2013 IL App (2d) 120525-U
No. 2-12-0525
Order filed April 30, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GILBERTO GALVAN and TANIA GALVAN,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiffs-Appellants,	)	
v.	)	No. 07-L-56
ALLIED INSURANCE COMPANY,	)	
Defendant	)	
(Brumettia Wilson and James Wilson, Defendants-Appellees).	)	Honorable Edward J. Prochaska, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly: denied plaintiff Tania's motion for substitution of judge; vacated an order substituting a judge; granted defendant James's motion for summary judgment as to count II; denied plaintiff Gilberto's motion for leave to amend the complaint; barred evidence of property damage at trial; quashed two trial subpoenas; denied plaintiff Gilberto's motion for a new trial on the issue of damages; and denied in part plaintiff Gilberto's motion to assess costs to Brumettia. Therefore, we affirmed.

¶ 2 Plaintiffs, Gilberto and Tania Galvan, filed a complaint against defendants, Brumettia and James Wilson, after a motor vehicle accident in Rockford. The accident occurred on April 23, 2006, when Brumettia turned and collided with Gilberto, as he drove through an intersection. The jury returned a verdict in plaintiffs' favor. Plaintiffs raise several issues on appeal. In particular, plaintiffs argue that the trial court (Judge Ronald Pirrello) erred by denying Tania's motion for substitution of judge as a matter of right after she was added as a party. In addition, plaintiffs argue that the trial court (Judge Edward Prochaska) erred by: (1) vacating an order entered by Judge Eugene Doherty granting Tania's motion for substitution of Judge Doherty as a matter of right; (2) granting James' motion for summary judgment as to count II of the amended complaint; (3) denying Gilberto's motion for leave to amend the complaint to include a request for punitive damages; (4) precluding Gilberto from introducing evidence of repair bills, estimates, and a towing bill and testimony to this effect at trial; (5) granting the motions of Doctors Javaid Iqbal and John Lind to quash trial subpoenas that had been served on them; (6) denying Gilberto's motion for a new trial on the issue of damages; and (7) denying, in part, Gilberto's motion to assess costs to defendants. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 8, 2007, Gilberto filed a two-count complaint against defendants. Gilberto alleged in count I that Brumettia negligently failed to yield the right of way to him as he drove through an intersection and proximately caused the accident. In count II, Gilberto alleged that Brumettia was an underinsured motorist. On May 16, 2007, Gilberto filed a first amended complaint. In count I, Gilberto again alleged that Brumettia was negligent and proximately caused the car accident. Gilberto brought count II against James, alleging that Brumettia was acting as his

agent at the time of the accident. In count III, Gilberto designated various insurance companies as respondents in discovery.

¶ 5 Nearly three years later, on January 19, 2010, Gilberto filed a "First Amendment to First Amended Complaint" (second amended complaint) adding Tania as a plaintiff. Judge Ronald Pirrello was assigned to the case. The order granting leave to add Tania as a plaintiff and to file the second amended complaint is dated two days after the filing of the second amended complaint, January 21, 2010. In count IV, Tania alleged loss of consortium against Brumettia, and in count V, Tania alleged loss of consortium against James.

¶ 6 On January 25, 2010, Tania moved for substitution of Judge Pirrello as a matter of right under section 2-1001(a)(2) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1001(a)(2) (West 2010)). According to the docket or "ROA Listing," on January 26, 2010, defendants moved to dismiss Tania's loss of consortium claims (counts IV and V) of the second amended complaint. (The motion to dismiss is not a part of the record on appeal). On February 18, 2010, Judge Pirrello entered orders granting defendants' motion to dismiss counts IV and V and denying Tania's motion for substitution of judge. On February 23, 2010, Tania filed a joint motion to vacate and reconsider Judge Pirrello's February 18, 2010, orders denying her motion for substitution of judge and dismissing counts IV and V of the second amended complaint. Tania's joint motion was never noticed-up for a hearing, however.

¶ 7 On June 7, 2010, James moved for summary judgment as to count II of Gilberto's complaint. In his motion, James argued that at the time of the accident, Brumettia was not doing any errand, job, or anything of benefit for James and thus was not acting as his agent. Attaching his own affidavit

and Brumettia's affidavit to this effect, James argued that there was no genuine issue of material fact as to count II.

¶ 8 In their brief, defendants explain that Judge Pirrello retired on July 1, 2010. Judge Eugene Doherty then took over the case. Even though both of Tania's loss of consortium counts had previously been dismissed, on July 8, 2010, she moved for substitution of Judge Doherty as a matter of right, and this motion was granted on that date. Judge Prochaska was the next judge assigned to the case. On July 9, 2010, Gilberto moved for substitution of Judge Prochaska as a matter of right. That day, Judge Prochaska entered an order indicating that Judge Doherty's order entered on July 8 granting Tania's motion for substitution was vacated and/or a nullity because Tania was not presently a party in the case. Judge Prochaska's July 9, 2010, order further stated that the case was continued for a status hearing on August 4, 2010, in front of Judge Doherty, who remained assigned to the case.

