2013 IL App (4th) 120640-U

NO. 4-12-0640

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 25, 2013
Carla Bender
4th District Appellate
Court, IL

| | | |
|---|---|---|
| KIMBERLY HOSIER, | ) | Appeal from |
| Plaintiff-Appellant, | ) | Circuit Court of |
| v. | ) | Macon County |
| MELVIN DULGAR, | ) | No. 11L68 |
| Defendant-Appellee. | ) | |
| | ) | Honorable |
| | ) | Scott B. Diamond, |
| | ) | Judge Presiding. |

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court held the trial court erred in granting defendants' setoff of $5,000 against plaintiff's jury award.

¶ 2 In May 2011, plaintiff, Kimberly Hosier, filed a two-count complaint against defendant, Melvin Dulgar, for injuries resulting from an August 2010 automobile accident. In November 2011, defendant filed an "Admission of Negligence" and reserved the issues of causation and damages. In May 2012, defendant requested a setoff of $5,000 for medical payments made by plaintiff's insurance company, State Farm Mutual Automobile Insurance Company (State Farm). A jury awarded plaintiff a total of $25,000, of which $9,508 was itemized for medical care expenses. In June 2012, the trial court reduced plaintiff's award by $5,000.

¶ 3 Plaintiff appeals, arguing the trial court erred in granting defendant's setoff.

Plaintiff's multiprong argument asserts (1) State Farm did not hold a right of subrogation against her; (2) because plaintiff's medical payment benefits did not exceed $25,000, section 2-1205.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1205.1 (West 2010)) does not permit reduction of plaintiff's recovery; and (3) because the March 2011 release between State Farm and defendant's insurance company, United Equitable Insurance Company (United), was not properly authenticated, defendant did not carry his burden of proof for the setoff. We reverse.

¶ 4 I. BACKGROUND

¶ 5 In May 2011, plaintiff filed a complaint against defendant alleging willful and wanton driving (count I), and negligent driving (count II), for a motor vehicle accident occurring on August 8, 2010, in Decatur. In June 2011, defendant filed a verified answer.

¶ 6 A. Defendant's "Admission of Negligence"

¶ 7 On November 3, 2011, defendant filed an "Admission of Negligence" which stated he "admit[s] that the defendant was the sole cause of the accident which took place on August 8th, 2010 [*sic*,] on Main Street of Decatur, Illinois. The Defendant further states that the only issue(s) left to be decided by the jury are related to causation and damages."

¶ 8 B. Defendant's "Counterclaim for Setoff"

¶ 9 In May 2012, defendant filed a "Counterclaim for Setoff" asserting he is entitled to a setoff in the amount of $5,000 because plaintiff's insurance company, State Farm, paid $5,000 in medical payments as a result of the accident. Attached to the counterclaim was (1) a November 16, 2010, letter from State Farm to United requesting payment of $15,699.61 for settlement of the claim, and (2) a March 10, 2011, release between State Farm, as subrogee of plaintiff, and defendant and United for the consideration of $11,275.69.

¶ 10 1. *The November 16, 2010, Letter*

¶ 11 The November 16, 2010, letter from State Farm to United states it "is to notify you of our subrogation claim and request your cooperation in settling this matter." It includes a breakdown of the amounts State Farm paid as a result of the claim. It lists (1) $9,875.08 for "Comp/Collision"; (2) $594.53 for "Rental/Loss of Use"; and (3) $5,000 for "Med Pay / PIP." It states plaintiff paid a $500 deductible and State Farm paid $15,469.61 in benefits. The letter states the total claim amount as $15,969.61 and requests 100% of this amount.

