2011 IL APP (1st) 092455-U

FIRST DIVISION
September 26, 2011

No. 1-09-2455

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SERGIO GARCIA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
	)	
v.	)	No. 04 L 11869
	)	
	)	
TNT LOGISTICS OF NORTH AMERICA,	)	
INC., a corporation, TNT LOGISTICS	)	
CORPORATION, a corporation, and	)	
KEVIN LAKE, an individual,	)	Honorable
	)	John B. Grogan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

O R D E R

¶ 1 ***Held***: The trial court's evidentiary rulings were proper. We affirm.

¶ 2 This appeal arises out of a negligence action brought by plaintiff Sergio Garcia against defendants TNT Logistics North America, Inc. (TNT), and Mr. Kevin Lake, to recover damages for injuries plaintiff sustained when a large tire for use on earth-moving equipment fell on him as he was unloading tires from a tractor-trailer. Plaintiff claimed that he was inside the trailer using a forklift to unload the tires. After he had unloaded the majority of the tires, he dismounted from the forklift to straighten out a stack of tires so it could be removed from the trailer. Plaintiff claimed that as he was walking back to the forklift, a large earth-moving tire fell on him breaking his left leg. The tractor-trailer was owned by Wichita Southeast Kansas Transit, Inc.,[1] and driven by Mr. Lake.

¶ 3 The tire at issue, along with several other tires, had been loaded onto the tractor-trailer by employees of TNT. Plaintiff complained that the employees negligently loaded the tires onto the tractor-trailer, ultimately resulting in his injuries.

¶ 4 A jury returned a verdict in favor of defendants and the trial court entered judgment on the verdict. Plaintiff now appeals from a trial court order denying his motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial.

¶ 5 Plaintiff contends on appeal that the trial court erred in making the following evidentiary rulings: (1) barring his expert witness from offering opinion testimony supporting plaintiff's *res ipsa loquitur* claim that the accident was not the type of accident that ordinarily occurred in the absence of negligence; (2) refusing to allow plaintiff to give testimony rebutting a defense witness's testimony that there were no straps available in the trailer that could have been used to

[1] Prior to trial, plaintiff dismissed Wichita Southeast Kansas Transit, Inc. as a defendant.

secure the tire; and (3) allowing the admission of hearsay statements contained in plaintiff's medical records. For the reasons that follow, we affirm.

¶ 6 ANALYSIS

¶ 7 Defendants initially request that we summarily affirm the trial court's judgment on the ground that plaintiff failed to provide a record sufficient for this court to review the issues raised on appeal. We must deny the request.

¶ 8 As a general rule, the appellant bears the burden of providing a record of the proceedings and judgments sufficient to show the errors of which he or she complains. *In re Estate of Jacobs*, 189 Ill. App. 3d 625, 629, 545 N.E.2d 502 (1989). And any doubts arising from an incomplete record are resolved against the appellant and those issues that depend for resolution upon facts not in the record mandate affirmance. *U.S. Minerals & Mining, Inc. v. Licensed Processors, Ltd.*, 194 Ill. App. 3d 428, 434, 551 N.E.2d 661 (1990).

¶ 9 However, the failure to present a complete report of the proceedings does not require automatic affirmance where the issues can be resolved on the record as it stands. *Venturini v. Affatato*, 84 Ill. App. 3d 547, 552, 405 N.E.2d 1093 (1980); see also *Dubey v. Abam Building Corp.*, 266 Ill. App. 3d 44, 46, 639 N.E.2d 215 (1994) ("an incomplete record does not preclude a reviewing court from determining whether a trial court's findings or rulings are correct where that determination can be made from the incomplete record presented"). Here, we find the record is sufficient to allow review of the issues presented on appeal.

¶ 10 Turning to the merits, plaintiff first contends the trial court erred in barring his expert witness, Marion D. Schafer, PhD, from offering opinion testimony supporting plaintiff's *res ipsa*

loquitur claim. Mr. Schafer was qualified as an expert in the field of industrial packaging. Plaintiff maintains the trial court erred in barring Mr. Schafer from giving an opinion as to "whether the fact that the tire fell, in and of itself, indicate[d] that the tire was not properly secured by TNT."

