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SIXTH DIVISION
May 17, 2012

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANIEL DURHAM,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 07 L 1639
)	
DUBIN AND ASSOCIATES, INC.,)	The Honorable
)	Susan Ruscitti-Grussel,
Defendant-Appellee.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Garcia and Palmer concurred in the judgment.

ORDER

- ¶ 1 *HELD:* Plaintiff has waived and/or forfeited his contentions of trial court error.
- ¶ 2 Plaintiff, Daniel Durham, appeals the jury's verdict finding in favor of defendant, Dubin & Associates, Inc., in the underlying negligence action wherein plaintiff alleged defendant was liable for injuries he sustained while working at a construction site. Plaintiff contends he is entitled to a judgment notwithstanding the verdict or a new trial because of numerous prejudicial

errors he sustained during trial. Based on the following, we affirm.

¶ 3

FACTS

¶ 4 On September 29, 2003, plaintiff was working as a carpenter on a construction site for a condominium building known as Arcadia. Plaintiff was employed by Asbach & Vanselow, Inc. (A & V). Defendant company was the general contractor on the project. While leaving the construction site, plaintiff attempted to cross over a trench by walking on a wooden plank. The wood broke and plaintiff fell, causing injuries.

¶ 5 James Eschenbauch testified that he was A & V's foreman on the Arcadia project. Eschenbauch testified that it was his responsibility to ensure the safety of the carpenters. According to Eschenbauch, A & V also employed a safety consultant to check the construction site periodically. Eschenbauch testified that the Arcadia project involved the construction of two condominium buildings that had garages on the lower level which faced each other. The construction site was fenced off with the entrance and exit on the east side of the property. Eschenbauch said that there was a trench approximately five feet wide and two and a half feet deep situated in front of the project. Eschenbauch testified that the trench had been in place for "awhile." According to Eschenbauch, A & V provided its employees with "scaffold grade" 2x10 or 2x12 wooden planks measuring 12 or 14 foot long to cross over the trenches in order to gain access to the condominiums through the garage area. Eschenbauch testified that he repeatedly told the carpenters to check the planks prior to using them to ensure they were safe. Eschenbauch added that, at the end of the working day, all of the carpenters brought their tools to Eschenbauch's truck to be stored for the night. The carpenters then left the construction site at

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the same time.

¶ 6 Eschenbauch further testified that he learned about plaintiff's fall from Melvin Schwindaman, another employee. When plaintiff emerged from the condominium and approached Eschenbauch's truck at the end of the day in question, Eschenbauch advised plaintiff that he needed to complete an accident report. Eschenbauch asked plaintiff if he was hurt and plaintiff responded in the negative. Plaintiff then left the construction site without completing an accident report. As a result, Eschenbauch completed the report based on information he learned from plaintiff and Schwindaman. The report indicated that plaintiff fell when a plank broke while he was crossing the trench. The following morning, September 30, 2003, Eschenbauch informed James Edgerton, the project superintendent, that one of his employees fell, but the employee was not hurt and left the job site. Eschenbauch, however, testified that he wrote in his accident report that plaintiff required medical treatment. According to Eschenbauch, he drew a diagram of the trench and reported the accident to Richard Lorenz, the owner of A & V.

¶ 7 Edgerton testified that he worked for defendant company as the superintendent on the Arcadia project. Edgerton described the fence surrounding the construction site as a chain-link fence with eight feet wide and six or seven feet high panels that could be removed from their footed posts. According to Edgerton, workers on the construction site regularly removed and replaced the fence panels to allow for deliveries and to enter and exit the site. The fence was erected approximately 10 feet from the north and south sides of the condominium buildings and 3 or 4 feet from the east side of the building. A brick wall was situated on the west side of the site. In addition, there was a main gate on the east side of the site, which Edgerton said was

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never locked. On the date of the accident, the condominium units were closed off by walls separating the units. Edgerton testified that he observed workers entering and exiting the buildings through the front doors of the units on the north and south sides of the buildings. According to Edgerton, no excavation was occurring on the date of the accident and the trenches were two or three feet deep, not five feet. Edgerton testified that he learned about plaintiff's accident from Eschenbauch, who said that plaintiff fell because a plank broke, causing plaintiff to land on the concrete footing at the bottom of the trench.