¶ 12 2. *The March 10, 2011, Release*

¶ 13 The first paragraph of the "FULL AND FINAL RELEASE OF ALL SUBROGATION INTERESTS" states for the sole consideration of $11,275.69, State Farm

> "as Subrogee of Kimberly Hosier, hereby release(s) and forever discharge(s) Defendant(s) - Releasees, Melvin Dulgar and United Equitable Insurance Company, and any of its/their heirs, executors, administrators, agents, employees, insurers and assigns, and all other predecessor or successor firms or corporation liable or, who might be claimed to be liable, none of whom admit any liability to the undersigned for all actions, causes of action, damages or suits of any kind or nature whatsoever, and particularly on account of the medical expenses and property damage(s) now known, or not yet known arising from an incident or occurrence which occurred on or about the 6th day of August, 2010 and involved a 2009 Chevrolet Malibu vehicle and a 1994 Chevrolet

vehicle, at or near 700 N. Main in Decatur, Illinois."

The release is signed by a State Farm agent and is dated March 10, 2011.

¶ 14 C. The Trial and Jury Verdict

¶ 15 In May 2012, before the jury trial began, plaintiff dismissed count I of her complaint. After a trial, the jury awarded $25,000 to plaintiff against defendant. The verdict was itemized, (1) $9,508 for "the reasonable expense of necessary medical care, treatment and services provided," (2) $11,000 for "the pain and suffering experienced and expected to experience in the future," and (3) $4,492 for "the loss of normal life experienced and expected to experience in the future."

¶ 16 D. Posttrial Motions and Hearings

¶ 17 In June 2012, plaintiff filed a memorandum of law in response to defendant's request for a setoff.

¶ 18 1. *Defendant's Response and Attached Affidavit*

¶ 19 A week later, defendant filed a response to plaintiff's response. Defendant's filing included an affidavit from Greg Oltman. The affidavit stated (1) Oltman is an attorney who performs subrogation work for State Farm, (2) he was assigned to plaintiff's claim, (3) "That the amount sought under State Farm's right of subrogation from the Defendant, Melvin Dulgar, for medical payments made on behalf of the Plaintiff amounted to $5,000.00," (4) "That on or about March 18, 2011, [he] settled the property damage and medical payments subrogation against Defendant through his insurance company, American Heartland Insurance, thus extinguishing their right to subrogation against the Defendant," (5) "That as a result of this settlement with American Heartland, State Farm was fully satisfied regarding their subrogation rights," (6) "That

the release signed by the representative for State Farm *** was a complete release of their right to recovery from the Defendant for both property damage and medical payments made on behalf of the Plaintiff," and (7) "As a result of this settlement State Farm has no lien against either the Plaintiff of Defendant." The affidavit does not clarify whether American Heartland is connected with United or a successor firm.

¶ 20 2. *Trial Court Awards $5,000 Setoff*

¶ 21 In June 2012, the trial court held a hearing on defendant's setoff claim. Defendant argued, "State Farm made $5,000 in medical payments on [plaintiff's] behalf. The defendant's insurance company *** negotiated with State Farm for that $5,000, paid them off." Defendant asserted the March 10, 2011, release "waiv[ed] the $5,000 subrogation" claim. Defendant stated "there is no $5,000 lien, if you want to call it, for the plaintiff to pay that $5,000 back to State Farm." Defendant asserted section 2-1205 of the Code (735 ILCS 5/2-1205 (West 2010)) "is the applicable law that needs to be applied to this, not the subsequent section [2-1205.1] ***. I don't believe we ever get to [section 2-]1205.1."

¶ 22 Plaintiff argued section 2-1205 of the Code applies to medical malpractice cases and section 2-1205.1 is the applicable section. Plaintiff asserted defendant had not carried its burden under section 2-1205.1 because the award did not exceed $25,000 and the release was not authenticated.

¶ 23 The trial court awarded a $5,000 setoff "based on the law of subrogation."

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 Plaintiff appeals, arguing the trial court erred in granting defendant's setoff.

Plaintiff makes the same multiprong argument she made before the trial court: (1) State Farm did not hold a right of subrogation against her; (2) because plaintiff's medical payment benefits did not exceed $25,000, section 2-1205.1 of the Code (735 ILCS 5/2-1205.1 (West 2010)) does not permit reduction of plaintiff's recovery; and (3) because the March 2011 release between State Farm and defendant's insurance company, United, was not properly authenticated, defendant did not carry his burden of proof for the setoff.

