2013 IL App (5th) 120366-U

NO. 5-12-0366

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CRAIG VIRGIN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 06-L-78
	)	
HANK'S EXCAVATING &	)	
LANDSCAPING, INC.,	)	Honorable
	)	Lloyd A. Cueto,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Chapman and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in refusing to sanction the defendant for producing only facsimile copies of a time sheet and an invoice during pretrial discovery when the plaintiff never requested to inspect the originals prior to the trial or otherwise indicate that the furnished copies were inadequate; the circuit court did not abuse its discretion in denying the plaintiff's request for a new trial based on defense counsel's comments during closing arguments.

¶ 2 The plaintiff, Craig Virgin, filed a complaint alleging that he sustained injuries after a slip-and-fall accident on ice in a parking lot. The plaintiff alleged that the defendant, Hank's Excavating & Landscaping, Inc., was responsible for clearing the ice and snow from the parking lot but failed to do so. A jury returned a verdict in favor of the defendant, and the plaintiff appeals the circuit court's judgment entered upon the jury's verdict. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 In February 2004, the plaintiff's company, Front Runner, leased office space at a

building that was a former bank building located in Lebanon, Illinois. The leased premises included a parking lot. The plaintiff's landlord, Regions Bank, had a contract with the defendant in which the defendant agreed to be responsible for snow and ice removal at the leased premises.

¶ 5 In the evening on February 4, 2004, and early in the morning on February 5, 2004, the city of Lebanon, Illinois, received approximately one or two inches of snow fall. Weather records admitted into evidence at the trial indicate that at some point on February 5, 2004, the snow stopped and light freezing rain or light freezing drizzle began to fall. The day's temperature range was in the low 30s.

¶ 6 The plaintiff arrived at his office building at approximately 8 a.m. that morning. The plaintiff testified that when he arrived, he noticed that the parking lot appeared to have been plowed, but the parking lot, the front and rear doorways, and the sidewalks of the building had not been treated with calcium chloride pellets or any other type of deicer material. At the trial, the defendant presented evidence that one of its employees, Joseph Renneker, applied calcium chloride pellets and flakes to the building's parking lot between 8:15 a.m. and 8:45 a.m. The plaintiff, however, testified that he did not notice anyone shoveling or applying calcium chloride pellets at the premises or working on the parking lot at any time during the day.

¶ 7 Angie Vassen testified for the plaintiff. In February 2004, Vassen was working with the plaintiff in organizing a law day race. Vassen testified that she arrived at the plaintiff's office sometime between 10:30 a.m. and 12:30 p.m. on February 5, 2004. She testified that the conditions in the parking lot were slushy and icy and that there was no calcium chloride on the parking lot or sidewalks. When she went inside, she asked the plaintiff if he noticed that there was no salt or chemical on the parking lot ice. Later, she noticed freezing rain falling outside sometime during the afternoon.

¶ 8 The plaintiff left the premises for lunch around 11 a.m. or 11:30 a.m. He testified that he again saw that no calcium chloride had been put on the parking lot at that time. Vassen testified that she left the plaintiff's office around 2:30 p.m. During the time she was inside the building, the condition of the parking lot ice had not changed. She did not see anyone applying calcium chloride and never saw any of the defendant's employees working on the parking lot. Around 4:30 p.m., the plaintiff left the building to run an errand, and he testified that he again saw no calcium chloride on the parking lot when he left.

¶ 9 At approximately 5:30 p.m., the plaintiff arrived back at his office building. He parked his truck in the parking lot close to the rear entrance of the building. He exited his truck carrying a small box containing a toner cartridge. He took two steps, slipped, and fell on a patch of ice in the parking lot near the rear entrance to his office. He felt a pop in his knee and extreme pain.

