2016 IL App (1st) 132494-U

FIFTH DIVISION
March 31, 2016

No. 1-13-2494



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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| | ) | Appeal from the |
| DOROTHY A. CAMMON, | ) | Circuit Court of |
| | ) | Cook County |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 10 L 3208 |
| | ) | |
| RUSTAM GEGRAEV, | ) | |
| | ) | Honorable |
| Defendant-Appellee. | ) | Irwin J. Solganick, |
| | ) | Judge Presiding. |

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PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held*: Following a jury trial, the appellate court affirmed the judgment of the circuit court in favor of the defendant in a negligence case, ruling the plaintiff failed to establish: (1) the selection of the jury venire was not random; (2) the trial court should have ordered an investigation of the jury venire selection; (3) she was entitled to a directed verdict; (4) a police officer's testimony regarding the contents of a police report denied her a fair trial; (5) the conduct of opposing counsel denied her a fair trial; (6) the conduct of the trial court denied her a fair trial; (7) the trial court's rulings on objections to videotaped testimony denied her a fair trial; and (8) the costs assessed regarding her posttrial motion should be reversed.

¶ 2 Following a jury trial, plaintiff, Dorothy A. Cammon (plaintiff), appeals orders of the circuit court of Cook County entering judgment in favor of and awarding costs to Rustam Gegraev (defendant) in a negligence case. On appeal, plaintiff asserts numerous errors denied her a fair trial: (1) the jury venire was not randomly selected; (2) the trial court improperly denied her request for an investigation of the jury venire selection; (3) she was entitled to a directed verdict; (4) the trial court failed to strike a witness' testimony; (5) defense counsel's conduct during trial prejudiced her; (6) the trial judge intimidated plaintiff's counsel and fell asleep during the trial; and (7) the trial court erred in its rulings on objections to testimony from her primary physician and a medical expert witness. In addition, plaintiff asserts the order for costs assessed against her in conjunction with the denial of her posttrial motion must be reversed. For the following reasons we affirm the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 On March 12, 2010, plaintiff filed a one-count complaint sounding in negligence against defendant. According to plaintiff's allegations, on March 14, 2008, at approximately 3:30 p.m. she was driving her automobile westbound near 3900 West Grand Avenue in Chicago. Defendant was operating a motor vehicle directly behind her. Due to defendant's negligence, his vehicle struck the rear of her automobile, forcing her automobile into another vehicle directly ahead of her (the 2008 accident). As a result of the 2008 accident, plaintiff sustained serious and permanent personal injuries; incurred present and future pain, suffering and loss of a normal life; and incurred present and future medical costs. On September 21, 2012, defendant filed an answer denying he was negligent and that his alleged negligence caused plaintiff injury. Defendant did not assert an affirmative defense.

¶ 5 A. Pretrial Proceedings

¶ 6 Prior to trial, plaintiff filed motions *in limine* which sought, in pertinent part, to prohibit any mention at trial of: (1) her "prior auto accident, prior lawsuit, and any and all prior injuries"; (2) comparative negligence; and (3) traffic tickets, police reports and testimony from police officers. The motions *in limine* stated that plaintiff's left wrist was fractured in 2006 (the 2006 wrist fracture) and was subsequently reinjured in an automobile accident that occurred in September of 2007 (the 2007 accident), but at the time of the 2008 accident she had minimal discomfort. The motions further asserted that no police officer had visited the scene of the accident and that there was no narrative of the incident in the police report.

¶ 7 During the hearing on the motions *in limine*, defense counsel stated that he possessed answers to interrogatories plaintiff provided in a prior lawsuit regarding the 2007 accident. The answers indicated that plaintiff had injured her left wrist in a manner similar to what was alleged in the present lawsuit and that the wrist required surgery.

¶ 8 The trial judge granted in part and denied in part the motions *in limine*. In granting the motions, the trial judge barred references to: (1) plaintiff's "other lawsuit"; (2) comparative fault or other defenses; and (3) traffic tickets. Defendant, however, was not prohibited from referring to: (1) "other statements" made by plaintiff; (2) the 2007 accident; and (3) prior injuries to parts of plaintiff's body at issue in this case. The trial court further allowed the officer who prepared the police report in this matter to testify; however, the police report could only be utilized "for the limited purpose of refreshing [the officer's] recollection as to any relevant statements [made] by the parties, if his recollection can be refreshed."

¶ 9 Immediately following the hearing on plaintiff's motions *in limine*, the trial court ruled on objections contained within the evidence deposition of plaintiff's primary physician, Dr. Deborah

Manus. Two of these rulings are contested by plaintiff in this appeal. First, the trial court struck the portion of Dr. Manus' testimony regarding whether the treatment provided to plaintiff by others was reasonable and necessary. Second, the court sustained an objection to Dr. Manus' opinion testimony that plaintiff's chronic left wrist pain was related to the 2008 accident. Although the trial court did not expressly state the basis for these rulings, defense counsel objected in both instances that the testimony was hearsay, lacked foundation, and was not properly disclosed during discovery.

¶ 10 The trial court next ruled on the objections contained within the evidence deposition of plaintiff's orthopedic surgeon, Dr. Samuel J. Chmell. The court struck Dr. Chmell's testimony that the past and present charges for plaintiff's medical treatment were reasonable and necessary, as plaintiff had failed to previously disclose the substance of Dr. Chmell's opinion.

¶ 11 B. Jury Selection

¶ 12 On January 17, 2013, jury selection commenced. The trial court began jury selection by asking the venire general questions as a group. Thereafter, the trial court dismissed seven jurors for cause. The venire was then broken down into two groups of 12. Counsels were allowed 10 minutes to question each group. After *voir dire*, the court tendered panels of four jurors at a time. Plaintiff and defendant were each given five preemptory challenges. The first panel of four proposed jurors was accepted by both parties. During the selection of the second panel, plaintiff excused three potential jurors and defendant excused one juror before the panel was accepted by both parties. A third panel of four potential jurors was then presented. Plaintiff utilized her remaining preemptory challenges and defendant excused four potential jurors. The third panel was accepted by both sides. Neither the trial court nor either counsel asked the potential jurors whether they identified with a particular race or underrepresented group.

Accordingly, the record is silent as to this aspect of the jury selection process. The record, however, does reflect the last names of those who served on the jury: Rivera, Haerle, Robles-Aquino, Palma, Walsh, Bedoe, Gallaher, Barillas, Galloway, Nunez-DeLeon, Wright, and Aranda.

¶ 13 C. Trial

¶ 14 The following witnesses testified at trial on behalf of the plaintiff: (1) defendant, as an adverse witness; (2) plaintiff; (3) Dr. Deborah Manus, plaintiff's general practitioner; (4) Dr. Samuel Chmell, an orthopedic surgeon; and (5) Pamela Jo Chwala, a certified registered rehabilitation nurse.[1] Defendant called two witnesses: (1) plaintiff, as an adverse witness; and (2) Officer David Pitzer.

¶ 15 1. Plaintiff's Case-in-chief

¶ 16 a. Defendant

¶ 17 At trial, plaintiff first called defendant who testified as an adverse witness. According to defendant, on the afternoon of March 14, 2008, he was driving westbound on Grand Avenue. The weather was warm and dry. He observed plaintiff's automobile in front of him driving at approximately 5 miles per hour, keeping pace with traffic. Defendant admitted he had testified in a prior deposition that he took his eyes from the road for "a couple of seconds." Defendant's vehicle then struck plaintiff's automobile, which in turn struck the vehicle in front of plaintiff. Prior to impact, defendant did not sound his horn or swerve to avoid colliding with plaintiff's automobile.

[1] The videotaped testimony of Drs. Manus and Chmell is not included in the record on appeal. Our summary of their testimony is based on the transcripts of the videotapes which were included in the record and were marked to reflect the trial judge's pretrial evidentiary rulings. Due to the fact these doctors testified by way of evidence deposition, the record does not indicate that the trial court qualified them as experts.

¶ 18 After plaintiff's inquiry, the witness was tendered to the defense. The trial judge allowed defense counsel to read certain portions of defendant's deposition into the record. According to defendant's deposition, defendant testified that the sun was shining in his eyes and so he attempted to open his sun visor. It was at that moment when he observed plaintiff's automobile stopped in front of him. Defendant applied his brakes, but his vehicle nevertheless struck plaintiff's automobile.

