IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

HAROLD GETTING and VERONICA GETTING, Plaintiffs,	: No. 18-1228
vs.	: CIVIL ACTION - LAW
MARK SALES AND LEASING, INC. d/b/a MARK'S SALES & LEASING, and LEMUEL SCOTT BARGER, Defendants.	: *Defendants' Motions for Post-Trial Relief*

OPINION AND ORDER

AND NOW, following argument held November 30, 2020, on the Motions for Post-Trial Relief filed by Defendants Mark Sales and Leasing, Inc. d/b/a Mark's Sales and Leasing and Lemuel Scott Barger (collectively "Defendants"), seeking relief from the verdict entered in favor of Plaintiffs Harold Getting and Veronica Getting (collectively "Plaintiffs"), the Court hereby issues the following ORDER.

Background

Plaintiffs initiated this action on August 21, 2018, by the filing of a Complaint. The Complaint averred that on September 13, 2017, Plaintiffs rented a Model TB Mini 10.5 HP 30" riding mower ("Model TB Riding Mower," "Riding Mower," or "Mower") from Defendant Mark Sales and Leasing, Inc., d/b/a Mark's Sales & Leasing ("Mark's Sales") for use on their lawn. Plaintiffs selected the Model TB Riding Mower upon the recommendation of an employee of Mark's Sales, Defendant Lemuel Scott Barger ("Mr. Barger"), who personally delivered the Riding Mower to Plaintiffs' property. On September 16, 2017, Plaintiff Harold Getting ("Mr. Getting") operated the Mower on his lawn. In the process, the Mower tipped and its blades struck Mr. Getting's left foot, resulting in a partial amputation.

The Complaint asserted a claim of negligence against Defendants, alleging that the accident occurred because the Model TB Riding Mower, a relatively small and light model, was unsuitable for the steep slopes of Plaintiffs' yard. Plaintiff Veronica Getting ("Mrs. Getting") also asserted a loss of consortium claim against Defendants.

On November 7, 2018, Defendants filed an Answer and New Matter to the Complaint. In the Answer, Defendants admitted that on or about September 13, 2017, Mark's Sales leased the Model TB Riding Mower to Plaintiffs. However, the Answer asserted that Plaintiffs were solely involved in selecting the Mower. In New Matter, Defendants raised a plethora of affirmative defenses. Plaintiffs filed a Reply to New Matter on November 13, 2018.

Following the close of discovery, and consistent with this Court's dispositive motion deadline, on January 10, 2020, Defendants filed a Motion for Summary Judgment. Within this Motion, Defendants asserted that Plaintiffs had failed to establish any duty on the part of Defendants that would support their negligence claim.[1] Following briefing and argument on the Motion for Summary Judgment, on March 30, 2020, the Court issued an Order granting partial summary judgment as to various theories of negligence asserted in the Complaint. However, the Court found that the pleadings and materials produced in discovery were sufficient to support a negligence claim based on Defendants' purported violation of two separate duties. First, the Court found that Plaintiffs could claim that Mr. Barger was negligent, and Mark's Sales vicariously negligent, for affirmatively representing that the Model TB Riding Mower was suitable for Plaintiff's lawn even after being informed that Plaintiffs' property has steep slopes. The Court additionally found that Plaintiffs could claim that Mr. Barger was negligent, and Mark's Sales vicariously negligent, for failing to provide the Riding Mower's operating manual to Plaintiffs.

Thereafter, on May 8, 2020, Plaintiffs filed a Motion *in Limine* to preclude certain opinions of Defendants' Expert, Paul L. Dreyer, P.E. ("Mr. Dreyer"). Following briefing and argument, on June 3, 2020, the Court issued an Order granting Plaintiff's Motion *in Limine* in part, specifically precluding testimony regarding whether Mr. Getting, as a consumer, was negligent for failing to read warning labels affixed to the Riding Mower and for failing to determine the slope of his lawn. The Court found that these issues would not be beyond the ken of the average layperson and, therefore, would not be

[1] *See Stephens v. Paris Cleaners, Inc*., 885 A.2d 59, 66 (Pa. Super. 2005) ("The task of determining the existence of a duty for purposes of assigning liability in a negligence action is for the court, not the jury.").

subject to expert testimony.[2] The Court also precluded testimony as to whether the Riding Mower was properly functioning, as Plaintiffs were not pursuing a theory of negligence based on the Mower's malfunction. However, the Court added the proviso that Mr. Dreyer could address this issue if Plaintiffs presented testimony or other evidence stating or implying that the Mower suffered from a malfunction. The Court otherwise held that Mr. Dreyer was properly qualified to testify as an expert witness.

The case proceeded to jury selection, and then to a five-day civil jury trial held from Monday, August 31, 2020, through Friday, September 4, 2020. The Court took extensive precautions during jury selection and at trial in light of the ongoing COVID-19 pandemic. All individuals entering the building were temperature tested at the entrance of the courthouse, individuals were required to wear both facemasks and face-shields into the building,[3] and the courtroom was arranged so all individuals, including all jurors, would be spaced to preserve social distancing.

However, the trial did not proceed without incident. On the morning of the second day, Tuesday, September 1, 2020, Mark O'Neill ("Mr. O'Neill"), owner and corporate designee of Mark's Sales, was called to testify. Following the close of his testimony, during the midday lunch break, a juror, who had left the courthouse, called the Court to relay that he had just learned of an indirect exposure to COVID-19. Specifically, this juror provided that he had received notification that his sister-in-law, who had spent several hours in close quarters with the juror's wife the Saturday prior to trial, had just recently been diagnosed with COVID-19. Even though neither the juror nor his wife had been diagnosed with COVID-19 nor reported any symptoms, out of an abundance of caution the Court dismissed the juror. Upon reconvening after lunch, the Court notified the other jurors of the potential exposure, but also informed the jurors that the exposure was indirect and that the dismissed juror had not displayed any symptoms. The Court solicited the jurors' thoughts on breaking early on that day so the

---

[2] *See Wexler v. Hecht*, 847 A.2d 95 99 (Pa. Super. 2004) ("When a witness is offered as an expert, the first question the trial court should ask is whether the subject on which the witness will express an opinion is so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman.") (citations omitted).

[3] Within the courtroom, the Court allowed participants, including counsel, witnesses, and jurors to wear only a face-shield if they so preferred.

courtroom could be sanitized, and then proceeding with trial the next day. The jurors unanimously expressed that they had no issues with proceeding on Wednesday.[4] On Wednesday, September 2, 2020, at 7:37 a.m., Mr. O'Neill, who had up to this point been present throughout the trial, informed Defendants' counsel, Richard A. Polachek, Esquire ("Attorney Polachek"), by phone that he would not be returning to the courthouse out of concern of exposing himself and his wife to COVID-19. Attorney Polachek relayed this information to the Court, and then moved for a mistrial. The Court denied this motion, holding that in light of the extensive safety and social distancing measures undertaken by the Court there was no basis to find that any party was at significant risk should the matter proceed.[5] The Court further denied Attorney Polachek's request that the jury be instructed that Mr. O'Neill had declined to return because he and his wife suffered from preexisting health conditions that placed them at increased risk. Finding it inappropriate to base instructions on unconfirmed representations as to Mr. O'Neill and his wife's health conditions, the Court instead simply instructed the jury that Mr. O'Neill had declined to return because he was concerned for his safety after learning that a juror had been dismissed due to a potential COVID-19 exposure.[6]

After the closing argument on Friday, September 4, 2020, the jury recessed for deliberations. The jury returned a verdict on that date in favor Plaintiffs and against Defendants in the amount of $2,300,000.00. The jury further found that Plaintiffs were 15% comparatively negligent.[7] Defendants filed Motions for Post-Trial Relief on September 14, 2020. Defendants' consolidated Motions for Post-Trial Relief include a Motion for Judgment N.O.V., a Motion for a New Trial on All Issues, a Motion for a New Trial on Damages, a Motion for Remittitur, and a Motion for Leave to Submit Supplemental Reasons. Plaintiffs filed a Response to the Motions for Post-Trial Relief

---

[4] *See Getting v. Mark Sales & Leasing, Inc., et al.*, CV-18-1228; Transcript of Proceedings: Jury Trial – Day 2 at pgs. 100-101 (Sept. 22, 2020) ("Transcript: Day 2 (Sept. 1, 2020)").

[5] Transcript: Day 3 at pgs. 4-7 (Sept. 2, 2020).

[6] Transcript: Day 3 at pgs. 8-11 (Sept. 2, 2020).

[7] The Court issued an Order entering the judgment on September 8, 2020. However, upon receiving the parties' timely filed post-trial motions, the Court found that it had acted prematurely. Therefore, by Order issued September 17, 2020, the Court vacated the judgment, but molded the verdict to $1,955,000.00 to reflect the jury's finding on comparative negligence.

on September 22, 2020. Defendants filed a Brief in Support of the Motions for Post-Trial Relief ("Brief in Support") on October 21, 2020. Plaintiffs filed a Memorandum of Law in Opposition to the Motions for Post-Trial Relief ("Memorandum of Law in Opposition") on November 17, 2020. The Court held argument on the Motions for Post-Trial Relief on November 30, 2020. Having reviewed the relevant filings and having had the benefit of argument on the issues, the Court will address Defendants' Post-Trial Motions *in seriatim* below.

Analysis

A. **Motion for Judgment N.O.V.**

Within the Motion for Judgment N.O.V., Defendants assert that judgment notwithstanding the verdict is required because:

a. Plaintiffs failed to adduce proper and competent evidence to establish a prima facie case of negligence against Defendants.

b. Plaintiffs failed to adduce sufficient proper and competent evidence that Defendants owed Plaintiffs a duty under the facts and circumstances of this case. Plaintiffs' claims should not have been submitted to the jury in the absence of evidence establishing a duty owed to Plaintiffs.

c. Defendants properly moved for summary judgment based on the lack of a duty, the denial of summary judgment was erroneous as a matter of law and fact. Plaintiffs' claims should not have been permitted to proceed to trial or submitted to the jury in the absence of evidence establishing a duty owed to Plaintiffs.

d. Plaintiffs failed to adduce sufficient proper and competent evidence to demonstrate that Defendants' alleged negligence was a legal cause of Plaintiffs' alleged damages.

e. Plaintiffs failed to adduce sufficient proper and competent evidence that Plaintiff Veronica Getting sustained a loss of consortium, much less a loss of consortium justifying an award of $500,000.

f. Since the verdict was not supported by sufficient evidence, no two reasonable persons could disagree that a verdict should have been rendered for Defendants on all claims and issues.[8]

[8] Motions for Post-Trial Relief of Defendants, Mark Sales and Leasing, Inc. d/b/a Mark's Sales and Leasing and Lemuel Scott Barger ¶ 2(a)-(f) (Sept. 14, 2020) ("Defendants' Post-Trial Motions").