¶ 9 On September 20, 2010, Gilberto moved for substitution of Judge Doherty, and this motion was granted on September 22, 2010. Once again, the case was reassigned to Judge Prochaska. On September 27, 2010, Tania moved for substitution of Judge Prochaska. This motion was denied on October 13, 2010, based on Tania not being a party to the litigation.

¶ 10 On April 7, 2011, Judge Prochaska granted James' motion for summary judgment as to count II (the agency count). Gilberto's motion to vacate and reconsider this order was denied on April 28, 2011.

¶ 11 On October 31, 2011, Gilberto filed a motion for leave to amend his complaint to include a prayer for punitive damages against Brumettia. Judge Prochaska denied Gilberto's motion for leave to amend his complaint on November 4, 2011. In that same order dated November 4, 2011, Judge

Prochaska ruled that the jury was to hear no evidence as to the cost of repair to either vehicle involved in the accident.

¶ 12 In a letter dated November 8, 2011, Judge Prochaska indicated that he had decided an issue taken under advisement during the pre-trial conference. The letter indicated that the court was barring any property damage witnesses, including body shop witnesses, because there was no property damage claim in the case.

¶ 13 Prior to trial, Gilberto issued trial subpoenas to two physicians who had treated him after the accident, Doctors Javaid Iqbal and John Lind. Doctors Iqbal and Lind moved to quash the subpoenas, and the trial court granted their motions to quash the subpoenas on November 14, 2011, prior to the commencement of the jury trial that day.

¶ 14 Following the trial, the jury returned a verdict in favor of Gilberto and against Brumettia, awarding Gilberto $8,127.48 in damages, plus court costs. On December 12, 2011, Gilberto filed a posttrial motion requesting a new trial on the issue of damages. Gilberto also filed a motion to assess costs to Brumettia. Judge Prochaska denied Gilberto's motion for a new trial on the issue of damages on April 17, 2012. On May 2, 2012, the court granted in part Gilberto's motion to assess costs against Brumettia in the amount of $610.50. Plaintiffs timely appealed.

¶ 15 II. ANALYSIS

¶ 16 A. Substitution of Judge

¶ 17 Plaintiffs' first argument on appeal is that the trial court erred by denying Tania's motion for substitution of judge as a matter of right and by dismissing counts IV and V of the second amended complaint.

¶ 18 Section 2-1001(a)(2) of the Code provides that when a party "timely exercises" his or her right to a substitution without cause, "each party shall be entitled to one substitution of judge without cause as a matter of right." 735 ILCS 5/2-1001(a)(2) (West 2010). "An application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case." *Id*.

¶ 19 A motion for substitution of judge must be brought at the earliest practical moment to prohibit a party from seeking a substitution only after he or she is able to discern the judge's position. *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (2004). Courts disfavor allowing a party to shop for a new judge after determining the original judge's disposition toward the case; therefore, a motion for substitution of judge may be untimely if it is made after pretrial conferences at which substantive issues were discussed but not decided. *Id*. Still, the statute is to be liberally construed; where the conditions are met, the trial court has no discretion to deny the request unless it is shown that the motion was made simply to delay or avoid trial. *Aussieker v. City of Bloomington*, 355 Ill. App. 3d 498, 500 (2005). Any order entered after a motion for substitution of judge was improperly denied is void. *Id*. at 500-01. We review *de novo* the denial of a motion for substitution of judge as of right. *In re Estate of Gay*, 353 Ill. App. 3d at 343.

¶ 20 We begin by reviewing the procedural history of Tania's involvement in the case. Nearly three years after Gilberto filed his initial complaint against Brumettia, Gilberto filed a second amended complaint adding Tania as a plaintiff on January 19, 2010. The second amended complaint added two counts of loss of consortium against Brumettia (count IV) and James (count V). Judge Pirrello's order granting leave to add Tania as a plaintiff and to file the second amended complaint

instanter was not filed until two days later, January 21, 2010. According to defendants, a hearing was held on January 21, 2010, at which they objected to the addition of Tania as a plaintiff and counts IV and V of the second amended complaint. However, the transcript of that hearing is not included in the record on appeal.

¶ 21 On January 25, 2010, Tania moved for substitution of Judge Pirrello as a matter of right. The next day, January 26, 2010, defendants moved to dismiss Tania's loss of consortium claims. This motion is not included in the record on appeal. On February 18, 2010, Judge Pirrello entered two separate orders; one, denying Tania's motion for substitution of judge as a matter of right and two, granting defendants' motion to dismiss. Again, the transcript of the February 18, 2010, hearing is not part of the record on appeal.