¶ 19 b. Plaintiff

¶ 20 At the time of trial plaintiff was a 67-year-old retired escrow officer. Plaintiff's testimony was similar to defendant's version of events. She also testified that when her automobile was struck, she extended her left hand against the dashboard to brace herself. Her left hand went numb and she experienced pain. In addition, her left hip struck the interior of the vehicle's driver's-side door. Plaintiff later discovered a large bruise on her left shoulder.

¶ 21 Both parties exited their vehicles after the accident. According to plaintiff, defendant apologized. Plaintiff was already experiencing pain in her left wrist, left shoulder, and left hip. She proceeded to a hospital, but she left after two hours because the emergency room was crowded. She telephoned her primary care physician, Dr. Manus, and obtained an appointment for March 18, 2008. Following the appointment, plaintiff received physical therapy at Athletico for her left shoulder and wrist.

¶ 22 In April, May, June, and September of 2008, plaintiff visited Dr. Victor Romano, an orthopedist, for an evaluation of her left shoulder and wrist. Dr. Romano recommended an electromyography (EMG) be performed on plaintiff.[2] She was also referred by Dr. Manus to a

[2] Electromyography is a diagnostic procedure to assess the health of muscles and the nerve cells that control them.

second orthopedist, Dr. Paul Prinz,[3] who ordered a magnetic resonance imaging scan (MRI).[4] Plaintiff informed Dr. Prinz that she experienced pain extending from two fingers of her left hand through her arm and shoulder into her neck. She received injections from Dr. Prinz, which temporarily alleviated her wrist pain. A group exhibit admitted into evidence included plaintiff's bills for the medical treatment she received following the accident.

¶ 23 Plaintiff further testified that her left wrist continued to have "good days and bad days." On bad days, she experienced "a lot" of wrist pain; she could not carry groceries up the stairs to her home and could not operate a vacuum cleaner. She also experienced difficulty combing her hair and buttoning her clothes using her left hand.

¶ 24 On cross-examination, plaintiff testified that before she visited the hospital, she drove to the police station because the police did not come to the scene of the accident. She acknowledged that she did not seek medical treatment between her departure from the hospital and her initial visit with Dr. Manus, which occurred four days later.

¶ 25 Defense counsel also cross-examined plaintiff regarding a "questionnaire" she completed regarding the 2007 accident involving a defendant named Coward.[5] The trial judge overruled an objection to defense counsel reading one of plaintiff's answers from the questionnaire that stated plaintiff's left shoulder, arm, wrist, and hand were injured in the impact caused by "defendant Coward's car."[6] Plaintiff acknowledged that she answered she had pain and disability in her left

[3] Dr. Prinz's name is spelled in various ways in the depositions and the trial transcript. For the purpose of simplicity, this order adopts the spelling employed by plaintiff's counsel in pretrial discovery documents.

[4] Magnetic resonance imaging is a technique that uses a magnetic field and radio waves to create detailed images of the organs and tissues within your body.

[5] Although described to the jury as a questionnaire, the document consisted of plaintiff's answers to interrogatories propounded in the prior lawsuit. The document was one of the subjects of plaintiff's motions *in limine*. The record does not contain Coward's first name.

[6] The answer referring to "defendant Coward" was mentioned on two other occasions

wrist after the 2007 accident. She further testified that some of the medical bills she presented in this case were also listed in answers to the questionnaire as medical expenses related to the 2007 accident.

¶ 26 On redirect examination, plaintiff testified that the 2007 accident created a "clicking and clunking pain" in her left wrist, which she did not attribute to the 2008 accident. After receiving physical therapy, her left wrist pain was reduced to a "one out of 10" at the time of the 2008 accident. She also testified that she had informed her doctors of both accidents.

¶ 27 c. Dr. Deborah Manus

¶ 28 The videotaped testimony of Dr. Manus, plaintiff's primary physician, was admitted into evidence and published to the jury. Dr. Manus testified that after her March 18, 2008, examination of plaintiff, she initially recommended ibuprofen, heat therapy, and that plaintiff maintain an active range of motion in her left wrist. She instructed plaintiff to contact her if there was no improvement after two weeks. According to Dr. Manus, plaintiff subsequently consulted with Dr. Romano, who referred plaintiff to a physical therapist.

¶ 29 Dr. Manus additionally reviewed notes prior to her testimony that were provided by Dr. Prinz along with the physical therapy records provided by Athletico. She opined that plaintiff: (1) presented to her a few days after the March 14, 2008, automobile accident complaining of pain; (2) had continuing wrist pain; and (3) spent time and underwent many procedures in order to attempt to improve her symptoms.

¶ 30 On cross-examination, Dr. Manus acknowledged her notes from the March 18, 2008, examination indicated complaints of left hip and shoulder pain, with no notation regarding arm or wrist pain. Her notes for December 31, 2008, indicated plaintiff complained of shoulder pain,

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during the cross-examination.

with no indication of left wrist pain. Her notes for June 2009 and June 2010 lacked any mention of complaints of left wrist pain and they also indicated a painless range of motion of all major muscle groups and joints. Dr. Manus further acknowledged she was paid a fee for her testimony in this matter.

¶ 31 d. Dr. Samuel Chmell

¶ 32 Dr. Chmell, an orthopedic surgeon, testified by way of a videotaped evidence deposition which was admitted into evidence and published to the jury. Dr. Chmell testified regarding his qualifications and his review of the records generated by other medical providers regarding plaintiff's treatment. Specifically, Dr. Chmell reviewed the records of: Dr. Manus; Dr. Craig Voldarek;[7] Dr. Prinz; Dr. Romano; and Athletico. He also reviewed plaintiff's April 16, 2009, and July 26, 2011, MRI scans; plaintiff's July 26, 2011 EMG, and her December 6, 2011, cervical spine MRI scan.

¶ 33 Dr. Chmell testified that he first examined plaintiff on January 28, 2010. In reviewing a MRI scan of plaintiff's wrist taken on April 16, 2009, Dr. Chmell observed swelling in the bone, ligament damage, and degeneration in the fibrocartilage complex. He later examined a MRI scan of plaintiff's wrist taken on July 26, 2011, and he observed cystic changes in the bones, as well as a ganglion cyst that developed on the wrist joint. He opined the conditions observed in both MRI scans were causally related to the 2008 accident. According to Dr. Chmell, the changes reflected in the MRI scans indicated an aggravation or progression of arthritis of the wrist related to the 2008 accident.

¶ 34 Dr. Chmell further opined that plaintiff experienced diminished motion, diminished strength, muscle atrophy, diminished sensation, and carpal tunnel syndrome in her left hand and

[7] Dr. Voldarek performed plaintiff's EMG procedure.

wrist. According to Dr. Chmell, these disabilities were causally related to the 2008 accident. Dr. Chmell's opinion relied upon plaintiff's medical history, as well as records from Drs. Manus, Romano, and Prinz.

¶ 35 Regarding the treatment provided and recommended by Dr. Prinz, Dr. Chmell testified that Dr. Prinz ordered tests for plaintiff, which included x-rays, an MRI scan of her wrist, and a nerve test of her left upper extremity. Dr. Prinz subsequently provided plaintiff with physical therapy and injections for her pain. Dr. Prinz also recommended arthroscopic surgery for plaintiff's left wrist. According to Dr. Chmell, the surgery would involve making several holes in the skin at the wrist joint and employing an arthroscope to observe and correct any abnormalities inside the wrist, such as bone spurs or loose cartilage. Dr. Chmell opined that such surgery was reasonable and necessary as a result of the injuries plaintiff sustained in the 2008 accident. Dr. Chmell stated that it would be a two-hour surgery.

¶ 36 During his testimony, Dr. Chmell additionally recommended plaintiff undergo carpal tunnel release surgery as a result of the 2008 accident. He based his opinion on plaintiff's continuing complaints regarding her left wrist, as well as Dr. Romano's diagnosis of left carpal tunnel syndrome. The carpal tunnel release surgery, which could be performed at the same time as the arthroscopic surgery, would involve cutting a ligament to reduce pressure on the median nerve caused by the swelling of plaintiff's wrist. This procedure would add approximately ten minutes to the total length of the surgery.

¶ 37 According to Dr. Chmell, after the surgery, plaintiff would require monthly doctor appointments for six months. She would also require four to six weeks of physical therapy. Her wrist would be immobilized for three weeks after surgery. Dr. Chmell opined that plaintiff would experience moderate to severe pain for two to three days following the surgery. He

testified the surgery would be reasonable and necessary to treat the injuries plaintiff sustained in the 2008 accident.

