+-2013 IL App (2d) 121016-U
No. 2-12-1016
Order filed December 24, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KATHLEEN REYNOLDS, Plaintiff-Appellant and Cross-Appellee, v. ARIELLE VIEIRA, Defendant-Appellee and Cross-Appellant.	)))))))))))	Appeal from the Circuit Court of Lake County. No. 09-L-1136 Honorable Wallace B. Dunn, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly denied plaintiff a judgment *n.o.v.* awarding her all the damages she sought, as the medical evidence did not clearly establish that all those damages were caused by defendant's negligence; (2) the trial court properly denied plaintiff's motion *in limine* to exclude evidence of her previous pain, as the evidence was relevant to whether plaintiff's damages were caused by defendant's negligence; (3) the trial court did not err in granting plaintiff's motion for a new trial on damages, as the law did not require the court to articulate a proper rationale, which in any event the court did.

¶ 2 Plaintiff, Kathleen Reynolds, filed suit in the circuit court of Lake County against defendant, Arielle Vieira, seeking recovery for personal injuries allegedly sustained as a result of a motor

vehicle accident on October 23, 2008. The matter proceeded to a jury trial, and the trial court entered a directed verdict in favor of plaintiff and against defendant on the question of negligence. The jury deliberated solely on the question of damages, returning an itemized verdict assessing damages in the amount of $3,531 for plaintiff's reasonable and necessary medical expenses. The jury assessed no damages, however, for pain and suffering or the loss of a normal life. The trial court entered judgment on the verdict. Arguing that the damages award was inadequate, plaintiff successfully moved for a new trial on the issue of damages. A second jury trial was conducted and the jury assessed damages at $9,466 for reasonable and necessary medical expenses, $500 for pain and suffering, and $500 for loss of a normal life. Claiming that she was entitled to recover medical expenses in the amount of $38,769, plaintiff moved for entry of a judgment notwithstanding the verdict (judgment *n.o.v.*). In the alternative, plaintiff sought a new trial on the basis that the trial court erroneously denied a motion *in limine* to bar evidence of a prior slip-and-fall accident. The trial court denied the motion, declining either to increase the award of damages or to grant plaintiff a new trial. Plaintiff now appeals, and defendant cross-appeals from the order entered after the first trial granting a new trial on the issue of damages. For the reasons discussed below, we affirm.

¶ 3 At the second trial, plaintiff testified that on October 23, 2008, while she was stopped at a red light at the intersection of Route 59 and Grass Lake Road near Antioch, her vehicle was struck from behind by a vehicle operated by defendant. After the collision her neck and right shoulder felt sore and she took a nonprescription pain reliever. The following day plaintiff was in a lot of pain and was experiencing numbness down her arm and into her hand. She sought treatment at Northern Illinois Medical Center (NIMC) and was advised to consult with an orthopedic surgeon. Daryl O'Connor was the first orthopedic surgeon from whom plaintiff sought treatment. O'Connor

ordered an MRI and ultimately referred plaintiff to another orthopedic surgeon, Craig A. Cummins. Plaintiff acknowledged telling Cummins that, prior to the accident, she had not experienced any problems with her shoulder. In fact, earlier in the year plaintiff had visited the emergency room after slipping in the shower and had reported shoulder pain. Plaintiff testified that Cummins performed surgery on her shoulder. She later received physical therapy.

¶ 4 Cummins's testimony was presented by way of an evidence deposition. Cummins began treating plaintiff on January 15, 2009. Plaintiff described pain on the right side of the neck extending into the back side of the shoulder in the region of the trapezius muscle. Plaintiff also described pain extending to her hand and numbness in her fingers. Plaintiff indicated that she experienced fairly severe shoulder pain with any motion. Plaintiff reported to Cummins that she had not had any significant neck or shoulder problems before the October 23, 2008, motor vehicle accident. Physical examination of plaintiff's shoulder suggested a possible problem with the labrum—which is a rim of cartilage lining the shoulder socket—or the biceps tendon. Cummins also reviewed the MRI ordered by O'Connor, which showed some tearing of one of the tendons of the rotator cuff.

¶ 5 Cummins testified that he initially prescribed an oral steroid to reduce inflammation. He also treated plaintiff's shoulder with a steroid injection. However, plaintiff's condition did not improve significantly with the use of the medication, and on February 4, 2009, Cummins performed arthroscopic surgery on plaintiff's shoulder. During the procedure, Cummins observed degenerative tearing of the labrum, which he debrided. He also observed that plaintiff's bicep was torn completely and formed a stump, which Cummins debrided near the labrum. He also debrided a minor rotator-cuff tear and "cleaned up" what he described as "a bit of arthritis" in plaintiff's shoulder. Cummins's final diagnosis was that plaintiff suffered from a partial rotator-cuff tear, a

complete tear of the long head of the biceps, arthritis in the main shoulder joint and a joint at the top of the shoulder, inflammation around the rotator cuff tendon, arthritis in the neck, and neck strain.

