

No. 1-13-1040

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARIA MARTINEZ,)	Appeal from the Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 07 L 10297
)	
MARTEN TRANSPORT, LTD., a corporation, and)	
BRIAN SIBLEY,)	Honorable
)	Donald J. Suriano,
Defendants-Appellees.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment

ORDER

¶ 1 **Held:** The circuit court did not abuse its discretion by permitting the expert testimony of defense witnesses, Drs. James Harding and Jerry Bauer and barring the testimony of plaintiff's expert, David Sallmann. We affirm the judgment of the court.

¶ 2 Plaintiff, Maria Martinez, brought this negligence action against defendants, Marten Transport, Ltd. (Marten) and Brian Sibley, to recover damages for injuries she sustained from a motor vehicle collision involving the pickup truck she drove for her employer and defendants'

tractor trailer cab. A jury trial resulted in a defense verdict. The circuit court denied plaintiff's posttrial motion and entered judgment in favor of defendants and against plaintiff.

¶ 3 On appeal, plaintiff asserts numerous allegations of reversible error due to the admission and prohibition of certain trial testimony. We affirm the circuit court's judgment entered in favor of defendants and against plaintiff.

¶ 4 **BACKGROUND**

¶ 5 On June 24, 2006, plaintiff was working as an intermodal clerk for Norfolk Southern Railway Company (Norfolk Southern) at its 47th Street rail yard in Chicago. She drove a company pickup truck to keep an inventory of the trains and freight containers coming into and out of the rail yard. That morning, she needed gas for her truck and drove toward the exit of the rail yard. Simultaneously, Sibley was driving a tractor trailer cab in the rail yard to pick up a trailer with a freight container for Marten, his employer. When he found out the trailer was in another yard, he began to make a U-turn toward the 47th Street exit. A collision occurred between the two vehicles.

¶ 6 Plaintiff filed her complaint on October 1, 2007, claiming defendants negligently and carelessly failed to keep a reasonably safe lookout for other motor vehicles and made a U-turn without yielding to another motor vehicle in defendants' path. She sought recovery of lost wages and benefits, her medical bills, and damages for pain and disfigurement.¹

¹ Defendants filed a third-party complaint for contribution against Norfolk Southern on October 8, 2009. Norfolk Southern filed a counterclaim against defendants on February 23, 2010. Defendants moved to voluntarily dismiss their third-party complaint against Norfolk Southern, which the circuit court granted on September 3, 2010, leaving only plaintiff's negligence claim against defendants.

¶ 7

Discovery Disclosures

¶ 8 On December 27, 2010, defendants filed their Illinois Supreme Court Rule 213(f)(3) (Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007)) disclosures, disclosing Drs. Bauer and Harding as their expert witnesses. Plaintiff claims Rule 213(f)(3) violations as to both these witnesses.

¶ 9 First, defendants disclosed that Dr. Bauer would testify regarding his education, knowledge, and training as set forth in his *curriculum vitae*, which was attached as an exhibit. Dr. Bauer reviewed plaintiff's medical records, her deposition testimony, and the deposition testimony of her treating physicians. Defendants listed all of the medical records Dr. Bauer reviewed in preparation for this case.

¶ 10 Defendants disclosed Dr. Bauer would testify that plaintiff "suffered from severe spondylolisthesis, a progressive degenerative condition, in her lumbar spine prior to the motor vehicle accident, which created a structural problem in her lumbar spine." According to Dr. Bauer, "[t]his condition was not caused or aggravated by the motor vehicle accident." Dr. Bauer would testify that plaintiff also suffered from severe critical stenosis in her lumbar spine prior to the accident. Defendants disclosed Dr. Bauer's opinion that, "[t]he pre-existing severe critical stenosis and spondylolisthesis would have required surgery in her lumbar spine with or without the motor vehicle accident and, therefore, the accident did not create a surgical condition in her lumbar spine." Finally, defendant disclosed Dr. Bauer's opinion that plaintiff's pre-existing condition in her lumbar spine "would have become symptomatic with or without" the accident. The disclosure stated that Dr. Bauer's opinions were "based upon his knowledge, training, and experience and his review of the referenced materials above."

¶ 11 As to Dr. Harding, defendants disclosed he would testify regarding the subjects of biomechanics, occupant kinematics², and injury causation. He would testify regarding the movement of the occupant inside the vehicle during the occurrence, the injuries sustained by plaintiff, and the manner in which she sustained these injuries. Dr. Harding's opinions were based on his education, knowledge, training, and experience. Defendants disclosed that Dr. Harding also relied on "tests, experiments, research studies, or reports he has completed over the years, or with which he is familiar." In addition, Dr. Harding relied on his visit to the occurrence site and his review of the materials set forth in his report to formulate his opinions. His conclusions were included in an 11-page report attached as an exhibit to defendants' Rule 213 disclosures (hereinafter, the Harding report).

¶ 12 **The Harding Report**

¶ 13 The purpose of the Harding report was to set forth Dr. Harding's general qualifications and opinions concerning the accident. Dr. Harding is a medically qualified consultant employed by Biodynamic Research Corporation (BRC). He consults in the scientific disciplines of vehicle dynamics (impact analysis), occupant kinematics, biomechanics, injury potential, and medical validation. Dr. Harding performs Injury Causation Analysis (ICA), which is also known as Injury Reconstruction and Forensic Injury Biomechanics.

¶ 14 To prepare his report, Dr. Harding reviewed, among other things, the pleadings, digital color images of the incident scene and site, repair estimates of the tractor trailer, depositions of plaintiff, Sibley, and plaintiff's treating physicians, and plaintiff's medical records. He also visited the site of the accident.

² Occupant kinematics is "[t]he study of the motion of the occupants inside of a vehicle during a collision sequence." See http://www.crashforensics.com/crashreconstruction_glossary.cfm.

¶ 15 Dr. Harding assessed the vehicle dynamics of the accident “using a simulation program developed specifically to model low velocity sideswipe collisions involving sliding contact between vehicles.” It is at this point in the report where he cites one footnote to what the parties in this case have termed “the Funk paper.” The Funk paper refers to a 2004 study performed by James R. Funk, Joseph M. Cormier, and Charles E. Bain on behalf of Dr. Harding’s company, BRC. The Funk paper is entitled “Analytical Model for Investigating Low-Speed Sideswipe Collisions.”

¶ 16 The purpose of the Funk paper was to address the “relatively little attention in the literature” to sideswipe collisions. The Funk paper pointed out that “[v]ehicle dynamics in sideswipe collisions are markedly different from other types of collisions.” According to the Funk paper, “[s]ideswipe collisions are characterized by prolonged sliding contact, often with very little structural deformation.”