¶ 38 On cross-examination, Dr. Chmell acknowledged that he received the medical records he reviewed from plaintiff's counsel. He conducted no "independent investigation" of the 2007 or 2008 accidents. He also acknowledged that plaintiff reported injuring her wrist in both accidents in a similar manner, *i.e.* plaintiff extended her left hand to stop the forward motion of her body. The records reviewed by Dr. Chmell indicated that after plaintiff completed physical therapy for the 2006 wrist fracture, she did not experience any problems with her left hand and wrist until the 2007 accident. Plaintiff informed Dr. Chmell that after the 2007 accident, she experienced continued problems with her left hand and wrist that were worsened by the 2008 accident.

¶ 39 On redirect examination, Dr. Chmell testified that records from Athletico indicated plaintiff experienced minimal pain upon the end of her physical therapy in December 2007. He reiterated that his opinions were based upon a full knowledge of plaintiff's medical records, including those related to the 2007 accident and 2006 wrist fracture.

¶ 40 When Dr. Chmell's videotaped testimony was published to the jury, some portions had to be read aloud by plaintiff's counsel due to technical issues. The first portion read aloud addressed the worsening of plaintiff's arthritis which was indicated in the 2011 MRI scan. The second portion was read aloud by defense counsel and involved cross-examination in which Dr. Chmell acknowledged he was being paid for his time. Plaintiff objected, claiming that the live reading placed undue emphasis on this second portion of Dr. Chmell's testimony. The trial court overruled the objection.

¶ 41 Following Dr. Chmell's videotaped testimony, and outside the presence of the jury, the trial judge expressed concerns about the editing of the videotape. He observed there were at

least 12 occasions where answers that he had ordered be removed nevertheless remained in the videotape. He also observed that although the jury indicated it could hear Dr. Chmell's testimony, the cross-examination was barely audible, while the direct and redirect examinations were clearly audible. He noted that one might speculate the volume problems were intentional. Plaintiff's counsel asked to respond. The trial judge stated that he was not requesting a response. Plaintiff's counsel nevertheless responded: "Certainly, nothing like that was done." The trial judge told plaintiff's counsel to "shut up," adding that he was placing the matter on the record and that he was upset that a number of the portions of the videotape were not removed in accordance with his pretrial rulings.

¶ 42 e. Pamela Jo Chwala

¶ 43 Plaintiff then presented the testimony of Pamela Jo Chwala, a certified registered rehabilitation nurse. Chwala testified that, in addition to being a registered nurse, she was also a certified case manager, certified life planner, and the owner of the company Rehabilitation Nursing Resource. She explained that, as part of her work, she evaluates and assesses individuals with disabilities to determine the types of supportive services they may require.

¶ 44 Plaintiff tendered Chwala as an expert to testify as to the cost of certain surgical and medical procedures. According to Chwala, she frequently testified regarding the fair and reasonable charges for various medical, surgical and physical therapy procedures. She opined that the arthroscopic and carpal tunnel surgery in this case would cost $6,000 for the first 15 minutes and $3,500 for each subsequent quarter-hour. She also opined that three weeks of physical therapy would cost between $5,500 and $6,000.

¶ 45 On cross-examination, Chwala acknowledged that she was not a surgeon or a surgical nurse. Over plaintiff's objection, she was questioned regarding the cost of an electrocardiogram

(EKG), blood typing, and an MRI scan. She testified that her calculations of these costs were based on information provided to her by plaintiff's counsel. The surgical fee was based on an estimate provided by Dr. Prinz.

¶ 46 Plaintiff did not re-examine Chwala. Thereafter, outside the presence of the jury, the trial judge and counsel for both sides conducted a hearing on jury instructions. Plaintiff's counsel did not request special findings be submitted to the jury. The trial judge also denied plaintiff's motion for a directed verdict on the issues of liability and negligence.

¶ 47 In the presence of the jury, plaintiff's counsel announced that "the Department of Social Security Life Tables of the United States" indicated the life expectancy of a 67-year-old woman such as plaintiff was 17.62 years. The trial judge explained to the jury that this announcement was an exception to the general rule that statements of counsel were not evidence. Plaintiff rested her case.

¶ 48 2. Defendant's Case-in-chief

¶ 49 a. Plaintiff

¶ 50 Defendant called plaintiff to testify as an adverse witness. Plaintiff acknowledged driving to the police station after the automobile accident. She did not recall the police officer asking if she was injured and responding, "no."

¶ 51 b. Officer David Pitzer

¶ 52 Chicago police officer David Pitzer testified that he prepared a police report regarding the 2008 accident. He also testified that he did not remember anything about the report and that reading the report would not refresh his recollection regarding the incident. He further testified, however, that he always asked the parties whether they were injured. Over plaintiff's objection, Officer Pitzer testified that he could not recall what plaintiff said, but the report indicated that

there was "no injury." Defendant then rested his case.

¶ 53 3. Plaintiff's Rebuttal

¶ 54 In rebuttal, plaintiff recalled defendant as an adverse witness. Defendant acknowledged that in his prior deposition he testified that the police did not inquire whether the parties were injured. He also testified that his command of the English language was much worse at the time of the 2008 accident. In his prior deposition, defendant stated that he did not hear the conversation between plaintiff and the police officer.

¶ 55 Following closing arguments and jury instructions, the jury deliberated on the matter. The jury sent the trial judge a note inquiring about the origins of the questionnaire regarding the 2007 accident, as well as inquiring whether plaintiff was right-handed or left-handed. Without objection, the trial judge informed the jurors that they should base their decision on the evidence and instructions already provided to them. The jury returned a general verdict in favor of the defendant.

¶ 56 On January 22, 2013, the day the jury rendered the general verdict, the trial judge entered a judgment on the verdict, "plus costs" in favor of the defendant. On February 7, 2013, the trial judge entered an order for costs against plaintiff in the amount of $1,010.40.

¶ 57 D. Posttrial Proceedings

¶ 58 Plaintiff filed a posttrial motion pursuant to section 2-1202 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1202 (West 2012)) seeking a judgment *n.o.v.* or, in the alternative, a new trial. Plaintiff asserted that the venire from which her jury was drawn was not randomly selected. Specifically, plaintiff alleged the venire consisted of a disproportionate number of individuals who had "unusually high profile positions" which included: (1) a budget director for Cook County; (2) a retired chief operating officer (CEO) or founder of a large construction and

demolition company; (3) the CEO of a restaurant chain; (4) the CEO of a large nonprofit organization owned by Illinois Masonic Hospital that served the Hispanic community; (5) the director of the office of economic opportunity at a large university; and (6) an executive committee member of a large organization for the advancement of people of a particular national descent. She also asserted generally that "others of similar unusual backgrounds and credentials" were likely part of the jury venire. Plaintiff alleged that the trial judge terminated counsel's questioning of several of these members of the venire, such that counsel was unable to discover during *voir dire* whether other members of the venire were CEOs of large organizations.

¶ 59 According to the posttrial motion, the CEO of the large construction and demolition company, the CEO of the large nonprofit organization, the university director, and the executive committee member ultimately served on the jury. Plaintiff asserted in passing that defendant used his five peremptory challenges to strike five of the seven African-Americans on the venire panels from which the jury was drawn. Although plaintiff used her peremptory challenges to strike the budget director for Cook County and an attorney who worked in claims evaluation, she claimed she might have used her three other peremptory challenges differently "had she known of the unusually high profile nature of the[] four" who ultimately served on the jury.

¶ 60 Plaintiff also claimed the trial judge erred in: (1) denying her motion for a directed verdict on the issues of liability and negligence; (2) denying her motion to strike Officer Pitzer's testimony; (3) instructing her counsel to "shut up" and falling asleep during the publication of Dr. Chmell's videotaped testimony; and (4) making certain evidentiary rulings regarding Drs. Manus and Chmell's testimonies.

¶ 61 Plaintiff additionally argued that she was denied a fair trial because defense counsel improperly: (1) violated the *in limine* orders; (2) misrepresented the evidence during closing

argument; (3) cross-examined Chwala beyond the scope of direct examination; (4) asserted that defendant demanded a jury trial; and (5) suggested Dr. Chmell was paid to testify a particular way.