¶ 10 The plaintiff crawled and hopped his way inside the office, called his father, Vernon, and told him that he fell and needed to be taken to the hospital. The plaintiff's parents lived near his office, and they picked him up and drove him to the emergency room. The next day they took him to a St. Louis hospital where his surgeon, Dr. Lehman, could examine his right knee and leg. Dr. Lehman determined that the plaintiff had suffered injuries to his right leg as a result of the slip and fall, including a complete tear of the quadriceps tendon and an anterior cruciate ligament (ACL) tear. On February 11, 2004, Dr. Lehman performed surgery on the plaintiff's right lower extremity. After the surgery, the plaintiff had a cast from his hip to his ankle. After the cast came off, he underwent a course of physical therapy.

¶ 11 At the trial, the plaintiff presented the testimony of Rodney Wolter, an expert in the area of snow and ice removal and the use of calcium chloride. Wolter testified that it is more advantageous to put calcium chloride down before bad weather begins. At the request of the plaintiff, Wolter reviewed various documents, photographs, weather data, and excerpts from

deposition transcripts. Wolter opined that when the plaintiff's accident occurred, no ice melt had been used where he slipped and fell. He also testified that the day's temperature range was very favorable for calcium chloride to work as an ice melt. He testified that, based on the day's temperature range and the amount of moisture that had fallen, if calcium chloride had been applied to the surface where the plaintiff slipped, the ice would have dissolved.

¶ 12 Wolter testified that one of the documents he reviewed in forming his opinion was an invoice from the defendant dated February 5, 2004, for 100 pounds of calcium chloride pellets spread on the parking lot between 8:15 and 8:45. He testified that if the calcium chloride pellets had been put down as stated in the invoice, they would have been sufficient to take care of icy conditions throughout the day. He did not believe that the amount of rain or additional moisture in the afternoon would have affected the pellets' ability to melt ice and snow. He also opined that the light rain/light drizzle would not have washed the calcium chloride away because the pellets form a brine that gets into the pores of the asphalt surface. According to Wolter, it would have taken "quite a rainfall" to wash the brine away.

¶ 13 The defendant presented the testimony of Joseph Renneker. Renneker testified that he was working for the defendant in February 2004. Renneker identified a time sheet he filled out on February 5, 2004. The time sheet showed that he began working at the office building on that day at 8:15 a.m. and worked until 8:45 a.m. The time sheet also indicated that he spread calcium chloride on the parking lot, both by hand and with a spreader that was on the back of a truck. He spread two 50-pound bags of calcium chloride pellets using the truck spreader and one-half of a 50-pound bag of calcium chloride flakes by hand.

¶ 14 Renneker could not remember specifically what he did on February 5, 2004, other than what was reflected on the time sheet. However, he testified that he normally threw calcium chloride on the sidewalks in addition to the parking lot. He had to hand spread the calcium chloride in areas where the truck could not reach, including the area where the plaintiff

slipped and fell.

¶ 15 At the conclusion of the evidence, the jury returned a verdict in favor of the defendant and against the plaintiff, and the circuit court entered a judgment on the jury's verdict. The plaintiff timely appealed the circuit court's judgment.

¶ 16 DISCUSSION

¶ 17 I.

¶ 18 Request for Discovery Sanctions

¶ 19 The first issue the plaintiff raises on appeal concerns the circuit court's admission into evidence of the time sheet that Renneker filled out on February 5, 2004, which documented that he spread calcium chloride on the parking lot on the day of the accident. In addition, the plaintiff challenges the circuit court's admission of an invoice that the defendant sent to Regions Bank's property manager, CB Richard Ellis, for those services. The plaintiff argues that the circuit court should not have admitted these documents into evidence because they were not properly disclosed by the defendant during discovery. The plaintiff's argument is not convincing.

¶ 20 The plaintiff admits that during discovery, more than five years before the trial, the defendant produced a copy of a facsimile copy of both the time sheet and the invoice in response to one of his discovery requests. The record establishes that he received copies of the "faxed" copies of the documents, but never sought to obtain or inspect the original documents prior to trial. In addition, nothing in the record suggests that the plaintiff objected to the copies of the "faxed" copies produced during discovery as being insufficient for his preparation for trial. Prior to the trial, on May 2, 2012, the plaintiff filed a notice pursuant to Illinois Supreme Court Rule 237(b) (eff. July 1, 2005) requesting the defendant to produce the originals of the time sheet and invoice at the trial. The defendant produced the originals of the documents pursuant to the plaintiff's request.