¶ 22 Tania argues that at the time she filed her motion for substitution of judge under section 2-1001(a)(2), Judge Pirrello had not ruled on a substantive issue in the case that directly related to the merits of her loss of consortium claims. Based on this argument, Tania concludes that the February 18, 2010, order dismissing her two counts is void. Defendants respond that Tania should not have been allowed to move for a substitution of judge as a matter of right, especially if the court made substantive rulings on the case in the three years prior to her addition as a plaintiff.

¶ 23 It appears that Tania, as an added plaintiff, was entitled to independently file a motion for substitution of judge. See *Aussieker*, 355 Ill. App. 3d at 501 (according to the plain language of the statute, each plaintiff should be entitled to file a motion for substitution of judge under section 2-1001(a)(2) of the Code). Assuming that Tania's motion for a substitution of judge was proper, we nevertheless affirm Judge Pirrello's decision to deny the motion on another basis, the incompleteness of the record on appeal.

¶ 24 "As the appellant, plaintiff has the burden of presenting a sufficiently complete record of proceedings to support a claim of error." *Moenning v. Union Pacific Railroad Co.*, 2012 IL App (1st) 101866, ¶ 38. In the absence of a complete record on appeal, we presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Id.* In fact, when the record is incomplete, we should actually indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including that the trial court ruled correctly. *Id.* "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 25 Regarding the incomplete record, we note that defendants filed a response to plaintiffs' docketing statement demanding that plaintiffs request the "entire original common law record" and report of proceedings of the five-day trial. Plaintiffs ignored defendants' demand and failed to file at least a bystander's report or an agreed statement of facts pursuant to Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2005).

¶ 26 Without the transcripts of the January 21, 2010, hearing at which defendants objected to the addition of Tania as a plaintiff and the added loss of consortium counts, and without the transcripts of the February 18, 2010, hearing at which Judge Pirrello denied Tania's motion for a substitution of judge, we must presume that Judge Pirrello followed the law and had a sufficient factual basis for denying her motion. While Tania argues that at the time of her motion, Judge Pirrello had not ruled on a substantive issue in the case that directly related to the merits of her loss of consortium claims, we note that even in the absence of any substantive ruling, a motion for substitution of judge may be denied if the movant had an opportunity to 'test the waters' and form an opinion as to the judge's reaction to her claim. *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (2004). Again, we do not know

the basis of defendants' objections to the addition of Tania as a plaintiff or her loss of consortium claims. Indulging in every reasonable presumption favorable to the denial of her motion for a substitution of judge, we presume that Tania formed an opinion about Judge Pirrello's reaction to her loss of consortium claims when the second amended complaint was filed, and that this caused her to file a motion for his substitution.

¶ 27 The record actually supports this conclusion because there was a problem with plaintiffs' second amended complaint on its face. In counts IV and V, Tania alleged that "on October 10, 2010," she "was married to" Gilberto. Defendants point out that plaintiffs were married on October 10, *2008*, and that October 10, *2010*, was a typographical error because that was a date in the future and the second amended complaint was filed in January *2010*. Plaintiffs did not file a reply brief and have not explained this discrepancy. Regardless, even if plaintiffs were married in October 2008, as defendants contend, the accident occurred on April 23, 2006, meaning that plaintiffs were not married at the time of the accident and that Tania was barred from filing a loss of consortium claim. See *Medley v. Strong*, 200 Ill. App. 3d 488, 494 (1990) (when cohabitants are unmarried, courts bar claims for loss of consortium). Defendants likely objected to the filing of the second amended complaint on this basis, giving Judge Pirrello a reason to later grant defendants' motion to dismiss. In any event, the incomplete record leaves this court with no choice but to presume that Judge Pirrello acted properly in denying Tania's motion for substitution of judge.

¶ 28 B. Order Vacating Substitution Order

¶ 29 Plaintiffs' second argument is that Judge Prochaska erred by vacating Judge Doherty's order granting Tania's motion for substitution of judge. Again, a procedural history is required to understand plaintiffs' argument.

¶ 30 On July 8, 2010, Tania filed a second motion for substitution of judge (naming Judge Doherty) as a matter of right, which he granted, and the case was transferred to Judge Prochaska. Defendants explain how this happened in their brief. According to defendants, they never got notice or service of Tania's motion for substitution of Judge Doherty. At the July 8, 2010, status hearing, the motion was simply handed to Judge Doherty, and defendants never saw it. Defendants assumed that because Tania's counts had been dismissed on February 18, 2010, the motion for substitution of judge was being made on behalf of Gilberto. There is no transcript of the July 8, 2010, hearing in the record on appeal.

