2018 IL App (2d) 170658-U
No. 2-17-0658
Order entered June 13, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DEBORAH LEONE	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	No. 15AR 335
v.	)	
	)	Honorable
DANIEL LUBY,	)	Donna-Jo Vorderstrasse and
	)	Michael J. Fusz,
Defendant-Appellee.	)	Judges, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Where plaintiff failed to provide a sufficient record to show that the trial court abused its discretion, its order granting defendant leave to disclose an expert witness after arbitration and its order denying plaintiff's motion *in limine* seeking to bar defendant's expert witness from testifying at trial are affirmed; circuit court affirmed.

¶ 2 This case comes to us after a jury awarded plaintiff $15,000 for personal injuries sustained in an automobile collision with defendant, Daniel Luby. Prior to the jury trial, defendant rejected an arbitration panel's award of $40,698 in favor of plaintiff. On appeal plaintiff argues that the trial court erred by allowing defendant to disclose an expert witness after

arbitration and by denying her motion *in limine* seeking to bar defendant's expert witness from testifying at trial. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Arbitration Proceeding

¶ 5 On June 5, 2013, plaintiff was driving her car on Eola road in Lake Zurich, Illinois, when defendant rear-ended plaintiff's vehicle with his vehicle. On April 14, 2015, plaintiff filed her complaint against defendant in the arbitration division of the circuit court of Lake County. The complaint alleged that defendant's negligence in the June 5, 2013, collision was the proximate cause of plaintiff's serious and permanent personal injuries. Plaintiff sought judgment against defendant in the amount of $50,000.

¶ 6 The arbitration hearing was set for October 14, 2015. On September 21, 2015, plaintiff sent defendant interrogatories and a request for production. On October 2, 2015, defendant filed a motion to continue the arbitration case stating that defense counsel did not appear until September 1, 2015, the hearing was set for October 14, 2015, and plaintiff's discovery deposition was scheduled for November 18, 2015. Defendant issued interrogatories on plaintiff. The trial court granted defendant's motion to continue. For some reason not explained in the record, neither party conducted depositions prior to the arbitration hearing. On November 12, 2015, plaintiff sent defendant plaintiff's answers to defendant's interrogatories.

¶ 7 On February 11, 2016, the arbitration hearing was held. Only the parties testified. The arbitration panel ruled in favor of plaintiff and awarded her $40,698. The award included a finding that both parties participated in the hearing in good faith and in a meaningful manner.

¶ 8 B. Circuit Court Proceedings

¶ 9 On February 29, 2016, defendant filed a notice of rejection of the arbitration award and a request for a jury trial. On March 28, 2016, the circuit court, Donna-Jo Vorderstrasse presiding,

granted defendant 14 days to file a "motion to compel authorizations," provided plaintiff "14 days thereafter to respond," and provided defendant seven days to reply. On March 30, 2016, defendant filed a motion to compel plaintiff to sign Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C. 201 *et seq.*) release forms.

¶ 10 On May 9, 2016, defendant filed a motion to disclose Dr. Dinora Ingberman, an expert witness, pursuant to Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2018). Defendant's motion alleged and argued the following. Defendant received plaintiff's "medical specials and 90c disclosures" on or about October 27, 2015, and defendant received plaintiff's "amended 90c disclosures" on November 24, 2015. Defendant received plaintiff's answers to interrogatories on November 17, 2015. Defendant issued subpoenas for plaintiff's medical records through Compex on November 5, 2015, but Compex notified defendant that it needed a signed authorization to obtain plaintiff's medical records. Plaintiff refused to authorize release of her medical records. Further, plaintiff was to be deposed on January 18, 2016, but "the deposition did not proceed." The case was schedule for arbitration on February 11, 2016. However, plaintiff never provided authorizations to Compex to provide defendant with her medical records. Defendant sent the "incomplete medical records in [his] possession for an independent medical review [to] Dr. Dinora Ingberman." Defendant also alleged that he would be severely prejudiced in the defense of his case if discovery was not extended.

¶ 11 Defendant attached to his motion Dr. Ingberman's report, which stated that plaintiff suffered only a brief muscle strain as a result of the collision. The report also indicated that Dr. Ingberman had authored her report on April 11, 2016, and her report was based, in part, on a transcript of plaintiff's arbitration hearing testimony.

¶ 12 On May 9, 2016, after a hearing on defendant's motions, the circuit court, Judge Vorderstrasse presiding, stated in a written order, in pertinent part:

> "This cause coming to be heard on Defendant's motion to compel discovery and to disclose a 213(f)(3) expert, [plaintiff] objecting to both motions based on assertions (discovery and disclosures closed by rule and no good cause shown, etc.) the Court being advised[:]
>
> (1) Motion to compel is Denied[;]
>
> (2) Motion to disclose [213](f)(3) is granted; Plaintiff may depose expert and [s]he will be made available therefore by July 14, 2016, Defendant may disclose rebuttal evidence by said date[.]" (Emphases in original.)

