2015 IL App (4th) 140775-U

NO. 4-14-0775

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 15, 2015
Carla Bender
4th District Appellate
Court, IL

MICHAEL HODITS,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
STEVEN DABNEY,	)	No. 12L194
Defendant-Appellee.	)	
	)	Honorable
	)	Michael Q. Jones,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Pope and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: In this personal injury case in which a jury returned a verdict in defendant's favor, the appellate court affirmed the trial court's denial of plaintiff's motion for a new trial, concluding that (1) the record on appeal was insufficient to address specific claims plaintiff raised and (2) the trial court properly sustained objections defendant made during plaintiff's opening statement.

¶ 2 In January 2012, plaintiff, Michael Hodits, and defendant, Steven Dabney, were involved in an automobile accident. In October 2012, Hodits sued Dabney, alleging that injuries he sustained as a result of the accident were proximately caused by Dabney's negligence. Following a June 2014 trial, a jury returned a verdict in Dabney's favor. In July 2014, Hodits filed a motion for a new trial, which the trial court denied.

¶ 3 Hodits appeals, arguing that the trial court abused its discretion by denying his motion for a new trial. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Undisputed Facts, Hodits' Complaint, and Dabney's Answer

¶ 6 On January 13, 2012, Dabney was driving east on Green Street in Champaign, Illinois. As Dabney approached the intersection of Green and State Streets, the traffic light at that intersection—which controlled his eastbound travel—was flashing red. Dabney stopped at the traffic light and then continued eastbound into the intersection. At that moment, Hodits, who was driving south on State Street, approached a green traffic light at the intersection of State and Green Streets. Hodits continued his southbound travel into the intersection and, as a consequence, his vehicle collided with Dabney's vehicle.

¶ 7 In October 2012, Hodits sued Dabney for injuries Hodits allegedly sustained as a result of the January 2012 collision. In his answer to Hodits' complaint, Dabney denied that he engaged in negligent acts that were the proximate cause of Hodits' alleged injuries.

¶ 8 B. The June 2014 Trial

¶ 9 1. *Hodits' Opening Statement*

¶ 10 On June 10, 2014, the parties presented their respective opening statements to the jury. During Hodits' presentation, the following exchange took place:

> "[T]he evidence will show that *** as *** Hodits was proceeding through the intersection *** Dabney darted out in front of him. *** Hodits immediately attempted to stop but wasn't able to avoid him and a collision occurred. If *** Dabney had simply chosen to yield—
>
> [DABNEY'S COUNSEL]: Objection ***. This is argumentative. This is not what the evidence will show. This is argu-

ment.

THE COURT: Sustained.

* * *

[HODITS' COUNSEL]: During the presentation of the evidence in this case you may hear the suggestion that *** Hodits is the one that wasn't keeping a proper lookout because *** Dabney had crossed two lanes of traffic and the collision occurred in the third lane. However, *** Hodits is going to tell you that he has a green light, he noticed that *** Dabney was stopped and he proceeded through the intersection while he still watched the road in front of him. He watched/checked traffic to his left. He did exactly what a reasonable person is required to do.

[DABNEY'S COUNSEL]: Objection ***. This is argumentative.

THE COURT: Well, it is. And, again, the purpose—the lawyers are allowed to argue their point of view later. The purpose here is to tell you what they think you are about to hear."

¶ 11 2. *The Remaining Pertinent Proceedings*

¶ 12 The record shows that on June 10 and 11, 2014, the parties presented evidence to the jury. However, because the record provided on appeal is devoid of a report of proceedings, a bystander's report, or an agreed-upon statement of facts documenting the evidence presented, we omit a summary of that portion of the proceedings.

¶ 13 The incomplete record on appeal also makes it unclear as to when the trial court

held the jury instruction conference. The record in this case includes a June 10, 2014, transcript entitled, "Excerpt—Jury Instruction Conference," in which the following exchange occurred after the parties returned from a lunch recess:

> "[HODITS' COUNSEL]: Your Honor, we were hoping we could go ahead and do the jury instruction conference now so if there are any changes that need to be done[,] those can be done while the parties are testifying.
>
> THE COURT: Are you okay with that ***?
>
> [DABNEY'S COUNSEL]: I am, Your Honor."

