SECOND DIVISION
August 20, 2013

No. 1-11-3247

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GERALD J. COSGROVE, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 07 L 13183
MICHAEL J. PRATHER, Defendant-Appellee.	)	Honorable William J. Haddad, Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

O R D E R

¶ 1 *Held*: In this personal injury action resulting from an automobile accident, where the record shows that the trial court did not abuse its discretion when it allowed photographs of plaintiff's vehicle to be admitted as evidence and when it allowed the jury to hear that plaintiff's treating physician filed a lien in the case, the trial court's orders entering judgment on the jury's verdict in favor of plaintiff and denying plaintiff's posttrial motion for judgment *n.o.v.* and a new trial are affirmed.

¶ 2 Plaintiff Gerald Cosgrove filed a personal injury lawsuit against defendant Michael Prather as the result of an automobile accident. Following a jury trial, judgment was entered for plaintiff in the amount of $3,835.24. Plaintiff then filed a posttrial motion to vacate the judgment and grant him judgment *n.o.v.* and/or a new trial. The trial court denied plaintiff's motion. On

appeal, plaintiff contends the trial court erred when it allowed photographs of his vehicle to be admitted as evidence where there was no testimony from a medical expert to correlate the vehicle damage in the photos with plaintiff's injury. Plaintiff also contends the trial court erred when it allowed the jury to hear that he received a "collateral benefit" of having his treating physician defer his fees and retain a lien in this case. We affirm.

¶ 3 Plaintiff filed a complaint against defendant alleging that on July 25, 2007, defendant negligently drove his vehicle and struck plaintiff's vehicle from behind while plaintiff was stopped. Plaintiff alleged that his vehicle was damaged, and that he suffered severe and permanent injuries to his head, body and nervous system. Plaintiff requested $1,048.01 plus costs for property damage, and an amount in excess of $30,000 plus costs for compensatory damages for his injuries.

¶ 4 The first trial in this case was held in September 2010 and resulted in a jury verdict in favor of defendant. In January 2011, the trial court granted plaintiff's motion to vacate that verdict and set the case for a new trial.

¶ 5 The second jury trial, which is the proceeding at issue in this appeal, was held from July 11, 2011, through July 13, 2011. The record on appeal does not include a report of proceedings from the trial in any format; only the common law record is before this court. The record shows that the jury rendered a verdict in favor of plaintiff in the amount of $3,835.24, plus costs, and the trial court entered judgment on that verdict.

¶ 6 Plaintiff filed a posttrial motion, followed five days later by an amended posttrial motion which included one additional paragraph. In his amended motion, plaintiff raised two issues and asked the trial court to vacate the judgment and grant him judgment *n.o.v.* and/or a new trial. Plaintiff first argued that the trial court erred when it allowed photographs of plaintiff's vehicle to be admitted as evidence because there was no testimony from a medical expert to correlate the vehicle damage to plaintiff's injuries, which therefore, would allow the jury to improperly speculate about that relationship, contrary to the holding of *Baraniak v. Kurby*, 371 Ill. App. 3d

310 (2007). Plaintiff argued that prior to trial, the court ruled that photographs of plaintiff's vehicle would be barred from admission due to defendant's failure to provide expert testimony, and the photos would only be admitted to impeach plaintiff's credibility. However, during trial, plaintiff testified that there was front-end damage to defendant's car, which defendant corroborated on cross-examination. Based on plaintiff's testimony about the damage to defendant's car, the trial court ruled that plaintiff had opened the door to the use of the photographs of plaintiff's vehicle for all purposes. Plaintiff argued that this ruling was improper pursuant to *Baraniak*.

¶ 7 Plaintiff's second argument was that the trial court erred when it allowed the jury to hear that plaintiff received a "collateral benefit" of having his treating physician, Dr. Dennis Karasek, defer his fees and retain a lien in the case. Plaintiff argued that the lien constituted a collateral benefit, and evidence of a collateral benefit is inadmissible pursuant to the holding of *Wills v. Foster*, 229 Ill. 2d 393 (2008). Plaintiff noted that in closing argument, defense counsel told the jury that Dr. Karasek had a lien in the case, and had an interest in seeing that lien satisfied. Plaintiff further argued that defense counsel improperly attacked the honesty of Dr. Karasek's testimony. Plaintiff claimed that the jury's monetary award erroneously excluded Dr. Karasek's "collateral benefit specials," and was a direct result of impermissible argument by defense counsel regarding the doctor's lien and impugning Dr. Karasek's integrity.

