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2014 IL App (3d) 130387-U

Order filed November 17, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

BARBARA GRAF,)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
Plaintiff-Appellant.)	Kankakee County, Illinois.
)	
v.)	Appeal No. 3-13-0387
)	Circuit Nos. 06-L-108, 06-LM-281
RANDY SKIBBA a/k/a RANDY SKEEBA, and)	
CRETE CARRIER CORPORATION,)	Honorable
)	Kendall O. Wenzelman
Defendants-Appellees.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's evidentiary rulings and subsequent denial of plaintiff's request for a directed verdict at the conclusion of plaintiff's case were not erroneous.
- ¶ 2 Plaintiff Barbara Graf initiated a personal injury lawsuit against defendants Randy Skibba and Crete Carrier Corporation (Crete) arising out of a motor vehicle collision. On the issue of contributory negligence, the jury found plaintiff was 49% responsible for the collision between the parties. Plaintiff appeals, arguing the trial court erred when it denied her motions for directed verdict and judgment notwithstanding the verdict. We affirm.

¶ 3

BACKGROUND

¶ 4

On June 3, 2005, plaintiff filed a one-count negligence complaint in Cook County circuit court against a number of defendants,¹ including Skibba and Crete, seeking more than \$30,000 in damages for medical expenses and injuries arising out of a June 5, 2003, collision.² Defendants filed an amended affirmative defense based on plaintiff's contributory negligence.

¶ 5

The parties engaged in extensive discovery for nearly six years. On March 3, 2011, plaintiff filed a motion *in limine* requesting the court to bar defendants from introducing photographs of plaintiff's vehicle on the grounds that the photographs did not accurately depict the condition of plaintiff's vehicle following the June 5, 2003, collision. On December 9, 2011, plaintiff filed another motion *in limine* requesting the court to bar defendants from referencing a 1996 medical record concerning plaintiff's treatment for back pain by Dr. Man Lee. After hearing arguments during separate proceedings on each motion, the court denied both of plaintiff's motions *in limine*.

¶ 6

The jury trial began on July 16, 2012. Defendant Randy Skibba testified he obtained his commercial driver's license in 2001 and he was employed by Crete in 2003. On the day of the accident, June 5, 2003, Skibba left the suburbs of Chicago in his truck, to pick up a shipment in Manteno. Skibba turned right at the Manteno exit and, after traveling a few miles on County Road 9, realized he was headed in the wrong direction. Skibba observed signs along the roadway indicating a 14-ton bridge ahead. Skibba explained his truck would not be able to travel across the bridge due to the weight restriction. Consequently, Skibba located a driveway where

¹ On August 24, 2005, plaintiff filed a two-count amended complaint naming additional defendants in the second count. Plaintiff subsequently voluntarily dismissed all other defendants from the lawsuit. In addition, a lawsuit was filed by State Farm Insurance against defendants Skibba and Crete, in Kankakee County case No. 06-LM-281, which was consolidated with the instant case.

² On May 10, 2006, the Cook County judge transferred the case to Kankakee County.

he believed he could turn his 73-foot truck around. Skibba stopped his vehicle in the lane of traffic, just past the driveway, and turned on his hazard lights.

¶ 7 Skibba was stopped for between two and five minutes in the lane of traffic, with his hazard lights flashing. After he parked his truck, Skibba walked around the front, and halfway down the side, of his truck. As he walked down the side of his truck, he looked, but could not see, behind his trailer due to a blind spot which was approximately 60 feet in length. Skibba acknowledged that the only way to determine if a vehicle was located in his blind spot would be to walk to the rear of the trailer and look. Skibba entered his truck, looked in his mirrors, released the parking brake, put the truck in reverse, and blew his air horn. Approximately three to four seconds later, Skibba released the clutch and the truck reversed three and one-half to four inches before coming to a stop. Skibba testified his foot never left the brake pedal.

