treat people how you *** want and deserve to be treated." Her mother wanted her and her sister to have careers and raise their families and make sure their family was always together.

In 2000 or 2001, Toney recalled that her mother fell and had back pain, which she treated with physical therapy and eventual surgery. After her surgery, the decedent was hindered in doing things for herself, so Toney and her sister helped. When the decedent recovered from back surgery, Toney continued to see her on many weekends and holidays. Toney testified that her fondest memories were going apple picking as a family tradition and her mother being there throughout her pregnancy. She testified that she thought of her mother every minute. As a result of her mother's death, she was not sleeping well, and she tried to distance herself from people, although she became closer to her sister.

On cross-examination, defense counsel elicited that Toney lived with her father after the divorce for only about eight months and then moved in with a friend, even though her mother was living in the area.

Monica Dunbar, 32 years of age at the time of trial, testified that she was the decedent's daughter. She lived with her mother until she was 16[4] when her parents were divorced and she then lived with her father. She described her mother as "kind of strict." The decedent did not approve of the 18-year-old boy Dunbar was dating. At age 17, Dunbar got pregnant, married, and moved out of her father's house. When the decedent learned of Dunbar's pregnancy, "she was not happy." Dunbar testified that there was a short period where she and her mother did not speak. Dunbar testified that the relationship gradually healed. The decedent went to doctors' appointments with Dunbar during her pregnancy and was "there" as "huge support" when her son was born with a clubbed foot and underwent a number of surgeries. Dunbar stated that she saw her mother three or four times a week, and when they did not see each other they chatted on the phone.

From the period of when she was 17 to 21, Dunbar and her mother "did a lot of family things." They had family dinners, card games, Chinese checkers, backyard get-togethers, and "just spent a lot of quality time." During this period, the decedent met and married Bruce Passow, and Dunbar stated that he was a "good addition to the family." According to Dunbar, her mother was the organizer for the holidays, taking over the planning and getting everyone together "because that

---

[4]Toney testified that she was 13 at the time of the divorce, which would make her three years younger than Dunbar. Dunbar testified that she was born on February 9, 1977, so their respective birth dates place them only two years apart. The record does not account for this discrepancy.

was how it should be." From the time Dunbar was 17 until the time her mother died, she considered her mother to be her closest friend in the world. "There was never anything that you couldn't go to her with *** nothing you couldn't tell her."

Dunbar testified that her mother developed a close relationship with Dunbar's firstborn son and was there for the birth of Dunbar's second son. With respect to the firstborn, the baby with the clubbed foot, Dunbar described him as her mother's boy. "[N]othing else mattered. Her boy was her boy." The lesson Dunbar learned from her mother in regard to parenting her own children was that her mother was strict but loving. "You can do both at the same time." Dunbar stated that she and her sister did not always like their mother as they were growing up, but they always loved her. Dunbar testified that her mother's back surgery and recovery did not adversely affect their relationship.

Dunbar's favorite memory of her mother was how her mother was there with her firstborn son through all of his surgeries and therapy. Dunbar testified that since her mother's death, it had become hard to be with her extended family, with Bruce Passow, because the memories came back, although she said she and her sister became closer. She testified that it was hard for her to be close to anyone because "they're just going to be taken away." Her grieving affected her relationship with her husband. She "shut him out and in turn he got tired of me grieving." Dunbar testified that she still talked to her mother "like you're talking to yourself." When asked on direct examination if she still missed her mother, Dunbar replied, "Horribly."

Bruce Passow testified that he was fifty-six years old. He met the decedent before Christmas 1997 and became engaged in the spring of 1998. They married on July 29, 1998. Passow was working construction so they did not immediately go on a honeymoon. They stayed home and had

"our own little honeymoon right there." He was working 10 to 12 hours a day, and when he got home, the decedent always had a hot meal ready. "It was amazing to me," he testified. On weekends, they went to flea markets, went swimming, and were involved with decedent's daughters, "so everything revolved around the family." They kept toys for the grandkids, had a cat for awhile, birds, and even a "duck running around the backyard."

Passow and the decedent remodeled the house in which they were living in Downers Grove. The project took two years. Passow described the remodeling as stressful. It caused "heated arguments" between him and the decedent. The arguments escalated to the point they sought marital counseling. This occurred in the mid-point of their marriage. Passow testified that the counseling brought them "a little closer together." He stated that, "[W]e both kind of committed to the marriage and the family."

Passow described the decedent as a planner who put together big family holiday get-togethers. Passow and the decedent went to Cancun for an official honeymoon; to Indiana to visit relatives; and to Iowa and Wisconsin. Trips to Wisconsin included canoeing and boating. "[W]e just had a lot of fun."