¶ 8 Plaintiff attached several documents to his posttrial motion including his motion *in limine* to bar photographs, and the jury's damages assessment showing an award of $3,835.24, which was comprised of $2,835.24 for past reasonable and necessary medical care, and $1,000 for past pain and suffering.

¶ 9 Also attached to plaintiff's motion was 25 pages from the trial transcript depicting a discussion between the trial court and counsel for both parties prior to closing arguments, and defense counsel's closing argument. This is the only portion of the report of proceedings included in the record on appeal. During this discussion, plaintiff's counsel argued that, pursuant

to *Baraniak*, photographs cannot be admitted to impeach the credibility of the parties, and where there is no medical expert who testifies about the force of the impact and causation, the photos cannot be admitted. Although the photographs had already been admitted, counsel argued that the attorneys should be barred from referring to them in closing arguments, and the photos should not be submitted to the jury. Defense counsel replied that admission of the photographs was in the trial court's discretion, that no error had been made in admitting them, that there were seven photographs to send to the jury, and that "we beat this horse to death at this point."

¶ 10 Referring to this court's holding in *DiCosola v. Bowman*, 342 Ill. App. 3d 530 (2003), the trial court stated that admission of photographs is within the sound discretion of the trial court. The court stated that it was also familiar with the *Baraniak* opinion. The court further stated that it was required to follow the law, and then explained:

> "I barred the photos from being used initially because there is no offer of proof that they would be accompanied with any testimony to explain any minimal impact damage to the rear of the plaintiff's vehicle was consistent with a minimal impact, otherwise that the photos corroborated an opinion. That was the initial decision made. The property damage without expert testimony as to minimal impact, not heavy impact, minimal impact, required some sort of expert testimony. I favored it. I didn't require it, but I favored it.
>
> Then during the trial, the plaintiff had decided to ask questions as to the front-end damage of the defendant's vehicle and the reasonable inference from those questions was that there was sufficient front-end damage to indicate an impact that was consistent with the plaintiff's testimony of speed somewhere between 45 and 65 miles an hour and even to the point of talking

> about the parts and the plastic and the metal and so on. Once that subject was broached, it seemed to me that your objection was waived and the door was opened and to have barred the defendant from responding to that by inviting this comment would have been unfair. It would have been patently unfair to allow you to show damage to the front of the car and him not to show damage to the rear of the car when the reasonable inference from your disclosure as to the front-end damage was to show that the photos and the damage in the photos were consistent with 45 to 65 miles an hour.
>
> You had no expert to explain it. He made no objection. You opened the door. And I had said before trial very clearly that, you know, the photos will be barred but that if you open the door, they'll be allowed in. Now, another way to open the door according to these cases is where there's other relevant issues. One relevant issue is the credibility of the witnesses. And on a separate tack, I believe that credibility issues were raised that allowed the defendant to use the rear-end damage to question the believability of the witness and the evidence in this case."

The court then denied plaintiff's motion to bar use of the photographs during closing arguments, but cautioned both parties to restrain from using the photos as if they were experts as the photos themselves did not prove the speed at impact.

¶ 11 Plaintiff's counsel then argued to the court that, pursuant to *Wills*, defense counsel should be barred from noting in his closing argument that Dr. Karasek's bills were unpaid. The court replied that defense counsel would not say that the bills were unpaid, but counsel could note that there was a lien in the case because such information goes to motive. Defense counsel argued that *Wills* barred disclosing information that a bill had been paid by Medicare or that the medical

services were rendered free of charge because such information was considered collateral. He argued that this case, however, was different because the bills were not paid by insurance or Medicare. Defense counsel asserted that the jury had a right to hear that plaintiff's doctor had a lien on file and an interest in seeing his bill paid. Plaintiff's counsel maintained that under the collateral benefit rule, the jury was barred from hearing about the doctor's lien.

¶ 12 The trial court stated that it reviewed the case law and found that if a doctor has a lien in the case, it may be one motive for his testimony, and the jury may hear such information. The court denied counsel's claim that allowing information about the lien would invite speculation by the jury, and stated that it would issue a jury instruction on the collateral source rule. During his closing argument to the jury, defense counsel stated that Dr. Karasek had filed a lien in this case and that the doctor had an interest in seeing that lien satisfied.