¶ 13 On June 9, 2016, plaintiff received defendant's amended answers to 213(f)(3) interrogatories, which included defendant's disclosure of Dr. Ingberman as his expert. On June 27, 2016, plaintiff moved to reconsider or modify the trial court's order granting defendant's motion to disclose Dr. Ingberman, alleging and arguing the following. Defendant did not show good cause for allowing discovery after the arbitration hearing. Defendant did not conduct any discovery before the arbitration hearing. Defendant was in possession of all of plaintiff's relevant medical records and bills and could have asked for a HIPAA release prior to arbitration but chose not to. Plaintiff cited Illinois Supreme Court Rule 89. Ill. S. Ct. R. 89 (eff. Mar. 26. 1996) (providing, in part, "No discovery shall be permitted after the hearing, except upon leave of court and good cause shown").

¶ 14 On July 25, 2016, the circuit court, Judge Vorderstrasse presiding, denied plaintiff's motion to reconsider or modify its order.

¶ 15 On March 6, 2017, the case was reassigned to the law division of the circuit court and a jury trial was set to begin on April 24, 2017. The parties deposed Dr. Ingberman. Prior to *voir dire* plaintiff filed "Motions *in limine* To Limit Defense Evidence (1-24)." Pertinent to this

appeal is plaintiff's first request, which sought to "Bar Dr. Ingberman's Testimony," alleging and arguing the following:

> "Prior to arbitration, the defense failed to answer discovery and did not take Plaintiff's deposition. Then, at arbitration, Defendant brought a court reporter who, of course, made a record of Plaintiff's direct and cross[-]examinations. Then, after a favorable award for Plaintiff, the defense rejected the award (of $40,000), utilized the arbitration transcript as information [sic] its newly disclosed 213(f)(3) expert, Dr. Dinora Ingberman, [sic] could use to render opinions. Dr. Ingberman was retained and disclosed after the arbitration and she, using the arbitration transcript, offered testimony against Plaintiff's injury claims. Plaintiff attaches these exhibits in support of the Motion:
>
> (a) Defendant's Motion and Notice of Motion to allow disclosure.
>
> (b) Amended Answer to 213(f)(3) Interrogatories.
>
> (c) Dr. Ingberman's Report of 4/11/16 (post arbitration).
>
> (d) Discovery Deposition, pgs. 1-17.
>
> (e) Notice of Evidence Deposition of Dr. Ingberman for 12/5/16.
>
> In light of the late retention and disclosure of Dr. Ingberman, she should not be allowed to testify."

¶ 16 After the trial court, Michael J. Fusz, presiding, heard argument on plaintiff's motion *in limine*, it denied plaintiff's request to bar Dr. Ingberman's testimony, stating in its written order, "[t]he Court finds that the Order of Judge Vorderstrasse is the law of the case and, for this reason, the Motion *in Limine* No. 1 to bar Dr. Ingberman's testimony is denied."

¶ 17 The jury heard testimony on April 25, 2017. After plaintiff rested her case, defense counsel called only Dr. Ingberman. On April 25, 2017, the jury returned a verdict in favor of plaintiff in the amount of $15,000 and the trial court entered judgment on the verdict.

¶ 18 On May 10, 2017, plaintiff filed a motion for a new trial arguing that the trial court erred by denying her motion *in limine* seeking to bar Dr. Ingberman's testimony because defendant failed to show good cause to conduct discovery after the arbitration hearing pursuant to Illinois Supreme Court Rule 89. Ill. S. Ct. R. 89 (eff. Mar. 26. 1996) (providing, in part, "No discovery shall be permitted after the hearing, except upon leave of court and good cause shown"). Defendant filed a response to plaintiff's motion asserting, in part, the following.

> "8. In her oral ruling, Judge Vorderstrasse granted leave for late disclosure of Defendant's SCR 213(f)(3) witness, reasoning that good cause was shown, in part, because Plaintiff failed to cooperate with [the] discovery process by refusing to execute authorizations, which would allow Defendant to obtain Plaintiff's medical records needed for an expert review.
>
> 9. Thereafter, Plaintiff re-raised the same arguments in her Motion to Reconsider which was denied by Judge Vorderstrasse. ***
>
> 10. Then again, Plaintiff re-raised the same arguments in her motion *in limine*, which was again denied by this Honorable Court.
>
> 11. Now, for the fourth time, Plaintiff re-raises the same arguments, without any newly discovered evidence or any changes in the law. Plaintiff's motion should be denied."

