

NOTICE  
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2014 IL App (5th) 130511-U

NO. 5-13-0511

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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MICHAEL THOMASON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	White County.
	)	
v.	)	No. 11-L-2
	)	
EVERGREEN ENERGY, LLC,	)	Honorable
	)	T. Scott Webb,
Defendant-Appellee.	)	Judge, presiding.

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JUSTICE GOLDENHERSH delivered the judgment of the court.  
Justices Chapman and Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court erred in admitting testimony on behalf of defendant and suppressing testimony on behalf of plaintiff relating to the same issue in controversy.

¶ 2 This is an appeal from a judgment entered in favor of defendant denying plaintiff's motion for a new trial. Plaintiff, Michael Thomason, brought an action against defendant, Evergreen Energy, LLC, in the circuit court of White County seeking retaliatory-discharge and punitive damages for an alleged wrongful termination that occurred while plaintiff was employed by defendant. Plaintiff claims he was terminated from employment as a result of his exercise of rights under the Illinois Workers'

Compensation Act after suffering a work-related injury. The matter went to a jury trial, in which a verdict was returned in favor of defendant.

¶ 3 After the verdict was reached, plaintiff timely filed a motion for a new trial raising two issues. The first issue concerns the lack of jury instruction regarding the affirmative defenses pled by defendant. Plaintiff asserts he was entitled to a jury instruction informing the jury that defendant had the burden of proof as to the matters alleged in defendant's affirmative defenses, and no such jury instruction was given. Second, plaintiff contends the court erred and abused its discretion by permitting testimony of a witness offered by defendant concerning a conversation with a supervisor that discussed the "main thing" relied upon for plaintiff's discharge, while excluding testimony of the same witness offered by plaintiff concerning a conversation with the same supervisor that discussed the "primary reason" for plaintiff's discharge. Plaintiff alleges this evidence is one and the same and, as such, both conversations should have been permitted or both conversations should have been excluded. The circuit court denied plaintiff a new trial, and plaintiff timely filed a notice of appeal. We agree with plaintiff. We reverse the circuit court's decision permitting one conversation concerning the reason for plaintiff's termination while excluding a similar conversation, and remand for a new trial.

¶ 4 **BACKGROUND**

¶ 5 Plaintiff filed suit against defendant alleging his termination from defendant's employment was in retaliation for his exercise of rights pursuant to the Illinois Workers' Compensation Act. Plaintiff was employed by defendant as a supervisor on a drilling rig on or about August 22, 2010, when plaintiff suffered a work-related injury resulting in a

hernia. After seeking treatment for his injury, plaintiff provided a work slip from his physician to defendant indicating that plaintiff was to be restricted to light duty. On March 1, 2011, within two days of providing the physician's work slip, plaintiff was terminated from defendant's employment. Plaintiff then filed suit seeking damages for lost wages during his period of underemployment, and emotional distress and punitive damages for alleged wrongful termination resulting from his pending workers compensation claim.

¶ 6 Defendant denied it terminated plaintiff for having a pending workers compensation claim, reasoning that plaintiff was terminated for general employee misconduct, including damage to equipment and abuse of company credit cards. Defendant raised several affirmative defenses, including unclean hands, *laches*, plaintiff's failure to exhaust all administrative injuries under the Workers' Compensation Act, failure to timely report an injury and theft, and that plaintiff was an employee at-will.

¶ 7 The case proceeded to a jury trial in which a verdict was returned in favor of defendant. Plaintiff subsequently filed a timely motion for a new trial. In his motion, plaintiff first argues that no jury instruction was provided concerning the affirmative defenses raised by defendant. During the jury instruction conference, plaintiff points out that defendant assumed it should not be required to assume the burden of proof for the affirmative defense pled because they were not actually affirmative defenses. Plaintiff argues this contravenes Illinois law, and he should have been entitled to proper jury instruction instructing the jury that defendant had the burden of proof as to those matters raised as affirmative defenses.