¶ 27 To untangle the parties' dispute, which comes down to whether a statutory modification to the collateral source rule applies, it is necessary to review common-law subrogation rights and the collateral source rule. To prevent confusion, we use the terms "right of subrogation" to describe the rights State Farm may or may not have against defendant or defendant's insurance company, and "right of recoupment" to describe the rights State Farm may or may not have against plaintiff. Upon reaching section 2-1205.1 of the Code and its statutory modification to the collateral source rule, we hold the section does not apply to the facts of this case. We need not decide whether State Farm held a right of recoupment against plaintiff, which concerns an exception to section 2-1205.1, or whether defendant carried his burden of proof.

¶ 28 A. Standard of Review

¶ 29 Where the parties request us to determine the correctness of the trial court's application of law to undisputed facts, our review is *de novo*. *Wills v. Foster*, 229 Ill. 2d 393, 399, 892 N.E.2d 1018, 1022 (2008).

¶ 30 B. Plaintiff's Claim State Farm Did Not Hold a Subrogation Right

¶ 31 Plaintiff argues "if under Illinois common law, State Farm had no subrogation right to its medical pay benefits paid to its own insured [plaintiff], then the subrogation release

cannot be read to include the $5,000 medical pay benefits of State Farm." Defendant responds "State Farm made payment to [plaintiff] through her medical payments provision in the amount of $5,000.00. As such State Farm is subrogated to the rights of [plaintiff] for those medical payments. [Defendant's] insurance company *** settled directly with State Farm for the medical payments and property damage in the amount of $11,275.69, of which $5,000.00 was for medical payments." Defendant adds "State Farm was only entitled to subrogate $5,000.00 against [plaintiff] if they chose to so."

¶ 32 The parties' arguments about State Farm's rights against plaintiff are largely directed at section 2-1205.1(2), which is an exception to the statutory reduction permitted by section 2-1205.1. In short, the parties' arguments are about an exception to an exception to the collateral source rule, and the exception to the exception depends on State Farm's rights against plaintiff.

¶ 33 1. *Common-Law Subrogation*

¶ 34 Subrogation "allows one who had involuntarily paid a debt or claim of another to succeed to the rights of the other with respect to the claim or debt so paid." *Equistar Chemicals, LP v. Hartford Steam Boiler Inspection & Insurance Co. of Connecticut*, 379 Ill. App. 3d 771, 780, 883 N.E.2d 740, 748 (2008). "A party 'who asserts a right of subrogation must step into the shoes of, or be substituted for, the one whose claim or debt [it] has paid and can only enforce those rights the latter could enforce.' " *Id.* (quoting *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill. 2d 314, 319, 597 N.E.2d 622, 624 (1992)). "In cases dealing with insurance, an insurer's right to subrogation allows it to be put in the position of the insured to pursue recovery from third parties responsible to the insured for the loss that the insurer both insured and paid." *Id.* "It is

well settled that an insurer may not subrogate against its own insured or any person or entity who has the status of a co-insured under the insurance policy." *Dix*, 149 Ill. 2d at 323, 597 N.E.2d at 626. See also *Chubb Insurance Co. v. DeChambre*, 349 Ill. App. 3d 56, 62, 808 N.E.2d 37, 42 (2004) ("The anti-subrogation rule is intended to prevent an insurer from recovering from its insured that loss or damage the risk of which the insured had passed along to the insurer under the policy.").

