2011 IL App (1st) 092576-U

FOURTH DIVISION
December 8, 2011

No. 1-09-2576

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAME LEPORE, Plaintiff-Appellant, v. CHICAGO TRANSIT AUTHORITY, a Municipal Corporation; JAMES REED, Individually, and as Agent/Employee of CHICAGO TRANSIT AUTHORITY; and MUHAREB MUSTAFA, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. 06 L 011568 The Honorable James P. McCarthy, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

HELD: In an action brought by the plaintiff for personal injuries allegedly caused by defendants while she was a passenger on a Chicago Transit Authority bus, although the trial court abused its discretion in determining that plaintiff's counsel made a prejudicial *per diem* argument, when in fact no such improper argument was made, the trial court did not abuse its discretion in vacating the jury's verdict in favor of plaintiff and ordering a new trial where: (1) plaintiff and plaintiff's trial counsel's violated an order *in limine* which prohibited plaintiff and her counsel from referring to plaintiff's financial condition;

(2) plaintiff's trial counsel's comments in closing argument violated an order *in limine* which prohibited plaintiff's counsel from referring to excluded evidence; (3) plaintiff's trial counsel's improperly injected his personal opinion during closing argument; and (4) the cumulative effect of all the errors committed prejudiced defendants and deprived them of a fair trial.

¶1 BACKGROUND

¶2 The instant action was brought to recover damages plaintiff suffered in an accident between the defendants while plaintiff was riding a Chicago Transit Authority (CTA) bus as a passenger on November 5, 2005, at Michigan and Balbo in Chicago. Defendant James Reed was driving the CTA bus, and defendant Muhareb Mustafa was driving another automobile and collided with the bus when the bus was making a left turn. Plaintiff was a surgical technical student at the time. Plaintiff was on her way to a program at the Adler Planetarium and had boarded the southbound bus near the orange "el" line. Plaintiff was seated on the right side of the bus as the bus made a left turn from Michigan onto Balbo. The bus stopped in the intersection as it was making the turn. Plaintiff heard the screech of tires and turned in her seat and saw Mustafa's vehicle approach the bus. Mustafa's car slammed into the bus where plaintiff was seated, and plaintiff was thrown sideways into the front of the seat and then back.

¶3 Plaintiff was taken by ambulance to Northwestern Memorial Hospital from the scene and was x-rayed and released from the emergency room. She subsequently saw a doctor who reviewed the x-ray and gave her pain medication. She received bills from Northwestern Memorial Hospital for the emergency room treatment and for an MRI that was done of her neck and spine from Northwestern Faculty Foundation, all of which were paid. Plaintiff was also given some more pain medicines when she was in Chicago. Plaintiff filed the instant action

against defendants for their alleged negligence. Some time after the accident she returned to her home in New Orleans.

¶4 At trial plaintiff testified that when she returned to New Orleans, she was seen by Dr. Logan, whom she had seen before for a previous back injury. Dr. Logan informed plaintiff that she had a herniated disc in her neck. He gave her pain medications, Soma and Lodine. At the time of trial, plaintiff was taking Mobic, Soma and Vicodin daily at a monthly cost of $15-155, $285, and $100-105, respectively. Each visit to Dr. Logan was $200, and a visit with one of his physician assistants was $100-125. Due to plaintiff's circumstances, she was given a regimen of home exercises by the physical therapist, and plaintiff performed these exercises twice a day in addition to using a TENS unit twice a week.

¶5 On cross-examination, plaintiff admitted that she had never gone to physical therapy or had any additional diagnostic testing of her neck due to "circumstances." Half of the reason she didn't have physical therapy was due to her work schedule because she "takes call," which means she gets paid around the clock.

¶6 After the accident, plaintiff completed her training and graduated as a level II surgical technician, after which her husband came to Chicago to bring her back to New Orleans. Plaintiff began working at Slidell Memorial Hospital in New Orleans. At the time of trial, plaintiff was a level III surgical technician. After receiving this certification, plaintiff could travel and earn up to three times her normal salary. Plaintiff traveled to two different hospitals in Pennsylvania and Idaho, and had applied for another position at New York University Hospital at the time of trial. As a surgical technician, plaintiff has to wear heavy lead jackets and lift heavy cases of

instruments for certain surgeries. Plaintiff did not seek lost wages.

¶7 Mustafa testified that he was familiar with the intersection where the accident occurred. It was raining immediately before the collision. Traffic was very light but the pavement was slippery. Mustafa was driving northbound on Michigan Avenue in the lane closest to the center and had a green light as he entered the intersection. The collision occurred while the bus was making a left-hand turn. Mustafa was four car lengths, or approximately 48 feet, from the bus when he saw the bus and tried to move into the middle lane to avoid hitting it. Mustafa testified he applied the brakes hard as soon as he saw the bus turning left in front of him. He kept his foot on the brake for the entire 48 feet until he slid into the bus. However, his car did not stop because the pavement was slippery. The impact was with the front half of the bus. He did not know the speed of his car at the time of impact except that it was less than 35 miles per hour. He also did not know if the bus was moving at the time of impact. His airbag deployed at the time of the accident.

