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2013 IL App (3d) 120761-U

Order filed June 10, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

WILLIAM WASILEWSKI,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Whiteside County, Illinois,
)	
v.)	Appeal No. 3-12-0761
)	Circuit No. 06-L-12
MENARD, INC.,)	
)	Honorable
Defendant-Appellant.)	John L. Hauptman,
)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* In a personal injury action that resulted in a jury verdict for the plaintiff, the defendant failed to establish that he was entitled to a judgment notwithstanding the verdict or a new trial or that the trial court erred in making certain evidentiary rulings. The appellate court, therefore, affirmed the judgment of the trial court.
- ¶ 2 Plaintiff, William Wasilewski, a truck driver, brought suit against defendant, Menard, Inc., for personal injuries he sustained when he was struck by a bundle of concrete reinforcement bar (rebar) that fell off of a flatbed trailer that he had transported from defendant's distribution

center to one of its local retail stores. After a trial, the jury found in favor of plaintiff and awarded damages of over \$615,000. Defendant filed a posttrial motion for judgment notwithstanding the verdict and for new trial, which the trial court denied. Defendant appeals, raising several claims of error. We affirm the trial court's judgment.

¶ 3

FACTS

¶ 4 Plaintiff, a professional truck driver to whom jobs were brokered, frequently delivered loads from defendant's distribution center in Plano, Illinois, to defendant's local retail stores. The loads were placed into vans or secured onto flatbed trailers, which were owned by defendant, and were transported by semi-tractor to the local stores. The loads were considered to be "no-touch" loads, meaning that the drivers did not have to load or unload the vans or trailers but only had to transport the vans or trailers from the distribution center to the retail store and back. Loads were packed, loaded, and secured in the vans or on the trailers by defendant's employees at the distribution center (either in the flatbed department or in the truss department), who had been trained in doing such, and were turned over to the drivers in a road-ready condition.

¶ 5 Under the federal regulations that applied to motor carriers, the drivers were responsible for making sure that loads were properly secured. The regulations required drivers to inspect loads before transport, after the first 50 miles of transport, and upon arrival at a destination. If a driver, such as plaintiff, was not satisfied with the manner in which a trailer that he was to receive was loaded, he could reject the load or ask defendant's employees to reload the trailer in a different manner. It was also custom and practice for the drivers to unsecure the loads when they arrived at the local store for delivery. The employees of that local store would then unload the van or trailer.

¶ 6 On October 15, 2004, plaintiff was to transport a flatbed-trailer load containing trusses, lumber, and a bundle of rebar from the distribution center to the retail store in Sterling, Illinois. The bundle was made up of about 150 pieces of rebar banded tightly together in a circular shape, was about 20 feet in length, and weighed about 2,000 pounds. After defendant's employees were finished loading the trailer and securing the load with securement straps, it was turned over to plaintiff with a bill of lading, indicating that the load was road ready. The rebar was loaded in an openly visible position on the outside area of the trailer on the passenger's side toward the rear. It was stacked on top of two bundles of lumber along the outside of some of the trusses and was about eight feet off the ground. Plaintiff walked around the trailer and inspected the load and checked the straps. He saw the bundle of rebar and where it was located. Plaintiff did not see anything that was unsecure or that needed to be adjusted and accepted the load for transport. The trip was about 87 miles long and took about two hours. Plaintiff did not stop and inspect the load after the first 50 miles as required under the federal regulations. During the trip, plaintiff did not feel the load shift in any manner.

¶ 7 Upon arrival at the store, plaintiff went to the designated area for unloading. He checked the straps and made sure that they were all still tight and that nothing had moved in transit. Without asking for assistance, plaintiff began to unstrap the load. There were six straps holding the load in place. Plaintiff watched the load as he unfastened each strap one at a time. As plaintiff stood under or near the area where the bundle of rebar was located and began to undo the sixth strap, the rebar fell off of the truck and struck and injured plaintiff. Employees of the store came to plaintiff's assistance and photographed and documented the incident. That documentation indicated that the bundle of rebar, which was about 12 inches in diameter, had

been placed on top of a spacer that was about 8 inches wide.