Defendants also contend that judgment n.o.v. is required for the loss of consortium award, as the jury never made a predicate finding that Plaintiff Veronica Getting had in fact suffered a loss of consortium.[9]

A Motion for Judgment *Non Obstante Veredicto*, or N.O.V., "is the directing of a verdict in favor of the losing party, despite a verdict to the contrary."[10]

> In reviewing a motion for judgment n.o.v., the evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, [a] judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations. There are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first a court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.[11]

Having failed to address any of the issues raised in the Motion for Judgment N.O.V. within their supportive brief, filed pursuant to this Court's Scheduling Order of September 28, 2020, the Court finds the issues waived.[12] Defendants' Motion for Judgment N.O.V. is therefore, DENIED.

---

[9] Defendants' Post-Trial Motions ¶ 3.

[10] *Green Valley Dry Cleaners, Inc. v. Westmoreland Cty. Indus. Dev. Corp.*, 861 A.2d 1013, 1016 (Pa. Commw. 2004) (citation omitted).

[11] *Moure v. Raeuchle*, 604 A.2d 1003, 1007 (Pa. 1992) (internal quotations and citations omitted).

[12] *See Bd. of Supervisors of Willistown Twp. v. Main Line Gardens, Inc.*, 155 A.3d 39, 45 (Pa. 2017) ("Because Rule 227.1(b)(2) does not require supporting briefs, the failure to file a brief does not violate the rule, and neither the trial court nor the appellate courts may find waiver pursuant to the rule for failing to do so. In its discretion, based upon its conclusion that it requires further advocacy on the issues, a trial court may request that the parties file briefs. In the event of non-compliance with such a request, it is for the trial court, again in its discretion, to find waiver or, alternatively, to overlook the noncompliance and rule on the merits of the issues presented.").

B. **Motion for a New Trial on All Issues**

Defendants seek a new trial on the basis that the verdict entered by the jury was contrary to the clear and overwhelming weight of the evidence, specifically that:

a. The jury's finding that Defendants were negligent was against the weight of the evidence.

b. The jury's finding that the alleged negligence of Defendants was a legal or factual cause of Plaintiffs' alleged damages was against the weight of the evidence.

c. The jury's apportionment of only 15% comparative negligence to Plaintiff Harold Getting was against the weight of the evidence because, among other reasons, Mr. Getting admittedly failed to read the instructions and warnings on the subject mower, the accident would not have occurred if he had read and heeded the warnings, he was an experienced mower operator who had mowed his property for approximately thirteen years without incident, he knew his property far better than Defendants, and a prior mower salesperson had specifically recommended a larger mower to Plaintiffs and Plaintiffs ultimately purchased a mower in 2005 that had a weight installed on it. Given these facts and Plaintiff Harold Getting's knowledge, his actions on the day in question were inexplicable, and the jury assessment of only 15% comparative negligence was manifestly unreasonable and shocks the conscience.

d. The jury's award of $500,000 for loss of consortium was against the weight of the evidence because Plaintiffs failed to prove by a preponderance of the evidence that Plaintiff Veronica Getting sustained a loss of consortium and, in fact, the jury never found a loss of consortium before returning its manifestly excessive award of $500,000.

Defendants further assert that a new trial is required based upon the Court's purportedly erroneous decision to deny Defendants' motion for a mistrial once Mr. O'Neill declined to return to the courthouse on September 2, 2020. Defendants contend that a new trial is required because the Court erred in failing to instruct the jury as to Mr. O'Neill's health concerns and preexisting medical conditions. Defendants also object that Plaintiffs' counsel, James J. Waldenberger, Esquire ("Attorney Waldenberger"), "improperly exploited" Mr. O'Neill's absence during closing arguments by asking that the jury draw an adverse inference as to his absence, even though Mr. O'Neill was equally available to both parties and had, in fact, testified at trial.

1. The Jury's finding of that Defendants were Negligent and its Assignation of Only 15% Comparative Negligence to Plaintiffs was Against the Weight of the Evidence

The Court will address Plaintiffs' first three arguments jointly, as they involve interrelated issues. As Defendants note in their Brief in Support of the Post-Trial Motions, to establish a cause of action for negligence, a party must demonstrate a duty, a breach of duty, causation, and resulting damages.[13] Defendants assert that the evidence provided at trial did not support a finding that Defendants' negligence was the sole cause of Mr. Getting's accident, and thus contend that Plaintiffs failed to establish causation. Defendants alternately assert that, assuming *arguendo* that causation had been established, because Mr. Getting had concededly failed to read safety warnings on the Riding Mower that included instructions that, if followed, would have prevented the accident, there was no basis for the jury to find Mr. Getting only 15% comparatively negligent. Defendants similarly argue that because Mr. Getting admitted that he had failed to read warning decals on the Riding Mower, there was no reasonable basis for the jury to have found that Mr. Getting would have read the manual for the Mower if provided.

A trial court's authority to upset a verdict based on a claim that the verdict is not supported by the weight of the evidence is narrowly circumscribed. The trial court cannot grant a new trial based on "a mere conflict in testimony or because the trial judge on the same facts would have arrived at a different conclusion."[14] Instead, a new trial should only be granted in exceptional circumstances, "when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail."[15] The Court notes that, "[i]t is the right of the fact-finder to believe all, part, or none of a witnesses'

[13] Brief in Support of Motions for Post-Trial Relief of Defendants, Mark Sales and Leasing, Inc. d/b/a Mark's Sales and Leasing and Lemuel Scott Barger at pg. 33 (Oct. 21, 2020) ("Defendants' Brief in Support of Post-Trial Motions") (citing *Scampone v. Highland Park Care Ctr., LLC*, 57 A.3d 582, 596 (Pa. 2012)).
[14] *Renna v. Schadt*, 64 A.3d 658, 670 (Pa. Super. 2013) (quoting *Thompson v. Philadelphia*, 493 A.2d 669, 672 (Pa. 1985)).
[15] *Id.*

testimony."[16] "A jury's verdict shocks one's sense of justice when it disregards the uncontroverted evidence of causation."[17]

The Court first addresses Defendants' contentions that Plaintiffs failed to prove causation because the evidence of record demonstrated that Defendants were not the sole cause of Plaintiff's accident. Defendants' specifically assert that Plaintiffs cannot prove causation because the accident would not have occurred if Mr. Getting had read and headed the warning decals on the Riding Mower. Defendants' argument is largely predicated on Mr. Getting's admissions that he failed to read safety decals affixed to the machine that warned, "do not mow slopes greater than 12 degrees," "use extra caution on slopes," "do not operate machine where it could tip or slip," and "read operator's manual."[18] Mr. Getting acknowledged that had he read the warnings, he would have questioned whether the Riding Mower was "suitable for the job" of mowing his lawn.[19] Even accepting *arguendo* that Mr. Getting's failure to read the warning and safety decals was a proximate cause of the accident, this would not negate a finding of causation against Defendants. As Plaintiffs note within their Memorandum of Law in Opposition, to establish that a defendant's actions were the proximate cause of the accident, the jury would have to find that the defendant's conduct was a "substantial factor" in bringing about the harm, but not necessarily the only factor.[20] "[T]he fact that some other cause concurs with the negligence of the defendant in producing an injury does not relieve defendant from liability unless he can show that such other cause would have produced the injury independently of his negligence."[21] In this case, that

---

[16] Com. v. Henson, No. 0545, 2004 WL 5437758 (Phila. Cty. June 14, 2004) (citing *Com. v. Markovitch*, 565 A.2d 468 (Pa. Super. 1989)).

[17] Allen v. Goodwin, No. 13102-2005, 2007 WL 5248583 (Erie Cty. June 06, 2007) (citing *Kraner v. Kraner*, 841 A.2d 141, 146 (Pa. Super. 2004)).

[18] *See* Transcript: Day 1 at pg. 115 (Aug. 31, 2020). The Court notes that there was a factual dispute as to whether Plaintiffs received the Riding Mower with an additional warning placard attached to the Mower's steering wheel.

[19] *See* Transcript: Day 1 at pg. 115 (Aug. 31, 2020).

[20] Plaintiffs' Memorandum of Law in Opposition to the Motions for Post-Trial Relief of Defendants, Mark Sales and Leasing, Inc. d/b/a Mark's Sales and Leasing and Lemuel Scott Barger at pg. 18 (Nov. 17, 2020) ("Plaintiffs' Memorandum of Law in Opposition to Post-Trial Motions") (quoting *Jones v. Montefiore Hosp.*, 431 A.2d 920, 924 (Pa. 1981)).

