2018 IL App (2d) 170507-U
No. 2-17-0507
Order filed February 21, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DEBRA BUMGARNER,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-L-619
	)	
SARAH BEDA,	)	Honorable
	)	James R. Murphy,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The jury was entitled to find that plaintiff had suffered no compensable injury or pain from an auto accident, but the jury was not entitled to deny plaintiff damages for her precautionary ambulance ride and emergency-room visit, which, as defendant conceded, resulted from the accident and were reasonable; accordingly, we awarded plaintiff a judgment for those damages.

¶ 2 Plaintiff, Debra Bumgarner, filed a negligence action against defendant, Sarah Beda, based on a two-vehicle accident. At the jury trial, defendant conceded that she had been negligent. The jury found for defendant. Plaintiff appeals, contending that the verdict was against the manifest weight of the evidence and requesting a new trial on damages only. We reverse outright and enter judgment for plaintiff for $2870.78.

¶ 3 Plaintiff's second amended complaint alleged as follows. On August 1, 2012, as she was driving north on Third Street into the intersection with McKinley Street, her vehicle collided with defendant's, which was driving east into the intersection. Defendant caused the accident by failing to yield the right-of-way; disobeying a stop sign; failing to decrease her speed as necessary; and otherwise driving carelessly. Plaintiff suffered severe and costly injuries.

¶ 4 The cause proceeded to trial. Defendant conceded that she had been negligent but not that her negligence had proximately caused any damages. We summarize the pertinent evidence.

¶ 5 Plaintiff testified on direct examination as follows. On the morning of August 1, 2012, she was driving her Jeep. Her four-month-old granddaughter Avary, whom plaintiff had picked up from her daughter, was in the backseat. As plaintiff approached the intersection, she saw defendant's vehicle, also a Jeep, entering the intersection. Plaintiff immediately slammed on her brake, which took her forward; her seat belt brought her back; and her knees went into the bottom of the dashboard. The front end of her Jeep collided with the front passenger door of defendant's Jeep. The impact was "very heavy." Plaintiff's Jeep came to rest "in somebody's yard and almost on the sidewalk." Defendant's Jeep was in the middle of the intersection.

¶ 6 Plaintiff testified that she got Avary out of the car and soon spoke to paramedics, who drove her and Avary to Delnor Hospital. She told them that her back hurt. Plaintiff had had three back surgeries: a laminectomy in 1988 and fusions in 1997 and 2011.

¶ 7 Plaintiff testified that, at the hospital, she complained of pain in her back but not in her knees. Two days later, she went to her physician, Dr. Bhavesh Shah, for a routine visit to refill her prescription for back-pain medicine. She mentioned that she had been in an accident but did not talk about any injuries. The next day, she went to the emergency room and complained of sharp pains in her back and knees. Within two days, plaintiff consulted Dr. Mark Cohen, who in

turn referred her to Dr. Kevin Tu. He performed surgery on her right knee, after which she spent three months in physical therapy with Cohen. The pain in plaintiff's back and her right knee had since cleared up but she still had problems with her left knee.

¶ 8 Plaintiff identified a group exhibit consisting of her medical bills that she associated with the accident. The bills were later admitted into evidence.

¶ 9 Plaintiff testified on cross-examination as follows. At the time of the accident, she was taking medicine for back pain; she had taken some the night before. The back pain from the accident cleared up in three or four months.

¶ 10 Called as an adverse witness, defendant testified that, just before the accident, she stopped her Jeep at a stop sign at the intersection. As she pulled out, she collided with plaintiff's Jeep. Defendant identified photographs, taken after the collision, depicting both vehicles. The court admitted the photographs into evidence.

¶ 11 The taped deposition testimony of Dr. Parkinson Lin, the emergency-room physician who examined plaintiff on August 1, 2012, was played. Lin testified on direct examination as follows. Plaintiff said that she had been in a collision while driving 30 miles per hour or less. She complained of back pain. She told Lin that she had had several back surgeries, most recently in December 2011, and had chronic back pain. She said that she had pain in her right foot.

¶ 12 Lin testified that, when he examined plaintiff, he was looking primarily for major injuries. Plaintiff had some muscle spasms in her back but no loss of range of motion. She also had ligament pain over the outside of one ankle, but no swelling in the region. Lin saw no swelling in either knee, but he noted that knee injuries do not always produce immediate swelling. An X-ray of plaintiff's back showed that she had not dislocated anything; none of the

hardware from her surgeries had been disturbed. Lin ordered Norco for plaintiff's use in the emergency room to relieve her back pain, but he did not prescribe it for her home use.