¶ 35 2. *Applying the Law of Subrogation to This Case*

¶ 36 As best we can understand, plaintiff does not assert, as is more typical of these types of claims, that (1) she destroyed State Farm's right of subrogation against the tortfeasor (see *Tarzian v. West Bend Mutual Fire Insurance Co.*, 74 Ill. App. 2d 314, 324-35, 221 N.E.2d 293, 298 (1966) ("As a general rule, if an insured settles with one primarily responsible for the loss and releases him fully from all liability, such release destroys the insurer's right to subrogation and is a complete defense to an action on the policy.")), or (2) State Farm could not release uncompensated damages—the November 2010 letter indicated State Farm paid $5,000 in medical benefits and plaintiff asserted she suffered $9,508.42 in medical expenses (see *Blatz v. City of Rock Falls*, 105 Ill. App. 3d 732, 734, 434 N.E.2d 807, 808 (1982) ("[T]he insured-subrogor, to the extent he has not been compensated for damages by his insurer, may bring an action to recover the damages sustained.")). Rather, plaintiff asserts State Farm had no right of subrogation against her and the March 2011 release did not release a right to recoup, from her, medical payments that State Farm paid.

¶ 37 Plaintiff's argument appears to be out of logical sequence because we must first decide whether section 2-1205.1 is even applicable before we need to decide whether an

exception—which concerns State Farm's right of recoupment—applies. Plaintiff is correct, State Farm as a matter of common law, would not have a right of subrogation against her because she is the insured party. State Farm, as insurer-subrogee, had a right of subrogation against defendant based upon plaintiff's insurance claim.

¶ 38 Because State Farm clearly did not have a right of subrogation, the real question is whether it has a right of recoupment against plaintiff. Accepting, for now, the March 2010 release and the Oltman affidavit, it is unclear how these affect State Farm's legal rights with plaintiff or how the release would create a right of recoupment against plaintiff. Defendant's cited case, his only cited case, *Wilson v. Hoffman Group, Inc.*, 131 Ill. 2d 308, 323, 546 N.E.2d 524, 531-32 (1989), is inapplicable to this case because *Wilson* concerned an employer's release of its workers' compensation lien. There is no suggestion the release created a lien upon plaintiff's insurance benefits.

¶ 39 C. Plaintiff's Claim Section 2-1205.1 Does Not Permit Reduction

¶ 40 Plaintiff asserts, as she did before the trial court, the relevant section is section 2-1205.1 of the Code, and this section does not permit a setoff for collateral source benefits because the amount of medical benefits paid was less than $25,000. Defendant, without citation, argues "[t]he collateral source rule does not apply in this case because [defendant's] company made payments on his behalf under his contract (insurance policy) to State Farm." In his brief, defendant does not argue which is the applicable section, and his written "Counterclaim for Setoff" did not contain a citation to the applicable statute. At the June 2012 hearing, defendant asserted section 2-1205 of the Code "is the applicable law that needs to be applied" and "I don't believe we ever get to [section 2-]1205.1."

¶ 41 We agree there is some "conceptual confusion" about the applicable law, and with defendant this confusion "stem[s] from the collateral source rule and its application to this case." Some of the confusion may exist because State Farm was never made a party, and State Farm, exercising its right of subrogation, settled with United *before* plaintiff filed this action. We begin by reviewing the collateral source rule and the statutory modifications.

¶ 42 1. *Common-Law Collateral Source Rule*

¶ 43 " ' "Under the collateral source rule, benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor." ' " *Wills*, 229 Ill. 2d at 399, 892 N.E.2d at 1022 (quoting *Arthur v. Catour*, 216 Ill. 2d 72, 78, 833 N.E.2d 847, 851 (2005), quoting *Wilson*, 131 Ill. 2d at 320, 546 N.E.2d at 530). As a substantive rule of damages, the collateral source rule " ' "bars a defendant from reducing the plaintiff's compensatory award by the amount the plaintiff received from the collateral source." ' " *Wills*, 229 Ill. 2d at 400, 892 N.E.2d at 1023 (quoting *Arthur*, 216 Ill. 2d at 80, 833 N.E.2d at 852, quoting J. Fischer, Understanding Remedies § 12(a), at 77 (1999)). "A situation in which the collateral source rule is frequently applied is one in which the injured plaintiff has been partly or wholly indemnified for the loss by proceeds from his accident insurance. In such a situation, the damages recovered by the plaintiff from the tortfeasor are not decreased by the amounts received from insurance proceeds." *Wilson*, 131 Ill. 2d at 320, 546 N.E.2d at 530. "Under the collateral source rule, a plaintiff may recover the full measure of damages, without setoff or credit, although she is also compensated from an independent source such as insurance." *Van Holt v. National R. R. Passenger Corp.*, 283 Ill. App. 3d 62, 77-78, 669 N.E.2d 1288, 1299 (1996). "The legislature has modified the collateral

