2012 IL App (3d) 110485-U

Order filed May 16, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

AARON G. LEVY,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois
	)	
v.	)	Appeal No. 3-11-0485
	)	Circuit No. 07-L-762
	)	
ANTHONY M. DEBELLIS, individually,	)	
DAVID L. MITCHELL, individually, and	)	
MITCHELL'S FLOWERS, INC., an	)	
Illinois Corporation,	)	Honorable
	)	Raymond E. Rossi,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not commit reversible error when it granted a defense motion *in limine* to bar certain medical expert opinion testimony regarding the extent and permanency of the plaintiff's injuries.

¶ 2 Appellant, Aaron Levy, the plaintiff in a personal injury claim, seeks a new trial, maintaining that the trial court erred in granting a defense motion *in limine* barring certain medical opinion testimony regarding the extent and permanency of his injuries.

¶ 3 BACKGROUND

¶ 4 This appeal arises from an automobile accident occurring on December 22, 2006, wherein the plaintiff's car was struck by a delivery van owned by Mitchell's Flowers, Inc. and driven by its employee, Anthony M. DeBellis. The defendants admitted liability, and the matter was tried to a jury only on the question of damages. The jury returned a verdict awarding damages in the amount of $13,500 and costs of $600.

¶ 5 The plaintiff appeals from the judgment entered on the jury verdict and seeks a new trial. On appeal, the plaintiff maintains the trial court erred in granting defense motions *in limine* regarding: (1) the medical opinion testimony of Dr. Laurie Schumacher, a dentist who treated the plaintiff four years after the accident; (2) the medical opinion testimony of Dr. Robert Sulo, the plaintiff's treating physician, regarding the plaintiff's condition after February 8, 2007; and (3) the medical opinion testimony of both Drs. Schumacher and Sulo regarding possible future medical damages or permanent injuries.

¶ 6 ANALYSIS

¶ 7 As a preliminary matter, we must first address the defendants' contention that the plaintiff waived any claims of error by the trial court in granting motions *in limine* by failing to make an offer of proof at trial seeking introduction of the evidence excluded by the order *in limine*. See *Schuler v. Mid-Century Cardiology*, 313 Ill. App. 3d 326, 334 (2000) (order *in limine* is interlocutory in nature and remains subject to reconsideration at trial); *Forreston County Mutual*

Fire Insurance Co., 50 Ill. App. 3d 966, 968 (1977) (proponent of evidence excluded *in limine* must make an offer of proof at trial in order to preserve the issue on appeal). Here, the plaintiff presented no formal offer of proof at trial. However, we note that, while the general rule is that a formal offer of proof must be made or the propriety of excluding the evidence is waived on appeal, exceptions to the general rule are made "where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced." *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495 (2002). Reviewing the record, it is apparent that the trial court in the instant matter clearly understood the nature and character of evidence sought to be introduced. The record established that, in ruling on the motion, the trial court was sufficiently aware of the content of the evidence depositions that the plaintiff sought to introduce.

¶ 8 Moving to the merits of the appeal, a reviewing court will not disturb a trial court's decision to grant a motion *in limine* absent a clear abuse of discretion. *DiCosola v. Bowman*, 342 Ill. App. 3d 530, 536 (2003). In determining whether there has been an abuse of discretion, this court may not substitute its judgment for that of the trial court or even determine whether the trial court exercised its discretion wisely. *Id.* A reviewing court may find an abuse of discretion only where "no reasonable person would take the position adopted by the trial court." *Taxman v. First Illinois Bank of Evanston*, 336 Ill. App. 3d 92, 97 (2002).

¶ 9 A. Dr. Laurie Schumacher

¶ 10 Dr. Laurie Schumacher was one of the plaintiff's treating dentists. Her discovery deposition was taken on November 4, 2010. At the discovery deposition, Dr. Schumacher testified that she saw the plaintiff for the first time on September 1, 2010, nearly four years after the accident. Other than the fact that the plaintiff came in for the first visit with a dental

appliance, she had no knowledge of his prior dental treatment and history. At the time of the discovery deposition, Dr. Schumacher had examined the plaintiff on two occasions, September 1, 2010, and September 9, 2010. After the two visits, Dr. Schumacher formulated a tentative diagnosis of "muscle spasm [and] muscle splinting." She testified at the discovery deposition that she had no opinion regarding the plaintiff's need for future dental treatment and no opinion regarding the permanence of his condition. Dr. Schumacher also testified in the discovery deposition that she had attempted to recommend follow up treatment, but she had been unable to contact the plaintiff despite several repeated phone calls. A review of the discovery deposition reveals three separate occasions upon which Dr. Schumacher was asked if she had an opinion whether the plaintiff's current condition was causally related to the automobile accident at issue; on each occasion, she reported that she had no opinion:

"Q. Okay. With respect to his issues with his - that he came to see you about, the headaches, the painful jaw, that sort of thing, do you have any opinions on any sort of relationship between those issues and the motor vehicle accident in December of 2006?

A. As of right now, no.

* * *

Q. Let me just ask you simply, do you have any way of knowing whether this is related or not to the motor vehicle accident?

A. No.

* * *

Q. Do you have any other opinions regarding this condition or the cause of this condition, anything like that that [sic] we haven't covered here today that you can think of?

