2015 IL App (2d) 140350-U
No. 2-14-0350
Order filed May 18, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JENNIFER ARNOLD Plaintiff-Appellant, v. RONALD ROCKE, Defendant-Appellee. (Sophia Arnold, a minor, individually And by her mother, Jennifer Arnold, Plaintiff.)	))))))))))))	Appeal from the Circuit Court of Kane County. No. 11-L-574 Honorable Edward C. Schreiber, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it allowed plaintiff's medical records into evidence because plaintiff stipulated to foundation for their admission as business records; plaintiff's unsupported arguments were forfeited; and the jury's decision to award plaintiff $0 in future damages was not against the manifest weight of the evidence.

¶ 2 Plaintiff, Jennifer Arnold, and her two-year-old daughter, Sophia, were occupants in a vehicle that was struck by a car driven by defendant, Ronald Rocke. A jury found in plaintiff's favor and awarded her approximately $35,000 in partial past damages, and $0 in future damages.

On appeal, plaintiff contends that the trial court erred by (1) allowing defendant to cross-examine plaintiff's neurologist, Dr. Nicholas Schlageter, while using plaintiff's medical records as substantive evidence, and by (2) allowing defendant to publish plaintiff's medical records to the jury during closing argument. Plaintiff also contends that (3) the verdict, with no award toward future damages, was against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The facts in this case are largely undisputed. At trial, defendant testified that on the afternoon of October 17, 2009, his sedan struck plaintiff's SUV at an intersection in St. Charles. Plaintiff's vehicle rolled onto its side. Plaintiff testified that she and her daughter were in the car. Both plaintiff and her daughter were taken to the emergency room. Plaintiff was treated and released that same day with minor pain to her neck, chest, left shoulder, and left arm; her daughter was uninjured.

¶ 5 Plaintiff testified that, after her release from the hospital, she continued to have pain and numbness in her neck, her shoulder, and her left arm. Plaintiff followed up with her family physician, Dr. Ronald Vilbar. Vilbar instructed plaintiff to apply ice and to take over-the-counter pain medication. Plaintiff testified that she developed anxiety following the accident and Vilbar prescribed her Lorazepam, an anti-anxiety medication.

¶ 6 Vilbar also instructed plaintiff to attend physical therapy, and plaintiff enrolled in a physical therapy program at Delnor Community hospital in St. Charles. There, plaintiff learned about exercises she could perform at home to ease her symptoms. Plaintiff testified that most of her physical therapy exercises were for her neck and that her pain level had been reduced as a result of her physical therapy. Plaintiff was discharged from physical therapy in November 2009.

¶ 7 Plaintiff returned to Vilbar in June 2010 because she continued to have shoulder pain, numbness in her left arm, and difficulty sleeping. Vilbar advised plaintiff to seek additional physical therapy and referred her to a neurologist, Dr. Nicholas Schlageter.

¶ 8 Plaintiff testified that the accident left her unable to pick up her infant daughter. Plaintiff also felt additional pain and numbness when she fixed her hair, washed dishes, or drove with her left arm held out the window. Plaintiff testified that as a result of the accident, she had incurred expenses of $19,260 on her own treatment (we round all numbers to the nearest dollar); $1,335 on Sophia's treatment; $3,584 in lost wages, and $168 for a new car seat. On cross-examination, plaintiff stated that she had never been prescribed Lorazepam prior to the accident.

¶ 9 Valerie Thurnau, plaintiff's mother, testified that plaintiff experienced pain and anxiety following the accident.

¶ 10 Prior to additional testimony, the court and the parties held a brief conference on jury instructions. During the conference, the defense renewed its request to admit plaintiff's medical records. Plaintiff objected, and the parties took a break for the evening. The next morning, the defense again renewed its request to admit. Defense counsel conceded that he was attempting to "cherry pick[ ]" plaintiff's medical records, but asked the court to admit the records to impeach plaintiff's trial testimony as well as the Vilbar's and Schlageter's deposition testimony. The trial court stated that plaintiff's medical records were admissible for impeachment purposes only. Plaintiff's counsel objected and the following colloquy occurred:

> "THE COURT: Here is the situation. He [(defendant's attorney)] [is] trying to introduce [plaintiff's medical] records as [ ] business record[s]. That was—the evidence dep[osition] was early on. So we're assuming that those records—we have to at this point—the records were admissible, and he can use those records.
>
> MS. CIBULSKIS [Plaintiff's Attorney]: We will not waive our objection, but we would stipulate that if the record keepers were called, they would establish a foundation ***."

***

MS. CIBULSKIS: I think the records have to come in as a complete set of records.

MR. STOCKMAN [Defendant's Attorney]: Well, yesterday, you were saying you wanted—

THE COURT: Well, they do, but I thought you didn't want them, and what I'm saying is that—

MS. CIBULSKIS: I don't think they should be.