¶ 21 A circuit court has wide discretionary powers in matters of pretrial discovery and has discretion to impose sanctions for discovery violations. *Redelmann v. K.A. Steel Chemicals, Inc.*, 377 Ill. App. 3d 971, 976 (2007). We will not reverse a circuit court's decision with respect to sanctions for discovery violations unless the court abuses its discretion. *Id*.

¶ 22 In the present case, the plaintiff has not established any pretrial discovery violation much less an abuse of the circuit court's discretion. The defendant furnished exact copies of the documents requested, except that the produced documents were facsimile copies. The plaintiff does not argue that the documents furnished were incomplete, altered, or different from the originals as far as the relevant content is concerned. The plaintiff does not suggest that the "faxed" copies he received were different from the authentic originals. The plaintiff could have requested an opportunity to inspect the originals prior to trial, but he never made that request.

¶ 23 In *Micklos v. Highsmith*, 149 Ill. App. 3d 779, 786 (1986), the plaintiff argued that the defendant should be sanctioned for refusing to produce original photographs instead of producing copies in response to a discovery request. The court held that "[t]he record contains no evidence of [the defendant]'s refusal to comply with a discovery request, and the plaintiff did not file a motion with the trial court to compel compliance with any of her discovery requests." *Id*. The court, therefore, concluded that there was no justification for imposing discovery sanctions. *Id*.

¶ 24 Likewise, in *Cohn v. Northern Trust Co.*, 250 Ill. App. 3d 222, 227 (1993), the plaintiff argued that the defendant's failure to produce the original of an incident report limited the scope of her examination of witnesses. The court, however, noted that the record did not reflect any specific demand for the original report until a midtrial subpoena. *Id*. In addition, the plaintiff possessed a redacted copy of the report two years and four months prior to the trial, and the production of the original never became an issue until the trial actually

started. *Id*. In rejecting the plaintiff's argument that the circuit court should have sanctioned the defendant for failing to produce the original report, the court noted that "the record fails to disclose any efforts on the plaintiff's part to compel production of the original document." *Id*. at 228. "If the document in its original form was so vital to the plaintiff's case, logic would have it that some effort would have been made to compel its production prior to trial." *Id*.

¶ 25 Likewise, in the present case, as noted above, there is nothing in the record that suggests that the plaintiff requested the original time sheet and invoice prior to the trial even though he had copies of the documents more than five years prior to the trial. At the trial, the defendant complied with the plaintiff's request to produce the originals of the documents pursuant to a Rule 237(b) notice to produce, and the plaintiff does not contend that the facsimile copies of the documents he received during discovery are substantively different from the originals the defendant produced at the trial. Under such circumstances, there was no basis for the circuit court to sanction the defendant for a discovery violation because no discovery violation occurred.

¶ 26 II.

¶ 27 Request for a New Trial Due to Improper Closing Arguments

¶ 28 Next, the plaintiff argues that the circuit court erred in denying his posttrial motion that requested a new trial due to improper comments made by defense counsel during closing arguments. Specifically, the plaintiff argues that his posttrial motion should have been granted because the defendant's counsel violated the circuit court's *in limine* order that prohibited the defendant from introducing evidence or arguing to the jury that "Regions Bank and/or CB Richard Ellis was a party to this lawsuit and/or that Plaintiff reached any type of settlement agreement with Regions Bank and/or CB Richard Ellis."

¶ 29 "An alleged violation of an *in limine* order will warrant a new trial where the order

is specific, the violation is clear, and the violation deprived [a party] of a fair trial." *Garden View, LLC v. Fletcher*, 394 Ill. App. 3d 577, 589 (2009). The determination of whether improper argument should be the basis for a new trial is left to the sound discretion of the trial court. *Zuder v. Gibson*, 288 Ill. App. 3d 329, 338 (1997). We defer to the trial court's discretion in determining whether to grant a new trial because it is in a superior position to consider the error that occurred, the fairness of the trial to all parties, and whether substantial justice was accomplished. *Smith v. City of Evanston*, 260 Ill. App. 3d 925, 932-33 (1994).

