[Cite as *Wolford v. Chekhriy*, 2015-Ohio-3085.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Heather M. Wolford	Court of Appeals No. L-14-1103
Appellee	Trial Court No. CI0201302032
v.	
Phil Chekhriy, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: July 31, 2015

* * * * *

Scott E. Spencer, Robert Z. Kaplan, Brian D. Vicente and Nathan T. Oswald, for appellee.

Timothy C. James and Lorri J. Britsch, for appellants.

* * * * *

JENSEN, J.

{¶ 1} Defendants-appellants, Phil Chekhriy and S&T Transport, Inc. (referred to singularly as "Chekhriy"), appeal the February 21, 2014 judgment of the Lucas County Court of Common Pleas entering a jury verdict in favor of plaintiff-appellee, Heather M. Wolford. For the reasons that follow, we affirm the trial court's judgment.

I. Background

{¶ 2} This personal injury action arose from an automobile accident that occurred on the Ohio turnpike just after midnight on October 9, 2009. Wolford, a toll booth operator, was traveling eastbound on her way home from work when her Honda Odyssey minivan became sandwiched between Chekhriy's semi-truck and a semi-truck driven by Joseph Baumgardner. Wolford sustained serious injuries including fractures to her vertebrae, ribs, and both femurs. She underwent a number of surgeries, requiring hospitalization, lengthy in-patient rehabilitation, and extensive physical therapy. One of her legs remains shortened as a result of her injuries, and her ability to work has been significantly impacted.

{¶ 3} The circumstances of the accident are disputed. Wolford, Chekhriy, and Baumgardner all testified at trial and provided their versions of events. All three described that an ambulance was driving eastbound en route to the scene of an accident and drivers were moving to the right and stopping or slowing to allow it to pass. Baumgardner's truck was ahead of Wolford's minivan and Chekhriy's truck.

{¶ 4} Baumgardner testified that he stopped along the right shoulder of the road to allow the ambulance to pass. After the ambulance passed, he resumed driving at a speed he approximated at 25 m.p.h., anticipating that he would be stopping for the traffic backed up from the collision ahead. He claimed to see a flash of light in his mirror and saw Wolford's vehicle at a 45 degree angle behind him, moving from the left lane into the right lane. After about two seconds, Wolford's minivan rammed into Baumgardner's

semi-truck. He said that she was driving faster than he was, so he knew she was going to hit him upon making the lane change. He did not initially realize that she had also been hit from behind.

{¶ 5} Chekhriy testified that he was traveling in the right eastbound lane and was alerted over his CB that there was an accident up ahead. He saw the ambulance. He moved toward the right shoulder of the road, slowing but not completely stopping. He described that after the ambulance passed, he returned completely into the right lane, but accelerated to no more than 25-30 m.p.h. because he knew that he was going to have to stop because of the traffic up ahead. Chekhriy said that Baumgardner's truck was stopped ahead of him, but he claimed that there was enough distance for him to safely bring his truck to a stop without colliding with Baumgardner. At that point, however, Wolford abruptly entered his lane. Chekhriy explained that he tried to stop his truck and veer to the right to avoid rear-ending Wolford, but he was unable to avoid the collision. His car struck Wolford's minivan, propelling it into Baumgardner's truck. Chekhriy conceded that he had not previously seen Wolford's minivan in either the left lane or in the right lane despite the fact that he was constantly checking his mirrors, and he maintained that the first time he saw her vehicle was directly in front of his, just before the impact.

{¶ 6} Wolford testified that she was driving in the right lane all along and denied that she had been driving in the left lane. She recalled that Baumgardner had stopped ahead of her along the shoulder of the road so that the ambulance could pass. He

returned to the right lane after it passed. Wolford described that she was driving behind Baumgardner's truck when Chekhriy quickly came up behind her, striking her vehicle and pushing it into the back of Baumgardner's truck.

{¶ 7} Despite Wolford's contention that she had been in the right lane the whole time, she was cited with failing to exercise due care when making a lane change, a violation of R.C. 4511.39. She contested the violation and the case was tried in the Maumee Municipal Court. Chekhriy testified at trial, as did Baumgardner and Trooper Rodney Bingman, of the Ohio State Highway Patrol. Wolford did not testify. The court returned a finding of guilt.