source rule in sections 2-1205 and 2-1205.1 of the Code of Civil Procedure." *Wills*, 229 Ill. 2d at 400, 892 N.E.2d at 1023. Under both sections, the burden is on the defendant to prove that a plaintiff's insurer does not have the right of recoupment against the benefits it has paid. *York v. El-Ganzouri*, 353 Ill. App. 3d 1, 22, 817 N.E.2d 1179, 1197 (2004).

¶ 44 2. *Collateral Source Rule Applies*

¶ 45 The collateral source rule applies because plaintiff received outside benefits from State Farm, her automobile insurer. As a matter of common law, plaintiff may receive the full damages award—without regard to benefits paid by State Farm—unless a statutory modification, section 2-1205 or section 2-1205.1, applies.

¶ 46 3. *Section 2-1205 of the Code*

¶ 47 Section 2-1205 of the Code provides for a deduction "from any judgment in an action to recover for that injury based on an allegation of negligence or other wrongful act, not including intentional torts, *on the part of a licensed hospital or physician*[.]" (Emphasis added.) 735 ILCS 5/2-1205 (West 2010). See also *Bernier v. Burris*, 113 Ill. 2d 219, 242, 497 N.E.2d 763, 774 (1986) ("The statute is limited to negligence actions against hospitals and physicians.").

¶ 48 4. *Section 2-1205.1 of the Code*

¶ 49 Section 2-1205.1 of the Code provides:

> "In all cases on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, *to which Section 2-1205 does not apply*, *the amount in excess of $25,000 of the benefits provided for medical charges*, *hospital charges, or nursing or caretaking charges*,

which have been paid, or which have become payable by the date of judgment to the injured person by any other insurance company or fund in relation to a particular injury, shall be deducted from any judgment. Provided, however, that:

(1) Application is made within 30 days to reduce the judgment;

(2) *Such reduction shall not apply to the extent that there is a right of recoupment through subrogation, trust agreement, contract, lien, operation of law or otherwise*;

(3) The reduction shall not reduce the judgment by more than 50% of the total amount of the judgment entered on the verdict; and

(4) The damages awarded shall be increased by the amount of any insurance premiums or the direct costs paid by the plaintiff for such benefits in the 2 years prior to plaintiff's injury or death or to be paid by the plaintiff in the future for such benefits."

(Emphases added.) 735 ILCS 5/2-1205.1 (West 2010).

(The text of the preceding section 2-1205.1 is quoted without changes made by Public Act 89-7 (eff. Mar. 9, 1995). The supreme court held Public Act 89-7 unconstitutional in its entirety in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 467, 689 N.E.2d 1057, 1104 (1997). As a result, the statute reverted to its preamendment form. *Jain v. Johnson*, 398 Ill. App. 3d 135, 144, 922 N.E.2d 1188, 1195-96 (2010).)

¶ 50 5. *Reduction of Award Not Permitted by Section 2-1205.1*

¶ 51 Before addressing whether State Farm has a right of recoupment against plaintiff, it is necessary to determine whether section 2-1205.1 applies, *i.e.*, we need to decide whether the exception applies before we decide if the exception to the exception applies. According to its plain language, section 2-1205.1 applies where (1) section 2-1205 does not apply, and (2) the "benefits provided for medical charges, hospital charges, or nursing or caretaking charges" exceed $25,000. Because plaintiff's action does not concern the negligence of a licensed hospital or physician, section 2-1205 does not apply and we move to the $25,000 threshold.