¶ 8 Ryan Berrend testified that he was employed by A & V as a carpenter on the Arcadia project. Berrend testified that he vaguely remembered plaintiff. When entering the job site, Berrend said he used the main gate. He could not recall whether the gate was ever locked. Berrend testified that the carpenters usually left the project as a group at the end of the day, around 3:15 p.m. The carpenters could not walk straight down the driveway to the gate because large equipment was situated in between the garages. In order to exit the condominium building, Berrend said he walked into a garage, around the equipment, back out of the garage, and onto the driveway to exit through the main gate. Berrend added that to enter and exit the garages from the driveway, the carpenters had to "[step] over the trenches that were there." According to Berrend, the trenches were a couple of feet wide and a couple of feet deep. Berrend testified that he did not recall needing to walk on a plank to cross the trench. Berrend testified that he did not witness the accident, but he spoke to plaintiff after it happened and plaintiff said, "I'll be fine."

¶ 9 Schwindaman testified that, when he would arrive on the job site in the morning, the main gate was unlocked. Schwindaman testified that, from time to time, he entered and exited

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the job site on the north side through the "removable fence" in order to get lunch across the street. Schwindaman recalled walking on planks over the trench on the site. Schwindaman did not know who provided the planks and did not recall the depth of the trench. Schwindaman had no recollection of plaintiff's accident.

¶ 10 Lorenz testified that he wrote a note after talking to Eschenbauch about plaintiff's accident. The note was written on the face of the accident report that Eschenbauch completed. The handwritten note provided that plaintiff "put a two-by-six down himself. Another guy crossed without breaking, then broke under [plaintiff]."

¶ 11 Timothy Kamradt testified that he was the superintendent for A & V. Kamradt said he visited the Arcadia job site approximately once per week. Kamradt testified that there were no problems with access to the site and that he did not know whether the main gate had a lock. According to Kamradt, 2x12 planks were used to cross excavations. Kamradt testified that he did not receive any complaints regarding the use of the planks. Moreover, the A & V safety consultant visited the Arcadia project from time to time and did not raise any concerns regarding the safety of the excavations. Kamradt testified that he was not on the job site on the date of the accident.

¶ 12 Michael Lorenz testified that he was a co-owner, estimator, and project manager for A & V. According to Michael, it was A & V's responsibility to provide the employees with access to the individual condominium units and using planks to walk over the trenches was not an unsafe work practice. In fact, Michael testified that it was A & V's custom and practice to provide workers with scaffold grade planks to cross excavations. Michael testified that he was

on the job site a couple of times per month. Michael opined that the Arcadia job site was safe.

¶ 13 Plaintiff testified that when he arrived to the job site at 6 a.m. on a daily basis he could not enter through the main gate because it was locked. Plaintiff was forced to wait for someone to open the gate. Plaintiff assumed the individual was an employee of defendant, but did not believe that individual was Edgerton.

¶ 14 Plaintiff testified that, on the date of the accident, there were no ditches or trenches on the job site when he arrived. Plaintiff worked on the roof of the condominium building for the entire day along with Berrend and other co-workers. At the end of the day, around 3:15 p.m. or 3:30 p.m., plaintiff gathered his tools, which included his tool belt, safety glasses, hard hat, lunch box, drive saw, nail gun, and air hoses that he wrapped around his shoulders. Plaintiff testified that he and 7 to 10 other carpenters proceeded down to the first floor and walked through the units toward the garage. Plaintiff said he was able to walk between the condominium units because the walls had not been dry-walled. In route to the driveway, plaintiff noticed four to six men standing in a trench. The trench had sloped sides and was approximately four feet wide at the bottom and eight feet wide at the top. Plaintiff testified that large mounds of dirt were on both sides of the trench, such that the trench was five to eight feet deep from the top of the dirt mound to the bottom of the trench. The bottom of the trench contained concrete footing. According to plaintiff, the trench blocked plaintiff's means of egress.

