

nies in federal and state court. The trial judge subsequently sentenced McGee to the maximum penalty of twenty years, although he ordered that McGee serve five of those years on probation. McGee now argues that the trial court should not have admitted—or considered—evidence relating to the federal conviction because the State failed to introduce the federal indictment or plea. The record shows, however, that McGee did not object to the use of this conviction at the sentencing hearing. As a result, he waived this alleged error.²²

[15] Furthermore, the State properly introduced evidence of the prior state felony conviction, which, McGee admits, obligated the trial court to impose the maximum 20-year sentence under the RICO Act.²³ McGee now speculates that the trial court *might* have probated a greater portion of his sentence if the federal conviction had been excluded. Yet, he has pointed to no evidence that the federal conviction impacted his sentence or that this alleged evidentiary error actually harmed him.²⁴ Accordingly, this argument presents no basis for reversal.

Judgment affirmed.

POPE, P.J., and BARNES, J., concur.



255 Ga.App. 715

BEAM

v.

KINGSLEY et al.

No. A02A0656.

Court of Appeals of Georgia.

June 11, 2002.

Widow brought wrongful death suit, individually and as the administratrix of her

22. See *Harden v. State*, 239 Ga.App. 700, 701(2), 521 S.E.2d 829 (1999); *Godfrey v. State*, 227 Ga.App. 576, 577(2), 489 S.E.2d 364 (1997).

23. See OCGA §§ 17-10-7(a); 16-14-5(a).

24. See *Jenkins v. State*, 235 Ga.App. 547, 550(3)(c), 510 S.E.2d 87 (1998); *Godfrey*, supra; *Scott v. State*, 216 Ga.App. 692, 695(4), 455

late husband's estate, against drunk driver of vehicle that collided with husband's motorcycle. After jury found driver liable and awarded \$4 million in damages, the State Court, Cherokee County, Hilliard, J., pro hac vice, denied driver's motion for a new trial or remittitur. Driver appealed. The Court of Appeals, Pope, P.J., held that: (1) evidence supported pain and suffering damages as part of award in excess of \$2.5 million for funeral expenses and pain and suffering, and (2) evidence that driver had been drinking prior to collision to celebrate breast cancer remission was irrelevant.

Affirmed.

1. Death ⇔99(4)

Evidence supported an award of damages for pain and suffering as part of award in excess of \$2.5 million for funeral expenses and pain and suffering, in wrongful death action brought against drunk driver by motorcycle's widow; motorcycle was aware of impending collision and swerved to avoid it, motorcycle suffered broken ribs and a collapsed lung in the collision, motorcycle survived for as long as two minutes after the collision, and could be heard choking and gasping for breath as he drowned in his own blood. O.C.G.A. § 51-12-12(a).

2. Damages ⇔130

The amount of damages returned by a jury in a verdict for pain and suffering due to alleged negligence is governed by no other standard than the enlightened conscience of impartial jurors.

3. Appeal and Error ⇔1004(8)

Appellate courts should be hesitant to second-guess verdicts where the damages

S.E.2d 609 (1995) (physical precedent only); cf. *Manker v. State*, 223 Ga.App. 3, 6(5), 476 S.E.2d 785 (1996) (sentence reversed where transcript specifically showed that trial judge relied on inadmissible evidence in sentencing defendant as a recidivist under OCGA § 17-10-7), questioned on other grounds, *Gillman v. State*, 239 Ga.App. 880, 882(2)(a), 522 S.E.2d 284 (1999).

award is based in any significant part on pain and suffering; this duty becomes most onerous when the jury is not required to render a special verdict as to damages.

4. Appeal and Error ◊1004(8)

For the Court of Appeals to overturn the jury's verdict for pain and suffering damages, verdict must be so flagrantly excessive or inadequate, in light of the evidence, as to create a clear implication of bias, prejudice, or gross mistake by the jurors. O.C.G.A. § 51-12-12(a).

5. Appeal and Error ◊1004(13)

The trial court's approval of the jury's verdict for pain and suffering damages, by denying defendant motorist's post-trial motion in wrongful death suit, created a presumption of correctness that would not be disturbed absent compelling evidence. O.C.G.A. § 51-12-12(a).

6. Death ◊60

Evidence that drunk driver of vehicle that collided with and killed motorcyclist was drinking on day in question to celebrate her second year in remission from breast cancer was irrelevant in wrongful death action brought by motorcyclist's widow, despite claim that nature of action placed driver's character into evidence and that proffered evidence demonstrated driver's actions were not willful and wanton, where driver admitted to drinking prior to the collision and claim for punitive damages was withdrawn prior to trial.

