2018 IL App (3d) 160398-U

Order filed February 2, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

MICHAEL SIMON,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellant,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3-16-0398
	)	Circuit No. 13-L-252
	)	
DEBRA ADAMS,	)	Honorable
	)	Stephen A. Kouri,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Carter and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by denying plaintiff's motion for a new trial because the jury's award of no money damages was not against the manifest weight of the evidence.

¶ 2 Michael Simon (plaintiff) sought damages for injuries plaintiff allegedly sustained in an automobile accident attributable to defendant's admitted negligence. After the jury returned a verdict awarding plaintiff no money damages, the trial court denied plaintiff's motion for a new trial. Plaintiff appeals. We affirm.

¶ 3 FACTS

¶ 4 The undisputed facts reveal that on February 11, 2007, a collision occurred between plaintiff and defendant. On September 16, 2013, plaintiff filed a complaint alleging defendant's negligence caused the collision. Defendant filed an amended answer admitting negligence and contesting only the amount of damages proximately caused by the 2007 collision.

¶ 5 A two-day jury trial took place on September 30, 2015, and October 1, 2015. Plaintiff's wife, Rose Bayee (Bayee), and plaintiff both testified at the trial. Bayee testified that she married plaintiff in 1999. Bayee testified that before the 2007 collision, plaintiff was a strong, healthy man. Plaintiff supported the couple and took care of chores and maintenance for the house and the car. The couple planned on adopting a child before the accident, but was no longer able to do so. Since the 2007 collision, plaintiff has not been able to do anything around the house. Plaintiff has been on painkillers most of the time. Bayee testified that plaintiff cannot take a shower by himself or dress himself. Plaintiff has difficulty sleeping due to the pain.

¶ 6 On cross-examination, Bayee was asked about a deer-vehicle collision that plaintiff was involved in on October 25, 2009. When Bayee was asked whether the front end of plaintiff's car was smashed in the 2009 accident, she responded "not too much" and stated, "[i]t just one corner." Bayee claimed the car was considered totaled in the 2009 accident because the car, a Mercedes, had expensive parts, not because the damage to the car was extensive. When Bayee was shown defendant's exhibit No. 8, photographs of plaintiff's vehicle from the 2009 accident, she admitted there was more damage to the vehicle than just to the corner of the vehicle. When Bayee was asked whether the whole front end was smashed in the 2009 accident, Bayee stated, "You know, I can't talk about this stuff, because really I'm not [a] professional."

¶ 7 Next, plaintiff testified. Plaintiff stated that he was 58 years old. He owned a restaurant called Chicago Grill in Peoria, Illinois. Plaintiff testified that he had a back injury in 1983 and received six months of treatment for that injury. According to plaintiff, the symptoms of that 1983 injury completely resolved following treatment. Plaintiff testified that he did not have any back treatment from 1983 until after the 2007 collision.

¶ 8 Plaintiff testified he was in excellent health before the 2007 collision and did not have a family doctor. Plaintiff wore his seatbelt at the time of the 2007 collision. Plaintiff described the force of the accident to be "very heavy." Plaintiff testified that the impact caused his body to twist forward and to the left and that his body almost slammed into the windows. Plaintiff testified that "his knee hit the bottom of the dash[board]." Immediately after the accident, plaintiff "felt some very hot, very -- like very cold icy running through [his] spine from the neck all the way down to the – to the lower back." Plaintiff went to church after the accident, but left after he felt his pain increasing.

¶ 9 Plaintiff testified he saw Dr. Ziad Musaitif on February 12, 2007, the day after the collision, and advised the doctor about plaintiff's pain in his head, neck, lower back, and knee. Plaintiff testified that at the time he saw Dr. Musaitif, plaintiff was experiencing pain "[e]verywhere" that was a level 10 on a scale from 1 to 10, with 10 being the worst pain he has ever experienced in his life. Dr. Musaitif prescribed painkillers, muscle relaxers, and anti-inflammatory drugs to plaintiff.

¶ 10 According to plaintiff's testimony, two days later, plaintiff returned to Dr. Musaitif and informed the doctor the painkillers did not cause his extreme pain and extreme headache to subside. Dr. Musaitif referred plaintiff to United Methodist Hospital and Proctor Hospital for a CT scan of his head and x-rays of his lower back and spine, respectively. The testing revealed no

fracture. Consequently, Dr. Musaitif continued plaintiff on the painkillers and muscle relaxers. After several visits, Dr. Musaitif referred plaintiff to see a chiropractor.