¶ 8 The second issue raised on appeal concerns a conversation that Ed Bruce, defendant's former co-owner, was a party to with Gary Evans, defendant's owner, which reportedly discussed Evans' reason for terminating plaintiff. Plaintiff contends the court erred in allowing the testimony of Bruce at the request of defendant, but prohibiting the testimony of Bruce at the request of plaintiff when each such testimony concerned the same issue. During trial, the court sustained defendant's objection to a question that plaintiff directed to Bruce. Plaintiff's question concerned the "primary reason" for Evans' decision to terminate plaintiff.

¶ 9 Later in the trial, Bruce was permitted to testify as to the "main thing" that Evans relied upon in his decision to terminate plaintiff over an objection made by plaintiff. Plaintiff asserts that there is no distinction between permitting Bruce's testimony concerning the "main thing" that Evans relied upon in his decision to terminate plaintiff and prohibiting Bruce's testimony concerning the "primary reason" for Evans' decision to terminate plaintiff. Plaintiff contends the court was inconsistent with regard to this evidence and that a proper foundation had been laid to admit Bruce's testimony concerning the "primary reason" for Evans' decision. Consequently, plaintiff argues both pieces of evidence should have been permitted or neither should have been admitted.

¶ 10 ANALYSIS

¶ 11 Plaintiff's first issue on appeal concerns the trial court's jury instructions. Plaintiff maintains the trial court failed to properly instruct the jury as to the burden of proof of the affirmative defenses pled by defendant, and this failure resulted in undue prejudice to plaintiff. Because of our disposition of the evidentiary issue, we need not reach this

issue.

¶ 12 Plaintiff's second issue on appeal involves evidence concerning the reason for plaintiff's termination. Plaintiff asserts the trial court abused its discretion by not allowing evidence of the reason for plaintiff's termination. Plaintiff contends the circuit court erred by permitting Bruce's testimony in response to defendant's questioning while not permitting Bruce's testimony in response to plaintiff's questioning. Plaintiff further alleges a proper foundation was laid for Bruce's testimony to be admitted, and either both should have been admitted or neither should have been admitted. Plaintiff asserts the circuit court's inconsistency with regard to this type of evidence justifies an order granting him a new trial. We agree.

¶ 13 A circuit court's exclusion or admission of evidence is reviewed under an abuse of discretion standard and will not be reversed without an abuse of that discretion. *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444, 452, 818 N.E.2d 713, 720 (2004). An abuse of discretion occurs when no reasonable person would take the view adopted by the circuit court. *Smith v. Silver Cross Hospital*, 339 Ill. App. 3d 67, 74, 790 N.E.2d 77, 83 (2003).

¶ 14 In this case, over an objection by plaintiff, Bruce was permitted to testify as to the "main thing" Evans relied upon in his decision to terminate plaintiff. Conversely, the circuit court sustained defendant's objection to plaintiff's question posed to Bruce concerning what the "primary reason" was for Evans' decision to terminate plaintiff. Based upon deposition testimony, plaintiff anticipated Bruce to testify that the primary reason for Evans' decision to terminate plaintiff was his pending workers compensation

claim. Plaintiff claims it is a distinction without meaning to allow Bruce to testify as to the "main thing" concerning plaintiff's termination while prohibiting Bruce from testifying as to the "primary reason" for plaintiff's termination. We agree.

¶ 15 The trial court cites two reasons for sustaining defendant's objection. First, the trial court indicated Bruce's answer would constitute opinion testimony that would usurp the jury's ability to create its own opinion as to the ultimate issue. Second, the trial court stated Bruce was not specifically told that plaintiff's pending workers compensation claim was the reason for his termination, and, therefore, Bruce had no basis for formulating an opinion regarding the issue.

¶ 16 Regarding Bruce's testimony concerning the ultimate issue, the trial court abused its discretion. Speaking of the ultimate issue, the trial court stated:

"The [c]ourt has considered the offer of proof and the arguments of counsel. The [c]ourt will maintain in sustaining the objection; in that, is an opinion testimony, and that pervades into the purview of the jury. It's a question for the jury. They are—they can clearly draw inferences from the testimony the same way as the witness can draw those inferences. So in order to have the witness testify, there should have been some direct evidence to him as to what was said or what was told directly to him was the reason for the firing. We've not heard any of that. For him to give an opinion would definitely run afoul of the jury's ability to deliver their own opinion on this ultimate issue."