¶ 8 Skibba shifted his truck back into park, looked in his mirror, exited his truck, and observed a woman waving her arms behind his trailer. When Skibba approached the back of his trailer, he saw the red and white bar of the trailer pressed against the front license plate holder of plaintiff's vehicle, but did not detect any damage to plaintiff's vehicle or see any debris on the roadway. Skibba asked plaintiff if she was injured and she stated she was not. Skibba provided plaintiff with his information and both Skibba and plaintiff left the scene.

¶ 9 On cross-examination, Skibba was asked about two photographs of plaintiff's vehicle. Skibba agreed the photographs accurately depicted the condition of plaintiff's vehicle after the collision on June 5, 2003.

¶ 10 Plaintiff testified that on June 5, 2003, she was driving approximately three to four car lengths behind Skibba's truck when she observed the truck stop in front of her. Plaintiff stopped three to four car lengths behind the truck and believed the driver of the truck was going to

attempt to turn around. Plaintiff waited behind the trailer for approximately three minutes before Skibba's truck began backing up three to four car lengths. Plaintiff inadvertently shifted the car into park instead of reverse. When the trailer hit plaintiff's vehicle, the impact moved her vehicle "a hair." Plaintiff stated she hit the steering wheel, then the back of her seat, and hit the steering wheel a second time due to the impact. Plaintiff stated the hood of her vehicle was bent and required repairs as a result of the collision.

¶ 11 After plaintiff and Skibba exchanged information, plaintiff continued on her way to her friend's house. Plaintiff called the sheriff's department after she returned home later that evening. Kankakee County sheriff's sergeant, David Zinanni, testified he observed some debris on the ground at the location of the accident, but he could not recall at trial the amount or nature of the debris. He spoke to plaintiff at her home on June 5, 2003 regarding the incident. Sergeant Zinanni stated that plaintiff did not tell him she was injured by the collision and he did not observe any physical injuries to plaintiff.

¶ 12 According to plaintiff, she went to the emergency room the following day, on June 6, 2003, where she received pain medication and muscle relaxants. Ten days later, she consulted her primary care physician, Dr. Ritu Chandan, on June 16, 2003. Dr. Chandan referred plaintiff to Dr. Michel Malek. After treatment, Dr. Malek referred plaintiff to Dr. James Kelly.

¶ 13 Plaintiff testified, that prior to the collision with Skibba, she had not seen Dr. Chandan for any complaints of back pain. On the questionnaire reciting her medical history for Dr. Malek, plaintiff indicated she had spinal surgery in 1973. On the medical questionnaire she completed for Dr. Kelly on February 25, 2004, plaintiff indicated that her back pain began on June 5, 2003.

¶ 14 Dr. Malek performed back surgery on plaintiff in April 2004 and plaintiff's condition improved, but plaintiff began to suffer from sciatic pain. Plaintiff continued to see Dr. Kelly for injections to help with her pain.

¶ 15 On cross-examination, Plaintiff testified she completed a form for the Social Security Administration (SSA) on June 15, 1982, where she indicated she was unable to: (1) walk more than one-half of a block, (2) stand for more than 10 minutes at a time, and (3) sit for more than 15 minutes. On March 5, 1996, plaintiff completed another form for the SSA, indicating she had "pain in lower spine down legs constantly," and was being treated for low back pain at that time.

¶ 16 On March 25, 1996, plaintiff indicated on another SSA form that she "can't do a lot of walking, can't carry heavy things, can't do much standing[,] have pain all the time."

¶ 17 Plaintiff acknowledged that on May 5, 1999, she indicated on a form for the SSA that she had spinal problems, including spondylolisthesis (displacement of the vertebra). On this 1999 form, plaintiff wrote she was unable to "do a lot of walking, can't carry heavy things, can't do much standing[,] have pain all the time. Gets worse every year." Plaintiff also indicated she had been under the care of Dr. Man Lee since 1994, but testified her condition subsequently improved after 1999. Plaintiff acknowledged during trial that she did not disclose in her answers to interrogatories that she suffered from chronic low back pain from 1973 through 1999. Plaintiff testified the pain would "come and go" over the 26-year period, despite indicating on numerous disability forms her pain was constant.