[21] Plaintiffs' Memorandum of Law in Opposition to Post-Trial Motions at pg. 18 (quoting *Montefiore Hosp.*, 431 A.2d at 923).

would require a demonstration that the accident would have occurred even if Mark's Sales had provided the operating manual in conjunction with the Riding Mower.[22] Both Mr. Getting and Mrs. Getting testified that had they received the manual, Mr. Getting would have read it. Mr. Getting supported this contention by stating that he had read the manual for his prior Snapper-model riding mower.[23] Mr. Getting also testified that he did not know the degree slope of his lawn, but would have used the slope gauge included in the operator's manual to measure the slope if Defendants had provided the manual.[24] The Court is satisfied that the fact-finder, if crediting this testimony, could reasonably determine that the accident would not have occurred if Mark's Sales had provided the operator's manual. That the jurors chose to credit this testimony, even when Mr. Getting admitted to failing to read warning decals on the Mower itself, was within their discretion as fact-finders.[25]

Defendants further cite a number of cases, *Davis v. Berwind Corp*. chief among them, for the proposition that, when a party is pursuing a theory of liability based on inadequate warnings, there is no duty to "warn against dangers that may arise if the stated warnings are not heeded."[26] In the Court's view, *Davis* and Defendants' other cited cases are inapposite to this matter, as those cases involve product defect claims against manufacturers for failure to provide adequate warnings, and do not address the issue *sub judice* of whether a lessor can be liable for failing to provide to the lessee all safety materials provided as standard with a product. Assuming *arguendo*, however, the Court were to apply the principles of those cases to this matter, the safety decals only warned against the use of the Mower on slopes greater than 12 degrees. However, the slope gauge, used to determine the slopes, was included only in the manual. Mr. Getting testified that he did not know the degree slope of his lawn, but

---

[22] The Court notes that the jury could also have determined that Defendants were the proximate cause of the accident if they credited Plaintiffs' averments that they rented the subject Riding Mower only due to the recommendation of Mr. Barger and his representations that the Mower would be suitable for Plaintiffs' steeply sloped property.

[23] *See* Transcript: Day 1 at pg. 76 (Aug. 31, 2020).

[24] *See* Transcript: Day 1 at pg. 76 (Aug. 31, 2020).

[25] *See Nemirovsky v. Nemirovsky*, 776 A.2d 988, 993 (Pa. Super. 2001) (citing *Gunn v. Grossman*, 748 A.2d 1235, 1239 (Pa. Super. 2000)) ("It is beyond argument that the fact-finder is free to accept or reject the credibility of both expert and lay witnesses, and to believe all, part or none of the evidence.").

[26] Defendants' Brief in Support of Post-Trial Motions at pg. 38 (quoting *Davis v. Berwind Corp.*, 268, 690 A.2d 186, 190 (Pa. 1997)).

would have used the slope gauge to measure the slope if it had been provided.[27] The Court is satisfied that the fact-finder could reasonably determine that the warning decals, taken alone, were inadequate as a warning mechanism without an accompanying tool to measure the slope.

Similarly, the jury's determination to attribute only 15% of the comparative negligence to Mr. Getting is not shocking to the conscience. Had the jury failed to attribute any negligence to Mr. Getting, this would indicate that the jury had in fact disregarded the uncontested fact that Mr. Getting had failed to read warning decals on the Riding Mower, and the jury's ruling might therefore be found to be "manifestly unreasonable." The fact that the jury chose not to assign some undefined percentage of negligence greater than 15%, however, does not render their verdict unreasonable. That the jury considered all of the evidence before it and found Defendants' negligence to be substantially greater than that of Plaintiffs is supported by the evidence. The Court cannot conclude that the jury's finding was against the weight of the evidence merely because it may not have been the conclusion reached by the Court, or even by another jury, or because the jury chose to credit Plaintiffs' testimony over that of Defendants' regarding certain controverted facts.

2. The Jury's Award of $500,000 for Loss of Consortium was Against the Weight of the Evidence, the Amount of the Award was Manifestly Excessive, and the Verdict Form was Deficient in Addressing the Loss of Consortium Claim.

The Court next addresses Defendants' assertion that there was an insufficient evidentiary basis to support Mrs. Getting's loss of consortium claim. A loss of consortium claim compensates the claimant for loss of his or her spouse's "companionship and services[.]"[28] While services may be conjugal in nature, they also include "whatever of aid, assistance, comfort, and society" the injured spouse would normally be expected to provide to the claimant.[29]

Mrs. Getting testified that prior to his injury, Mr. Getting was very active, and would landscape, do carpentry, and make plumbing and maintenance repairs around the

[27] *See* Transcript: Day 1 at pg. 76 (Aug. 31, 2020).
[28] *Darr Const. Co. v. W.C.A.B. (Walker)*, 715 A.2d 1075, 1080 (Pa. 1998).
[29] *Hopkins v. Blanco*, 302 A.2d 855, 856 (Pa. Super. 1973), aff'd, 320 A.2d 139 (Pa. 1974).

house. She stated that she and Mr. Getting would regularly go antiquing and out to eat on the weekends.[30] Mrs. Getting testified that following the accident, Mr. Getting lost his characteristic energy, and spent much of his time in a recliner with his foot up, taking Aleve for pain. She indicated that Mr. Getting would still occasionally attempt to do work around the house, but was unable to be active for extended periods due to his pain and loss of balance. She testified that she and Mr. Getting no longer went out socially following the accident.[31] The Court is satisfied that this evidence is sufficient to demonstrate a loss of companionship and services supportive of a *prima facie* loss of consortium claim. As to Defendants' argument that the loss of consortium reward is excessive, that will be more appropriately addressed in the Motion for Remittitur.
As to Defendants' objection that the verdict form provided to the jury was deficient for failing to include a predicate finding of loss of consortium, Attorney Polachek had the opportunity to review the proposed verdict form before it was provided to the jury and did not raise any such objection at that time. This issue has therefore been waived.[32]

3. A New Trial is Required, as the Court Should Have Granted a Mistrial Once Mr. O'Neill Stopped Attending Trial After a Juror Reported a Possible COVID-19 Exposure

Defendants assert that a new trial is required because the Court erred in failing to grant a mistrial on the morning of September 2, 2020, the third day of trial, when Mark's Sales representative Mr. O'Neill communicated to his attorney that he would not be returning to the courthouse due to health concerns. The prior day, the Court had excused a juror due to an indirect COVID-19 exposure and recessed the proceedings in order to sanitize the courtroom. Defendants argue, conversely, that a new trial is required because the Court failed to instruct the jury upon Mr. O'Neill's absence that both Mr. O'Neill and his wife suffered from preexisting medical conditions that put them at an elevated risk from COVID-19 exposure. Defendants contend that Mr. O'Neill was subject to disparate treatment, as he was not afforded the same deference that the Court provided to both to the excused juror and to the jury as a whole.

---

[30] *See* Transcript: Day 4 at pg. 28 (Sept. 3, 2020).

[31] *See* Transcript: Day 4 at pg. 33 (Sept. 3, 2020).

[32] *See Com. v. Harvey*, 666 A.2d 1108, 1114 (Pa. Super. 1995) (citing *James v. Nolan*, 614 A.2d 709 (Pa. Super. 1992)) ("As a general rule, a party's failure to object to the verdict form constitutes waiver of that issue.").

As detailed *supra*, on the morning of the second day of trial, Tuesday, September 1, 2020, Plaintiffs' counsel, Attorney Waldenberger, called Mr. O'Neill to testify as on cross during Plaintiffs' case-in-chief. Mr. O'Neill then was subject to direct examination by Defendants' counsel, Attorney Polachek. Mr. O'Neill concluded his testimony before the afternoon lunch recess.[33] During the lunch recess, Adrianne Stahl ("Ms. Stahl"), Director of Court Administration, received a call from a juror (hereinafter "Juror 1") in the foregoing case. Juror 1 informed Ms. Stahl that he had just received notification that his sister-in-law had been diagnosed with COVID-19. He provided that he had not had any recent direct contact with this sister-in-law, but stated that his wife had spent six hours in the car with the sister-in-law the prior Saturday without wearing a mask. He further explained that he had been in close contact with his wife the prior Sunday, and on Monday evening. He stated that neither he nor his wife had been displaying any symptoms, but also explained that they had not yet been COVID tested.[34] Ms. Stahl relayed this information to the Court and counsel for both parties.

The Court asked counsel if they were satisfied with the veracity of Juror 1's representations, or whether they wanted him to call in and state his reasoning on the record; counsel for both parties indicated that they were satisfied.[35] The Court then asked counsel whether they thought Juror 1 should be excused. Attorney Polachek stated he had no problem excusing Juror 1. Attorney Waldenberger stated that he did not think that Juror 1 had to be excused based on the reported indirect contact, but added that excusing Juror 1 might be the best course to maintain the other jurors' peace of mind.[36] The Court also consulted Ms. Stahl, who had familiarized herself with the CDC COVID guidelines. She opined that the Court should "exercise an abundance of caution" and excuse Juror 1.[37]

Having reached an agreement that Juror 1 should be excused, the Court then discussed with counsel and Ms. Stahl what information should be relayed to the remaining jurors. While the Court reasoned that counsel would have a right to inform

---

[33] *See* Transcript: Day 2 at pgs. 5-82 (Sept. 1, 2020).
[34] *See* Transcript: Day 2 at pgs. 83-84 (Sept. 1, 2020).
[35] *See* Transcript: Day 2 at pg. 84 (Sept. 1, 2020).
[36] *See* Transcript: Day 2 at pg. 85 (Sept. 1, 2020).
[37] *See* Transcript: Day 2 at pg. 86 (Sept. 1, 2020).

their clients that a juror had been excused for potential COVID-19 exposure under the theory the "the parties are entitled to the jury that they choose[,]"[38] the Court had some initial reservations that providing the same information to the other jurors could invade Juror 1's medical privacy rights. Ms. Stahl recommended providing only a general instruction that a juror had been excused because he was "unable to fulfill his obligation."[39] The Court ultimately rejected this approach:

> THE COURT: [I]f I were a juror and I should somehow find out next week, for example, that this juror was excused because of this COVID contact and nobody told me, as a juror, and then I went home to my family and – I would be furious. Because we've asked these people to come in during a pandemic. We've represented and have taken extraordinary precautions to keep them safe. And then when something has happened we keep it from them.[40]

Having reached the decision that the jury should be informed of the reason for the Juror 1's absence, the Court then called Juror 1 to notify him that he would be dismissed. The Court also obtained Juror 1's permission to inform the other jurors of the generalities of his indirect COVID contact.[41] The parties agreed the trial should be recessed for the rest of the day so the courtroom could be sanitized. The jury was then called into an unused courtroom. The Court provided the following information:

> THE COURT: Ladies and gentlemen, I have reconvened us in another courtroom because I wanted to update you on a situation. So one of the jurors has been excused. Counsel and the Court have spoken with this juror, and they've given me permission to talk to you about this. And I felt it was important that you had a right to know.
>
> So this juror has been excused because they have notified the Court over the lunch hour that they just learned that a relative of theirs has tested positive for COVID. They have not had any direct contact with this relative. However, their family member has had direct contact with this relative. And they've obviously – the juror has had direct contact with their family member.
>
> Neither the juror nor their family member are symptomatic. The family member is going to be tested. We don't know whether the family member is positive. But in light of this sort of one or two degrees of separation of possible contact, we've excused the juror. And they will be replaced by an alternate.

