2011 IL App (1st) 102336-U

FIRST DIVISION
October 17, 2011

No. 1-10-2336

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

LOUIS W. LEVIT, Trustee of the Bankruptcy Estate of NEIL GAITTENS and SHERRY GAITTENS, and SHERRY SIRCHER-GAITTENS,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	No. 08 L 296
v.	)	
SSM HEALTHCARE d/b/a ST. FRANCIS HOSPITAL AND HEALTH CENTER,	)	Honorable Susan F. Zwick,
Dependant-Appellee.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
PRESIDING JUSTICE HOFFMAN and JUSTICE ROCHFORD concurred in the judgment.

ORDER

¶ *1* *HELD:* The circuit court did not err in allowing defendant to present undisclosed videos of physical therapy exercises as demonstrative evidence where defendant presented sufficient foundation for the videos and plaintiffs suffered no prejudice from admission. The court did not err in denying plaintiffs' posttrial motion for a new trial.

¶ 2 Plaintiffs Louis W. Levit, trustee of the bankruptcy estate of Neil Gaittens and Sherry Gaittens, and Sherry Sircher-Gaittens filed a personal injury action against

defendant SSM Healthcare d/b/a St. Francis Hospital and Health Center. They asserted Sherry was injured while performing physical therapy exercises under the direction of physical therapists employed by defendant. The jury found in favor of defendant and the circuit court entered judgment on that verdict. Plaintiffs argue on appeal that the court erred in allowing defendants to show videotaped demonstrations of the exercises Sherry was performing when she was injured and they were prejudiced as a result. They assert (1) defendant failed to timely disclose that it intended to use the videos; (2) the exercises were performed (a) in a manner consistent with the defense theory and (b) by one of the therapists whose conduct was the basis for plaintiffs' action; and (3) admission of the videos "tipped the scales" in defendant's favor because the manner in which the exercises were performed was the critical question in the case. We affirm.

¶ 3 Background

¶ 4 In 2001, Sherry injured her back. Her doctor prescribed assorted treatments, including physical therapy. Sherry went to St. Francis Hospital and Health Center (St. Francis Hospital) for physical therapy. Sherry subsequently filed a personal injury action against St. Francis Hospital, alleging she was injured during one of her physical therapy sessions. The trustee of her bankruptcy estate was a co-plaintiff.

¶ 5 On Sherry's first visit to St. Francis Hospital, physical therapist Angela Meaney conducted an evaluation of Sherry's condition. She determined Sherry needed therapy two to three times per week and prescribed a series of exercises. She instructed Sherry

on how to perform them and Sherry did them at home. During Sherry's third session with Meaney, to build Sherry's abdominal strength, Meaney asked her to perform two modified pilates exercises using an Iso-Flex stacked weight machine. The first exercise involved Sherry lying on her back with legs straight out and feet braced against the base of the machine. She was to grasp a silver bar attached to a pulley, curl her chin toward her chest and slowly raise her body to a sitting position, one vertebra at a time. The pulley was attached to a 31 pound weight stack and would assist her in coming to a sitting position. She would then lower slowly back down to her original position. She performed the exercise five times and appeared to have no difficulty with it.

¶ 6 The second exercise is the crux of the case at bar. The parties differ in their versions of how exercise two was to be performed. They agree that Sherry was to lie on her back with her head close to the base of the machine. Meaney testified that Sherry was to have her legs straight out and her hands holding onto a center post at the base of the machine to stabilize her. She was to raise her legs as straight as possible and a short bar, attached to the pulley, was placed by the therapist underneath her mid-calves. Sherry was then to lower her legs to the floor and raise them back to the starting position. Meaney stated that Sherry performed the exercise five times with no indication of difficulty and her back and buttocks remained on the floor at all times during the exercise.

¶ 7 In contrast, Sherry testified that she was instructed to lift her legs straight up and the bar was put behind her heels. She stated that when the bar was put behind her

heels, her buttocks came off the floor and she was in a "bicycle ride" position, such as when one puts their hands under the hips and are straight up in the air from the mid-torso up. She stated she was instructed to lower her torso one vertebra at a time.