¶ 8 In May 2005, plaintiff filed the instant personal injury action against defendant. The case proceeded to a jury trial. Prior to trial, the parties filed numerous motions *in limine*, three of which are relevant to this appeal. In the first motion, defendant sought to bar the testimony of plaintiff's expert witness, claiming that the witness was not qualified to render opinions as an expert in this case and that certain aspects of the witness's testimony were contrary to federal regulations. The trial court granted that motion in part and prohibited the witness from testifying as to matters that were contrary to the federal regulations but also denied the motion in part and allowed the witness to testify as an expert witness. In the second motion, based in part upon a discovery violation, defendant sought to prevent plaintiff from presenting evidence of future wage loss because plaintiff had failed to tender his 2010 tax return, although plaintiff had tendered his wage statements for that period. The trial court denied the motion, finding that sufficient financial information had been provided and that any claim by defendant that the records were inaccurate went to the weight of the evidence, not the admissibility. In the third motion, plaintiff sought to prevent defendant from admitting evidence of a lien that had been filed against plaintiff for past due child support. The trial court granted the motion, finding that the evidence was not relevant.

¶ 9 The jury trial in this case took place in February 2012 and was about a week long. During the course of the trial, several witnesses testified and numerous photographs, documents, and other exhibits were admitted into evidence. Many of the witnesses who testified were current or former employees of defendant, either at the distribution center (in the flatbed department or in the truss department) or at the local store where the accident took place. The key issue at the trial

was whether plaintiff, defendant, or both had the responsibility to ensure that the rebar was properly loaded and could be unsecured safely at the delivery point.

¶ 10 As to that issue, both sides presented the testimony of an expert witness. Plaintiff's expert testified by way of videotaped deposition that it was defendant's responsibility to make sure that the rebar was properly loaded and secured and that defendant's failure to do so in this case caused the accident. Over objection of defendant, plaintiff's expert also testified as to the language of the bill of lading, a subject that several of the other witnesses had already testified about. Defendant's expert testified that plaintiff was responsible for making sure that the load was properly secured and that it could be safely unsecured at the delivery destination and that plaintiff's failure to do so and his lack of training caused the accident. Defendant's expert acknowledged in his testimony, however, that cargo generally did not fall off of a trailer unless it was placed in a precarious position.

¶ 11 In addition to the expert testimony and of relevance to the matters raised on appeal, the following testimony was elicited from the former or current employees of defendant: (1) the former manager of defendant's truss department acknowledged in his testimony that in hindsight, it may have been bad judgment to place the rebar where it was located on the trailer and that rebar and trusses did not mix well when put together in the same load; (2) the former general manager of the local store where the accident occurred stated that there was not a lot of room in that area of the trailer for the rebar to be placed; and (3) an employee who assisted during the accident and photographed the occurrence specifically noted on one of the photographs that a 12 inch bundle of rebar had been placed on top of an 8 inch spacer because he thought it was an important point of which to make the transportation office aware. Testimony was also elicited

from plaintiff and his sister as to his lifestyle and activities both prior to and after the accident, including his activities with his step-children and his sister's children.

¶ 12 During the course of the trial when the videotaped testimony of plaintiff's treating physician was presented, one of the jurors became ill and may have lost consciousness. The testimony being presented at that time was about the treatment of plaintiff's injury, but it was not overly graphic. An ambulance was called. Although most of the other jurors were sent back to the jury room, some of the jurors stayed to attend to the sick juror. The trial judge also stayed. When the ambulance personnel arrived, the trial judge informed them of the nature of the testimony that was being presented when the juror became ill. That conversation may have taken place with some of the other jurors present. Eventually, one of the alternate jurors was selected to replace the sick juror and the doctor's testimony was completed. The following day when the trial resumed, defendant requested that the jury be polled about the matter. A discussion was had and there was some disagreement as to what the judge actually said during the emergency in the presence of the jurors. After considering the matter, the trial court denied defendant's request to poll the jury. The trial court also denied defendant's request to give the jury a specific limiting instruction about the matter but did give the jury a general limiting instruction consistent with the Illinois Pattern Jury Instructions during the jury-instruction portion of the trial that his "rulings, remarks or instructions [did] not indicate any opinions as to the facts."

¶ 13 At the conclusion of the trial, the jury returned a verdict for plaintiff and awarded damages of over \$615,000. As part of the verdict, the jury answered two special interrogatories, one that established that the jury believed that defendant's negligence was the proximate cause of plaintiff's injury and another that established that the jury believed that plaintiff was not more

than 50% liable in causing the accident and injury. In determining the amount to be awarded, the jury did not attribute any of the fault in causing the accident to plaintiff. Defendant filed a motion for judgment notwithstanding the verdict and for new trial, which the trial court denied. This appeal followed.