¶ 17 The Funk paper developed an analytical model to investigate the vehicle dynamics of sideswipe collisions. It explains the modeling procedures and calculations performed to create the parameters used for running the simulations. Then the Funk paper describes the vehicle crash tests that were performed in the simulations. Plaintiff claims reliance on the Funk paper is faulty because the simulations used, among other things, different vehicles, speeds, and angles of impact than the accident in this case. In other words, plaintiff claims a comparison cannot be made between a sideswipe collision involving a pickup truck and tractor trailer and a sideswipe collision involving the Ford Taurus and Buick Skylark used in the Funk paper simulations.

¶ 18 The Harding report also states Dr. Harding’s opinion that plaintiff’s vehicle “received a brush-type impact to relatively soft material of its right rear side” and was a “low acceleration event” producing a change in average acceleration of no greater than 1G of force. “Such

changes in acceleration would be unlikely to overcome lateral tire friction, and would produce only rocking motion of the vehicle upon its suspension.” Dr. Harding then stated, “[t]hese conclusions are supported by previously published independent test results of sideswipe events,” citing a footnote to another study authored by M.N. Bailey entitled “Data and methods for estimating the severity of minor impacts.”

¶ 19 According to Dr. Harding, plaintiff’s kinematic response to the accident “would have been very mild, and would have comprised a rightward and slightly forward movement of her head, torso, low back, and extremities relative to the passenger compartment as the vehicle responded to the contact.” Dr. Harding opined that “[t]he degree of flexion of [plaintiff’s] head and neck to the right and forward slightly would be well within her normal physiological range of motion, and consequently unlikely to produce injury.” Dr. Harding concluded that no mechanism for injury was apparent as a consequence of the accident and that the collision was “not beyond the tolerance level for an individual based on normal activities” and that the accident “was biomechanically trivial for her.”

¶ 20 Enclosed with the Harding report is a memorandum entitled “Impact Analysis Results,” authored by Richard Watson (hereinafter, the Watson report), another analyst employed by BRC to simulate the accident and calculate the force generated in this case. Citing the Funk paper, the Watson report states, “The vehicle dynamics that occurred during this collision were investigated using a simulation program specifically to model low severity sideswipe collisions involving sliding contact between vehicles.” The Watson report noted that “[t]he simulation tracked the acceleration, velocity, and position of the two vehicles based on inter-vehicular contact forces by integrating Newton’s equations of motion for rigid bodies having the same mass and geometric properties as the subject vehicles.” Inter-vehicular forces were calculated based on stiffness

values measured from sideswipe vehicle crash tests, but data on stiffness was “sparse” and only specifically characterized the interaction between the bumper of a 1996 Ford Taurus and the side of a 1996 Buick Skylark, as those were the vehicles tested in the Funk paper simulations.

¶ 21 It appears the Watson report relied on the Funk paper for input parameters to create simulations of the subject accident. The results of the simulations showed the collision forces and accelerations imparted to the pickup truck “were quite low.” The Watson report concluded “it is likely that the [pickup truck] experienced a peak resultant acceleration of [1G] during the subject collision.”

¶ 22 Plaintiff deposed Dr. Harding twice before trial. In neither of his depositions did plaintiff question him regarding his opinion that the collision generated 1G of force.

¶ 23 *Motions in Limine*

¶ 24 Before trial, plaintiff filed a number of motions *in limine*. Those relevant to this appeal include motions to bar the testimony of Drs. Bauer and Harding. Defendants also moved *in limine* to bar Sallmann’s testimony.

¶ 25 Plaintiff argued in her motion regarding Dr. Bauer that defendants’ Rule 213 disclosures failed to provide any bases for his opinions that (1) the June 24, 2006 accident did not aggravate plaintiff’s preexisting spinal condition and (2) she eventually would need lumbar spine surgery, with or without the accident. Plaintiff asserted defendants’ Rule 213 disclosures provided a boilerplate, catch-all statement that Dr. Bauer “will testify to a reasonable degree of neurological and medical certainty and his opinions will be based upon his knowledge, training, and experience and his review of the material referenced above.” Plaintiff contended Dr. Bauer should be barred because he had no basis for causally relating the preexisting injury to the later surgeries and spinal fusion.

¶ 26 The circuit court asked plaintiff's counsel, "If the medical records show that condition that he is talking about, and he is a medical doctor, why can he not opine that that is causally related to her spinal fusion even if it was asymptomatic?" Counsel responded that the medical records cannot provide the basis of Dr. Bauer's opinion that the accident did not aggravate the prior condition. Plaintiff had elected not to depose Dr. Bauer.

¶ 27 The circuit court stated that plaintiff "had spondylolisthesis which was asymptomatic before the -- I mean that goes more towards the weight. You will be able to bring that out. The jury is -- Remember I'm going to give them the instruction that you may not deny or limit plaintiff's right of recovery due to a preexisting condition." The court noted the issue to be decided concerned whether the car accident aggravated the preexisting injury and that one medical witness would testify the accident was an aggravation, satisfying *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49 (2000). The court ruled Dr. Bauer had a basis to form his opinions. "He reviewed this person's medical history, says based on the medical history she is going to need a spinal fusion anyway whether the accident happened or not. It is an aggravation." The court denied plaintiff's motion *in limine* to bar Dr. Bauer.

¶ 28 Plaintiff sought to bar Dr. Harding's testimony because his conclusions were based on the sideswipe analysis performed by Watson, in which Watson allegedly used unsupported input data from the Funk paper to complete the accident simulations. Plaintiff challenged Dr. Harding's opinion that plaintiff was subjected to a lateral force of 1G during the accident. Plaintiff argued that Dr. Harding took Watson's opinion as the sole basis that the accident resulted in 1G of force. Plaintiff contended the defense hired both Watson and Harding, but Watson gave his opinion to Harding and then Harding testified about Watson's opinion.

¶ 29 The circuit court partially granted plaintiff's motion to bar in that Dr. Harding could not render an opinion based on Watson's finding that the accident caused less than 1G of force. However, the court allowed Dr. Harding to "come up with his own opinion that it was a low impact and low impacts would not aggravate this person's condition."

¶ 30 As to Sallmann, defendants sought to bar his testimony because he was retained for no purpose other than to contradict what Sibley testified to regarding the accident, namely, that he was stopped at the time of impact. Defendants argued that plaintiff could not retain an expert solely to contradict the testimony of an eyewitness.

¶ 31 Sallmann testified before the circuit court in an offer of proof by plaintiff that he was retained "to look at the testimony of Mr. Sibley and determine if his version of the accident was consistent with the physical evidence." After the offer of proof, the circuit court found that "this witness has only offered an opinion to impeach the testimony of Mr. Sibley. He does not tell us how the accident happened. He only tells us that the accident did not happen the way Mr. Sibley says it does." The court barred Sallmann's testimony.