---

[38] *See* Transcript: Day 2 at pgs. 89-90 (Sept. 1, 2020).
[39] *See* Transcript: Day 2 at pg. 89 (Sept. 1, 2020).
[40] Transcript: Day 2 at pgs. 90-91 (Sept. 1, 2020).
[41] *See* Transcript: Day 2 at pgs. 94-97 (Sept. 1, 2020).

In light of this, we've also decided to recess the trial for this afternoon so that we can do a thorough sanitization of both the courtroom and the juror's lounge where you have all been with the plan that we would commence the trial again at 9:00 tomorrow morning.
Now having said all of that, counsel and the Court also thought that out of respect for you we would give you an opportunity to share your thoughts or feelings about reconvening this trial at 9:00 tomorrow morning and you all continuing to serve.[42]

The jury at that point unanimously expressed that they had no issue with continuing with the trial the following day. The Court therefore excused the jury, instructing them to return to the courthouse no later than 8:45 a.m. the following day, and reiterating that both the courtroom and juror's lounge would be thoroughly cleaned.[43]

The following morning, on September 2, 2020, Attorney Polachek notified the Court and opposing counsel in chambers that he had received a call from his client, Mr. O'Neill, at 7:37 a.m. that morning. Attorney Polachek stated that Mr. O'Neill had informed him that, after speaking with his wife ("Mrs. O'Neill"), Mr. O'Neill had decided not to return due to a fear of potential COVID-19 exposure. Attorney Polachek explained that his client was 73 years old, had two stents and was on heart medication, and further stated that Mrs. O'Neill had recently undergone treatment for rheumatoid arthritis. Attorney Polachek then moved for a mistrial.[44] Attorney Waldenberger opposed this motion, stating that ordering a mistrial would be inappropriate because Mr. O'Neill had made the voluntary decision not to return.[45] The Court agreed that a mistrial was uncalled for, noting the extensive safety and social distancing measures implemented in the courthouse to ensure the safety of the participants in the trial. The Court also commented that Mr. O'Neill had apparently continued to operate Mark's Sales up to the date of trial, noting that it was unlikely Mr. O'Neill had undertaken comparable safety measures at his business.[46]

---

[42] Transcript: Day 2 at pgs. 100-01 (Sept. 1, 2020).
[43] *See* Transcript: Day 2 at pgs. 101-02 (Sept. 1, 2020).
[44] *See* Transcript: Day 3 at pgs. 4-5 (Sept. 2, 2020).
[45] *See* Transcript: Day 3 at pg. 5 (Sept. 2, 2020).
[46] *See* Transcript: Day 3 at pgs. 5-6 (Sept. 2, 2020).

After discussing how the jury should be instructed as to Mr. O'Neill's absence, the Court ultimately decided that it would not refer to Mr. O'Neill or Mrs. O'Neill's health conditions, as those conditions could not be properly verified over the phone.[47] However, the Court elaborated that before closing argument the Court would consider whether Attorney Polachek could discuss these medical conditions.[48] The Court then instructed the jury as to the following:

> THE COURT: Good morning, ladies and gentlemen. I apologize for the late start. You may notice that Mr. O'Neill is not present this morning. I wanted you to be aware that he called his attorney at about 7:30 this morning and indicated that he did not intend to come to trial, return to trial, today, that in light of the circumstances that happened yesterday with the one juror being excused, he expressed concerns about COVID and indicated that he did not feel safe returning. So he will not be with us, I presume, for the balance of the trial.[49]

The Court did ultimately permit Attorney Polachek to address without constraint Mr. O'Neill's health concerns during closing argument. Attorney Polachek informed the jury that Mr. O'Neill had decided not to return to the courthouse after learning of a juror's potential COVID-19 exposure because he and his wife suffered from preexisting conditions that put them in the highest risk category for COVID-19. Attorney Polachek detailed Mr. O'Neill's heart condition, and elaborated that Mrs. O'Neill suffered from rheumatoid arthritis so severe that she had required treatment at the Mayo Clinic the summer prior to trial.[50]

With this background in mind, the Court first addresses Defendants' argument that the Court was obligated to order a mistrial once Mr. O'Neill declined to return to the courthouse. The Court notes that, "[t]he remedy of a mistrial is an extreme remedy required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial tribunal."[51] "It is within the trial judge's

---

[47] *See* Transcript: Day 3 at pgs. 9-10 (Sept. 2, 2020).
[48] *See* Transcript: Day 3 at pg. 10 (Sept. 2, 2020).
[49] Transcript: Day 3 at pg. 11 (Sept. 2, 2020).
[50] *See* Transcript: Day 5 at pgs. 119-120 (Sept. 4, 2020).
[51] *Com. v. Ragland*, 991 A.2d 336, 340 (Pa. Super. 2010) (citation omitted).

discretion to declare a mistrial, and, absent an abuse of that discretion, no reversal of its exercise will result."[52]

As previously noted, Defendants contend that the Court's decision not to order a mistrial was not only erroneous, but potentially indicative of bias against Mr. O'Neill, because the Court had been much more accommodating of the jurors' potential concerns regarding Juror 1's reported indirect exposure.[53] The Court notes that while the empaneled jurors were provided the opportunity to share their thoughts regarding continuing with the trial, the Court had not at that point decided that any juror who expressed reservations would be excused, and communicated this to counsel at trial:

> THE COURT: [J]ust so we're clear, it was the Court's intention yesterday when I gave the jurors an opportunity to share their feelings about whether or not they wanted to return was to give them an opportunity to talk through that with the Court. I certainly had not made up my mind that anybody who requested to be excused was automatically gonna be allowed to leave.
>
> And so. . .it's not accurate to say that. . .the parties now have a right to decide whether or not they want to participate or not participate. They don't.[54]

The Court's instructions to the jury regarding Mr. O'Neill's absence were also not prejudicial, or indicative of a bias against Mr. O'Neill. The Court intentionally worded its instructions to the jury regarding Mr. O'Neill's absence to be entirely neutral, cognizant of its role as impartial arbitrator. The Court was also aware, as it had been when drafting its instructions regarding the excusal of Juror 1, that it should not speak authoritatively, and perhaps invasively, as to the medical conditions of an absent party. However, the Court granted Attorney Polachek the opportunity, in his role as advocate, to address these medical conditions during closing argument. The jury was therefore not deprived of any essential information regarding Mr. O'Neill's decision for absenting himself from the trial.

The Court further holds that if, accepting *arguendo*, there was differing treatment between Mr. O'Neill and the jury, such treatment was justified by the circumstances. Juror 1 was excused from the trial because his COVID-19 contact, while indirect, was

---

[52] *Com. v. Leister*, 712 A.2d 332, 334 (Pa. Super. 1998) (citation omitted).
[53] *See* Defendants' Brief in Support of Post-Trial Motions at pgs. 9-15.
[54] Transcript: Day 3 at pg. 9 (Sept. 2, 2020).

closer than any other individual participating in the trial. Excusing only Juror 1 was therefore justified by the circumstance. Further, if the Court was, in fact, more accommodating to the other jurors' concerns, this was reflective of the Court's cognizance that those jurors were in much closer contact to Juror 1 than were the attorneys or parties to the action. While the Court had implemented social distancing efforts, the jurors remained in comparatively close quarters, sharing a jury box and comingling in the juror's lounge. Mr. O'Neill, in contrast, had spent the duration of the trial seated with his attorney, some twenty feet away from Juror 1. Even when Mr. O'Neill testified as a witness, he remained seated at a distance from the jury, and the witness stand was separated from the courtroom by a plexiglass partition. There was no significant basis to find that Mr. O'Neill was at an unreasonable risk of infection. Defendants also strongly protest that Mr. O'Neill had legitimate health concerns based on his preexisting conditions and the spiking rate of COVID-19 across Pennsylvania and in Lycoming County specifically. Defendants note that on September 3, 2020, the day after Mr. O'Neill had absented himself from trial, the COVID-19 positivity rates in Pennsylvania reached 1,160 diagnosed cases, the highest number since July of that year.[55] Defendants also point out that the COVID-19 rate in Lycoming County increased from four diagnosed cases on the first day of trial to eleven diagnosed cases on the final day of trial.[56] Defendants further emphasize the severity of Mr. O'Neill and Mrs. O'Neill's preexisting conditions, noting that they were in the highest risk category from COVID-19.[57]

The Court has no basis to challenge the representations regarding the severity of Mr. O'Neill and Mrs. O'Neill's health conditions. However, in electing to proceed with a jury trial in the midst of the coronavirus outbreak, the parties were knowingly exposing themselves and others to an increased risk of exposure. Moreover, the Court appropriately mitigated this risk by undertaking extensive precautionary measures to ensure the safety of all parties involved. Mr. O'Neill, in agreeing to participate in the

---

[55] *See* Defendants' Brief in Support of Post-Trial Motions at pg. 15 (citing Steven Adams, *Pennsylvania's Reported Covid-19 Cases, Positivity Rate Both Spike*, TRIBLIVE (Sept. 3, 2020, 2:36 P.M.), https://triblive.com/news/pennsylvania/pennsylvanias-reported-covid-19-cases-positivity-rate-both-spike/).
[56] *See* Defendants' Brief in Support of Post-Trial Motions at pg. 15 (citing https://www.health.pa.gov/topics/disease/coronavirus/Page.Cases.aspx).
[57] *See* Defendants' Brief in Support of Post-Trial Motions at pgs. 16-19.

trial, could not then unilaterally deem continuance of the trial too great a risk when the Court, its staff, the jury, counsel, and remaining Defendant Mr. Barger all arrived at the courthouse the following morning ready to proceed.