¶8 James Reed testified that he was employed by the CTA as a bus operator for five years. On the day of the accident he was driving a number 146 route southbound toward the Planetarium. The bus was an "articulated" bus, which is sixty feet long and weighs about three tons. There are three southbound lanes on Michigan Avenue, one of which is a left turn lane. Based on Reed's experience driving through that intersection going north, Reed testified that if the left turn arrow for southbound traffic is green, the light for northbound traffic has to be red. Reed also testified that as a safety precaution, he would "cover" his brakes when making a left turn driving an articulated bus in case someone runs a red light. Reed estimates he was driving at

probably ten miles an hour when he first covered his brakes 15 to 20 feet before the turn, and when he entered the intersection to turn left he was traveling 3 to 5 miles per hour. Reed further testified that the green arrow was on when he entered the intersection. The weather was misty, hazy, and raining and the ground was wet. His wipers and headlights were on and the intersection was lit by streetlights. Reed also had activated his turn signal.

¶9 Reed saw Mustafa's car approximately 50 feet away to the south, and Mustafa was moving at about 35-40 miles per hour. Reed stopped the bus when Mustafa was 1-2 seconds away from him. Reed estimated it was three seconds at best between when he saw Mustafa's car and the impact. Reed felt that if he had continued through the turn there would have been casualties if Mustafa's car had hit the bus head on. Right before the impact, Reed saw that Mustafa moved his hands like he was tossing something. Before that, Mustafa's hand was to his ear. The bus was hit on the right side. Reed described the damage to the bus as a big scuff mark. However, the damage to Mustafa's car was significant and severe.

¶10 On cross-examination, Reed admitted he never saw Mustafa's vehicle before he began his left turn. He acknowledged that a rule of the road is to ensure that the lane was clear before making a left turn. Reed further testified that the way he filled out his report was "disgusting" because he was very upset and thought Mustafa was collapsed behind the wheel of his vehicle and he thought Mustafa was a casualty. Reed circled in his report that he was moving because he was in the left turn lane and then stopped. Reed felt he should have filled out his report differently.

¶11 After the accident, plaintiff asked him for a cigarette and he gave her one. She did not

tell Reed she was injured, and he did not notice her favoring any body part or limping. Plaintiff was crying a lot.

¶12 The testimony of plaintiff's treating physician was presented in his video evidence deposition. Dr. John Logan testified that he is an orthopedic surgeon who had additional specialized training in spinal surgery and has practiced orthopedic surgery in New Orleans since completing his fellowship. He is board-certified in orthopedic surgery and was recertified for his specialty in spinal surgery in 2007. Logan first saw plaintiff in January of 2006. Plaintiff told him that a car hit the side of the bus where she was seated. Plaintiff said she had significant neck pain, primarily on her right side by the shoulder and was treated and released at Northwestern. Plaintiff had a previous history of a herniated disc in her lower back. Logan reviewed the MRI done at Northwestern Memorial Hospital, which showed multiple cervical degenerative changes with a mild disc protrusion at C6-7. Logan recommended conservative treatment without surgery and physical therapy and placed plaintiff on an anti-inflammatory medicine. Logan recommended that plaintiff follow up in a month if she was not better and that facet injections could then be considered if she did not improve. In Logan's opinion, 95 percent of his treatment of her was related to the collision. There were no complaints by plaintiff of cervical pain noted before the collision. At the time of trial, plaintiff was on Vicodin, Soma, and Mobic, and a self-directed exercise program. In Logan's opinion, plaintiff will remain on the medications either permanently or for an extended period of time. She may also need the physical therapy and injections and will require a minimum of four doctor visits a year and an MRI every other year. Physical therapy would cost $2,000 per four-week session, $1,500 per session for facet

injections, and $1,500 per MRI. In Logan's opinion, after three years of symptoms, plaintiff's injury is permanent.

¶13 On cross-examination, Logan testified that plaintiff never received any formal physical therapy and that he noted he did not feel she had taken the necessary steps to improve her situation. Logan finds physical therapy generally useful, but it is not mandatory and at times there are circumstances where a person cannot do physical therapy. At her last visit, plaintiff indicated she was at maximum medical improvement, which means that a profound change is not expected. Logan acknowledged that the cervical herniated disc could have been present before the collision, but plaintiff's neck became symptomatic at the time of the accident.

¶14 Angel Covington from Northwestern Memorial Hospital testified concerning the authenticity of the medical bills. Aaron Poe also testified regarding the authenticity of the medical bills for the charges at Northwestern Faculty Foundation. The emergency medical technician with the Chicago Fire Department who responded and prepared a report concerning ambulance services also testified. The responding Chicago Police Department officer also testified concerning his investigation and report.

¶15 The jury returned a verdict in favor of plaintiff and against defendants Reed, CTA, and Mustafa in the amount of $240,000, itemized as $5,000 for pain and suffering, $5,000 for loss of a normal life, and $230,000 for past and future medical expenses. The trial court entered judgment on the verdict on May 21, 2009. Defendants all filed posttrial motions. Reed and CTA moved for a mistrial, a new trial, and to amend the verdict in accordance with Illinois Supreme Court Rule 222 (Ill. S. Ct. Rule 222 (eff. July 1, 2006)). Defendant Mustafa moved for a new

trial or a remittitur. On August 28, 2009, the trial court vacated the judgment on the verdict and granted defendants a new trial based on portions of plaintiff's counsel's closing argument. LePore appealed.

