2014 IL App (3d) 130483-U

Order filed October 10, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

DENNIS J. BERRY, SR.,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant.	)	Will County, Illinois.
	)	
v.	)	Appeal No. 3-13-0483
	)	Circuit No. 10-SC-1710
JOSEPH CERNUGEL, Special Administrator for	)	
the Estate of EARNEST M. JORDAN, deceased.	)	Honorable
	)	John C. Anderson
Defendant-Appellee.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court's evidentiary rulings concerning the exclusion of testimony based on the Dead Man's Act were proper and the order entering a directed verdict in favor of defendant is affirmed.

¶ 2 This litigation arose from a March 10, 2010, automobile accident involving plaintiff, Dennis Berry, Sr., and the now-deceased defendant, Earnest Jordan. Plaintiff appeals from the court's order granting a directed verdict in favor of defendant, arguing the evidence supported a finding of negligence. We affirm.

¶ 3 BACKGROUND

¶ 4 On March 10, 2010, plaintiff Dennis Berry, Sr., was allegedly involved in an automobile accident with a vehicle being driven by the decedent Earnest Jordan at the intersection of Cass Street and Park Street in Joliet. The decedent passed away on January 15, 2011, prior to the initiation of this small claims action initiated by plaintiff against the decedent on February 29, 2012. Plaintiff's complaint sought less than $10,000 in damages resulting from his physical injuries, medical expenses, and lost wages, based on decedent's negligent operation of his motor vehicle on March 10, 2010. On April 12, 2012, plaintiff filed an amended complaint substituting Joseph Cernugel (defendant), the special administrator of the decedent's estate, as defendant.

¶ 5 On May 10, 2012, defendant filed his answer to the amended complaint, admitting the decedent operated his vehicle on the date and at the location of the accident, but denying the remaining allegations contained in plaintiff's complaint. On February 7, 2013, defendant filed a "Motion to Exclude Testimony of Plaintiff's Insured Pursuant to the Dead Man's Act," seeking to prevent plaintiff from testifying at trial about how the accident happened, the impact on his car, or any event which took place in the presence of the decedent. On June 4, 2013, defendant filed a motion entitled "Supplemental Motions *in limine*," including nine paragraphs seeking separate rulings from the court.

¶ 6 The court's rulings relevant to this appeal involve paragraph numbers 1, 2, and 3, recited below, which requested the court as follows:

> "1. To bar any testimony by plaintiff as to the 'speed and operation of the decedent's vehicle, any warnings the decedent provided or failed to provide, the decedent's alleged failure to control his vehicle, and his alleged failure to 'keep a proper and sufficient lookout for adverse vehicles.' ' ***

2. To bar any other testimony by plaintiff as to events that occurred within the presence of the decedent. ***

3. To bar any testimony by the responding officer as to events not occurring within the personal knowledge of the officer." [1]

The court ruled in favor of defendant with respect to paragraph numbers 1 and 3 over plaintiff's objection, and granted the relief requested in paragraph number 2, without objection.

¶ 7 The jury trial began on June 4, 2013, and established the collision at issue occurred on March 10, 2010. On that date, decedent was operating his vehicle southbound on Park Street which is controlled by a stop sign at the intersection with Cass Street. Plaintiff was operating his vehicle eastbound on Cass Street and there were no traffic control devices for plaintiff's direction of travel.

¶ 8 Officer Corrado Venzon responded to a report of the accident. When the officer arrived at the scene, he observed damage to plaintiff's vehicle near the "driver's side rear, like bumper area." After learning the decedent did not remain at the scene, the officer located the decedent's vehicle in front of decedent's home. Upon inspection, the officer noticed damage to decedent's vehicle near the "driver's side front like bumper area."

¶ 9 The following exchange occurred during the officer's testimony:

"Q. MR. PYLES [Plaintiff's counsel]: Officer, when you conducted your investigation, did you make a comparison between the damage to Mr. Jordan's car and Mr. Berry's car?

A. [Officer Venzon]: Yes.

Q. What did you find?

[1] Defendant's supplemental motion *in limine* number 3 had additional language stricken by the court. The remaining portion, quoted here, was allowed as modified.

A. Seemed consistent with the way the accident was reported by [plaintiff]."

Defense counsel objected, arguing the testimony was prohibited by the Dead-Man's Act. After a brief sidebar, plaintiff's counsel indicated he would not continue the line of questioning and the trial court sustained the objection. On cross-examination, Venzon testified he had no independent recollection of the accident other than the information contained in his report.