¶ 17 Plaintiff notes that "a witness, whether expert or lay, may provide an opinion on the ultimate issue in a case." *Richardson v. Chapman*, 175 Ill. 2d 98, 107, 676 N.E.2d

621, 625 (1997). The trial court's statement that Bruce's testimony concerning the ultimate issue "pervades into the purview of the jury" is inconsistent with Illinois law. There is no requirement that the jury accept a witness's conclusion. *Richardson*, 175 Ill. 2d at 107, 676 N.E.2d at 625. Accordingly, it should have been a decision left to the jury to decide whether to accept Bruce's testimony concerning plaintiff's termination, and the testimony should have been admitted.

¶ 18 Defendant contends the trial court acted properly by not allowing Bruce's testimony in response to plaintiff's questioning because it related to an ultimate issue before the jury. Defendant cites *Knecht v. Radiac Abrasives, Inc.*, 219 Ill. App. 3d 979, 985, 579 N.E.2d 1248, 1252 (1991), which ruled "[t]he closer the subject of the [lay] opinion approaches critical issues, the more likely it is that the court will require more concrete details from the witness, either alone or prior to the offering of an opinion." (Internal quotation marks omitted.)

¶ 19 However, *Knecht* is distinguishable from the case at hand. In *Knecht*, which also involved a retaliatory discharge, the court did not allow an employee to testify for the defendant employer in an attempt to show that the defendant had a character trait of always treating its employees fairly. The court properly prohibited the testimony, indicating character evidence can be proved by evidence of reputation, but never by mere opinion. The court continued further by stating "evidence is relevant when it has a tendency to prove a fact in controversy or render a matter in issue more or less probable." *Knecht*, 219 Ill. App. 3d at 986, 579 N.E.2d at 1252. In that case, the witness's opinion concerning whether the employer was fair in the past had no tendency to make it more or

less probable that the employer was acting fairly at the time it fired the plaintiff, making the opinion testimony inadmissible.

¶ 20 In contrast to *Knecht*, this case involves testimony concerning a specific conversation discussing the reason for plaintiff's termination that the witness personally observed. This is relevant because it has the tendency to render the matter in issue more or less probable, as it helps answer questions surrounding the reason for plaintiff's termination. *Knecht* did not involve specific information that could help the trier of fact. That case involved opinion evidence of character, which the court properly excluded. As such, *Knecht* is not relevant to the case at hand, as this case involves specific information that will help the trier of fact rather than opinion evidence of character.

¶ 21 The trial court's second reason for excluding plaintiff's question posed to Bruce concerning plaintiff's termination was that Bruce was not explicitly told that plaintiff's pending workers compensation claim was the basis for his termination. Because Bruce was not personally informed of the reason for plaintiff's termination, the trial court determined Bruce could not form an opinion for why plaintiff was terminated.

¶ 22 Illinois Rule of Evidence 701 governs the admissibility of lay witness testimony. Rule 701 states the following:

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the

scope of Rule 702." Ill. R. Evid. 701 (eff. Jan. 1, 2011).

¶ 23 As Rule 701 indicates, nonexpert opinion testimony is admissible if it assists the trier of fact as long as certain requirements are met, including that the testimony be (1) rationally based on the witness's observation and (2) helpful to a clear understanding of the witness's testimony or to the determination of a fact in issue. *Freeding-Skokie Roll-Off Service, Inc. v. Hamilton*, 108 Ill. 2d 217, 221-22, 483 N.E.2d 524, 526 (1985) (citing Fed. R. Evid. 701). Evidence is admissible if it is based on the witness's personal observation and is helpful to a clear understanding of the issue at hand. *Zoerner v. Iwan*, 250 Ill. App. 3d 576, 580, 619 N.E.2d 892, 897 (1993).

¶ 24 In this case, Bruce was party to a conversation with Evans which discussed plaintiff's termination. Defendant asserts Bruce has no rational basis to form an opinion regarding plaintiff's termination because he was never specifically informed of a reason for the termination during the conversation and, therefore, his opinion could not be based on what Evans or others from the company told him.

¶ 25 Defendant further contends the trial court was within its discretion to bar the evidence of what Bruce thought was the primary reason for plaintiff's termination pursuant to Rule 701, claiming Bruce could not form a rational opinion from his perception of the conversation. For example, defendant alleges Bruce could not rationally perceive the tone of Evans' voice, and, therefore, his testimony should not be placed before the jury. We disagree.