¶16 ANALYSIS

¶17 Plaintiff argues that the court erred in overturning the jury's verdict and awarding defendants a new trial based on part of plaintiff's trial counsel's final argument. In vacating the jury's verdict and granting a new trial the trial court ruled as follows:

> "Here, after reviewing the trial in its entirety the Court finds as follows: Plaintiff's attorney, in closing argument, improperly referred to, excluded and/or stricken evidence in front of the jury. Page 97 of the closing arguments.
>
> Also Cooper versus Cox 31 Ill. App. 2d First District 51, 1961.
>
> Second, Plaintiff's attorney in closing arguments improperly expressed his own opinions or belief on the issues or personally vouched for a witness. An attorney cannot be an unsworn witness as to credibility, and the closing argument is replete with such instances.
>
> Third, during the trial, the Plaintiff used the word circumstance on numerous occasions when responding to questions asked of her, which when individually reviewed, had several possible inferences, most of which would have been appropriate and no cause of concern.
>
> However, when viewed cumulatively and in light of her attorney's remarks on Page 100 of the closing arguments, clearly were intended to violate Defendant's motions

in limine regarding wealth and poverty of the parties and to convey inappropriate inference to the jury.

Four, Plaintiff's attorney in his closing arguments, while commenting on what would be appropriate compensation for Plaintiff's future medical care, used a *per diem* argument – see closing arguments Pages 50 and 51, which in essence state: If you add these costs up, it's approximately 537 per month, times 12; 6,444 per year times 41.2 years, comes to 265,492, close quote.

Such an argument is not permitted in Illinois. See Caley versus Manicke, 24 Ill. 2d 390.

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For all of the above reasons, the Court finds that the cumulative error resulting from Plaintiff and/or Plaintiff's attorney's conduct deprived the defendants of a fair trial and, therefore, vacates the judgment previously entered in Plaintiff's favor and orders a retrial of this matter."

¶18 Plaintiff argues that none of the following comments by her counsel during closing argument was sufficient to overturn the verdict: (1) alleged *per diem* argument; (2) comment construed as referencing the wealth or poverty of the parties; (3) use of the pronoun "I"; and (4) alleged reference to excluded evidence. Plaintiff maintains that none of the remarks were prejudicial and defendants were not deprived of a fair trial, as evidenced by the fact that the jury could have found that plaintiff's future medical expenses would be in excess of $730,000 (based in part on Dr. Logan's testimony), yet the jury's returned a verdict awarding "less than a third of

that amount." Plaintiff's counsel at one point argued for damages on the "high end" of $1,732,536, but specifically argued an amount of $265,492 for plaintiff's future medical care. The jury awarded a total of $240,000. Plaintiff also argues there was no prejudice because the jury only awarded a combined total of only $10,000 for past and future pain and suffering and loss of a normal life.

¶19 Defendant CTA argues that the court's grant of a new trial is supported where: (1) plaintiff's trial counsel's repeated use of the word "circumstances" during the trial intentionally violated the trial court's order *in limine* which prohibited reference to plaintiff's financial status; (2) plaintiff's counsel also consistently violated other orders *in limine*; (3) plaintiff's counsel's use of the pronoun "I" during closing argument justified reversal of the jury's verdict; (4) the trial court's conclusion that prejudice occurred during closing argument is subject to an abuse of discretion standard; and (5) even if this court reverses the trial court's award of a new trial, the jury's verdict should still be overturned due to other alleged trial errors.

¶20 Defendant Mustafa argues granting a new trial was proper because: (1) plaintiff improperly elicited prejudicial information regarding her financial condition; (2) plaintiff's counsel improperly interposed his personal opinions in closing argument; (3) plaintiff's counsel directed the jury's attention to inadmissible evidence; (4) and plaintiff's counsel improperly committed other trial errors, including attempting to elicit sympathy for the plaintiff due to her family circumstances and Hurricane Katrina, engaging in incomplete impeachment of witness, and introducing evidence for an improper purpose; and (5) the cumulative effect of plaintiff's counsel's conduct supports the grant of a new trial.

¶21 A closing argument must be clearly improper and prejudicial to warrant reversal of a judgment. *Lagoni v. Holiday Inn Midway*, 262 Ill. App. 3d 1020, 1035 (1994) (citing *Boasiako v. Checker Taxi Co.*, 140 Ill. App. 3d 210 (1986)). The standard of review that our supreme court has recognized for a circuit court's ruling on a motion for new trial is abuse of discretion. *Slovinski v. Elliot*, 237 Ill. 2d 51, 60 (2010); *Pecaro v. Baer*, 406 Ill. App. 3d 915, 918 (2010). Specifically, the determination of whether comments of counsel have deprived a party of a fair trial rests in the discretion of the trial court. *Lagoni*, 140 Ill. App. 3d at 1034-35 (citing *Kern v. Uregas Service of West Frankfort*, 90 Ill. App. 3d 182 (1980); *Greig v. Griffel*, 49 Ill. App. 3d 829 (1977)). The trial court's determination of improper argument of counsel as the basis for granting a new trial should not be disturbed on appeal absent an abuse of that discretion. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 854-55 (2010) (quoting *First National Bank of La Grange v. Glen Oaks Hospital & Medical Center*, 357 Ill. App. 3d 828, 833 (2005), quoting *Zuder v. Gibson*, 288 Ill. App. 3d 329, 338 (1997)). We are mindful that "[t]he attitude and demeanor of counsel, as well as the atmosphere of the courtroom, cannot be reproduced in the record, and the trial court is in a superior position to assess and determine the effect of improper conduct on the part of counsel. [Citation]." *Zuder*, 288 Ill. App. 3d at 338. The standard of review for granting a new trial is thus deferential to the lower court. *Ortiz v. Jesus People, U.S.A.*, 405 Ill. App. 3d 967, 976 (2010) (citing *Boll v. Chicago Park District*, 249 Ill. App. 3d 952, 958 (1991)). When reviewing a circuit court's ruling on a motion for new trial, " 'an abuse of discretion will be found where there is no recognizable basis in the record to support' " the order entered by the circuit court. *Slovinski*, 237 Ill. 2d at 60 (quoting *Snelson v. Kamm*, 204 Ill.

