NOTICE
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2013 IL App (5th) 110541-U

NO. 5-11-0541

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

TERRY SMITH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Williamson County.
	)	
v.	)	No. 07-L-148
	)	
ROSE M. STONE,	)	Honorable
	)	Brad K. Bleyer,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Spomer and Justice Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The court properly admitted evidence of the plaintiff's intoxication where medical evidence showed that his blood-alcohol content was extremely high and there was evidence that his ability to exercise due care was impaired as a result. The court properly allowed the defendant's expert to testify about the effects of alcohol at increasing levels of intoxication and to base his opinion on a learned treatise. The court properly instructed the jury.

¶ 2 The plaintiff, Terry Smith, was injured when he was struck by a vehicle driven by the defendant, Rose M. Stone. Evidence showed that the plaintiff had a blood-alcohol content (BAC) of .37 nearly an hour after the accident occurred. He appeals a verdict in favor of the defendant, arguing that (1) the court abused its discretion by admitting evidence of the plaintiff's intoxication, (2) the court erred in allowing an expert witness to testify about the effects this level of intoxication would have on the average person, and (3) the court erred in giving three jury instructions. We affirm.

¶ 3 On the night of the accident, the plaintiff arrived at Pip's II Tavern in Marion, Illinois,

at approximately 6 or 7 in the evening. Shortly after 10 p.m., he called Lois Jenkins, his landlady, and asked her to pick him up and drive him home. He waited outside the bar until Jenkins arrived. When the plaintiff saw Jenkins' car, he began crossing the street towards her and was struck by the defendant's vehicle. The plaintiff was taken by ambulance to Heartland Regional Medical Center, where he was treated for a laceration on his scalp and a hematoma (bruise). While he was there, a blood-alcohol test revealed that his BAC was .37.

¶ 4 The plaintiff filed a motion *in limine* seeking to exclude evidence of his intoxication, arguing that it was not relevant because there was no evidence of resulting impairment. The court denied the motion. The plaintiff filed a motion to reconsider this ruling, which the court also denied.

¶ 5 At trial, the plaintiff testified that he was drinking beer and rum and Coke that night. He stated that he drank four beers "at most," but he could not remember how many rum and Cokes he drank. He acknowledged that in his deposition, he testified that he had "several" of each. He further acknowledged stating in his deposition that he left Pip's Tavern that night because he ran out of money and no one would buy him another drink.

¶ 6 The plaintiff further testified that he called Lois Jenkins to ask her for a ride home. He waited for her in the parking lot of Pip's, near an illuminated sign. The plaintiff stated that the parking lot was well-lit. He testified that when he saw Jenkins' car, he started walking across the street towards her. He stated that the defendant's car hit him as soon as he stepped into the street. The plaintiff admitted that there was nothing obstructing his vision, but he stated that he never saw the defendant's vehicle even though he looked both directions before crossing the street.

¶ 7 On cross-examination, the plaintiff admitted that he was not sober when he left Pip's Tavern. He explained that he had been drinking and was "feeling good." He admitted that

he was intoxicated, but stated that he was "not drunk." He testified that he did not want Jenkins to know that he had been drinking. In addition to the plaintiff's trial testimony, an admission from his deposition was read to the jury. The plaintiff was asked if he could walk in a straight line when the accident occurred, to which he replied, "I ain't going to say all that."

¶ 8 The defendant testified that it was "very dark" in the vicinity of Pip's Tavern. She testified that she knew that there were always a lot of people in the area and that it was difficult to see them. Therefore, she stated, she slowed down as she approached the area. The defendant testified that the speed limit was 20 miles an hour, but she slowed down to between 5 and 10 miles per hour.

¶ 9 The defendant testified that the plaintiff "jumped out" from behind the sign in front of Pip's Tavern. Asked if the plaintiff was running, she replied: "I was looking. All of a sudden he just appeared right in front of me, and I hit my brakes and sat perfectly still while he–and [I] watched him roll up my hood, up the windshield, and roll back off." The defendant further testified that the plaintiff was wearing dark-colored clothing.