¶ 62 In response, defendant argued that plaintiff failed to: (1) list all of the prospective jurors selected for the venire; (2) submit any statistics suggesting the venire was not randomly selected; and (3) make herself present when the venire was selected, thereby forfeiting any objection to the composition of the venire. He also argued that plaintiff failed to explain what further examinations of the venire could have revealed. He further argued that plaintiff's claims regarding particular jurors were unsupported by the record.

¶ 63 Defendant also maintained that a directed verdict was unwarranted because plaintiff's case-in-chief permitted the jury to conclude defendant was not negligent. Moreover, plaintiff failed to specify which objections to Officer Pitzer's testimony were improperly overruled. Defendant argued he was permitted to lay a foundation for a past recollection recorded during the police officer's testimony. He maintained that plaintiff's objections to the rulings on the deposition testimony were nonspecific and not supported by case law. He also denied plaintiff's claims of misconduct by the trial judge and defense counsel.

¶ 64 Plaintiff, in reply, argued that she had not forfeited her claims regarding the composition of the jury venire and stating that she was unsure of the propriety of naming specific venire members in her posttrial motion. She also asserted that the trial judge's *in limine* order did not allow Officer Pitzer's testimony to be admitted as a past recollection recorded.

¶ 65 Following a two-day hearing, the trial court denied plaintiff's posttrial motion. In considering and rejecting plaintiff's claim regarding the composition of the jury venire, the court stated:

> "With regard to the jurors, there is no reason to believe that the jurors were selected to appear in this Court's courtroom in any way other than at random in selection. There has been no showing that -- nor even an inference that the method was anything other than random, other than *** that some of the jurors may have been too intelligent or too sophisticated or have business backgrounds or [were] too well-educated. I don't hear people make that argument when you get a group of people coming in that aren't well-educated or aren't sophisticated in business.
>
> I think doing an independent investigation of the jurors is improper. It should be considered improper."

The trial judge additionally observed that plaintiff made no objection during jury selection that the defense was excluding African-Americans.

¶ 66 The trial judge further found that the jurors were never informed plaintiff was involved in a prior lawsuit. Regarding the claims of misconduct by defense counsel, the trial judge observed that some of plaintiff's objections were sustained and the jury was instructed to disregard the answers and argument in such instances. The trial judge reaffirmed his rulings regarding the deposition testimony from Drs. Manus and Chmell. He acknowledged that he had instructed plaintiff's counsel to "shut up" outside the presence of the jury and reiterated the circumstances surrounding the comment. The trial judge stated that if he fell asleep during the showing of the videotaped testimony, "it wasn't more than a minute." He agreed, however, that he may have been turned away from the jury with his eyes closed while the videotape was played for the jury. Accordingly, the trial judge denied the posttrial motion in all respects. Thereafter, plaintiff filed her notice of appeal.

¶ 67 E. Bystander's Report

¶ 68 On August 29, 2013, plaintiff filed a proposed bystander's report for approval by the circuit court. The proposed bystander's report was organized into three sections. The first section asserted that the transcript of proceedings on *voir dire* failed to record that plaintiff used her second peremptory challenge to strike a particular venire member from the jury. The second section asserted that the trial transcript failed to indicate that plaintiff's counsel informed the court and defense counsel of a technical problem with a portion of Dr. Chmell's videotaped testimony. Plaintiff also sought to insert"[The judge was roused from sleep]" into the transcript, although the proposed bystander's report does not otherwise refer to the trial judge sleeping. The third section asserted that the trial transcript failed to record plaintiff's oral motion to strike Officer Pitzer's testimony.

¶ 69 After hearing arguments of counsels, the trial court granted plaintiff's motion to approve the bystander's report in part. The trial judge ruled that the name of the juror struck by plaintiff should be reflected in the record. He also granted the motion with regard to the exchange among the trial judge and counsel prior to the publication of Dr. Chmell's videotaped deposition testimony. He further granted the motion to include plaintiff's oral motion to strike Officer Pitzer's testimony. The trial judge did not issue a ruling, however, regarding whether he fell asleep during the videotaped testimony, but acknowledged that if he had fallen asleep "it wasn't more than a minute." The trial judge entered an order reflecting these rulings on the same date.

¶ 70 II. ANALYSIS

¶ 71 On appeal, plaintiff challenges the denial of her posttrial motion for directed verdict, motion for judgment *n.o.v.*, and motion for a new trial. Specifically, plaintiff argues: (1) the jury venire was not randomly selected; (2) the trial court erred in denying plaintiff an opportunity to

conduct an investigation of the jury venire selection; (3) she was entitled to a directed verdict; (4) the trial court erred in failing to strike Officer Pitzer's testimony; (5) defense counsel's misconduct prejudiced her right to a fair trial; (6) the trial judge intimidated plaintiff's counsel and fell asleep during the trial; (7) the trial judge erred in his ruling on objections to testimony from Dr. Manus and Dr. Chmell; and (8) the order for costs assessed against plaintiff in conjunction with the denial of her posttrial motion must be reversed. We address plaintiff's contentions in turn.

¶ 72 A. Standard of Review

¶ 73 In this appeal, plaintiff contests the rulings of the trial court regarding the denial of her motion for a directed verdict, motion for judgment *n.o.v.*, and motion for a new trial. There are distinct standards to be used by the trial court in deciding whether to grant these motions as explained below.

¶ 74 1. Standard Governing a Motion for Directed Verdict and Judgment *N.O.V.*

¶ 75 Trial courts apply what is known as the *Pedrick* standard when deciding a motion for directed verdict or a motion for judgment *n.o.v.* See *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). Under that standard, a directed verdict or a judgment *n.o.v.* is appropriate " 'only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 88 (quoting *Pedrick*, 37 Ill. 2d at 510). In ruling on these motions, "a court does not weigh the evidence, nor is it concerned with the credibility of the witnesses; rather it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion." *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). "Although motions for directed verdicts and motions for

judgments *n.o.v.* are made at different times, they raise the same questions and are governed by the same rules of law." *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37.

¶ 76 "A directed verdict is granted improperly where 'there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome.' " *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444, 460 (2004) (quoting *Maple*, 151 Ill. 2d at 454 (1992)). "[A] motion for judgment notwithstanding the verdict presents a question of whether, considering the evidence and all reasonable inferences in the light most favorable to the [opponent], there is a total failure or lack of evidence to prove any element of the plaintiff's case." *Spiegelman v. Victory Memorial Hospital*, 392 Ill. App. 3d 826, 841 (2009). This is a very high standard where "[t]he trial court, or for that matter, a reviewing court, is not free to reweigh the evidence and substitute its judgment for that of the jury because the court feels a different result is more reasonable." *Hamilton v. Hastings*, 2014 IL App (4th) 131021, ¶ 23.

¶ 77 We review a trial court's decision on a motion for directed verdict or judgment *n.o.v. de novo*. *Lawlor*, 2012 IL 112530, ¶ 37.

¶ 78 2. Standard Governing a Motion for a New Trial

¶ 79 In contrast, a motion for a new trial will be granted, and a new trial ordered, where the verdict is contrary to the manifest weight of the evidence. *Id.* ¶ 38. A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary and not based upon any of the evidence. *Maple*, 151 Ill. 2d at 454. "The application of this standard is addressed to the sound discretion of the trial court." *Hamilton*, 2014 IL App (4th) 131021, ¶ 26. The trial judge, when ruling on a motion for

a new trial, "may not reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court feels that other results are more reasonable. [Citation.] Thus, a trial court may not set aside a verdict merely to achieve more reasonable results." (Internal quotation marks omitted.) *Redmond v. Socha*, 216 Ill. 2d 622, 652 (2005) (quoting *Maple*, 151 Ill. 2d at 452).

¶ 80 A reviewing court will not reverse the trial court's ruling on a motion for a new trial unless it is affirmatively demonstrated that the trial court abused its discretion. *Lawlor*, 2012 IL 112530, ¶ 38. "In determining whether a trial court abused its discretion, the reviewing court should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial." *Maple*, 151 Ill. 2d at 455. In addition, "it is important to keep in mind that the presiding judge in passing upon the motion for a new trial has the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility." (Internal quotation marks omitted.) *Id.* at 456 (quoting *Buer v. Hamilton*, 48 Ill. App. 2d 171, 173-74 (1964)).