¶ 13 Defendant filed a response to plaintiff's posttrial motion arguing that the photographs of plaintiff's vehicle were properly admitted into evidence because plaintiff opened the door to the issue of vehicle damage when he questioned defendant about the damage done to the front end of defendant's vehicle upon impact. Defendant further argued that the photographs were admissible because credibility issues were raised by plaintiff's testimony about the speed defendant was driving when the impact occurred. In addition, defendant argued that the trial court did not err when it allowed the jury to hear that Dr. Karasek had a lien in the case because such information went to the doctor's bias, and the lien was not a collateral source. Plaintiff filed a reply to defendant's response maintaining his arguments that the trial court erred when it allowed the photographs to be admitted and when it allowed the jury to hear about the doctor's lien, which was a collateral benefit.

¶ 14 The trial court denied plaintiff's posttrial motion. The court's order states that in doing so, it heard argument from counsel; however, the transcript from that hearing does not appear in the record before this court. Plaintiff now appeals.

¶ 15 Initially, we note that plaintiff's appellate brief is substantially the same as his amended posttrial motion filed in the trial court and for the most part, is a verbatim copy of that motion. Consequently, we have already provided the detail of plaintiff's two issues and his arguments above. See, *supra*, ¶¶ 6, 7.

¶ 16 Plaintiff first contends the trial court erred when it allowed photographs of plaintiff's vehicle to be admitted as evidence because there was no testimony from a medical expert to correlate the vehicle damage to plaintiff's injuries, which therefore, allowed the jury to improperly speculate about that relationship, contrary to the holding of *Baraniak v. Kurby*, 371 Ill. App. 3d 310 (2007). Plaintiff acknowledges that the trial court found that plaintiff opened the door to the use of the photographs when plaintiff testified about the damage to defendant's car. Nevertheless, plaintiff maintains that the trial court's ruling was improper under *Baraniak*.

¶ 17 Plaintiff states that the standard of review for questions of law is *de novo*. However, the issue presented here is not a question of law. It has long been established that the determination of whether a photograph should be admitted into evidence is a decision that rests within the sound discretion of the trial court. *Bullard v. Barnes*, 102 Ill. 2d 505, 519 (1984). The trial court's ruling on the admissibility of a photograph will not be disturbed on appeal absent an abuse of that discretion. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 647 (2010). An abuse of discretion will be found where the trial court's ruling is arbitrary, unreasonable or fanciful (*Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 23) or where no reasonable person would agree with the position taken by the trial court (*DiCosola v. Bowman*, 342 Ill. App. 3d 530, 536 (2003)). The abuse of discretion standard is highly deferential to the trial court. *Taylor*, 2011 IL App (1st) 093085, ¶ 23. When determining if there has been an abuse of discretion, the reviewing court may not substitute its judgment for that of the trial court, nor may it consider whether the trial court exercised its discretion wisely. *DiCosola*, 342 Ill. App. 3d at 536.

¶ 18 In *Baraniak*, the trial court granted the plaintiff's motion *in limine* to bar use of photographs of the plaintiff's vehicle because such photographs were not relevant. *Baraniak*, 371

Ill. App. 3d at 316. Plaintiff's counsel had argued that none of the medical experts were going to testify that the vehicle damage could be correlated to the plaintiff's injuries, and without supporting medical testimony, the photos could allow for improper jury speculation. *Baraniak*, 371 Ill. App. 3d at 316. However, the trial court then ruled that defense counsel could use the photographs during his cross-examination of the plaintiff. *Baraniak*, 371 Ill. App. 3d at 316. On appeal, the court found that, pursuant to *DiCosola*, there is no "bright-line rule" that photographs showing minimal damage to a vehicle are automatically admissible to prove the extent of a plaintiff's injuries, or lack thereof. *Baraniak*, 371 Ill. App. 3d at 317, quoting *DiCosola*, 342 Ill. App. 3d at 535. Consequently, the court found that there must be a case-by-case analysis to determine if the trial court abused its discretion when it admitted photographs to prove the extent of a plaintiff's injuries. *Baraniak*, 371 Ill. App. 3d at 317.

¶ 19 The defense in *Baraniak* argued that the photographs were not admitted to connect the plaintiff's injuries to the vehicle damage, but instead, were offered to aid the jury in assessing the plaintiff's credibility when she testified that the impact was hard. *Baraniak*, 371 Ill. App. 3d at 317. The *Baraniak* court found that the defendant's reasoning would allow parties to bypass the relevancy rule for evidence, and would render vehicle photographs always admissible because witness credibility is always at issue. *Baraniak*, 371 Ill. App. 3d at 317. Accordingly, parties would be able to improperly argue or imply, without expert testimony, that there was a correlation between a plaintiff's injuries and the extent of vehicular damage. *Baraniak*, 371 Ill. App. 3d at 317-18. Based on its findings, the *Baraniak* court ruled that absent expert testimony regarding the correlation between the plaintiff's injuries and the vehicular damage, photographs of the parties' damaged vehicles had to be excluded at retrial. *Baraniak*, 371 Ill. App. 3d at 318.