{¶ 8} Although she was found guilty of violating the improper lane change statute Wolford brought this action against Chekhriy and his employer, S&T Transport, on November 24, 2010, claiming that Chekhriy operated his semi-truck negligently or recklessly, resulting in her injuries, and she claimed that S&T Transport was vicariously liable for Chekhriy's conduct because he was acting in the course and scope of his employment at the time of the accident. In addition to compensatory damages, Wolford sought punitive damages.

{¶ 9} On March 12, 2013, Wolford voluntarily dismissed the action and refiled her complaint the same day. Chekhriy moved for partial summary judgment as to Wolford's claim for punitive damages and his motion was granted on January 14, 2014. The case proceeded to a jury trial on January 21, 2014.

{¶ 10} That morning, Chekhriy filed a written motion for a directed verdict, arguing that based on her conviction in the Maumee Municipal Court, Wolford was collaterally estopped from disputing that she was negligent. Wolford opposed Chekhriy's motion and countered that (1) collateral estoppel did not apply because Wolford did not testify in her own defense in the municipal court action; (2) the motion was untimely because it came after opening statements and after Wolford testified that she had not been driving in the left lane, thus the argument was waived; and (3) R.C. 4511.34 supersedes the changing lanes statute because it places a special duty on truck drivers to maintain sufficient space to allow passing vehicles to enter the lane in front of them safely.

{¶ 11} The trial court heard additional argument on Chekhriy's motion for directed verdict just before Wolford rested her case. Chekhriy countered that because he asserted collateral estoppel as an affirmative defense in his answer, there was no waiver. He argued that the issue of Wolford's negligence was fully and fairly litigated in the Maumee Municipal Court and that the personal injury action presented the exact same issue as the Maumee case. Chekhriy also urged that in determining whether a party is collaterally estopped from litigating the issue of negligence in a personal injury action following a conviction of a traffic offense, no distinction should be made based on whether or not the defendant chose to testify in her own defense.

{¶ 12} The trial court denied Chekhriy's motion. It considered the elements required for the application of collateral estoppel, but ultimately concluded that by availing herself of her constitutional right not to testify on the traffic offense, she

sacrificed the ability to fully and fairly participate in the litigation on the specific issue of her negligence.

{¶ 13} Trial continued for three days. The jury ultimately rendered a verdict in Wolford's favor and awarded damages totaling $950,000. The jury concluded that Chekhriy was 100 percent at fault.

{¶ 14} Following the jury verdict, Chekhriy filed a motion for a new trial, judgment notwithstanding the verdict, or for review of evidence supporting damages for non-economic loss. He reiterated his argument that Wolford was collaterally estopped from arguing that she was not negligent and urged that the jury should have been instructed that Wolford was negligent per se for violating R.C. 4511.39. Chekhriy complained that the court instructed the jury on insurance coverage and he also argued that Wolford's counsel made repeated references to S&T Transport's absence at trial and improperly appealed to the jury to consider the wealth of the company by telling the jury that it was S&T that would be responsible for any verdict rendered against Chekhriy. Finally, he claimed that the jury's damages award exceeded the verdicts in comparable cases involving similarly-situated plaintiffs. Wolford filed an opposition brief.

{¶ 15} The trial court denied Chekhriy's motion. It again emphasized that Wolford had not testified in Maumee Municipal Court, and it noted that the municipal court made no findings as to what had occurred—the municipal court merely posited two possibilities: (1) that Wolford first hit Baumgardner's truck, or (2) Chekhriy first hit Wolford's minivan, pushing it into the back of Baumgardner's truck. The trial court

concluded that the jury, unlike the municipal court judge, had before it the testimony of all three witnesses to the crash, thus Wolford had not been afforded a full and fair opportunity to litigate in the municipal court trial and was not collaterally estopped from challenging her negligence in the personal injury action. The trial court also expressed skepticism as to Baumgardner's version of events.

{¶ 16} As to counsel's references to S&T's absence at trial and S&T's responsibility for paying any verdict rendered against Chekhriy, the trial court described the scene in the courtroom at the time of counsel's statements. Counsel made his remarks and immediately thereafter, screams were heard from the hallway in response to a nearby criminal trial. At the same time, defense counsel objected to plaintiff's counsel's statement about who would be responsible for paying a judgment. The trial court sustained the objection and advised the jury to disregard counsel's remark. This, the court held, rectified any potential impropriety. Moreover, the court explained, the propriety of statements made in closing argument must be viewed in the context of the entire closing argument. It noted that the improper remarks lasted less than one minute of a one-hour-twenty-minute closing. The court also questioned whether defense counsel registered a proper objection to the reference to S&T's absence at trial because nine seconds elapsed between the time plaintiff's counsel made the statement about S&T's absence and the time he referenced S&T's responsibility to pay damages, yet defense counsel did not object until the second remark was made. What is more, the court said that no information as to S&T's wealth, or lack thereof, was presented to the jury. The

court posited that the jury could just have easily believed S&T to be a "mom and pop" operation.