After the decedent's fall in 2000 or 2001 and her back surgery, Passow had to do the dishes and some cleaning, but he said "it wasn't a big deal." He described the events of February 11, 2004, when the decedent received the nerve block from Dr. Glaser, and the following two days up to his wife's death on February 14, 2004. He described the impact of her death on him. He said that after building a life filled with grandchildren and building the home for the family, he now came home to a big, empty house. He said when he saw couples on the street, he would think of the decedent.

The decedent's daughters had moved nearer to their natural father and did not visit. "The grandkids are no longer in the picture."

On cross-examination, Passow admitted that during the period he and the decedent were undergoing stress and marital counseling, they lived separately for about six months within the same house at the suggestion of the counselor.

As stated above, the jury returned the sum of zero for loss of society. Plaintiffs filed a timely posttrial motion seeking a new trial on that element of damages, which the trial court denied on October 7, 2009. Plaintiffs then filed a timely notice of appeal.

ANALYSIS

We must first address the appropriate standard of review. Plaintiffs contend that the jury ignored a proven element of damages, which presents a question of law that we review *de novo*. Defendants argue that a trial court's denial of a motion for a new trial will be not be reversed unless the trial court abused its discretion. Plaintiffs ask us to grant them a new trial on the damages element of loss of society. Although plaintiffs do not explicitly state in the notice of appeal that they are appealing from the order denying the motion for a new trial, implicit in their request that we grant a new trial is their position that the trial court erred in denying the motion for a new trial. Consequently, we must review the order denying the motion for a new trial. In order to reverse the denial of a motion for a new trial, we must find that the verdict is contrary to the manifest weight of the evidence and that the trial court abused its discretion. *New v. Pace Suburban Bus Service*, 398 Ill. App. 3d 371, 379 (2010). This requires a finding that the opposite conclusion is clearly evident or that the jury's findings are unreasonable, arbitrary, or not based upon any evidence at trial. *New*, 398 Ill. App. 3d at 379. Resolution of conflicts in testimony and credibility determinations are the

province of the trier of fact. *New*, 398 Ill. App. 3d at 379. Accordingly, we reject plaintiffs' argument that our review is *de novo*.

We now turn to the merits of the appeal. Plaintiffs contend that the jury ignored their proven evidence of loss of society and ignored the presumption of substantial pecuniary loss. A jury's award of damages is entitled to substantial deference. *Snover v. McGraw*, 172 Ill. 2d 438, 447 (1996). The determination of a damages award is a question of fact that is within the jury's discretion. *Snover*, 172 Ill. 2d at 447. Reviewing courts will not upset a jury's award of damages unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss suffered. *Snover*, 172 Ill. 2d at 447. In *Snover*, our supreme court held that a jury has complete discretion to award damages in the manner it sees fit, provided that the award falls within the confines of the evidence. *Zuder v. Gibson*, 288 Ill. App. 3d 329, 335 (1997). In the present case, plaintiffs argue that the jury was not free to award nothing for loss of society where defendants introduced no evidence of estrangement, did very little cross-examination, and did not even make a closing argument on the issue. We disagree that this is the correct analysis.

Passow, as the decedent's spouse, had a claim for loss of society. See *Colella v. JMS Trucking Co. of Illinois, Inc.*, 403 Ill. App. 3d 82, 88 (2010). In *Bullard v. Barnes*, 102 Ill. 2d 505 (1984), our supreme court decided that a parent's pecuniary injury for the wrongful death of a child includes loss of society. *Bullard*, 102 Ill. 2d at 518. Likewise, an adult child may recover for the loss of a deceased parent's society. *Cooper v. Chicago Transit Authority*, 153 Ill. App. 3d 511, 519 (1987).

In the present case, the jury was instructed that the law recognizes a presumption that the lineal next of kin sustained some substantial pecuniary loss by reason of the death. The jury was further instructed that the weight to be given the presumption was for the jury to decide from the evidence. The presumption establishes a *prima facie* case for plaintiffs, but the presumption is rebuttable and is not itself evidence. *Cooper*, 153 Ill. App. 3d at 519. The presumption merely shifts the burden of production, and once the plaintiff's evidence is rebutted, the presumption no longer serves a function in the trial. *Cooper*, 153 Ill. App. 3d at 519. "Implicit in the right to weigh the presumption is the right to give it no weight at all." *Cooper*, 153 Ill. App. 3d at 519. Damages for loss of society are difficult to estimate exactly and no standard of value applies. *Patch v. Glover*, 248 Ill. App. 3d 562, 568 (1993). Rather, the assessment is committed to the sound discretion of the jury as to what is reasonable under the circumstances of any given case guided by its experience, observations, and sense of fairness. *Patch*, 248 Ill. App. 3d at 568. Thus, absent any evidence, the presumption gets the issue to the jury; however, it is the jury's function to decide what, if any, weight to give to the presumption in light of the evidence it heard at trial.