¶ 31 The next day, July 9, 2010, Gilberto filed a motion for substitution of Judge Prochaska as a matter of right. A transcript of the July 9, 2010, hearing is not part of the record on appeal, and once again, defendants explain what transpired. According to defendants, at the July 9, 2010, hearing, Gilberto's motion for substitution of judge was filed *instanter*, with no notice to defendants. Defendants state in their brief that they objected to Gilberto's motion based on their belief that he had filed a motion for substitution of Judge Doherty the day before. Plaintiffs' counsel clarified that the July 8, 2010, motion for substitution of judge was filed on behalf of Tania. According to defendants, Judge Prochaska was advised that Tania's loss of consortium claims (counts IV and V) had been dismissed by Judge Pirrello on February 18, 2010. Although Tania had filed a joint motion to vacate and reconsider the dismissal on February 23, 2010, she failed to notice-up the motion for a hearing. Deeming Tania's joint motion to vacate and reconsider withdrawn, Judge Prochaska entered an order stating that Judge Doherty's July 8, 2010, order was vacated and/or a nullity because Tania was not presently a party in the case. Judge Prochaska's order further indicated that Judge Doherty remained assigned to the case for the next status hearing.

¶ 32 Plaintiffs make two arguments as to why Judge Prochaska erred in entering the July 9 order. However, without transcripts of the July 8 and July 9, 2010, hearings, we must again presume that the order was in conformity with the law and had a sufficient factual basis. See *Moenning*, 2012 IL App (1st) 101866, ¶ 38.

¶ 33 Plaintiffs first argue that Tania was "unquestionably a party-plaintiff" and had standing to file her July 9 motion for substitution of judge, but they do not explain how. After Tania's counts were dismissed and she moved to vacate and reconsider the dismissal, she abandoned that motion. The party filing a motion bears the responsibility of bringing it to the trial court's attention. *Jackson v. Alvarez*, 358 Ill. App. 3d 555, 563 (2005). Unless it appears otherwise, where no ruling appears to have been made on a motion, the presumption is that the motion was forfeited or abandoned. *Id*. The trial court specifically found that Tania was not a party, meaning she had no standing to move for a substitution of judge on July 8, 2010. Given the incomplete record in this case, we presume that Judge Prochaska followed the law in vacating that order and/or declaring it a nullity.

¶ 34 Second, plaintiffs argue that once Gilberto moved for a substitution of Judge Prochaska on July 9, 2010, Judge Prochaska had no jurisdiction to vacate the July 8, 2010, order entered by Judge Doherty. This argument fails. The basis for the parties appearing before Judge Prochaska was the July 8, 2010, order that was declared a nullity. In vacating the July 8, 2010, order and finding it to be a nullity, it had no legal effect. See *Siddens v. Industrial Comm'n*, 304 Ill. App. 3d 506, 511 (1999) (a void order is a complete nullity from its inception and has no legal effect). Therefore, the case went back to the judge who entered the July 8, 2010, order, Judge Doherty, and there was no basis for Judge Prochaska to rule on Gilberto's motion for substitution of judge.

¶ 35 C. Summary Judgment

¶ 36 Plaintiffs next argue that the court erred by granting summary judgment in favor of James as to count II of the second amended complaint.

¶ 37 Summary judgment motions are governed by section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2010)). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. *Pielet v. Pielet*, 2012 IL 112064, ¶ 29. Although a plaintiff is not required to prove his or her case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle him or her to a judgment. *Oliveira-Brooks v. ReMax Intern., Inc.*, 372 Ill. App. 3d 127, 134 (2007). Our review of the trial court's grant of summary judgment is *de novo*. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93 (2010).

¶ 38 In count II, Gilberto alleged that Brumettia was the "duly authorized agent of" James at the time of the accident. On June 7, 2010, James moved for summary judgment as to that count, arguing that at the time of the accident, Brumettia was not doing any errand, job, or anything of benefit for him and thus was not acting as his agent. James and Brumettia attached individual affidavits to the motion for summary judgment stating that at the time of the accident, Brumettia was not doing any errand, job, mission, or anything of benefit for James; James was at home at the time of the accident; and James did not know where Brumettia was driving or for what purpose she was driving at the time of the accident.

¶ 39 To support their argument that summary judgment was not proper, plaintiffs rely on the deposition testimony of Brumettia taken on June 14, 2010. According to plaintiffs, the deposition

shows that James "was in joint ownership and control of the vehicle" at the time of the accident. In her deposition, Brumettia testified that at the time of the accident, she was going to get gas and run an errand. Brumettia explained that her mother had just passed away, and she was delivering a hat that had belonged to her mother to one of her mother's friends. Brumettia further testified in her deposition that James was at home at the time of the accident and did not know her purpose for driving the car. Brumettia reiterated that she was not doing anything of benefit for James at the time of the accident.