¶ 18 Plaintiff applied for a disability parking placard from the State of Illinois on September 17, 2001. Plaintiff informed the jury that Dr. Chandan completed the form, indicating plaintiff suffered from a permanent disability caused by spondylolisthesis.

¶ 19 Nicole Kent testified that plaintiff arrived at Kent's home shortly after the collision and complained of chest and back pain. According to Kent, after the collision, plaintiff was unable to stand or drive for long periods of time and wore a back brace.

¶ 20 Janet Luttrell's deposition transcript was read to the jury. Ms. Luttrell's testimony indicated that she worked with plaintiff at Dollar General at the time of the June 5, 2003, collision. Luttrell explained that as part of plaintiff's duties as a cashier, she was required to lift boxes and move them around the store to stock shelves. Prior to the collision, Luttrell did not observe plaintiff have any difficulties performing the physical demands of her position. However, after the collision, plaintiff often left work early due to pain and was unable to stock shelves, until plaintiff's resignation in January 2004.

¶ 21 Mark Bishir testified he owned Dick's Body Shop and performed repair work on plaintiff's vehicle. Bishir replaced the shock absorber, located under the front bumper cover, because it was cracked and damaged, and repaired the hood panel. Bishir testified the photographs did not truly and accurately depict the damage he observed on plaintiff's car following the collision.

¶ 22 Dr. Timothy Moran, an emergency room physician at Provena St. Mary's Hospital in Kankakee, testified he treated plaintiff on June 6, 2003, for complaints of chest and back pain. Dr. Moran diagnosed plaintiff with "back and neck pain and strain and sternum pain, contusion." Dr. Moran prescribed Vicodin, a pain medication, and Skelaxin, a muscle relaxant, and instructed plaintiff to follow up with her family physician.

¶ 23 Dr. Ritu Chandan, plaintiff's personal physician, testified, via video deposition, that plaintiff first became a patient in August 2000. Dr. Chandan testified plaintiff did not complain of any back pain in the past and prior to plaintiff's visit on June 16, 2003, after the collision. Dr.

Chandan acknowledged plaintiff's medical chart included a 1996 report from Dr. Man Lee, which indicated plaintiff suffered from lower back pain since 1973.³

¶ 24 Dr. Chandan agreed she completed an application for plaintiff's disability parking placard by stating on the form plaintiff suffered from spondylolisthesis which "severely limited" plaintiff's "ability to walk." In addition, Dr. Chandan indicated on the form that plaintiff's disability was permanent.

¶ 25 Dr. Michel Malek, a neurosurgeon, testified, via video deposition, that he first met with plaintiff on June 27, 2003. Dr. Malek testified he was aware plaintiff underwent a laminectomy in 1973, and plaintiff indicated she had not experienced any back problems over the past several years. Upon physical examination, Dr. Malek concluded plaintiff had underlying spondyloptosis (forward movement of the vertebra). Dr. Malek recommended conservative treatment including therapy, medications, and muscle relaxants, and ordered an MRI and x-ray to be completed. The MRI revealed plaintiff suffered from spondyloptosis at the S1-S2 and L5-S1 levels of her spine, as well as a laminectomy defect at the L4-L5 level.

¶ 26 Throughout the summer and fall of 2003, Dr. Malek gave plaintiff epidural injections and recommended plaintiff engage in physical therapy to help with her pain. Dr. Malek believed plaintiff's pain emanated from the spondyloptosis at the L5-S1 level and the laminectomy defect. Dr. Malek explained that although plaintiff suffered from spondylolisthesis and spondyloptosis prior to the accident, the accident rendered plaintiff's previously stable conditions unstable, requiring plaintiff to undergo surgery. Dr. Malek opined that the June 5, 2003, accident resulted in plaintiff requiring surgery.

³ Plaintiff's December 9, 2011, "Motion *in limine* to Bar Use of Dr. Lee's Record" indicates plaintiff attached a copy of Dr. Lee's 1996 report as Exhibit 2. However, the exhibit is not included in the record on appeal for this court's review. Plaintiff's reply brief asserted that the trial court ordered the exhibits to be destroyed, due to privacy concerns for plaintiff. Plaintiff also suggested she would "seek to supplement the record with a copy of those documents." However, to date, this court has not received a copy of the medical records at issue.