{¶ 17} Concerning the instruction to the jury about insurance coverage, the court emphasized that it specifically instructed the jury not to consider whether the defendants may have been covered by insurance. The court reasoned that there had been no error in doing so because the jury is presumed to follow the court's instructions. The court also found it pertinent that defense counsel intimated to the jury that Wolford was covered by health insurance while addressing the *Robinson v. Bates* figures.[1]

{¶ 18} Finally, the court disagreed that the verdict was excessive or was the result of remarks made during plaintiff's closing argument designed to inflame passion or prejudice in the jury. The court denied Chekhriy's post-trial motions.

{¶ 19} Chekhriy and S&T Transport appealed the February 21 2014 judgment of the Lucas County Court of Common Pleas entering the jury's verdict, and assigns the following errors for our review:

> First Assignment of Error:
>
> The Trial Court Erred to the Prejudice of the Defendants/Appellants When it Denied their Motions for a Directed Verdict and Judgment Notwithstanding the Verdict, Finding that Plaintiff was not Collaterally Estopped from Re-Litigating the Issue of Her Negligence, Even Though

[1] *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195.

She was Found Guilty in a Trial Before the Maumee Municipal Court of Violating R.C. § 4511.39.

Second Assignment of Error:

The Trial Court Erred to the Prejudice of the Defendants/Appellants by Instructing the Jury on Insurance Coverage.

Third Assignment of Error:

The Trial Court Erred in Denying The Defendants/Appellants' Motion for a New Trial, and Found that the Jury Verdict was Not Excessive, or Based Upon Passion and Prejudice.

{¶ 20} Pertinent to his assignments of error, Chekhriy asks us to consider the following issues:

1) Did the trial court err when it concluded Plaintiff/Appellee did not have a full and fair opportunity to litigate the issue of her negligence in the Maumee Municipal Court?

2) Did the trial court err when it gave the jury an instruction on insurance coverage?

3) Did the trial court err when it found the jury's verdict was not based upon passion and unfair prejudice generated by the inflammatory remarks of counsel and references to insurance coverage?

II. Law and Analysis

A. First Assignment of Error

{¶ 21} In his first assignment of error, Chekhriy argues that the trial court erred by refusing to apply the doctrine of collateral estoppel to bar Wolford from relitigating the issue of her negligence. He claims that the Maumee Municipal Court's decision finding Wolford guilty of violating R.C. 4511.39 prevented Wolford from denying in the civil case that she had been negligent with respect to the accident.

{¶ 22} Under Civ.R. 50(A)(4), a motion for a directed verdict may properly be granted where, after construing the evidence most strongly in favor of the non-moving party, the trial court finds that "upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." In considering a motion for a directed verdict, the court cannot evaluate the weight of the evidence or the trustworthiness of witnesses. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 284-285, 423 N.E.2d 467 (1981). The court must use the "reasonable minds" approach to determine whether there exists any material evidence that supports the arguments of the non-moving party. *Id.* Civ.R. 50(A)(4).

{¶ 23} A party to a suit can bring a motion for a directed verdict at three points throughout a trial: (1) upon the opponent's opening statement, (2) after the opponent has completed its presentation of the evidence, or (3) following the presentation of all of the evidence. Civ.R. 50(A)(1). The Ohio Supreme Court discourages trial courts from granting directed verdict motions during an attorney's opening statement, unless the facts

of the case clearly display that either no cause of action or defense exists after viewing the evidence in a light most favorable to the non-moving party. *Brinkmoeller v. Wilson*, 41 Ohio St.2d 223, 325 N.E.2d 233 (1975), syllabus.

{¶ 24} A motion for a directed verdict presents a question of law. In determining whether a trial court erred in granting or denying a motion for directed verdict, we employ a de novo standard of review. (Citations omitted.) *Bennett v. Admir., Ohio Bur. of Workers' Comp.*, 134 Ohio St.3d 329, 2012-Ohio-5639, 982 N.E.2d 666, ¶ 14.