¶ 6 It was Cummins's opinion that the arthritis he observed was present before the accident, that it was impossible to say whether the rotator-cuff tear was caused by the accident or was present before the accident, and that it was more likely than not that the accident caused the biceps tear. Cummins testified, "Based on the information the patient provided to me and the studies and the operative report and correlating all of that together, I would say it's clearly more likely than not that the motor vehicle accident caused [plaintiff's] shoulder pain which led to her shoulder surgery." Cummins was shown Plaintiff's Group Exhibit 2, which consisted of copies of plaintiff's medical bills incurred since the accident, along with a document entitled "Medical Specials List" showing the date and amount of each medical bill. He testified that the bills represented the usual and customary charges for the medical services provided. He also testified that the treatment plaintiff received following the accident was reasonable and necessary.

¶ 7 On cross-examination, Cummins revisited the question of whether the accident caused plaintiff's injuries. Cummins stated, "With no history of a previous shoulder trauma or shoulder problems and a biceps tear, I think it's more likely than not it was caused by the accident." Defense counsel showed Cummins a note dated March 25, 2008, from medical records maintained by the NIMC indicating that plaintiff reported having injured her right shoulder when she fell in the shower five days earlier and was experiencing pain radiating down her right arm and intermittent right-hand numbness. The following exchange then took place between defendant's attorney and Cummins:

> "Q. Doctor, having read that record, do your opinions as to the cause of the shoulder condition change?

A. Is there other—Is this the only incident? Does she have any other visits to primary care doctors?

Q. I don't know, Doctor. I just have that record.

A. Well, it suggests that this isn't the first time—the car accident is not the first time that she had that problem. So could all of this have been related to a fall in the shower? That's possible. That's a—Five months. I would think if you had a significant problem, you might have sought some care along the way; but, you know, it does raise a flag that there may be—well, there is a prior history of a shoulder problem. It's just hard to know how significant—a shoulder and neck problem, how significant that problem was for her in the five months prior to this motor vehicle collision.

Q. But at least we know that your patient was not truthful, nor accurate with you; isn't that true?

A. It, again, raises suspicion. I think that there's a couple potential scenarios. You know, one scenario is that she had the fall in the shower and continued to have problems and then blamed it on the car accident. The other scenario is that she went to an acute care facility, all the symptoms went away, and she didn't see another doctor for the next five months because the problem went away and she didn't think of it as being significant and then had the car accident and it all sort of started again. I don't know which one is right or wrong."

¶ 8 During redirect examination, Cummins was asked whether the records from NIMC affected his opinions. He replied as follows:

> "It is hard to know, you know, people's motivation, you know, one way or the other. I think it would be tough for seven months to live with the type of pain she was in and not seek medical treatment and then blame it on an accident. So I still think [*sic*] more likely than not the car accident contributed to her at least having surgery and not getting better."

¶ 9 Defendant's expert witness, orthopedic surgeon Boone Brackett, also testified by means of an evidence deposition. Brackett examined plaintiff in October 2010 and also reviewed plaintiff's discovery deposition and various medical records. Brackett noted that, according to plaintiff's medical records, when she visited the NIMC emergency room following the motor vehicle accident, her chief complaint was neck pain; there was no record of a complaint of arm or bicep pain. The records pertaining to the emergency-room visit indicated a clinical impression of neck sprain, not of any arm or shoulder injury. Brackett also reviewed plaintiff's discovery deposition testimony. Brackett testified that his examination of plaintiff did not result in any objective findings that her condition was caused by the motor vehicle accident. Brackett noted that plaintiff complained of shoulder and arm pain when she sought medical treatment after falling in the shower. Brackett further noted that, in her discovery deposition, plaintiff denied having any trouble with her shoulder before the motor vehicle accident. Brackett explained that the slip-and-fall accident was significant because "it's the same *** joint of which she's complaining now, and this is a—this is the type of injury which could or might cause some of the things that were found, including an erosion of the biceps tendon."

¶ 10 Asked for his opinion, to a reasonable degree of medical certainty, in what way (if any) the condition of plaintiff's shoulder was related to the motor vehicle accident, Brackett replied as follows:

> "Well, I think the only thing that I think can reasonably or rationally be related to this accident is it is possible that [plaintiff] either aggravated or actually tore her biceps tendon, which was found by Dr. Cummins at the time of his operation. That's something that you—it's up to the jury to see that, but my view is it's something that could have happened in this accident."