¶ 81 B. Jury Selection

¶ 82 Plaintiff first asserts that she was denied a fair trial because the venire from which her jury was chosen could not have been randomly selected. Specifically, plaintiff maintains that "[u]p to 25% or more of the first twenty-four veniremen and venirewomen were individuals with high profile employment." In addition, plaintiff contends the venire, and ultimately the jury, consisted of a disproportionate number of "white Hispanics." For the first time on appeal, plaintiff argues that the 2010 census indicated Cook County consisted of 12.5% "white Hispanic" individuals whereas "white Hispanics" made up 29.17% of the first 24 individuals in the venire. According to plaintiff, six jurors were "white Hispanic" based on their last names: Barillas,

Nunez-DeLeon, Palma, Robles-Aquino, Rivera, and Aranda. She asserts that the nonrandom jury selection violated the equal protection clause of the fourteenth amendment to the United States Constitution. U.S. Const., amend. XIV.

¶ 83 "Because an equal protection claim is a constitutional question, our review is *de novo*." *People v. Hollins*, 366 Ill. App. 3d 533, 538 (2006).

¶ 84 "The United States Supreme Court has repeatedly held that the equal protection clause of the fourteenth amendment prohibits the exclusion of any individual juror from a jury on account of his or her race." *Id.* The Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) (considering a claim of discrimination against Mexican-Americans in the grand jury selection process), set forth the test to be utilized in determining whether a defendant has made a *prima facie* showing of discrimination resulting in an equal protection violation. It is the defendant's burden to demonstrate an equal protection violation has occurred, *i.e.*, that the procedure employed resulted in substantial underrepresentation of his or her race or of the identifiable group to which the individual belongs. *Id.* To meet this burden, the defendant must first establish that "the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Id.* Second, the defendant must prove the degree of underrepresentation "by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, *over a significant period of time*." (Emphasis added.) *Id.* According to the United States Supreme Court, "a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. [Citations.] Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case." *Id.* at 494-95.

¶ 85 Plaintiff relies on *Hollins*, to support her position; however, the facts surrounding *Hollins* are quite distinguishable from the facts of the case at hand. In *Hollins*, after a jury found the defendant guilty, the defendant filed a motion for a new trial asserting that the odd distribution of individuals from traditionally underrepresented groups suggested that the selection of the jury venire was not random. *Hollins*, 366 Ill. App. 3d at 535. The trial court continued the case for additional investigation and evidence. *Id.* at 536. According to the reviewing court, "[a]s a result of the concerns raised in this case and in other Kankakee County cases, an administrative investigation was conducted concerning the selection of jury panels in the county." *Id.* at 536-37. This investigation did not commence until two months after the defendant's jury trial concluded. *Id.* at 537. "The investigation revealed that the assignment of potential jurors to jury panels during the period of July 21, 2003, through June 7, 2004, had been intentionally manipulated by the Kankakee County jury coordinator in an effort to change several panels' racial composition." *Id.* The trial court reviewed the report, admitted it into evidence, and made the following findings of fact: (1) the jury coordinator had "intentionally manipulated the assignment of potential jurors to panels to increase the number of individuals from traditionally underrepresented groups in the defendant's panel"; (2) the coordinator repeatedly lied to investigators concerning her actions; and (3) as a result of the jury coordinator's actions, the first 16 potential jurors who were called during defendant's *voir dire* were individuals from traditionally underrepresented groups. *Id.* Despite these findings, the trial court found the defendant was not deprived of a fair and impartial jury. *Id.* at 538. The court further held that the defendant had waived any right to challenge the composition of the jury venire when he failed to object at the time of jury selection. *Id.*

¶ 86 The *Hollins* court concluded the manipulation violated the equal protection clause of the

fourteenth amendment. *Id*. at 540. In reaching this conclusion, the reviewing court undertook a *Castaneda* analysis and determined that: (1) the defendant proved that Caucasians are a cognizable racial group; (2) the Kankakee County jury coordinator systematically excluded a number of Caucasians from the defendant's jury venire; and (3) the proportion of Caucasians called to serve as jurors on his venire were underrepresented in relation to the number of Caucasians found in the county's general population. *Id.* at 539-40. The reviewing court, however, expressly noted that "we do not need any percentages to come to the conclusion that certain individuals were intentionally excluded from defendant's jury venire on the basis of race" due to the intentional and arbitrary manipulation of the racial composition of the defendant's jury venire by the jury coordinator. *Id.* at 540. According to the reviewing court, although there is no requirement that there be an "exact statistical match between the jury pool and the county population," the randomness of the process was eliminated by the deliberate manipulation of the jury pool. *Id.* In addition, the *Hollins* court went beyond the equal protection ruling in *Castaneda*, holding "that any arbitrary manipulation of any jury pool on the basis of race[] constitutes an actionable due process violation[,] *** regardless of whether it was one individual from traditionally underrepresented groups that was arbitrarily excluded or in the alternative, the entire group." *Id.* at 542.

¶ 87 Plaintiff's argument that she was denied a fair trial because the venire from which her jury was chosen could not have been randomly selected fails for the following reasons. First, plaintiff's posttrial motion focused on the occupations and credentials of identified venire members, not on their racial characteristics.[8] Second, plaintiff argues for the first time on appeal

[8] We note that plaintiff inaccurately described the occupations of certain veniremen and women in her posttrial motion and on appeal. According to the record, the CEO of the nonprofit organization was also a retired nurse's aide with a high school education. In addition, there is no

that "white Hispanics" were *overrepresented* in the jury venire. Plaintiff does not specifically raise a claim that members of a particular group were *underrepresented* in the jury venire. See *Castaneda*, 430 U.S. at 494. Third, assuming for the sake of argument that plaintiff is claiming that African-Americans were underrepresented in the venire,[9] plaintiff produced no statistical evidence suggesting this fact was true over a significant period of time, as required by *Hollins* and *Castaneda*. Indeed, neither plaintiff's posttrial motion nor her briefs on appeal contained any statistical data regarding the racial composition of the venire or the total population over a significant period of time. Lastly, plaintiff failed to identify a selection procedure that was susceptible of abuse or was not racially neutral. Accordingly, plaintiff failed to present a *prima facie* case of an equal protection violation. See *Castaneda*, 430 U.S. at 494-95.[10]

¶ 88 Plaintiff further contends that the trial judge abused his discretion by claiming he had no authority to order an investigation of the jury venire selection. Plaintiff relies upon the rule that it is error when a trial court refuses to exercise discretion in the erroneous belief that it has no discretion as to the question presented. *People v. Autman*, 58 Ill. 2d 171, 176 (1974). In *Autman*, the trial judge improperly responded to a request from the jury to have the court reporter read back testimony by indicating it was not permissible. *Id*. at 176-77. Conversely, where the

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evidence in the record: (1) to support plaintiff's allegation that one juror is an "executive committee member" of a "large organization for advancement of people of a particular national descent"; or (2) of the *voir dire* of the alleged restaurant CEO.

[9] Plaintiff alludes in passing to her accusation that defense counsel struck African-Americans when selecting jurors from the venire. As the trial judge noted, during jury selection, plaintiff did not raise a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), which applies to civil trials pursuant to *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991). Moreover, a claim regarding selection of jurors from the venire is not a claim regarding the selection of the venire.

[10] In addition, as plaintiff failed to establish any arbitrary manipulation of the jury pool on the basis of race, plaintiff's one-sentence due process claim also fails. See *Hollins*, 366 Ill. App. 3d at 542.

trial court's comments do not establish that the trial judge had a mistaken belief about his or her discretion, cases like *Autman* are distinguishable. See, *e.g.*, *People v. Abrego*, 371 Ill. App. 3d 987, 996-97 (2007).

¶ 89 Here, the trial judge initially stated that "doing an independent investigation of jurors after the trial is improper" and immediately thereafter stated, "It should be considered improper." The trial judge made those comments only after determining there were no circumstances in the record from which it could be inferred that the venire was not the product of random selection.[11] Thus, the trial judge's comments do not establish that the judge believed he had no discretion on the question generally. Rather, the trial judge's comments may be read as a reaction to plaintiff's failure to present the basis for an investigation. As the record does not demonstrate the trial judge had a mistaken belief about his discretion, plaintiff's argument fails. See *Abrego*, 371 Ill. App. 3d at 997.

¶ 90 C. The Motion for a Directed Verdict

¶ 91 Plaintiff claims that the evidence presented in her case-in-chief established that there was no question as to defendant's negligence; therefore, the trial court erred by failing to direct a verdict on the issue of liability. As previously discussed, a directed verdict is appropriate " 'only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Jablonski*, 2011 IL 110096, ¶ 88 (quoting *Pedrick*, 37 Ill. 2d 494, 510 (1967)). Our standard of review is *de novo*. *Lawlor*, 2012 IL 112530, ¶ 37.

