2015 IL App (3d) 140392-U

Order filed May 15, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

JANA R. HOGLE,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-14-0392
	)	Circuit No. 11-L-0070
JEANNETTE HURST,	)	
	)	The Honorable
Defendant-Appellee.	)	Raymond E. Rossi,
	)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The jury was presented with factual questions regarding defendant's negligence and plaintiff's contributory negligence, and the evidence was sufficient to support a verdict in favor of defendant. Also, the trial court did not err in denying plaintiff's motion for a new trial as no reversible errors were found in the issues presented.

¶ 2 Plaintiff-appellant, Jana R. Hogle, filed a negligence claim against defendant-appellee, Jeannette Hurst, following a motor vehicle accident. After a jury trial, the jury found in favor of Hurst and the trial court denied Hogle's motion for a new trial. Hogle appeals arguing that the

jury's findings were against the manifest weight of the evidence and that the trial court erred in denying her motion for a new trial as there were various errors during the trial. We affirm.

¶ 3 FACTS

¶ 4 On January 3, 2006, Hogle was involved in a motor vehicle accident when she was rear-ended by Hurst. Hogle filed a negligence claim against Hurst to recover damages for the personal injuries she suffered as a result of the accident. She claimed Hurst was negligent for several reasons. Hurst filed two affirmative defenses supporting her allegation that Hogle was contributorily negligent. The matter was tried before a jury.

¶ 5 Hogle testified that at the time of the accident, she had been stopped at a red light in the "right-turn only" lane of the intersection behind the painted white stop line for 5-7 seconds. She was leaning forward toward the steering wheel looking for oncoming traffic and waiting for the light to turn green when she was rear-ended by Hurst. Hogle stated that at no time did she start up for a green light and then slam on her brakes. She did not bring her vehicle to an abrupt stop, but slowed to a gradual stop. She further testified that she would not have pulled out to make her right turn because a semi-truck was approaching that would have struck her vehicle if she did.

¶ 6 Hurst testified that she was driving her step dad's car at the time of the accident and her friend, Kelly Cooney, was a passenger. Hurst stopped her car five to seven feet behind Hogle's vehicle in the "right-turn only" lane. She saw Hogle's vehicle brake lights working and illuminated before the accident. She did not see any traffic coming through the intersection. When the traffic light turned green, Hogle began to move forward and then stopped. Hurst stated that Hogle could not have been going very fast as "she had just left from a red light stop sign (sic)." Hurst took her foot off the brake and was "idling" before she put her foot back on the brake in an attempt to avoid striking the rear of Hogle's vehicle. She estimated her maximum

speed from the time she took her foot off the brake until the impact to be about 5 mph, if not less. Hurst stated she and Cooney jerked forward after Hurst reapplied the brakes. She could not bring her vehicle to a complete stop before contact with the Hogle's vehicle. After impact, Hurst's vehicle was a bit over the white line. Hogle's vehicle was about a foot in front of Hurst's vehicle.

¶ 7 Hurst testified that this was the exact version of the accident she told the police who reported to the scene of the accident. She was cited for failing to reduce speed (625 ILCS 5/11-601(a) (West 2006)). She pled guilty to the citation and paid the fine.

¶ 8 Hurst's passenger, Cooney, also testified. Cooney stated she did not actually witness the accident. She was not sure if the traffic light was red or green or if Hogle's vehicle was moving or stopped at the time of the impact. She did see Hogle's vehicle brake lights illuminated before the accident. She noted that when Hogle started inching forward, Hurst also started inching forward. When Hogle stopped inching forward, the accident occurred.

¶ 9 From the scene of the accident, Hogle was rushed by ambulance to the emergency room. Because of her persistent pain, she sought additional medical attention in the coming years. Two of Hogle's treating doctors as well as Hurst's medical expert all testified that to a reasonable degree of medical certainty the accident caused injuries to the Hogle.

¶ 10 Hogle also testified she employed various additional soothing methods outside of the medical treatments she received to help relieve the pain she suffer due to the accident. One such activity was having her husband rub her back. He, however, disaffirmed this statement during cross examination of his testimony.

¶ 11 No other evidence was presented. Hogle moved for a directed verdict on the issues of negligence, causation and damages and requested the case be given to the jury on the issue of the extent of damages only. The court reserved its ruling on the motion and allowed arguments on

the motion. During arguments, Hogle conceded the issue of negligence should be decided by the jury. The trial court then denied Hogle's motion for a directed verdict on causation.