Brackett testified that, in his opinion, the accident did not cause or result in permanent aggravation of the degenerative changes to plaintiff's shoulder. Brackett indicated that it was reasonable to treat plaintiff's shoulder surgically. On cross-examination, Brackett testified that the surgery was related to the motor vehicle accident "as it focused on the biceps tendon tear and not the rest of the problems." He added that it would have been inappropriate for Cummins to perform surgery on the biceps tear without also treating plaintiff's other conditions.

¶ 11 Plaintiff first argues that the trial court erred in denying her motion for *n.o.v.* awarding her the full amount of medical expenses she claimed as set forth in the Medical Specials List. "A motion for judgment *n.o.v.* should be granted only when ' "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand." ' " *Lawlor v. North American Corp. Of Illinois*, 2012 IL 112530, ¶ 37 (quoting *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006), quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967))). Entry of judgment *n.o.v.* is inappropriate if " ' "reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented." ' " *Id.* (quoting *York*, 222 Ill. 2d at 178, quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351(1995). The trial court's ruling on a motion for judgment *n.o.v.* is reviewed *de novo*. *Id.*

¶ 12 Because plaintiff contends that the trial court erred in failing to enter a judgment *n.o.v.* awarding her *the full amount* of medical expenses set forth in the Medical Specials List, the salient question is whether the evidence, when viewed in its aspect most favorable to defendant, so overwhelmingly establishes plaintiff's right to recover the full amount sought that no verdict for any lower amount could ever stand. As explained below, the answer to that question is "no."

¶ 13 It is firmly established that " '[i]n order to recover for medical expenses, the plaintiff must prove that he or she has paid or become liable to pay a medical bill, that he or she necessarily incurred the medical expenses because of injuries resulting from the defendant's negligence, and that the charges were reasonable for services of that nature.' " *Arthur v. Catour*, 216 Ill. 2d 72, 81-82 (2005) (quoting *Baker v. Hutson*, 333 Ill. App. 3d 486, 493 (2002)). Plaintiff argues that the jury appears to have refused to award damages for expenses related to her surgery. Citing the opinions offered by the two orthopedic surgeons who testified at trial, plaintiff insists that "the only medical evidence before the jury was that the motor vehicle collision *** either caused or aggravated the biceps tendon tear/condition of Plaintiff's right shoulder and necessitated the surgical procedure[.]" (Emphasis omitted.) The argument is meritless for two reasons.

¶ 14 First, the jury was not bound by the opinions of the two surgeons who testified. In *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 283 Ill. App. 3d 630 (1996), we observed as follows:

> "The weight accorded expert testimony must be decided by the trier of fact. [Citation.] Even if several competent experts concur in their opinion and no opposing expert testimony is offered, it is well within the province of the trier of fact to weigh the credibility of the expert evidence and decide the issue. [Citation.] Although uncontradicted and unimpeached testimony of an expert cannot be rejected arbitrarily [citation], subjective and

> unclear testimony need not be given credence by a trier of fact enjoined by law to avoid speculation, guess, or conjecture in its verdict [citation]. Expert testimony is to be accorded such weight that, in light of all the facts and circumstances of the case, reasonably attaches to it. [Citation.]" *Id.* at 655.

Here, Cummins's ultimate opinion was somewhat equivocal. He initially opined that "*[w]ith no history of a previous shoulder trauma or shoulder problems and a biceps tear*, I think it's more likely than not it was caused by the accident." (Emphasis added.) When advised that plaintiff did, in fact, have a history of complaints of arm and shoulder pain, Cummins stated the opinion that it was "more likely than not the car accident *contributed to her at least* having surgery and not getting better." (Emphasis added.) Cummins acknowledged that prior accident raised a "flag" and he conceded that he did not know whether plaintiff had been symptomatic since the first accident or whether her symptoms had subsided and then reappeared as a result of the car accident. Under these circumstances it would have been reasonable for the jury to disregard Cummins's opinion as, in essence, the product of speculation.

¶ 15 Brackett's testimony was also somewhat equivocal. On the one hand he expressed the opinion that plaintiff's surgery was related to the motor vehicle accident as "it" (presumably the surgery) "focused on the biceps tendon tear." On the other hand, Brackett had previously testified that "the only thing that I think can reasonably or rationally be related to this accident is *it is possible that [plaintiff] either aggravated or actually tore her biceps tendon*." (Emphasis added.) This testimony did not foreclose the jury from finding that plaintiff had failed to prove a causal relation between the motor vehicle accident and the damage to her biceps tendon.