¶ 32 The Evidence Presented at Trial

¶ 33 Trial commenced on October 30, 2012. We focus on only the testimony pertinent to resolution of this appeal.

¶ 34 Plaintiff presented the videotaped deposition testimony of one of plaintiff's treating surgeons, Dr. Nitin Khanna. Plaintiff first came under Dr. Khanna's care on July 24, 2006. At that time, she presented with severe debilitating back and right leg pain. Plaintiff denied any previous problems with her back or any issues with her health. She told Dr. Khanna that she was involved in an accident 10 years prior, had therapy, and improved without any problems. The onset of symptoms occurred soon after the June 24, 2006 accident.

¶ 35 Dr. Khanna's medical diagnosis of plaintiff was that she had severe critical stenosis at L5-S1 and spondylolisthesis at L5 with a pars defect at L5 that was noted on both sides. The "pars defect" refers to the disruption of "the hook-and-catch mechanism of the bones as they attach to each other," which led to further instability.

¶ 36 On August 30, 2006, plaintiff returned to Dr. Khanna with symptoms of significant back and leg pain. Because of the weakness and severe pain plaintiff presented, Dr. Khanna recommended spinal fusion surgery. Dr. Khanna performed surgery on plaintiff's lumbar spine on September 14, 2006. He last examined plaintiff on March 26, 2007. In Dr. Khanna's opinion, plaintiff's spondylolisthesis predated the June 24, 2006 accident. According to Dr. Khanna, the accident aggravated the preexisting condition in plaintiff's spine. Dr. Khanna opined that it would have been very difficult for plaintiff to return to work as a railroad yard clerk.

¶ 37 Plaintiff next presented the videotaped deposition testimony of her second treating spinal surgeon, Dr. George Miz. He first saw plaintiff on February 20, 2007. She complained of continuing back pain five months after the surgery performed by Dr. Khanna. She told Dr. Miz that the back pain was slightly improved from her preoperative status, but her leg pain was persistent and somewhat worse than before. He offered her three treatment options, including another surgery "to address the as yet unaddressed L4-L5 pathology by extending her fusion up to L4-L5 and doing a right-sided decompression at the L4-L5 level." On April 24, 2007, plaintiff told Dr. Miz she would like to proceed with the surgical option. He performed the surgery on February 13, 2008.

¶ 38 When Dr. Miz saw plaintiff again on February 26, 2008, he reviewed her X-rays and became concerned about her left L5 screw being misplaced because she presented the onset of

left leg pain. After a CT scan, Dr. Miz determined that plaintiff's left L5 screw was laterally positioned in such a way that it may have irritated the L5 nerve. Dr. Miz performed a revision of the spinal fusion instrumentation on March 5, 2008, the purpose of which was to reposition the screw to prevent nerve irritation.

¶ 39 In Dr. Miz's opinion, "there was a causal relationship between the collision and her subsequent symptoms for which [he] cared for her." The basis for Dr. Miz's opinion on causation was that, according to plaintiff, she was asymptomatic other than one incident in the years prior to the accident and then had immediate onset of symptoms after the accident.

¶ 40 After Dr. Miz, plaintiff presented the videotaped testimony of her medical expert, Dr. Dennis Gates. He reviewed plaintiff's medical records, interviewed plaintiff, performed a physical examination, provided diagnoses, summarized her treatment and diagnoses, and gave a prognosis for the future and a causation for the injury and disability.

¶ 41 According to Dr. Gates, based on plaintiff's medical history, her symptoms all began at the time of the accident on June 24, 2006. Her symptoms included low back pain and pain radiating into the right leg. Plaintiff's symptoms worsened between the time of the accident and the time of her first surgery on September 14, 2006.

¶ 42 In Dr. Gates's opinion, plaintiff had Grade 1 spondylolisthesis prior to June 24, 2006. An X-ray from 1993 showed the Grade 1 spondylolisthesis. Dr. Gates testified that plaintiff's Grade 1 spondylolisthesis was stable prior to the accident. He based his opinion on the fact that plaintiff presented no symptoms in the five years prior to the accident.

¶ 43 In Dr. Gates's opinion, the collision on June 24, 2006 caused plaintiff's spondylolisthesis to become unstable, which resulted in the symptoms she had. The accident was a cause of the spinal surgeries that plaintiff had undergone and was a cause of the back and leg pain that

plaintiff experienced since that date. He also opined that plaintiff was incapable of gainful employment due to her injuries.

¶ 44 Defendants presented the live testimony of Dr. Harding. When defense counsel asked whether Dr. Harding had an opinion to a reasonable degree of scientific certainty as to the degree of impact plaintiff sustained as a result of the accident, plaintiff's counsel objected and the circuit court ordered a sidebar. Outside the presence of the jury, the court asked Dr. Harding how he formed the opinion that the force of the impact measured 1G. Dr. Harding responded that "the photographs of this event tell me it's a sideswipe, and a sideswipe is a very low energy event." He also based his finding on "the literature that I know of, and I have experiments in which I have been involved." The court again asked how Dr. Harding arrived at the conclusion that the impact measured 1G of force. Dr. Harding responded, "[t]hat is what the literature tells me. That's what the paper says." The court then asked if all sideswipes are less than 1G of force. Dr. Harding responded, "[u]nless there is a snag and there was not a snag in here." Plaintiff's counsel asserted there was no publication cited by Dr. Harding that says all sideswipes are less than 1G of force.

¶ 45 Plaintiff's counsel argued that a reconstruction of the accident was required for Dr. Harding to express his opinion and that he conducted no reconstruction. Plaintiff's counsel agreed that Dr. Harding could rely on the speed of the vehicles, the angle of impact, the density of the materials, the fender, and the bumper. All of those details needed to be considered to determine the force of impact.

¶ 46 Defense counsel responded that the photographs of the accident provided all the necessary information to arrive at Dr. Harding's conclusion. According to the defense, a person

with Dr. Harding's training is capable of arriving at the opinion of the amount of force by looking at the photographs.

¶ 47 The circuit court ruled, "What I'm barring you from doing is basing any of your opinions on Watson's testing." The court asked whether the opinion regarding 1G of force was based on Watson. The court continued, "[Dr. Harding] has to tell me how he came up with that number independent of Watson's report. I'm letting him say low impact." Dr. Harding agreed he would say, "low impact event." Dr. Harding agreed he would not discuss the Watson report.

¶ 48 Defense counsel then stated, "Based on what he said, the materials we relied upon and the analysis he applied, we still get to the 1G force, that's my point. And that's where we were when this was addressed before, and frankly, I think I'm being prejudiced by being put in this position when this is not a different argue -- and this is the same argument that was made before. And he did come to that 1G independent of Watson's."