Defendants further assert that, pursuant to the case law of the Third Circuit, a defendant in a civil proceeding has a due process right to be present at every stage of his or her trial, although this right may be waived expressly, and may also be waived if the defendant "voluntarily" absents him or herself from the Courtroom.[58] Defendants contend that an absence cannot be truly voluntary if the defendant is deprived of a meaningful choice, which may include a choice limited to two bad options.[59]

Defendants further assert that for the purposes of a trial, a corporate representative is the corporate party, and this representative therefore has a coequal right to be present through trial on behalf of the corporate defendant.[60] Defendants further argue that the Court violated Mr. O'Neill's rights under Article 1, Section 11 of the Pennsylvania Constitution, requiring open courts. [61]

Accepting *arguendo* that Defendants' summary of the applicable law is correct, the Court cannot find that Mr. O'Neill's continued presence at trial presented the "grave health risk" that Defendants represent, and certainly presented no greater risk than Mr. O'Neill's continued operation of Mark's Sales during the pandemic. The Court therefore stands by its determination that Mr. O'Neill's decision not to continue with trial was voluntary, and not compelled by the circumstances.[62] Similarly, Defendants argument that the Court violated Mr. O'Neill's rights under Article 1, Section 11 of the

---

[58] *See* Defendants' Brief in Support of Post-Trial Motions at pg. 20 (citing *Arrington v. Robertson*, 114 F.2d 821, 823 (3d Cir. 1940)).

[59] *See* Defendants' Brief in Support of Post-Trial Motions at pgs. 20-21 (citing *Com. v. Ball*, 146 A.3d 755, 766 (Pa. 2016)).

[60] *See* Defendants' Brief in Support of Post-Trial Motions at pg. 19 (citing Pa.R.E. 615(b) (prohibiting sequestration of a corporate representative)).

[61] Pa. Const. art. I, § 11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.").

[62] While not dispositive to the Court's decision on this issue, the Court finds that Defendants' citation to various criminal cases, which address clearly distinguishable Sixth Amendment confrontation clause considerations, does not particularly bolster their argument. The Court is also unconvinced that Defendants' citation to Pa.R.E. 615(b), forbidding sequestration of a designated representative of a corporate defendant, provides a basis for the Court to determine that corporate representatives have a recognized due process right to be continually present at a civil trial.

Pennsylvania Constitution is unconvincing. Even assuming Mr. O'Neill has standing as the corporate representative of Mark's Sales to object on this basis, the Court did not bar Mr. O'Neill, in actuality or in effect, from participating in the trial.

Defendants also argue that in other cases involving potential COVID-19 exposure in the courtroom, courts in other jurisdictions have ordered a mistrial.[63] Nonetheless, an appellate court of Pennsylvania has not yet addressed this issue, and the decisions of other jurisdictions provide, at best, persuasive authority. However, Defendants' cited cases lack such persuasive authority, as their facts are clearly distinguishable. In the case of *Nebraska v. Kuek*, a spectator who had been within the courtroom for a full day was diagnosed with COVID-19, leading to a mistrial.[64] In that case, everyone in the courtroom would potentially have had firsthand exposure to a COVID infected party. In a criminal trial in Merced California, a witness, who had testified in the courtroom, revealed that he had been in contact with a police officer who had tested positive for COVID-19.[65] While this would constitute an indirect contact for courtroom participants, it is closer contact than that which occurred in this case. In the instant matter, courtroom participants had contact with Juror 1, who had contact with his wife, who had contact with her sister who had tested positive for COVID-19. In a case in Fresno, California, a 70-year-old defense attorney informed the judge near the close of jury selection that he had health conditions that put him at high risk from COVID exposure. The judge agreed to grant a mistrial.[66] In the instant matter, the parties fully participated in jury selection and Attorney Polachek did not move for a mistrial until halfway through the trial, and only after Mr. O'Neill, the at-risk party, had already concluded his testimony. In the high profile Manhattan case *People v. Braverman*, defendant's counsel represented to the court during trial that he was experiencing COVID-like symptoms. The court allowed counsel to proceed examining a witness

---

[63] *See* Defendants' Brief in Support of Post-Trial Motions at pgs. 26-28.

[64] *See* Defendants' Brief in Support of Post-Trial Motions at pg. 26 (citing https://www.ketv.com/article/douglas-county-judge-declares-mistrial-in-double-murder-trial-after-spectator-tests-positive-for-covid-19/33373485#).

[65] *See* Defendants' Brief in Support of Post-Trial Motions at pgs. 26-27 (citing https://www.law.com/therecorder/2020/03/20/mistrial-declared-in-merced-murder-case-amid-covid-19-exposure-fears/).

[66] *See* Defendants' Brief in Support of Post-Trial Motions at pg. 27 (citing https://www.fresnobee.com/news/local.article241305911.html).

remotely by speakerphone, but declared a mistrial once counsel's condition deteriorated to the point where he could not adequately represent his client.[67] This is plainly distinguishable from the foregoing case, where no party or courtroom participant exhibited COVID-19 symptoms. Similarly, the Texas case that Defendants cite, in which a COVID-positive inmate was mistakenly taken to the wrong courthouse, involves a direct exposure of the COVID-positive inmate with other inmates during transport.[68] Here there was no direct exposure. In fact, the Court remains without any evidence that Juror 1 or his wife ever tested positive for COVID-19.

Finally, Defendants argue that Attorney Waldenberger improperly exploited Mr. O'Neill's absence during closing argument. Defendants specifically object that the following statement of Attorney Waldenberger during closing argument was highly prejudicial and misleading to the jury:

> ATTORNEY WALDENBERGER: [It] doesn't sit well with me that they put up on the stand a man who – I hesitate. I hesitate for a reason, okay, because in doing what we do, we, meaning lawyers, and we talk about what witnesses say on the witness stand, we're often very careful to call people names. Right. We don't like to characterize people by the way that they conduct themselves on the stand or what they say. So what I'm going to say to you I do not say lightly and I put a lot of thought into having now that I'm going to say it. Getting up on that stand and Mr. O'Neill lied. He lied.
>
> And I understand what [Attorney] Polachek said about why Mr. O'Neill did not show up for the rest of the trial following my cross-examination of him. And I thought about that and we didn't hear from Mr. O'Neill himself. That was information he was communicated – he communicated to his lawyer about his health and his spouse's health. Didn't say it to us, didn't say it to – the judge nor I were part of that conversation. But it isn't something that we all have to accept is true. It isn't something I take lightly to say that, ladies and gentlemen. I don't like having to say that, but under the circumstances of what this man showed on

---

[67] *See* Defendants' Brief in Support of Post-Trial Motions at pgs. 27-28 (citing http://www.nydailynews.com/new-york/manhattan/ny-manhattan-judge-mistrial-covid-20200316-e625abx3k5axfdki3tu5ou7xuu-story.html). The Court notes that Attorney Polachek never requested that Mr. O'Neill be permitted to participate in the trial remotely.

[68] *See* Defendants' Brief in Support of Post-Trial Motions at pg. 28 (citing https://www.kbtx.com/2020/08/19/mistrial-in-brazos-county-after-inmate-with-covid-19-accidentally-brought-to-courthouse/).

the witness stand, he lied and then he left. And how's that for accepting responsibility?[69]

Defendants assert that Attorney Waldenberger's argument that the Court and counsel "didn't hear from Mr. O'Neill himself" and were not involved in the conversation as to his health concerns was misleading because Attorney Polachek had invited the Court and opposing counsel to speak directly to Mr. O'Neill and Attorney Waldenberger had rejected that offer.[70] Defendants further assert that Attorney Waldenberger's assertion that Mr. O'Neill was a "liar" was improper, as "it is basic to accepted trial practice that counsel may not so comment on the evidence as to remove an issue of credibility from the province of the jury."[71] Finally, Defendants assert that because Plaintiffs called Mr. O'Neill as a witness during their case-in-chief, it was improper for them to comment adversely on his absence, as he was equally accessible to either party.[72] However, the Court declines to address the validity of these arguments or the prejudicial impact of Attorney Waldenberger's statements, as Defendants have once again waived this issue by Attorney Polachek's failure to object at the time of trial.[73]

4. A New Trial is Required because the Jury Should Have Been Instructed that Defendants Had No Duty to Ensure that Plaintiffs Read, Understood, and Followed the Mower's Manual

Defendants assert that a new trial is required because the Court declined to provide the jury instruction drafted by Defendants' counsel that instructed the jury that Defendants had no duty to ensure that Plaintiffs read, understood, and followed the warnings in the Riding Mower's manual. As revealed in the transcript of the video deposition of Plaintiff's Expert, E. Smith Reed, P.E., this issue first arose when Attorney Waldenberger questioned Mr. Reed as to a provision on page six of the Riding Mower's

---

[69] *See* Defendants' Brief in Support of Post-Trial Motions at pg. 29 (quoting Transcript: Day 5 at pgs. 150-51 (Sept. 4, 2020)).

[70] *See* Defendants' Brief in Support of Post-Trial Motions at pg. 30 (citing Transcript: Day 3 at pg. 9 (Sept. 2, 2020)).

[71] *See* Defendants' Brief in Support of Post-Trial Motions at pg. 30 (quoting *Millen v. Miller*, 308 A.2d 115, 117 (Pa. Super. 1973)).

[72] *See* Defendants' Brief in Support of Post-Trial Motions at pgs. 30-31.