¶ 11 After being treated by Dr. Musaitif, plaintiff saw a number of medical professionals including: Dr. Paul Mroz, a chiropractor; Premier Physical Therapy and the Institute of Physical Medicine and Rehabilitation (IPMR) for physical therapy services; Dr. Kevin Henry, a pain management doctor; Dr. Amod Sureka and Dr. Omprakash Sureka, physical medicine doctors; Dr. Dzung Dinh, a neurosurgeon; Dr. Robbye Bell, a pain management doctor; Dr. Richard Kube II, an orthopedic surgeon; Dr. Tracy (first name unknown), a neurosurgeon; and Dr. James Maxey, an orthopedic surgeon. Plaintiff testified that he received steroid injections in his lower back on several occasions to reduce the pain.

¶ 12 Plaintiff testified that since the 2007 collision, plaintiff took prescription pain medication and wore a back brace on a daily basis. Plaintiff started using a cane within a few years of the accident. At the time of the trial, plaintiff claimed his neck pain was an 8 out of 10, his lower back pain was a 7 or 8 out of 10, and his left knee pain was a 5 out of 10.

¶ 13 Plaintiff testified that on October 25, 2009, he struck a deer while driving his car. Plaintiff testified that he did not injure any part of his body during the 2009 accident. However, plaintiff said that the 2009 accident temporarily elevated his pain symptoms. Plaintiff testified that he visited a chiropractor, Dr. Lori Keller-Wight, two times after the 2009 accident.

¶ 14 On cross-examination, plaintiff admitted that he had previously testified in his deposition that the impact of defendant's vehicle in the 2007 collision pushed his car across the lane up to the curb. Plaintiff was shown defendant's exhibit No. 5, which consisted of photographs of plaintiff's and defendant's vehicles after the 2007 collision. Plaintiff admitted that he told a responding police officer at the scene of the 2007 collision that he was okay.

¶ 15 Plaintiff claimed that when he saw Dr. Musaitif the day after the accident, plaintiff complained about the sharp pain in his neck, but Dr. Musaitif "misrecord[ed]" the information. Plaintiff testified that he complained of neck pain during every visit with Dr. Musaitif, but Dr. Musaitif misheard plaintiff or did not understand plaintiff.

¶ 16 Plaintiff admitted that he did not begin chiropractic care with Dr. Mroz until two months after the 2007 collision. Dr. Mroz's chiropractic records show that plaintiff failed to return as instructed. Plaintiff claimed that the chiropractor discharged him from his care.

¶ 17 Plaintiff's next treatment was with Premier Physical Therapy in December 2007. Plaintiff was ordered to attend physical therapy two to three times per week for four to six weeks. The Premier discharge report states, "Patient with inconsistent attendance to therapy. Attempted contact with patient multiple times with no return calls. Patient will be discharged from therapy at this time." Plaintiff testified he completed the required course of therapy with Premier and that to the extent the records said otherwise, the records were wrong.

¶ 18 On October 27, 2009, two days after the October 25, 2009, accident, plaintiff saw Dr. Lori Keller-Wight, a chiropractor. Dr. Keller-Wight wrote the following in her notes: "Acute neck pain, right shoulder pain, numbness, tingling into fingertips of right hand, migraines and headaches following motor vehicle accident on 10/25/09 where patient hit a deer." Dr. Keller-Wight treated plaintiff's cervical, thoracic, and lumbar spine after the 2009 accident. At trial, plaintiff denied that he was injured in the 2009 accident.

¶ 19 On September 29, 2010, which was 11 months after the 2009 accident, plaintiff was referred to IPMR for an evaluation for aquatic therapy. According to the IPMR records, plaintiff did not report the 2009 accident, but reported chronic pain in his lower back and leg, neck pain, arm pain, and a headache stemming from the 2007 collision. The IPMR records indicate that

plaintiff reported the 2007 collision was a "T-bone" car accident. The IPMR records state that the evaluator "question pts effort on strength testing." An IPMR record, dated October 14, 2010, states that plaintiff only appeared for the initial evaluation, but "[n]ever showed up to scheduled appt. & never called back to reschedule." Plaintiff claimed he was not allowed to do aquatic therapy due to bladder control issues. Plaintiff also claimed that the accident description was written by IPMR's staff and was inaccurate. On December 17, 2010, IPMR performed another evaluation of plaintiff for purposes of physical therapy. The IPMR records from that date show that plaintiff complained of neck pain, back pain, and headaches since a motor vehicle accident on February 11, 2007. The record did not say anything about the 2009 accident.

¶ 20 When cross-examined, plaintiff agreed the IPMR record from that date states, "Severe pain reported without supportive etiology." The discharge summary in the IPMR records, on January 11, 2011, stated that plaintiff was referred again to aquatic therapy. There was no record of plaintiff presenting for aquatic therapy. Plaintiff testified that he had "been in treatment since [the] day's [*sic*] accident until" the trial.