¶ 10 Lois Jenkins testified that the plaintiff called to ask for a ride home, but he did not tell her why he wanted to leave. She testified that she did not know where he was, so she asked him to give her directions, which he did. When she was almost there, she called the plaintiff and asked him to guide her the rest of the way, which he was able to do.

¶ 11 When she pulled up in front of Pip's Tavern, Jenkins could see the plaintiff standing in the parking lot waiting for her, so she hung up the phone. She testified that the area was well-lit and that the plaintiff was standing approximately 15 feet from the sign. She stated that he was standing in a group of about 15 other people, but did not appear to be with any of them.

¶ 12 Jenkins' vehicle was across the street from where the plaintiff was standing. She

testified that she intended to turn around, but when she saw the plaintiff begin to walk towards her, she pulled over to the side of the road to wait for him instead. Jenkins saw the defendant's vehicle hit the plaintiff. She testified that the plaintiff was thrown onto the hood of the car and then rolled off and landed in the street.

¶ 13 Jenkins testified that the plaintiff did not appear to stagger as he walked towards her. She further testified that his speech did not sound slurred when she spoke to him on the phone.

¶ 14 The evidence deposition of Dr. Craig Furry was read to the jury. Dr. Furry was the emergency room physician who provided care to the plaintiff after the accident. Dr. Furry did not remember the plaintiff, but testified based on his treatment notes. He testified that the plaintiff was treated for a laceration to his skull and a bruise under the laceration. He testified that a blood test administered to the plaintiff approximately 50 minutes after the accident revealed that his BAC was .37. He explained that this level is "consistent with marked intoxication," which would suggest that the plaintiff was "significantly intoxicated" at the time of the accident. Dr. Furry acknowledged that he could not remember the plaintiff's behavior. He explained that the blood test was ordered because "the patient must have appeared intoxicated or smelled of alcohol" when he presented at the emergency room. However, Dr. Furry also acknowledged that he did not note "any obvious impairment" at the time he provided treatment.

¶ 15 Dr. Furry further testified that the plaintiff's patient history included a notation that the plaintiff was a heavy drinker. Dr. Furry explained that heavy drinkers often develop tolerance to heavy alcohol use. He explained that this means a heavy drinker such as the plaintiff will not be impacted by a .37 BAC level in quite the same way an occasional or more moderate drinker would be impacted.

¶ 16 A video recording of the evidence deposition of Dr. Jan Bowen-Marsh was played for

the jury. Dr. Bowen-Marsh was the plaintiff's treating physician after he was admitted to the hospital. Like Dr. Furry, Dr. Bowen-Marsh did not remember treating the plaintiff and had to rely on her treatment notes to testify. She testified that the plaintiff had a Y-shaped laceration on his scalp and a hemotoma underneath it, which is a bruise. He did not suffer any other injuries as a result of the accident. Dr. Bowen-Marsh testified that she treated the plaintiff for these injuries, and she also administered medications to the plaintiff to prevent delirium tremens due to his "reported history of alcohol abuse." She further testified that the plaintiff's BAC upon admission was .37, a level at which a person is intoxicated. Finally, she testified that the plaintiff's records indicated that he was confused, but she acknowledged that his confusion could have been the result of either his intoxication or his head injury.

¶ 17 Dr. Christopher Long, a forensic toxicologist, testified as an expert witness for the defendant. His video-recorded evidence deposition was played for the jury. In it, Dr. Long opined that the plaintiff was intoxicated at the time of the accident. He based his opinion on the results of the blood-alcohol test. He explained that a BAC of .37 "is a very significant blood alcohol concentration, producing very significant impairment of the nervous system, the cognitive function, and the senses." He testified that because the plaintiff's blood was drawn 50 minutes after the accident occurred, the plaintiff's BAC was likely slightly higher at the time of the accident.