¶ 92 In an automobile negligence case, the burden is on the plaintiff to establish a negligence

[11] The lack of a record suggesting racial discrimination distinguishes this case from *Hollins*. In this case, plaintiff presented a claim that focused on the credentials and occupations of several venire members, rather than the sort of lopsided racial distribution that triggered an investigation in *Hollins*.

cause of action. Plaintiff must prove that defendant was negligent and that defendant's negligence was a direct and proximate cause of an injury sustained by plaintiff. *Hamilton v. Hastings*, 2014 IL App (4th) 131021, ¶ 35. The facts established from defendant's own testimony that he took his eyes off the road for "a couple of seconds" to adjust his sun visor because the sun was in his eyes and as a result, struck the rear of plaintiff's vehicle that was stopped in front of him. Defendant's testimony was basically an admission of negligence, and the trial court erred in not granting plaintiff's motion for a directed verdict on the issue of negligence.

¶ 93 Our analysis, however, does not stop here. For the purposes of this case, it really did not matter that defendant was negligent if the jury was unconvinced that defendant's negligence caused plaintiff's injuries. We presume, from the general verdict, in favor of defendant that the jury found in defendant's favor on every defense raised, including the defense of lack of causation and injury. *Holloway v. Sprinkmann Sons Corp. of Illinois*, 2014 IL App (4th) 131118, ¶ 143; see *Lazenby*, 236 Ill. 2d at 102. "The return of a general verdict creates a presumption that all issues of fact upon which proof was offered were found in favor of the prevailing party." *Klingler Farms, Inc. v. Effingham Equity, Inc.*, 171 Ill. App. 3d 567, 572 (1988). The presumption from the jury's general verdict here is rebutted on the issue of negligence from defendant's own testimony. However, that presumption was not rebutted on the issues of causation and injury, as the jury could have reasonably found against plaintiff on causation and injuries. Thus, the issue of the denial of the motion for a directed verdict on the question of negligence is moot. *Holloway*, 2014 IL App (4th) 131118, ¶ 145. For the trial court to find that a question of fact existed as to whether defendant was negligent was not appropriate under the evidence presented in this case.

¶ 94 D. Evidentiary Rulings

¶ 95 Plaintiff contends the trial judge's evidentiary rulings denied her a fair trial. A court may consider errors in the exclusion or admission of evidence and grant a new trial if there were serious and prejudicial errors made at trial. *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 816 (2008). A trial court's decision regarding the presentation of evidence to a jury is reviewed under an abuse of discretion standard. *Kayman v. Rasheed*, 2015 IL App (1st) 132631, ¶ 62.[12] Similarly, this court will not reverse a trial court's ruling on a motion for a new trial "except in those instances where it is affirmatively shown that [the trial court] clearly abused its discretion." *Maple*, 151 Ill. 2d at 455. An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. *Favia*, 381 Ill. App. 3d at 815.

¶ 96 In addition, a party is not entitled to a new trial unless a trial court's erroneous evidentiary ruling was substantially prejudicial and affected the outcome of the trial. *DiCosolo v. Janssen Pharmaceuticals, Inc.*, 2011 IL App (1st) 093562, ¶ 40 (citing *Simmons v. Garces*, 198 Ill. 2d 541, 566-67 (2002)). "The burden of establishing prejudice and showing that the trial court's error affected the outcome of the trial is on the party seeking reversal." *Id.* With these principles in mind, we address the evidentiary rulings plaintiff raises on appeal.

¶ 97 1. Officer Pitzer's Testimony

¶ 98 Plaintiff argues that the trial judge erred in overruling her objections to Officer Pitzer's testimony and denying her motion to strike the testimony.[13] Plaintiff maintains that Officer Pitzer was allowed to testify in contravention of the *in limine* order, which precluded defense counsel's use of the police report other than to refresh Officer Pitzer's recollection.

[12] Plaintiff asserted in her brief that our standard of review is *de novo*. Plaintiff relied on *In re D.G.*, 144 Ill. 2d 404, 409 (1991), which addressed the issue of whether probable cause exists when reviewing a trial court's ruling on a motion to quash.

[13] We note that plaintiff's motion to strike is not included in the record on appeal.

¶ 99 Generally, a police report is not admissible evidence (*People v. Garrett*, 216 Ill. App. 3d 348, 357 (1991)); however, a police report may be used to refresh recollection (*People v. Shatner*, 174 Ill. 2d 133, 153 (1996)) or may be admitted as past recollection recorded if the proper foundation is laid (*Horace Mann Insurance Co. v. Brown*, 236 Ill. App. 3d 456, 462 (1992)).[14] See *Rigor v. Howard Liquors, Inc.*, 10 Ill. App. 3d 1004, 1010-11 (1973). In refreshing a witness' recollection, "it is fundamental that a witness' memory can be refreshed only after it has been established that the witness has no memory concerning the facts in question." *Shatner*, 174 Ill. 2d at 153. When a witness has testified that his or her memory is exhausted, "a written memorandum may be used to refresh and assist his [or her] memory, but the manner and mode of refreshing a witness' memory rests within the discretion of the trial court." *Id.*; see Ill. R. Evid. 612 (eff. Jan. 1, 2011).

¶ 100 Our review of the record reveals that Officer Pitzer admitted he had no independent recollection of the 2008 accident, even after defense counsel attempted to refresh his recollection with the police report. In fact, the record demonstrated that Officer Pitzer's testimony constituted a reading into evidence of the police report. See *Baumgartner v. Ziessow*, 169 Ill. App. 3d 647, 656 (1988). Putting aside the fact that use of the police report was limited by the court, the report could not have been read into evidence as a past recollection recorded because defendant had not laid the foundation by having the witness testify that he had recorded the facts at the time of the occurrence or soon thereafter and that his report was accurate and true when made. See *Rigor*, 10 Ill. App. 3d at 1010-11; *Horace Mann Insurance Co.*, 236 Ill. App. 3d at 462-63.

¶ 101 Defendant claims, however, that Officer Pitzer's testimony regarding the contents of his police report was properly admitted as an admission of a party opponent. An admission by a

[14] Pursuant to Rule 1101 of the Illinois Rules of Evidence (eff. Jan. 1, 2011), "these rules govern proceedings in the courts of Illinois," which includes criminal and civil alike.

party opponent is a statement that is (1) offered against a party and (2) is the party's own statement or a statement of which the party has manifested an adoption or belief in its truth. Ill. R. Evid. 801(d)(2) (eff. Jan. 1, 2011). According to our rules of evidence, such a statement is not hearsay. *Id.*

¶ 102 When questioned if he asked plaintiff "whether or not she was injured," Officer Pitzer responded, "If that's what's reflected in the report, correct." Defense counsel then asked, if the report could refresh his recollection and the officer responded, "I can tell you what I put in the report, correct." Defense counsel next asked, "Now looking at the document, what did Dorothy Cammon say to you?" Plaintiff's objection to this question was overruled by the trial court and Officer Pitzer responded, "I can't recall, but this indicates there's no injury."

¶ 103 We reject defendant's characterization of the police report as containing an admission by a party opponent. Based on Officer Pitzer's testimony, we do not know whether he alone authored the report at issue as he did not testify regarding the truth and accuracy of the report. Additionally, Officer Pitzer did not testify as to how the contents of the police report were generated or that he took down what plaintiff said to him in narrative form. In fact, Officer Pitzer testified he had no recollection of creating the report at all. Moreover, Officer Pitzer did not testify that plaintiff made a statement to him that he included in the police report. Officer Pitzer did not testify that plaintiff said to him that she had not been injured, but only that the report "indicates there's no injury." Thus, to the extent that defendant maintains that the police report was based on an admission by plaintiff such an argument is mere speculation. See *Kociscak v. Kelly*, 2011 IL App (1st) 102811, ¶ 31 (concluding the decedent's alleged statements in a police report were not an admission by a party opponent where the police report was properly excluded by the trial court because no foundation was laid as to the truth and accuracy

of the report and nor did the officer put any statements made by parties into his report). Accordingly, the trial court erred in failing to strike Officer Pitzer's testimony.