¶ 21 Plaintiff offered the evidence deposition of plaintiff's expert witness, Dr. Gabriel Levi, an orthopedic surgeon, as evidence and the transcript of the deposition was read to the jury. In Dr. Levi's deposition, dated September 15, 2015, Dr. Levi testified that he was retained as an expert witness to review and summarize plaintiff's medical records related to this case. In addition, Dr. Levi was asked to determine if there was a causal relationship between plaintiff's symptoms and the 2007 collision.

¶ 22 Based on his review, Dr. Levi testified that an MRI taken of plaintiff's lumbar spine after the 2007 collision showed two small disc protrusions with degenerative changes and mild narrowing. Dr. Levi testified that a disc protrusion can cause pain that radiates down the

extremities and causes weakness in the lower extremities. Dr. Levi testified that plaintiff was seen by Dr. Tracy, a neurosurgeon, who noted that plaintiff had no surgically correctable abnormality.

¶ 23 On April 22, 2014, Dr. Levi examined plaintiff and took x-rays of plaintiff's spine. Dr. Levi diagnosed plaintiff with "cervical spine radiculopathy of the left upper extremity and lumbar spine radiculopathy to the left side with some motor weakness." Dr. Levi explained that radiculopathy is "[p]ain radiating down the extremity." Dr. Levi prescribed plaintiff muscle relaxants, painkillers, and anti-inflammatory drugs, and referred plaintiff to physical therapy.

¶ 24 Based on his knowledge, training, experience, and his review of the materials related to this case, Dr. Levi opined that "[t]he injuries that Mr. Simon sustained to his lumbar spine and cervical spine appeared to be caused by the motor vehicle accident on February 11, 2007." Dr. Levi also opined that the 1983 accident did not cause plaintiff's injuries based on plaintiff's report that the symptoms from that accident resolved long before the 2007 collision occurred.

¶ 25 On cross-examination, Dr. Levi testified that he charged plaintiff $3000 to review plaintiff's records and to draft his report.[1] Dr. Levi agreed that when conducting an independent review of medical records, he should look for inaccurate histories that "raise red flags or concerns with respect to the treatment and what's going on in the case." Dr. Levi also agreed that he had to "trust Mr. Simon's history in order to conclude that this pain and complaints that he's been complaining of since this 2007 collision were caused by that accident." Dr. Levi testified that if he received a history that was not truthful, that may compromise his opinions in this case. Dr. Levi agreed that his opinions in this case are based on a reliance on plaintiff's history.

[1]Dr. Levi's expert report was not attached to Dr. Levi's evidence deposition transcript or otherwise made a part of the record.

¶ 26 Dr. Levi agreed that the medical records show that there is an almost two-year gap in treatment from February of 2008 through January 2010. Dr. Levi also agreed that there is a three-year gap in treatment between the last medical record dated January 2011 and when Dr. Levi first saw plaintiff in April 2014. Dr. Levi agreed that plaintiff "was referred for physical therapy on multiple occasions and never completed a single course of physical therapy."

¶ 27 Dr. Levi testified that plaintiff told Dr. Levi that immediately after the 2007 collision, plaintiff felt a pop followed by immediate neck pain. However, Dr. Levi admitted the medical records showed that plaintiff did not complain of neck pain to Dr. Musaitif on the day after the 2007 collision. Dr. Musaitif's records show no complaints of neck pain and a full range of motion in plaintiff's cervical spine for a month following the accident. Dr. Levi agreed that plaintiff's condition depicted in the 2007 MRI "could have been there for years and years." Dr. Levi agreed that "the MRI doesn't depict pain." Dr. Levi admitted that there is no way of knowing whether plaintiff's condition, as depicted in the 2007 MRI, existed before the 2007 collision, without a pre-accident MRI.

¶ 28 Dr. Levi admitted that plaintiff did not inform Dr. Levi about the 2009 accident or the chiropractic treatment plaintiff received after the 2009 accident. Dr. Levi admitted that his expert opinion that the 2007 collision caused plaintiff's alleged injuries was compromised because plaintiff failed to inform him of the 2009 accident.

¶ 29 Defendant introduced the following trial exhibit Nos. 1 through 9, that included: Dr. Musaitif's records, Dr. Mroz's records, Dr. Keller-Wight's records, Dr. Musaitif's January 22, 2010, record, photographs of plaintiff's and defendant's vehicles from the 2007 collision, therapy records from Dr. Levi's deposition, other therapy records, and photographs of plaintiff's vehicle from the 2009 accident. These exhibits were admitted as evidence.

¶ 30 Plaintiff did not introduce any medical bills into evidence. Plaintiff asked the jury to award him a total of $50,000 as compensation for his pain and suffering and the loss of a normal life due to the 2007 collision. At the conclusion of the trial, on October 1, 2015, the jury returned a verdict awarding plaintiff $0 in damages. On that same date, the trial court entered judgment in favor of defendant, and against plaintiff.