¶ 19 On July 27, 2017, after the trial court heard argument on plaintiff's motion for a new trial, it denied plaintiff's motion. Judge Fusz stated that he believed (1) Judge Vorderstrasse "had the discretion to make the decision [to grant defendant's motion to disclose] as she did," (2) Judge Vorderstrasse's decisions [granting defendant's motion to disclose and denying plaintiff's motion for reconsideration] "were proper," and (3) he "was bound by those decisions."

¶ 20 On August 23, 2017, plaintiff filed her notice of appeal, appealing the trial court's order of May 9, 2016, granting defendant's motion to disclose his 213(f)(3) witness and its order of

April 25, 2017, denying plaintiff's motion *in limine* seeking to bar the testimony of defendant's 213(f)(3) expert.

¶ 21 II. ANALYSIS

¶ 22 A. Standard of Review

¶ 23 Plaintiff argues that defendant failed to demonstrate good cause for late, post-arbitration discovery and disclosure of his rule 213(f)(3) expert witness, and, therefore, the trial court erred by allowing the disclosure and trial testimony of the witness. Thus, plaintiff challenges the trial court's (1) grant of defendant's motion to disclose his expert after arbitration based on a finding of good cause and (2) denial of plaintiff's motion *in limine*.

¶ 24 Plaintiff contends that our review is *de novo*. We reject plaintiff's contention. A trial court's determination regarding whether good cause exists will not be disturbed absent an abuse of discretion. *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 353-54 (2007). Similarly, we will not disturb a trial court's decision to grant or deny a motion *in limine* absent a clear abuse of discretion. *Alm v. Loyola University Medical Center*, 373 Ill. App. 3d 1, 4 (2007). A trial court abuses its discretion only if it exceeds the bounds of reason and ignores recognized principles of law or if no reasonable person would take the position adopted by the court. *Id.* As our Supreme Court explained, " '[a]buse of discretion' is the most deferential standard of review -- next to no review at all -- and is therefore traditionally reserved for decisions made by a trial judge in overseeing his or her courtroom or in maintaining the progress of a trial." *In re D.T.*, 212 Ill. 2d 347, 356 (2004). Pertinent to this case, these decision include whether to grant or deny a motion *in limine* seeking to exclude evidence (*Swick v. Liautaud*, 169 Ill. 2d 504, 521 (1996)) and whether to grant a motion to impose sanctions for discovery violations (*Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 110-11 (2004)).

¶ 25 Plaintiff cites *Norskog v. Pfiel*, 197 Ill. 2d 60 (2001), to support her argument that we must review *de novo* the trial court's denial of her motion *in limine*. In *Norskog*, our supreme court **"**decid[ed] whether disclosure of mental health information [was] prohibited by a statutory discovery privilege and whether any exception to the privilege applie[d]." *Id*. at 71. Our supreme court concluded that *de novo* review was appropriate because these issues were purely questions of law. *Id***.** By contrast, here, plaintiff argues that the trial court erred because defendant failed to establish good cause. Whether good cause exists is fact-dependent and rests within the sound discretion of the trial court. *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 373 (2008). Accordingly, *Norskog* is distinguishable from this case, and an abuse of discretion standard of review is appropriate. See *Doe v. Township High School Dist. 211*, 2015 IL App (1st) 140857, ¶ 75.

¶ 26 B. Motion to Disclose Expert

¶ 27 Plaintiff argues that the trial court erred by allowing the disclosure of defendant's rule 213(f)(3) expert witness because defendant failed to demonstrate good cause pursuant to Supreme Court Rule 89 providing:

> "Discovery may be conducted in accordance with established rules and shall be completed prior to the hearing in arbitration. However, such discovery shall be conducted in accordance with Rule 222, except that the timelines may be shortened by local rule. No discovery shall be permitted after the hearing, *except upon leave of court and good cause shown*." (Emphasis added.) Ill. S. Ct. R. 89 (eff. Mar. 26, 1996).

¶ 28 Whether good cause exists is fact-dependent and rests within the sound discretion of the trial court. *Holthaus*, 387 Ill. App. 3d at 373 (citing *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 353-54 (2007) (discussing Supreme Court Rule 183 providing that a trial court "for good cause shown on motion *** may extend the time for filing any pleading or the doing of any act

which is required by the rules to be done within a limited period, either before or after the expiration of the time"). To establish good cause a party must present objective reasons as to why the deadline was not met. *Vision Point*, 226 Ill. 2d at 348. The supreme court emphasized that "there is a broad overall policy goal of resolving cases on the merits rather than on technicalities (see, *e.g.*, *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123 (1998) (in resolving discovery disputes, the goal is to insure "'both discovery and a trial on the merits')))." *Vision Point*, 226 Ill. 2d at 351. Thus, it follows that good cause includes "all objective, relevant evidence presented by the delinquent party with respect to why there is good cause for its failure to comply *** and why an extension of time should now be granted." *Id*. at 353. This includes "mistake, inadvertence, or attorney neglect" but does not permit "an open-ended inquiry" unrelated to the noncompliance. *Id*. The purpose of good-cause review is "in the interest [ ] of judicial economy and the need to reach an equitable result." *Id*. at 354.