¶ 49 The circuit court repeated, "Have [Dr. Harding] tell me, I have not heard it, how he gets to 1G force independent of Watson's testimony. How can you tell it's less than 1G force?" Dr. Harding responded, "Because that's what is observed in sideswipes of this nature, a sideswipe, which is sliding one car past another." The court asked whether he made that conclusion solely from the pictures. Dr. Harding responded affirmatively.

¶ 50 Plaintiff's counsel again asserted that there was no reconstruction testimony and, therefore, Dr. Harding could not rely on the speed of the vehicles. The court disagreed, stating "[t]here is reconstruction testimony based on his observations of the picture and the deposition and testimony of the speed of the vehicles." Plaintiff's counsel argued that plaintiff testified she did not know how fast she was going. The court stated that plaintiff "said she was going 5 miles per hour and accelerated, and the other vehicle was sitting still." Dr. Harding testified that the

speeds did not matter because of the nature of a sideswipe accident. The pictures showed “brush” damage, indicating a sideswipe.

¶ 51 The circuit court once again asked Dr. Harding if he could tell just by looking at the pictures alone “with certainty” that the collision resulted in less than 1G of force. Dr. Harding responded affirmatively. The court ruled, “I am going to let him testify, but I’m not going to let you use Watson’s report as your basis.”

¶ 52 Dr. Harding testified before the jury that, in his opinion, the accident was “a low acceleration event less than 1G” based on his analysis. “The photographs of the two vehicles and the descriptions of the two drivers combined to tell me that this was a sideswipe.” Dr. Harding described the collision as “a brush-like event,” which was not an impact. According to Dr. Harding, there was no common velocity between the vehicles as compared to a rear-end collision. Dr. Harding detailed the difference between a sideswipe collision and a rear-end collision. He also explained the biomechanics of the accident using demonstrative exhibits and described plaintiff’s kinematic response. In Dr. Harding’s opinion, there was no mechanism to cause injury to plaintiff’s low back because under the conditions of the collision, the low back was “extremely well protected by the seat back and the restraint system.”

¶ 53 During cross-examination, plaintiff’s counsel asked Dr. Harding if he relied on the Funk paper and Dr. Harding responded affirmatively. When counsel sought to question Dr. Harding regarding the Funk paper, the defense objected and the circuit court called for a sidebar. The following colloquy occurred:

“MR. HUNT [defense counsel]: Mind boggling and not for the first time in the case in as far as he is now violating his own motion in limine. He had a

motion in limine sustained regarding car accidents, and he is now referring to the report and the work of Watson that he barred, that's what he's getting at.

MR. FARINA [plaintiff's counsel]: Watson did the simulation in this case, based on Funk.

THE COURT: Are you opening the door?

MR. HUNT: He did it with the car accident thing and I let it slide. This is the same thing. He gets a motion in limine. I didn't ask Dr. Harding about it in direct examination, now I'm following the rules and he is going into it. What in the world?

THE COURT: The Funk report was Watson based, his finding on orders, if he relies on -- Funk, independent of Watson, Funk, it's listed on his report of Exhibit Number 1 for authority. Funk contradicts.

MR. FARINA: Have the stuff he just testified to, Your Honor, and I can impeach him with this.

THE COURT: Let me see what the report says. The only time they mention the Funk report is in a footnote to the paragraph that I barred concerning the simulation program that was developed specifically for these models so I'm going to sustain the objection. We are not going into Funk."

¶ 54 Following closing arguments and deliberations, the jury returned a verdict finding that defendants were not liable. On November 2, 2012, the circuit court entered judgment in favor of defendants and against plaintiff.

¶ 55 Plaintiff argued in her posttrial motion that the circuit court erred by: (1) barring Sallmann's testimony; (2) admitting Dr. Harding's testimony; (3) permitting the jury to hear Dr. Bauer's opinions; and (4) allowing testimony regarding plaintiff's prior complaints of back pain.

¶ 56 At the February 20, 2013 hearing on plaintiff's posttrial motion, the circuit court first noted that it did not believe that any experts were needed in this case because it involved a low impact collision. Both Sibley and plaintiff were consistent in what they observed regarding the accident, with the only discrepancy being the speed of the vehicles.

¶ 57 As to Sallmann, the circuit court noted "the only thing that this reconstruction expert was going to testify to is that the plaintiff's version of his eyewitness occurrence is not correct." Sallmann was not going to provide any additional evidence of how the accident occurred. Plaintiff argued that there were no cases on point for this issue, but the court relied on a number of opinions including *Olson v. Bell Helmets, Inc.*, 195 Ill. App. 3d 20 (1990), *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 353, 359 (1979) (overruled on other grounds by *Wills v. Foster*, 229 Ill. 2d 393 (2008)), and *Plank v. Holman*, 46 Ill. 2d 465, 471 (1970), to reject her contention.

¶ 58 As to Dr. Harding, the circuit court noted it was plaintiff who moved *in limine* to bar any mention of the Watson report and that the Watson report relied on the Funk paper. The court stated that it had barred the Funk paper as unreliable because it "was based on an analysis of crash vehicles that had nothing to do with the type of crash vehicles in this case." The court continued, "to then come back and say now I want to use the Funk report to cross-examine the defendants' expert when I wouldn't let the defendants' expert use the Funk report or the Watson report."

¶ 59 In regards to plaintiff's argument that evidence of her preexisting back pain should have been barred, the circuit court ruled that plaintiff "opened the door on that" in her opening statement and that plaintiff's counsel "started talking about the prior accidents that caused prior back pain."

¶ 60 Finally, as to Dr. Bauer, the circuit court noted that plaintiff chose not to depose him before trial. The court stated, "if you neglected to take his deposition, there are some cases now starting to say that that's a tactic[al] gamesmanship played by the nondeposing party that -- now they say, well, it wasn't -- the [213] disclosures weren't made because you can't cover everything in a report. You're supposed to follow up with a report." The court found that Dr. Bauer's testimony was consistent with his disclosures.

¶ 61 The circuit court denied plaintiff's posttrial motion. Plaintiff timely appeals.

¶ 62 ANALYSIS

¶ 63 On appeal, plaintiff argues that six issues constitute reversible error. First, plaintiff contends the circuit court erred by prohibiting her cross-examination and impeachment of Dr. Harding with the Funk paper that he allegedly relied upon to formulate his opinions. Plaintiff asserts the court committed reversible error by permitting Dr. Harding to give a new basis for his previously disclosed opinion, which was not in his Rule 213 disclosures, his attached report, or in his discovery depositions. Next, plaintiff argues the court committed reversible error by failing to exclude Dr. Harding's opinions concerning alleged lack of causation because: (1) his testimony was speculative conjecture not supported by an adequate factual foundation; (2) he failed to use a methodology that satisfied the general-acceptance requirement; and (3) there was no evidence that his purported methodology could be reliably applied to this case. As to Dr. Bauer, plaintiff contends the court committed reversible error by permitting him to testify that

the sideswipe collision did not aggravate plaintiff's preexisting spinal condition because: (1) the alleged basis for his opinions was her medical records; and (2) he did not use a methodology that is generally accepted in the medical community. Plaintiff also challenges the admission of Dr. Bauer's testimony with regard to her previous complaints of back pain preceding 5 years before the accident. Finally, plaintiff argues the court erred by barring Sallmann's testimony.