7. Appeal and Error ◊970(2)

Trial ◊43

The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.

8. Pretrial Procedure ◊3

A grant of a motion in limine excluding evidence is a judicial power which must be exercised with great care.

9. Evidence ◊106(1)

Generally, the character of a party to a civil action is not an issue, and character evidence is not relevant.

10. Evidence ◊106(1)

An exception to general rule that the character of a party to a civil action is not an issue and that character evidence is not relevant exists if the party's character is a material issue under the pleadings or if there is evidence that the party threatened to commit a crime.

Downey & Cleveland, Y. Kevin Williams, Marietta, for appellant.

Cooper & Jones, Lance A. Cooper, Scott B. Cooper, Andrew W. Jones, Marietta, for appellees.

POPE, Presiding Judge.

On the afternoon of September 4, 1999, a car driven by Donna Beam collided with Scott Kingsley's motorcycle. Kingsley was killed in the collision. The facts surrounding the collision were undisputed. Beam pulled in front of Kingsley. Although Beam did not see the motorcycle approaching, there was no allegation that Kingsley was speeding or that he was negligent in operating his vehicle. The evidence showed that Beam had been drinking that afternoon, and her blood alcohol level tested at 0.12, above the legal limit. She later pled guilty to a felony charge of vehicular homicide.

Kingsley's wife, Susan, filed a wrongful death suit, individually and as the administratrix of her husband's estate. The case proceeded to trial, and although Beam testified that a dip in the road had prevented her from seeing Kingsley's motorcycle approaching, the jury found liability and awarded damages in the amount of \$1,416,000 for the value of Kingsley's life, and \$2,584,000 to Susan Kingsley, as administratrix. Beam filed this appeal following the denial of her motion for new trial or remittitur.

[1] 1. Beam first asserts that the evidence was insufficient to support the amount of the jury's verdict. She argues that the evidence showed that Kingsley's funeral bills amounted to only \$1,693.86. In addition, the medical evidence showed that Kingsley's death occurred within one or two minutes after impact and that he may have lost con-

sciousness prior to that. Beam asserts that the \$2,584,000 award for funeral expenses and pain and suffering was excessive in light of these facts. Beam also notes that Susan Kingsley's attorney requested \$2,584,000 in lost wages on the wrongful death claim. Beam suggests that the jury may have mistakenly awarded the wrongful death damages to Susan Kingsley in her capacity as administratrix. She requests that the portion of the judgment awarding damages to Susan Kingsley as administratrix be reversed and remanded for new trial on the issue.

[2-5] "The amount of damages returned by a jury in a verdict for pain and suffering due to alleged negligence is governed by no other standard than the enlightened conscience of impartial jurors." (Citations and punctuation omitted.) *McCormick v. Harris*, 253 Ga.App. 417, 419(3), 559 S.E.2d 158 (2002). And the defendant has a heavy burden under OCGA § 51-12-12(a) to establish that such a damage award is excessive: "In particular, appellate courts should be hesitant to second-guess verdicts where the damage award is based in any significant part on pain and suffering. This duty becomes most onerous when the jury is not required to render a special verdict as to damages." (Citation omitted.) *Alternative Health Care Systems v. McCown*, 237 Ga.App. 355, 362(7), 514 S.E.2d 691 (1999). Therefore, for this Court to overturn the jury's verdict, it must be "so flagrantly excessive or inadequate, in light of the evidence, as to create a clear implication of bias, prejudice, or gross mistake [by] the jurors." (Citations and punctuation omitted.) *Turpin v. Worley*, 206 Ga. App. 341, 343(1), 425 S.E.2d 895 (1992). Moreover, because the trial court approved the verdict in denying Beam's post-trial motion, a presumption of correctness arises that will not be disturbed absent compelling evidence. *E-Z Serve Convenience Stores v. Crowell*, 244 Ga.App. 43, 47(2), 535 S.E.2d 16 (2000).

The evidence showed that Kingsley was aware of the impending collision and swerved to avoid it. Kingsley suffered broken ribs and a collapsed lung in the collision. He survived for as much as two minutes after the crash and could be heard choking and

gasping for breath as he drowned in his own blood. This evidence supported an award of damages for pain and suffering, and we cannot say that the amount of damages was so flagrant under the circumstances as to shock the conscience. Nor has Beam provided us with any compelling evidence to justify overturning the jury's verdict.