¶ 20 In this case, we find that plaintiff's interpretation of the holding in *Baraniak* is incorrect. Contrary to plaintiff's claim, *Baraniak* did not hold that vehicle photographs can never be admitted without medical expert testimony that correlates the vehicle damage to the plaintiff's injuries. Instead, the court held that photographs of a vehicle cannot be admitted solely on the

basis for challenging the plaintiff's credibility. See *Baraniak*, 371 Ill. App. 3d at 317. Because witness credibility is always at issue, the photographs would always be deemed admissible, which would then allow for improper speculation by the jury. *Baraniak*, 371 Ill. App. 3d at 317.

¶ 21 In *DiCosola*, this court expressly stated "[w]e do not hold that expert testimony must always be required for such photographic evidence to be admissible." *DiCosola*, 342 Ill. App. 3d at 537. As discussed throughout the analysis in *DiCosola*, the dispositive question when determining whether a vehicle photograph should be admitted is whether that photograph is relevant. See *DiCosola*, 342 Ill. App. 3d at 533-38. "Irrelevant evidence is not admissible." *DiCosola*, 342 Ill. App. 3d at 538. In *DiCosola*, the trial court properly barred admission of the vehicle photographs because, without expert testimony, they were not relevant to any issues in the case. *DiCosola*, 342 Ill. App. 3d at 533-35. Similarly, in *Baraniak*, the plaintiff moved for the vehicle photographs to be barred because, in that case, the photos were not relevant without medical expert testimony. *Baraniak*, 371 Ill. App. 3d at 316.

¶ 22 Here, based on the record before this court, we cannot say that the trial court abused its discretion when it allowed the photographs of plaintiff's vehicle to be admitted as evidence. Our only resource for resolving this issue is the 25-page portion of the report of proceedings plaintiff attached to his amended posttrial motion. In that excerpt, quoted at length above, the trial court explained that it initially barred use of the photographs because there was no expert testimony to explain that the damage to the rear of plaintiff's vehicle was consistent with a minimal impact. The photographs were not going to be used to corroborate an expert opinion. In other words, at that point, the photographs were not relevant evidence.

¶ 23 The trial court then explained that during the trial, plaintiff asked questions about the damage to the front of defendant's vehicle, and the reasonable inference drawn therefrom was that there was sufficient damage to defendant's vehicle to indicate an impact consistent with plaintiff's testimony that defendant was driving between 45 and 65 miles per hour. At that point, the trial court determined that plaintiff had waived his objection and opened the door to the use

of the photographs. The trial court explained in great detail that it would have been "patently unfair" to allow plaintiff to show the damage to defendant's car, but then bar defendant from showing the damage to plaintiff's car. The trial court expressly stated "I had said before trial very clearly that, you know, the photos will be barred but that if you open the door, they'll be allowed in." The record thus reveals that the trial court determined that the photographs became relevant evidence when plaintiff asked questions about the damage to defendant's vehicle. We find that the trial court's ruling allowing the photographs of plaintiff's vehicle to be admitted as evidence was not arbitrary or unreasonable, but instead, was based on its reasoned determination that plaintiff opened the door to the issue of the vehicular damage and strength of impact, rendering the photographs relevant evidence. Accordingly, the trial court did not abuse its discretion.

¶ 24 We note that in his brief, plaintiff refers to events that occurred during trial, such as the specifics of plaintiff's testimony, defendant corroborating plaintiff's testimony, a lack of photographs of the front of defendant's vehicle, and a lack of expert testimony. As stated earlier, this court has no report of proceedings from the trial in any format. We do not have the transcript for the hearing on plaintiff's motion *in limine* to bar the photographs, and therefore, we must rely on the trial court's subsequent discussion of its ruling. We do not know who testified at trial or the substance of any testimony presented. We do not have a transcript depicting the point during the trial where the court determined that plaintiff opened the door to the use of the photographs. It is well settled that appellant has the burden of providing this court with a sufficient record to review for any possible error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). Our review was confined to the common law record, which included a 25-page excerpt from a sidebar discussion and defense counsel's closing argument. To the extent that our review was impeded by an incomplete record, this court must presume the trial court acted in conformity with the law and ruled properly after considering the evidence before it. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156-57 (2005); *Foutch*, 99 Ill. 2d at 391-92.

