2013 IL App (3d) 120632-U

Order filed April 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

LUCY GREEN, as Administrator of the Estate of KIMBERLY A. HUCKLEBY, Deceased,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Iroquois County, Illinois,
Plaintiff-Appellant,	)	Appeal No. 3-12-0632 Circuit No. 2007-L-1
v.	)	
JEFFREY L. HOPKINS,	)	Honorable James B. Kinzer,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

¶ 1 *Held:* Plaintiff waived the issues relating to her medical bills incurred immediately after the accident when she failed to address them in her post-trial motion. Since the jury's verdict for defendant was supported by the evidence, the trial court's denial of plaintiff's motions for directed verdict, judgment notwithstanding the verdict, and a new trial is affirmed.

¶ 2 Plaintiff's decedent, Kimberly Huckleby (Kimberly), filed a complaint against defendant Jeffrey Hopkins seeking to recover damages resulting from a traffic accident. The jury returned a

verdict in favor of defendant on the issues of proximate cause and damages. On appeal, plaintiff argues the trial court erred by denying her motions for directed verdict, judgment notwithstanding the verdict, and a new trial. We affirm.

¶ 3 FACTS

¶ 4 On January 10, 2007, Kimberly filed a one-count complaint against defendant seeking damages of $87,704.74 for certain medical expenses, loss of normal life experiences, and pain and suffering from injuries resulting from a traffic accident on January 13, 2005, while traveling as a passenger in defendant's van.[1] On July 21, 2011, defendant filed a motion *in limine* which sought to bar plaintiff from presenting evidence regarding certain medical expenses. The motion alleged plaintiff would not call "any doctor, healthcare provider or any person from any hospital or clinic to causally relate the medical expenses claimed to the accident at issue." The trial court allowed defendant's motion *in limine* on July 25, 2011.

¶ 5 On September 13, 2011, defendant filed an amended answer, admitting his negligence as the driver on January 13, 2005, but denying Kimberly suffered the injuries set out in her complaint. On January 4, 2012, the matter proceeded to a jury trial on the issues of proximate cause and damages.

¶ 6 Plaintiff first called defendant, who testified he picked up Kimberly from Kentland, Indiana on January 13, 2005, because she needed a ride back to Watseka, Illinois. According to defendant, it was snowing and "white out" conditions existed on the roadway. Just before the collision, defendant was driving west on Lincoln and came to a stop before the stop sign at the intersection with U.S. Rt. 41, a four lane divided highway. After stopping, defendant drove his

[1]Kimberly died on September 5, 2009 but, before trial, the parties stipulated that Kimberly's death was unrelated to the January 13, 2005 car accident. On March 10, 2010, the trial court allowed plaintiff's request to substitute Lucy Green, Kimberly's mother, as plaintiff.

van across the northbound lanes of Rt. 41, then stopped again at a yield sign, before continuing across the southbound lanes. As he crossed the southbound lanes, a vehicle collided with the right side of defendant's van, behind the front passenger seat where Kimberly was seated. The impact caused his van to spin and come to a stop on the far side of the northbound lanes. Immediately after the accident, Kimberly complained she was "hurting" and defendant noticed some minor abrasions with "a little" blood on Kimberly's face. First responders removed Kimberly from the van and placed her on a stretcher, before loading her into an ambulance.

¶ 7 Next, plaintiff testified that her daughter, Kimberly, spent five to six days at two local hospitals following the accident. Following her release from the hospital, Kimberly recuperated at her mother's home for approximately two weeks. During that time, Kimberly was "sedate," remained in bed most of the time, and "had a hard time getting around." Until her death in 2009, Kimberly always wore a back brace, according to plaintiff.