{¶ 25} A judgment notwithstanding the verdict must be brought within 28 days of entry of the judgment. Civ.R. 50(B). Under Civ.R. 50(B), a motion for a judgment notwithstanding the verdict is subject to the identical appellate review as that of a motion for a directed verdict. *MedPartners, Inc. v. Calfee, Halter & Griswold*, 140 Ohio App.3d 612, 616, 748 N.E.2d 604 (8th Dist.2000).

{¶ 26} Chekhriy claims that the decision by the Maumee Municipal Court established that Wolford violated R.C. 4511.39, and that she was, therefore, negligent per se. He argues that the municipal court trial afforded Wolford the full and fair opportunity to litigate the issue of her negligence, notwithstanding her decision not to testify. He claims she was collaterally estopped from arguing otherwise, and a directed verdict should have been granted in his favor and the jury instructed accordingly.

{¶ 27} In response, Wolford claims that Chekhriy asserted inconsistent affirmative defenses because he argued both that Wolford was contributorily negligent and that the issue of Wolford's negligence was precluded by the previous judgment; the collateral

estoppel defense was waived because Chekhriy failed to object to evidence relating to her alleged negligence during her case-in-chief; Chekhriy made no attempt to elicit the facts required to establish collateral estoppel because he did not confront Wolford with the Maumee Municipal Court judgment and did not offer the prior judgment or transcript of the trial at the close of Wolford's case-in-chief; Chekhriy offered evidence that created a question of fact for the jury instead of offering evidence (the judgment of conviction) that would have kept the issue from the jury; Chekhriy waived any error by failing to renew his motion for directed verdict; Chekhriy invited error by requesting a contributory negligence jury instruction; Chekhriy failed to proffer an instruction or object to the trial court's failure to instruct the jury on collateral estoppel; the Maumee Municipal Court never adjudicated the issue of proximate cause or contributory negligence, thus the municipal court and the jury were adjudicating distinct issues; any discrepancy between the municipal court's findings and the jury's findings was harmless because the jury interrogatories were unclear as to whether the jury found Wolford to be negligent—the interrogatories demonstrated only that the jury did not believe Wolford to have proximately caused her own injuries; there was an absence of mutuality because Chekhriy's conduct was not at issue in the municipal court action; and Wolford should not suffer collateral estoppel by exercising her Fifth Amendment right not to testify.

{¶ 28} First, we find merit to Wolford's argument that Chekhriy failed to properly preserve for appeal the trial court's denial of his motion for directed verdict based on collateral estoppel. Specifically, Chekhriy filed his motion for directed verdict the

morning of trial and argued it just after Wolford finished presenting her case-in-chief, just before she rested. However, it appears that Chekhriy failed to renew his motion at the close of all evidence, and, therefore, waived the issue for appeal.[2] *Chemical Bank of New York v. Newman*, 52 Ohio St.3d 204, 207, 556 N.E.2d 490 (1990) ("[A] motion for directed verdict which is denied at the close of the plaintiff's evidence must be renewed at the close of all evidence in order to preserve the error for appeal."). Moreover, while Chekhriy appealed the trial court's February 21, 2014 judgment entering the jury verdict, he failed to appeal the April 17, 2014 decision denying his motion for judgment notwithstanding the verdict, again constituting waiver. *See id.* ("It is clear that an appeal from the ruling on a directed verdict motion and an appeal from the ruling on a JNOV motion are sufficiently different, both as a general proposition and on the specific facts before us, that one is not a substitute for the other."). Even considering the merits of Chekhriy's appeal, however, we find his assignment of error not well-taken.

{¶ 29} "Collateral estoppel * * * precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action." *Fort Frye Teachers Ass'n, OEA/NEA v. State Emp. Rel. Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998). A party asserting collateral estoppel must plead and prove four elements: "(1) the party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) there was a final judgment on the merits in the previous case after a full and fair opportunity to

[2] Chekhriy did, however, move for a directed verdict on the issue of future wage loss following the close of evidence.

litigate the issue; (3) the issue [was] admitted or actually tried and decided and [was] necessary to the final judgment; and (4) the issue [is] identical to the issue involved in the prior suit." *Monahan v. Eagle Picher Industries, Inc.*, 21 Ohio App.3d 179, 486 N.E.2d 1165 (1st Dist.1984), paragraph one of the syllabus.