¶ 15 Plaintiff testified that at least three carpenters slid down the trench, which caused "a bunch of yelling and commotion" by other workers on the site and the "guy from Dubin that was supervising the operation." According to plaintiff, one of defendant's employees then grabbed a

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12 to 14 feet long 2x8 or 2x10 plank and threw it toward the carpenters in the trench to place across the trench. Defendant's employee then instructed the remaining carpenters to hurry across the plank. One carpenter walked across the plank before plaintiff without issue. Plaintiff then began walking on the plank while carrying air hoses, a drive saw, a nail gun, his hard hat, safety glasses, his tool belt with approximately 30 pounds of tools attached, and his lunch box. Plaintiff testified that he made his way to the middle of the plank when it snapped. Plaintiff said he "saw a flash of light and landed on [his] back." According to plaintiff, he fell six to eight feet down onto the concrete footing at the bottom of the trench.

¶ 16 Plaintiff testified that he was helped out of the trench and his coworkers checked if he was okay. Approximately 10 minutes later, the A & V "big boss," Jim, approached. Jim was very upset and blamed the carpenters for using a plank to cross the trench. Plaintiff followed Jim to his van, as instructed. When Jim asked plaintiff whether he was "okay," plaintiff responded, "does it look like I'm all right?" Jim told plaintiff that he would complete an accident report the following day. Plaintiff then left the job site.

¶ 17 Kenneth Yotz testified as a safety expert for plaintiff. Yotz opined that defendant failed to comply with the Occupational Safety and Health Act (OSHA) requirements for conducting frequent and regular inspections of the work site. Yotz further opined that defendant failed to provide a safe means of egress from the site. Yotz testified that defendant was responsible for the work performed by A & V and plaintiff. Yotz further testified that, while defendant was the "controlling employer" pursuant to OSHA, A & V was the "exposing employer" by exposing its workers to a hazard. Yotz admitted that he did not evaluate A & V's safety protocol or safety

practices on the job site.

¶ 18 Richard Hislop, defendant's safety expert, testified that defendant provided the requisite safety program and a safe workplace for the Arcadia project. Hislop provided that it was A & V's duty to provide its employees with a safe place to work, to train the employees to recognize safety hazards, and to ensure the employees followed its safety practices. Hislop testified that A & V complied with its duties. Hislop opined that walking through trenches and using scaffold grade planks to cross the excavations were safe methods to traverse the trenches. Hislop testified that plaintiff was a "journeyman" carpenter with 20 years experience working with lumber. According to Hislop, plaintiff had the technical ability to grade and assess the quality of wood. Hislop said it was plaintiff's duty, as a journeyman carpenter, to inspect his tools prior to use, namely, to inspect the plank before using it. Hislop opined that "whoever laid that board, Mr. Durham claimed he laid it, didn't inspect that board before it was used."

¶ 19 Hislop further testified that the workers on the Arcadia site had three means of egress: (1) to walk out the front door of the condominium and move the fence panels; (2) to cross over the trench and exit through the main gate on the east side of the property; or (3) to walk out the front door of the condominium, walk along a sidewalk between the buildings and the fence, and walk out the main gate. Hislop noted that crossing over the trench was the easiest and shortest way to leave the job site.

¶ 20 The jury returned a verdict in favor of defendant. Plaintiff filed a posttrial motion for a judgment notwithstanding the verdict or, in the alternative, a new trial. The motion was denied.

¶ 21

DECISION

¶ 22 Plaintiff raises several contentions of trial court error. Plaintiff contends that these trial errors caused prejudice such that he is entitled to a judgment notwithstanding the jury's verdict or a new trial. Plaintiff, however, has failed to provide the relevant law for either posttrial action in violation of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). Moreover, plaintiff's brief is replete with arguments that do not include citations to the record in further violation of Rule 341(h)(7). In addition, plaintiff failed to object to a number of the claimed errors at trial, causing him to forfeit those contentions. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988) (in order to preserve an issue for review, the party must lodge a contemporaneous objection and include the alleged error in posttrial motion). We address each contention in turn.