2d 1, 41 (2003).

¶22 Guided by these principles, we hold: (1) There was no improper *per diem* argument, and thus the trial court's grant of a new trial cannot be supported on this basis. However, the trial court's determination that a new trial was necessary was not abuse of discretion based on the following grounds; (2) plaintiff and plaintiff's counsel's references to plaintiff's financial condition, which specifically violated an order *in limine*; (3) plaintiff's counsel's comments referencing excluded evidence, which also specifically violated an order *in limine*; (4) plaintiff's counsel's interjection of his personal opinion during closing argument; and (5) the cumulative effect of all the alleged errors. We address each of the court's bases for granting a new trial in turn.

¶23 I. *Per Diem* Argument

¶24 We first address plaintiff's argument that no improper *per diem* argument occurred. The trial court *sua sponte* identified certain statements made by plaintiff's counsel as "per diem" arguments and relied on *Caley v. Manicke*, 24 Ill.2d 390 (1962). In *Caley*, our supreme court held that, although it is permissible for counsel to suggest to the jury during closing argument a total sum to compensate for pain and suffering, it is improper for counsel to suggest a mathematical formula, such as an award of a specific sum per day, or other fixed unit of time, to calculate damages for pain and suffering. *Caley*, 24 Ill.2d at 391-94. Subsequently, this court declined to extend the holding of *Caley* in *Friedland v. Allis Chalmers Co. of Canada*, 159 Ill. App. 3d 1 (1987), where we held that even if the argument that the plaintiff in a personal injury action should be awarded $7,500 per year for pain and suffering during his 48.7 years life

expectancy amounted to improper *per diem* argument, the argument was not so prejudicial as to require new trial because the argument was a small portion of the closing argument and no undue emphasis was placed on it. *Friedland*, 159 Ill. App. 3d at 8.

¶25 Counsel for plaintiff in this case argued that the medical costs would amount to a certain figure per year, and that this figure should be multiplied by plaintiff's life expectancy of 41.2 years. Plaintiff's counsel's argument was as follows:

> "What was the testimony on the medication? Okay. It's 284 per month for the Soma, it is 102 per month for the Vicodin; and it was 151 per month for the Lodine. All right?
>
> So, if you add these costs up, it's approximately 537 per month, times 12; 6,444 per year times 41.2 years come to 265,492. Let's say 265,492 that's for the medication only. 265,492 only to keep her in the meds that she needs to continue work. But she also needs the physical therapy, ladies and gentlemen. And I would submit to you that if she's on the low end at 2,000 a year times 41.2 years, it would be 82,000 – this is the low end, this'll be the high end – so at 2,000, like if she only has one session a year – it will be 82,4000. If you look at the injections on the low end, it would be 3,000 times 41.2 equals 123,600. Okay?
>
> And if you look at the office visits – remember the office visits he said she's going to need approximately 4 a year at 200 each, that's 800 a year. 800 times 41.2, that comes to 32,960.
>
> So – and those are the low end, ladies and gentlemen. On the high end for the

therapy, it's 6,000 times – for the high end of the therapy, it would be 247,000. But if you add all of this up – I have taken the time to add these together, ladies and gentlemen, I'm just going to write them here because I'm running out of time.

We have 605,936 is the low end, and the high end is 1,732,536."

¶26 There was no objection by any of the defendants to this argument. Therefore, we find such argument waived. See *Friedland*, 159 Ill. App. 3d at 9 (restating the general rule that assignments of error based on alleged prejudicial conduct of opposing counsel will not be considered on appeal unless objection to the alleged prejudicial argument has been made in the trial court, a ruling of the court obtained and the ruling preserved).

¶27 However, even considering the merits of defendants' argument we find that there was no improper *per diem* argument. There was no *per diem* argument based on pain and suffering. Regarding pain and suffering, plaintiff's counsel merely stated the following:

"Let's talk about pain and suffering, okay? This woman Jame LePore works hard and constant and stays on call to make that extra 150. She isn't claiming one cent of a wage loss. She doesn't want anything she's not entitled to."

¶28 As is clear from the record, plaintiff's counsel made no reference to any calculation for *pain and suffering*. Counsel properly argued the jury should calculate the future *medical costs*, supported by the uncontradicted evidence, by the number of years plaintiff was likely to live based on mortality tables admitted into evidence.

¶29 Defendants cite no authority for the proposition that any calculations for past and future medical expenses are also improper *per diem* arguments. Rather, precedent establishes that *per*

diem arguments are only improper where they refer to pain and suffering. There was no improper argument, and thus no prejudice to defendants, resulting from counsel's argument as to future medical costs. Thus, we find the court's ruling that plaintiff's trial counsel made an improper *per diem* argument an abuse of discretion. As such, the grant of a new trial cannot be supported on this basis.

¶30 II. Comments Regarding Wealth or Poverty of the Parties in Violation of Order *in Limine*

¶31 Plaintiff argues that the trial court abused its discretion in granting a new trial based on statements that allegedly referred to plaintiff's financial status. Plaintiff maintains that the term at issue, "circumstances," was at best ambiguous, while defendants CTA and Mustafa argue that plaintiff's and plaintiff's trial counsel's repeated use of the word "circumstances" during the trial intentionally violated the trial court's order *in limine* which prohibited reference to plaintiff's financial status. As set forth above, the trial court ruled that, although each isolated comment had several possible innocent inferences, when viewed cumulatively and in light of her attorney's closing argument, clearly were intended to violate the order *in limine* regarding wealth and poverty of the parties.