[73] *See e.g.*, *Craley v. Jet Equip. & Tools, Inc.*, 778 A.2d 701, 707 (Pa. Super. 2001) (affirming trial court's ruling that appellants had waived their objection to the purportedly prejudicial comments made by appellee's counsel during closing argument, as appellants' counsel had failed to timely object at trial and the issue was first raised in appellants' post-trial motions).

manual ("Provision"). The Provision reads as follows: "Your responsibility – restrict the use of this power machine to persons who have read, understand and follow the warnings and instructions in this manual and on the machine."[74] Attorney Polachek objected to counsel referencing this Provision. Attorney Waldenberger proceeded, asking whether, based on the cited Provision, Mark's Sales should have provided the Mower to Plaintiffs *without* the manual, to which Mr. Dryer opined "no." Attorney Polachek again objected.[75] At trial, the Court sustained the objections on the basis that it was unclear whether the cited Provision was intended to apply to lessors as well as to purchasers, therefore holding the Provision was not a proper basis for an expert opinion.[76] However, the Court specifically noted that its ruling would not *per se* preclude Attorney Waldenberger from referencing the Provision when examining witnesses at trial.[77]

Attorney Waldenberger subsequently cited the Provision several times when examining witnesses. For example, Attorney Waldenberger cited the Provision during his direct examination of Mr. O'Neill specifically to establish that Mr. O'Neill was unfamiliar with the Provision, as he had concededly not read the manual.[78] Following the close of argument, as the Court and counsel reviewed the proposed charges for the jury in chambers, Attorney Polachek proposed a non-standard charge that would instruct the jury that Defendants were under no duty to ensure that Plaintiffs had read, understood, and followed the instructions in the manual.[79] The Court declined to provide this instruction, indicating that counsel could better address the issue at closing argument.[80] The Court further stated that citation to the Provision was "fair argument" for counsel because it was potentially relevant to the underlying issue of whether Mark's Sales was negligent for failing to provide the manual to the Plaintiffs.[81]

---

[74] A copy of the Troy-Bilt Riding Mower's operating manual was entered as Defendants' Exhibit 15.
[75] *See* Transcript: Deposition of E. Smith Reed, P.E. at pgs. 230-32 (Aug. 19, 2020).
[76] *See* Transcript: Day 1 at pgs. 172-73 (Aug. 31, 2020).
[77] *See* Transcript: Day 1 at pg. 173 (Aug. 31, 2020).
[78] *See* Transcript: Day 2 at pgs. 13-15 (Sept. 1, 2020).
[79] *See* Transcript: Day 4 at pgs. 102-03 (Sept. 3, 2020).
[80] *See* Transcript: Day 4 at pgs. 104-05 (Sept. 3, 2020).
[81] *See* Transcript: Day 4 at pg. 105 (Sept. 3, 2020).

Attorney Polachek proceeded first at closing argument, and he addressed the Provision in anticipation that Attorney Waldenberger would cite the Provision during his closing. Attorney Polachek argued that the scope of the Provision should necessarily be limited to purchasers, as to find that sellers or lessors had a duty to ensure that purchasers or lessees read, understood, and followed product manuals would impose an unsupportable burden.[82]

As anticipated, Attorney Waldenberger did reference the Provision as well in closing argument. However, he explained that his repeated citation to the Provision during the trial was simply to emphasize that "mowers are dangerous. . .before you let somebody get on [a mower], make sure you give them the safety information."[83] Attorney Waldenberger acknowledged that stores such as Lowe's, Home Depot, and Amazon sell riding mowers regularly without any particular vetting of purchasers' experience or capability to operate these mowers. However, as these other sellers provide their products with their operating manuals as a matter of course, Attorney Waldenberger asserted that Defendants' failure to provide the operating manual with the Troy-Bilt Riding Mower fell below the standard of care typically provided by these other sellers.[84] Following closing arguments, the Court read instructions to the jury, which included the standard jury instruction on negligence.[85]

Jury instructions will be found deficient in instances where the instructions provided will likely have misled or confused the jury, or where there is an omission in the charge that amounts to a fundamental error.[86] The Court notes that at no point during trial did Plaintiffs' counsel make the argument that Defendants were under a duty to ensure that Plaintiffs read, understood, and followed the Riding Mower's manual.

---

[82] *See* Transcript: Day 5 at pgs. 130-33 (Sept. 4, 2020).

[83] *See* Transcript: Day 5 at pg. 162 (Sept. 4, 2020).

[84] *See* Transcript: Day 5 at pgs. 162-63 (Sept. 4, 2020).

[85] Transcript: Day 5 at pg. 189 (Sept. 4, 2020); see also Pa. SSJI (Civ.) 1310 ("THE COURT: In this case, you must decide whether Defendants Mark Sales and Leasing and Lemuel Scott Barger were negligent. I will now explain what negligence is. A person must act in a reasonably careful manner to avoid harming others. The care required varies according to the circumstances and the degree of danger at a particular time. You must decide how a reasonably careful person would act under the circumstances established by the evidence in this case. A person who does something a reasonably careful person would not do under the circumstances is negligent. A person also can be negligent by failing to act. A person who fails to do something a reasonably careful person would do under the circumstances is negligent.").

[86] *Passarello v. Grumbine*, 87 A.3d 285, 296 (Pa. 2014) (citation omitted).

Indeed, Plaintiffs' counsel summarized its three theories of negligence in closing arguments. These theories included: 1. Defendants' failure to provide Plaintiffs the Riding Mower's manual; 2. Mr. Barger's erroneous recommendation of the Riding Mower as suitable for Plaintiff's deeply sloped lawn, and; 3. Mr. Barger's continued representations upon delivery that the Riding Mower would be appropriate for Plaintiffs' property despite having now had the opportunity to observe the deeply sloped lawn for himself.[87] In light of the above, the Court does not find the record sufficient to support Defendants' contentions that the jury was likely misled as to Plaintiffs' theory of negligence, necessitating a special jury charge.

5. A New Trial is Required because the Admission of Scott Barger's 26-Year-Old Conviction for Receiving Stolen Property Interjected Impermissible Character Evidence Rather than Permissible *Crimen Falsi* Evidence

Defendants assert that a new trial is required because, in allowing admission of Mr. Barger's 26-year-old conviction for receiving stolen property, the Court interjected impermissible character evidence rather than permissible *crimen falsi* evidence. At the time of trial, the Court discussed with counsel in chambers whether Plaintiffs' counsel could admit evidence of Mr. Barger's prior criminal convictions to impeach his credibility. Mr. Barger had a total of eleven *crimen falsi* convictions on his record, one conviction for theft by unlawful taking from 2017, and ten others dating from the early 1980s to 1994. Counsel agreed that pursuant to Pa.R.E. 609(a), the 2017 conviction would be admissible,[88] but there was disagreement as to whether the other convictions should be admitted pursuant to Pa.R.E. 609(b).[89] The Court ultimately ruled that in addition to the 2017 conviction, the 1994 conviction for receiving stolen property would also be admitted, reasoning that if only the 2017 conviction were admitted it could mislead the

[87] *See* Transcript: Day 5 at pgs. 162-63 (Sept. 4, 2020).

[88] Pa.R.E. 609(a) ("For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, must be admitted if it involved dishonesty or false statement.").

[89] Pa.R.E. 609(b) ("This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if: (1) its probative value substantially outweighs its prejudicial effect; and (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.").

jury to believe the 2017 conviction "was a single isolated conviction, which is clearly not the case."[90]

Defendants argue that the admission of the 1994 conviction was erroneous, as its highly prejudicial effect could not be outweighed by its probative value, in violation of the admissibility standard under both Pa.R.E. 609(b) and Pa.R.E. 403.[91] Defendants cite the Pennsylvania Supreme Court's decision in *Commonwealth v. Randall* for the proposition that a court must evaluate five elements when determining the admissibility of *crimen falsi* convictions that are more than ten years old.[92] Pursuant to *Randall*:

> In making the determination as to the admissibility of a prior conviction for impeachment purposes, the trial court should consider: (1) the degree to which the commission of the prior offense reflects upon the veracity of the defendant-witness; (2) the likelihood, in view of the nature and extent of the prior record, that it would have a greater tendency to smear the character of the defendant and suggest a propensity to commit the crime for which he stands charged, rather than provide a legitimate reason for discrediting him as an untruthful person; 3) the age and circumstances of the defendant; 4) the strength of the prosecution's case and the prosecution's need to resort to this evidence as compared with the availability to the defense of other witnesses through which its version of the events surrounding the incident can be presented; and 5) the existence of alternative means of attacking the defendant's credibility.[93]

Defendants assert that all of these factors would weigh against the admissibility of the 1994 conviction. Defendants further argue that in admitting the 1994 conviction, the Court violated Pa.R.E. 404(a)(1)[94] and 404(b)(1),[95] which prohibit the use of

---

[90] *See* Transcript: Day 1 at pg. 178 (Aug. 31, 2020).

[91] *See* Defendants' Brief in Support of Post-Trial Motions at pg. 48 (citing Pa.R.E. 403 ("The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.")).

[92] See Defendants' Brief in Support of Post-Trial Motions at pg. 48-49.

[93] *Com. v. Randall*, 528 A.2d 1326, 1328 (Pa. 1987) (quoting *Com. v. Roots*, 393 A.2d 364 (Pa. 1978)). The *Randall* test has been adopted into the civil context. *See Russell v. Hubicz*, 624 A.2d 175, 182 (Pa. Super. 1993).

[94] Pa.R.E. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

[95] Pa.R.E. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

character evidence to demonstrate that on a particular occasion, an individual acted in accordance with his or her character.

The Court considers the *Randall* elements in turn. As to the first element regarding the degree to which the 1994 conviction reflected on the veracity of Mr. Barger, the Court found the repeated nature of Mr. Barger's convictions for *crimen falsi* crimes was relevant to his credibility as a witness. Further, while the majority of Mr. Barger's *crimen falsi* convictions had occurred more than twenty-five years prior to the date of trial, Mr. Barger's conviction in 2017 for theft by unlawful taking was not an aberration, but part of a pattern of dishonest behavior, and therefore indicative of Mr. Barger's truthfulness as a witness.

As to the second element, whether the admission of the 1994 conviction would have a greater tendency to smear the reputation of Mr. Barger, or suggest a propensity to commit the type of crime for which he was charged, than to discredit him as an honest person, the Court did consider the potential prejudice. In admitting only Mr. Barger's 2017 and 1994 *crimen falsi* convictions and precluding evidence of his nine other *crimen falsi* convictions the Court mitigated this prejudice. However, the Court found that the evidence of Mr. Barger's large number of convictions for *crimen falsi* crimes too probative to the issue of Mr. Barger's veracity to omit entirely, and so balanced these competing factors and admitted only his two most recent convictions.