{¶ 30} As to the first requirement for establishing collateral estoppel, a majority of Ohio courts, including this court, allow the defensive use of collateral estoppel. *Frank v. Simon*, 6th Dist. Lucas No. L-06-1185, 2007-Ohio-1324, ¶ 12. This allows a defendant to "prevent a plaintiff from asserting a claim that the plaintiff had previously litigated and lost," even though the party asserting collateral estoppel was not a party to the prior action. *Id.* In essence, the defensive use of collateral estoppel eliminates the mutuality requirement. *Id.* Wolford asserts that mutuality is lacking, but this argument is based not on the fact that Chekhriy was not a party to the municipal court case, but because his conduct was not at issue in the previous case. We think that under the circumstances of this case, this actually goes to the other three collateral estoppel requirements, and mutuality is not at issue.

{¶ 31} Essential to the application of collateral estoppel is that the party against whom collateral estoppel is asserted previously had the fair opportunity to fully litigate the issue sought to be precluded. *Phillips v. Rayburn*, 113 Ohio App.3d 374, 380, 680 N.E.2d 1279 (4th Dist.1996). This due process consideration is reflected in the second element. The trial court held that this element failed because Wolford asserted her Fifth Amendment right not to testify in the municipal court action, thus depriving her of the

ability to fully litigate whether she committed any negligent act in connection with the auto accident. This presents a dilemma that the Fourth District recognized in *Phillips,* where the plaintiff sought to assert collateral estoppel offensively. The court explained:

> [T]he advantages gained by preclusion do not outweigh the risks inherent in allowing a criminal conviction to bind a defendant in a subsequent civil suit based on the same conduct. Procedural and discovery differences between the criminal and civil forums coupled with the defendant's dilemma over whether to testify in his own behalf or present any defense at the criminal trial make preclusion in this instance a precarious and, we believe, unwise practice. *Id.* at 381-82.

{¶ 32} But the Fourth District later concluded in *Burns v. Adams*, 4th Dist. Scioto No. 12CA3508, 2014-Ohio-1917, ¶ 33, that "[t]he strategic choice not to testify does not automatically mean a litigant has not had a full and fair opportunity." In *Burns,* however, the defendant against whom collateral estoppel was asserted had been convicted of murder, aggravated burglary, and kidnapping, along with firearms specifications, thus R.C. 2307.60(A)(2) applied.[3] That statute provides:

> A final judgment of a trial court * * * that adjudges an offender guilty of an offense of violence punishable by death or imprisonment in excess of one year, when entered as evidence in any subsequent civil proceeding based on the criminal act, shall preclude the offender from

[3] *Phillips* involved an aggravated assault conviction, however, R.C. 2307.60(A)(2) did not exist in the same form in 1996 when *Phillips* was decided.

> denying in the subsequent civil proceeding any fact essential to sustaining that judgment, unless the offender can demonstrate that extraordinary circumstances prevented the offender from having a full and fair opportunity to litigate the issue in the criminal proceeding or other extraordinary circumstances justify affording the offender an opportunity to relitigate the issue.

The defendant in *Burns* was, therefore, required to show "extraordinary circumstances" preventing a full and fair opportunity to litigate—a hurdle that Wolford, who was found to have committed a minor misdemeanor, was not required to overcome. Thus, under the circumstances of this case, we find merit to Wolford's position that her decision to assert her Fifth Amendment right not to testify interfered with her ability to fully and fairly litigate the issue.

{¶ 33} Beyond the problem of whether Wolford's decision to testify deprived her of the full and fair opportunity to litigate, we cannot say in this case that the municipal court and personal injury actions presented identical issues or that the issues presented in the personal injury action were actually tried and decided and were necessary to the final judgment in the traffic case.

{¶ 34} Chekhriy cites our decision in *Frank*, 6th Dist. Lucas No. L-06-1185, 2007-Ohio-1324, as support for his position that collateral estoppel should have barred Wolford from relitigating whether she was negligent. In *Frank*, the plaintiff was found guilty of a red light violation that resulted in a collision. She sued the defendant for

personal injuries in connection with that collision. The color of the light was the "pivotal" issue in the civil case—in other words, it was determinative of who had caused the accident. Because the exact issue in both cases was the color of the traffic light when the plaintiff entered the intersection, we concluded that the trial court properly applied collateral estoppel to bar relitigation of that fact.