¶ 10 Next, plaintiff testified he was traveling eastbound on Cass Street on March 10, 2010, around 11 p.m., as he approached the intersection with southbound Park Street. Plaintiff testified his direction of travel on Cass Street did not have a traffic control device. Plaintiff explained that Park Street "T-bone[s]," with a stop sign for traffic on Park Street, into Cass Street. Plaintiff explained that, after the accident, he obtained a prescription for his pain from the hospital and received neck and back stimulation from his chiropractor between April 1 and April 19, 2010.[2] Plaintiff testified that, other than an occasional problem, he had recovered from the accident.

¶ 11 On cross-examination, plaintiff testified he had been a patient of the chiropractor prior to the accident and missed one day of work following March 10, 2010. After defense counsel asked plaintiff if he was "claiming that [his pain was] related to the accident," plaintiff responded, "[d]uring the accident my head hit the window." The trial court denied defense counsel's request to strike plaintiff's response.

¶ 12 On redirect examination, the following exchange took place:

"Q. MR. PYLES [Plaintiff's counsel]: Your head hit the windshield from the impact in this collision, is that correct, Mr. Berry?

A. [Plaintiff]: Yes, sir.

Q. What was the impact of the cars in this collision?

[2] Plaintiff's subsequent testimony related to his pain and medical bills after the accident.

Defense counsel objected. During a sidebar conference, defense counsel asserted he did not open the door to this line of questioning by asking plaintiff if his pain was related to the collision. The court noted, "I don't think that all these questions that are barred by the Dead Man's Act are automatically going to come in just because [plaintiff] said he hit his head on a window." Plaintiff's counsel responded that defense counsel "opened the door to at least that question, maybe not to all of them, but I think the force and violence of the impact can come in based on the answer to his question." After defense counsel reiterated he did not question plaintiff about the force of the impact, the trial court agreed, and informed plaintiff's counsel he could not continue the line of questioning. Plaintiff's counsel withdrew his question.

¶ 13 After plaintiff rested, defendant moved for a directed verdict on the issue of negligence, arguing the evidence was too speculative to support a finding of negligence. Defendant, relying on *Fabschitz v. King*, 10 Ill. App. 3d 43 (1973), argued the decedent's admission he operated his vehicle at the time and location was insufficient to prove negligence.

¶ 14 After further discussion concerning the evidence, the trial court stated, "I thought that perhaps the officer would testify as to an admission that [decedent] Mr. Jordan made or that the officer could testify to something more substantive. I am afraid that at this point the only thing the jurors – the jury can do is speculate or guess as to what happened." The court continued, "I think you're right, you have three things going for you, but that's really still not enough, I think. You have the stop sign, you have the damage to the vehicles, and you have the admissions in paragraphs one and two [of plaintiff's complaint], but I just don't think it's enough to send it to the jury. And, you know, to tell you the truth, I have never granted a motion for a directed verdict finding before. I don't take it lightly. But I think I have to grant this one." The trial

court entered an order granting defendant's motion for a directed verdict on the issue of negligence and entered judgment in favor of defendant.

¶ 15 On June 5, 2013, plaintiff filed a motion for new trial asserting the trial court erred when it granted defendant's motion for a directed verdict. Plaintiff argued the court improperly excluded the responding officer's testimony regarding his investigation of the collision, photographs of plaintiff's vehicle showing the point of impact, and plaintiff's testimony regarding the point of impact. Defendant filed a response on July 1, 2013, and on July 2, 2013, after a hearing, the court denied plaintiff's motion. Plaintiff timely appeals.

¶ 16 ANALYSIS

¶ 17 On appeal, plaintiff raises two issues. First, plaintiff argues the trial court improperly excluded photographs "demonstrating the points of impact on Plaintiff [*sic*] and defendant's vehicles." Second, plaintiff submits the trial court incorrectly applied the Dead-Man's Act. Defendant responds the trial court's exclusion of the testimony and evidence was proper and asserts the directed verdict in favor of defendant should be affirmed.

¶ 18 With respect to the first issue, the officer informed the jury he observed damage to both vehicles. For example, the officer testified he observed damage to plaintiff's vehicle on the "driver's side rear, like bumper area." In addition, the officer testified he observed damage to the vehicle parked in front of decedent's home on the "driver's side front like bumper area." During the officer's testimony, plaintiff did not tender any photographs to the officer and the trial court did not refuse to allow photographic evidence. Consequently, the record does not support plaintiff's contention that he was prohibited from introducing photographic evidence.

¶ 19 We note the record on appeal contains sixteen photographs of plaintiff's vehicle.[3] These photographs were not marked as trial exhibits or attached as exhibits to plaintiff's posttrial motion. It appears the circuit clerk received and file-stamped these photographs on July 2, 2013, a month after the trial, on the date the parties argued plaintiff's posttrial motion.[4] Since the photographs were not addressed during the course of the trial, we conclude plaintiff forfeited this issue regarding photographic evidence for our review. *Snelson v. Kamm*, 204 Ill. 2d 1, 23 (2003).