¶32 Reference to the parties' financial condition is impermissible during closing argument. *Thomas v. Johnson Controls, Inc*., 344 Ill.App.3d 1026, 1036 (2003) (citing *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1064 (2001)). However, not every reference to a party's proprietary interest or occupation which touches on the party's financial status constitutes reversible error. *Lagoni*, 262 Ill. App. 3d at1033 (citing *McMahon v. Richard Gorazd, Inc.*, 135 Ill. App. 3d 211 (1985)). The reference must be reasonably understood to refer to the financial

status of the parties and must also be so harmful and prejudicial that it resulted in an improper verdict. *Lagoni*, 262 Ill. App. 3d 1020, 1033 (1994) (citing *Schultz v. Siddens*, 191 Ill. App. 3d 622 (1989); *Scheibel v. Groeteka*, 183 Ill. App. 3d 120 (1989); *McMahon*, 135 Ill. App. 3d at 223). "[C]ourts have generally required more than a single reference before finding that the references were so harmful and prejudicial that they resulted in an improper verdict." *Lagoni*, 262 Ill. App. 3d at 1034 (citing *Scheibel*, 183 Ill. App. 3d at 142; *McMahon*, 135 Ill. App. 3d at 223).

¶33 Here, defendants filed motions *in limine* to specifically prohibit the plaintiff from referring to her financial condition, which the trial court granted. An alleged violation of a motion *in limine* will warrant a new trial where the order is specific, the violation is clear, and the violation deprived the opposing party of a fair trial. *Garden View, LLC v. Fletcher*, 394 Ill. App. 3d 577, 589 (2009)). "Where the likelihood of prejudice is great, the violation is reversible error." *Jackson v. Reid*, 402 Ill. App. 3d 215, 230 (2010) (quoting *Tomaszewski v. Godbole*, 174 Ill. App. 3d 629, 634 (1988), citing *In re Estate of Loesch*, 134 Ill. App. 3d 766 (1985)). "An improper insinuation during closing argument that violates an *in limine* order can be the basis for a new trial." *Boren v. BOC Group, Inc.*, 385 Ill. App. 3d 248, 257 (2009) (Citing *Cancio v. White*, 297 Ill. App. 3d 422, 434 (1998)). "The determination of whether improper argument should be the basis for a new trial is left to the sound discretion of the trial court." *Boren*, 385 Ill. App. 3d at 257 (citing *Zuder v. Gibson*, 288 Ill. App. 3d 329, 338 (1997)).

¶34 We find that the trial court did not abuse its discretion in concluding that the continued use of the word "circumstances" throughout the trial was clearly meant to reference plaintiff's

financial condition, which constituted a clear violation of the order *in limine* precluding such references and deprived defendants of a fair trial. Plaintiff argues that the term "circumstances" referred to her work schedule and being on call around the clock, which was brought out on cross-examination. Plaintiff also emphasizes the fact that the jury heard about her certifications and ability to earn triple her salary, thus defusing any potentially prejudicial inference by the term "circumstances."

¶35 However, the record demonstrates that plaintiff's references are reasonably understood to refer to her financial status, especially in light of the plaintiff's counsel's clear appeal to the jury's sympathy based on her financial condition during closing argument. At trial, plaintiff testified that she was unable to receive additional treatment because of her "circumstances." Plaintiff testified that she discussed facet injections with her doctor but did not receive them "due to circumstance." In response to examination by her counsel, plaintiff further testified "circumstances" have not allowed her to have those injections. Plaintiff also testified that she was unable to go to physical therapy "due to circumstance." Plaintiff testified the only treatment she received "under these circumstances" was pain medication. Plaintiff also testified that she made the physical therapist aware of "certain circumstances" that resulted in being given a home regimen instead. Plaintiff further testified that she could not have additional diagnostic testing because of her "circumstances." On cross-examination, plaintiff repeatedly testified that "[c]ircumstances does [sic] not allow for me to have further diagnostic testing of my neck area" and "circumstances have not allowed me to not [sic] have any more diagnostic treatment for my neck." This last remark was stricken by the trial court.

¶36 After discussing the cost of plaintiff's medical care during closing argument, plaintiff's counsel's specific remarks were as follows:

> "But I ask you to, please, keep in mind she needs the medication. I would also ask you that – I would submit that it would be appropriate to change her circumstances and give her money she needs so she could do physical therapy –"

¶37 Although the court overruled the objection at that time, it is clear that in reviewing the entire trial the court determined that the cumulative effect of all the references to plaintiff's "circumstances," in light of her counsel's remarks, were intended to violate the order *in limine* and improperly refer to plaintiff's financial condition.

¶38 Plaintiff's citations in support of her argument that the comments were not prejudicial are vastly distinguishable, as in the most of those cases there was one isolated reference which was ambiguous and not a clear reference to the party's financial status. See *Lagoni*, 262 Il. App. 3d at 1033 (single reference to the defendants's ownership of a doughnut shop); *Lake County Forester Preserve District v. Continental Illinois National Bank and Trust Co. of Chicago*, 35 Ill. App. 3d 942, 946-47 (1976) (single reference to ownership of a large house); *Pumo v. Foltynewicz*, 82 Ill. App. 3d 178, 181-82 (1980) (one isolated comment about the plaintiff's financial status during closing argument). We also find *McMahon v. Richard Gorzad, Inc.*, 135 Ill. App. 3d 211 (1985), distinguishable because in that case, although the comments did improperly reference the financial condition of the party, there were only 5 comments during the course of two weeks of testimony. *McMahon*, 135 Ill. App. 3d at 223. In the present case, on the other hand, there were repeated references to plaintiff's "circumstances" throughout the trial, coupled with plaintiff's trial

counsel's unmistakable reference to plaintiff's financial condition and appeal to the jury's sympathy during closing argument.