¶ 18 Dr. Long was asked to describe the effects of intoxication. He testified, over the plaintiff's objection, that the Dubowski chart is routinely used by forensic toxicologists as a basis to describe the general effects of different levels of intoxication. He testified that the chart is generally accepted as appropriate for that purpose. Dr. Long testified that a person with a BAC of between .04 and .10 experiences "impairment of vision, fine motor control, [and] an increase in risk taking." He next testified that a person with a BAC of between .10 and .20 typically experiences "more impairment of fine motor and gross motor tasks" as well

as vision impairment, including depth perception, color recognition, peripheral vision, and the ability to judge distances. Dr. Long stated that at this stage, double vision can occur. He explained that someone with a BAC of between .20 and .30 typically experiences disorientation, confusion, dizziness, slurred speech, and a staggered gait. Coma or death can occur in people with a BAC of over .30. Dr. Long testified that although a BAC of .40 is generally fatal, he has seen death occur as a result of intoxication at lower levels. He had encountered an instance where the decedent's BAC was .36.

¶ 19 Dr. Long discussed the effects of tolerance to alcohol. He explained that people who drink frequently exhibit these same signs and symptoms, but to a lesser extent than more moderate or occasional drinkers. This occurs, he explained, because "the body adapts [in] its ability to deal with alcohol." He testified that most people with a BAC of between .27 and .40 would be unable to stand or walk and would experience vomiting or incontinence, symptoms the plaintiff was not exhibiting. He further testified, however, that a BAC of .37 would still have an adverse impact on the plaintiff's ability to understand the risks he was taking and would slow his reaction time.

¶ 20 The jury returned a verdict for the defendant. The plaintiff filed a motion to set aside the verdict, which the court denied. This appeal followed.

¶ 21 The plaintiff raises three interrelated arguments. He contends that (1) the trial court erred in admitting any evidence of his intoxication because there was no evidence that he was impaired as a result and (2) the court erred in admitting the testimony of Dr. Long because it was speculative and because it was based, in part, on the Dubowski chart, which was inadmissible hearsay. The plaintiff also challenges three jury instructions.

¶ 22 The admissibility of evidence is a decision within the discretion of the trial court. On appeal, we will not reverse a court's evidentiary rulings absent a clear abuse of that discretion. *Bielaga v. Mozdzeniak*, 328 Ill. App. 3d 291, 296, 765 N.E.2d 1131, 1135 (2002)

(citing *Gill v. Foster*, 157 Ill. 2d 304, 312-13, 626 N.E.2d 190, 194 (1993)).

¶ 23 Evidence of drinking can be highly prejudicial, and it is therefore not admissible without some evidence of "intoxication with impairment of physical or mental capabilities." *Bielaga*, 328 Ill. App. 3d at 296, 765 N.E.2d at 1135. "Evidence of a plaintiff's intoxication is relevant to the extent that it affects the care he takes for his own safety and is therefore admissible ***." *Marshall v. Osborn*, 213 Ill. App. 3d 134, 140, 571 N.E.2d 492, 496-97 (1991). Such evidence is only relevant if the defendant can show that the plaintiff's lack of due care was causally related in some way to the injury. See *Bielaga*, 328 Ill. App. 3d at 298, 765 N.E.2d at 1137.

¶ 24 It is improper to insinuate or imply that a party is intoxicated based solely on evidence of drinking. *Bielaga*, 328 Ill. App. 3d at 296, 765 N.E.2d at 1135. Instead, the evidence must show "that the intoxication resulted in an impairment of mental or physical abilities and a corresponding diminution in the ability to act with ordinary care." *Marshall*, 213 Ill. App. 3d at 140, 571 N.E.2d at 497. This impairment may be shown " 'either directly or by reasonable inference.' " *Marshall*, 213 Ill. App. 3d at 140, 571 N.E.2d at 497 (quoting *Shore v. Turman*, 63 Ill. App. 2d 315, 323, 210 N.E.2d 232, 236 (1965)).

¶ 25 Here, the record contained evidence that the plaintiff's own negligence may have contributed to the accident. The defendant testified that the plaintiff "jumped out" from behind a sign into the path of her vehicle. The plaintiff testified that he was hit as soon as he stepped into the street, which provides some support for the defendant's contention. Although there was conflicting evidence on this point, the impact of the plaintiff's intoxication on his ability to act with due care was relevant here.