[6] 2. Beam next asserts that the trial court erred in granting Susan Kingsley's motion in limine to exclude background evidence concerning the reason for Beam's alcohol consumption on the day of the accident. Beam made a proffer at trial to show that the weekend of the accident also marked the second anniversary of the remission of her breast cancer and that she had been celebrating her successful battle with cancer with friends that day. She asserts that this evidence should have been admitted because the nature of the claims against her placed her character into evidence. She states that she should have at least been allowed to explain her actions. Beam also argues that this evidence also would have demonstrated that her actions were not wilful and wanton.

[7, 8] "The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. However, the grant of a motion in limine excluding evidence is a judicial power which must be exercised with great care." (Citations and punctuation omitted.) *Homebuilders Assn. of Ga. v. Morris*, 238 Ga.App. 194, 195, 518 S.E.2d 194 (1999). We find no abuse of discretion in this case.

[9, 10] Generally, the character of a party to a civil action is not an issue, and character evidence is not relevant. *Weaver v. Ross* 192 Ga.App. 568, 569(1), 386 S.E.2d 43 (1989). An exception to this general rule exists where the party's character is a material issue under the pleadings or where there is evidence that the party threatened to commit a crime. *Housing Auth. of Atlanta v. Green*, 169 Ga.App. 211, 212(3), 312 S.E.2d 196 (1983). Neither exception exists in this case. Beam admitted that she had been drinking prior to the accident. The reason behind her drinking was irrelevant, and it was within the

trial court's discretion to determine that the evidence was irrelevant. Moreover, because Susan Kingsley withdrew her claim for punitive damages prior to trial, whether Beam's action were wilful or wanton was not at issue.

Judgment affirmed.

RUFFIN and BARNES, JJ., concur.



255 Ga.App. 721

JOHNSON

v.

The STATE.

No. A02A0793.

Court of Appeals of Georgia.

June 11, 2002.

Certiorari Denied Sept. 6, 2002.

Defendant was convicted in the Superior Court, Chatham County, Morse, J., of armed robbery, kidnapping with bodily injury, two counts of aggravated assault, burglary, and possession of a firearm during the commission of a crime. Defendant appealed. The Court of Appeals, Pope, P.J., held that: (1) evidence was sufficient to support convictions; (2) evidence that defendant's father attempted to offer victim \$5000 to drop the case was admissible; (3) drugs found by police during execution of search warrant of defendant's home regarding an unrelated crime were inadmissible; (4) error in denying defendant's motion to suppress evidence of drugs found by police during execution of search warrant regarding an unrelated crime was harmless; (5) gun found by police during execution of search warrant of defendant's home regarding an unrelated crime was admissible; and (6) defendant was not denied effective assistance of counsel.

Affirmed.

1. Criminal Law ⇨308, 1144.13(2.1)

On appeal from a criminal conviction, defendant no longer enjoys the presumption of innocence, and reviewing court views the evidence in the light most favorable to the jury's verdict.

2. Assault and Battery ⇨92(1)

Burglary ⇨41(1)

Kidnapping ⇨5

Robbery ⇨24.15(2)

Weapons ⇨17(4)

Evidence was sufficient to support convictions for armed robbery, kidnapping with bodily injury, two counts of aggravated assault, burglary, and possession of a firearm during the commission of a crime; defendant, carrying a pistol, forced victims to lie on floor while he ransacked home looking for money, defendant hit one victim on head with pistol during the robbery and knocked him out, defendant then took victim's money and car, and victim subsequently identified defendant in a photographic lineup, as well as in court.

3. Criminal Law ⇨351(10)

State can show a defendant's attempt to influence a witness because it is evidence of consciousness of guilt and this includes attempts to influence witnesses made through intermediaries; but evidence of a threat or attempt to influence a witness made by a third party must be linked to defendant in order to be relevant to any material issues.

4. Criminal Law ⇨351(10)

In prosecution for armed robbery, kidnapping with bodily injury, two counts of aggravated assault, burglary, and possession of a firearm during the commission of a crime, evidence that defendant's father attempted to offer victim \$5000 to drop the case against his son was admissible to show consciousness of guilt, since there was evidence that father did not act independently from his son in making the offer to drop the case.

5. Criminal Law ⇨369.1

In prosecution for armed robbery and related offenses, drugs found by police during execution of search warrant of defendant's home regarding an unrelated crime