¶39 Here, an order *in limine* clearly prohibited plaintiff and her counsel from referring to plaintiff's financial condition, yet plaintiff repeatedly used the word "circumstances," and her counsel made a patent appeal to the jury's sympathy for her financial condition using this same word, which was a clear reference to plaintiff's financial condition. Here, the resulting prejudice is clear. The trial court did not abuse its discretion in its determination that the consistent use of the word "circumstance" was reasonably understood to mean a reference to plaintiff's financial condition, and that these references, especially during closing argument, were so harmful and prejudicial as to have deprived defendants of a fair trial.

¶40 III. Comments Referring to Excluded Evidence in Violation of Order *in Limine*

¶41 Plaintiff also argues that comments by her trial counsel regarding excluded evidence were not so prejudicial as to warrant overturning the jury's verdict and awarding a new trial. Defendant Mustafa maintains that plaintiff's counsel directed the jury's attention to inadmissible evidence during closing argument and throughout the trial. Again, we review of the trial court's determination of whether improper argument should be the basis for a new trial for abuse of discretion. See *Boren*, 385 Ill. App. 3d at 257.

¶42 Defendant CTA's motion *in limine* requested that plaintiff's counsel not be allowed to "suggest, infer or allude to the jury that he has been prevented from commenting on facts barred by the court." During argument on the motion *in limine*, plaintiff's counsel argued in favor of referring to excluded evidence, and stated, "I think it's reasonable for a jury to know that there are

issues that they probably have questions to which laws prevent us from telling them the answers to." The trial court disagreed and granted the motion *in limine*, stating, "to suggest to the jury that they are getting less than – something less than the full story because of some nuances of the law, I don't think is appropriate. *** [T]he jurors are not made aware of the rulings of any motions *in limine* or the why behind them."

¶43 However, plaintiff's counsel disregarded the court's order *in limine* and directed the jury's attention to redacted portions of a medical record which the court had ruled inadmissible. Specifically, plaintiff's counsel wanted to show the jury parts of a medical exhibit which indicated plaintiff did not receive physical therapy because of a "financial constraint." The court, however, had ruled that this portion of the medical record was inadmissible and it was redacted. Plaintiff's counsel stated in closing argument, "I wish I had time to show you, but let me show you this real quick because this is so important. Do you see that – ," and then counsel bracketed the redacted parts of the exhibit. When the court questioned plaintiff's counsel's intent in referring to the inadmissible redacted portions of the exhibit, plaintiff's counsel specifically stated that he did so because plaintiff testified that 50% of the reason she did not go to therapy was because of work, but "[i]t never came in as a result of the other 50 percent [why] she couldn't get the therapy" – namely, plaintiff's financial condition. Although plaintiff argues there was nothing improper or prejudicial because the jury could not see the redacted area, the prejudicial effect is clear, especially in the context of the entirety of plaintiff's counsel's closing argument. As we already discussed, plaintiff's counsel's comments during closing arguments regarding plaintiff's "circumstances" was an appeal to the jury's sympathy to award plaintiff damages because of her

financial condition.

¶44 "The purpose of a motion *in limine* is to permit a party to obtain an order before trial excluding inadmissible evidence and prohibiting interrogation concerning such evidence without the necessity of having the questions asked and objections thereto made in the presence of the jury." *Wilbourn*, 398 Ill. App. 3d at 851 (citing *Rutledge v. St. Anne's Hospital*, 230 Ill. App. 3d 786, 792 (1992)). It is improper in closing argument to make reference to matters not in evidence or to comment upon evidence which has been excluded. *Department of Transportation v. First Bank of Schaumburg*, 260 Ill. App. 3d 490, 504 (1992) (citing *Mazurek v. Crossley Construction Co.*, 220 Ill. App. 3d 416, 427 (1991)). "A party is entitled to a fair trial, free from prejudicial conduct of counsel who undertakes to supply facts or to draw inferences not based upon the evidence in the record, and prejudice is not necessarily cured where the trial court has sustained objections to improper questioning." *First Bank of Schaumburg*, 260 Ill. App. 3d at 504 (citing *Mazurek*, 220 Ill. App. 3d at 426; *Charpentier v. City of Chicago*, 150 Ill. App. 3d 988, 998 (1986)). "It would be intolerable to permit an attorney to disregard a trial court's ruling that the jury should not hear certain evidence by nonetheless getting that evidence before the jury because the attorney believes that the court is really wrong about the issue." *Thomas v. Koe*, 395 Ill. App. 3d 570, 581 (2009).

¶45 Here, the order *in limine* also specifically prohibited plaintiff and her counsel from referring to excluded evidence. Yet, plaintiff's counsel disregarded the order *in limine* and specifically sought to draw the jury's attention to excluded evidence. The order *in limine* was specific, the violation of the order *in limine* was clear, and the violation was prejudicial and

deprived defendants of a fair trial. Attempts to offer or argue inadmissible evidence before a jury constitute prejudicial error. *Kutchins v. Berg*, 264 Ill. App. 3d 926, 931 (1994) (citing *Gillson v. Gulf, M. & O. R. Co.*, 42 Ill. 2d 193, 200 (1969)). We conclude the trial court did not abuse its discretion in determining defendants were prejudiced and did not receive a fair trial and ordering a new trial on this basis.