A. No. I just would like to get him out of pain."

¶ 11 On May 31, 2011, six days prior to trial, Dr. Schumacher gave an evidence deposition at which she testified that between November 15, 2010, and May 27, 2011, she had treated the plaintiff on eight different dates. At the evidence deposition, she testified that the plaintiff's dental condition, which she diagnosed as temporal mandibular disorder, could be causally related to the automobile accident. The record contains no notice to the defendants regarding the treatment Dr. Schumacher gave after the date of the discovery deposition, nor did there appear to be any notice of Dr. Schumacher's new opinion as to causation.

¶ 12 The defense filed a motion *in limine* seeking to bar Dr. Schumacher's evidence deposition arguing that: (1) the opinions expressed in the evidence deposition were not properly disclosed in accordance with Supreme Court Rules 213 and 214 (Ill. S.Ct. R. 213 (eff. Jan. 1, 2007); R. 214 (eff. July 1, 2002)); (2) testimony concerning the relationship between the plaintiff's injuries and the accident was in direct contradiction to what had been disclosed by way of the discovery deposition; and (3) the opinions were entirely too speculative in nature to be properly admitted into evidence at trial. The record established that the trial court relied, at least in part, on all three arguments when it granted the motion *in limine.*

¶ 13 We find no abuse of discretion by the trial court in granting the motion *in limine*. It is well settled that, under Supreme Court Rule 213, a trial court may exclude expert testimony that exceeded or conflicted with the testimony given by the witness in a discovery deposition.

Thornhill v. Midwest Physician Center of Orland Park, 337 Ill. App. 3d 1034, 1049 (2003); *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 536-37 (1998); see also *Harding v. Amsted Industries, Inc.*, 276 Ill. App. 3d 483, 493 (1995). In addition, we cannot say that the trial court's finding that Dr. Schumacher's opinion testimony was too speculative to be admitted to the jury was an abuse of discretion. A trial court has discretion to exclude expert opinion testimony that lacks a foundation in fact and is too speculative in nature. *Schuler*, 313 Ill. App. 3d at 334-36. Here, Dr. Schumacher acknowledged that she had no information regarding the accident, which had occurred nearly four years prior to her first treating the plaintiff. She also acknowledged that she had not reviewed any records regarding his treatment in the years after the accident and prior to the plaintiff coming under her care. Given the lack of these foundational facts, the trial court's finding that Dr. Schumacher's opinions were too speculative in nature cannot be overturned on appeal.

¶ 14 B. Dr. Robert Sulo

¶ 15 We next consider whether the trial court erred in limiting the testimony of Dr. Sulo, the plaintiff's treating physician. During his evidence deposition, Dr. Sulo testified that the plaintiff had been suffering from carpal tunnel syndrome and intermittent episodes of neck pain since January 2002. Dr. Sulo examined the plaintiff 18 days after the accident, on January 9, 2007. At that examination, Dr. Sulo noted contusions on the right elbow and thumb, and a cervical strain or "whiplash." Dr. Sulo testified that he would have expected any injuries associated with the automobile accident to have shown up by the time of his first post-accident examination. He testified, however, that carpal tunnel symptoms in both hands and neck pain appeared at subsequent examinations. He acknowledged that the right hand symptoms could be an

exacerbation of the plaintiff's preexisting carpal tunnel condition, but he had no opinion as to causation within any reasonable degree of medical certainty. Rather, he testified that he would defer to someone with greater expertise than his to state an opinion as to causation:

> "Q. Is it possible that complaints relating to soft tissue injuries will occur more than, say, 18 or 20 days after blunt trauma?
>
> A. A patient certainly can complain of pains after - I can't tell you any particular definite time limit where they would or would not. I mean you have all that time, but it's just from the standpoint of being able to relate it to a certain episode, I would have to defer to someone with more expertise on whether that is scientifically possible."

¶ 16 Dr. Sulo testified that he could only opine with a reasonable degree of medical certainty that the plaintiff's contusions to his right thumb and right elbow and the soft tissue (whiplash) injury to his neck were causally related to the December 22, 2006, automobile accident. Additionally, the only treatments that he could correlate to the accident were the ones he administered during his first two post-accident appointments, January 9, 2007, and February 8, 2007.

¶ 17 The defendants sought and were granted a order *in limine* barring Dr. Sulo from testifying regarding any medical conditions and treatments that were included in his treatment of the plaintiff after the February 8, 2007, appointment. We find no abuse of discretion in the trial court's order. Dr. Sulo was not completely barred from testifying at trial. Rather, he was barred from testifying regarding treatments and conditions arising after February 8, 2007. While it appears from the record that Dr. Sulo could have testified to certain conditions that appeared

after that date, he has conclusively testified that he did not have the expertise to render an opinion as to whether these conditions were attributable to the accident. Thus, any testimony he gave as to conditions observed after that date would be, by his own admission, speculative. A trial court has discretion to exclude expert testimony that is speculative or lacks sufficient foundation in fact. *Schuler*, 313 Ill. App. 3d at 334-36. Given that the witness himself placed a limit upon his own expertise, we find that the trial court did not abuse its discretion in also placing limitations upon the witnesses' testimony.

¶ 18 C. Future Damages

¶ 19 The appellant lastly maintains that the trial court abused its discretion when it barred Drs. Schumacher and Sulo from testifying as to possible future medical damages. We note, however, that these allegations of error are included in the above discussions and need not be addressed further.

¶ 20 CONCLUSION

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

¶ 22 Affirmed.