¶ 64 Standard of Review

¶ 65 The purpose of discovery rules governing the timely disclosure of expert witnesses " 'is to avoid surprise and to discourage strategic gamesmanship' " among the parties. *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, ¶ 92 (quoting *Spaetzel v. Dillon*, 393 Ill. App. 3d 806, 812 (2009)). As a result, Rule 213(f)(3) provides:

"A 'controlled expert witness' is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case." (Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 1997)).

¶ 66 Pursuant to this rule, a witness may elaborate on a disclosed opinion if the testimony states logical corollaries to the opinion rather than new reasons for it. *Spaetzel*, 393 Ill. App. 3d at 812. The decision of whether to admit or exclude evidence, including whether to allow an expert to present certain opinions, rests solely with the discretion of the circuit court and will not be disturbed absent an abuse of discretion. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 36-37

(2010). Such an abuse of discretion occurs only if no reasonable person would take the view adopted by the circuit court. *Foley v. Fletcher*, 361 Ill. App. 3d 39, 46 (2005).

¶ 67 This court generally applies the abuse of discretion standard when reviewing rulings on motions *in limine* (*Beehn v. Eppard*, 321 Ill. App. 3d 677, 680-81 (2001)), admissions of evidence (*Martinelli v. City of Chicago*, 2013 IL App (1st) 113040, ¶38), expert testimony (*Thompson v. Gordon*, 356 Ill. App. 3d 447, 461 (2005)), and posttrial motions (*Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 38). Plaintiff argues, however, that this court should apply a *de novo* standard of review where the circuit court's ruling is based on "an erroneous conclusion of law." *Beehn*, 321 Ill. App. 3d at 680-81. Problematically, plaintiff has not pointed to an alleged erroneous conclusion of law by the court.

¶ 68 Plaintiff also contends *de novo* review also applies to the circuit court's ruling on whether the methodology used by an expert is generally accepted in the relevant scientific community, citing *In re Commitment of Simons*, 213 Ill. 2d 523, 531 (2004) and *Northern Trust Co. v. Burandt & Armbrust, LLP*, 403 Ill. App. 3d 260, 275 (2010). Plaintiff seeks *de novo* review in this context because she is challenging Dr. Harding's testimony based on *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (known as the general acceptance test in Illinois) for the first time on appeal. See *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 76-77 (2002), abrogated on other grounds by *Simons*, 213 Ill. 2d at 530-31 (the admission of expert testimony is governed by the standards expressed in *Frye*, which dictates that scientific evidence is only admissible at trial if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs" (quoting *Frye*, 293 F. at 1014)). Because the record shows that plaintiff failed to object under *Frye* prior to trial, during trial, or in her posttrial motion, she forfeits that argument

here. See *Snelson v. Kamm*, 204 Ill. 2d 1, 24-25 (2003); see also *People v. Moore*, 171 Ill. 2d 74, 98 (1996); *People v. Swart*, 369 Ill. App. 3d 614, 632 (2006). We apply the abuse of discretion standard to each of the issues on review.

¶ 69 Preclusion of the Funk Paper During Dr. Harding’s Cross-Examination

¶ 70 Plaintiff first argues that the circuit court committed reversible error by prohibiting her counsel from cross-examining Dr. Harding with the Funk paper, which she alleges Dr. Harding relied upon to formulate his opinions that the biomechanics of the accident could not have aggravated her preexisting spinal conditions. Plaintiff contends she should have been allowed to cross-examine the defense expert with the literature he relied upon if that literature is used to impeach the witness. Plaintiff asserts Dr. Harding relied on the Funk paper to conclude: (1) all sideswipe collisions generate less than 1G of force; (2) the photographs of the accident show that the collision generated less than 1G of force; (3) the speeds at the time of the impact were irrelevant in determining the amount of force generated by the sideswipe collision; and (4) the “literature” he reviewed supported his opinion regarding amount of force. Plaintiff argues the Funk paper contradicts each of these opinions and, as such, she had a right to cross-examine Dr. Harding on these contradictions.

¶ 71 “Under the doctrine of invited error, a party may not request to proceed in one manner and then later contend on appeal that the course of action was in error.” (Internal quotation marks omitted.) *Fleming v. Moswin*, 2012 IL App (1st) 103475-B, ¶ 92; see also *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004) (a party cannot complain of error which that party induced). Our supreme court has held that “ ‘[i]t is fundamental to our adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding.’ ” *McMath v. Katholi*, 191 Ill. 2d 251, 255

(2000) (quoting *Auton v. Logan Landfill, Inc.*, 105 Ill. 2d 537, 543 (1984)). According to our supreme court, the rationale supporting this rule is obvious because “ ‘[i]t would be manifestly unfair to allow one party a second trial upon the basis of error which he injected into the proceedings.’ ” *Id.* Plaintiff moved *in limine* to bar the Watson report because it relied on the Funk paper’s conclusions to conduct simulations of the subject accident. We find that plaintiff cannot claim the circuit court committed error by engaging in an analysis that she herself invited. We reject plaintiff’s argument on this issue.

¶ 72 Forfeiture under the doctrine aside, the admissibility of the data underlying an expert’s opinion is within the sound discretion of the circuit court. *Bass v. Cincinnati Inc.*, 281 Ill. App. 3d 1019, 1024 (1996). An expert witness may give an opinion without disclosing the facts underlying such an opinion. *Adams v. Family Planning Associates Medical Group*, 315 Ill. App. 3d 533, 550 (2000). The court has the responsibility to determine whether the underlying facts or data upon which the expert bases the opinion are of a type reasonably relied upon by experts in the particular field. *Bass*, 281 Ill. App. 3d at 1024; see also *People v. Thill*, 297 Ill. App. 3d 7, 11 (1998). The court must look behind the expert’s conclusion and analyze the adequacy of foundation. *Baley v. Federal Signal Corp.*, 2012 IL App (1st) 093312, ¶ 127. It is the opponent’s responsibility to challenge the sufficiency or reliability of the basis for the expert’s opinion during cross-examination. *Adams*, 315 Ill. App. 3d at 550. The determination of the weight to be given the expert’s opinion is left to the finder of fact. *Id.* The opponent may also have his own expert witness to testify as to the validity and reliability of the methodology underlying the opposing expert’s opinion. *Id.*

¶ 73 In this case, plaintiff deposed Dr. Harding twice before trial without challenging his conclusion that the collision generated less than 1G of force. In addition, plaintiff chose not to retain an expert to challenge the validity and reliability of Dr. Harding's conclusions.