¶ 8 At Sherry's next physical therapy session, Meaney asked her to perform the two modified pilates exercises. Testimony is conflicting regarding what happened during the exercises and whether Sherry performed both exercises. Meaney testified Sherry performed six repetitions of the first exercise, complained of pain in her neck and never performed the second exercise. She assessed Sherry as having an upper trapezius strain, probably resulting from the tendency to curl in through the neck during the exercise.

¶ 9 Sherry testified she felt a little pain during the last repetition of the first exercise, probably due to the repeated tucking of her chin. She stated that, although she was not sure she could complete the second exercise, she gave it a try. When she assumed the position with the bar behind her heels and her buttocks lifted off the ground, she felt an excruciating pain in her neck, screamed and blacked out. She stated Meaney removed the bar, lifted her up and performed heat and traction, which eased the pain immediately. Sherry then went home. Meaney did not prepare a report of Sherry's injury but left instructions for Sherry's next appointment, for which she would not be present, that treatment for cervical pain should be administered if the pain continued. At Sherry's appointment the following day, she reported neck pain so extreme that she could barely drive to the appointment. She received treatment for her pain.

¶ 10 Over the next two and a half years, Sherry intermittently suffered from headaches, back pain and neck pain, including pain as severe as when she first injured her neck. She saw assorted doctors and physical therapists, underwent numerous tests and was diagnosed as having a C5-6 disk herniation. Her neurosurgeon stated her condition could cause pain and headaches that wax and wane. He opined that some force caused the herniation and, based on Sherry's history, the source of the trauma was the physical therapy she received at St. Francis Hospital. Sherry underwent surgery for the condition. It was not entirely successful and a second surgery was recommended but Sherry elected to treat her pain with medication, under the care of a pain intervention specialist. Sherry reported that her pain, although still present, was under control and there was less need for emergency care.

¶ 11 In 2005, plaintiffs' physical therapy expert had prepared a video showing a female physical therapist performing the two modified pilates exercises as the expert understood Sherry performed them based on her deposition testimony and his interview of her. Defendant moved to bar plaintiffs' use of the video. After opening arguments, the court examined the video and granted plaintiffs leave to present it to the jury if assorted edits were made. Plaintiffs' counsel stated he was not sure he would use the video at trial. At the end of the first day of trial, plaintiffs' counsel stated he might have his expert demonstrate the exercises in court on a portable weight machine and he produced the machine. The next day, some three hours before he was to call the expert witness, plaintiffs' counsel stated he would not present the video and, instead,

would have the expert demonstrate the exercises on the portable machine. Defendant objected because the portable machine was not representative of the machine on which Sherry performed her exercises, being one third the size of the St. Francis machine, not free standing and with a different center of gravity. The court overruled the objection.

¶ 12 Plaintiffs' expert then testified regarding how Sherry had performed the exercises and demonstrated them on the portable machine. During his demonstration of exercise two, he struggled with the machine and asked for counsel's assistance. His buttocks and back were off the floor during the exercise. After assorted objections from defense counsel, the court asked that the demonstration be stopped because the machine was unstable, the expert had difficulty controlling the weights and the demonstration was not helpful to the jury. Back on the witness stand, the expert testified that the force of the weights took him by surprise during exercise two. He stated that, when the bar was placed behind his legs and released, the weight picked up his buttocks, his body rolled backward and he felt his head pushing against the floor to get his buttocks down to the floor. He testified this type of force could cause serious damage to the cervical spine of someone like plaintiff.

¶ 13 That afternoon, a Friday, plaintiffs' counsel rested pending finalization of his exhibits. That Friday evening, defense counsel had three short videos prepared at St. Francis Hospital showing Meaney performing exercise one and two versions of exercise two, Meaney's version with the bar behind the calves and Sherry's version with the bar behind the ankles. Meaney's back and buttocks remained on the floor during each

exercise. At approximately 10:30 p.m. Sunday night, defense counsel sent an email to plaintiffs' counsel informing him that she intended to use the videos during her examination of her physical therapy expert the next day, Monday, to explain his understanding of how the exercises in question were performed.