¶ 27 On April 27, 2004, Dr. Malek surgically removed the remaining portion of the lamina located at the L4-L5 level and removed the discs at the L4-L5 and L5-S1 levels. Dr. Malek also realigned plaintiff's L5-S1 vertebra and used screws and plates to hold plaintiff's spine in place. Despite plaintiff's complaints of sacroiliac joint pain after the surgery, Dr. Malek determined plaintiff made an excellent recovery. Dr. Malek opined that plaintiff's sacroiliac pain was a direct result of the surgery, which was a result of the June 5, 2003, accident. Dr. Malek concluded that plaintiff's condition was permanent.

¶ 28 Dr. James Kelly, a pain management specialist, testified, via video deposition, that he first treated plaintiff on February 25, 2004. After surgery, Dr. Kelly treated plaintiff approximately 26 times between 2006 and 2011 for sacroiliac pain. Dr. Kelly concluded that plaintiff did not have a normal spine at the time of the accident due to her prior surgery in 1973, but the accident aggravated her preexisting condition.

¶ 29 The court's minute entry from July 19, 2012, indicated plaintiff moved for "admission of various exhibits without objection."⁴ In addition, the minute entry states, "Plaintiff rests. Motion for directed verdict made by defendant and denied. Prior to final evidence deposition on defendant's case, motion for direct verdict as to contributory negligence made and denied."

¶ 30 The trial continued with the testimony of Dr. Michael Kornblatt, an orthopedic surgeon, who testified on behalf of the defense via video deposition. Dr. Kornblatt testified that a 1999 x-ray revealed plaintiff had spondylolisthesis at the L5-S1 level and degenerative disc disease at the L4-L5 level. A June 2003 x-ray showed plaintiff's spondylolisthesis had increased since the

⁴ Although the admission of exhibits is not contained in the transcript of the trial proceedings, the record on appeal contains an "Exhibit List" with what appears to be the trial judge's handwritten notes. According to the "Exhibit List," the following exhibits were admitted into evidence: plaintiff's social security records, plaintiff's payroll records, photographs of plaintiff's vehicle, exemplar photograph of defendant's trailer, Dr. Kelly's new patient questionnaire, Dr. Malek's physician lien, Dr. Malek's July 28, 2004, clinical note and his intake form, the operative reports from August 21, 2003, and October 22, 2003, and two photographs of the scene of the collision. These exhibits are included in the record on appeal.

1999 x-ray, but Dr. Kornblatt determined this increase was not related to the June 5, 2003, accident. Dr. Kornblatt reviewed records from Dr. Bernard Milton, which included a statement that plaintiff had been on disability since 1991, and records from a physical therapist stating plaintiff had a history of chronic back pain after a 1973 spinal surgery.

¶ 31 Upon review of plaintiff's medical records, Dr. Kornblatt concluded that Dr. Malek's surgery was unrelated to the June 5, 2003, collision. After reviewing the police report and photographs of plaintiff's vehicle, as well as her medical records, Dr. Kornblatt concluded that the force of the impact was not enough to cause plaintiff's back injury such that surgery was required. Dr. Kornblatt believed that, at most, plaintiff suffered a mild strain as a result of the accident. Dr. Kornblatt testified lumbosacral pain lasts between six and eight weeks.

¶ 32 After closing arguments, the jury returned a verdict in favor of plaintiff. The jury determined plaintiff suffered damages in the amount of \$15,000, representing her pain and suffering attributable to the collision, loss of normal life experiences, and reasonable expenses for medical care and treatment. In addition, the jury determined that plaintiff's negligence contributed to the accident and, accordingly, reduced the amount of damages by 49%, to \$7,650.