¶ 74 Determinations of the credibility of the witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are exclusively within the province of the jury. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006); see also *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 179 (2006) ("We are mindful that credibility determinations and the resolution of inconsistencies and conflicts in testimony are for the jury"). Photographs depicting minimal damage in a car accident are relevant not only to the issue of credibility of the witnesses, but also to prove whether the plaintiff's injury was more probable or less probable. *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 565 (2008).

¶ 75 Dr. Harding testified before the jury that the accident was "a low acceleration event less than 1G" based on his analysis. According to Dr. Harding, "[t]he photographs of the two vehicles and the descriptions of the two drivers combined to tell me that this was a sideswipe" and he explained to the jury the difference between sideswipe collisions and rear-end collisions. The jury did not hear testimony that all sideswipe collisions generate less than 1G of force. Dr. Harding testified that in sideswipe collisions, "the speeds are not relevant because it's not going to be an impact, it's going to be a brushing." Dr. Harding cited the Bailey paper in support of this conclusion.

¶ 76 Plaintiff was responsible to challenge Dr. Harding's opinions on cross-examination. Plaintiff chose not to cross-examine Dr. Harding using the Bailey paper. Although the Bailey paper is not included in the record on appeal (it is attached as part of the appendix to defendants' response brief), the record shows Dr. Harding cited to this paper in his report to conclude the

collision in this case generated less than 1G of force, independent of the Watson report. For the first time on appeal, plaintiff notes in her opening brief that “Bailey and his colleagues reported that their tests of sideswipe collisions generated forces up to [3Gs],” but for some reason, she chose not to cross-examine Dr. Harding on this contradictory information.

¶ 77 Even absent forfeiture, we find that the circuit court did not abuse its discretion by precluding plaintiff from cross-examining Dr. Harding with the Funk paper. The jury heard conflicting medical testimony regarding whether the accident aggravated plaintiff’s preexisting spinal conditions. Plaintiff contested whether a minor sideswipe collision could aggravate her preexisting spinal conditions. The question of whom to believe and what weight to be given all the evidence was a decision for the trier of fact. See *1350 Lake Shore Associates v. Casalino*, 352 Ill. App. 3d 1027, 1040 (2004) (conflicts relating to witness credibility and the weight to be accorded their testimony are matters which the trier of fact is in a superior position to resolve).

¶ 78 Whether Dr. Harding’s Opinions Violated Rule 213(f)(3)

¶ 79 Plaintiff asserts the circuit court committed reversible error by permitting Dr. Harding to provide previously undisclosed, new bases for his opinions at trial, in violation of Rule 213(f)(3). Again, plaintiff claims Dr. Harding’s testimony included three opinions not previously disclosed in his report: (1) he could tell from the photographs of the accident alone that the collision generated less than 1G of force; (2) all sideswipe collisions generate less than 1G of force; and (3) the speeds of the vehicles are irrelevant when calculating the forces generated by sideswipe collisions.

¶ 80 As to the first argument that Dr. Harding concluded solely from the photographs that the collision generated less than 1G of force, both the Rule 213(f)(3) disclosure and the Harding report discuss how Dr. Harding viewed the photographs to arrive at his conclusion. In other

words, Dr. Harding's reliance on the photographs was disclosed in contrast to plaintiff's contention.

¶ 81 In *Jackson v. Seib*, 372 Ill. App. 3d 1061, 1071 (2007), the defense expert, Dr. Craig Beyer, testified that, based on his education in biomechanics and physics, it was clear from the photographs of the accident that the collision was not a 50-mile-per-hour impact as the plaintiff suggested in the emergency room. Dr. Beyer testified that he relied on the photographs with regard to the nature and severity of the impact because that information was crucial to his opinion regarding the causal relationship between the accident and the plaintiff's complaints. *Id.* The court in *Jackson* concluded that, "even assuming that Dr. Beyer was not qualified to give an expert opinion regarding the severity of the impact based on the photographs, we cannot say the trial court abused its discretion by admitting the photographs into evidence without expert testimony." *Id.* The court found the photographs revealed "it was clear that the plaintiff was not rear-ended at anywhere near the speed he suggested. Under these facts, the circuit court could properly have found that the pictures, by themselves, were relevant to prove that the matter at issue was 'more or less probable.'" *Id.* (citing *Ferro v. Griffiths*, 361 Ill. App. 3d 738, 743 (2005)); see also *Fronabarger*, 385 Ill. App. 3d at 566 (circuit court did not abuse its discretion by allowing testimony of expert witness physician regarding the damage done to the vehicles, as depicted in the photographs, and the plaintiff's corresponding injury).

¶ 82 Similar to the expert in *Jackson*, a person with Dr. Harding's training is capable of arriving at the opinion for amount of force by looking at the photographs of the collision. The concern regarding Dr. Harding's testimony stemmed from his reliance on the Watson report, not the photographs. A review of the Harding report shows Dr. Harding reached his conclusion regarding the amount of force generated independent of the Watson report.

¶ 83 In this case, Dr. Harding based the opinions in his report, attached to his Rule 213(f)(3) disclosures on, among other things, the deposition testimony of Sibley and plaintiff, plaintiff's medical records, previously published independent test results of sideswipe collisions independent of the Watson or Funk reports, *and* the accident photographs. We find no violation of Rule 213(f)(3) occurred with regard to Dr. Harding's conclusions from the photographs.

¶ 84 As to plaintiff's argument that defendants violated Rule 213(f)(3) when Dr. Harding concluded all sideswipe collisions generate less than 1G of force, the record shows Dr. Harding never concluded as such. Outside the presence of the jury, the circuit court asked Dr. Harding if all sideswipes are less than 1G of force. Dr. Harding responded, "[u]nless there is a snag and there was not a snag in here." In other words, Dr. Harding was referring to *this* accident and not all accidents. In any event, Dr. Harding *did not* testify before the jury that all sideswipe collisions generate less than 1G of force. We reject plaintiff's argument on this issue and conclude no violation of Rule 213(f)(3) occurred.

¶ 85 Finally, plaintiff argues that defendants violated Rule 213(f)(3) when Dr. Harding testified that the speeds of the vehicle are irrelevant when calculating the forces generated by sideswipe collisions. According to Dr. Harding, there was no common velocity between the vehicles involved in this collision as compared to a rear-end collision. Dr. Harding testified that in sideswipe collisions, "the speeds are not relevant because it's not going to be an impact, it's going to be a brushing." In his report attached to his Rule 213(f)(3) disclosures, Dr. Harding cited the Bailey paper.