¶ 13 Lin's diagnostic impression of plaintiff's condition was "[m]otor vehicle collision and exacerbation of back pain." By "exacerbation of back pain," Lin meant that plaintiff "ha[d] chronic back pain and the car accident could have exacerbated it." Lin did not have any diagnostic opinion about plaintiff's knees, because she had not complained of knee pain.

¶ 14 Lin testified on cross-examination as follows. According to his records, plaintiff did not complain about her knees or mention hitting anything in the vehicle (such as striking the dashboard with her knees). Lin found nothing wrong with plaintiff's knees. In his opinion, she had no significant injuries as a result of the accident. Plaintiff did not complain of neck or chest pain and appeared to walk normally. She told Lin about her chronic back pain but not the frequency or extent of it. She was treated and released the same day. On redirect examination, Lin testified that it is not unusual for people with knee injuries to develop pain only later.

¶ 15 In his taped deposition, Tu testified on direct examination as follows. Plaintiff visited him on August 30, 2012, having been referred by Cohen. She told Tu that she had been in an accident in which her left knee had slammed into the dashboard. Tu's MRI revealed some degenerative changes in plaintiff's left knee, on which she had had surgery in 1996. Her right knee had some loss of range of motion, tenderness at the joint line, and swelling when the meniscus was stressed. Tu diagnosed plaintiff with a lateral meniscus tear in the right knee, accompanied by degenerative changes that likely predated the accident.

¶ 16 Asked his opinion of what injuries were connected to the accident, Tu named the meniscus tears, based primarily on their timing. It was not clear whether there had been any twisting or hyperflexion of the knees, the usual mechanisms for such tears. Typically, slamming

a knee into the dashboard, by itself, will not cause a meniscus tear. On September 14, 2012, Tu performed surgery on plaintiff's right meniscus, removing part of it. On October 22, 2012, she complained of left knee pain, which she had not mentioned before. An MRI showed a meniscus tear to that knee as well. This tear was likely related to the collision, based primarily on the timing and the lack of any other intervening event that would have caused it. On November 30, 2012, Tu performed surgery on the left knee. Asked about the delay between the accident and plaintiff's complaint of knee pain, Tu testified that sometimes pain a person experiences in one area will overshadow pain elsewhere.

¶ 17 Tu testified on cross-examination as follows. On October 22, 2012, plaintiff did not say that the pain in her left knee had begun right after the accident. After November 5, 2012, she did not mention anything about her right knee. Tu did not know plaintiff's current condition. Each time that she described her knee pain, she did not go into the nature and extent of it.

¶ 18 Jerry Martinez, who worked at Delnor Hospital, identified bills for services rendered to plaintiff from August 1, 2012, through August 8, 2012. Other witnesses identified charges for services that Cohen performed; for anesthesiologists and assistant surgeons who helped Tu with the knee surgeries; and for an MRI of plaintiff's right knee.

¶ 19 Plaintiff rested. Defendant read into evidence the deposition of Shah, who testified as follows. Plaintiff had been his patient since 2002. On August 7, 2012, at a visit that had been scheduled long before, she saw him for chronic conditions unrelated to the accident. Plaintiff told him that she had been in an accident a few days earlier and felt sore in her chest, back, and neck. She said nothing about her knees, and Shah noticed no indications of knee problems. Plaintiff had chronic back pain for which Shah had long prescribed Norco. He did not change her pain medicine as a result of the accident.

¶ 20 Shah had no opinion on whether plaintiff had suffered any injury from the accident. He acknowledged that, if a person's knees hit the dashboard of a car in an accident, the resultant pain might occur only after 7 to 10 days. Also, Norco can mask knee pain.

¶ 21 Defendant introduced the videotaped deposition testimony of Dr. Kevin Walsh, an orthopedic surgeon. He testified on direct examination as follows. He had reviewed all of the medical records in this case as well as the discovery depositions of plaintiff, Lin, and Tu. According to contemporaneous reports, plaintiff did not complain of knee pain to either the paramedics or Lin. Lin had not described the nature of plaintiff's knee injuries, if any, and his examination produced no objective evidence of injury, such as swelling or pain. Also, when she visited Shah, she did not complain of any knee pain or discomfort. In Walsh's opinion, there was no evidence that plaintiff had sustained a direct trauma to either knee inside her vehicle.

¶ 22 Walsh testified that Tu had provided no mechanism by which plaintiff might have injured either knee. In the MRI films, there was evidence of some wear and tear of the cartilage. In Walsh's opinion, the accident did not cause any injury to plaintiff's knees or aggravate any preexisting condition. There had been no pain or discomfort to her knees at the time of any alleged trauma. The two knee surgeries had no relation to the accident.