¶ 16 Second, even if the jurors believed that, as a result of the motor vehicle accident, plaintiff injured or aggravated an injury to her biceps tendon, they could conclude that the shoulder arthritis—which Cummins "cleaned up" during the surgical procedure in which he debrided the biceps tendon—was unrelated to the accident. The jury might therefore have concluded that the procedure would have been necessary regardless of the motor vehicle accident. In this respect, we agree with the holding of a court in a sister state that " '[a] verdict for less than the amount of the proved medical expenses is not so inadequate as to require a new trial where there [is] evidence that [the plaintiff's] complaints were at least partially related to his physical condition prior to the accident.' " *Booker v. Older Americans Council of Middle Georgia*, 629 S.E.2d 69, 73 (Ga. App. 2006) (quoting *Hammond v. Lee*, 536 S.E.2d 231, 235 (Ga. App. 2000)).

¶ 17 We next consider whether the trial court committed reversible error by denying plaintiff's motion *in limine* to bar evidence that plaintiff suffered arm and shoulder pain after falling in the shower months before the motor vehicle accident. "Evidentiary motions, such as motions *in limine*, are within the trial court's discretion and are reviewed under an abuse of discretion standard." *Citibank, N.A. v. McGladrey & Pullen, LLP*, 2011 IL App (1st) 102427, ¶ 13. The trial court reasoned that the evidence bore on plaintiff's credibility, inasmuch as she had stated prior to trial that she had experienced no such problems before the motor vehicle accident. In *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 58 (2000), our supreme court held that, in order for evidence of a prior undisclosed injury to be admissible for impeachment purposes, the injury must be "relevant to a fact in consequence, *i.e.*, whether the prior injury negates causation or negates or reduces the defendant's damages." Furthermore, the *Voykin* court held as follows:

> "[W]e conclude that, if a defendant wishes to introduce evidence that the plaintiff has suffered a prior injury, whether to the 'same part of the body' or not, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages, or some other issue of consequence. This rule applies unless the trial court, in its discretion, determines that the natures of the prior and current injuries are such that a lay person can readily appraise the relationship, if any, between those injuries without expert assistance." *Id.* at 59.

¶ 18 Plaintiff argues that the requisite expert testimony establishing relevance to a fact of consequence is absent in this case. We disagree. It is abundantly clear from the testimony of both of the orthopedic surgeons who offered opinion testimony at trial that the prior injury was relevant to the question of whether the motor vehicle accident caused plaintiff's injuries. Indeed, whereas Cummins had originally testified that it was more likely than not that the motor vehicle accident "caused" plaintiff's injuries, after learning of the prior accident he revised his opinion, stating that it was "more likely than not the car accident contributed to her at least having surgery and not getting better." The trial court did not abuse its discretion in denying the motion *in limine*.

¶ 19 We now turn our attention to defendant's cross-appeal from the order granting plaintiff's motion, made after the first trial, for a new trial on the issue of damages. We may dispose of the cross-appeal in short order because the argument defendant raises is predicated on both a misreading of the record and a misquotation of our supreme court's decision in *Snover v. McGraw*, 172 Ill. 2d 438 (1996). According to defendant, "the [*Snover*] court stated that '[A] jury's award is entitled to substantial deference by the court, and, a trial court can only upset a jury's award of damages only if it finds that (1) the jury ignored a proven element of damages; (2) the verdict resulted from passion

or prejudice; or (3) the award bore no relationship to the loss sustained.' " Defendant argues that "[t]he trial court's order in the matter within does not set forth any finding as required by the *Snover* decision" and that the record is silent as to the trial court's reasoning. Thus, according to defendant, the order granting plaintiff's motion for a new trial must be vacated.

¶ 20 First of all, the correct quotation from *Snover* is as follows:

> "[A] jury's award of damages is entitled to substantial deference. The determination of damages is a question of fact that is within the discretion of the jury. [Citations.] *This court* will not upset a jury's award of damages 'unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss suffered.' [Citations.]" (Emphasis added.) *Id.* at 447.

The quoted language makes no reference to any sort of express finding by the trial court. More importantly, defendant is incorrect in her assertion that the record is silent as to the trial court's reasons for granting the motion for a new trial. At the hearing on the motion, the trial court stated, "the cases specifically don't allow the jury to—even though the verdict is entitled to great respect, but they just can't totally ignore a proven element of damages, *and I think that's exactly what happened here.*" (Emphasis added.) Accordingly, defendant's argument is meritless.

¶ 21 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 22 Affirmed.