¶ 86 A witness may elaborate on a disclosed opinion as long as the testimony states logical corollaries to the opinion rather than new reasons for it. *Spaetzel*, 393 Ill. App. 3d at 812. Dr. Harding elaborated on an opinion based on the Bailey paper, which was disclosed in his report.

We find no violation of Rule 213(f)(3) on this issue and, therefore, the circuit court did not abuse its discretion by allowing Dr. Harding's testimony.

¶ 87 Plaintiff's Challenge to Dr. Harding's Opinion on Lack of Causation

¶ 88 In plaintiff's third attack on Dr. Harding's testimony, she argues that the circuit court committed reversible error by failing to exclude his opinions regarding lack of causation. Plaintiff contends Dr. Harding's testimony included: (1) speculative conjecture that was not supported by adequate factual foundation; (2) a methodology that did not satisfy the general acceptance (*Frye*) test; and (3) no evidence that his purported methodology could be reliably applied to this case.

¶ 89 As to the first portion of plaintiff's argument, she asserts that, because there is no basis for Dr. Harding's conclusion that the accident generated less than 1G of force, his opinions were inadmissible.

¶ 90 "The fundamental requirement with respect to expert testimony is that the assumptions that support the expert's opinion must be within the realm of direct or circumstantial evidence, supported by the facts or reasonable inferences from the facts." *Nelson v. Speed Fastener, Inc.*, 101 Ill. App. 3d 539, 544 (1981). Generally, it is the function of the circuit court to decide if the facts assumed in expert testimony have a basis in the evidence. *Id.* at 545.

¶ 91 Dr. Harding included the bases for his opinion that the accident generated 1G of force in his report. Dr. Harding's opinion regarding 1G of force had a basis in the evidence, as both plaintiff and Sibley testified that this was a low impact event. The photographs of the occurrence also supported Dr. Harding's conclusions. We conclude that the circuit court did not abuse its discretion to permit Dr. Harding's opinions at trial because they were supported by literature independent of Watson and Funk and had a basis in the evidence.

¶ 92 The remainder of plaintiff’s argument is a *Frye* challenge that we previously addressed. Because the record shows that plaintiff failed to object under *Frye* prior to trial, during trial, or in her posttrial motion, she forfeited that argument here. See *Snelson*, 204 Ill. 2d at 24-25; see also *Moore*, 171 Ill. 2d at 98; *Swart*, 369 Ill. App. 3d at 632 (2006).

¶ 93 Medical Records as the Proper Basis to Express Medical Opinions

¶ 94 Plaintiff next argues that the circuit court committed reversible error by permitting Dr. Bauer to testify that the sideswipe collision did not aggravate her preexisting spinal conditions because: (1) the basis for his opinions was her medical records; and (2) he did not use a methodology that is generally accepted in the medical community. Plaintiff essentially contends that Dr. Bauer’s Rule 213(f)(3) disclosures provided only a boilerplate, “catch-all” statement that he based his opinions on his “knowledge, training, and experience in his review of the materials referenced above,” citing *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 622 (2007) in support. Plaintiff asserts that Rule 213(f)(3) requires specific disclosures and that providing the basis of a controlled-expert’s opinion in a “catch-all” provision does not comply with the disclosure requirements of the rule.

¶ 95 The facts in *Nedzvekas* are inapplicable to this case. The reviewing court found that the plaintiff’s Rule 213(f)(3) disclosures lacked the necessary details to comply with the rule. *Nedzvekas*, 374 Ill. App. 3d at 622. Based on the violation of three separate court orders setting deadlines for disclosing witnesses and the untimely service of the defendant with an insufficient witness disclosure, the *Nedzvekas* court ruled that the circuit court did not abuse its discretion when it barred the plaintiff from calling her expert witness. *Id.*

¶ 96 Pursuant to Rule 213(f)(3), a witness may elaborate on a disclosed opinion as long as the testimony states logical corollaries to the opinion rather than new reasons for it. *Spaetzel*, 393

Ill. App. 3d at 812. The testimony of an expert witness is admissible if the proffered expert is qualified by knowledge, skill, experience, training, or education and the testimony will assist the trier of fact in understanding the evidence. *Davis v. Kraff*, 405 Ill. App. 3d 20, 38 (2010).

¶ 97 “It is not error to permit an expert to testify regarding reports or medical tests performed by other doctors, which the expert examined in reaching his or her own opinion.” *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 105 (1995). Moreover, “[a]n expert witness is permitted to state an opinion based on facts not within his or her personal knowledge so long as those facts are of a type reasonably relied upon by experts in the particular field.” *Iaccino v. Anderson*, 406 Ill. App. 3d 397, 407 (2010). Plaintiff cites no authority for the proposition that facts in medical records are not of a type reasonably relied upon by medical experts in the field. Plaintiff’s citations provide no such support.

¶ 98 Furthermore, plaintiff chose not to depose Dr. Bauer. Plaintiff bore the responsibility “to challenge the sufficiency or reliability of the basis for Dr. Bauer’s opinion during cross-examination, and the determination of the weight to be given his opinion is left to the finder of fact.” *Adams*, 315 Ill. App. 3d at 550. While plaintiff may have effectively challenged Dr. Bauer’s opinions through the testimony of her own expert, Dr. Gates (*Adams*, 315 Ill. App. 3d at 550), it was the province of the jury to resolve this battle between the experts. *Lisowski v. MacNeal Memorial Hospital Ass’n*, 381 Ill. App. 3d 275, 289 (2008); *Bergman v. Kelsey*, 375 Ill. App. 3d 612, 625-26 (2007).

¶ 99 We find that the circuit court did not abuse its discretion by allowing Dr. Bauer to testify regarding his opinions that were disclosed in defendants’ Rule 213(f)(3) disclosures. We also hold that plaintiff forfeited the second part of her argument that Dr. Bauer did not use a methodology that is generally accepted in the medical community because she never mounted a

Frye challenge below. See *Snelson*, 204 Ill. 2d at 24-25; see also *Moore*, 171 Ill. 2d at 98; *Swart*, 369 Ill. App. 3d at 632 (2006). Forfeiture aside, plaintiff has not explained how Dr. Bauer’s “methodology” of relying on her medical records, her deposition testimony, and the deposition testimony of her treating surgeons was any less acceptable under Illinois law considering her expert, Dr. Gates, based his expert medical opinions on the same things.

¶ 100 Evidence of Plaintiff’s Prior Back Pain

¶ 101 Plaintiff contends the circuit court erred by permitting Dr. Bauer to testify regarding plaintiff’s history of back pain preceding the accident. Plaintiff argues this evidence should have been barred considering her last complaint of back pain occurred more than 5 years before the accident. She asserts that defendants did not disclose Dr. Bauer’s opinion about her previous complaints of back pain and, therefore, his testimony on that subject should have been barred.