As to Defendants' assertions that admission of the 1994 conviction was impermissible character evidence, Defendants were not on trial for a theft crime, but for negligence.[96] Further, Plaintiffs' counsel expounded in detail at closing argument that the purpose of his reference to Mr. Barger's prior criminal history was for the specific purpose of determining whether Mr. Barger had testified truthfully as a witness.[97] Evidence of the conviction was properly admitted to impeach Mr. Barger's credibility as a witness, and not to suggest that he had acted in furtherance of a crime.

---

[96] *See e.g.*, *Com. v. Cascardo*, 981 A.2d 245 (Pa. Super. 2009), appeal denied 12 A.3d 750 (Pa. 2010) (holding that admission of murder defendant's prior convictions for extortion and tampering with a witness, both more than ten years old, were appropriate bases for impeachment, where credibility was a key issue in the case, and did not suggest a propensity to commit murder).

[97] See Transcript: Day 5 at pgs. 152-53 (Sept. 4, 2020).

As to the third element, Mr. Barger's age and circumstances, the Defendants accurately note that Mr. Barger's 1994 conviction occurred twenty-six years prior to the trial, and the Court notes that Mr. Barger would have been in his late twenties at the time of the conviction. While Mr. Barger was much younger at the time of his 1994 conviction, crimes committed by a man in his late twenties could clearly not be dismissed as mere juvenile delinquency. No other extenuating circumstances were provided to the Court regarding the 1994 conviction. Further, the Court's decision to omit evidence of Mr. Barger's various other *crimen falsi* convictions did take into account Mr. Barger's youth at the time of those convictions, with the earliest dating back to when Mr. Barger was just eighteen.[98]

As to the fourth element, regarding the significance of the admission of the 1994 conviction to the prosecution's case, the Court found that this consideration weighed heavily in favor of admission. One of Plaintiffs' key theories of negligence was that at the time they visited Mark's Sales with the intention of renting a riding mower, Mr. Barger immediately recommended the Troy-Bilt Riding Mower, and represented when questioned on the subject that the Mower would be suitable for Plaintiffs' sloped property. At trial, Mr. Barger testified to the contrary that Plaintiffs selected the Troy-Bilt Riding Mower independently, and stated that he had not made any representations regarding the Mower's capabilities. Mr. O'Neill also testified that he was present at the time that Plaintiffs arrived a Mark's Sales, and claimed that Plaintiffs independently selected the Troy-Bilt Riding Mower based on cost, even after he had advised them that a larger model would be safer for their lawn. However, Plaintiffs both contended that Mr. O'Neill had not been present on that day. There were no additional witnesses to this interaction. In light of the divergent recollections of events, the Court found that the issue of the witnesses' veracity was of key import.

There was a similar discrepancy in testimony regarding a safety placard containing warnings that was purportedly attached to the steering wheel of the Troy-Bilt Riding Mower. Mr. Getting testified that he did not recall ever having seen the placard. Mrs. Getting testified that she remembered seeing the placard on the steering wheel of the Mower in the store, but had not examined it at that time. She testified that once Mr.

[98] *See* Transcript: Day 1 at pg. 178 (Aug. 31, 2020).

Barger delivered the Riding Mower, there was no placard attached to the Mower. Instead, she stated that she only found the placard in Plaintiffs' garage following the accident, suggesting that it had been removed from the Mower at the time of delivery. Mr. Barger testified to the contrary, that the placard had been attached to the steering wheel at the time of delivery, and stated that he did not remove it. The placement of the safety placard was among the central issues relevant to the question of Plaintiffs' potential comparative negligence, and thus Mr. Barger's credibility on this issue was central to the jury's finding as well.[99]

Finally, as to the existence of other means to attack Mr. Barger's credibility as a witness, the Court acknowledges that the 2017 conviction served to undermine Mr. Barger's veracity. As previously discussed, however, the Court felt that admission of the 2017 conviction in isolation could mislead the jury that the *crimen falsi* conviction was an anomaly, rather than part of a pattern of dishonest behavior. Having summarized the five elements, the Court affirms its determination at the time of trial that the probative value of the 1994 conviction substantially outweighed its prejudicial value, particularly in light of the centrality of Mr. Barger's testimony, and thus his credibility, to the jury's finding.

6. A New Trial is Required because the Court Erroneously Omitted Relevant Expert Testimony of Defendants' Expert, Paul E. Dryer, P.E., and Erroneously Permitted Plaintiffs' Expert, E. Robert Smith, to Testify Beyond the Scope of his Report

Defendants raised several additional matters within their Motion for a New Trial on All Issues. Defendants assert that a new trial is required because the Court erroneously granted, in part, Plaintiff's Motion *in Limine* to Preclude Certain Opinions of Defendants' Expert, Paul L. Dryer, P.E., precluding Mr. Dryer from providing relevant evidence regarding Mr. Getting's conduct and negligence. Defendants also contend that the Court improperly acted *sua sponte* in precluding Mr. Dryer from discussing the deposition of a witness on the basis that the deposition was hearsay. Finally, Defendants contend that a new trial is required because the Court improperly overruled Defendants' objections to the testimony of Plaintiff's liability expert, E. Robert Smith,

[99] *See Com. v. Harris*, 884 A.2d 920 (Pa. Super. 2005) (holding that a fifteen-year-old robbery conviction in 1984 as a certified adult from which defendant was release from jail in 1993 was admissible to impeach defendant at murder trial in 2004 where credibility was central to the jury's finding).

and thereby permitted Mr. Smith to testify beyond the scope of his report and to offer opinions that impermissibly intruded upon the province of the jury.[100] However, as none of these issues were addressed in Defendants' supportive brief, the Court considers them waived.

Pursuant to the foregoing, Defendants' Motion for a New Trial on All Issues is DENIED.

C. **Motion for a New Trial on Damages**

Defendants next move for a new trial on damages, contending that a new trial is required because the jury's net award of $1,955,000.00 was manifestly excessive and against the clear and overwhelming weight of the evidence, as to impermissibly constitute an award of punitive damages.[101] A court may grant a new trial limited to the issue of damages, "only where (1) the question of liability is not intertwined with the question of damages, and (2) the issue of liability is either (a) not contested or (b) has been fairly determined so that no substantial complaint can be made with respect thereto."[102] In this case, where Defendants strongly contest both damages and liability, it would be improper for the Court to award a new trial on damages alone. Therefore, Defendants' Motion for a New Trial on Damages is DENIED.

D. **Motion for Remittitur**

Defendants move for a remittitur of damages. Defendants assert that the verdict against them on liability, causation, and damages is unsupported by substantial credible evidence, is unsupported by the weight of the evidence, is manifestly excessive, and is shocking to the conscience of both the community and the Court. Defendants contend that the verdict is so excessive, "as to suggest that the jury was influenced by partiality, prejudice, mistake, corruption, and the absence of Mr. O'Neill from trial."[103] Defendants further identify the loss of consortium award of $500,000.00 to Plaintiff Veronica Getting

[100] Defendants' Post-Trial Motions ¶¶ 11-13.
[101] Defendants' Post-Trial Motions ¶¶ 15-17.
[102] *Nogowski v. Alemo-Hammad*, 691 A.2d 950, 958 (Pa. Super. 1997) (quoting *Chiaverini v. Sewickley Valley Hospital*, 598 A.2d 1021, 1024 (Pa. Super. 1991)).
[103] Defendants' Post-Trial Motions ¶¶ 19-20.

as “improper, completely unsupported, and grossly excessive,” especially when there was no predicate finding of a loss of consortium.[104]

If a court determines that a jury’s verdict is manifestly excessive, it may grant a remittitur, requiring the plaintiff to remit a portion of the verdict or otherwise proceed to a new trial.[105] “[A] remittitur may only be granted where the trial court determines that the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption and articulates the reason supporting a reduction of the verdict.”[106] “So long as the verdict reached by the jury bears a reasonable resemblance to the proven damages, a court may not alter the award.”[107]

When determining if damages for past or future non-economic loss award merits remittitur, courts look to considerations including, “the age of the plaintiff, the severity of his or her injuries, whether the injuries are temporary or permanent, the duration and nature of medical treatment, the duration and extent of physical pain and mental anguish on the part of the plaintiff, and the plaintiff's physical condition before the injuries.”[108] If the Court determines the jury’s compensatory award is excessive, remittitur must reduce the award to “the highest amount any jury could properly award[,]. . .[which] may well be higher. . .than the level the court would have deemed appropriate if working on a clean slate.”[109]

In support of its Motion for Remittitur, Defendants assert that the $1.53 million dollar verdict to Mr. Getting (taking into account the 15% reduction for comparative negligence) is unsupported by the evidence. Defendants cite the trial testimony of Plaintiffs’ expert, Dr. Marcus Riedhammer, M.D., for the proposition that by the time of trial, the area around Mr. Getting’s amputation had fully healed, and that he was experiencing minimal pain treatable by over-the-counter Aleve.[110] Defendants further

---

[104] Defendants’ Post-Trial Motions ¶ 21.

[105] *See Baker v. Com., Dep't of Highways*, 165 A.2d 243, 245 (Pa. 1960).

[106] *Vogelsberger v. Magee-Womens Hosp. of UPMC Health Sys.*, 903 A.2d 540, 552 (Pa. Super. 2006) (quoting *Goldberg ex rel. Goldberg v. Isdaner*, 780 A.2d 654, 662 (Pa. Super. 2001)).

[107] *Mendralla v. Weaver Corp.*, 703 A.2d 480, 487 (Pa. Super. 1997) (citations omitted).

[108] *Gillingham v. Consol Energy, Inc.*, 51 A.3d 841, 858 (Pa. Super. 2012) (quoting *Hyrcza v. West Penn Allegheny Health System, Inc.*, 978 A.2d 961, 979 (Pa. Super. 2009)).

[109] *Ferrer v. Trustees of Univ. of Pennsylvania*, 882 A.2d 1022, 1028 (Pa. Super. 2005).