¶ 33 Plaintiff filed a motion requesting a judgment notwithstanding the verdict on the issue of contributory negligence and requested a new trial on damages only. The court conducted a hearing on February 11, 2013.⁵ On March 29, 2013, the court issued a "Memorandum of Decision," denying plaintiff's posttrial motion. On April 30, 2013, the trial court entered a written order denying plaintiff's posttrial motion.

¶ 34 Plaintiff mailed her notice of appeal on May 30, 2013, which was filed on June 3, 2013, challenging the trial court's April 30, 2013, order denying her posttrial motion, the March 29, 2013, "Memorandum of Decision," and the jury's July 19, 2012, verdict.

⁵ The transcript from this hearing is not contained in the record on appeal.

¶ 35

ANALYSIS

¶ 36

On appeal, plaintiff contends the trial court erred when it failed to direct a verdict in favor of plaintiff. Similarly, plaintiff argues the trial court erroneously failed to correct its original error when it denied plaintiff's motion for a judgment notwithstanding the verdict after the trial with respect to the issue of plaintiff's comparative negligence. In addition, plaintiff contends the trial court improperly permitted defendants to introduce certain evidence during the jury trial. Defendants respond the trial court properly denied plaintiff's request for a directed verdict and did not commit any errors with respect to evidentiary rulings during trial.

¶ 37

This court applies a *de novo* standard of review to the trial court's denial of a motion for directed verdict. *Buckholtz v. MacNeal Hospital*, 337 Ill. App. 3d 163, 167 (2003). It is proper for a trial court to direct a verdict or enter a judgment notwithstanding the verdict only where *all of the evidence*, when viewed in the light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *Id.* When reviewing the trial court's ruling on a motion for directed verdict or a corresponding request for a judgment notwithstanding the verdict following the jury's decision, this court must not substitute our judgment for that of the jury, reweigh evidence, or determine the credibility of witnesses. *Id.*

¶ 38

When determining whether the court improperly denied plaintiff's motion for a directed verdict at the close of plaintiff's case and the motion for judgment notwithstanding the verdict at the conclusion of the trial, we must be able to review *all of the evidence* when measuring the propriety of the court's rulings. See *Hye Ra Han v. Holloway*, 408 Ill. App. 3d 387, 391 (2011) (difficulty arises when a reviewing court is prevented from considering all of the evidence for purposes of evaluating a trial court's ruling on a motion for a directed verdict). The burden is on

the appellant to present this court with a record that is adequate for a determination of the issues raised. *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 421 (2008).

¶ 39 Here, the record provided by plaintiff for this court’s consideration does not appear to include a complete transcript of the trial and also appears to omit the entire testimony of at least one witness, Phyllis Haley. The record on appeal contains various excerpts of the trial testimony of some, but perhaps not all, of the witnesses who testified during the jury trial.⁶ Although the court’s minute entry reveals “motion for direct verdict as to contributory negligence made and denied,” this court is unable to evaluate whether the court’s ruling was in error because we have not received a complete trial transcript of the testimony and did not receive the transcript of the arguments of counsel concerning the basis for a directed finding. Without a complete record, we must presume the trial court’s ruling was correct. *Foutch v. O’Bryant*, 99 Ill. 2d 389, 392 (1984) (absent a sufficiently complete record of the proceedings at trial, it will be presumed the order entered by the trial court was in conformity with the law and had a sufficient factual basis.)

¶ 40 Plaintiff additionally contends the trial court improperly allowed defendants to introduce photographs allegedly depicting the condition of plaintiff’s vehicle after the collision. When a trial court decides to admit photographs, the court must determine whether the damage to the vehicle and the injury to plaintiff are such that a lay person can assess their relationship without expert interpretation. *Ferro v. Griffiths*, 361 Ill. App. 3d 738, 742 (2005). A reviewing court will not disturb the court’s decision absent a clear abuse of discretion. *Id.*

⁶ A “Witness List” included in the record on appeal suggests there were a total of 12 witnesses who testified before the jury. The transcript of Phyllis Haley’s testimony is not included in the record on appeal, although it appears, based on the “Witness List,” that she testified via the reading of her deposition transcript. In addition, the court’s minute entry reveals that on July 17, 2012, “4 witnesses sworn. *** One witness heard by evidence deposition.” On July 18, 2012, the court’s minute entry indicates “5 witnesses heard by either video or reading.” The court’s July 19, 2012, minute entry states, “One witness heard by evidence deposition. *** Prior to final evidence deposition on defendant’s case ***.” Therefore, according to the court’s minute entries, it appears 12 witnesses testified before the jury in this case, although this court received testimony of only 11 witnesses.