¶46 IV. Plaintiff's Counsel's Interjection of Personal Opinion

¶47 Plaintiff also argues that the trial court abused its discretion in granting a new trial based on plaintiff's trial counsel's interjection of his personal opinion in closing arguments. Plaintiff argues that the use of the personal pronoun "I" during closing argument was not prejudicial and did not warrant the grant of a new trial, while defendants Chicago Transit Authority and Mustafa maintain that such references, as well as numerous other statements by counsel, indeed warranted a new trial.

¶48 Plaintiff urges us to apply the waiver rule against defendants because they failed to object at trial to all such references except one, although she does not provide citations to the record. Defendant Mustafa argues that plaintiff's reliance on waiver is misplaced, as waiver is a limitation on the parties and not the court, and because the cumulative effect of all alleged errors deprived defendants of a fair trial. We agree with Mustafa. A party's failure to make contemporaneous objections during closing arguments "does not preclude us from considering the comments in reviewing the circuit court's order granting a new trial." *Boren v. BOC Group, Inc.*, 385 Ill. App. 3d 248, 258 (2008) (citing *Zoerner v. Iwan*, 250 Ill. App. 3d 576, 585 (1993)). We proceed to review the comments at issue.

¶49 Plaintiff focuses only on her trial counsel's use of the personal pronoun "I" during closing argument and relies on *Lagoni*, 262 Ill. App. 3d 1020, and *Malatesta v. Leichter*, 186 Ill. App. 3d 602 (1989), *appeal denied* 128 Ill. 2d 664 (1990). In *Lagoni*, we restated the general rule that although considerable latitude is allowed in making closing arguments, trial counsel may not express his or her own personal belief on the issues or vouch for the credibility of a witness. *Lagoni*, 262 Ill. App. 3d at 1037 (citations omitted). However, we held that "not every use of the pronoun 'I' constitutes an impermissible personal comment." *Lagoni*, 262 Ill. App. 3d at 1037. We specifically held that "[i]n instances where counsel was merely commenting on the evidence presented at trial, a court will not find error present in the form of an impermissible personal opinion merely because counsel used the pronoun 'I' during closing argument." *Lagoni*, 262 Ill. App. 3d at 1037.

¶50 In *Lagoni* we relied on *Malatesta*, where the court held that the trial counsel's comments regarding a witness' testimony were not prejudicial and did not support the grant of a new trial. During closing argument, the plaintiff's trial counsel in Malatesta stated the following regarding a witness: "No, I don't think everybody was lying in this case, but I think Leo Leichter lied like a rug." *Malatesta*, 186 Ill. App. 3d at 626. The court held that, while the statement was an expression of a personal opinion, it was invited by the defense counsel's closing remarks. *Malatesta*, 186 Ill. App. 3d at 626. Trial counsel also stated of an expert, "I do not understand a man who can do what he did here. *** Why he took the stand and said that is an absolute mystery to me." *Malatesta*, 186 Ill. App. 3d at 626. The court held this was a fair comment on the evidence. *Malatesta*, 186 Ill. App. 3d at 626. The plaintiff's counsel also stated during

closing argument, "I consider [this case] to be one of the most egregious exercises in perjury I have ever seen." *Malatesta*, 186 Ill. App. 3d at 626. The reviewing court in *Malatesta* held that this comment was not prejudicial and did not support the grant of a new trial. *Malatesta*, 186 Ill. App. 3d at 626-27.

¶51 In *Lagoni*, defense counsel commented on a witness' testimony as follows: "I do think she was very straight forward with us on that issue." *Lagoni*, 262 Ill. App. 3d at 1026-27. Defense counsel also commented, "I think maybe we all have certain ideals and hopes. And one of those hopes I think is best expressed in Washington, D.C. before our Supreme Court building." *Lagoni*, 262 Ill. App. 3d at 1027. Defense counsel then proceeded to use the pronoun "I" several more times. *Lagoni*, 262 Ill. App. 3d at 1027. However, we held that the defense counsel's use of the personal pronoun "I" was limited to fair comments on the evidence presented at trial. *Lagoni*, 262 Ill. App. 3d at 1037. We also noted that the plaintiff's objection to the remark specifically concerning the witness' testimony was sustained and the trial court instructed the jury that argument of counsel did not constitute evidence and was not to be considered by them. *Lagoni*, 262 Ill. App. 3d at 1038 (citing *Atwood v. Chicago Transit Authority*, 253 Ill. App. 3d 1 (1993)). Therefore, we concluded that the defense counsel's use of the personal pronoun "I" did not provide a basis for the trial court's grant of a new trial. *Lagoni*, 262 Ill. App. 3d at 1038 (citing *Heeg v. Jewel Cos.*, 232 Ill. App. 3d 75, 84 (1992)). See also *Heeg*, 232 Ill. App. 3d at 84.

¶52 Unlike *Lagoni* and *Malatesta*, however, in this case, plaintiff's trial counsel's repeated comments were not invited by defense counsel and went beyond fair comments on the evidence.