¶ 8 The court allowed plaintiff to publish the evidence deposition of Dr. Ronald Michael, a neurological surgeon, by reading the deposition to the jury. Dr. Michael testified he first saw Kimberly as his patient on August 14, 2006. At that time, Kimberly reported she was involved in a car accident on January 13, 2005, where she was "t-boned" at 55 miles per hour, and she suffered from low back, mid-back, and bilateral leg pain. Kimberly informed Dr. Michael she underwent eight weeks of physical therapy and one epidural steroid injection since the accident. Dr. Michael's physical examination of Kimberly was normal. He reviewed a January 18, 2006, magnetic resonance imaging (MRI) of Kimberly's lower spine and observed an L1-L2 disc herniation and kyphosis. Dr. Michael concluded the traffic accident caused Kimberly's conditions. From August 2006 through March 2009, Dr. Michael performed a number of diagnostic tests and prescribed various treatments for Kimberly, resulting in an outstanding

balance for services rendered totaling $87,704.74.

¶ 9 On cross-examination, Dr. Michael testified he did not conduct an independent investigation to determine the accuracy of Kimberly's report regarding the accident, nor was he aware Kimberly wore a back brace after the accident. Dr. Michael explained that he reviewed Kimberly's MRI, but did not rely on the radiologist's report when reaching his conclusion about Kimberly's injuries. However, Dr. Michael acknowledged that the report provided by the radiologist, who originally conducted Kimberly's MRI, did not reference a herniation.

¶ 10 According to Dr. Michael, Kimberly did not inform him of four separate emergency room (ER) visits after the date of the accident. Specifically, Kimberly did not report to Dr. Michael that she visited the ER on December 17, 2005, complaining of an injury to her lower back following an incident on the couch. Kimberly did not report her ER visit on June 15, 2006, complaining of a lower back injury after tripping up the stairs or her ER visit on July 25, 2006, regarding an injury to her lower back after a fall in the shower. Kimberly also did not report her ER visit on December 23, 2006, for an injury to her lower back after lifting heavy furniture.

¶ 11 On the second day of trial, defendant called Randy Thompson, who testified that Kimberly lived with him from the fall of 2004, prior to the accident, until July 2005. According to Randy, after the accident, Kimberly did not appear to him to suffer from physical difficulties and he did not observe her wearing a back brace at any time while they lived together.

¶ 12 Next, the court allowed defendant to publish a portion of Kimberly's June 16, 2008, evidence deposition by reading it to the jury. Kimberly testified that in December 2005 she went to the ER because her lower back popped "really loud" after she bent over the end of the couch to pick something up off the floor and, in June 2006, Kimberly went to the ER because she had low back pain after falling up a set of stairs. According to Kimberly, she had not worn her back brace

since summer of 2005. The parties stipulated that, during Kimberly's deposition testimony, Kimberly stated she did not know the speed of the vehicle that collided with the van driven by defendant.

¶ 13 Defendant testified he saw Kimberly on three separate occasions after the accident and when he asked Kimberly how she was doing, she responded she was fine. In the fall of 2005, defendant saw Kimberly run across a street into a store, then run back across the street into a restaurant.

¶ 14 Finally, Dr. Michael Kornbatt, an orthopedic surgeon, testified as an expert witness for the defense. Dr. Kornblatt testified that he reviewed all of Kimberly's medical records, including Dr. Michael's reports, and reached the opinion that, at the time of the accident, Kimberly suffered from degenerative disc disease, a disease commonly found in a person in his or her late 30's. According to Dr. Kornblatt, the pre-existing degenerative disc disease was not affected by the January 13, 2005, car accident. Dr. Kornblatt concluded the accident may have caused Kimberly to suffer a soft tissue strain near her spine, resulting in a temporary aggravation of her pre-existing degenerative disc disease, but Kimberly's symptoms would have resolved no later than March 2005, resulting in no permanent injury. Dr. Kornblatt also concluded that Dr. Michael's treatment of Kimberly was not related to any conditions arising out of the accident.

¶ 15 On cross-examination, Dr. Kornblatt testified that he did not physically examine Kimberly. Dr. Kornblatt explained that although he reviewed a report from Dr. Robert Hurford, who examined Kimberly on January 20, 2005, after she complained of lower back pain, he disagreed with Dr. Hurford's diagnosis that Kimberly suffered from an L1-L2 chance injury.