¶ 104 We, however, believe that the error was harmless because there was overwhelming evidence that defendant's negligence was not the cause of plaintiff's injuries. See *DeBow v. City of East St. Louis*, 158 Ill. App. 3d 27, 44 (1987) (an error in the admission of evidence does not require a reversal if there has been no prejudice or if the evidence has not materially affected the outcome of the trial). Plaintiff's primary treating physician Dr. Manus' opinions that plaintiff's chronic left wrist pain was related to the 2008 accident and her testimony concerning the treatment provided to plaintiff by other medical providers was stricken. In addition, the testimony of plaintiff's expert medical witness, Dr. Chmell, that the past and present charges for plaintiff's medical treatment were reasonable and necessary was also stricken. In plaintiff's own testimony, after the accident, she drove to the police station and then went to a hospital, but left because it was crowded, and did not obtain a medical visit until four days later. Also, there was evidence that defendant was traveling at five miles per hour at impact. The defense introduced plaintiff's answer from a questionnaire that admitted that plaintiff's left shoulder, arm, wrist, and hand were injured in an accident the year prior to the case at bar. Plaintiff acknowledged that she answered in the questionnaire that she had pain and disability in her left wrist in the previous accident in 2007. Plaintiff also presented some of the same medical bills she incurred for both the 2007 and 2008 accidents as part of her special damages for the 2008 accident. In addition, Dr. Prinz, who was the primary orthopedic who treated plaintiff from the accident in 2008, did not testify in this case. Instead, Dr. Chmell, the expert orthopedic surgeon, testified on behalf of plaintiff from a review of the records from all of plaintiff's treating doctors without ever examining plaintiff. Dr. Chmell received plaintiff's medical records from plaintiff's counsel. Dr.

Chmell conducted no "independent investigation" of the 2007 or 2008 accident. Dr. Chmell acknowledged in his testimony that plaintiff reported injuring her wrist in both accidents in a similar manner. Plaintiff initially injured her wrist in an accident in 2006 and sustained a fracture from a fall on a sidewalk. A 2007 auto accident caused plaintiff continual left wrist and hand problems, which were aggravated by the 2008 accident. The trial court observed, outside the presence of the jury, that the direct and redirect examinations played to the jury of Dr. Chmell's videotaped evidence deposition was clearly audible, but the cross-examination was barely audible. The jury indicated to the trial court that they could hear Dr. Chmell's testimony.

¶ 105 Based on all of that evidence, we cannot say that the trial court's error in allowing the admission of plaintiff that she was not injured in the 2008 accident prejudiced plaintiff in this case. The left extremities of plaintiff including the wrist, shoulder, and hand were injured in the 2007 accident. The wrist was fractured in a 2006 accident. The jury certainly could have determined that any future surgery that may now be required crystallized from the 2006 or 2007 accident. There was no boney pathology shown by any of plaintiff's physicians in any of the tests after the 2008 accident that would illustrate that there was an aggravation of the wrist injury. No real objective changes in the wrist were shown. Accordingly, we conclude that the claim of no injury by plaintiff in the police report did not prejudice plaintiff in light of all of the evidence that it was the 2006 or 2007 accident that caused the problems to plaintiff's upper left extremities and wrist.

¶ 106 2. The Expert Testimony

¶ 107 Plaintiff also asserts that the trial judge erred in sustaining objections to portions of the testimony provided by Dr. Manus and Dr. Chmell. Plaintiff's brief, however, fails to provide a record citation or any legal authority in support of these assertions. Supreme Court Rule

341(h)(7) (eff. Feb. 6, 2013) requires the appellant's brief to include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." This court will not search the record for purposes of finding error when the appellant has made no good-faith effort to comply with the rules governing the contents of the briefs. *In re Estate of Parker*, 2011 IL App (1st) 102871, ¶ 47. Mere contentions, without argument or citation of authority, do not merit consideration on appeal. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 401 Ill. App. 3d 868, 881 (2010), *aff'd*, 2013 IL 110505. Indeed, contentions supported by some argument but without authority do not meet the requirements of Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). See *Palm*, 401 Ill. App. 3d. at 881-82 (citing the substantively identical predecessor to Rule 341(h)(7)). Accordingly, plaintiff has forfeited these claims on appeal.[15]

¶ 108 D. Misconduct by Defense Counsel

¶ 109 We next address plaintiff's claim that she is entitled to a new trial based upon the alleged misconduct of defense counsel. "Generally, improper argument or misconduct of counsel can be a sufficient basis to require a new trial." *Cancio v. White*, 297 Ill. App. 3d 422, 431 (1998). As previously noted, this court will not reverse a trial court's ruling on a motion for a new trial "except in those instances where it is affirmatively shown that [the trial court] clearly abused its discretion." *Maple*, 151 Ill. 2d at 455. "This is because the attitude and demeanor of counsel, as well as the atmosphere of the courtroom, cannot be reproduced in the record, and the trial court is in a superior position to assess and determine the effect of improper conduct on the part of counsel." *Bisset v. Village of Lemont*, 119 Ill. App. 3d 863, 865 (1983). When deciding whether

[15] Indeed, plaintiff also failed to include the videotaped testimony of Drs. Manus and Chmell in the record on appeal, which is of particular significance in this case, where the trial judge observed that the videotaped testimony presented to the jury included matters he ordered removed.

the trial court abused its discretion in denying a motion for new trial, the reviewing court should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Maple*, 151 Ill. 2d at 455.

¶ 110 Initially, we note that plaintiff has forfeited several of her arguments on appeal based on her failure to comply with the Illinois Supreme Court Rules regarding briefing. Specifically, plaintiff failed to present any argument or explanation in support of her assertion that defense counsel disregarded the *in limine* order barring any reference to comparative fault in violation of Rule 341(h)(7) (eff. Feb. 6, 2013). As to her claim that defense counsel improperly cross-examined Chwala, plaintiff (1) failed to identify the portions of the record where the allegedly improper cross-examination of Chwala appears, (2) does not refer to Chwala's testimony in her statement of facts, and (3) failed to cite any legal authority on the issue of such cross-examination warranting a new trial. Each of these failures warrants forfeiture of the issue pursuant to Rule 341(h)(7). See *Palm*, 401 Ill. App. 3d at 881-82. Moreover, plaintiff's brief failed to identify defense counsel's allegedly false, misleading and prejudicial closing arguments regarding Chwala, again in violation of our supreme court rules. *Id.* Given plaintiff's disregard of these rules, we conclude she has forfeited these issues on appeal. See *id.*

¶ 111 1. *In Limine* Orders

¶ 112 Plaintiff contends defense counsel violated the *in limine* order barring use of the police report other than to refresh Officer Pitzer's recollection. As previously discussed, although defense counsel did use the police report other than to refresh Officer Pitzer's recollection, the error was harmless and did not prejudice plaintiff. Plaintiff also argues that defense counsel violated the order *in limine* barring mention of her other lawsuit, but not barring other statements made by her. We note that the record discloses that defense counsel made three references

during his cross-examination of plaintiff to "defendant Coward." Defense counsel, however, did not expressly reference plaintiff's other lawsuits in the presence of the jury. Moreover, plaintiff's brief fails to set forth specifically how she was prejudiced by defense counsel's references in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). Consequently, plaintiff has failed to demonstrate these instances of alleged misconduct affected the outcome of the trial. See *DiCosolo*, 2011 IL App (1st) 093562, ¶ 40.

¶ 113 2. Closing Arguments

¶ 114 Plaintiff further contends defense counsel made numerous false statements and misrepresentations to the jury during closing arguments. The scope of closing arguments is within the trial judge's sound discretion. *Velarde v. Illinois Central R.R. Co.*, 354 Ill. App. 3d 523, 543 (2004). Generally, attorneys are allowed broad latitude in drawing reasonable inferences and conclusions from the evidence. *Id*. at 544. It is improper for counsel to base closing arguments upon matters not in evidence. *E.g.*, *Mazurek v. Crossley Construction Co.*, 220 Ill. App. 3d 416, 427 (1991). Nevertheless, "[a] new trial is not warranted based on an improper opening statement or closing argument unless, when the trial is viewed in its entirety, the argument resulted in substantial prejudice to the losing party or rose to the level of preventing a fair trial." *Davis v. City of Chicago*, 2014 IL App (1st) 122427, ¶ 84.