¶ 40 The status of husband and wife does not establish an agency relationship between the parties; mere proof of marriage does not prove that the wife was the husband's agent or servant. *Sumner v. Griswold*, 338 Ill. App. 3d 190, 197 (1949). However, a general presumption of agency arises between the driver and the owner of a vehicle. *DeLeonardis v. Checker Taxi Co.*, 189 Ill. App. 3d 9, 13 (1989). To rebut the presumption the owner must show that the driver was not acting in the capacity of the owner's agent at the time of the accident. *Id*. When evidence is introduced which is contrary to the presumption, it ceases to operate. *Id*. For example, in *Safeco Insurance Co. v. Jelen*, 381 Ill. App. 3d 576, 584 (2008), where the evidence showed that two individuals owned the truck that a third person was driving at the time of the collision, the proof of ownership created a rebuttable presumption that an agency relationship existed. Yet, that presumption was rebutted by the affidavits tendered by the two owners and the driver, in which each of them attested that the driver was using the vehicle for his own personal use and was not acting as an employee or agent of the owners at the time of the accident. *Id*.

¶ 41 In this case, the affidavits and Brumettia's deposition testimony demonstrated that she and James owned the vehicle. However, the evidence also showed that at the time of the accident,

Brumettia was using the vehicle for personal use (getting gas and dropping off a hat at the house of her deceased mother's friend) and not as an agent or at the behest of James. In fact, the affidavits showed that James was at home at the time of accident and was not even aware of Brumettia's purpose in driving the vehicle.

¶ 42 Plaintiffs filed "Objections To & Motion to Strike" James's motion for summary judgment, arguing that Brumettia's deposition testimony showed that James "was in joint ownership and control of the vehicle" at the time of the accident. Other than this response, plaintiffs filed no counter affidavits, meaning that defendants' affidavits were uncontradicted. See *Northrop v. Lopatka*, 242 Ill. App. 3d 1, 8 (1993) (unsupported allegations in a complaint cannot raise factual issues where the affidavits which support a motion for summary judgment are to the contrary). In other words, the representations in the affidavits that Brumettia was not performing any task or errand on behalf of James at the time of the accident must be taken as admitted and true for purposes of the summary judgment motion. See *DeLeonardis*, 189 Ill. App. 3d at 14 (the plaintiffs filed no counter affidavits in response to the defendant's motion for summary judgment and its supporting affidavits; in the absence of responsive affidavits by the plaintiffs, the representations about the driver at the time of the accident were deemed admitted and true for purposes of the summary judgment motion).

¶ 43 In a related argument, plaintiffs attack the two affidavits as failing to comply with Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) in four general ways: for failing to set forth with particularity the facts upon which the defense is based; for failing to have attached sworn or certified copies of all papers upon which they relied; for consisting of conclusions and not facts admissible in evidence; and for failing to affirmatively show that they could testify competently to the matters

asserted. Other than these general and conclusory arguments that defendants violated Rule 191(a), plaintiffs do not explain how the affidavits are deficient or what information, specifically, is missing. As defendants point out, the affidavits were derived from the personal knowledge of Brumettia and James; neither affidavit relied on any papers that needed to be attached; both affidavits consisted of facts that would have been admissible at trial; and both James and Brumettia were competent to testify as to the matters asserted, as evidenced by Brumettia's deposition testimony. Accordingly, plaintiffs' challenges to the affidavits and the grant of summary judgment are unpersuasive.

¶ 44 D. Denial of Leave to Add Claim of Punitive Damages

¶ 45 Plaintiffs' next argument is that the court erred by denying Gilberto's motion for leave to amend the second amended complaint to include a prayer for punitive damages under section 2-604.1 of the Code (735 ILCS 5/2-604.1 (West 2010)). Gilberto's motion with respect to punitive damages related to count I, which alleged that Brumettia was negligent in operating her vehicle and that such negligence caused the accident. Based on the traffic citations that Brumettia received and her admission of liability for the accident, plaintiffs argue she admitted to "a course of conduct which show[ed] an utter indifference to or conscious disregard for Gilberto's safety which justified permitting him to amend the complaint to include a prayer for punitive damages."

¶ 46 The purpose of punitive damages is not compensation but punishment of the offender and deterrence by the wrongdoer and others. *LaSalle National Bank v. Willis*, 378 Ill. App. 3d 307, 325 (2007). In order to address certain concerns relating to punitive damage awards (*id.*), the legislature enacted section 2-604.1, which provides:

> "In all actions on account of bodily injury or physical damage to property, based on negligence *** where punitive damages are permitted no complaint shall be filed containing

> a prayer for relief seeking punitive damages. However, a plaintiff may, pursuant to a pretrial motion and after a hearing before the court, amend the complaint to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the complaint if the plaintiff establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. Any motion to amend the complaint to include a prayer for relief seeking punitive damages shall be made not later than 30 days after the close of discovery." 735 ILCS 5/2-604.1 (West 2010).