¶ 26 The fact that Bruce was not directly informed of the reason for plaintiff's termination does not hinder his ability to form an opinion as to why plaintiff was

terminated when he was party to a conversation discussing plaintiff's termination.

¶ 27 Bruce personally participated in a conversation in which Evans discussed plaintiff's termination and expressed anger regarding plaintiff's injury. Bruce perceived Evans' demeanor and disposition towards plaintiff, and this personal observation would have been helpful to a clear understanding of the issue at hand, that being the reason for plaintiff's termination.

¶ 28 Bruce's observation of Evans' conversation was rationally based on his perception and is within the realm of Rule 701. Defendant's argument that there was no rational basis for Bruce to formulate an opinion concerning why Evans terminated plaintiff is not supported by this record. Accordingly, Bruce's testimony should have been admitted.

¶ 29 Lastly, plaintiff contends it is a distinction without meaning to exclude Bruce's testimony concerning the "primary reason" for plaintiff's termination while permitting him to testify as to the "main thing." Plaintiff alleges the trial court took inconsistent positions on this type of evidence and abused its discretion by not allowing Bruce's testimony as to the "primary reason." Plaintiff asserts both pieces of evidence should have been admitted or neither admitted. We agree.

¶ 30 As discussed above, a circuit court's exclusion or admission of evidence is reviewed under an abuse of discretion standard and will not be reversed without an abuse of that discretion. *Kim*, 353 Ill. App. 3d at 452, 818 N.E.2d at 720. An abuse of discretion occurs when no reasonable person would take the view adopted by the circuit court. *Smith*, 339 Ill. App. 3d at 74, 790 N.E.2d at 83.

¶ 31 Plaintiff cites to *Kritzen v. Flender Corp.*, 226 Ill. App. 3d 541, 560, 589 N.E.2d

909, 923 (1992), which involved a similar situation. In that case, an employer appealed a jury verdict in favor of employees who sued their employer for workers' compensation-related retaliatory discharge. On appeal, the employer alleged evidence was erroneously excluded. Specifically, an employee was permitted to testify that his termination had a negative impact on his marriage, while the employer was not permitted to testify that the employee's wife had filed for divorce prior to the termination. The appellate court agreed with the employer, finding that without the employer's testimony, the jury could have been improperly influenced when allocating damages. Also, the court stated the company was deprived of important impeachment evidence.

¶ 32 Defendant asserts it elicited testimony from Bruce in a different manner than plaintiff. Defendant contends Bruce's testimony concerning the "main thing" was allowed by the court because it consisted of what Evans stated to Bruce regarding the termination, and Illinois Rule of Evidence 803 regarding hearsay was invoked. Defendant claims Bruce's testimony concerning the "primary reason" was not allowed because it sought Bruce's opinion.

¶ 33 However, defendant's reasoning for why Bruce's testimony concerning the "primary reason" is flawed. It has long been consistent with Illinois law that witnesses are permitted to give opinions as to intent. *Beeson v. H.W. Gossard Co.*, 167 Ill. App. 561 (1912).

¶ 34 In this case, plaintiff's question posed to Bruce concerning the "primary reason" was relevant to Evans' intent and for impeachment purposes. In fact, both defendant's question as to the "main thing" and plaintiff's question as to the "primary reason" for

plaintiff's termination examine Evans' intent behind the decision to terminate plaintiff.

¶ 35 The trial court allowed defendant to use Bruce's testimony to show plaintiff's termination was not related to his injury. Conversely, the court did not allow plaintiff to use Bruce's testimony to show plaintiff's termination was related to his injury. We find this exclusion was an abuse of discretion, as the jury should have been fully informed of both testimonies concerning the reason for plaintiff's termination.

¶ 36 **CONCLUSION**

¶ 37 For the reasons states herein, we reverse the judgment of the circuit court of White County denying plaintiff's motion for a new trial, and remand for a new trial with directions to allow the testimony of plaintiff's witness concerning the reason why plaintiff was terminated.

¶ 38 Reversed and remanded with directions.