¶ 115 Moreover, an opponent's failure to object to allegedly prejudicial remarks during closing arguments generally forfeits the issue for review. *Velarde*, 354 Ill. App. 3d at 544. A reviewing court should strictly apply the doctrine "unless the prejudicial error involves flagrant misconduct or behavior so inflammatory that the jury verdict is a product of biased passion, rather than an impartial consideration of the evidence." *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 375-76 (1990).

¶ 116 Of particular relevance in this case is the rule that prejudicial remarks are cured by an immediate sustained objection. *Carlasare v. Wilhelmi*, 134 Ill. App. 3d 1, 5 (1985). In addition, a misstatement by counsel will not deny the losing party a fair trial where the misstatement comprises only a small segment of the closing argument and the jury is instructed that closing arguments are not evidence. See, *e.g.*, *Lagoni v. Holiday Inn Midway*, 262 Ill. App. 3d 1020, 1035 (1994); see also *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 759 (2010) (and cases cited therein discussing harmless error).

¶ 117 Plaintiff asserts the following statements made by defense counsel during closing arguments were improper: (1) "When my client came in to see me, I told him I think he better have a jury in this case"; (2) "I don't think [plaintiff and plaintiff's counsel] knew I was getting my hands on this [questionnaire]"; and (3) "she said we bumped her." The trial court, however, immediately sustained plaintiff's objections to these comments, thereby curing any error. *Carlasare*, 134 Ill. App. 3d at 5. In addition, plaintiff contends that defense counsel falsely stated that Dr. Chmell "puts himself out to testify for people if they'll pay him whatever amount of money he requests," and "he would have to testify a certain way." The trial court overruled the objection to the first comment, which was based on the evidence, and sustained the objection to the second comment, thus remedying any error. *Id.*

¶ 118 Plaintiff additionally argues that defense counsel: (1) made false statements insinuating that plaintiff and her counsel concealed information from Dr. Chmell; and (2) falsely denied that Dr. Chmell identified all of the records he reviewed and analyzed.

¶ 119 The transcript of proceedings establishes that after attacking Dr. Chmell as a paid expert, defense counsel argued that plaintiff should have presented opinion testimony directly from Dr. Prinz, as opposed to Dr. Chmell (whom defense counsel previously noted had not treated

plaintiff). Defense counsel subsequently argued that Dr. Chmell's analysis was based on the records provided by plaintiff's counsel, rather than an independent investigation. Our review of the record reveals that these arguments were based on Dr. Chmell's testimony.

¶ 120 Defense counsel then asserted that Dr. Chmell "didn't want you to know anything else" because he could then testify that plaintiff's problems resulted from the 2008 accident as opposed to the 2007 accident. Upon reviewing the record, we find defense counsel's argument on this point was not part of the direct examination of Dr. Chmell and, thus, was not based on the evidence. Plaintiff, however, did not object to this argument at trial and, thus, forfeited our review. See *Babikian v. Mruz*, 2011 IL App (1st) 102579, ¶ 13 (citing V*elarde*, 354 Ill. App. 3d at 544).

¶ 121 Defense counsel also rhetorically wondered how Dr. Chmell could possibly know the incident at issue caused plaintiff's problems when he never compared the records regarding the 2008 accident with the records and tests related to the 2007 accident. Plaintiff's objection to this argument was overruled. We conclude, however, that this argument misstated Dr. Chmell's testimony, in which he stated his opinions were based on a full knowledge of plaintiff's medical records, including records regarding the 2007 accident and the 2006 wrist fracture.

¶ 122 In sum, the trial judge properly sustained objections to several of the arguments identified by plaintiff. Forfeiture aside, the trial judge erred in allowing defense counsel to attack Dr. Chmell and his opinions on grounds not supported by the evidence. Defense counsel's misstatements regarding Dr. Chmell, however, comprised a relatively small portion of the closing arguments. See *Lagoni*, 262 Ill. App. 3d at 1035 (concluding the defense counsel's misstatements were not prejudicial as they comprised "only a small segment" of his closing argument). The record of proceedings also demonstrates that the trial judge repeatedly

admonished the jury that any statement of counsel not based on the evidence should be disregarded. See *id.* These factors militate against finding that plaintiff was denied a fair trial. See *id.* Accordingly, when the trial is viewed in its entirety, plaintiff fails to establish defense counsel's improper arguments resulted in substantial prejudice to her or prevented a fair trial. *Davis*, 2014 IL App (1st) 122427, ¶ 84.

¶ 123 E. The Trial Judge's Conduct

¶ 124 Plaintiff next argues that the trial judge's behavior towards her counsel, both outside and in the presence of the jury, prejudiced her case and denied her a fair trial. "A trial court has wide discretion in conducting a trial, but the court may not interject comments or opinions indicating its opinion on the credibility of a witness or the argument of counsel." *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶ 73. "The trial judge, as the dominant figure in the courtroom, should exercise caution and avoid making statements that could prejudice the jury against or in favor of a party." *Id.* A trial judge has the power to admonish or rebuke a party or counsel for misconduct, but care must be taken that even necessary admonishments occur in a manner which will not deprive either party of a fair trial. *Id.* "A new trial will be granted on the basis of a judge's remarks or conduct only if the remarks or conduct result in prejudice to a party." *Id.* "[R]emarks of a trial judge are not grounds for reversal where they are of little consequence either way, and the record does not show that the jury heard them." *Gasperik v. Simons*, 124 Ill. App. 2d 360, 366 (1970).

¶ 125 Plaintiff asserts the trial judge shouted at her counsel, accused her of not listening, and otherwise intimidated her. Plaintiff, however, failed to identify any way in which her counsel's representation was affected. In addition, the record of proceedings establishes that the trial judge did not make the comments at issue in the presence of the jury. Plaintiff asserts that the trial

judge's discussion of the editing of Dr. Chmell's videotaped deposition was conducted in a "courtroom voice" and thus may have been overheard by the jury in the jury room. This assertion is purely speculative and does not establish prejudice to plaintiff's case. See *id.*

¶ 126 Plaintiff further asserts the trial judge fell asleep and needed to be awakened in the jury's presence during the publication of Dr. Chmell's videotaped testimony. Plaintiff relies entirely upon *People v. Donley*, 314 Ill. App. 3d 671 (2000), in which the defendant appealed the summary dismissal of his postconviction petition, arguing that his petition raised the gist of a meritorious claim that the trial judge was asleep during part of his bench trial. *Id*. at 672. Although the claim regarding the sleeping judge was not raised in the trial court, the appellate court rejected the argument that the claim was forfeited because the case involved postconviction proceedings, not a direct appeal. *Id*. at 674. The *Donley* court also rejected the argument that the claim was contradicted by the trial judge's detailed discussion of the evidence, based on the low threshold applied at the first stage of postconviction proceedings. *Id*. Thus, the *Donley* court reversed the summary dismissal and remanded the matter for further postconviction proceedings. *Id*. at 674-75.

¶ 127 In contrast, in *Chicago City Ry. Co. v. Anderson*, 193 Ill. 9, 12 (1901), our supreme court considered the claim that the trial judge slept for four or five minutes during a civil jury trial. Our supreme court conceded the irregularity of a judge falling asleep during trial, but concluded it was not reversible error where the trial proceeded without a timely objection and there was no demonstration of prejudice. *Id*. at 12-13.

¶ 128 This case is a direct appeal from a civil jury trial, similar to *Anderson*, not a postconviction proceeding, such as *Donley*. Initially, we note that plaintiff failed to make a timely objection. Second, it is unclear from the record that the trial judge fell asleep during the

publication of the videotaped testimony. Plaintiff attempted to include an indication that the trial judge had to be awakened in her bystander's report, but the record of proceedings regarding the bystander's report contains no discussion of or ruling upon that question. The trial judge stated that *if* he fell asleep during the showing of the videotaped testimony, "it wasn't more than a minute." The trial transcript further includes the trial judge's criticism of the editing of the videotape, including the observation that material was included to which he had sustained objections on at least a dozen occasions. The trial judge's commentary indicates he was watching and scrutinizing the videotaped testimony in some detail. Given the record on appeal, plaintiff has failed to demonstrate prejudice warranting a new trial on this point. See *id.*

¶ 129 F. Costs

¶ 130 Lastly, plaintiff asserts the trial court's order denying her posttrial motion and awarding costs "must be reversed for the foregoing reasons," without further argument. As plaintiff's arguments have been rejected by this court, her assertion necessarily fails.

¶ 131 CONCLUSION

¶ 132 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 133 Affirmed.