¶ 47 Section 2-604.1 precludes plaintiffs from requesting punitive damages on the face of any complaint based, even in part, on a negligence theory. *LaSalle National Bank*, 378 Ill. App. 3d at 325. Therefore, in instances where negligence is pleaded, it is only with the court's leave, pursuant to section 2-604.1, that the plaintiff may amend the complaint upon a showing of facts sufficient to support a punitive damage award. *Id*. When reviewing the denial of a pretrial motion to amend pursuant to section 2-604.1, if the trial court conducted an evidentiary hearing at which witnesses testified and their credibility was assessed, then an abuse of discretion standard of review is appropriate. *Stokovich v. Monadnock Building*, 281 Ill. App. 3d 733, 743 (1996). However, when the trial court makes its determination based upon documentary submissions only, credibility is not a factor, and our review is *de novo*. *Id*.

¶ 48 The trial court denied Gilberto's motion for leave to amend the second amended complaint to request punitive damages on November 4, 2011. The order stated that the motion was "heard and denied." Once again, the transcript of this hearing is not a part of the record on appeal, meaning we do not know how the court reached its decision (*i.e.*, whether or not an evidentiary hearing was held). Therefore, regardless of how the trial court arrived at its decision, we must presume that the court's

denial of Gilberto's motion was in conformity with the law and had a sufficient factual basis. See *Moenning*, 2012 IL App (1st) 101866, ¶ 38; see also *Hye Ra Han v. Holloway*, 408 Ill. App. 3d 387, 390 (2011) ("Where the issue on appeal relates to the conduct of a hearing or proceeding, this issue is not subject to review absent a report or record of the proceeding").

¶ 49 On the one hand, it is possible, as defendants suggest, that the court denied Gilberto's motion on ths basis that it was untimely. Gilberto filed the motion two weeks prior to trial, and the statute requires it to be filed "not later than 30 days after the close of discovery." 735 ILCS 5/2-604.1 (West 2010). The incomplete record in this case precludes this court from determining on what date discovery closed. On the other hand, the court may have denied Gilberto's motion to seek punitive damages on the merits, in that the second amended complaint alleged ordinary negligence with respect to Brumettia's driving and not the type of conduct that would warrant an award of punitive damages. See *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 68 (2009) (because punitive damages are not favored in the law, they are only available in cases where the wrongful act complained of is characterized by wantonness, malice, oppression, willfulness, or other circumstances of aggravation). Regardless of the court's rationale, we presume the court acted properly based on the incomplete record.

¶ 50 E. Evidentiary Rulings

¶ 51 Plaintiffs' fifth argument on appeal is that the trial court erred by barring the introduction of repair bills and a towing bill for Gilberto's vehicle. In its November 4, 2011, order, the court ruled that "the jury shall hear no evidence as to the cost of repair to either vehicle involved in the accident." Then, on November 11, 2011, the court issued a letter to counsel ruling on an issue taken under advisement at the final pretrial conference. The letter stated the court was "barring any

property damage witnesses, including body shop witnesses" because there was no property damage claim in the case. According to the court, "[t]he only relevance regarding damage to the vehicle would be related to Plaintiff's personal injury claim." To this end, the court indicated that it would "allow testimony about the force of the impact" and "photographs showing the damage to the vehicles."

¶ 52 The admission of evidence is within the sound discretion of a trial court, and we will not reverse its decision absent a showing of an abuse of that discretion. *Colella v. JMS Trucking Co. of Illinois, Inc.*, 403 Ill. App. 3d 82, 90 (2010). "Testimony is irrelevant and properly excluded if it has no legitimate bearing on any fact or issue in the case." *Gaston v. Founders Insurance Co.*, 365 Ill. App. 3d 303, 323 (2006).

¶ 53 Without explaining the relevance of the evidence, plaintiffs initially argue that the cost of repairing the property damage to Gilberto's vehicle was recoverable under the "collateral source rule." Under the collateral source rule, benefits received by the injured party from a source wholly independent of the tortfeasor (such as insurance) will not diminish damages otherwise recoverable from the tortfeasor. *Wills v. Foster*, 229 Ill. App. 3d 393, 399 (2008); see also *Ross v. Cortes*, 95 Ill. App. 3d 772, 774 (1981) (whether a bill was paid by insurance or from any other source was immaterial as the plaintiff could properly recover the entire amount of property damage after a car accident under the collateral source rule). In making this argument, plaintiffs misunderstand the application of the collateral source rule. The collateral source rule is not implicated in this case because plaintiffs never made a claim of property damage to the car. Had the second amended complaint included a claim of property damage, plaintiffs' argument might have merit. By alleging

only a personal injury claim, however, plaintiffs may not avail themselves of the collateral source rule.

¶ 54 Plaintiffs next argue that the towing and repair bills for both vehicles, and the testimony of the individuals who prepared the bills, were admissible to show "the impact of the automobile collision which was relevant to prove the causation and degree of personal injuries claimed by Gilberto." We disagree.