¶ 29 Plaintiff argues that defendant failed to allege good cause in his motion to disclose and that the record demonstrates that no good cause existed. Conversely, defendant contends that in granting his motion to disclose Dr. Ingberman the circuit court reasoned that good cause was shown, in part, because plaintiff failed to cooperate in the discovery process by refusing to execute authorizations which would have allowed defendant to obtain plaintiff's medical records needed for an expert's review. Plaintiff counters that that the record contains no finding and no evidence that she failed to cooperate in discovery.

¶ 30 It is well established that to support a claim of error, the appellant has the burden to present a sufficiently complete record. *In re Marriage of Gulla & Kanaval*, 234 Ill. 2d 414, 422 (2009). "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." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). "An issue relating to a circuit court's

factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005). Without an adequate record to review the claimed error a reviewing court must presume that the circuit court's order had a sufficient factual basis and is in conformity with the law. *Id.*

¶ 31 In this case, the transcript (or a substitute (see Ill. S. Ct. R. 323 (eff. July. 1, 2017)), from the hearing on defendant's motion to disclose is not included in the record on appeal. In addition, the record does not contain a response from plaintiff to defendant's motion to disclose. Therefore, all we know is that on March 9, 2016, counsel for both parties were present and that the cause was called for hearing on defendant's motion to disclose his expert. We do not know what evidence or arguments were presented at that hearing or the basis for the trial court's decision. We do know, however, that the circuit court granted defendant's motion and rejected plaintiff's contention that defendant had not established good cause. Under these circumstances we presume that the trial court heard adequate evidence to support its decision and that its order granting defendant's motion to disclose his expert, Dr. Ingberman, was in conformity with the law. See *Webster v. Hartman*, 195 Ill. 2d 426, 433-34 (2001) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Thus, we cannot say that the trial court abused its discretion. See *Holthaus*, 387 Ill. App. 3d at 373.

¶ 32 C. Motion *in Limine*

¶ 33 Plaintiff also challenges the trial court's denial of her motion *in limine* seeking to bar defendant's expert's testimony at trial. Again, plaintiff contends that Dr. Ingberman should have been barred because defendant failed to demonstrate good cause for late, post-arbitration discovery and disclosure of his rule 213(f)(3) expert witness.

¶ 34 However, plaintiff has not presented an adequate record on appeal. "Where the issue on appeal relates to the conduct of a hearing or proceeding, this issue is not subject to review absent

a report or record of the proceeding." *Webster*, 195 Ill. 2d at 432 (citing *Foutch*, 99 Ill. 2d at 391-92). "Instead, absent a record, 'it [is] presumed that the order entered by the trial court [is] in conformity with the law and had a sufficient factual basis.' " *Id*. (quoting *Foutch*, 99 Ill. 2d at 392).

¶ 35 We recognize that the trial court's written order states that it denied plaintiff's motion because it "finds that the Order of Judge Vorderstrasse is the law of the case." While this provides a "snippet" of the trial court's reasoning when it denied plaintiff's motion, it is not the only reason apparent from the record. Judge Fusz agreed with Vorderstrasse's ruling. Nevertheleless, without the transcript of the hearing and the trial court's ruling, which would contain the arguments of the parties as well as the trial court's full reasoning, we are not required to speculate whether or not both judge's abused their discretion. "[A]bsent a record, 'it [is] presumed that the order entered by the trial court [is] in conformity with the law and had a sufficient factual basis.'" *Id*. (quoting *Foutch*, 99 Ill. 2d at 392). Thus, any doubts must be resolved against plaintiff and we cannot say that, based on this record or lack thereof, the trial court abused its discretion by denying plaintiff's motion *in limine*.

¶ 36 Finally, plaintiff cites Supreme Court Rule 91(a) (eff. June 1, 1993), for the proposition that, "[i]f a party does not participate in an arbitration hearing in good faith and in a meaningful manner, the party can be barred from rejecting the arbitration award, or suffer other sanctions." However, in this case, the arbitration panel made a finding that the parties participated in good faith and in a meaningful manner. Further, plaintiff raises this issue for the first time on appeal. Thus, this argument is forfeited. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010) (arguments raised for the first time on appeal are forfeited).

¶ 37 In conclusion, in the absence of a complete record, there is no basis for this court to say that the trial court abused its discretion by granting defendant's motion to disclose his expert

after arbitration, or that it abused its discretion by denying plaintiff's motion *in limine* seeking to bar the expert's testimony at trial.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's order.

¶ 40 Affirmed.