¶ 23 Walsh testified on cross-examination that he disagreed with Tu's statement that plaintiff's knee injuries were caused by the accident and with Lin's statement that they could have been so caused. In the emergency room, plaintiff did not report knee pain but did complain of back pain. On redirect examination, Walsh testified that meniscus tears are frequent but not always traumatic. Normally, traumatic tears involve twisting, not a simple blow to the knee.

¶ 24 Defendant rested. In rebuttal, plaintiff called Dr. Joshua Alpert, an orthopedic surgeon, who testified on direct examination as follows. At plaintiff's request, he had examined the

medical records in her case and prepared a report dated September 15, 2016. The MRI of plaintiff's right knee, which Tu reviewed shortly before he performed the surgery, showed a tear in the lateral meniscus in a location that had no arthritis. This was more consistent with a recent traumatic injury than with a preexisting, degenerative condition. The MRI of the left knee, taken about two months after the other one, also showed a meniscus tear. In Alpert's opinion, the tears resulted from the accident and could have been caused by plaintiff's knees hitting the dashboard.

¶ 25 Alpert testified on cross-examination as follows. His report did not mention the theory that, because plaintiff had no preexisting arthritic changes in her right knee, the accident must have caused the tearing. On redirect examination, Alpert testified that X-rays taken of plaintiff's knees on August 8, 2012, showed no evidence of arthritis.

¶ 26 In closing argument, plaintiff stated that defendant's negligence had proximately caused plaintiff injuries to her back, right ankle, chest, and knees. Lin had described the injuries to the right ankle; circumstantial evidence showed that the collision had caused harm to both knees. Thus, plaintiff should receive the reasonable medical costs that resulted from the accident and compensation for the pain and suffering she had experienced in her back and knees.

¶ 27 In response, defendant argued primarily that, although she had been negligent, that had not caused plaintiff's knee injuries. She noted that the reports from the paramedics, Lin, and Shah did not mention plaintiff's knees. Further, although twisting or hyperflexion of the knee can cause a meniscus tear, there was no evidence of twisting or hyperflexion during the accident. Moreover, plaintiff had not complained of knee pain until weeks later.

¶ 28 Defendant also discussed plaintiff's other alleged injuries. She acknowledged that plaintiff had had an accident and felt pain in her back. Thus:

> "[H]ere's what makes sense. You got back pain. You better get checked out. You better take the ambulance ride and let the folks at the emergency room, people like Dr. Lin, check you out.
>
> The ambulance charges $528. Radiology, $50. The ER physician, $310.70. The ER visit for the use of the hospital room, $1,982.08. That comes to $2,870.78. In my view, in my client's view, if you go beyond that, that doesn't make sense."

¶ 29 Addressing pain and suffering or the loss of a normal life, defendant continued that plaintiff's back pain had cleared up soon and that there was no basis for any such award based on plaintiff's knee injuries. She argued, "So I'm asking you to consider the medical bills from that very first day. And after that, everything dealt with the knees. And it doesn't make sense."

¶ 30 In rebuttal, plaintiff contended that Lin and Tu had testified that there was nothing unusual about the delay in the manifestation of her knee injuries. Tu and Alpert had testified that the knee injuries resulted from the accident, whatever the specific mechanism of injury had been.

¶ 31 The jury returned a verdict for defendant. Plaintiff moved to reconsider. She asserted that she had $2870.78 in medical bills for her emergency-room visit and that defendant had conceded liability for these bills. Further, in refusing to award anything for pain and suffering, the jury ignored the evidence that plaintiff had complained of back pain immediately after the accident and that Lin had diagnosed her with exacerbation of back pain and given her Norco for it. Thus, at the least, the accident aggravated her preexisting condition. Plaintiff did not specifically argue that the jury erred in denying damages for knee injuries.

¶ 32 Defendant responded that the evidence had shown only that plaintiff had had a preexisting condition that the accident aggravated minimally. The condition resolved itself within weeks. Thus, any evidence of pain and suffering did not require an award of damages.

¶ 33 Without explanation, the trial court denied plaintiff's motion. She timely appealed.

¶ 34 On appeal, plaintiff contends that the judgment cannot stand, because the jury ignored proven damages that proximately resulted from defendant's negligence. Plaintiff concedes that the jury was within its prerogative in refusing to award her any damages for her knee injuries, as the evidence of causation was conflicting. She argues, however, that she produced undisputed evidence of compensable losses resulting from the accident. Essentially, plaintiff argues that she should have been awarded damages for (1) pain and suffering caused (or exacerbated) by the collision; and (2) the bills that she incurred for treatment in the emergency room shortly after the accident. As to (1), plaintiff notes the evidence that the back pain that she mentioned to Lin was either caused or aggravated by the accident. As to (2), she points out that, in closing argument, defendant conceded that the medical bills for August 1, 2012, were reasonably incurred as a result of the accident, which was caused by defendant's negligence.