¶ 52 The evidence at trial showed plaintiff's medical expenses totaled $9,508. The jury awarded $9,508 for "[t]he reasonable expense of necessary medical care, treatment and services received." Defendant contends he is entitled to a $5,000 setoff because his insurer paid plaintiff's insurer for "Med Pay" benefits. We note defendant's insurer paid plaintiff's insurer $11,275.69 in settlement and not the full $15,969.61 requested by State Farm. This reflects approximately 70.6% of the requested payment. Defendant's claim he is entitled to a setoff of 100% of the value of the medical payments where his insurer only paid 70.6% is suspect. Regardless, defendant, by his own admission, asserts plaintiff received $5,000 in benefits for medical charges, hospital charges, or nursing or caretaking charges, not an amount in excess of $25,000 as required by section 2-1205.1.

¶ 53 Because section 2-1205.1 is not applicable to the facts of the case, the common-law collateral source rule applies, and plaintiff is permitted to recover the full measure of damages, without setoff, although she was also compensated by her automobile insurance.

¶ 54 D. Plaintiff's Claim Defendant Has Not Met His Burden

¶ 55 As we have determined section 2-1205.1 is not applicable, we need not decide whether (1) State Farm had "a right of recoupment through subrogation, trust agreement, contract, lien, operation of law or otherwise" (735 ILCS 5/2-1205.1(2) (West 2010)) against plaintiff, or (2) defendant met his burden in proving State Farm had such a right.

¶ 56 We note if we were required to address plaintiff's argument defendant did not properly authenticate the release as required for admission as evidence, we would be without a transcript or a bystander's report of the trial (Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)) or a copy of plaintiff's State Farm insurance policy. The record from the June 12, 2012, and June 22, 2012, hearings indicates the release was not formally requested to be admitted or admitted into evidence at these hearings, and the record does not show whether defendant made such a request at trial. Further, the record does not contain a copy of plaintiff's insurance policy, and plaintiff, in her appendix on appeal, provides a single page of an insurance policy—which she purports to be her policy. We question how defendant can show the rights between State Farm and plaintiff without the governing insurance policy entered into evidence.

¶ 57 E. The Parties' Briefs

¶ 58 In closing, we address two rules governing appellate briefs. Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) provides a party's brief must contain his or her contentions and the reasons therefor, with citations of the authorities relied on. "Mere contentions, without argument or citation of authority, do not merit consideration on appeal." *Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 521-22 (2001); *Cundiff v. Patel*, 2012 IL App (4th) 120031, ¶ 22, 982 N.E.2d 175. Appellate briefs are required to contain case law citation to the Illinois Official Reports, or for cases filed after July 1, 2011, to the public-

domain citation that has been assigned, and Illinois statutes must be cited to the Illinois Compiled Statutes. Ill. S. Ct. R. 6 (eff. July 1, 2011). Plaintiff's brief and reply brief, totaling 16 pages of argument, contain four proper citations to cases or statutes. In her reply brief, plaintiff quotes seven lines of a case but does not include a citation, and she cites one proposition with "*Landersos*" but does not provide a full name or any reporter citation for this case anywhere in her reply brief. Defendant's brief, totaling eight pages of argument, contains three proper citations to cases. Two of these citations are for the point "[s]ubrogation rights originated in equity but now arise by both statute and contract." Despite the fact the parties' briefs bordered on violating these rules by failing to support their contentions with citation or provide proper citations, we were able to review the record and ascertain the parties' contentions and determine the controlling law. It bears repeating: " '[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.' " *In re Marriage of Baumgartner*, 237 Ill. 2d 468, 474-75, 930 N.E.2d 1024, 1027 (2010) (quoting *Pecora v. Szabo*, 109 Ill. App. 3d 824, 825-26, 441 N.E.2d 360, 361 (1982)).

¶ 59 III. CONCLUSION

¶ 60 We reverse the trial court's judgment.

¶ 61 Reversed.