¶ 11 During a sidebar at trial outside the presence of the jury, defense counsel argued that Mr. Schafer should not be permitted to give the opinion in question because it had not been disclosed in accordance with Supreme Court Rule 213. The trial court agreed and ruled that the opinion was inadmissible.

¶ 12 Under Rule 213(f)(3) (210 Ill. 2d R. 213(f)(3)), upon written interrogatory, each party must disclose the subject matter, conclusions, and opinions of controlled expert witnesses who will offer opinion testimony at trial. *Iaccino v. Anderson*, 406 Ill. App. 3d 397, 404, 940 N.E.2d 742 (2010). Rule 213(g) (210 Ill. 2d R. 213(g)) limits expert opinions at trial to information disclosed in answer to a Rule 213(f) interrogatory or in a discovery deposition. *Cetera v. Difilippo*, 404 Ill. App. 3d 20, 37, 934 N.E.2d 506 (2010). And under Rule 213(i) (210 Ill. 2d R. 213(i)), each "party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party."

¶ 13 "[T]he purpose of Rule 213 is to avoid surprise and permit litigants to ascertain and rely upon the opinions of experts retained by the opposing party." *Scassifero v. Glaser*, 333 Ill. App. 3d 846, 860, 776 N.E.2d 859 (2002). Whether an opinion has been adequately disclosed under Rule 213 is a matter within the trial court's discretion whose ruling will not be disturbed absent an abuse of that discretion. *Iaccino*, 406 Ill. App. 3d at 405.

¶ 14 In the instant case, plaintiff argues that Mr. Schafer should have been allowed to give his opinion testimony as to "whether the fact that the tire fell, in and of itself, indicate[d] that the tire was not properly secured by TNT," because the testimony was a logical corollary to Mr. Schafer's original disclosed opinion that if the tire had been properly packaged within the trailer then it would not have fallen on plaintiff. We must disagree.

¶ 15 "A witness may elaborate on a disclosed opinion as long as the testimony states logical corollaries to the opinion, rather than new reasons for it." *Scassifero*, 333 Ill. App. 3d at 860. The witness's testimony must be encompassed by the original opinion. *Scassifero*, 333 Ill. App. 3d at 860; *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 800, 776 N.E.2d 262 (2002).

¶ 16 In this case, Mr. Schafer's proposed opinion testimony, that the fact that the tire fell, in and of itself, indicated that it was not properly secured by employees of TNT, cannot be considered to have been encompassed by his original opinion that if the tire had been properly packaged within the trailer then it would not have fallen on plaintiff. The former suggests that the tire could have fallen only as a result of TNT's negligence, while the latter leaves open the possibility that the tire fell due to someone else's negligent conduct *i.e.*, someone unloading the tire could have improperly destabilized it. An expert's opinion is only as valid as the reasons for that opinion. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 151, 720 N.E.2d 242 (1999). Mr. Schafer's proposed opinion testimony stated a new reason as to why he believed the tire fell rather than a logical corollary to his original opinion and therefore the trial court did not err in barring this testimony.

¶ 17 Plaintiff next contends the trial court erred by refusing to allow him to give testimony

rebutting defense witness Mr. Nick Cutinello's testimony that there were no straps available that could have been used to secure the tire to the wall of the trailer. Mr. Cutinello was plaintiff's supervisor.

¶ 18 Rebuttal evidence is evidence offered to explain, repel, or disprove affirmative matters introduced by a defendant. *Lebrecht v. Tuli*, 130 Ill. App. 3d 457, 474, 473 N.E.2d 1322 (1985); *Lagestee v. Days Inn Management Co.*, 303 Ill. App. 3d 935, 942, 709 N.E.2d 270 (1999). The trial court has the discretion to admit or exclude such evidence and the court's decision will not be disturbed absent an abuse of that discretion. *Affatato v. Jewel Companies, Inc.*, 259 Ill. App. 3d 787, 796, 632 N.E.2d 137 (1994). We find the trial court did not abuse its discretion.

¶ 19 In this case, the trial court allowed all parties to give testimony regarding the existence and use of straps. Plaintiff's witness, Mr. Cutinello testified that straps were not used to secure large earth-moving tires inside of trailers. He further testified that the trailer in use at the time of the accident was not equipped for the use of securing straps.