¶ 55 Again, the only claim at issue in this case was Gilberto's personal injury claim. In determining what evidence to allow, the court recognized that the force of impact was relevant to the personal injury claim, and it allowed testimony regarding the force of the impact and photographs showing the damage to the vehicles. However, the evidence plaintiffs sought to admit went beyond the evidence allowed by the trial court. With no property damage claim, plaintiffs do not explain the relevance of the vehicles' repairs, towing, or testimony by property damage witnesses, such as body shop witnesses. It was within the court's discretion to bar evidence of the cost of the vehicles' repairs and towing. Furthermore, without a transcript of the five-day hearing, plaintiffs cannot show how they were prejudiced by the court's refusal to allow this evidence.

¶ 56 F. Quashing of Subpoenas

¶ 57 Plaintiffs' sixth argument is that the trial court erred by quashing two subpoenas served on Doctors Javaid Iqbal and John Lind. Defendants respond that the record contains no transcript of the hearing on the motions to quash, meaning this court must presume that the trial court acted properly.

¶ 58 Prior to trial, Gilberto issued two trial subpoenas for Dr. Iqbal, his treating physician after the accident, in order to introduce evidence of the medical treatment he received. On November 10,

2011, Dr. Iqbal moved to quash the subpoenas. In his motion, Dr. Iqbal advised the court that he had sent two letters and made two phone calls to plaintiffs' counsel advising that his schedule would not allow him to testify on November 14, 2011, and asking for cooperation in scheduling him to testify at a different time. (The two letters from D. Iqbal are included in the record on appeal.) Dr. Iqbal went on to say in his motion that plaintiffs' counsel never responded to his letters or calls, and that because he was unable to resolve this dispute outside of court, he "was forced to file" a motion to quash. Dr. Iqbal's motion further stated that if the court ordered him to testify at trial, he requested the court to order compensation at a rate of $500 per hour, which was his usual and customary rate.

¶ 59 Plaintiffs also issued a trial subpoena for Dr. Lind, another physician who treated Gilberto after the accident. Dr. Lind did not file a written motion to quash the subpoena but instead made an oral motion to do so on the first day of trial, November 14, 2011. According to plaintiffs, Dr. Lind's oral motion requested that the subpoena be quashed unless he was paid "more than the statutory witness and mileage fee for his testimony at trial."

¶ 60 Yet another time, defendants explain what transpired because the transcript of the hearing on the motions to quash is not part of the record. Defendants state in their brief that on November 14, 2011, prior to the start of the trial, several attorneys representing various physicians who had received trial subpoenas issued by Gilberto appeared in court and made separate motions to quash the subpoenas. The docket reflects that the trial court granted several motions to quash that day, including the motion by Dr. Lind. With respect to Dr. Iqbal, an order dated November 14, 2011, appears in the record stating that "having been advised upon oral argument," the motion to quash was granted.

¶ 61 While plaintiffs argue that the court's decision to grant the motions to quash the subpoenas was without legal basis, without the transcript of the hearing on the motions to quash, we must presume that the trial court acted properly in granting the motions to quash. See *Moenning*, 2012 IL App (1st) 101866, ¶ 38 (the plaintiff has the burden of presenting a sufficiently complete record of proceedings to support a claim of error, and in the absence of a complete record, we presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis); see also *Hye Ra Han*, 408 Ill. App. 3d at 390 (where the issue on appeal relates to the conduct of a hearing, this issue is not subject to review absent a report or record of the proceeding).

¶ 62 Section 2-1101 of the Code provides that "[f]or good cause shown, the court on motion may quash or modify any subpoena." 735 ILCS 5/2-1101 (West 2010). Without a transcript of the November 14, 2011, hearing, we do not know on what basis Dr. Lind moved to quash the trial subpoena or on what basis the trial court granted Dr. Lind's motion to quash the trial subpoena. In addition, although the order granting Dr. Iqbal's motion to quash indicates that a hearing was held, we do not know whether the trial court granted the motion to quash due to the failure of plaintiffs' counsel to resolve the scheduling conflict or for some other reason. Although the basis for the court's decision to quash the subpoenas is not clear, we must presume that the court did not abuse its discretion in quashing the subpoenas. See *People v. Brummett*, 279 Ill. App. 3d 421, 425 (1996) (the court's decision to quash portions of the subpoenas *duces tecum* was not an abuse of discretion).

¶ 63 G. Denial of Posttrial Motion

¶ 64 Plaintiffs next argue that the trial court erred by denying their posttrial motion. On December 12, 2011, plaintiffs filed a 20-page posttrial motion for a "new trial on the issues of damages and

other appropriate relief" under section 2-1202 of the Code (735 ILCS 5/2-1202 (West 2010)). The court denied this motion on April 17, 2012 following a "telephonic hearing."