¶ 35 A jury's award of damages (or its refusal to make one) is entitled to great deference. *Snover v. McGraw*, 172 Ill. 2d 438, 447 (1996). Determining damages is within the jury's discretion, and we will not disturb its decision unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bore no reasonable relationship to the loss suffered. *Id.*; *Orava v. Plunkett Furniture Co.*, 297 Ill. App. 3d 635, 637 (1998).

¶ 36 We note that defendant asserts that plaintiff is not entitled to a new trial on damages unless the pertinent evidence, when viewed in the light most favorable to her, so overwhelmingly favors a judgment for her that no contrary verdict based on that evidence could ever stand. We agree with plaintiff that defendant confuses the standard of review for a new trial with that for a judgment *n.o.v.* See *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). However, given our resolution of this case, we must observe that, in part, plaintiff has not met the lower

standard for a new trial and, in part, she has met the higher standard for a judgment *n.o.v.* Although plaintiff has not specifically argued that she met the latter standard, we choose to so hold, for reasons that we shall explain.

¶ 37 We hold first that the jury was within its prerogative in refusing to award plaintiff any damages for pain and suffering. However, we hold second that the jury should have awarded her the medical expenses that defendant conceded. The jury was not bound by defendant's concession, but the evidence was undisputed and should not have been ignored. Because there is no need for any further factual findings, we exercise our power to enter judgment directly (see Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1,1994)).

¶ 38 Although factually dissimilar to this case in important respects, *Snover* and *Orava* set out principles that shape our analysis. In the former case, Kimberly Snover was in a car accident. The jury awarded her damages for medical expenses that were pain-related, including emergency-room diagnostic examinations and treatment later on, but none for pain and suffering *per se*. On appeal, she argued that the jury's choices were inconsistent, requiring a new trial on damages. *Snover*, 172 Ill. 2d at 443-44.

¶ 39 The supreme court disagreed, holding that "a jury may award pain-related medical expenses and may also determine that the evidence of pain and suffering was insufficient to support a monetary award." *Id.* at 448. Although awarding pain-related medical expenses might not be consistent with denying damages for pain and suffering if the plaintiff has clearly suffered a serious injury, it can be proper if the plaintiff's evidence of injury is "primarily subjective." *Id.* at 449. The court concluded that the jury had properly denied Snover damages for pain and suffering, as it had reasonably found that she suffered only "minimal discomfort." *Id.*

¶ 40 In *Orava*, the defendant driver backed his vehicle into the plaintiff's vehicle. She went to a hospital emergency room for immediate treatment and received other treatment later on. A jury awarded her damages for the aggravation of a preexisting condition and past medical expenses but nothing for pain and suffering. *Orava*, 297 Ill. App. 3d at 636. She moved for a new trial on damages only, arguing that the verdict was internally inconsistent and that the jury had ignored a proven element of damages, a "new whiplash injury" that the defendants, the driver and his employer, had conceded she had suffered. *Id*. The trial court granted the plaintiff's motion. The defendants appealed. *Id*. at 637.

¶ 41 We held that the trial court had abused its discretion, because the jury had neither ignored a proven element of damages nor created an irreconcilable inconsistency. *Id*. We explained first that the jury properly found that the impact was relatively slight; that the plaintiff suffered little if any pain at the time; and that she incurred no more than short-term strain and the aggravation of her preexisting condition, which itself consisted of pain without objective findings of injury. *Id*. at 637-38. Thus, the jury's refusal to award her anything for new pain and suffering had been proper: the evidence showed that any new pain, including the whiplash injury, was minimal. *Id*. at 638.

¶ 42 We continued:

> "There is an additional reason the jury's award of medical expenses is consistent with its refusal to award damages for pain and suffering. The jury had reason to find that not all plaintiff's medical expenses were pain-related. Defendants' expert conceded that plaintiff's trip to the hospital emergency room was a reasonable precautionary measure. Plaintiff went to the emergency room in large part to find out whether and how badly she

was hurt. *Even had the hospital personnel found no injuries at all, this expense would have been caused by defendants' negligence.*" (Emphasis added.) *Id.*