THE COURT: —many of the records are irrelevant. I'm finding that the records technically are admissible, but I'm not going to allow him [(defense counsel)] to publish the entire—

MS. CIBULSKIS: Correct. We would stipulate to the business record foundation for those records. We object to their relevancy. We believe under *Troyan* [*v. Reyes*, 367 Ill. App. 3d 729 (2006)], they are not admissible, but we would stipulate to the foundational requirement of the records that we have produced."

The trial court then gave the parties several minutes for plaintiff's counsel to examine the defendant's exhibits.

¶ 11 When the trial resumed, Vilbar's deposition was read into the record. Vilbar testified that he diagnosed plaintiff in October 2009 with cervical muscle strain, lumbar strain, and anxiety as a result of the accident. Vilbar prescribed plaintiff Lorazepam for anxiety, and recommended that plaintiff undergo physical therapy and take over-the-counter pain medication as needed. Plaintiff returned to Vilbar's office the following week; she reported increased anxiety, and stated that she was "having some tightness while carrying [her] daughter, mostly up the stairs." Vilbar increased plaintiff's dose of Lorazepam, and testified that plaintiff had taken Lorazepam prior to the accident for insomnia. Vilbar advised plaintiff to continue physical therapy. Plaintiff returned to Vilbar's office in June 2010 and reported additional pain and numbness in

her left arm. Vilbar prescribed additional medications for pain and anxiety, and referred plaintiff to Schlageter.

¶ 12 Schlageter testified that, based on his examination, he diagnosed plaintiff with mild thoracic outlet syndrome as a result of the compression of plaintiff's chest due to the accident. According to Schlageter, a symptom of thoracic outlet syndrome is numbness and tingling in the arm.

¶ 13 Plaintiff saw Schlageter throughout 2010, and each time reported improvement with physical therapy. Plaintiff returned to Schlageter in September 2013 and reported occasional pain and numbness and difficulty sleeping. Plaintiff stated that if she "does the exercises, her arm is okay"; Schlageter recommended plaintiff continue her exercises. Schlageter testified that plaintiff had reached maximum medical improvement and would likely have to perform the exercises for the remainder of her life.

¶ 14 On cross-examination, Schlageter agreed that thoracic outlet syndrome could also be caused by anatomical defects or poor posture. According to Schlageter, symptoms of thoracic outlet syndrome would manifest "within a few days" and it would be "unusual" for months to pass without symptoms. Following this statement, defendant asked Schlageter to examine plaintiff's medical records from her discharge from physical therapy in November 2009. According to Schlageter, the discharge form did not indicate that plaintiff reported any numbness or tingling in her left arm when she was discharged from physical therapy.

¶ 15 Erin Arnold, plaintiff's sister, testified regarding plaintiff's physical condition and anxiety following the accident. Plaintiff rested and defendant rested.

¶ 16 During closing, defendant argued to the jury using an enlarged version of plaintiff's discharge form from the end of her first round of physical therapy in November 2009.

Defendant noted that, on the form, there was no indication that plaintiff reported experiencing numbness in her arm, a symptom of thoracic outlet syndrome, until she saw Dr. Vilbar in June 2010, nearly eight months after the accident. Plaintiff did not object during defendant's argument. In rebuttal, plaintiff argued that "the therapy notes here, that's the best that she got, and to the extent her symptoms returned [in June 2010] [it was] because she only had short-term relief ***." Plaintiff sought $165,179 in past and future damages.

¶ 17 The jury awarded plaintiff $24,347, which was the amount of her expenses and lost wages, as well as $5,000 for past pain and suffering, and $5,000 for past loss of normal life. The jury awarded plaintiff $0 in future loss of normal life and future pain and suffering. Plaintiff's posttrial motion was denied and plaintiff timely appealed.

¶ 18 II. ANALYSIS

¶ 19 Plaintiff first contends that the trial court erred by allowing defendant to cross examine Dr. Schlageter regarding the contents of a medical report issued upon plaintiff's discharge from physical therapy in November 2009. According to plaintiff, defendant improperly used the reports as a business record, *i.e.*, as substantive evidence, rather than for the proper purpose of impeaching Schlageter's diagnosis.

¶ 20 Plaintiff's argument is unpersuasive in light of the record. In the trial court, plaintiff twice stipulated to the "foundational requirement[s]" for the admission of the discharge summary under the business-records exception to the hearsay rule. Although plaintiff maintained an objection to the records' relevance, the records were clearly relevant in this trial on plaintiff's physical condition. Accordingly, once plaintiff stipulated to the records' foundation, there was no obstacle to their admission as substantive evidence. See *Troyan v. Reyes*, 367 Ill. App. 3d 729, 733 (2006) (holding that once a party "has established the foundational requirements [for

the admission] of a business record, [t]he records themselves should be introduced" (citation and internal quotation marks omitted)).