¶ 23

I. Motions *In Limine*

¶ 24 Plaintiff argues that the trial court erred in denying three motions *in limine*: (1) to bar reference to a 2007 motorcycle accident; (2) to bar the testimony of Doctor Marc Levin; and (3) to bar the testimony of David Gibson. Defendant responds that plaintiff has waived review of his contentions where he failed to object at trial to the introduction of the challenged testimony, has waived review of the propriety of the trial court's rulings where he failed to provide the transcript of the motion *in limine* hearing, and is prohibited from raising his arguments to the challenged testimony where he invited the testimony. Defendant further contends that the challenged testimony was relevant only to the issue of damages, which was not reached by the jury and, therefore, any error was harmless.

¶ 25 Plaintiff concedes that he failed to object to the disputed testimony at trial. The supreme court has instructed that failure to renew an objection to a ruling on a motion *in limine* at trial results in forfeiture. In *Simmons v. Garces*, 198 Ill. 2d 541, 763 N.E.2d 720 (2002), the supreme court provided "[t]he denial of a motion *in limine* does not in itself preserve an objection to disputed evidence that is introduced later at trial. 'When a motion *in limine* is denied, a contemporaneous objection to the evidence at the time it is offered is required to preserve the issue for review.'" *Id.* at 569 (quoting *Brown v. Baker*, 284 Ill. App. 3d 401, 406, 672 N.E.2d 69 (1996)). Plaintiff, however, argues that he had a continuing objection to the challenged testimony by raising the motion *in limine* and that repeated objections would have had prejudicial consequences. Plaintiff cites to *Spryka v. County of Cook*, 366 Ill. App. 3d 156, 851 N.E.2d 800 (2006), for support. In *Guski v. Raja*, 409 Ill. App. 3d 686, 949 N.E.2d 695 (2011), this court expressly called *Spryka* into question and declined to follow it because of the misapplication of relevant law. *Guski*, 409 Ill. App. 3d at 696. This court ultimately concluded that there was "no reason to excuse plaintiff's failure to object at trial and [deemed] the issue forfeited." *Id.* at 697. We agree with the *Guski* reasoning and similarly find plaintiff forfeited review of the challenged testimony where he failed to object to the challenged testimony at trial.

¶ 26 Moreover, we have no basis upon which to review the trial court's rulings on the motions *in limine* because plaintiff has failed to provide us with a transcript of the hearing. We, therefore, must presume that the trial court complied with the law and its rulings were appropriate. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391, 459 N.E.2d 958 (1984) (any doubts raised by an incomplete record must be resolved against the appellant).

¶ 27

II. Improper Opinion Testimony

¶ 28 Plaintiff contends the trial court erred in allowing the testimony of Hislop, defendant's safety expert, where his testimony lacked sufficient foundation and was based purely on speculation and conjecture. Plaintiff argues that Hislop's testimony did not qualify as that of an expert opinion and he suffered prejudice because the jury was misled to believe Hislop was an expert. Specifically, plaintiff contends Hislop's opinion that plaintiff was responsible for his fall was based solely on the incorrect assumption that plaintiff placed the plank over the trench. Defendant responds that plaintiff failed to preserve his contention for review where he did not object to the challenged testimony at trial. *Enoch*, 122 Ill. 2d at 186. In addition, defendant contends plaintiff's argument is based on a misrepresentation of the trial testimony.