¶ 43 We apply *Snover* and *Orava* here. First, we turn to the jury's refusal to award plaintiff anything for pain and suffering. As *Snover* and *Orava* hold, such an award is subject to the *de minimis* rule. Not all pain rises to a level that requires compensation. Here, the evidence did not show more than incidental pain, and it showed that only equivocally. In the emergency room, plaintiff did complain of back pain, and Lin noticed muscle spasms in her back. He gave her Norco for use in the emergency room, and his notes referred to back pain "exacerbated" by the collision. However, beyond his precautionary administration of Norco, Lin did not prescribe any pain medicine; he testified that his note meant only that the collision *could have* exacerbated plaintiff's preexisting chronic back pain; and, other than the back spasms (at most), he saw no objective evidence of any new injury that could have caused new pain. The evidence relating to the pain in plaintiff's ankle ligament was even slighter; Lin testified that plaintiff tested positive for such pain, and the subject was barely mentioned again in the evidence. Thus, the jury did not err in refusing to award plaintiff damages for pain and suffering.

¶ 44 Plaintiff emphasizes her testimony that the impact was so severe that her Jeep was knocked off the roadway and onto a yard nearby. From this, she argues, it was inconceivable that she could not have suffered serious pain from the accident. Unfortunately for plaintiff, however, the evidence did nothing to support, and much to undermine, this theory. Neither her subjective complaints of pain nor the objective medical evidence required the jury to find that she endured pain that rose to a compensable level; the fact of the collision itself cannot substitute for the missing evidence. Moreover, there was evidence that plaintiff was traveling relatively

slowly (no more than 30 miles per hour) when the vehicles collided. Also, there was no evidence how far sideways her vehicle went or how forcefully it come to a halt.

¶ 45 We thus hold that the jury acted within its prerogative in refusing to find that any compensable pain and suffering was caused by defendant's negligence. However, that does not end our analysis. Plaintiff's claimed medical expenses stood on a different footing.

¶ 46 Defendant conceded that she had been negligent. Although she argued that her negligence had not proximately caused plaintiff any injuries (particularly knee injuries), she did not contend that her negligence had not proximately caused *the accident itself*. Plaintiff *did* contend that defendant's negligence had caused the collision; that was essential to her case. Thus, there was no dispute that defendant's negligence proximately caused the collision.

¶ 47 There was also no dispute that the collision proximately caused plaintiff's treatment by the paramedics, her ride in the ambulance to the hospital, and the examination and treatment that Lin administered there. Obviously, the collision was the cause in fact of all of this treatment and the resulting charges for it. And defendant conceded that plaintiff acted reasonably in obtaining this treatment and that the charges for it were proper. Thus, if the medical expenses that plaintiff incurred as a direct result of the accident were a proven element of damages, the jury could not ignore them.

¶ 48 We can easily supply the final link in the chain of reasoning: the medical expenses conceded by defendant were a proven element of damages even though the jury properly concluded that she had suffered no compensable injuries or pain from the accident. Our conclusion follows from *Orava*. In the passage that we emphasized earlier, we recognized that, regardless of the proof of actual injuries or pain, plaintiff's reasonable medical expenses, having resulted from accident, had flowed from the defendants' negligence. The medical expenses that

plaintiff here incurred on the day of the accident are indistinguishable from those that the plaintiff in *Orava* incurred on the day of her accident.

¶ 49 *Orava* differs from this case in that there the jury awarded the plaintiff the precautionary medical expenses she incurred directly after her accident, whereas, here, the jury refused to make a similar award to plaintiff. However, the passage in *Orava* that we quoted did not state that the jury acted within its discretion in concluding that the expenses were compensable; it stated broadly that the expenses *were* compensable. As important, that proposition is simply correct as a matter of law. Both in *Orava* and here, the reasonable emergency-related expenses incurred by the victim of an accident caused by another driver's negligence were a proven element of damages. Although juries have discretion in deciding damages, that discretion is not unlimited. We can see no proper basis for a jury to deny the type of proven damages that arose in both *Orava* and this case. Moreover, in the present case, the precise amount of the expenses and their reasonableness were both undisputed. Thus, the jury's refusal to award these damages to plaintiff was not merely an abuse of discretion but also a violation of the *Pedrick* standard.

¶ 50 As the proper remedy is clear, there is no basis for us to require the delay and expense of a new trial on damages. Plaintiff did not request the precise relief that we provide, but any consideration of forfeiture is overridden by the lack of ultimate prejudice to defendant in combination with our responsibility for a just and legally sound result. See *Hux v. Raben*, 38 Ill. 2d 223, 225 (1967). Therefore, in the exercise of our power to enter any order that the trial court could have entered (see Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994)), we reverse the judgment of the circuit court of Kane County and enter judgment in plaintiff's favor for $2870.78.

¶ 51 Reversed; judgment entered for plaintiff.