[110] Defendants’ Brief in Support of Post-Trial Motions at pg. 53 (citing Video Deposition of Marcus Riedhammer, M.D. at pgs. 96-108) (Aug. 21, 2020)).

emphasize that Mr. Getting already suffered from end-stage osteoarthritis in his left knee prior to the accident, which was severe enough to cause him to consider a knee replacement surgery.[111] Defendants – noting that the amount awarded in damages in other cases, while not precedential, may be persuasive evidence to the Court[112] – additionally contend that remittitur has been granted in other cases with similar facts. Defendants particularly identify the case of *Smalls v. Pittsburgh-Corning Corp.*,[113] in which the Superior Court remitted a $2 million award to a 74-year-old man suffering from an asbestos exposure, finding the award manifestly excessive. In that case, the jury had also awarded $500,000 to the injured man's wife for loss of consortium, which was also subject to remittitur. Defendants further elaborate that in other cases involving similarly sized awards where courts upheld the verdict, the injuries involved were much more severe, even to the point of death, or included economic damages in addition to pain and suffering.[114]

Having considered the entire record, the Court finds that Defendants' summation of Mr. Getting's damages is rather reductive. Mr. Getting sought and obtained recovery for past, present, and future non-economic loss, including: pain and suffering, embarrassment and humiliation, loss of enjoyment of life, and disfigurement. There was extensive testimony provided as to Mr. Getting's pain and suffering. At trial, Mr. Getting testified that immediately following the accident he lost consciousness and remained in a state of shock as he was transported to the hospital.[115] After several weeks of hospitalization, during which Mr. Getting underwent two surgeries on his foot and physical therapy, Mr. Getting was released to in-home nursing care. Mr. Getting described his pain during this initial period as severe and continuous.[116] Mr. Getting acknowledged the pain in his foot had gradually reduced, so that by the time of trial he only experienced pain two to four times a week, but elaborated that he would

---

[111] Defendants' Brief in Support of Post-Trial Motions at pg. 53 (citing Video Deposition of Marcus Riedhammer, M.D. at pgs. 111-115) (Aug. 21, 2020); Transcript: Day 1 at pg. 127 (Sept. 2, 2020)).
[112] Defendants' Brief in Support of Post-Trial Motions at pg. 53 (citing *A.Y. v Janssen Pharm, Inc.*, 224 A.3d 1, 28 (Pa. Super. 2019), *rearg. denied* (Pa. Super. 2020)) (other citations omitted).
[113] *See Smalls v. Pittsburgh-Corning Corp.*, 843 A.2d 410 (Pa. Super. 2004).
[114] See Defendants' Brief in Support of Post-Trial Motions at pg. 54-55.
[115] *See* Transcript: Day 1 at pgs. 73-74 (Aug. 31, 2020).
[116] *See* Transcript: Day 1 at pgs. 75-81 (Aug. 31, 2020).

experience pain constantly when walking, severely limiting his activity levels.[117] He explained that he now takes only Aleve to treat this pain because he is concerned about the possibility of becoming addicted to narcotics.[118] He also testified that the accident exacerbated his pre-existing knee issues, necessitating a knee replacement surgery.[119] Plaintiffs' medical experts, Dr. S. Ross Noble, M.D., and Dr. Riedhammer, also testified extensively to the severe pain Mr. Getting underwent in the period following his accident. Dr. Noble and Dr. Riedhammer both further diagnosed Mr. Getting as currently suffering from neuropathy (nerve damage) in his injured foot, resulting in stabbing or burning sensations in the foot.[120]

As to Mr. Getting's embarrassment and humiliation and loss of enjoyment of life (areas where there is significant overlap), Mr. Getting testified that following the accident, he must always walk with a cane, can no longer drive, and has balance issues that put him at risk of falling.[121] As per the testimony of Mrs. Getting, summarized in more detail *supra*, Mr. Getting, once a very active man for his age, has been so hobbled and devitalized by his injuries that he now spends most of his time sitting in a recliner.[122] Mr. Getting also testified to having great difficulty climbing stairs, explaining that to climb or descend the stairs he would need to sit and scoot up or down each step.[123] Mr. Getting testified to severe psychological consequences to his injuries. He averred that he has traumatic flashbacks to the accident event, has felt embarrassed and emasculated due to perceiving himself as helpless and useless in his injured state, and testified to experiencing severe depression post-accident, even to the point of contemplating suicide.[124]

As to Mr. Getting's disfigurement claims, exhibits were presented at trial demonstrating that the accident has resulted in the complete amputation of Mr.

---

[117] *See* Transcript: Day 1 at pgs. 81-83 (Aug. 31, 2020).
[118] *See Id.*
[119] *See* Transcript: Day 1 at pg. 82 (Aug. 31, 2020).
[120] *See* Plaintiffs' Memorandum of Law in Opposition to Post-Trial Motions at pgs. 63-63 (citing deposition testimony of Dr. Riedhammer at 26-29, 67-86; deposition testimony of Dr. Noble at 37-45, 52-56).
[121] *See* Transcript: Day 1 at pgs. 81-87 (Aug. 31, 2020).
[122] *See* Transcript: Day 4 at pgs. 24-25 (Sept. 3, 2020).
[123] *See* Transcript: Day 1 at pgs. 81-83 (Aug. 31, 2020).
[124] *See* Transcript: Day 1 at pgs. 80-89 (Aug. 31, 2020).

Getting's big toe and the ball of his left foot. Both Dr. Riedhammer and Dr. Noble testified that the other toes on Mr. Getting's left foot are beginning to curve toward his missing big toe, and opined that this would continue with the passage time, resulting in an even further decrease in Mr. Getting's mobility and more extreme disfigurement.[125] Mrs. Getting's $425,000 verdict for loss of consortium (taking into account the 15% reduction for comparative negligence) has been discussed at some length *supra*. However, to summarize, Mrs. Getting testified that Mr. Getting, once a very active man who would do repairs and maintenance around the house, is now largely immobilized. The couple no longer leaves the house for social activities.[126] Mrs. Getting now suffers constant anxiety that her husband will fall and reinjure himself. She infrequently leaves the house, and if she does need to shop for necessities, she makes sure to return as quickly as possible so that her husband will not long remain alone and at risk.[127] When considering this testimony holistically, and in the light most favorable to Plaintiffs, the Court is satisfied that a jury could have reasonably found that Mr. Getting has experienced severe pain and suffering and is likely to continue to suffer from significant pain and mobility issues for the remainder of his life. Similarly, the evidence was sufficient to support a finding that Mr. Getting has consequently suffered significant emotional and psychological harm, and has been grossly disfigured by the accident. Even considering Mr. Getting's advanced age, the Court is satisfied that the jury's verdict, while admittedly quite generous, is supported by the evidence and not indicative of bias or prejudice. The Court similarly finds that the amount that the jury awarded to Mrs. Getting for loss of consortium is supported by the evidence and is not shocking to the conscience.

The Court further notes that it does not find *Smalls v. Pittsburgh-Corning Corp.* persuasive evidence that the reward in this matter should be subject to remittitur. The Superior Court in *Smalls* found remittitur appropriate because the plaintiff had failed to provide any evidence of injury from asbestos exposure beyond a minor shortness of breath, which the Superior Court noted could be as easily attributable to the plaintiff's

---

[125] *See* Plaintiffs' Memorandum of Law in Opposition to Post-Trial Motions at pgs. 62-63 (citing deposition testimony of Dr. Riedhammer at 64-65; deposition testimony of Dr. Noble at 61-62).
[126] *See* Transcript: Day 4 at pgs. 27-31 (Sept. 3, 2020).
[127] *See* Transcript: Day 4 at pgs. 32-32 (Sept. 3, 2020).

extensive history of smoking, or to his previously contracted pneumonia.[128] The Court cannot correspondingly find that Mr. Getting's preexisting osteoarthritis in his left knee was a likely primary factor to his pain or suffering following the accident, or to his ambulatory difficulties.

Pursuant to the forgoing, Defendants' Motion for Remittitur is DENIED.

E. **Motion for Leave to Submit Supplemental Reasons**

Defendants request leave to supplement their Motions for Post-Trial Relief once they have received and have had the opportunity to review the trial transcripts. However, the Defendants have already supplemented their Motions for Post-Trial Relief within their supplemental brief. Specifically, Defendants' arguments under the Motion for a New Trial on All Issues regarding the Court's purportedly erroneous failure to provide an instruction that Defendants had no duty to ensure Plaintiffs read, understood, and followed the Riding Mower's manual is unique to Defendants' supportive brief. The argument regarding the Court's purportedly erroneous admission of Mr. Barger's 1994 *crimen falsi* conviction was likewise raised only in Defendant's supportive brief. Having addressed these issues rather than dismissing them outright, the Court has in effect permitted Defendants to supplement their Motion for Post-Trial Relief. However, the Court will not further protract this matter by permitting further supplementation. Therefore, Defendants' Motion for Leave to Submit Supplemental Reasons is DENIED.

Conclusion

Pursuant to the foregoing, Defendants' Motions for Post-Trial Relief are hereby DENIED.

IT IS SO ORDERED this 12th day of February 2021.

---

[128] *See Smalls v. Pittsburgh-Corning Corp.*, 843 A.2d 410, 416 (Pa. Super. 2004) ("The only visible symptom that Appellee manifested relating to asbestosis was shortness of breath following moderate exercise such as walking three or four blocks or ascending several flights of stairs. However, considering Appellee's age and lifestyle, when coupled with the fact that he did not seek continuing medical attention until prompted by a lawyer, this impairment is insubstantial.").

BY THE COURT,

_____

Eric R. Linhardt, Judge

ERL/cp

cc: *James J. Waldenberger, Esq.*
Kline & Specter, P.C.
1525 Locust St., 19th Floor, Philadelphia, PA 19102
Richard A. Polachek, Esq.
22 E. Union St., Ste. 200, Wilkes-Barre, PA 18701-2723
John Hare, Esq.
Marshall Dennehey Warner Coleman & Goggin
2000 Market St., Ste. 2300, Philadelphia, PA 19103
Charles Becker, Esq.
Kline & Specter, P.C.
1525 Locust St., 19th Floor, Philadelphia, PA 19102
Gary Weber, Esq. / Lycoming Reporter