Plaintiffs contend that the only contrary evidence that will rebut the presumption is evidence of estrangement. They reach this conclusion from the following language in *Bullard*: "Defendants may rebut the presumption by presenting evidence that a parent and child were estranged." *Bullard*, 102 Ill. 2d at 517. We do not read *Bullard* as holding that only evidence of estrangement will rebut the presumption.[5] Moreover, in committing the assessment of damages to the discretion of the jury, the law also commits to the jury the assessment of the credibility of the witnesses. In our case, there

[5]Plaintiffs have not provided, nor have we found, any case which specifies the quantum of evidence necessary to rebut the presumption.

was evidence of estrangement. Passow and the decedent had heated arguments that drove them to marital counseling and to live separately within their home for a six-month period in the midpoint of their short marriage. Passow testified that the counseling brought them "a little" closer together. He also testified that after the counseling, he and the decedent "kind of" committed to the marriage and the family. Both daughters chose to live with their father after their parents' divorce. Toney lived with her father for only eight months, and at age 13 or so moved in with a friend rather than live with her mother. This calls into question the veracity of Toney's testimony that up until age 13 she and her mother had a "great" relationship and that they did pretty much everything together. Dunbar testified that there was a period after she got pregnant when she and her mother did not speak. After the decedent's death, neither stepdaughter nor the grandchildren had anything more to do with Passow. The jury may reasonably not have believed the picture of close family life Passow, Toney, and Dunbar tried so hard to depict. There was enough contrary evidence in the testimony of plaintiffs themselves for the jury to have given the presumption no weight. Once the presumption ceased to operate, the jury had to base its decision on the actual facts and circumstances established by the evidence. *Adams v. Turner*, 198 Ill. App. 3d 353, 357 (1990).

The cases plaintiffs rely on are inapposite. In *Murray v. Philpot*, 305 Ill. App. 3d 513 (1999), the court reversed and remanded for a new trial on damages where the jury's award of nothing for pain and suffering was contrary to objective symptoms of injury found by three different doctors. *Murray*, 305 Ill. App. 3d at 515. The plaintiff in *Torres v. Irving Press, Inc.*, 303 Ill. App. 3d 151 (1999), demonstrated objective proof of her injuries, which was corroborated by other witnesses, so that the jury's award of zero for loss of a normal life did not fall within the confines of the evidence. *Torres*, 303 Ill. App. 3d at 160. *Galloway v. Kuhl*, 346 Ill. App. 3d 844 (2004), held that the trial

court correctly set aside a jury's verdict where it awarded compensation for pain and suffering but failed to award proven medical expenses. *Galloway*, 346 Ill. App. 3d at 850. In each of these cases, unlike the present case, the plaintiff's injuries or element of damages were objectively proven. Here, plaintiffs' evidence of loss of society was subjective, uncorroborated, and unverifiable. Toney's statement that she thought of her mother "every minute" could have struck the jury as exaggeration. Neither grandchildren nor anyone else corroborated the stories of all the family outings.

Plaintiffs also rely on *Casey v. Pohlman*, 198 Ill. App. 3d 503 (1990), in which the jury found in favor of the plaintiff on her loss of consortium claim but awarded her no damages. The appellate court found the failure to award damages to be against the manifest weight of the evidence. We note that *Casey* predated *Snover* in which our supreme court articulated that a jury "has complete discretion to award damages in the manner it sees fit, provided that the award falls within 'the confines of the evidence.'" *Zuder*, 288 Ill. App. 3d at 335. We also note, as discussed above, that the jury's award of nothing for loss of society in the instant case is not against the manifest weight of the evidence. This court, even if it may have decided the issue differently, cannot substitute its judgment for that of the trier of fact.

We agree with defendants that *Chrysler v. Darnall*, 238 Ill. App. 3d 673 (1992), is factually similar to the instant case. In *Chrysler*, the jury awarded the daughter of the decedent nothing for loss of society despite her testimony that her relationship with her father was very caring and loving, and that she was very close to her father because she was an only child. Her testimony included details such as seeing her father once a week and on holidays; engaging in activities with him like shopping, watching television, and playing cribbage; and seeking his advice on child rearing and marital problems. *Chrysler*, 238 Ill. App. 3d at 678. The appellate court upheld the jury's verdict,

stating that a jury verdict of no damages is not inconsistent with a finding of liability. *Chrysler*, 238 Ill. App. 3d at 680.

CONCLUSION

For the foregoing reasons, we cannot say that the jury's verdict was against the manifest weight of the evidence or that the trial court abused its discretion in denying plaintiffs' motion for a new trial on the issue of loss of society. Accordingly, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.