{¶ 35} "In general, a cause of action for negligence requires proof of (1) a duty requiring the defendant to conform to a certain standard of conduct, (2) breach of that duty, (3) a causal connection between the breach and injury, and (4) damages." *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 23. In this action, involving a three-car, rear-end collision, the determination that Wolford violated R.C. 4511.39 is not tantamount to a finding that it was her sole negligence that caused her injuries. The Maumee municipal court judge made no findings as to whether Chekhriy violated any traffic law or whether it was Wolford's improper lane change that proximately caused her injuries.

{¶ 36} Chekhriy submits that Wolford's violation of R.C. 4511.39 constituted negligence per se and that the jury should have been instructed that she was negligent per se.[4] *Coronet Ins. Co. v. Richards*, 76 Ohio App.3d 578, 585, 602 N.E.2d 735 (10th Dist.1991) ("Violation of R.C. 4511.39 is also negligence *per se*."). But "[n]egligence *per se* does not equal liability *per se*." *Merchants Mut. Ins. Co. v. Baker*, 15 Ohio St.3d 316, 318, 473 N.E.2d 827 (1984). A finding of negligence per se "does not mean that

[4] Chekhriy's proposed jury instructions do not include such an instruction.

[her] negligence was the sole proximate cause, or even a proximate cause, of the collision" which resulted in her injuries. (Citations omitted.) *Smiddy v. Wedding Party, Inc.*, 30 Ohio St.3d 35, 40, 506 N.E.2d 212 (1987). In addition, a finding that Wolford was negligent per se does not preclude the possibility that Chekhriy, too, was negligent per se for violating R.C. 4511.34 or another statute. Where both parties are negligent per se, it is the jury's responsibility to apportion fault. *Coronet Ins. Co.* at 585. This properly occurred in the present case.

{¶ 37} Chekhriy claims that the trial court's ruling permitted inconsistent decisions because it resulted in the jury determining that Wolford was not in any way negligent. This is not entirely accurate. The jury interrogatories, which were proposed by Chekhriy, posed the following questions:

> Jury Interrogatory No. 1:
>
> Do you find that defendant, Phil Chekhriy was negligent in regard to the motor vehicle accident of October 9, 2009?
>
> Jury Interrogatory No. 2:
>
> Do you find that plaintiff Heather Wolford was negligent in regard to the motor vehicle accident of October 9, 2009, and, if so, did that negligence contribute to her injuries?

{¶ 38} The jury answered "yes" to the first interrogatory and "no" to the second one, thereby determining Chekhriy to be 100 percent at fault. Wolford argues that there is no inconsistency between the municipal court finding of a R.C. 4511.39 violation and

the jury's findings. Specifically, she contends that it cannot be concluded from the responses to these interrogatories that the jury found no negligence on Wolford's part because the second interrogatory poses a compound question: was Wolford negligent *and,* if she was, did her negligence contribute to her injuries? We agree with Wolford. Even if we assume that the municipal court's finding was somehow binding in the personal injury action, the jury's negative response to this question leaves open the possibility that it found Wolford negligent but did not find that her negligence contributed to her injuries. As we previously stated, a finding of negligence per se does not mean that Wolford's negligence was *the*—or even *a*—proximate cause of her injuries.

{¶ 39} Finally, while we have concluded that Wolford was not collaterally estopped from litigating the issue of her negligence, this does not mean that the fact that she was cited and convicted of an improper lane change is not probative of her comparative negligence, if any. As the court in *Phillips,* 113 Ohio App.3d at 381-382, 680 N.E.2d 1279, explained:

> [T]he conviction may be admitted into evidence and accorded whatever weight the factfinder deems appropriate. It does not, however, preclude additional litigation involving the facts and legal issues underlying the conviction. We recognize, of course, that the conviction will likely be very strong evidence in most instances. Nevertheless, the party against

whom the evidence is submitted should have an opportunity to offer evidence rebutting the inference provided by the conviction.

* * *

Similarly, testimony adduced at the criminal trial may be considered in the civil case when properly submitted. In the interest of fairness, however, we feel the defendant to the tort must be afforded an opportunity to present evidence rebutting or explaining the criminal conviction.

{¶ 40} There is nothing in the lower court record to suggest that Chekhriy attempted to question Wolford about the traffic conviction or that he offered as evidence the judgment entry of conviction. It appears from the trial transcript that the trial court advised counsel and the witnesses to avoid disclosing that they had testified at Wolford's municipal court trial. However, there is no evidence in the record that Chekhriy requested the opportunity to question Wolford about her conviction, objected to the denial of such request, or proffered the evidence to preserve the issue for appeal.