¶ 30 In the present case, the plaintiff's initial lawsuit alleged causes of action against not only the defendant, but also Regions Bank, which owned the leased premises, and CB Richard Ellis, which is the management company that was responsible for managing the leased property on behalf of Regions Bank. Prior to the trial, the plaintiff settled his claims against Regions Bank and CB Richard Ellis. The plaintiff then filed a motion *in limine* that requested, in part, that the court enter an order precluding the defendant from making any reference in *voir dire*, opening statement, closing argument, or otherwise eliciting any testimony "that Regions Bank or CB Richard Ellis was a party to this lawsuit and/or that Plaintiff reached any type of settlement agreement with Regions Bank and/or CB Richard Ellis." The circuit court granted this portion of the plaintiff's motion *in limine*.

¶ 31 During the defendant's closing argument, the following took place:

> "Now, they waited until two days before the statute of limitations ran. ***
>
> [I]n February they sued us, they sued the bank, they sued the management company.
>
> [Plaintiff's counsel]: Objection, Your Honor, that was–
>
> [Defendant's counsel]: It was brought up by you, sir.
>
> [Plaintiff's counsel]: –that was covered in motions *in limine*.
>
> [Defendant's counsel]: He brought it out–
>
> [The Court]: Okay. Well, let's stick to the evidence in this case."

¶ 32 The defendant's counsel then completed his closing argument without any further objections. The plaintiff argues that this violation of the *in limine* order resulted in an unfair trial. However, a violation of an *in limine* order does not automatically result in a new trial if the plaintiff did not suffer any prejudice. *Willaby v. Bendersky*, 383 Ill. App. 3d 853, 862 (2008). Instead, a comment in violation of an *in limine* order must cause substantial prejudice to justify a new trial. *Id*. Considering the record as a whole, we do not believe that the circuit court abused its discretion in declining the plaintiff's request for a new trial based on this brief comment during closing argument because the plaintiff has not established substantial prejudice as a result of the comment.

¶ 33 When the defendant's attorney made the comment in violation of the *in limine* order, the plaintiff's attorney objected, and the circuit court instructed the defendant's attorney to "stick to the evidence in this case." Later, the court instructed the jury to disregard any statement during closing arguments that is not supported by the evidence and not to consider any other possible sources of recovery. Generally, a circuit court's prompt action in sustaining an objection cures any prejudice resulting from an improper comment. *Manus v. Trans States Airlines, Inc.*, 359 Ill. App. 3d 665, 670 (2005). In addition, the error is often cured even "if the trial court does not rule on the objection, but rather merely instructs the jurors that they should rely on their own memories of the evidence." *Lecroy v. Miller*, 272 Ill. App. 3d 925, 933 (1995).

¶ 34 In the present case, nothing in the record compels us to second-guess the circuit court's discretion in evaluating the prejudicial effect of defense counsel's comment. The trial court had "the opportunity to consider the conduct of the trial as a whole[ ] and therefore is in a superior position to consider the effects of errors which occurred, the fairness of the trial to all parties, and whether substantial justice was accomplished." *Magnani v. Trogi*, 70 Ill. App. 2d 216, 220 (1966).

¶ 35 On appeal, the plaintiff attempts to bolster the prejudicial effect of defense counsel's comment in violation of the *in limine* order by raising "additional misconduct" that was not objected to during the trial. The plaintiff argues that the cumulative effect of these additional improper comments impacted the fairness of the trial. Specifically, the plaintiff argues that, in his closing argument, defense counsel insinuated unethical conduct on the part of the plaintiff's attorney and directly stated that the plaintiff's counsel was unethical.