¶ 21 To the extent plaintiff relies on *Jager v. Libretti*, 273 Ill. App. 3d 960 (1995), for the proposition that her medical records were only admissible for impeachment purposes, her reliance is misplaced. The admissibility issue in *Jager* was limited to the question of permissible versus improper impeachment; neither the appellate court nor the trial court had occasion to consider whether, as here, the plaintiff's medical records were admissible, not merely for impeachment, but as business records. Thus, even if we were to set aside plaintiff's waiver of this issue (see *Van Holt v. National R.R. Passenger Corp.*, 283 Ill. App. 3d 62, 76 (1996) (stating that "[a] party who procures, invites, or acquiesces in the admission of improper evidence cannot complain with respect to the admission of said evidence")), we would find no error in the trial court's admission of plaintiff's medical records as substantive evidence.

¶ 22 Elsewhere in her brief, plaintiff makes two assertions related to the business-records issue, which we may easily dispose of. First, plaintiff suggests that the trial court was required to determine whether record keepers were available to testify, in order to satisfy the foundational requirements of the admission of her medical records. Second, plaintiff posits that the trial court erred when it did not personally examine plaintiff's medical records prior to their admission. Although plaintiff neglects to consider the impact of her stipulation to the records' foundation, we find it dispositive that plaintiff cites no authority in support of either assertion. There is, therefore, no need for us to address either point. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[p]oints not argued are waived"); *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36 (stating that a party's failure to support a point with relevant authority results in forfeiture).

¶ 23 Next, plaintiff contends that the trial court erred when it allowed defendant to publish an enlarged copy of her physical therapy records to the jury. As plaintiff notes, defendant rested his case without marking the records as exhibits and moving them into evidence. Then, at closing argument, defendant referred to the records to impeach plaintiff's and Schlageter's testimony regarding the delayed onset of her symptoms. Thus, according to plaintiff, the defense failed to confine its closing argument to matters that were "in evidence," and she was thereby prejudiced.

¶ 24 Initially, as noted, plaintiff did not object during defendant's closing argument. "To the extent the defendant['s] closing argument was unsupported by the [admitted] evidence, it was incumbent upon the plaintiff to object. [Citation.]" *Tabe v. Ausman*, 388 Ill. App. 3d 398, 408 (2009). "Because no objection was made, the claim is forfeited." *Id*.

¶ 25 Even if we were to overlook plaintiff's forfeiture, we would find no error. The crux of plaintiff's argument is that the discharge summary was not "in evidence" because it was not formally marked and admitted during defendant's case. It is well settled, however, that the trial court has considerable discretion in controlling how evidence is introduced and used in court. *Foerster v. Illinois Bell Telephone Co.*, 20 Ill. App. 3d 656, 661 (1974). Variations in the admission of evidence are often productive and will only be deemed harmful "where it tends to confuse the jury, or where it misleads the opponent or finds him unprepared to meet it." (Citation and internal quotation marks omitted.) *Id*.

¶ 26 Given that the evidence in question was simple and that plaintiff anticipated its introduction, no error occurred. The discharge summary was a straightforward recitation of plaintiff's report of her symptoms; the record reflects no confusion on the part of the jury. Moreover, despite defendant's failure to move the summary into evidence before the jury, the record reflects that the parties and the trial court treated the discharge summary as "in evidence."

After the defense rested without formally moving to admit evidence, plaintiff sought to bar defendant from publishing the discharge summary during argument. The trial court denied the request because it had said defendant was allowed to "use" plaintiff's medical records. The publication of the records during argument was therefore neither misleading nor surprising. Accordingly, the trial court did not abuse its discretion when it allowed defendant to "use" plaintiff's medical records during closing argument.

¶ 27 Finally, plaintiff contends that the jury's award of $0 for future loss of normal life and future pain and suffering was contrary to the manifest weight of the evidence. We note that, for the most part, plaintiff's argument is a rehash of her evidentiary arguments; *i.e.*, that the jury decided not to award her future damages based solely on the physical therapy discharge records "that were improperly shown to the jury" and were "not [in] evidence."

¶ 28 "A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary and not based upon any of the evidence." *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 38. We need not restate our earlier rejection of plaintiff's evidentiary arguments. Further, to the extent plaintiff suggests that the jury ignored "undisputed evidence," we note that the evidence regarding the projected effects of plaintiff's injury was greatly disputed. Plaintiff testified that she felt numbness and pain in her left arm when she slept, fixed her hair, washed dishes, lifted her daughter, or drove with her left arm held out the window. However, Schlageter testified that plaintiff reported that "her arm is okay" when she "does the [physical-therapy] exercises." Schlageter opined that plaintiff would likely have to perform those exercises for the remainder of her life.

¶ 29 We cannot say that the jury's decision to award plaintiff $0 in future damages was unreasonable. The evidence regarding the effects of plaintiff's injury was largely subjective and the jury may, quite reasonably, have found it unconvincing. See *Stift v. Lizzadro*, 362 Ill. App. 3d 1019, 1029 (2005) (stating that, "[w]here evidence is contradicted, or where it is merely based on the subjective testimony of the plaintiff, a jury is free to disbelieve it"). Moreover, to the extent plaintiff suffers future symptoms, by plaintiff's own account, her symptoms may be abated by simple exercise. We conclude that the jury's decision to award plaintiff $0 in future damages was not against the manifest weight of the evidence.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 32 Affirmed.