¶ 16 After the defense rested, plaintiff moved for a directed verdict, which the trial court denied stating that "we still need to get to the issue of proximate cause." During closing

argument, defense counsel argued:

> "We believe that a reasonable result here would be you can make an award to Kimberly Huckleby's estate, and I would say you could use the medical expenses relating to her treatment for the emergency room and the ambulance, *** but where is it?"

¶ 17 Plaintiff's objection to defense counsel's argument was overruled. Also over plaintiff's objection, the court provided the jury with two verdict forms, one finding for plaintiff and awarding damages (Form A), and the other finding for defendant (Form B). During deliberations, the jury submitted a question asking "If we go with [Form] B can we still put a dollar amount for pain [and] suffering?" The court informed the jury it could only award pain and suffering using Form A. The jury returned the Form B verdict and, on January 12, 2012, the court entered judgment in favor of defendant.

¶ 18 On January 23, 2012, plaintiff filed a post-trial motion requesting the court enter a judgment notwithstanding the verdict and to grant a new trial as to damages. On June 28, 2012, the court entered a written order denying plaintiff's motion, noting:

> "6. Plaintiff argues that since Defendant's expert, Dr. Kornblatt, testified that the accident would have caused some pain to [Kimberly], that some award of damages was required.
>
> 7. Plaintiff's expert, Dr. Michael, testified by way of deposition. While there was extensive treatment of [Kimberly] by Dr. Michael, that treatment was for lower back pain which, according to Dr. Kornblatt's trial testimony, afflicts nearly all people of [Kimberly's] age. Thus, Defendant confronted the issue of proximate cause directly at the trial

with the testimony of Dr. Kornblatt. That testimony was un-rebutted."

The court concluded there was sufficient evidence for the jury to find Kimberly suffered no compensable injury from the accident. Plaintiff appeals.

¶ 19 ANALYSIS

¶ 20 On appeal, plaintiff argues a new trial is in order because the trial court committed the following errors: (1) prohibited plaintiff from presenting evidence of paid medical bills to the jury and overruled plaintiff's objection to defendant's closing arguments concerning those medical bills, (2) refused to direct a verdict for plaintiff, and (3) denied plaintiff's post-trial motion for judgment notwithstanding the verdict and for a new trial.

¶ 21 We begin with plaintiff's contention that the trial court improperly allowed defendant's motion *in limine* prohibiting plaintiff from presenting evidence relating to medical bills not supported by evidence of causation to the accident. Plaintiff also contends the trial court erred when it overruled plaintiff's objection to defendant's reference in closing argument to those prohibited medical bills. Defendant responds that plaintiff has waived these issues by failing to raise them in her post-trial motion and, in the absence of waiver, the court's rulings were proper.

¶ 22 Initially, we note the trial court allowed defendant's motion *in limine* on July 25, 2011, nearly six months before trial. This ruling allowed plaintiff ample time to obtain the necessary evidence in order to publish these bills to the jury, but she failed to do so. In addition, plaintiff failed to raise both issues relating to these medical bills in her post-trial motion. It is well-settled that an issue is waived on review if it is not raised both at trial and in a post-trial motion. *Jackson v. Seib*, 372 Ill. App. 3d 1061, 1076 (2007); Ill. S. Ct. R. 366 (b)(2)(iii) (eff. Feb. 1, 1994). Defendant filed a motion to strike certain portions of plaintiff's brief referencing the prohibited medical bills. Since we conclude these issues are waived for appeal, the motion to

strike is denied.