¶ 41 Here, plaintiff testified the force of the impact caused her to hit the steering wheel, hit the back of her seat, and rebound back into the steering wheel resulting in nearly eight years of treatment for back injuries, including spinal surgery. The photographs were relevant to the issue of whether the impact from this collision was the proximate cause for the treatment that ensued after 2003. Accordingly, we conclude the trial court did not abuse its discretion when it allowed defendants to introduce the photographs of plaintiff's vehicle into evidence.

¶ 42 Plaintiff also raises an issue concerning the court's decision to deny plaintiff's request for a motion *in limine* preventing defendants from referring to a 1996 medical record purportedly created by Dr. Man Lee. However, plaintiff has not included a copy of this document in the appellate record for our review.⁷ In addition, plaintiff has failed to include the transcript of the hearing conducted concerning the motion *in limine*. The case law provides that any doubts arising from the incompleteness of the record must be resolved against plaintiff. *Hubeny v. Chairse*, 305 Ill. App. 3d 1038, 1046 (1999). Accordingly, this court is unable to determine whether the trial court's ruling denying plaintiff's motion *in limine* constituted error.

¶ 43 Next, we consider plaintiff's contention that the trial court improperly allowed defendants to introduce evidence of plaintiff's prior medical conditions for the jury's consideration on the issue of damages. Specifically, plaintiff contends the trial court should not have allowed the introduction of plaintiff's social security records or plaintiff's application for a disability parking placard. Plaintiff also argues defendant's expert, Dr. Kornblatt, should not have been allowed to discuss plaintiff's 1999 complaints of pain, a statement made by an endocrinologist that plaintiff had been on disability since 1991, or a statement made by a physical therapist from July 2003.

⁷ Although plaintiff suggested in her reply brief that she would supplement the record on appeal with Dr. Lee's medical record, to date, this court has not received a copy of the record at issue.

¶ 44 The case law provides that a trial court's decision to allow the introduction of certain evidence rests solely within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Snelson v. Kamm*, 204 Ill. 2d 1, 33 (2003). It is within the discretion of the trial court to decide whether evidence is relevant and admissible. *Ferro v. Griffiths*, 361 Ill. App. 3d at 742. Relevant evidence constitutes evidence that has any tendency to make the existence of a fact important to the determination of the action more or less probable than it would be without the evidence. *Id.*

¶ 45 In this case, defendants offered plaintiff's social security records to establish plaintiff received treatment for chronic back problems prior to the June 5, 2003, collision, contrary to her statements to Drs. Chandan and Malek. Similarly, defendants offered evidence that plaintiff requested a handicap parking placard in September 2001. This information was relevant with respect to the reliability of Dr. Chandan's opinion regarding plaintiff's preexisting back issues.

¶ 46 In addition, defendants' expert, Dr. Kornblatt, testified, based on his review of plaintiff's medical records, that the force of the impact in the collision was not sufficient to cause plaintiff to suffer a back injury, which would require subsequent spinal surgery. Dr. Kornblatt's testimony that plaintiff suffered from back problems prior to the collision was relevant to his conclusion that plaintiff's treatment after the accident was related to problems pre-dating the collision.

¶ 47 For these reasons, we conclude the trial court did not abuse its discretion when it allowed defendants to introduce certain evidence showing plaintiff suffered from ongoing back problems prior to June 5, 2003. Consequently, we affirm the trial court's denial of plaintiff's motions for directed verdict and judgment notwithstanding the verdict.

¶ 48

CONCLUSION

¶ 49

For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 50

Affirmed.