¶ 12 Hogle requested that the court give the jury Illinois Pattern Civil Jury Instructions (IPI) for following too closely pursuant to section 5/11-710(a) of the Illinois Code of Civil Procedure. (the Code). (625 ILCS 5/11-710(a) (West 2008)) The court refused the request. Over Hogle's objection, the court did give Hurst's tendered modified IPI (Illinois Pattern Jury Instructions, Civil, No. 10.04 (hereinafter, IPI Civil No. 10.04)) referencing a finding that the plaintiff must also be found to be free of negligence.

¶ 13 Hogle then tendered a special interrogatory she had apparently just handwritten and asked the court to provide it to the jury. It included two questions: "Do you find Hurst, Jeanette Hurst, negligent, yes or no?" and "Do you find Hogle, Janna Hogle, negligent, yes or no?" The court refused, noting her special interrogatory contained questions of law and not fact.

¶ 14 During deliberation, the jury presented the following question to the court: "[i]f we find Hogle majority at fault for the accident, does that mean that Hogle would not get any damages?" The trial court replied "yes."

¶ 15 The jury found in favor of Hurst. Hogle's post trial motion for a new trial was denied. This appeal timely followed.

¶ 16 ANALYSIS

¶ 17 Hogle presents two issues on appeal. She first argues that the jury's verdict was against the manifest weight of the evidence because she proved that Hurst was negligent in causing the motor vehicle accident and therefore liable for the injuries she suffered as a result. Hurst contends that the jury, after reviewing the evidence and testimony of the witnesses, properly

assessed the percentage of negligence and found Hogle's contributory negligence the majority cause of the accident.

¶ 18 A reviewing court will set aside a jury's verdict if it is "contrary to the manifest weight of the evidence." *Maple v. Gustafson,* 151 Ill.2d 445, 453 (1992) (quoting *Pedrick v. Peoria & Eastern R.R. Co.,* 37 Ill.2d 494, 510 (1967)). " 'A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence.' " *Id.* (quoting *Villa v. Crown Cork & Seal Co.,* 202 Ill.App.3d 1082, 1087 (1990)). However, we will not substitute our judgment for that of the jury even if we "might feel an opposite conclusion would be more reasonable." *Green v. Smith,* 59 Ill. App. 2d 279, 284 (1965). The jury's verdict must be "palpably erroneous" for it to be set aside. *Id.*

¶ 19 To state a claim for negligence, the plaintiff must show that the defendant owed a duty of care that he breached and that breach proximately caused the plaintiff's injuries. *Wojdyla v. City of Park Ridge,* 148 Ill. 2d 417, 421 (1992). "A driver approaching from the rear has the duty to keep a safe lookout to avoid colliding with the vehicle ahead and he must take into account the prospect of having to stop his car suddenly." *Glenn v. Mosley,* 39 Ill. App. 3d 172, 176 (1976). Otherwise, he is negligent. *Burroughs v. McGinness,* 63 Ill. App. 3d 664, 667 (1978). Further evidence of negligence involves a driver's failure to stop if she is given ample warning of the preceding driver's intent to stop by the illumination of the preceding driver's brake lights. *Hickox v. Erwin,* 101 Ill. App. 3d 585 (1981).

¶ 20 Our courts have also held that even if the defendant is shown to have been negligent in a negligence claim, the plaintiff also has the burden of showing that she exercised due care for her own safety and was free from contributory negligence. *Compton v. Frank,* 126 Ill. App. 2d 356,

359 (1970). Due care, or the lack thereof, can be " 'inferred from all the facts and circumstances shown to exist prior to and at the time of the collision.' " *Id*. (quoting *Devine v. Delano*, 272 Ill. 166 (1916)). Case law shows that adherence to traffic signs and signals provides a strong presumption of due care. *Amadeo v. Gaynor*, 299 Ill. App. 3d 696, 701 (1998); *Freeman v. Chicago Transit Authority*, 50 Ill.App.2d 125, 134 (1964); *Cook v. Boothman*, 24 Ill.App.2d 552, 558 (1960). Yet, whether due care has been properly exercised by the plaintiff turns into a question of fact for the jury to decide once the plaintiff leaves the "protection of the law [by way of a traffic signal] and voluntarily subject[s] herself to the rule of the reasonable and prudent person." *Cook*, 24 Ill. App. 2d at 559. It is then the province of the jury to resolve any conflict in the evidence and pass upon the credibility of witnesses determining what weight to give their testimony. *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). If the plaintiff was contributorily negligent, then damages are reduced accordingly. 735 ILCS 5/2–1116 (West 2012). If the plaintiff is found to be more than 50% contributorily negligent, he may not recover. *Id*. *Hobart v. Shin*, 185 Ill. 2d 283, 290, (1998).