¶ 23 Plaintiff's remaining contentions allege error based on the trial court's decisions to deny her requests for a directed verdict, judgment notwithstanding the verdict, and new trial. A directed verdict or a judgment notwithstanding the verdict is properly entered in limited cases where all of the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could stand. *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). A court should not enter a directed verdict or judgment notwithstanding the verdict if there is any evidence demonstrating a substantial factual dispute, or where the assessment of the credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome. *Id.* at 454; *Baker v. Hutson*, 333 Ill. App. 3d 486, 492 (2002). We apply a *de novo* standard of review to decisions on motions for directed verdict and judgment notwithstanding the verdict. *Jackson*, 372 Ill. App. 3d at 1068. A reviewing court must not substitute its judgment for the jury's, nor may a reviewing court reweigh the evidence or determine the credibility of witnesses. *Kindernay v. Hillsboro Area Hospital*, 366 Ill. App. 3d 559, 569 (2006).

¶ 24 On a motion for a new trial, the court will weigh the evidence, set aside the verdict, and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Maple*, 151 Ill. 2d at 454. A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident, or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence. *Id.* A court's ruling on a motion for a new trial will not be reversed except in those instances where it is affirmatively shown that it abused its discretion. *Id.* at 455. In determining whether a trial court abused its discretion, the reviewing court should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Id.*

¶ 25 After carefully reviewing the evidence presented at trial, we cannot find that the findings of the jury were unreasonable, arbitrary, or not based on the evidence. In this case, plaintiff carried the burden of convincing this jury that Kimberly's injuries were proximately caused by defendant's admitted negligence. Although defendant did not dispute that Kimberly incurred $87,704.74 in medical expenses for treatment provided by Dr. Michael, defendant's expert, Dr. Kornblatt, testified that it was his professional opinion that those expenses were not related to Kimberly's purported injuries stemming from the January 13, 2005 car accident. This jury, who was charged with weighing the evidence and resolving any conflicts in testimony, was free to believe Dr. Kornblatt's testimony over Dr. Michael's deposition testimony.

¶ 26 Further, plaintiff's testimony that Kimberly suffered from limited mobility and wore a back brace every day after the accident, until her death in 2009, conflicted with Kimberly's own deposition testimony that she stopped wearing the back brace in mid-2005, as well as the testimony of defendant and Kimberly's roommate regarding Kimberly's post-accident activities, requiring this jury to make multiple credibility determinations. The credibility issues in this trial were especially significant in light of the 19-month delay before Kimberly sought treatment from Dr. Michael, Kimberly's intervening trips to the ER complaining of low back pain caused by other incidents, the subjective nature of Kimberly's complaints, and Dr. Kornblatt's objective findings. See *Maple*, 151 Ill. 2d at 460. The question of whom to believe and what weight to be given to all of the evidence was a decision for the trier of fact. *Jackson*, 372 Ill. App. 3d at 1069.

¶ 27 Plaintiff also suggests this jury was confused about proximate cause because a question submitted by the jury shows the jury wanted to grant a verdict in favor of defendant and award plaintiff damages for pain and suffering. However, it is clear from the question submitted by the

jury that this jury was considering rendering a verdict for defendant, but sought clarification regarding the impact that such a verdict would have on granting a financial award to plaintiff. The trial court's response eliminated any confusion the jury may have experienced. For these reasons, we conclude the trial court did not err in denying plaintiff's motions for directed verdict, judgment notwithstanding the verdict, and a new trial.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Iroquois County is affirmed.

¶ 30 Affirmed.

¶ 31 JUSTICE SCHMIDT, specially concurring.

¶ 32 I concur in the majority's decision, but write separately to further address plaintiff's argument that the trial court erred in allowing defendant's motion *in limine* with respect to certain medical bills. As the majority correctly points out, the issue is forfeited by plaintiff's failure to raise this issue both at trial and in a posttrial motion. *Supra* ¶ 21. Plaintiff neither offered the contested medical bills as evidence at trial nor made an offer of proof with respect to those bills. This, too, results in a waiver of the issue on appeal. *Snelson v. Kamm*, 204 Ill. 2d 1, 23 (2003); *People v. Andrews*, 146 Ill. 2d 413, 422 (1992).