¶ 26 The plaintiff argues, however, that there was no evidence that his consumption of alcohol had any impact on his behavior and that evidence of his intoxication was therefore inadmissible. He points to the testimony of Lois Jenkins that she did not notice the plaintiff

walking with a staggered gait or slurring his speech. He also points to Dr. Furry's testimony that he did not note any specific impairment on the part of the plaintiff. We are not persuaded.

¶ 27 The record in this case contains ample evidence that showed that the plaintiff was intoxicated to a degree that impaired his ability to exercise due care for his own safety. The plaintiff himself admitted that he was not sober when the accident occurred. Although he stated that he was intoxicated but not drunk, the two words are generally used interchangeably to describe an inebriated state. See Webster's Ninth New Collegiate Dictionary 386, 634 (1988). In addition, there was undisputed medical evidence that his BAC was .37 nearly an hour after the accident, a level which is close to fatal in most people. Expert testimony showed that even with a tolerance to alcohol developed from frequent heavy drinking, any person's judgment and reaction time would be impaired at this level.

¶ 28 In *Marshall v. Osborn*, the court considered the admissibility of evidence relating to a pedestrian's intoxication under similar circumstances. There, the plaintiffs' decedent was killed when he was struck by a vehicle late at night on a rural road with no streetlights and a posted speed limit of 55 miles per hour. *Marshall*, 213 Ill. App. 3d at 138, 571 N.E.2d at 494-95. A pathology report showed that the decedent's BAC was .32, which the defendant driver's expert witness "characterized as 'severely intoxicated.' " *Marshall*, 213 Ill. App. 3d at 138, 571 N.E.2d at 495. The expert testified to the effects this level of intoxication has on the average person. *Marshall*, 213 Ill. App. 3d at 138, 571 N.E.2d at 495. On appeal, the plaintiffs argued that the trial court erred in admitting this evidence. *Marshall*, 213 Ill. App. 3d at 140, 571 N.E.2d at 496.

¶ 29 The Third District found that the evidence of impairment was sufficient to allow the jury to hear evidence of the decedent's intoxication. *Marshall*, 213 Ill. App. 3d at 140, 571 N.E.2d at 497. In reaching this conclusion, the court emphasized two factors. First, the court

noted that the decedent was "on an unlighted roadway with a posted speed limit of 55 miles per hour in a rural area on a dark and foggy night." *Marshall*, 213 Ill. App. 3d at 140-41, 571 N.E.2d at 497. Although not directly stated, the implication is that this evidence showed that his judgment was likely impaired. The court also emphasized the testimony of the defendant's expert that the decedent's BAC level "would have a profound effect on his perception, judgment, and physical abilities." *Marshall*, 213 Ill. App. 3d at 141, 571 N.E.2d at 497. We also note that, while not highlighted by the *Marshall* court, there was also evidence that a car driven by the decedent was found in a ditch, undamaged, with its headlights on. *Marshall*, 213 Ill. App. 3d at 137-38, 571 N.E.2d at 495.

¶ 30 The facts of this case are not identical to those in *Marshall*; however, we find no meaningful distinctions. Here, as there, the evidence showed that the pedestrian had an extremely high BAC level. Here, as in *Marshall*, an expert testified about the impairment that was likely to have had on the pedestrian. The plaintiff argues that the expert testimony was speculative due to the differences in how alcohol affects different people, an argument we will consider in more detail next. In *Marshall*, there was no evidence as to how much the decedent normally drank and no evidence about his actions before the accident, other than the fact that he apparently left his car in a nearby ditch and walked on or next to the highway. Here, there was evidence that the plaintiff regularly drank excessive amounts of alcohol and that he had developed some tolerance to the effects of alcohol as a result. There was also evidence that even a person who had developed tolerance would be impaired and evidence that the plaintiff acted carelessly by walking directly in front of a moving vehicle. Thus, in both cases, there was evidence that the pedestrian had a very high BAC level and engaged in risky behavior. We agree with the *Marshall* court that this type of evidence is sufficient to present the issue of intoxication and impairment to the jury.