¶ 20 In somewhat of a contrast, plaintiff testified as to how such straps were commonly used to secure tires and other materials. If plaintiff's proposed rebuttal testimony was directed at establishing that fact, then the testimony could properly be deemed cumulative. Under these circumstances we cannot find that the trial court abused its discretion in excluding plaintiff's proffered rebuttal testimony. See, *e.g.*, *Hall v. Northwestern University Medical Clinics*, 152 Ill. App. 3d 716, 721-22, 504 N.E.2d 781 (1987) (finding that trial court did not abuse its discretion in excluding proffered rebuttal testimony where that testimony would be cumulative of testimony given by other medical experts).

¶ 21 Plaintiff finally contends the trial court erred by allowing the admission of hearsay statements contained in his medical records regarding the manner in which the accident occurred. Plaintiff purportedly made a statement to his doctor's physician's assistant, Mr. Owen Barmada, stating that he suffered the leg fracture when a stack of tires fell on his leg. Such statement is in contrast to plaintiff's trial testimony that he suffered the leg fracture when a single large earth-moving tire fell on his leg.

¶ 22 Plaintiff maintains that the medical record containing his purported statement was not admissible under the business record exception to the hearsay rule. Again, we must disagree.

¶ 23 In Illinois, properly authenticated business records are admissible pursuant to Supreme Court Rule 236(a) (145 Ill. 2d R. 236(a)) as an exception to the hearsay rule. *Troyan v. Reyes*, 367 Ill. App. 3d 729, 733, 855 N.E.2d 967 (2006). Business records are admissible as an exception to the rule against hearsay because they are thought to be sufficiently trustworthy if it is demonstrated that they were made in the regular course of business at or near the time of the event or occurrence to which they relate and that it was in the regular course of business to prepare such records. *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 352, 938 N.E.2d 640 (2010); *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 414, 830 N.E.2d 814 (2005).

¶ 24 In 1992, our supreme court amended Rule 236 to allow medical records to be treated as any other business record. See committee comments to Rule 236 (145 Ill. 2d R. 236); *Troyan*, 367 Ill. App. 3d at 733; see also *Werner v. Nebal*, 377 Ill. App. 3d 447, 457, 878 N.E.2d 811 (2007) ("[m]edical records are now treated as any other business record"). Medical records are

admissible provided a sufficient foundation is laid to establish that they are a business record. *Troyan*, 367 Ill. App. 3d at 733. Plaintiff does not dispute that such a foundation was properly laid in this case.

¶ 25 Statements made to a physician or other medical personnel are admissible as an exception to the rule against hearsay if they were made for the purposes of medical diagnosis or treatment. *Roszak v. Kankakee Firefighters' Pension Board*, 376 Ill. App. 3d 130, 143, 875 N.E.2d 1280 (2007). The reasoning behind this exception is based on the assumption that patients tell their doctors their true condition of well-being and have no motive to provide false information to their doctors. *Roszak*, 376 Ill. App. 3d at 143-44.

¶ 26 In this case, plaintiff contends that the statement he purportedly made to the physician's assistant concerning the stack of tires falling on his leg was inadmissible an exception to the hearsay rule because the statement was unrelated to his medical diagnosis or treatment. We disagree.

¶ 27 When plaintiff was giving his medical history to the physician's assistant he described his leg injury as having occurred when "a stack of tires weighing approximately 1000 pounds fell on the left leg." The record indicates that plaintiff underwent surgery to repair his broken leg. Thus, the statement at issue was clearly an important piece of plaintiff's medical history and was reasonably related to his medical diagnosis and treatment, even though the statement was allegedly given more than two years after the accident. See, *e.g., Madrid v. Gomez*, 889 F. Supp. 1146, 1203 (N.D. Cal. 1995) ("providers must know the patient's medical history, allergies, medications, and past courses of therapy in order to properly diagnose and treat current

problems").

¶ 28 Plaintiff further suggests that the statement was unreliable and probably misconstrued by the physician's assistant because it was made in English when plaintiff's primary language is Spanish. We believe that any questions as to the physician's assistant's ability to understand plaintiff and accurately record his statement goes to the weight of the statement rather than its admissibility. In sum, we find that the trial court's evidentiary rulings were proper.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 30 Affirmed.