Plaintiff's counsel vouched for plaintiff when he stated, "[Plaintiff's] done these exercises every day. I've seen her do them." The trial court sustained the objection and instructed the jury to disregard the statement. However, there were many further instances where plaintiff's counsel interjected his personal opinion. Plaintiff's counsel also commented on his personal opinion regarding the credibility of defendant Mustafa and defendant Reed. Counsel stated at one point, "Mr. Mustafa has, in my opinion, some further credibility issues." Plaintiff's counsel further stated, "I agree with Defendant Reed when he testified [Mustafa] was going 15 to 20 over the speed limit." Plaintiff's counsel further stated, "I would believe Mr. Reed on this point that [his injuries] are closer to the appearance of somebody who could perish as opposed to minor injuries." Plaintiff's counsel also told the jury, "[t]he doctor is what I would consider to be the most important person in this case." Plaintiff's counsel further commented on plaintiff's credibility and vouched for her when he stated, regarding her x-ray, "Do people sit for x-rays that aren't injured? I don't think they do." Plaintiff's counsel further continued his personal opinions by stating to the jury, "Now, do you think that they're not good doctors at Northwestern? I think they're good."

¶53 We agree with defendants that these comments were beyond mere comment on the evidence. Moreover, we agree with the conclusion of the trial court that the cumulative effect of these statements deprived defendants of a fair trial. Our Rules of Professional Conduct provide that an attorney shall not "assert personal knowledge of facts in issue except when testifying as a witness," or "state a personal opinion" as to the "credibility of a witness." Ill. S. Ct. Rs. Of Prof. Conduct R. 3.4(e) (eff. Jan. 1, 2010). Although considerable latitude is allowed in making

closing arguments, trial counsel may not express his or her own personal belief on the issues or vouch for the credibility of a witness. *Lagoni*, 262 Ill. App. 3d at 1037 (citations omitted). See also *Chuhak v. Chicago Transit Authority*, 152 Ill. App. 3d 480, 492 (1987) (an attorney may not assert his personal opinion as to the credibility of a witness). As the trial court noted, plaintiff's counsel's closing argument was "replete" with instances where plaintiff's attorney improperly expressed his own opinions or belief on the issues and personally vouched for a witness. We find no abuse of discretion in the trial court's grant of a new trial on this basis.

¶54 V. Cumulative Effect of the Errors Committed by Plaintiff's Counsel

¶55 The final ground for granting a new trial stated by the trial court was the cumulative effect of all the errors committed by plaintiff's counsel. "In determining whether a party has been denied a fair trial based upon allegedly improper argument, a court of review must consider the trial as a whole." See *Skelton v. Chicago Transit Authority*, 214 Ill. App. 3d 554, 581-82 (1991) (citing *Cooper v. Chicago Transit Authority*, 153 Ill. App. 3d 511, 523 (1987)). "The cumulative effect of errors may deprive a party of a fair trial, and in those circumstances, a new trial is necessary." *Boren v. BOC Group, Inc.*, 385 Ill. App. 3d at 254 (citing *Netto v. Goldenberg*, 266 Ill. App. 3d 174, 184 (1994)). Considering the record of the trial as a whole, the trial court did not abuse its discretion in concluding that the cumulative effect of the errors committed prejudiced defendants and deprived them of a fair trial.

¶56 Additional Alternative Arguments by Defendants

¶57 The CTA argues that if this court were to reverse the court's grant of a new trial, the jury's verdict should still be overturned because the court erred in instructing the jury that it owed

plaintiff the highest duty of care and in not allowing the CTA to introduce evidence to impeach the plaintiff's credibility. Defendant Mustafa additionally argues that plaintiff's counsel attempted to elicit sympathy from the jury for plaintiff due to her circumstances and Hurricane Katrina, engaged in incomplete impeachment of witnesses and harassment of other witnesses, improperly placed an inadmissible report on the ledge in front of the jury, and introduced and kept referring to evidence of the amount of damage to Mustafa's car and to Mustafa's injuries for the improper purpose of correlating the amount of damage to Mustafa's car with plaintiff's injuries.

¶58 However, since we determine that the trial court did not abuse its discretion and affirm its order vacating the jury verdict and granting a new trial, we need not consider these various alternative arguments. See *In re Marriage of Schiltz*, 358 Ill. App. 3d 1079, 1085 (2005) (holding that because the court reversed the trial court's award of permanent maintenance, it need not consider the appellant's alternative argument that the maintenance award was excessive); *Finch v. Illinois Community College Board*, 315 Ill. App. 3d 831, 837 (2000) (holding that because the court reversed and remanded, it need not consider a party's alternative argument on damages); *Z.R.L. Corp. v. Great Central Ins. Co.*, 201 Ill. App. 3d 843, 845 (1990) (holding that since the court agreed that a *nunc pro tunc* order should not have been entered and reversed the order, it was not necessary to address the defendant's alternative arguments).

¶59 CONCLUSION

¶60 We hold that although the trial court abused its discretion in determining that plaintiff's counsel made an improper *per diem* argument in closing, when in fact no such improper

argument was made, the trial court did not abuse its discretion in overturning the jury's verdict and granting a new trial based on: (1) plaintiff and plaintiff's trial counsel's repeated violation of the order *in limine* which prohibited plaintiff and her counsel from referring to plaintiff's financial condition; (2) plaintiff's trial counsel's comments in closing argument which violated the order *in limine* which prohibited plaintiff's counsel from referring to excluded evidence; (3) plaintiff's trial counsel's injection of his personal opinion during closing argument; and (4) the cumulative effect of all the errors committed. Under the abuse of discretion standard of review, we cannot say there was " 'no recognizable basis in the record to support' " the order entered by the circuit court. *Slovinski*, 237 Ill. 2d at 60 (quoting *Snelson*, 204 Ill. 2d at 41). Thus, we affirm the trial court's order vacating the jury's verdict and granting a new trial.

¶61 Affirmed.