¶ 31 The plaintiff attempts to distinguish the instant case from *Marshall* based on the

differences in the locations. As he points out, the accident at issue here took place on a city street with a posted speed limit of only 20 miles per hour in an area which had at least some lighting, although there was some discrepancy in the testimony as to how well-lit the area was. We find this to be a distinction without a difference. The evidence in *Marshall* showed that the pedestrian placed himself in danger by walking on or next to an unlighted highway with a high speed limit. The record here contained evidence that the plaintiff placed himself in danger by failing to notice the defendant's car and crossing the street directly in the path of the car. Both cases involved evidence that the pedestrian's judgment may have been impaired in acting as they did.

¶ 32 We note that, as the plaintiff contends, evidence of negligence and involvement in an accident is not always evidence of intoxication. In *Clay v. McCarthy*, for example, the plaintiff sought to introduce evidence of the defendant driver's intoxication. The only negligence alleged there was that the defendant drove at an excessive speed. *Clay v. McCarthy*, 73 Ill. App. 3d 462, 466-67, 392 N.E.2d 693, 696 (1979). The appeals court found that this evidence, coupled with evidence that the driver's breath smelled of alcohol, was not sufficient to place the issue of intoxication before the jury. The court explained that "the logical connection between the evidence alleged and the proposition sought to be proved is too strained, too tenuous." *Clay*, 73 Ill. App. 3d at 467, 392 N.E.2d at 696. Here, the connection is less tenuous. As we have discussed at length, the record here contained medical evidence that the plaintiff was highly intoxicated and evidence that he failed to either notice the defendant's car or appreciate the danger of crossing the street directly in front of the car. In light of all of this evidence, we find no abuse of discretion in the court's decision to admit evidence of the plaintiff's intoxication.

¶ 33 The plaintiff next challenges the testimony of the defendant's expert witness, Dr. Long. The plaintiff stipulated at trial that Dr. Long was qualified to testify as an expert and

does not challenge the propriety of his qualification on appeal. Rather, he challenges two aspects of Dr. Long's testimony.

¶ 34 The plaintiff first argues that Dr. Long's testimony was speculative because Dr. Long testified to the effects a BAC of .37 would have on other people. We disagree. As discussed earlier, there was evidence that the plaintiff regularly drank large amounts of alcohol and had developed tolerance to its effects as a result. Dr. Long testified that people with a BAC that high are often unable to stand or walk at all, but he noted that the plaintiff was able to walk out of Pip's Tavern. However, Dr. Long's testimony as well as the testimony of Dr. Furry addressed the issue of tolerance to alcohol. Both witnesses specifically stated that people who have developed tolerance are not impacted to the same extent as others, but both also stated that people with tolerance to alcohol are still impacted. It was ultimately for the jury to determine to what extent the plaintiff's intoxication impacted his ability to exercise due care when he crossed the street on the night in question. We find that Dr. Long's testimony was sufficiently specific to aid the jury in making this determination.

¶ 35 The plaintiff further contends that Dr. Long's testimony was improper because some of it was based on the contents of the Dubowski chart, which was inadmissible hearsay. We find this argument unavailing.

¶ 36 An expert witness may base his opinion on facts, opinions, or data contained in a learned treatise if it is recognized as a reliable authority by experts in the field. *USX Corp. v. White*, 352 Ill. App. 3d 709, 727, 817 N.E.2d 896, 909-10 (2004); *Piano v. Davison*, 157 Ill. App. 3d 649, 669-70, 510 N.E.2d 1066, 1080-81 (1987). This is true even if the facts, opinions, or data are not themselves admissible. *Piano*, 157 Ill. App. 3d at 670, 510 N.E.2d at 1081 (citing *Wilson v. Clark*, 84 Ill. 2d 186, 192-93, 417 N.E.2d 1322, 1326 (1981)). As the plaintiff correctly points out, however, the contents of a learned treatise are not admissible as substantive evidence. *Piano*, 157 Ill. App. 3d at 668, 510 N.E.2d at 1079.