¶ 14

ANALYSIS

¶ 15 As its first point of contention on appeal, defendant argues that the trial court erred in denying its motion for judgment notwithstanding the verdict. Defendant asserts that its motion should have been granted because plaintiff failed to establish that defendant had a duty to plaintiff regarding the securing of the rebar or that defendant's alleged negligent conduct was the proximate cause of plaintiff's injuries. Plaintiff argues that the trial court's ruling was proper and should be affirmed.

¶ 16 A trial court's ruling on a motion for judgment notwithstanding the verdict is subject to a *de novo* standard of review on appeal. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37. A motion for judgment notwithstanding the verdict raises a question of law and asserts that even when all of the evidence is considered in the light most favorable to the party opposing the motion, there is a total failure or lack of evidence to prove a necessary element of the opposing party's case. See *Id.* The burden on the party seeking a judgment notwithstanding the verdict is a high one as the motion may be granted only under a very limited set of circumstances—when all of the evidence, viewed in the light most favorable to the party opposing the motion, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. See *Id.*; *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). In ruling upon a motion for judgment notwithstanding the verdict, the court does not weigh the evidence

or concern itself with the credibility of the witnesses and must consider the evidence, and any reasonable inferences therefrom, in the light most favorable to the opposing party. *Maple*, 151 Ill. 2d at 453. A court has no right to enter a judgment notwithstanding the verdict if the evidence demonstrates a substantial factual dispute or if the outcome of the case depends upon an assessment of credibility or a determination regarding conflicting evidence. *Id.* at 454. In addition, a motion for judgment notwithstanding the verdict may not be granted merely because the verdict is contrary to the manifest weight of the evidence. *Id.* at 453.

¶ 17 In the present case, after having reviewed the record, we find that the motion for judgment notwithstanding the verdict was properly denied. At the trial, evidence was presented that supported each of the party's theory of the case—that the other party's negligence caused the accident. In large part, the trial was a battle of experts. Plaintiff's expert testified that defendant had a duty to properly load and secure the bundle of rebar, that defendant breached that duty, and that defendant's breach caused the accident and injury. That testimony was supported by the testimony of defendant's own employees and to some extent, by defendant's own expert. Although defendant provided evidence to the contrary, when we consider all of the evidence presented at the trial in the light most favorable to plaintiff, we conclude that defendant cannot meet the high standard required to obtain a judgment notwithstanding the verdict. See *Id.* at 453-54.

¶ 18 As its second point of contention on appeal, defendant argues that the trial court erred in denying its motion for new trial. Defendant asserts that its motion should have been granted because the jury verdict, finding plaintiff to be without fault in the accident, was arbitrary, unreasonable, and insupportable. Plaintiff argues that there was abundant evidence in support of

the jury's verdict and that the trial court properly denied the motion for new trial.

¶ 19 In ruling upon a motion for new trial, the trial court will weigh the evidence and will set aside the jury's verdict and order a new trial only if the verdict is against the manifest weight of the evidence. *Lawlor*, 2012 IL 112530, ¶ 37. A verdict is against the manifest weight of the evidence only if it is clear from the record that the jury should have reached the opposite conclusion or if the jury's findings are unreasonable, arbitrary, and not based upon any of the evidence. *Id.* On appeal, the trial court's ruling on a motion for new trial will not be reversed unless the trial court committed an abuse of discretion in making its ruling. *Id.* In determining whether an abuse of discretion has occurred, the reviewing court should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Maple*, 151 Ill. 2d at 455-56. If the trial court, in the exercise of its discretion, finds that the jury's verdict is sufficiently supported by the evidence, it does not commit an abuse of discretion by denying the motion for new trial. See *Id.* at 456; *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 102 (2010).

¶ 20 Upon reviewing the evidence in the instant case, we find that defendant's motion for new trial was properly denied. It was for the jury to determine the level of fault of each of the parties. See *King v. Petefish*, 185 Ill. App. 3d 630, 641 (1989). Although evidence was presented from which the jury could have found that plaintiff was negligent, we cannot conclude, based upon the evidence presented, that it was erroneous for the jury to find that defendant's negligence was the sole cause of the accident and the injury.

¶ 21 As its third contention on appeal, defendant argues that it is entitled to a new trial because of certain evidentiary rulings that were made by the trial court. Defendant asserts that the trial

court committed reversible error in each of the following rulings: (1) by allowing plaintiff's expert witness, Robert Cooksey, to render opinions in this case as to custom and practices in the industry; (2) by allowing Cooksey to render an expert opinion as to the meaning of the bill of lading in relation to the obligations that the federal regulations place upon defendant, an opinion which was not disclosed; (3) by allowing plaintiff to present evidence of future lost wages after plaintiff had violated discovery requests and had failed to tender his 2010 tax return; and (4) by refusing to allow defendant to cross-examine plaintiff and his sister about plaintiff's child support lien. Plaintiff argues that the trial court's evidentiary rulings were proper, that defendant was not denied a fair trial, and that defendant's assertion that he is entitled to a new trial should be rejected.