¶ 102 Evidence of a prior injury is admissible when relevant to negate causation, negate or reduce damages, or to impeach a witness. *Voykin*, 192 Ill. 2d at 57. A prior injury is relevant to causation when it makes it less likely that the defendant’s actions caused any of the plaintiff’s injuries. *Id.* at 58. A prior injury is relevant to damages to establish that the defendant is liable for only a portion or aggravation of plaintiff’s injuries. *Id.* Expert testimony on causation may be necessary to connect the prior injury with the injury at issue. *Id.* at 59.

¶ 103 In this case, defendants specifically disclosed that plaintiff suffered from spondylolisthesis, a progressive degenerative condition, in her lumbar spine prior to the accident. Her treating surgeon, Dr. Khanna, testified that plaintiff’s spondylolisthesis predated the June 24, 2006 accident. Her 1993 lumbar spine X-ray showed a grade 1 spondylolisthesis. Plaintiff’s treating physicians testified that the prior injury was related to and aggravated by the subject

accident. Plaintiff retained Dr. Gates to provide opinion testimony that the accident aggravated her preexisting spondylolisthesis.

¶ 104 Logically, a plaintiff must have some sort of prior condition in order for that condition to be aggravated. It is abundantly clear from the testimony of both the treating orthopedic surgeons and plaintiff's medical expert who offered opinion testimony at trial that her preexisting degenerative spinal conditions were relevant to the question of whether the accident caused her injuries. Defendant sought to introduce expert evidence demonstrating why plaintiff's prior complaints of back pain were relevant to causation and damages. Defendants introduced Dr. Bauer's testimony to show that plaintiff's prior complaints of back pain stemmed from her degenerative spinal conditions (severe stenosis and spondylolisthesis), and that the accident did not aggravate these conditions. Defendants introduced this testimony to negate both causation and damages. In addition, when plaintiff first saw Dr. Khanna, she denied that she had any previous health problems. As such, defendants also introduced evidence of plaintiff's prior low back pain to impeach her testimony.

¶ 105 In any event, the evidence in the case was such that the jurors could readily appraise the relationship between plaintiff's preexisting spinal conditions and her back pain following the accident without additional expert assistance and that plaintiff and her treating surgeons had presented specific testimony regarding the extent of the preexisting spinal conditions and symptoms, the treatments that she had received, and the relationship between the preexisting conditions and the symptoms she had experienced following the accident. We find that the circuit court did not abuse its discretion when it permitted Dr. Bauer to testify regarding plaintiff's previous complaints of back pain.

¶ 106 Preclusion of David Sallmann’s Testimony

¶ 107 Finally, plaintiff argues that the circuit court erred by barring Sallmann’s testimony that Sibley’s tractor trailer was moving at the time of impact. Sallmann himself told the circuit court that his testimony was being offered solely to refute Sibley’s testimony that he was stopped at the time of the accident. The court stated that it would have allowed Sallmann’s testimony if it was being offered for a reason other than to contradict Sibley.

¶ 108 The admission of expert reconstruction testimony generally turns on the usual concerns of whether expert opinion is appropriate. *Zavala v. Powermatic, Inc.*, 167 Ill. 2d 542, 546 (1995). As such, for reconstruction testimony to be admissible, there must be sufficient data about the accident in evidence to provide a reasonable basis for the expert’s opinion. *Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 401 (2007).

¶ 109 In addition, where eyewitness testimony of the accident is available, accident reconstruction testimony may be used to supplement the eyewitness testimony as long as such testimony “would be needed to explain scientific principles to a jury and enable it to make factual determinations.” *Watkins v. Schmitt*, 172 Ill. 2d 193, 206 (1996). Indeed, “expert reconstruction testimony is proper, even where there is an eyewitness, if what the expert offers is ‘knowledge and application of principles of science beyond the ken of the average juror.’ ” *Zavala*, 167 Ill. 2d at 546 (quoting *Plank*, 46 Ill. 2d at 471). Evidence is “beyond the ken” of the average juror when it involves knowledge or experience that a juror generally lacks. *Rinesmith v. Sterling*, 293 Ill. App. 3d 344, 348 (1997). However, the speed of a vehicle is not a matter beyond the ken of an average juror and it is well established under Illinois law that “speed is recognized ‘as a subject about which a layman can express an opinion.’ ” *Watkins*, 172 Ill. 2d at

207-08 (quoting *Peterson*, 76 Ill. 2d at 359) (overruled on other grounds by *Wills v. Foster*, 229 Ill. 2d 393 (2008))).

¶ 110 In *Olson*, the decedent died from head injuries after his motorcycle collided with a pickup truck. Prior to trial, the defense moved *in limine* to exclude the deposition of a police officer who had conducted experiments to reconstruct the collision. The defendant helmet company argued that there was competent eyewitness testimony. The eyewitness stated in her deposition that the impact of the collision had thrown the decedent over the pickup truck. The police officer stated his opinion based on his reconstructions and personal experience as a motorcycle rider that the decedent's head had struck a glancing blow to the side of the truck and could not have flown over the top of the truck. The jury returned a verdict in favor of the defendant. *Olson*, 195 Ill. App. 3d at 22.

¶ 111 On appeal, the plaintiff argued that it was prejudiced by the circuit court's preclusion of the police officer's testimony rebutting the eyewitness's testimony. The reviewing court affirmed and held that "reconstruction evidence may not be used to rebut the testimony of an eyewitness unless he or she is found incompetent or incredible, and because the admissibility of such evidence depends of on a finding of incompetence or incredibility, it may not be used to establish those factors." *Id.* at 24. The police officer's testimony that the decedent could not have flown over the pickup truck was being offered only to rebut the eyewitness's perception of the events, not to explain a matter beyond the understanding of the average juror. *Id.* at 23. The *Olson* court stated that, had the circuit court allowed the police officer's testimony, it would have committed reversible error. *Id.*

¶ 112 Likewise, in this case, plaintiff sought to present Sallmann's testimony solely to rebut Sibley's perception of the events. The speed of Sibley's tractor trailer at the time of the accident

was not a matter beyond the understanding of the average juror. See *Watson*, 172 Ill. 2d at 207-08; *Olson*, 195 Ill. App. 3d at 23-24. If the circuit court had allowed Sallmann's testimony, it might have committed reversible error. *Olson*, 195 Ill. App. 3d at 23; *Peterson*, 76 Ill. 2d at 359. Accordingly, we conclude the circuit court did not commit reversible error by precluding Sallmann's testimony.

¶ 113

CONCLUSION

¶ 114 The circuit court did not abuse its discretion by permitting the expert testimony of Drs. Bauer and Harding, nor did it abuse its discretion by precluding Sallmann's testimony. We affirm the judgment of the circuit court.

¶ 115 Affirmed.