¶ 37 Here, as the plaintiff acknowledges, Dr. Long made only a passing reference to the Dubowski chart. He testified that it was routinely relied upon by experts in his field. He then testified about the effects of alcohol at increasing levels of intoxication. The record shows that Dr. Long properly testified to an opinion he formed based in part on the information in the Dubowski chart without testifying to its contents directly. We find no error in the court's decision to allow the testimony.

¶ 38 Finally, the plaintiff argues that three of the instructions given to the jury were improper. We disagree.

¶ 39 A party has the right to have the jury instructed on every theory supported by the evidence. The evidence needed to support giving an instruction "may be slight." *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 100, 658 N.E.2d 450, 458 (1995). However, there must be some evidence in the record to support each instruction given. It is error to give a jury instruction that is not supported by any evidence. *Leonardi*, 168 Ill. 2d at 100, 658 N.E.2d at 458. It is also error to give an instruction that is not based on applicable law. *People v. Mohr*, 228 Ill. 2d 53, 65, 885 N.E.2d 1019, 1026 (2008). The determination of which issues have been raised by the evidence presented is a matter within the sound discretion of the trial court. *Leonardi*, 168 Ill. 2d at 100, 658 N.E.2d at 458. We will reverse the court's decision to give a tendered jury instruction only if the court abused its discretion. *Mohr*, 228 Ill. 2d at 66, 885 N.E.2d at 1026. If "the jury was fairly, fully, and comprehensively informed as to the relevant principles," we will not find an abuse of discretion. *Leonardi*, 168 Ill. 2d at 100, 658 N.E.2d at 458.

¶ 40 The plaintiff first challenges defendant's instruction number 4, which was an unmodified version of Illinois Pattern Jury Instructions, Civil, No. 12.01 (2011) (hereinafter IPI Civil (2011)). The jury was instructed as follows:

"Intoxication is no excuse for failure to act as a reasonably careful person would act.

> An intoxicated person is held to the same standard of care as a sober person. If you find that Terry Smith was intoxicated at the time of the occurrence, you may consider that fact, together with other facts and circumstances in evidence, in determining whether Terry Smith's conduct was contributorily negligent."

The plaintiff argues that this instruction improperly placed the issue of his intoxication before the jury. He reasserts his arguments that evidence of his intoxication was irrelevant and inadmissible in this case. We have previously rejected the plaintiff's arguments that the evidence of his intoxication was not relevant. We thus find no error in the court's decision to give defendant's instruction number 4.

¶ 41 The plaintiff next challenges defendant's instruction number 6. That instruction was based on IPI Civil (2011) No. 60.01 and section 11-1002(b) of the Illinois Vehicle Code (625 ILCS 5/11-1002(b) (West 2006)). The jury was instructed that a statute in effect at the time of the occurrence provided, "No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a moving vehicle which is so close as to constitute an immediate hazard." The jury was further instructed that, if it found that a party had violated the statute, it could consider this fact in determining "to what extent, if any, [the] party was negligent." The plaintiff argues that there was no evidence in the record that he suddenly left the curb. As discussed earlier, however, the defendant testified that the plaintiff suddenly stepped out from behind the sign and into her path. As also previously discussed, the plaintiff's own testimony that he was hit as soon as he began crossing the street also supports this instruction. This evidence supported the instruction. We find no error.

¶ 42 Finally, the plaintiff challenges defendant's instruction number 7, which was based on IPI Civil (2011) No. 60.01 and section 11-1010 of the Illinois Vehicle Code (625 ILCS 5/11-1010 (West 2006)). The jury was told that a statute in effect at the relevant time provided, "A pedestrian who is under the influence of alcohol or any other drug to a degree

which renders himself a hazard shall not walk or be upon a highway except on a sidewalk." The jury was instructed that it could consider evidence of a violation of this statute in determining whether the plaintiff acted negligently. The plaintiff once again argues that the evidence of his intoxication was not legally relevant and the instruction improperly placed this issue before the jury. We have already rejected this contention. Additionally, the plaintiff argues that the instruction does not define the word "hazard." We do not believe this renders the instruction fatally flawed. Jurors could rely on their common sense to determine what constituted a hazard. We find no abuse of discretion in any of the challenged instructions.

¶ 43 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 44 Affirmed.