We note that a June 11, 2014, docket entry shows that following the close of evidence, the court and the parties conducted a jury instruction conference prior to scheduling closing arguments for the following day. In his brief to this court, Dabney contends that the court "heard all of the evidence in this matter prior to ruling on the jury instructions," which supports the aforementioned docket entry. The record on appeal, however, does not contain a report of proceedings, a bystander's report, or an agreed-upon statements of facts documenting the June 11, 2014, jury instruction conference.

¶ 14 In July 2014—following the jury's verdict in Dabney's favor—Hodits filed a motion for a new trial, arguing that the trial court should set aside the jury's verdict and grant him a new trial because (1) the court provided the jury a modified jury instruction that was unnecessarily repetitive; (2) he was prejudiced by the absence of a general verdict form in his favor; and (3) objections Dabney made during Hodits' opening statement, which the court sustained, prevented him from outlining his case to the jury. In August 2014, the court denied Hodits' motion.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Hodits contends that he was entitled to a new trial because (1) the court provided the jury a modified jury instruction that was unnecessarily repetitive; (2) he was prejudiced by the absence of a general verdict form in his favor; and (3) objections Dabney made during Hodits' opening statement, which the court sustained, prevented him from outlining his case to the jury. We consider Hodits' contentions in turn.

¶ 18 A. Hodits' Jury Instruction and Verdict Form Claims

¶ 19 In response to Hodits' jury instruction and verdict form claims, Dabney contends that this court does not have any basis to conclude that the trial court abused its discretion because Hodits failed to provide a sufficient record to establish error. Although we agree with Dabney, we note that this court would have been better served if he had provided some supporting authority for his contention.

¶ 20 More than three decades ago, the supreme court reiterated the following fundamental principle concerning an appellant's burden on appeal:

> "From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant.
>
> As was pointed out in *Chicago City Bank & Trust Co. v. Wilson*[, 86 Ill. App. 3d 452, 454, 407 N.E.2d 964, 966-67 (1980)], an 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, 459 N.E.2d 958, 959 (1984).

¶ 21 In this case, Hodits urges this court to review the propriety of an instruction the trial court provided to the jury and the court's acceptance of verdict forms Hodits tendered. As previously noted, however, Hodits failed to provide a report of proceedings, a bystander's report, or an agreed-upon statements of facts (Illinois Supreme Court Rule 323(a), (c), (d) (eff. Dec. 13, 2005)) documenting (1) the evidence presented to the jury during the three-day trial or (2) the June 11, 2014, jury instruction conference.

¶ 22 In his reply brief, Hodits brushes aside concerns regarding the sufficiency of the record on appeal by asserting, with regard to his jury instruction claim, that a transcript was not required because he was not "contesting the evidence the jury considered at trial in rendering [its] verdict." With regard to his general verdict claim, Hodits asserts—without any legal citation—that "[a]lthough providing [a] transcript of proceedings to the [appellate] court may have been helpful, it was not required." Hodits, however, misapprehends the nature and scope of our review.

¶ 23 Here, Hodits complains about the following modified jury instruction the trial court provided to the jury: "If you decide for the defendant on the question of liability, then your verdict shall be for the defendant." Specifically, Hodits claims that the instruction at issue was "unnecessarily repetitive" and "improperly emphasized" a ruling in Dabney's favor because the court had "already instructed the jury to render a verdict in Dabney's favor if they found [Dabney] not liable." Standing alone, the challenged instruction is a correct statement of law.

However, without the proper context—that is, without a transcript of the evidence presented to the jury—this court cannot determine whether the instruction at issue prejudiced Hodits, as he claims. See *In re James W.*, 2014 IL App (5th) 110495, ¶ 25, 11 N.E.3d 417 (quoting *People v. Mohr*, 228 Ill. 2d 53, 65, 885 N.E.2d 1019, 1025 (2008)) (" 'Instructions convey the legal rules *applicable to the evidence presented at trial* and thus guide the jury's deliberations toward a proper verdict.' " (Emphasis added.)).