¶ 20 Contrary to defendant's position on appeal with regard to an incomplete record, this court is able to review the issues presented by plaintiff with respect to the court's rulings on the application of the Dead-Man's Act. Although the record on appeal does not contain the transcripts of the hearings held on the motions *in limine*, the record does include the trial court's pretrial order, which we have carefully considered.

¶ 21 The Dead-Man's Act provides: "In the trial of any action in which any party sues or defends as the representative of a deceased person * * *, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased * * * or to any event which took place in the presence of the deceased * * *." 735 ILCS 5/8–201 (West 2012). The Dead-Man's Act protects a decedent's estate from fraudulent claims and equalizes the parties' positions regarding testimony. *Balma v. Henry*, 404 Ill. App. 3d 233, 237-38 (2010). The decision whether to admit evidence rests within the sound discretion of the trial court and a reviewing court will not reverse the trial court unless that discretion was clearly abused. *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 82.

[3] These photographs bear a digital camera date of March 17, 2010.
[4] It is unclear how these photographs became part of the record in this case since we do not have a transcript of that hearing.

¶ 22 Even if this court upholds the trial court's application of the Dead-Man's Act, plaintiff next argues defense counsel opened the door to allow questioning about the nature of the collision by asking plaintiff if he was "claiming that [his pain was] related to the accident." Here, the question carefully posed by defense counsel required a "yes" or "no" answer. Since plaintiff provided a non-responsive answer, we conclude defense counsel's question did not open the door to allow plaintiff to testify about the collision itself. Any testimony concerning the force of the impact at the scene of the accident was properly excluded pursuant to the Dead-Man's Act. See *Rerack v. Lally*, 241 Ill. App. 3d 692, 695 (1992) (the "event" at issue was the accident and the court properly barred plaintiff from testifying regarding the details of the collision itself.)

¶ 23 Having resolved the evidentiary issues, we address plaintiff's contention that the trial court erred when it granted a directed verdict in favor of defendant. A motion for a directed verdict will not be granted unless all of the evidence so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225 (2010). A directed verdict is improper when there is any evidence, together with reasonable inferences drawn therefrom, demonstrating a substantial factual dispute. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). This court reviews a trial court's granting of a directed verdict *de novo*. *Krywin*, 238 Ill. 2d at 225.

¶ 24 Here, plaintiff contends the decedent's admissions that he operated a vehicle at the intersection on the date of this occurrence should have allowed plaintiff to survive a directed verdict. In support of his position, plaintiff argues the facts in *Rerack v. Lally*, 241 Ill. App. 3d 692 (1992), are analogous to the case at bar. However, in *Rerack*, the defendant admitted to rear-ending the plaintiff in his answer. *Id.* at 696. This fact alone distinguishes *Rerack* from the

instant case. Here, decedent denied acting negligently in his answer, while admitting he operated a vehicle at the time and location of the accident.

¶ 25 We note the decision in *Fabschitz v. King*, 10 Ill. App. 3d 43 (1973), is instructive. In *Fabschitz*, the only evidence concerning the defendant's alleged negligence appeared in defendant's admissions he was driving his vehicle at the time and place of the accident and the testimony of a police officer who investigated the collision. *Id.* at 44. There was no evidence the collision occurred where the vehicles were located when observed by the investigating officer. *Id.* Consequently, the *Fabschitz* court concluded the evidence was insufficient to establish negligence on the part of the defendant and reversed the trial court's denial of defendant's motion for a directed verdict. *Id.*

¶ 26 Like *Fabschitz*, the physical evidence observed by the officer, in this case, did not support an inference that decedent was the only person who could have proximately caused the collision. Given the facts of this case, there are other plausible initial causes for the accident, in spite of decedent's admission. Further, there was no evidence decedent was involved in the collision that did not originate from plaintiff. Based on this record, the cause of the accident cannot be circumstantially inferred from the admission, together with the evidence presented. Therefore, the trial court properly granted defendant's motion for a directed verdict.

¶ 27 CONCLUSION

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

¶ 29 Affirmed.

¶ 30 JUSTICE SCHMIDT, specially concurring.

¶ 31 I concur in the Order, but write separately simply to point out that there is no evidence, which did not originate from the plaintiff, that defendant's decedent was even involved in a

collision with plaintiff, let alone that he caused the accident. Admitting that one was at a given intersection "on or about" a given date and time, is not the same as admitting to being involved in a collision. Even the fact that one had damage on his car that "seemed consistent" with the events recounted by the plaintiff, is not enough to establish that the defendant's decedent was involved in the collision about which plaintiff complains.