¶ 29 After reviewing Hislop's testimony, we conclude that plaintiff failed to preserve his contention for our review where he did not raise any foundational objections at trial. *Id.* Moreover, contrary to plaintiff's recitation of the disputed testimony, Hislop recognized that plaintiff may not have placed the plank over the trench; however, ultimately it was plaintiff's duty to inspect the piece of wood prior to using it as a tool to traverse over the trench. Further, the admission of Hislop's expert testimony was not an abuse of discretion. *Citibank N.A. v. McGladrey & Pullen, LLP*, 2011 IL App (1st) 102427, ¶13. Again, plaintiff did not object to Hislop's admission as an expert. *Enoch*, 122 Ill. 2d at 186. Importantly, Hislop testified extensively regarding his background, education, experience, and knowledge of OSHA and other safety standards. In addition, Hislop testified regarding the documents he used in forming his opinion, including depositions, contracts detailing the applicable safety programs and procedures,

blueprints, and diagrams. Plaintiff's counsel then conducted a thorough cross-examination of Hislop's qualifications without raising any objections to his qualifications. We, therefore, do not find any error in the admission of Hislop's testimony.

¶ 30 Plaintiff further contends the trial court erred in admitting the expert testimony of David Gibson, a vocational economist, where he improperly relied upon and produced a written report without disclosing it in violation of Supreme Court Rule 213(g) (eff. Jan. 1, 2007). Plaintiff fails to cite to the record to support his contention and defendant advises this court that the record does not contain Gibson's deposition testimony upon which plaintiff relies to support his argument. *Foutch*, 99 Ill. 2d at 391 (all doubts raised by an incomplete record are resolved against the appellant). Moreover, even if we had the appropriate means of reviewing this contention, any error would be deemed harmless as Gibson's testimony was relevant only to the issue of damages and the trial court did not reach that issue where the verdict was in favor of defendant.

¶ 31 **III. Improper Impeachment**

¶ 32 Plaintiff next contends the trial court erred in allowing the introduction of improper impeachment. Specifically, plaintiff contends it was improper for the trial court to allow defendant to cross-examine plaintiff, over his objection, regarding a previous lawsuit on an unrelated matter. In addition, plaintiff contends it was improper for the trial court to allow defendant to cross-examine him regarding failure to identify an employee of defendant as a witness to the accident in his answers to interrogatories. Defendant responds that, contrary to his argument, plaintiff failed to object to the disputed cross-examination, thereby forfeiting his right

to raise the challenge on appeal. Defendant further responds that the impeachment was proper.

¶ 33 Plaintiff again has failed to cite to the record in violation of Rule 341(h)(7), which provides that arguments "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. ***. Points not argued are waived ***." Rule 341(h)(7) is not merely a suggestion, but is "necessary for the proper and efficient administration of the courts." *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶5. Moreover, it is not this court's duty to sift through the record to find support for plaintiff's contentions. *Id.* Additionally, our review of what we presume to be the disputed cross-examination reveals that plaintiff failed to raise an objection. *Enoch*, 122 Ill. 2d at 186 (failure to object at trial and include the alleged error in a posttrial motion results in forfeiture). Plaintiff, therefore, has both waived and forfeited review of this issue.

¶ 34 IV. Prejudicial Closing Argument

¶ 35 Plaintiff finally contends that defendant presented improper and prejudicial closing arguments. Specifically, plaintiff argues that defense counsel stated, in closing, "that Plaintiff had suffered his injury as a result of tripping over an air hose that was on the work site. There was absolutely no evidence that there was ever any air hose on the work site." Plaintiff contends that defense counsel made the argument to infer that plaintiff was fraudulent in making his claim, which was a direct violation of a motion in limine. Yet again, plaintiff has not provided this court with any citations to the record in violation of Rule 341(h)(7). Moreover, our review of defense counsel's closing argument reveals that plaintiff failed to raise any objection to the challenged argument. *Enoch*, 122 Ill. 2d at 186. We, therefore, conclude that plaintiff has

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waived and forfeited review of his contention.

¶ 36

CONCLUSION

¶ 37 We affirm the judgment of the trial court, denying plaintiff's motion for judgment notwithstanding the verdict or a new trial. Plaintiff has either waived and/or forfeited his contentions for which we find no support.

¶ 38 Affirmed.