¶ 14 Monday morning, plaintiffs' counsel objected to use of the videos as demonstrative evidence. The court overruled the objection but granted plaintiffs' counsel leave to question the defense expert and/or Meaney regarding the videos prior to their testimony in front of the jury. Counsel declined. Defendant's expert then testified and used the videos as a visual aid. He stated the videos accurately demonstrated his understanding of the exercises based on his review of medical records and deposition testimony and that the machine in the videos appeared identical to the machine he examined and which Sherry had used at St. Francis Hospital. He stated that both exercises were designed to safely treat Sherry's complaints of lumbar strain, were appropriate treatments and complied with the standard of care. He testified that exercise two was performed within the standard of care regardless of whether the bar was placed behind the mid-calves or behind the heels. In his opinion, neither exercise one nor exercise two, no matter how performed, put undue stress on Sherry's cervical spine or put her spine at risk. In his opinion, Sherry suffered a muscle strain while performing exercise one on her fourth visit and that this could occur even when exercises are performed within the standard of care.

¶ 15 The jury found for defendant. In response to special interrogatories posed by

defendant asking whether Meaney and/or Collins violated the standard of care, the jury answered "no" to both queries. Following the court's denial of their posttrial motion for a new trial, plaintiffs timely appealed.

¶ 16 Analysis

¶ 17 Plaintiffs argue that the circuit court erred in denying their request for a new trial because they were prejudiced when the court improperly allowed defendant to present to the jury the videos of Meaney performing the physical therapy exercises. A court should order a new trial only when it determines that the jury's verdict is against the manifest weight of the evidence. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999). A verdict is against the manifest weight of the evidence if the opposite conclusion is clearly evident or the jury's findings appear unreasonable, arbitrary, or not based on the evidence. *McClure*, 188 Ill. 2d at 132. We will not reverse the court's decision to deny plaintiffs' motion for a new trial unless the court abused its discretion. *McClure,* 188 Ill. 2d at 132-33. To determine whether the court abused its discretion, we look to whether the jury's verdict in favor of defendant was supported by the evidence and whether plaintiffs were denied a fair trial. *Sbarboro v. Vollala*, 392 Ill. App. 3d 1040, 1053 (2009).

¶ 18 Plaintiffs argue they were unfairly prejudiced for the following reasons:

(1) defendant failed to timely disclose the videos; defendant had consistently maintained that it did not intend to present a video of the exercises; none of plaintiffs' experts or witnesses had the opportunity to examine the videos in

depth; and the videos were not demonstrative evidence but rather substantive evidence, intended to show what happened when Sherry performed the exercises;

(2) the videos showed the exercises performed in a manner consistent with the defense theory that Sherry's back and buttocks would not come off the floor during the exercises and she would not have excessive pressure on her neck, thus preconditioning the jury to accept that theory; and the exercises were performed by Meaney, whose conduct was at issue in the case and whose physical condition as an experienced physical therapist with no known back problems or abdominal weakness did not match that of Sherry, in a self-serving effort to disprove her/defendant's negligence;

(3) the jury's eight-hour deliberation over two days shows the late disclosed videos of the exercises addressing the issue at the heart of the litigation may have "tipped the scales" in defendant's favor and thus was substantial error prejudicing plaintiffs.

¶ 19 Defendant did not notify plaintiffs that it intended to use the videos until the night before defendant was to present its case, after plaintiffs had closed their case. There is no question this belated disclosure is a violation of the discovery rules. The Illinois Supreme Court rules on discovery are mandatory rules of procedure with which the parties must strictly comply. *Jackson v. Seib*, 372 Ill. App. 3d 1061, 1074 (2007). Parties must seasonably supplement or amend prior answers or responses whenever

new or additional evidence or information subsequently becomes known to that party. *Jackson*, 372 Ill. App. 3d at 1074. However, admission at trial of evidence which should have been disclosed through discovery is not reversible error absent proof that it resulted in prejudice. *Sbarboro*, 392 Ill. App. 3d at 1053. Both the decision to admit evidence and the decision to sanction a party for a discovery violation lie within the circuit court's discretion. *Jackson*, 372 Ill. App. 3d at 1074; *Sbarboro*, 392 Ill. App. 3d at 1053. We will not reverse the court's ruling on either of these issues absent an abuse of discretion, absent a finding that no reasonable person would take the view adopted by the circuit court. *Jackson*, 372 Ill. App. 3d at 1074.