¶ 24 As to his general verdict form claim, Hodits takes issue with the trial court's rejection of the verdict forms he tendered and acceptance of the following two verdict forms Dabney tendered:

> "Verdict Form A
>
> We, the jury, find for Michael Hodits and against Steven Dabney and further find the following:
>
> *** Assuming that 100% represents the total combined negligence of all persons whose negligence contributed to the accident, including Michael Hodits and Steven Dabney, we find that the percentage of such negligence attributable to Michael Hodits is _____ percent (%).
>
> * * *
>
> Verdict Form B
>
> We, the jury, find for Steven Dabney and against Michael Hodits."

Hodits asserts that the absence of a general verdict form in his favor—such as verdict form B—

"suggests that regardless of what form the jury uses, Hodits was still somewhat at fault for the collision." Hodits posits that the trial court's decision to accept Dabney's verdict forms and reject his tendered verdict forms—which did contain a general verdict form in his favor—prejudiced him because "the jury was asked to assess [the] amount of [Hodits'] fault from the start."

¶ 25 We reject Hodits' assertion that this court should address his claim in the absence of a transcript of proceedings. Hodits essentially requests that this court reverse the trial court's decision denying his motion for a new trial based on a record that does not contain any information regarding the rationale underlying the court's ultimate decision to accept Dabney's verdict forms. If this court were to conclude that the trial court abused its discretion, as Hodits urges, we would be doing so based on nothing more than sheer speculation. Contrary to Hodits' stance, "[o]n appeal it is always the appellant's burden to provide the court of review with a sufficient record in order to establish error." *Webster v. Hartman*, 195 Ill. 2d 426, 436, 749 N.E.2d 958, 964 (2001). Because Hodits has failed to comply with this fundamental principle, we will not—indeed, we cannot—address the merits of his claim.

¶ 26 B. Hodits' Opening Statement Claim

¶ 27 Hodits contends that he was entitled to a new trial because objections Dabney made during Hodits' opening statement, which the court sustained, prevented him from outlining his case to the jury. We disagree.

¶ 28 "An opening statement is intended to inform jurors of the nature of the action and to provide an outline of what counsel expects admissible evidence at trial to show so the jurors can better understand testimony they will hear during trial[.]" *Auten v. Franklin*, 404 Ill. App. 3d 1130, 1153, 942 N.E.2d 500, 519 (2010). "Argumentative" is defined as "[s]tating not only facts, but also inferences and conclusions drawn from facts." Black's Law Dictionary 114 (8th ed.

2004).

¶ 29 Based on the excerpts of the parties' respective opening statements, we reject Hodits' argument and conclude that the two objections Dabney raised during Hodits' opening statement were appropriately sustained because Hodits began to explain not only the facts that the jury could expect to hear, but also the inferences to be drawn from those facts. Specifically, after informing the jury about facts pertaining to the parties' actions just prior to the January 2012 collision, Hodits attempted to draw an inference from those facts by asserting that "[i]f *** Dabney had simply chosen to yield," which drew an appropriate objection from Dabney. On the second occasion, Hodits explained facts the jury could expect to hear related to his attentiveness just prior to the collision, when he impermissibly concluded that those facts constituted what "a reasonable person is required to do." Dabney immediately raised an objection that these remarks were improper, which was correct under the circumstances. We conclude that the trial court correctly exercised its discretion in sustaining Dabney's objections. Even if we were to agree with Hodits that the objections Dabney raised during Hodits' opening statement prevented him from outlining his case to the jury, Hodits does not cite any case—and we are aware of none—that holds the proper remedy under such circumstances is to reverse and remand for a new trial**.**

¶ 30 Because we conclude that the trial court appropriately exercised its discretion with regard to objections Dabney raised during Hodits' opening statement, we need not consider Dabney's harmless error claim except to note that Hodits, in response to that claim, incorrectly cited *People v. Nitz,* 219 Ill. 2d 400, 410, 848 N.E.2d 982, 989 (2006) for the proposition that Dabney "must *prove beyond a reasonable doubt* that the jury's verdict in his favor would have been the same had the judge overruled his objection during Hodits' opening statement." (Emphasis added.) See *People v. Stull*, 2014 IL App (4th) 120704, ¶ 104, 5 N.E.3d 328 (explaining that

the harmless beyond a reasonable doubt standard of review applies to constitutional errors in criminal cases).

¶ 31 III. CONCLUSION

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

¶ 33 Affirmed.