¶ 25 Plaintiff next contends that the trial court erred when it allowed the jury to hear that he received a "collateral benefit" of having Dr. Karasek defer his fees and retain a lien in this case. Plaintiff maintains that the doctor's lien constitutes a collateral benefit, and evidence of a collateral benefit is inadmissible pursuant to *Wills v. Foster*, 229 Ill. 2d 393 (2008). It appears plaintiff is contesting defense counsel's statement in closing argument that "Dr. Karasek has a lien in this file, in this case. He has an interest in seeing that lien satisfied."

¶ 26 The purpose of closing argument is to assist the jury in arriving at a fair verdict based on the evidence and the law. *Drakeford v. University of Chicago Hospitals*, 2013 IL App (1st) 111366, ¶ 50. Consequently, counsel is given wide latitude during closing argument and may argue and comment on the evidence and any reasonable inferences that may be fairly drawn from that evidence. *Drakeford*, 2013 IL App (1st) 111366, ¶ 50. Issues regarding the prejudicial effect of remarks made during closing argument are within the sound discretion of the trial court, and the court's determinations regarding such issues will not be disturbed on review absent a clear abuse of discretion. *Zickuhr v. Ericsson, Inc.*, 2011 IL App (1st) 103430, ¶ 73.

¶ 27 Plaintiff quotes two paragraphs from *Wills* in support of his claim that Dr. Karasek's lien was a collateral benefit that should not have been disclosed to the jury. In the first paragraph cited by plaintiff, the *Wills* court stated that the purpose of the collateral source rule was " 'to prevent the jury from learning *anything* about collateral income' " and to prevent the defendant from presenting evidence that the plaintiff had been compensated for his losses, even in part, by insurance. (Emphasis in original.) *Wills*, 229 Ill. 2d at 418, quoting *Arthur v. Catour*, 216 Ill. 2d 72, 79, 80 (2005). The court further stated that a defendant may cross-examine the plaintiff's witness and call his own witness to testify about the reasonableness of the charges. *Wills*, 229 Ill. 2d at 418. "Defendants may not, however, introduce evidence that the plaintiff's bills were settled for a lesser amount because to do so would undermine the collateral source rule." *Wills*, 229 Ill. 2d at 418.

¶ 28 In the second paragraph quoted by plaintiff, the *Wills* court explains that a benefit for the injured plaintiff should not become a windfall for the tortfeasor. *Wills*, 229 Ill. 2d at 413, citing *Arthur*, 216 Ill. 2d at 79, and Restatement (Second) of Torts §920A, Comment *b*, at 514 (1979). Plaintiff emphasizes the court's statement that "an arrangement between the plaintiff and a physician who agrees to perform free medical services is a relationship with a third party who is collateral to the tortfeasor." *Wills*, 229 Ill. 2d at 413.

¶ 29 Contrary to plaintiff's assertion, we find that the *Wills* holding does not apply to the case at bar. Without citing authority, plaintiff repeatedly equates the doctor's lien with "collateral income." Plaintiff is incorrect. The physician's lien was not income for plaintiff. A physician may file a health care lien to claim money due to him for health care services he provided to an injured party. See *Black's Law Dictionary* 942 (8th ed. 2004). This is money the plaintiff owes the physician for services rendered. Dr. Karasek filed the lien to protect his own financial interest in receiving payment for the health care services he provided to plaintiff. The doctor's lien was not a collateral benefit to plaintiff. Thus, the collateral source rule and the holding of *Wills* is inapplicable in this case.

¶ 30 Defendant correctly points out that our supreme court has long recognized that counsel may cross-examine an expert witness about his possible bias, partisanship or financial interest. *Trower v. Jones*, 121 Ill. 2d 211, 217 (1988). Dr. Karasek's lien would be a financial interest in this case. In the excerpt of the trial transcript included in the record, during the sidebar discussion, plaintiff's counsel noted that defense counsel had asked Dr. Karasek about the lien during cross-examination. During that discussion, the trial court stated that the doctor's lien was "already in the case," and that it was "not going to limit argument regarding it."

¶ 31 Based on this record, we find no abuse of discretion by the trial court in allowing defense counsel to refer to Dr. Karasek's lien during closing argument. We note that in his brief, plaintiff again refers to events that occurred at trial which do not appear in the record before this court. As stated above, to the extent that our review is impeded by an incomplete record that lacks a

report of proceedings, we must presume the trial court acted in conformity with the law and ruled properly after considering the evidence before it. *Corral*, 217 Ill. 2d at 156-57; *Foutch*, 99 Ill. 2d at 391-92.

¶ 32 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.