¶ 20 Defendant asserts the videos were proper demonstrative evidence, intended to assist their physical therapy expert in explaining the exercises. Demonstrative evidence is not subject to the same stringent discovery disclosures as substantive evidence because it is not substantive evidence. *Velarde v. Illinois Central RR Co.*, 354 Ill. App. 3d 523, 531-32 (2004); *Cisarik v. Palos Community Hospital*, 144 Ill. 2d 339, 341-42 (1991). It has no probative value. *Cisarik*, 144 Ill. 2d at 341; *Preston ex rel. Preston v. Simmons*, 321 Ill. App. 3d 789, 801 (2001). Instead it serves as a visual aid to help the jury understand the verbal testimony of witnesses and the issues raised at trial and courts look favorably on its use. *Spyrka v. County of* Cook, 366 Ill. App. 3d 156, 167 (2006); *Preston*, 321 Ill. App. 3d at 801. The circuit court has the discretion to determine whether a party may present demonstrative evidence to clarify an expert's testimony and we will not disturb that determination absent a clear abuse of discretion.

Preston, 321 Ill. App. 3d at 801.

¶ 21 Before a video can become evidence at trial, the court must determine that (1) a sufficient foundation has been laid, by someone having personal knowledge of the filmed subject, that the video is an accurate portrayal of what it purports to show; and (2) that the video's probative value is not outweighed by the danger of unfair prejudice. *Spyrka,* 366 Ill. App. 3d at 167 (citing *Cisarik*, 144 Ill. 2d at 342). Relevancy and fairness are the primary considerations in determining whether demonstrative evidence should be allowed. *Preston,* 321 Ill. App. 3d at 801. Only if demonstrative evidence is inaccurate or tends to mislead the jury will its admission constitute an abuse of discretion. *Preston,* 321 Ill. App. 3d at 801.

¶ 22 Here, the evidence supports a finding that defendant's expert laid an adequate foundation for the videos showing the exercises. He testified the videos were made at St. Francis Hospital; the machine on which the exercises were demonstrated in the videos appeared identical to the machine he examined at St. Francis Hospital, which was the machine on which Sherry claimed she was injured; and the exercises were demonstrated as he understood them to be performed, with exercise two being shown both with the bar behind the ankles as Sherry asserted and with the bar behind the ankles as Meaney asserted.

¶ 23 The evidence also supports a finding that plaintiffs were not unfairly prejudiced by admission of the videos. Videos may be shown if their inflammatory effect does not outweigh their probative value. *Glassman v. St. Joseph Hospital*, 259 Ill. App. 3d 730,

754 (1994). If a tape preconditions the minds of the jury to accept the presenting party's theory, it is not a demonstrative video and should not be admitted into evidence on that basis. *Spyrka,* 366 Ill. App. 3d at 168; *French v. City of Springfield*, 65 Ill. 2d 74, 81-82 (1976).

¶ 24 First, regarding the timeliness of the disclosure, defendant presented a good faith explanation for its failure to prepare and disclose the videos earlier. It asserted it intended to use plaintiffs' 2005 video during its expert's testimony and, when plaintiffs' decided not to present that video and instead present their expert's in-court demonstration, to use the machine plaintiffs brought in. When the machine was removed and unavailable, defendant was faced with having to counter plaintiffs' in-court demonstration with nothing but verbal testimony. It therefore quickly prepared the videos of the exercises in order to have an exhibit available to assist its expert in explaining the exercises. The court accepted this explanation for the untimely disclosure, finding the circumstances necessitating production of the videos were "immediate and unplanned." Defendant's explanation is reasonable and nothing shows that its failure to disclose the videos earlier was a purposeful attempt to surprise plaintiffs.

¶ 25 Second, looking to the content of the videos, they demonstrated the exercises better than a verbal description could and showed the jury what the actual machine used by Sherry looked like. Unlike the in-court demonstration by plaintiffs' expert, both Sherry's and Meaney's versions of exercise two were demonstrated in the videos and

the demonstrations were made without editorial comment by the performer. Plaintiffs argue, however, that the videos misled the jury because they did not show the performer's back and buttocks coming off the floor as Sherry asserted. But plaintiffs' expert showed the jury only that version of exercise two during his in-court demonstration. We are hard-pressed to see how the evidence of plaintiffs' expert's demonstration, which was disclosed only a day prior to its presentation, is outweighed by the evidence of defendant's demonstrative videos such that plaintiffs were unfairly prejudiced by admission of the videos.