¶ 31 On November 5, 2015, plaintiff filed a motion for a new trial, arguing that the jury verdict awarding plaintiff no money damages was against the manifest weight of the evidence in light of defendant's admission of negligence. On June 30, 2016, the trial court denied plaintiff's motion for a new trial. On July 9, 2016, plaintiff filed a notice of appeal from the final judgment entered on June 30, 2016, denying plaintiff's motion for a new trial.

¶ 32 ANALYSIS

¶ 33 On appeal, plaintiff contends that he is entitled to a new trial because the jury's verdict awarding him no money damages runs contrary to the manifest weight of the evidence. Plaintiff relies on the fact the defense stipulated to negligence and claims the evidence showed no alternate substantial cause for his damages.

¶ 34 In response, defendant claims the trial court properly denied plaintiff's motion for a new trial because the record supports the verdict awarding plaintiff no money damages. Further, defendant argues that plaintiff failed to provide a complete record on appeal.

¶ 35 When reviewing a motion for a new trial, the trial court will weigh the evidence and set aside the jury verdict and order a new trial only if the verdict is contrary to the manifest weight of the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). A jury verdict is against the manifest weight of the evidence where the opposite conclusion is plainly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence. *Id.* It is

the jury's function "to resolve conflicts in the evidence, to pass upon the credibility of the witnesses and to decide what weight should be given to the witnesses' testimony." *Pecaro v. Baer*, 406 Ill. App. 3d 915, 919 (2010). A jury verdict may not be set aside merely because contrary inferences would be equally supported by the evidence or because a judge feels that another result is more reasonable. *Finley v. New York Central R.R. Co.*, 19 Ill. 2d 428, 436 (1960).

¶ 36 The decision of whether to grant a motion for a new trial is within the sound discretion of the trial court, and a reviewing court should not reverse the court's decision unless the appellant affirmatively shows that the court abused its discretion. *Maple*, 151 Ill. 2d at 455. When determining whether the court abused its discretion, a reviewing court must consider whether the verdict was supported by the evidence and whether the losing party was denied a fair trial. *Id*. The case law recognizes that the presiding judge, in ruling upon the motion for a new trial, had "the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility." *Id*. at 456.

¶ 37 First, we address defendant's contention that plaintiff failed to provide a complete record on appeal for our review. Here, plaintiff failed to include the transcript of the June 30, 2016, hearing on plaintiff's motion for a new trial as part of the record submitted for our review.[2] It is well settled that any doubts that may arise from an incomplete record will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). In the absence of a complete record on appeal, "it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Id*.

[2] Plaintiff also initially failed to include defendant's trial exhibit Nos. 1 through 8 as a part of the record on appeal. However, after defendant filed defendant's appellate brief, plaintiff supplemented the record on appeal by providing these exhibits.

¶ 38 Based on our careful review of the record on appeal, that contains a transcript of the trial, it is plainly evident that the jury's verdict was well supported by the record plaintiff submitted to our court and there was no basis to grant plaintiff's request for a new trial. Based on our review of the photographs of the vehicles involved in both the 2007 and 2009 accidents, we conclude that a reasonable jury could find that plaintiff exaggerated the severity of the impact in the 2007 accident and minimized the severity of the impact in the 2009 accident.

¶ 39 In addition, defense counsel's thorough cross-examination and impeachment of plaintiff and Bayee undermined plaintiff's credibility and exposed numerous discrepancies in plaintiff's testimony and statements to various medical providers. For example, plaintiff claims his neck pain was immediate, after the 2007 collision. Yet, the medical records show that plaintiff did not complain of neck pain for at least a month after the accident. The medical records show that plaintiff was prescribed multiple courses of physical therapy and chiropractic treatment to treat the constant pain, but failed to complete the prescribed treatment. The physical therapy records reveal that plaintiff reported "severe pain," but his claims were not corroborated by "supportive etiology." The physical therapist also questioned plaintiff's efforts on strength testing.

¶ 40 In addition, Dr. Levi admitted that plaintiff's condition depicted in the 2007 MRI may have existed long before the 2007 collision, and may be asymptomatic. Further, Dr. Levi admitted that the expert opinions he previously offered in this matter were compromised due to plaintiff's failure to tell him about the 2009 accident and the chiropractic treatment following the 2009 accident.

¶ 41 Based on our careful review of the record submitted on appeal, we conclude the evidence presented to the jury supported a reasonable inference that plaintiff either feigned or greatly

exaggerated his injuries stemming from the 2007 collision. In conclusion, the jury's decision to not award plaintiff any money damages was well supported by the evidence.

¶ 42 CONCLUSION

¶ 43 The judgment of the circuit court of Peoria County is affirmed.

¶ 44 Affirmed.