¶ 36 Because the plaintiff failed to object to the comments, we must analyze them under the plain error analysis set forth by the supreme court in *Belfield v. Coop*, 8 Ill. 2d 293, 313 (1956). In general, a failure to object results in waiver of claimed prejudice as a result of improper arguments. *Diaz v. Kelley*, 275 Ill. App. 3d 1058, 1072 (1995). In *Belfield*, however, the court articulated a plain-error exception to the general rule, but that exception is only "applied in cases involving 'blatant mischaracterizations of fact, character assassination, or base appeals to emotion and prejudice.' [Citation.]" *Simmons v. University of Chicago Hospitals & Clinics*, 162 Ill. 2d 1, 12 (1994). The error must be prejudicial and involve flagrant misconduct or behavior so inflammatory that the jury verdict is a product of biased passion, rather than an impartial consideration of the evidence. *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 375-76 (1990). In *Belfield*, the court stated, "If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon." *Belfield*, 8 Ill. 2d at 313.

¶ 37 In the present case, we see no reason to relax the waiver principle with respect to the defendant's closing argument. Considering the record as a whole, we cannot say that the jury's verdict was a product of biased passion, rather than an impartial consideration of the

evidence. *Gillespie*, 135 Ill. 2d at 375-76. In addition, the defendant's closing argument did not substantially impair the integrity of the judicial process itself. *Id*. at 377.

¶ 38 The unobjected-to comments during closing arguments that the plaintiff has identified as improper are related to the credibility of the plaintiff's expert, Wolter. During Wolter's testimony, the defendant's attorney cross-examined Wolter about whether he had ever "worked with" the plaintiff's attorney on any other cases, and Wolter responded "no." When defense counsel asked Wolter if the plaintiff's attorney had ever "represented" him, he initially responded, "not yet." After further cross-examination, Wolter testified that the plaintiff's attorney had filed a lawsuit on his behalf and was representing him in that lawsuit. During the cross-examination, the jury also heard evidence that Wolter never disclosed this lawsuit during his deposition, but that Wolter claimed that he was never specifically asked about the lawsuit. During further cross-examination, the following took place:

"Q. You never once said that he was representing you, did you?

A. No.

Q. And then when I asked you today if he had ever represented you, you said no again, right?

A. Yes.

Q. Why are you lying to this jury, sir? He has represented you since he filed suit on your behalf in March of '09. This jury deserves the truth and you have lied to them, haven't you?

You have lied to them, haven't you, sir?

A. Okay. If that's the case, yes."

¶ 39 During redirect examination of Wolter by the plaintiff's attorney, the circuit court paused the trial proceedings at the request of a juror to allow the jury time for a bathroom break. When redirect examination resumed after the break, Wolter explained to the jury that

when defense counsel asked him whether the plaintiff's attorney had represented him, he interpreted the term "represented" to mean in a court proceeding. He told the jury that, based on his understanding of the term "represented," he did not lie to them because the plaintiff's attorney had not yet represented him in court.

¶ 40 During closing argument, the defendant's attorney argued that Wolter's testimony was not credible because he did not disclose his attorney-client relationship with the plaintiff's attorney. In addition, the defendant's attorney argued, without objection, that Wolter and the plaintiff's attorney conspired to fabricate testimony during the break that occurred during Wolter's redirect examination. Defense counsel argued that Wolter's testimony on redirect examination was fabricated by Wolter and the plaintiff's attorney when they improperly spoke with each other during the recess outside the presence of the jury.

¶ 41 We need not decide whether defense counsel's comments were improper because, even if so, the unobjected-to comments do not justify a new trial under the stringent *Belfield* standards.

¶ 42 To invoke plain error, it is not enough for an attorney to make an improper comment during arguments; rather, we must determine whether the argument undermined the judicial process itself. *Oldenstedt v. Marshall Erdman & Associates, Inc.*, 381 Ill. App. 3d 1, 11 (2008). On the record before us, the improper argument does not rise to plain error. *Holder v. Caselton*, 275 Ill. App. 3d 950, 959 (1995) ("longtime hometown" doctor theme in opening, examination of witnesses, and closing argument did not meet stringent standard of plain error to warrant reversal); *Bruske v. Arnold*, 44 Ill. 2d 132, 138 (1969) (statements made in closing argument were improper, but did not rise to the level of prejudice contemplated in *Belfield*).

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, we affirm the judgment of the circuit court entered upon

the jury's verdict.

¶ 45 Affirmed.