

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 4-10-0548

Order filed 2/14/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

MARGARET BURKS,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	McLean County
MATTHEW J. VIVIRITO,)	No. 07AR167
Defendant-Appellee,)	
and)	Honorable
DOVER PRODUCTS,)	Scott Drazewski,
Defendant.)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred
in the judgment.

ORDER

Held: Where the jury found in favor of defendant on the issue of negligence, the verdict was not against the manifest weight of the evidence because contradictory evidence was presented regarding the cause of plaintiff's injuries.

On March 27, 2007, plaintiff, Margaret Burks, filed a complaint against defendants, Matthew J. Vivirito and Dover Products, alleging negligence and seeking damages resulting from injuries plaintiff suffered as a result of a motor vehicle collision. On April 20, 2010, the jury returned a general verdict in favor of defendant Matthew J. Vivirito. When the jury entered the verdict, defendant Dover Products was no longer involved in the case; however, the record does not explain the circumstances surrounding the dismissal. On appeal, plaintiff argues the jury verdict was against the manifest weight of the

evidence, and she was entitled to a judgment notwithstanding the verdict (JNOV) or a new trial on damages. We affirm.

Plaintiff filed a complaint alleging that defendant collided with her vehicle causing her injury. On May 1, 2007, defendant filed an answer to the complaint, denying responsibility for plaintiff's injuries. On October 11, 2007, an arbitration hearing was held. Also, on October 11, 2007, the arbitration panel found for plaintiff and against defendant, Matthew Vivirito, and awarded plaintiff \$15,000 in damages. Additionally, the panel found against plaintiff and for defendant, Dover Products. Both parties rejected the arbitration award and requested a trial in the circuit court.

The case proceeded to jury trial in April 2010. The parties are aware of the evidence presented.

On April 20, 2010, plaintiff's counsel made an oral motion for a directed finding of liability, and the trial court denied the motion. On April 20, 2010, the jury returned a general verdict in favor of defendant. On May 19, 2010, plaintiff filed a motion for a JNOV or, in the alternative, for a new trial. On June 25, 2010, the court denied plaintiff's motion for a JNOV or, in the alternative, for a new trial.

This appeal followed.

Plaintiff argues she is entitled to a JNOV because the evidence of defendant's negligence was overwhelming. In the alternative, plaintiff argues she is entitled to a new trial to

determine the appropriate amount of damages she is entitled to receive as a result of defendant's negligence.

When considering a motion for JNOV, the trial court should not reweigh the evidence and set aside the verdict merely because different inferences could be drawn from the evidence or the court believes the opposite result is more reasonable. *Maple v. Gustafson*, 151 Ill. 2d 445, 452, 603 N.E.2d 508, 512 (1992). Additionally, "the appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way." *Maple*, 151 Ill. 2d at 452-53, 603 N.E.2d at 512. It is the function of the jury to resolve conflicts of evidence and determine witness credibility. *Maple*, 151 Ill. 2d at 452, 603 N.E.2d at 511-12.

Alternatively, when considering a motion for new trial, the trial court may weigh the evidence and order a new trial when the verdict is against the manifest weight of the evidence. *Maple*, 151 Ill. 2d at 454, 603 N.E.2d at 512. A jury verdict is contrary to the manifest weight of the evidence when the opposite conclusion is clearly evident or where the jury findings are unreasonable, arbitrary, and not based on the evidence. *Maple*, 151 Ill. 2d at 454, 603 N.E.2d at 512-13. When reviewing a trial court's decision on a motion for new trial, the reviewing court should remember the trial court had the opportunity to personally observe the witness testimony. *Maple*, 151 Ill. 2d at 456, 603

N.E.2d at 513.

In the present case, plaintiff argues she is entitled to a JNOV or, alternatively, a new trial limited to damages, because the evidence at trial overwhelmingly establishes defendant's negligence. In support of her arguments, she points to defendant's testimony that he was distracted when he collided with plaintiff's vehicle. Plaintiff argues she was clearly injured by the collision, as evidenced by her subsequent trip to the emergency room. She points to her medical records showing a diagnosis of motor vehicle accident with acute lumbar back strain, her continued treatment with Dr. Schnack, her visits to her regular doctors, and her physical therapy records. In response, defendant argues plaintiff is not entitled to a JNOV or a new trial because the medical records were based on plaintiff's subjective reports of pain. Additionally, defendant points to the inconsistencies in plaintiff's trial testimony compared to her medical records, the fact that plaintiff's medical records show plaintiff had degenerative changes in both her neck and lower back that preexisted the accident, and Dr. Schnack's testimony that she was unable to say whether the accident aggravated plaintiff's preexisting injuries.

A jury is entitled to disbelieve contradicted evidence or evidence that is merely based on plaintiff's subjective testimony. *Stift v. Lizzadro*, 362 Ill. App. 3d 1019, 1029, 841 N.E.2d 126, 135 (2005). Additionally, a medical professional's

determination of patient credibility and acceptance of that patient's complaints of pain for purposes of medical diagnosis is not binding on the jury. *Moran v. Erickson*, 297 Ill. App. 3d 342, 354, 696 N.E.2d 780, 788 (1998). Instead, the jury must make its own determinations regarding the credibility of the witness. *Moran*, 297 Ill. App. 3d at 354, 696 N.E.2d at 788.

Here, the jury heard conflicting evidence as to what, if any, injuries plaintiff sustained as a result of the accident. The jury's credibility determinations were especially significant in light of plaintiff's preexisting degenerative changes in her back and neck and the subjective nature of her complaints. Although plaintiff testified that her injuries were caused by the automobile accident, defendant presented evidence to contradict plaintiff's testimony. In particular, Dr. Schnack testified the degenerative changes in plaintiff's low back preexisted the motor vehicle accident, and she was unable to testify that the degenerative changes were aggravated by the accident. Additionally, she testified the spondylolisthesis could have preexisted the accident. She also testified that a person with degenerative changes in the low back could be expected to experience temporary symptom onset with daily activities, and absent a traumatic event, the degenerative changes in the lumbar spine could explain plaintiff's symptoms. She further testified that even if the accident had not occurred, she would still recommend plaintiff continue with once-a-month maintenance visits for the degenera-

tive changes in her lumbar spine.

The jury was instructed that a finding of negligence required a finding that defendant was negligent, plaintiff was injured, and defendant's negligence was a proximate cause of plaintiff's injuries. When faced with medical opinions based on plaintiff's subjective reports of pain, the jury was entitled to make its own determinations on the cause of plaintiff's injuries and disregard the medical professional's acceptance of plaintiff's subjective complaints. Considering the inconsistencies in plaintiff's testimony, her preexisting injuries, and Dr. Schnack's deposition testimony, sufficient evidence was presented for the jury to enter a verdict in favor of defendant. Consequently, the trial court's denial of the motion for JNOV or, in the alternative, for a new trial on damages was not against the manifest weight of the evidence.

For the reasons stated above, we affirm the trial court's judgment.

Affirmed.