{¶ 41} We find Chekhriy's first assignment of error not well-taken.

B. Second Assignment of Error

{¶ 42} In his second assignment of error, Chekhriy argues that the trial court erred to his prejudice by providing the following jury instruction on insurance coverage:

It is a common concern among jurors as to the existence or nonexistence of insurance. Some jurors may wish to know whether the

plaintiff had insurance that paid any of her medical bills or other bills or whether the plaintiff had to pay those bills out of her own pocket.

Some jurors may wish to know if the defendant has insurance that will may [sic] any verdict, the jurors may award to the plaintiff, or whether the defendant will have to pay such an award out of his or its own pocket.

In your deliberations, you are not to consider or discuss the issue of whether either party does or had any kind of insurance, you are to decide the issue in this case based upon the evidence presented to you, not upon any considerations considering insurance.

{¶ 43} Trial courts are charged with giving juries correct and comprehensive instructions that adequately reflect the argued issues in the given case before them. *State v. Sneed*, 63 Ohio St.3d 3, 9, 584 N.E.2d 1160 (1992). "Requested jury instructions should ordinarily be given if they are correct statements of law that are applicable to the facts in the case, and reasonable minds might reach the conclusion sought by the instruction." *Miller v. Defiance Regional Med. Ctr.*, 6th Dist. Lucas No. L-06-1111, 2007-Ohio-7101, ¶ 40, citing *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991). We review the trial court's instructions to the jury for an abuse of discretion. *State v. White*, 2013-Ohio-51, 988 N.E.2d 595, ¶ 97 (6th Dist.), citing *State v. Lillo*, 6th Dist. Huron No. H-10-001, 2010-Ohio-6221, ¶ 15. In doing so, we review the instructions as a whole to determine whether or not the jury was likely misled in a matter materially affecting the substantial rights of the party who claims error. *Miller* at

¶ 40, citing *Becker v. Lake Cty. Mem. Hosp. West*, 53 Ohio St.3d 202, 208, 560 N.E.2d 165 (1990).

{¶ 44} Wolford argues that the jury instruction was authored by the Ohio State Bar Association and the Ninth District affirmed the use of a similar version of the instruction in *Davis v. Wooster*, 193 Ohio App.3d 581, 2011-Ohio-3199, 952 N.E.2d 1216 (9th Dist.). She insists that the instruction did not imply to the jurors that there was a presence or absence of insurance and that it simply communicated to the jurors its duty to avoid speculation as to insurance coverage. Wolford also points out that Chekhriy's counsel injected the issue into the proceedings when eliciting testimony that medical bills totaled $600,000 but the providers agreed to accept only $140,000—implying to the jury that this was the result of an arrangement with Wolford's health insurer.

{¶ 45} Chekhriy, on the other hand, claims that the instruction was highly prejudicial and may have influenced an award greater than what was warranted. He insists that the exclusion of this instruction from Ohio Jury Instructions ("OJI") evidences the risk of prejudice and impropriety of the instruction. He also claims that the *Robinson v. Bates* expenses-versus-write-offs issue is the subject of a separate instruction advanced by OJI and was, in fact, given in this case.

{¶ 46} Here, the instruction given in this case was not improper or prejudicial. Although insurance was not discussed during the case, the instruction was neutral and addressed a question that would naturally arise in a juror's mind. As the *Davis* court recognized, "[b]ecause courts realize that jurors will be tempted to inappropriately

speculate regarding the impact of insurance, it is not improper to include an instruction for the jurors that there was no evidence taken on that issue, and therefore, they must not allow speculation about that issue to enter their discussions. *Davis* at ¶ 29.

{¶ 47} We find Chekhriy's second assignment of error not well-taken.

C. Third Assignment of Error

{¶ 48} In his third assignment of error, Chekhriy contends that the trial court erred by denying his motion for a new trial and in its conclusion that the jury verdict was not excessive, or based upon passion and prejudice. He claims that Wolford's counsel improperly suggested to the jury during closing argument that S&T was disinterested because it had not sent a representative to trial, and that he improperly advised the jury that it would be S&T—not Chekhriy—that would be required to pay any damages it awarded.