¶ 21 Hurst's vehicle rear-ended Hogle's vehicle. Though she testified to have only been idling as she was driving behind Hogle, Hurst failed to stop her vehicle prior to impact with Hogle. Both she and her passenger, Cooney, testified that they saw Hogle's brake lights illuminated prior to the impact. Both Hogle and Hurst's medical experts also testified that Hogle's injuries were proximately caused by the accident. Here on appeal, Hurst has not refuted that assertion of proximate causation nor Hogle's injuries and resultant damages. Thus, the jury could have found Hurst negligent and liable for the proximately caused damages suffered by Hogle.

¶ 22 However, there is evidence in the record from which a jury could have also reasonably inferred Hogle was not exercising due care and was over 50% contributorily negligent. Hogle

testified that she did not move from her stopped position at the white stop line prior to the impact. She, therefore, would have been presumed to have been exercising due care. However, Hogle's version of the facts is contested by Hurst. Hurst states the light turned green, both cars began to move, and her car had crossed the white painted stop line when Hogle abruptly hit her brakes and Hurst hit the back of Hogle's car. Hogle does not attempt to challenge this view. She states only that even if Hurst's statement of events is accepted as true, barring the assertion of an abrupt stop, there is sufficient evidence to show Hurst was negligent.

¶ 23 As previously noted we agree that there is sufficient evidence to show Hurst was negligent. That negligence does not, however, negate Hogle's duty to exercise due care for her own safety and show she is free of contributory negligence. If Hurst's version was believed, Hogle was not stopped at a red light when she was struck. She now had the green light and was proceeding from the intersection into the stream of traffic. It is not unreasonable for the jury to conclude that, given a green light, Hurst would not have anticipated Hogle would stop her vehicle in the intersection.

¶ 24 Additionally, there are several other areas where the jury could have questioned Hogle's exercise of due care as well as her credibility. Hurst testified that there was no oncoming traffic. Yet, Hogle testified that while she was stopped, she looked left to check for oncoming traffic and saw a semi-truck crossing the intersection. The jury was provided during trial an aerial diagram of the intersection where the accident occurred. It showed that the intersection's design included a dedicated lane on the cross street for those making the right turn Hogle and Hurst were making. Thus Hogle's implication to the jury, and statement to this court, that she would have been struck by the truck had she turned was discredited.

¶ 25 Additionally, Hurst testified that she engaged in several home treatments to alleviate her pain including asking her husband to rub her back. However, during cross examination of his testimony, he directly disaffirmed engaging in such an act. Based on all of the evidence and testimony presented to the jury, it is not unreasonable or improbable for the jurors to have concluded that Hogle's testimony was not credible and that she was not exercising due care.

¶ 26 We can be confident that the jury found for Hurst because Hogle was over 50% contributorily negligent and not because the negligence factors of causation and damages were not sufficiently proven. Hurst's brief here on appeal effectively concedes that the evidence presented at trial shows the accident was the proximate cause of Hogle's incurred injuries. Moreover, the question the jury asked during deliberation gives some insight into what it was concerned with when making its decision, Hogle's contributory negligence. We do not find the jury's verdict for Hurst due to Hogle being over 50% contributorily negligent was against the manifest weight the evidence.

¶ 27 Now we move to Hogle's second issue here on appeal. She argues that the trial court's denial of her motion for a new trial was erroneous because (1) her motion for a directed verdict should have been granted, (2) her special interrogatory should have been given to the jury, and (3) the IPI instructions should not have been modified pursuant to the request of Hurst. We review the trial court's denial of a motion for a new trial for an abuse of discretion. *Reidelberger v. Highland Body Shop, Inc*. 83 Ill. 2d 545, 548 (1981).

¶ 28 With regard to her first point of contention in this second issue, directed verdicts should be entered "only in those cases in which all of the evidence, when viewed in its most favorable light to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could never stand." *Zaeh v. Huenke*, 70 Ill. App. 3d 39, 40 (1979). In ruling on a

directed verdict, a court does not weight the evidence, nor assess witness credibility; rather it only considers the evidence and any possible inferences in the light most favorable to the nonmoving party. *Mizowek v. DeFranco*, 64 Ill. 2d 303, 309-10 (1976). On review we, too, must view the evidence in a light most favorable to the nonmovant and determine whether that evidence so overwhelmingly favors movant that no contrary verdict could ever stand. *Zaeh*, 70 Ill. App. at 40. Witness testimony, reasonable inferences drawn therefrom, and a diagram of the intersection was the only evidence presented during trial and before this court. When viewed in the light most favorable to Hurst, as previously discussed, the evidence does not overwhelmingly favor Hogle. A contrary verdict in favor of Hurst is reasonable. Thus, the trial court did not abuse its discretion in denying Hogle's motion for a directed verdict.