¶ 65 On appeal, plaintiffs present a two-paragraph argument stating that in "the interest of brevity, plaintiffs adopt and incorporate for this part [seven of their brief] their arguments and citations to decisional and statutory authorities contained in the preceding parts [one through six] by reference thereto as if set forth fully in this [part seven of their brief] and, for the reasons enumerated in the preceding parts of the within argument, plaintiffs submit that a reversal is warranted and plaintiffs are entitled to a new trial on the issues of damages."

¶ 66 Plaintiffs' argument that the court erred by denying their posttrial motion fails. We have already rejected all of plaintiffs' prior arguments, either on the merits or due to an incomplete record. Therefore, by not advancing any new arguments as to why the trial court erred by denying their posttrial motion, we cannot say that the trial court erred by denying their posttrial motion.

¶ 67 H. Motion to Assess Costs

¶ 68 Plaintiffs' final argument is that the trial court erred by denying in part their motion to assess costs. On December 12, 2011, plaintiffs filed a motion to assess costs to defendants. Plaintiffs sought a total of $2,241.50 in costs, which consisted of filing fees, service summons fees, court reporting fees for depositions and a hearing, statutory witness fees, and service subpoena fees. Following a telephonic hearing on May 2, 2012, the trial court granted in part and denied in part this motion. The court awarded plaintiffs a December 26, 2006, filing fee ($458.50), one-third of the March 9, 2007, service of summons fee ($27); and statutory witness fees for five witnesses ($125), which totaled $610.50. The remainder of plaintiffs' motion to assess costs was denied. On appeal,

plaintiffs seek reversal of that order and request that they receive the full amount of costs requested, $2,241.50.

¶ 69 The prevailing plaintiff's recovery of costs has been authorized by statute under section 5-108 of the Code, which provides:

> "If any person sues in any court of this state in any action for damages personal to the plaintiff, and recovers in such action, then judgment shall be entered in favor of the plaintiff to recover costs against the defendant, to be taxed, and the same shall be recovered and enforced as other judgments for the payment of money, except in the cases hereinafter provided." 735 ILCS 5/5-108 (West 2010).

Section 5-108 fails to define "costs" or describe what costs are recoverable; thus, the proper definition of "costs" has been left for the courts to determine. *Boehm v. Ramey*, 329 Ill. App. 3d 357, 366 (2002). In defining costs under section 5-108, courts apply a distinction between costs commonly understood to be "court costs," such as filing fees, subpoena fees, and statutory witness fees, all of which would be undisputed as taxable costs, and "litigation costs," which are the ordinary expenses and burdens of litigation. *Moller v. Lipov*, 368 Ill. App. 3d 333, 347 (2006); see also *Hesson v. Leichsenring*, 321 Ill. App. 3d 1018, 1020 (2001) (generally, a successful litigant is not entitled to recover the ordinary expenses of litigation; the allowance and recovery of costs is entirely dependent on statutory authorization). Although this provision entitling plaintiff to costs is mandatory, the mandate must be narrowly construed because statutes allowing recovery of costs are in derogation of the common law. *Moller*, 368 Ill. App. 3d at 347. A trial court's judgment on a motion for costs will be not be reversed absent an abuse of discretion. *Boehm*, 329 Ill. App. at 3d at 366.

¶ 70 In this case, the trial court awarded some costs and denied others. Once again, without a transcript or at least an agreed statement of facts as to the May 2, 2012, hearing, this court must presume that the trial court acted properly in awarding some costs and denying others. See *Hye Ra Han*, 408 Ill. App. 3d at 390 (where the issue on appeal relates to the conduct of a hearing, this issue is not subject to review absent a report or record of the proceeding, and any doubts arising from the incompleteness of the record on appeal will be resolved against the plaintiff).

¶ 71 Besides no transcript of the hearing on the motion to assess costs, there is no transcript of the five-day trial, as previously mentioned. According to defendants, some of the costs sought by plaintiffs pertain to witnesses who did not testify at trial. The same judge who presided over the trial ruled on plaintiffs' motion to assess costs, and without a complete record, we have no basis to disturb the court's denial of costs with respect to those witnesses. Moreover, with respect to plaintiffs' request for court reporter fees and transcripts, plaintiffs cite no authority for their claim that such costs are recoverable. For all of these reasons, we cannot say that the court abused its discretion in granting in part and denying in part plaintiffs' motion to assess costs.

¶ 72 As a final matter, we note that plaintiffs' counsel has raised eight separate issues on appeal. Five of those issues are entirely unsupported by the record and the other three have absolutely no basis in law or fact. Counsel is admonished that an appeal with no arguable merit does a disservice to the litigants and the court system.

¶ 73 III. CONCLUSION

¶ 74 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County.

¶ 75 Affirmed.