{¶ 49} Under Civ.R. 59(A)(4), a new trial may be granted on the ground that the jury's award of damages was "excessive or inadequate * * *, appearing to be given under the influence of passion or prejudice." To support a finding of passion or prejudice under Civ.R. 59(A)(4), the defendant must demonstrate that "the jury's assessment of the damages was so overwhelmingly disproportionate as to shock reasonable sensibilities." *Berge v. Columbus Cmty. Cable Access*, 136 Ohio App.3d 281, 317, 736 N.E.2d 517 (10th Dist.1999), citing *Pena v. Northeast Ohio Emergency Affiliates, Inc.*, 108 Ohio App.3d 96, 104, 670 N.E.2d 268 (9th Dist.1995). In assessing such a claim, a reviewing court must consider "(1) the amount of the verdict, and (2) whether the jury considered

incompetent evidence, improper argument by counsel, or other improper conduct which had an influence on the jury." *Pena* at 104. "The mere size of the verdict is insufficient to establish proof of passion or prejudice." *Id.* We review the trial court's denial of a Civ.R. 59(A)(4) motion for an abuse of discretion. *Berge* at 317.

{¶ 50} Again, we note that Chekhriy failed to appeal the trial court's denial of his motion for a new trial, however, because the issues raised in his third assignment of error need not be raised by a post-trial motion to preserve the issue for appeal, we address the substance of Chekhriy's argument. *Gonzalez v. Henceroth Ent., Inc.*, 135 Ohio App.3d 646, 653, 735 N.E.2d 68, 73 (9th Dist.1999) ("The Ohio Rules of Civil Procedure and the Ohio Appellate Rules of Procedure do not require a party to move for a new trial in order to preserve an argument.").

{¶ 51} The statements at issue are as follows:

> [By Wolford's counsel:] One last thing. You heard that there is a defendant S&T Transport, Inc. I haven't seen them in the courtroom. Are they that disinterested?
>
> You will be instructed that the law says that if you find Mr. Chekhriy to be negligent, that the corporation is responsible. We aren't looking to bankrupt Mr. Chekhriy S&T Corporation employer [sic].
>
> Mr. James: I'm going to object, Your Honor, who may have to pay a judgment rendered in this matter even though it shouldn't be [sic].

Mr. Spencer: I thought you were going to object to what was going on out in the hall.

Mr. James: I'm objecting to that also.

The Court: We'll just take a pause. I'm going to sustain the objection and ask the jury disregard if you wait a moment until the obstreperous defendant in the hallway seems unhappy [sic].

Pardon the interruption and Mr. Spencer [sic].

Mr. Spencer: I think that was a defense verdict.

Keeping in mind when you are rendering your verdict that S&T is a defendant and that S&T is liable for any damages that you assess in this case [sic]. The employer of a negligent employee [sic].

{¶ 52} Chekhriy claims that the comments by Wolford's counsel as to S&T's absence and its obligation to pay a damages award invited the jury to punish S&T for its perceived indifference and to award excessive damages with the expectation that a wealthy corporation would be responsible for paying them.

{¶ 53} Upon Chekhriy's motion for a new trial, the trial judge reviewed the audio recording from the proceedings. He noted that: (1) nine seconds elapsed after the statement about S&T's absence, yet Chekhriy did not object to the statement; (2) Wolford's counsel's closing argument lasted an hour and twenty minutes, while the objectionable statements lasted less than a minute; (3) there was commotion in the hallway following a verdict in the criminal case in a nearby courtroom, thereby causing a

distraction during the particular statements at issue; (4) no evidence was introduced regarding the size or wealth of the company; (5) closing arguments must be reviewed in their entirety; and (6) a curative instruction was provided.

{¶ 54} We agree with the trial court's reasons for denying Chekhriy's motion for a new trial. Moreover, we conclude that the jury's damages award was not so "overwhelmingly disproportionate as to shock reasonable sensibilities." The parties stipulated to a wage loss of $140,000. Medical bills could have ranged anywhere between $140,000 to $600,000, but the jury reached an in-between figure of $210,000. Thus, economic damages totaled $350,000, leaving the non-economic damages at $600,000. Wolford presented evidence of the seriousness of her injuries, her numerous surgeries, the length of her hospitalization and in-patient rehabilitation, the difficulty of her recovery, the limitations the injuries have placed on her day-to-day activities, and the permanency of her leg injury. The jury's award was not excessive.

{¶ 55} We find Chekhriy's third assignment of error not well-taken.

III. Conclusion

{¶ 56} We find Chekhriy's three assignments of errors to be not well-taken and, therefore, affirm the February 21, 2014 judgment of the Lucas County Court of Common Pleas. The costs of this appeal are assessed to Chekhriy pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE