

NOTICE
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NO. 5-09-0206
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

JOSEPH PINKSTON,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Saline County.
)	
v.)	No. 06-L-45
)	
LARRY GIBBONS,)	Honorable
)	Ronald R. Eckiss,
Defendant-Appellee.)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Goldenhersh and Donovan concurred in the judgment.

RULE 23 ORDER

Held: The evidence before the jury supported its verdict in favor of the defendant.

The plaintiff, Joseph Pinkston, brought suit against the defendant, Larry Gibbons, following an automobile accident that the plaintiff claimed caused him injury. The case ultimately proceeded to a trial, and a jury found in favor of the defendant. The plaintiff now appeals, and for the following reasons, we affirm.

BACKGROUND

In August 2006, in the circuit court of Saline County, the plaintiff filed a complaint alleging negligence against the defendant. In February 2009, the cause proceeded to a jury trial, where the following evidence was adduced.

The defendant testified that on the evening of Friday, April 29, 2005, he and the plaintiff were returning to Illinois from Texas in the defendant's 1989 Oldsmobile sedan. The defendant was driving, and the plaintiff was in the front-passenger seat wearing his seatbelt. At approximately 8:40 p.m., as they were traveling through West Memphis,

Arkansas, on a divided four-lane highway with a speed limit of 40 miles per hour, the defendant missed the exit that he needed to take. The defendant testified that it was dark and "pouring down rain," he was in the left-hand lane, and he had never been through West Memphis before. After missing the exit, the defendant slowed to a speed of approximately five miles per hour. Intending to take another exit so that he could turn around, the defendant activated his turn signal and started "to ease into the right-hand lane." The defendant testified that although he had "looked into [his] rearview mirror and [had seen] nothing coming," as he merged over, "a car [came] out of nowhere, and bumped [his car] on [the] right[-]front bumper or on the [passenger's] side." The defendant then brought his vehicle to "a complete stop" before pulling it over onto a nearby median. The defendant subsequently spoke with the driver of the other car involved in the collision, and the other driver indicated that "he was perfectly fine." The police responded to the scene, and an officer issued the defendant a ticket for improper lane usage. The defendant testified that rather than challenge the charge, he pled guilty to it and paid a fine.

The defendant testified that he had not lost control of his vehicle when it was bumped and that the collision "was somewhat in the nature of a sideswiping accident." The defendant indicated that when he later inspected his car, he had not observed "any damage at all." He further indicated that although the other vehicle involved in the accident had "spun around *** two or three times before [it] landed in a ditch," it did not appear to be damaged as a result of the contact either. The defendant acknowledged that the plaintiff had "complained about his back" at the scene.

The plaintiff testified that he was 48 years old and had been to West Memphis before while "working on the river." He testified that while traveling through West Memphis with the defendant on the night of April 29, 2005, after stating, "I think we're lost," the defendant started to merge from the left-hand lane of the highway into the right-hand lane. When the

defendant's car "got over in the lane a little bit," another vehicle "came up on [it] and clipped [it] in the [passenger-side] front end." The plaintiff indicated that although the other car did not strike the defendant's car very hard, the impact was "enough *** to jar [him] *** pretty good." The plaintiff further indicated that his body had been somewhat "jerked" and "twisted" by his seatbelt. The plaintiff testified that immediately after the accident, he was "in a little bit of shock" and "really [didn't] feel [what was] going on in [his] body." When he exited the defendant's car several minutes later, however, he felt severe pain in his lower back. At that point, the plaintiff told the defendant that they needed to call an ambulance. When an ambulance arrived, the paramedics asked the plaintiff if he wanted them to take him to a hospital, but he declined their offer. The plaintiff testified that West Memphis was "not a good place" to be on a Friday night, and he did not "want to go to a hospital there if [he could] make it home *** to see [his] family doctor." The plaintiff indicated that he was in pain the rest of the drive home, and he "pretty well stayed in bed the rest of the weekend."

The plaintiff testified that on the Monday morning following the accident, he had seen his family physician, Dr. Elliott Partridge, and had told him what had happened in West Memphis. Having had two prior back surgeries, the plaintiff sought relief from his pain. He stated, "But the last thing in the world I wanted was another surgery." Dr. Partridge gave the plaintiff prescriptions for muscle relaxants and pain medication and recommended that the plaintiff consult a chiropractor. The plaintiff was subsequently treated by a chiropractor twice a week for six weeks, but his condition worsened. The plaintiff indicated that his back pain originated in his right buttock and radiated down his right leg and into his right foot and toes. He further indicated that his pain was a symptom of sciatica. After trying the chiropractics for six weeks, the plaintiff went back to Dr. Partridge, and Dr. Partridge ordered an MRI and referred him to Dr. Jose Arias.

After meeting with Dr. Arias, the plaintiff's "worst fear came true," and he realized

and decided that he needed a surgery to address a herniated disc in his lower back. In August 2005, Dr. Arias performed the surgery, and the plaintiff was hospitalized for two days. The plaintiff testified that his initial recovery was "horrible" and that his first weeks home from the hospital were very difficult. The plaintiff explained that he lived alone and was "not supposed to pick up anything over [5] pounds for at least 30 days after the surgery." The plaintiff indicated that the surgery had temporarily eased the pain in his right leg and buttock but that the numbness that he felt in his toes never subsided. He further indicated that for several months following the surgery, Dr. Arias and Dr. Partridge had both been prescribing him pain medications.

The plaintiff testified that approximately a year after the surgery, the pain in his right leg and buttock returned. He testified, "I could feel [myself] going back downhill big time." The plaintiff indicated that he had done nothing to aggravate his condition and that neither he nor his doctors could understand why he was not getting better. In the summer of 2006, Dr. Partridge, who had primarily been prescribing pain medicine and anti-inflammatory medicines," recommended that instead of another surgery, the plaintiff should try pain management. The plaintiff subsequently received two series of epidural injections at a pain clinic in Marion, but the injections provided little to no relief. After another MRI, the plaintiff went back to Dr. Arias, and in October 2008, he returned for another surgery. The plaintiff indicated that the second surgery Dr. Arias had performed was the same as the first and had yielded the same result, *i.e.*, "no relief whatsoever."

The plaintiff testified that he is in constant pain and walks "on eggshells" out of fear that he will further injure his back. The plaintiff stated that his pain medications "do okay for a little while," but he is only pain-free when he sleeps. He stated, "And that's maybe three [to four] hours a night." At the time of the trial, the plaintiff was scheduled for another MRI. The plaintiff acknowledged that prior to the accident in West Memphis, he had had two other

back surgeries, and he stated that he was never completely pain-free. He explained, however, that the excruciating pain in his right buttock and the numbness that he felt in his right toes were new symptoms that had not existed before the accident. He further explained that although he had rated his preaccident pain level as a 10 out of 10, it was "more like" a 5 out of 10 that "jumped up" to maybe a 15 after the accident. The plaintiff testified that although he was only in his forties, his postaccident pain made him feel like a 60-year-old man with limited physical abilities. The plaintiff explained that the pain had also worsened his depression and led him to isolate himself in his home. The plaintiff indicated that he had lost his friends and that watching television, going to Wal-Mart, and taking care of his small dog were the main activities in his life. Before the accident, the plaintiff liked to ride his four-wheeler and hike in the woods, but he indicated that he was now too fearful to do so. The plaintiff testified that he was not blaming anyone for his plight but that he wished he had never gone to Texas with the defendant.

When cross-examined, the plaintiff acknowledged that the two back surgeries he had before the accident were for a previous injury incurred while he was working as a deckhand on a barge in Shawneetown. He further acknowledged that before the accident, Dr. Partridge had been treating him for the same discomfort and pain that the preaccident surgeries had attempted to alleviate.

Via video evidence deposition, Dr. Partridge testified that he specialized in family practice and emergency medicine and that the plaintiff had been a patient of his since January 2003. Dr. Partridge testified that before the accident in West Memphis, the plaintiff had undergone two back surgeries on the L5-S1 section of his spine but that because neither procedure had been "terribly successful," the plaintiff had chronic low-back syndrome. Dr. Partridge further stated that before the accident, the plaintiff had also been suffering from anxiety and depression and had been diagnosed as having a bipolar disorder. In November

2003, following the plaintiff's second preaccident surgery, the plaintiff reported that his back pain was "essentially unchanged," and in December 2003, he reported that after "changing the sheets on his bed," his pain had gone "into the right buttock and into the right leg" and was worse than the pain he felt from his original injury. In February 2004, the plaintiff again reported increased pain after somehow aggravating his back, and his anxiety and depression continued. Thereafter, the plaintiff's conditions remained unchanged, and in April 2004, he advised Dr. Partridge that he was at his "wit's end." Dr. Partridge testified that the plaintiff seemed "to be getting worse every day." In May 2004, Dr. Partridge increased the plaintiff's prescribed pain medication to address the plaintiff's ongoing complaints of pain in his lower back, right buttock, and right leg. In June 2004, the plaintiff reported that he could not "deal with [the pain] any more," and in September 2004, he indicated that the pain level was 10 out of 10. In November 2004, the plaintiff reported that he had spent three weeks in an inpatient treatment center for his bipolar condition, and at the plaintiff's request, Dr. Partridge increased his pain medication again. In January 2005, the plaintiff reported that his pain and depression were both worse, and he decided to undergo further back surgery. In February and March 2005, the plaintiff reported that his condition remained the same. In April 2005, before the accident, the plaintiff's pain medications were again increased after he again complained of increased pain.

Dr. Partridge testified that prior to the accident, there were indications that the plaintiff "was suffering from degenerative conditions in his spine, particularly in the [L5-S1] area." The degenerative conditions made the plaintiff more susceptible to back injuries, and Dr. Partridge deemed the plaintiff's preaccident back pain a permanent disability.

On the Monday following the accident, the plaintiff saw Dr. Partridge for continued pain, but the plaintiff did not refer to an auto accident. When the plaintiff saw Dr. Partridge three weeks later, the plaintiff first told him about the accident, and a straight-leg raise

indicated that the plaintiff's chronic low-back syndrome had gotten worse. Because the surgeon who had previously operated on the plaintiff's back was no longer in the area, Dr. Partridge referred the plaintiff to Dr. Arias, who ultimately performed two postaccident surgeries on the L5-S1 area of the plaintiff's spine.

Dr. Partridge testified that in October 2005, he had seen the plaintiff after his first postaccident surgery and that the plaintiff was "quite upset" because he "still hurt." The plaintiff stated that he was "going crazy," and Dr. Partridge prescribed him psychotropic medications. From 2006 to 2008, Dr. Partridge continued to treat the plaintiff's pain with "high doses of medication," and for a while, the plaintiff went to a pain clinic, where he received epidural treatments. The plaintiff's condition never improved, however, and in October 2008, Dr. Arias operated on him for the second time. When Dr. Partridge saw the plaintiff after the second postaccident surgery, the plaintiff advised him that the surgery "was no good for his back" and that his pain was as bad as it was before, if not worse.

Dr. Partridge opined that because the plaintiff had reported increased pain since the West Memphis accident, within a reasonable degree of medical certainty, the accident had exacerbated the plaintiff's chronic low-back syndrome. Noting, "It's very rare to do a fifth operation," Dr. Partridge testified that the plaintiff "will need continued pain medication unless Dr. Arias can do something to make him well."

Via video evidence deposition, Dr. Arias testified that he was a neurosurgeon and had performed surgery on the L5-S1 section of the plaintiff's spine in August 2005 and October 2008. Dr. Arias testified that he had first seen the plaintiff in October 2003, on a referral by Dr. Partridge, and at that time, the plaintiff had reported that he had injured his back pulling a wire at work. The plaintiff had further reported that as a result of the injury, he had undergone a microdiscectomy for an L5-S1 disc herniation in March 2003. Dr. Arias testified that the plaintiff had advised that the surgery had not improved his back pain and

that he was considering undergoing a second procedure. Because a postsurgical MRI "showed a broad-based disc bulge at L5-S1 on the right side but no significant compression on the nerves," Dr. Arias recommended further investigation, and additional testing procedures were ordered and performed. In June 2004, when the results of the additional procedures failed to reveal a source of major compression, Dr. Arias recommended that the plaintiff forgo a second surgery "unless the pain became excruciating." Dr. Arias testified that the plaintiff ultimately opted for the second surgery, and he did not see the plaintiff again until July 2005.

Dr. Arias testified that in July 2005, the plaintiff had reported that following the second surgery, he had been "doing well" until the accident in West Memphis. The plaintiff reported that following the accident, he had developed a severe and persistent pain that radiated down his right leg and into his right foot. An MRI "showed the presence of a sizable disc herniation at L5-S1 on the right, markedly compressing the thecal sac of the S1 nerve root," which explained the plaintiff's symptoms. In August 2005, Dr. Arias performed a surgery to repair the condition. According to Dr. Arias, in September 2005 the plaintiff "reported marked improvement of his pre-operative pain" and "said that he was extremely pleased with the results." Dr. Arias recalled that the plaintiff had reported that he occasionally felt a "mild ache in the right thigh on an intermittent basis" but that the pain "did not require any analgesics." Dr. Arias recommended that the plaintiff gradually increase his physical activities over several weeks until he could function normally and return to work.

In October 2005, the plaintiff went to see Dr. Arias and reported having "stiffness in the back and difficulty bending backwards or forwards." The plaintiff also reported feeling occasional pain that was different than before but much less intense. Dr. Arias testified that he had prescribed the plaintiff a "combination of a painkiller, muscle relaxant, and anti-inflammatory" and ordered an X ray and another MRI. In February 2006, after advising the

plaintiff that the latest MRI revealed no evidence of a disc herniation recurrence, Dr. Arias recommended that the plaintiff's symptoms be treated with physical therapy. Thereafter, he did not see the plaintiff again until August 2008, following Dr. Partridge's second referral.

Dr. Arias testified that when he saw the plaintiff in August 2008, the plaintiff had complained of severe and recurring pain radiating from his right buttock to his right foot. The plaintiff indicated that the problem had started a year earlier "without any new injury or participating event" and had gotten progressively worse since then. An MRI revealed a new disc herniation in the L5-S1 area of the plaintiff's spine, and in October 2008, Dr. Arias performed another surgery to correct the condition. In November 2008, the plaintiff reported that the intensity of his preoperative pain had significantly improved, and Dr. Arias testified that given the plaintiff's back history, a significant decrease in pain was a "relatively good result." Dr. Arias testified that he could not predict whether the plaintiff might need further back surgery in the future, but he stated that another herniation in the L5-S1 area would require a fusion procedure.

Dr. Arias testified that given the plaintiff's preaccident surgeries, in April 2005 the plaintiff's back was more susceptible to injury because his spine was weaker than normal. Dr. Arias opined that within a reasonable degree of medical certainty, the plaintiff's disc herniation recurrence identified in July 2005 was related to the motor vehicle accident and contributed to the plaintiff's need for the surgeries that were performed in August 2005 and October 2008. Dr. Arias explained that because the accident was the only precipitating event that the plaintiff had described to him, he had to assume that there was a relationship between the accident and the recurrence.

When cross-examined, Dr. Arias acknowledged that the plaintiff's claim that, following his second preaccident surgery, he had been doing well until the accident was inconsistent with the back pain that the plaintiff had reported to Dr. Partridge following the

second preaccident surgery. Dr. Arias acknowledged that the symptoms the plaintiff had reported to Dr. Partridge following the second preaccident surgery were possibly consistent with those associated with a herniated disc in the L5-S1 area. Dr. Arias further acknowledged that the disc herniation recurrence that he had identified in July 2005 could have been a consequence of any number of normal daily activities, and he indicated that given the condition of the plaintiff's spine following his two preaccident surgeries, the recurrence could have possibly occurred spontaneously. Dr. Arias stated that he could not determine when the recurrence occurred by looking at the plaintiff's MRI. Dr. Arias further stated that while a moderate impact collision could cause or contribute to a disc herniation recurrence, when describing the accident in West Memphis, the plaintiff had advised that he had been a passenger in a car that had been "T-boned on the passenger side" by another vehicle.

At the close of all the evidence, the defendant moved for a directed verdict on the issue of proximate cause, and the plaintiff moved for a directed verdict on the issues of negligence and proximate cause. Noting that, in light of the evidence presented, both issues were factual ones for the jury to decide, the trial court denied both motions, and the cause proceeded to an instruction conference.

In his closing argument to the jury, the plaintiff maintained that the defendant's plea of guilty to the ticket that he had been issued for improper lane usage was proof that the defendant had been negligent. With respect to proximate cause, in addition to referencing his own testimony, the plaintiff argued that nothing refuted the medical opinions that the accident had either caused or exacerbated his disc herniation recurrence. The plaintiff then argued damages.

In response, noting that Dr. Partridge and Dr. Arias both had to rely on what the plaintiff had told them, the defendant argued that the plaintiff's "whole case" turned on the

plaintiff's credibility and that the plaintiff was simply not credible. The defendant emphasized that for more than a year before the accident, the plaintiff had been seeing Dr. Partridge for chronic back pain and had reported, *inter alia*, that he had once aggravated his back by merely changing the sheets on his bed. The defendant argued that the plaintiff's complaints of pain prior to the accident were inconsistent with what the plaintiff had told Dr. Arias and that the plaintiff had never attempted to explain the discrepancy. The defendant also noted that months before the accident the plaintiff had advised Dr. Partridge of his intent to have further back surgery. The defendant suggested that the only reason why the plaintiff would have told Dr. Arias that his back was doing fine before the accident was to peg his disc herniation recurrence to the event. The defendant argued that given the condition of the plaintiff's back, any number of routine activities could have caused the plaintiff's disc herniation recurrence and that, all things considered, it was "more probably true than not true that the disc herniated before the accident." With respect to the issue of negligence, the defendant argued that just because he had paid the ticket that he had been given after the accident did not necessarily mean that he had been negligent under the circumstances.

In rebuttal, the plaintiff emphasized that even though "his back was in bad shape before the accident," the accident could have nevertheless made it worse. The plaintiff also reiterated his argument that nothing refuted the medical opinions that the accident had either caused or exacerbated his disc herniation recurrence.

The jury ultimately returned a general verdict finding for the defendant and against the plaintiff. In March 2009, after a judgment on the verdict had been entered, the plaintiff filed a motion for a judgment notwithstanding the verdict (*n.o.v.*) and a motion for a new trial. The motion for a judgment *n.o.v.* alleged that the jury's verdict was against the manifest weight of the evidence and further alleged that the trial court had erred in denying his motion for a directed verdict on the issues of negligence and proximate cause. The motion for a new

trial likewise alleged that the trial court had erred in denying his motion for a directed verdict on the issues of negligence and proximate cause. Following the trial court's denial of both posttrial motions, the plaintiff brought the present appeal.

ANALYSIS

Arguing that the jury's finding in favor of the defendant was against the manifest weight of the evidence, the plaintiff asserts that the trial court erred in denying his motion for a directed verdict on the issues of negligence and proximate cause. He thus contends that the trial court erred in denying his motion for a new trial and his motion for a judgment *n.o.v.* Because the evidence before the jury supported its verdict in favor of the defendant, however, we affirm the trial court's judgment.

"A directed verdict or a judgment *n.o.v.* is properly entered in those limited cases where 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). "We apply the *de novo* standard of review to the trial court's denial of a motion for directed verdict as well as its denial of a motion for judgment *n.o.v.*" *Moss v. Amira*, 356 Ill. App. 3d 701, 705 (2005). A motion for a new trial is properly granted where the verdict is contrary to the manifest weight of the evidence (*McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999)), and "[a] verdict is against the manifest weight of the evidence where the opposite result is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based on the evidence" (*Jackson v. Seib*, 372 Ill. App. 3d 1061, 1069 (2007)). "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 clearly abused its discretion." *Maple*, 151 Ill. 2d at 455.

The plaintiff's contentions on appeal can be combined into two arguments, one of

which is that the trial court erred in denying his requests for a directed verdict, a judgment *n.o.v.*, and a new trial on the issue of proximate cause. See *Jackson*, 372 Ill. App. 3d at 1068. Referencing his own testimony and the expert opinions of Dr. Partridge and Dr. Arias, the plaintiff maintains that because the defendant did not directly refute his evidence, the issue of proximate cause should have never gone to the jury. The plaintiff insists, "Here, since the facts are undisputed, the issue of proximate cause is one of law." As the defendant notes, however, his cross-examination of Dr. Partridge and Dr. Arias raised questions regarding the plaintiff's credibility and whether the plaintiff's claimed injuries were truly the result of the automobile accident in West Memphis. The issue of proximate cause was therefore a question of fact for the jury to decide (*Diehl v. Polo Cooperative Ass'n*, 328 Ill. App. 3d 576, 582 (2002)), the plaintiff's credibility was particularly significant under the circumstances (*Jackson*, 372 Ill. App. 3d at 1069), and we cannot conclude that the jury's finding in favor of the defendant was erroneous.

In addition to the plaintiff's testimony suggesting that the accident had caused his claimed injuries, Dr. Partridge opined that the accident had exacerbated the plaintiff's chronic low-back syndrome, and Dr. Arias opined that the plaintiff's disc herniation recurrence was related to the accident. Both of those opinions were based on what the plaintiff had reported, however, and the jury could have concluded that the plaintiff's reports were unreliable and tailored to make it appear as if the accident had caused or contributed to the recurrence. Most notably, the plaintiff told Dr. Arias that following his second preaccident surgery, he had been "doing well" until the accident, but Dr. Partridge had been treating the defendant for severe back pain, anxiety, and depression for well more than a year prior thereto. Additionally, during that time, the plaintiff had twice reported that he had aggravated his back, and Dr. Partridge testified that the plaintiff seemed "to be getting worse every day." The plaintiff also reported that he had spent three weeks in an inpatient treatment center on

account of his mental health issues, and months before the accident, after repeatedly reporting increased pain, he told Dr. Partridge that he intended to undergo further back surgery. At the trial, however, the plaintiff testified that only after meeting with Dr. Arias after the accident did he decide to have surgery. We also note that the plaintiff testified that on the Monday following the accident, he had told Dr. Partridge what had happened, but Dr. Partridge testified that the plaintiff had not referenced the accident during that visit and did not mention it until three weeks later.

Dr. Arias acknowledged that the disc herniation recurrence that he had identified after the accident could have been a consequence of any number of "normal daily activities," and he indicated that given the condition of the plaintiff's spine following his two preaccident surgeries, the recurrence could have possibly occurred spontaneously. The jury could have also concluded that the plaintiff had exaggerated the seriousness of the accident by advising Dr. Arias that the car he had been in had been "T-boned" by another vehicle. In any event, the facts in this case are not undisputed, "what weight to be given all of the evidence was a decision for the trier of fact" (*Maple*, 151 Ill. 2d at 460), and having carefully reviewed the record, we cannot conclude that the jury's verdict was unreasonable, arbitrary, or not based on the evidence presented for its consideration. Accordingly, we affirm the trial court's judgment denying the plaintiff's requests for a directed verdict, a judgment *n.o.v.*, and a new trial on the issue of proximate cause. Given our disposition, we need not address the plaintiff's claims that the trial court erred in denying his requests for a directed verdict, a judgment *n.o.v.*, and a new trial on the issue of negligence. See *Hajian v. Holy Family Hospital*, 273 Ill. App. 3d 932, 936-37 (1995); *Cox v. Stutts*, 130 Ill. App. 3d 1018, 1020 (1985). We do note, however, that we agree with the defendant that the arguments the plaintiff raises for the first time on appeal in support of those claims have been forfeited. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996).

CONCLUSION

Because the evidence before the jury supported its verdict in favor of the defendant, the trial court's judgment is hereby affirmed.

Affirmed.