¶ 22 A determination of the admissibility of evidence, including a ruling upon a motion *in limine*, rests in the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *In re Leona W.*, 228 Ill. 2d 439, 460 (2008). In addition, a trial court's determination of the appropriate sanction to impose on a party for a discovery violation is also subject to an abuse of discretion standard of review on appeal. *In re Marriage of Booher*, 313 Ill. App. 3d 356, 359 (2000). "The threshold for finding an abuse of discretion is high. A trial court will not be found to have abused its discretion with respect to an evidentiary ruling unless it can be said that no reasonable man would take the view adopted by the court." *Leona W.*, 228 Ill. 2d at 460. If a trial court commits an abuse of discretion, a new trial should be ordered only if the exclusion of evidence appears to have affected the outcome of the trial. See *Id.*; *Troyan v. Reyes*, 367 Ill. App. 3d 729, 732-33 (2006).

¶ 23 In the present case, we have thoroughly reviewed and considered the evidentiary rulings

of which defendant complains, and we find that no abuse of discretion occurred. First, as to whether Cooksey was qualified to testify as an expert on the custom and practices in the industry, the record indicates that the trial court made its ruling after considering Cooksey's background and experience in the industry and carefully tailored its ruling to prevent testimony from being presented that was contrary to the federal transportation regulations. The criticisms that defendant raises as to Cooksey's expertise are matters that go to the weight of his testimony, not the admissibility. See *Department of Public Works & Buildings v. Bohne*, 415 Ill. 253, 264-65 (1953). Second, as to Cooksey's testimony about the bill of lading, we agree with plaintiff that the testimony in that regard merely pertained to the plain language of the document, a matter to which several of defendant's employees also testified. As that testimony was not in the nature of expert opinion testimony, plaintiff was not required to disclose it as an opinion. Third, as to the evidence of the future lost wages, the evidence was properly allowed, despite the discovery violation, because defendant was not prejudiced by plaintiff's failure to provide the 2010 tax return. Defendant had been provided with other documentation of plaintiff's financial matters, including plaintiff's weekly wage information for 2010 and 2011 and, as the trial court indicated, any inaccuracies in that information went to the weight of the evidence, not the admissibility. Finally, as to the child support lien, the testimony of which defendant complains of plaintiff and his sister was indicative of the activities that plaintiff enjoyed prior to the accident, a matter that was relevant to the issue of damages in the instant case. However, the proposed cross-examination that defendant sought to engage in about the lien had no bearing on, and was not relevant to, that issue. Based on the facts involved in this case, the issues raised, and the trial court's thoroughly considered and carefully tailored rulings, we find that the trial court did not

commit an abuse of discretion. See *Leona W.*, 228 Ill. 2d at 460.

¶ 24 As its final contention on appeal, defendant argues that the trial court erred in refusing to poll the jury or give a limiting instruction as to certain remarks that were made by the trial court while attending to the sick juror. Defendant asserts that the trial court's conduct in that regard deprived it of a fair trial. Plaintiff argues that defendant's assertion has no merit and that defendant is not entitled to a new trial because of this issue.

¶ 25 The trial court is generally given a wide latitude in the manner in which it conducts a trial. *Pavilon v. Kaferly*, 204 Ill. App. 3d 235, 251 (1990). "A judge's conduct and remarks in the presence of a jury will not warrant a reversal unless they are such as would ordinarily create prejudice in the minds of the jurors." *Id.* at 251.

¶ 26 In the instant case, there is nothing about the trial judge's conduct that caused any prejudice to defendant. The trial court merely attended to a sick juror. That juror was replaced with an alternate and the trial continued. Defendant's request to poll the jury about the matter was not made until the following day. We cannot say that it was error for the trial court to refuse to poll the jury about the matter at that point or to refuse to give a specific limiting instruction about the matter. See *Id.* at 251. In reaching that conclusion, we note that a general limiting instruction, consistent with the Illinois Pattern Jury Instructions and pertaining to remarks made by the trial court during the course of the trial, was given during the jury-instruction portion of the trial in this case.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court of Whiteside County.

¶ 29 Affirmed.