¶ 26 Plaintiffs' expert performed the in-court demonstration of the exercises showing only Sherry's version of the occurrence. With considerable effort, he demonstrated exercise two with the bar behind his ankles and with his buttocks and back in the air and his neck constricted. He demonstrated on an unstable machine latched to the bench and one third smaller than the machine at St. Francis Hospital and testified that the force of the weight brought him up onto his buttocks. In contrast, defendant's expert showed videos demonstrating both plaintiffs' and defendant's version of exercise two, albeit without back and buttocks in the air, on the same machine as that which Sherry used. If, as plaintiffs assert, defendant's demonstrative videos were a self-serving device intended to precondition the jury, plaintiffs' in-court demonstration of the exercises by its expert was nothing less.

¶ 27 The fact that Meaney performed the demonstration in the videos does not make the videos substantive rather than demonstrative evidence. It does not condition the

minds of the jury to accept defendant's version of events. Granted, although the videos do not identify Meaney, the jury presumably recognized her from her appearance on the stand and in court. However, the videos merely show that Meaney can do the exercises without raising her buttocks off the floor. Given that Meaney is an experienced physical therapist and not suffering the same physical condition as Sherry was at the time Sherry performed the exercises, it is not surprising that she can do the exercises easily. Further, the fact that the videos show Meaney's back and buttocks on the floor does not make it inaccurate or inflammatory. It accurately reflects defendant's version of the exercises, the version explained by its expert, just as plaintiffs' in-court demonstration accurately reflected plaintiffs' version of the exercises.

¶ 28 Plaintiffs thoroughly cross-examined defendant's expert about the videos, the exercises and his opinion and had the opportunity to bring all the discrepancies and any alleged bias to the jury's attention. Clearly, neither Meaney's performance of the exercises on the videos nor plaintiffs' expert's in-court demonstration of the exercises was an actual recreation of the occurrence, of what, if anything, happened to Sherry. As the court noted, the manner in which the exercises were performed was the crux of the case and both parties used demonstrative evidence to assist their experts in describing the exercises. Just as plaintiffs' in-court demonstration of the exercises illustrated and did not change its expert's opinion regarding what happened, so the videos illustrated and did not change defendant's expert's opinion regarding what happened. The evidence supports a finding that plaintiffs suffered no unfair prejudice

from admission of the videos. A sufficient foundation having been laid and no unfair prejudice to plaintiffs resulting, the court did not abuse its discretion in allowing defendant to present the videos as demonstrative evidence to the jury.

¶ 29 The court did not err in denying Plaintiffs' motion for a new trial. The evidence regarding defendant's negligence in prescribing and instructing Sherry on the exercises, specifically on exercise two, is contradictory. Witnesses and experts on both sides testified regarding the exercise, how and when it was performed. The jury must weigh the evidence, determine the credibility of witnesses, and resolve any conflicts in expert testimony and we cannot substitute our judgment for that of the jury in such determinations. *Dabros by Dabros v. Wang*, 243 Ill. App. 3d 259, 264 (1993); *Becht v. Palac*, 317 Ill. App. 3d 1026, 1035 (2000). The jury chose to credit defendant's evidence over plaintiff's and found in favor of defendant.

¶ 30 Meaney testified that she did not instruct Sherry to perform exercise two with her legs straight up; Sherry's buttocks were to remain and did remain on the floor during the exercise; and Sherry did not perform exercise two during the session in which the injury was alleged to occur. Defendant's physical therapy expert opined that exercise two was appropriate and within the standard of care for someone in Sherry's condition, regardless of whether performed with the bar behind the ankles or behind the mid-calves. Given this testimony, the evidence did not overwhelmingly favor plaintiffs nor was the jury's finding against the manifest weight of the evidence. We cannot set aside a verdict simply because the jury could have drawn different conclusions from

conflicting testimony nor substitute our judgment for that of the jury in determining the weight of conflicting evidence. *Becht*, 317 Ill. App. 3d at 1035. Therefore, given the evidence presented, we do not find an opposite conclusion to the jury's is clearly evident or that the jury's finding was unreasonable, arbitrary or not based on the evidence such that a new trial was warranted. *McClure*, 188 Ill. 2d at 132.

¶ 31 For the reasons stated above, we affirm the decision of the circuit court denying plaintiffs' motion for a new trial.

¶ 32 Affirmed.