¶ 29 Hogle argues next that the denial of her request for a special interrogatory was erroneous. The question of the negligence or contributory negligence of a party is a material question of fact and not law as found by the trial court. She asserts her interrogatory was proper and should have been submitted to the jury. Hurst contends that Hogle did not submit her special interrogatory in accordance with section 5/2-1108 of the Code (735 ILCS 5/2-1108 (West 2012)) that requires it to be submitted in writing. She also asserts that the trial court was correct to note that the orally argued special interrogatories were duplicative of another jury instruction already tendered, would serve only to further confuse the jury, and addressed an ultimate determination of law and not fact.

¶ 30 In evaluating a trial court's decision for an abuse of discretion, we must determine whether the record is sufficient to conduct such a review.

> "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in

> the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant,* 99 Ill.2d 389, 391–92 (1984).

¶ 31 The record shows Hogle requested that the court tender to the jury a special interrogatory containing two questions. Though it was asserted during oral arguments that a handwritten copy of the interrogatory had been submitted during trial, the record is devoid of such a document. Although we could decline for this reason to review this issue for a possible abuse of discretion, we do not do so because there appears to be no dispute about the language in which the special interrogatory was couched. The substantive issue is capable of resolution.

¶ 32 A special interrogatory serves to test the general verdict against the jury's determination as to one or more specific issues of ultimate fact. *Noel v. Jones,* 177 Ill. App. 3d 773, 783 (1988). It is in proper form if (1) it relates to an ultimate issue of fact upon which the rights of parties depend, and (2) a response to it is inconsistent with some general verdict that might be returned. Noel, 177 Ill. App. 3d at 783. Special interrogatories on negligence must also include all relevant factors—negligence, proximate cause, and injury—to be in proper form. *Snyder v. Curran Township.,* 281 Ill. App. 3d 56, 67 (1996); *Bruske v. Arnold,* 100 Ill. App. 2d 428, 431 (1968) *aff'd,* 44 Ill. 2d 132 (1969). It is reversible error to refuse a special interrogatory in proper form. *McGovern v. Kaneshiro,* 337 Ill. App. 3d 24, 32 (2003).

¶ 33 Hogle's purportedly submitted special interrogatory contained two questions asking merely if there was negligence. Thus it was properly refused as all relevant factors for a

negligence special interrogatory were not present. See *Prignano v. Prignano,* 405 Ill.App.3d 801, 814 (2010) (noting the reviewing court may affirm on any basis supported by the record).

¶ 34 Finally, we decline review of Hogle's last challenge to the denial of her motion for a new trial as she failed to preserve the issue of the IPI modification for appeal. Illinois Supreme Court rule 366(b)(2)(iii) dictates that "[a] party may not urge as error on review of the ruling on the party's post-trial motion any point, ground, or relief not specified in the motion." Ill. S. Ct. R. 366(b)(2)(iii) (eff. Feb. 1, 1994). Thus all waivable issues not argued in the post-trial motion are forfeited for appellate review. *American National Bank & Trust Co. of Chicago v. J & G Restaurant, Inc.*, 94 Ill. App. 3d 318, 319 (1981). Plain error review is an exception to this rule. However, in civil cases, this exception is only applied if "the prejudicial error involves flagrant misconduct or behavior so inflammatory that the jury verdict is the product of biased passion, rather than an impartial consideration of the evidence." *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 375-76 (1990).

¶ 35 Hogle forfeited on appeal her IPI modification issue as she did not contest it in her post-trial motion. Her reply brief regarding this issue notes that the modification is plain error which deprived her of a fair trial. However, we find that the modification if viewed as an error does not rise to the level required invoking plain error view in this civil case.

¶ 36 CONCLUSION

¶ 37 We find the jury's verdict was not against the manifest weight of the evidence. There was sufficient evidence in the record to support its finding for Hurst and that Hogle was over 50% contributory negligent. The trial court also did not err in denying Hogle's motion for a new trial because there were no reversible errors made at trial. Denial of her motion for a directed verdict was appropriate because the evidence was not so overwhelmingly in her favor as a contrary

verdict was reasonable. Hogle also failed include in the record a copy of the purportedly submitted handwritten special interrogatory. Thus we are unable to review for an abuse of discretion and find it was properly denied. Further she waived her contention against the IPI modifications as she failed to include it in her post-trial motion.

¶ 38 The judgment of the circuit court of Will County is affirmed.

¶ 39 Affirmed.