

2014 IL App (2d) 130866-U
No. 2-13-0866
Order filed November 4, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

DAVID WAGMAN,)	Appeal from the Circuit Court
)	of McHenry County.
Plaintiff-Appellant,)	
)	
v.)	No. 08-LA-469
)	
THE COTTAGE LTD. and ROBERT D.)	
GURSKE,)	Honorable
)	Thomas A. Meyer,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* Appellant’s failure to meet the burden of presenting a sufficient record capable of review, as required by *Foutch v. O’Bryant*, 99 Ill.2d 389, 391-92 (1984), precludes meaningful review; appellant’s failure to comply with Illinois Supreme Court rules improperly places the burden on the appellate court to search the record for testimony, documents and court orders referred to in the body of the brief.; therefore, we affirm.

¶ 2 Plaintiff, David Wagman, appeals from the trial court’s May 8, 2013, judgment and July 23 order denying his motion for a new trial. Plaintiff requests a new trial, arguing that: (1) the trial court erred when it granted “certain” motions *in limine* filed by defendants, The Cottage,

Ltd., and Robert D. Gurske; (2) defendants violated certain motions *in limine*; (3) he was prejudiced during closing argument when the trial court overruled his objections to defendants' alleged violations of the motions *in limine*; (4) certain jury instruction were given in error; (5) the trial court erred when it denied his motion to add a claim for punitive damages to his complaint. For the reasons stated herein, we affirm.

¶ 3

I. BACKGROUND

¶ 4 On Christmas Eve, 2006, plaintiff was a patron in The Cottage, a bar in downtown Crystal Lake, Illinois, where defendant Gurske was tending bar. An altercation ensued between plaintiff and Gurske that resulted in plaintiff's ejection from the bar. Plaintiff called the police from another establishment. Although plaintiff told the responding officers that he had been attacked by Gurske, the police arrested plaintiff for battery and criminal trespass to land. On March 12, 2008, the State *nolle prossed* the criminal charges against plaintiff. At that time, the prosecutor stated "I don't think that perhaps the elements as specified in the complaint even occurred in this matter."

¶ 5 Subsequently, plaintiff, acting *pro se*, sued Gurske for intentional misconduct, intentional infliction of emotional distress, battery, and assault; he also sued the owner of the bar, The Cottage, for negligence. Plaintiff filed his first complaint on December 23, 2008; seven amended complaints followed. On September 13, 2011, plaintiff filed a motion for leave to add a count for punitive damages pursuant to section 2-604.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-604.1 (West 2010)) which was denied on the same day. On March 26, 2013, plaintiff filed a "motion for reconsideration" of the prior ruling on punitive damages which the trial court denied April 1, thereby barring plaintiff from arguing punitive damages before the jury. The "Final Updated Complaint at Law 1A," filed on April 26, 2013, raised allegations

against Gurske and The Cottage for negligence, intentional misconduct, intentional infliction of emotional distress, battery, and assault. Plaintiff also included one count of intentional misconduct by Gerry Reinhardt, a customer at the bar.

¶ 6 Prior to trial, defendants filed 21 motions *in limine* (MIL); MIL Nos. 12, 13, and 14 are pertinent to this appeal. The trial court granted MIL No. 12 over objection, barring any mention that defendants failed to contact the police at the time of the incident; MIL No. 13, over objection, barring any evidence of interactions or disputes with Gurske and The Cottage prior to or subsequent to the events alleged in the complaint; and MIL No. 14, without objection, barring any mention of the State's *nolle prosequi*, in March 2008, of the criminal charges against plaintiff.

¶ 7 A jury trial was held on May 7 and 8, 2013.

¶ 8 At trial, Jason Dodson testified for plaintiff that on the evening of December 24, 2006, he was a customer at The Cottage in Crystal Lake. During the evening, he noticed a disturbance involving plaintiff. Dodson stated that he and his brother, Chad Dodson, escorted plaintiff outside and asked him if he needed a ride home. Dodson did not see the altercation begin, nor did he did see anyone punch plaintiff. He did not remember telling Officer Koertgen that he saw plaintiff spit on Gurske because the altercation was seven years prior to the trial. Dodson also testified that plaintiff called him several times and told him that, if he did not testify at trial, plaintiff would sue him.

¶ 9 Carissa Mauroth, a patron at the bar, testified for plaintiff, and Wagman himself testified. Neither Mauroth's testimony nor plaintiff's direct testimony during his case in chief is included in the transcript provided to us on appeal.

¶ 10 Robert Gurske testified that on December 24 he was working behind the bar. He saw an altercation involving plaintiff and he quickly came around the bar and grabbed plaintiff's arms. Jason and his brother, Chad Dodson, then took plaintiff outside through the back door of the bar. Gurske testified that plaintiff refused to leave when Gurske told him he could not have any more beer and told him to go home. Gurske thought that plaintiff seemed more agitated and aggressive than afraid.

¶ 11 Reinhardt testified for defendants¹ that, on December 24, he was at "The Cottage" with his wife. Gurske was managing the bar and bartending behind the bar. Reinhardt stated that he remembered "people getting loud" and he looked over and saw plaintiff spit in Gurske's face. Gurske came around the bar and grabbed plaintiff, and then Reinhardt and "a couple other guys" ushered him out of the bar. Plaintiff was "flailing" and "got upset pretty quickly." Plaintiff was "furious for whatever reason" and resisted leaving. The police arrived shortly thereafter. Reinhardt didn't know what started the argument.

¶ 12 Reinhardt also testified that plaintiff called him and emailed him "non stop and that he received a certified letter from plaintiff in April 2009 that said "if you don't say what I want, then the guy sues me for something that happened to him."

¶ 13 Plaintiff, acting as his own attorney, cross-examined Reinhardt, who testified that "if [the conversation] was loud enough to be heard over the generalized talking in a bar, it was pretty loud." He stated that "two adults were talking to each other in loud noises. Then when [plaintiff] spit on him, then he came on the other side of the bar; and then we threw [plaintiff] out."

¹ Wagman originally had sued Gerry Reinhardt but then dismissed him as a defendant.

¶ 14 Patrol officer Scott Koertgen, Crystal Lake Police Department, testified for defendants that he investigated the incident and prepared a report that could refresh his memory. Plaintiff's objection to Koertgen's use of the term "arrest report" was sustained. Plaintiff continued to object to Koertgen's reference, and after off-the-record discussions, the trial court overruled the objections. Koertgen continued to testify from his "incident report." Koertgen stated that he interviewed plaintiff, Gurske, Reinhardt, Jason Dodson, and Carissa Mauroth. At first, plaintiff told Koertgen that his name was "London Bresette." Koertgen opined that plaintiff was intoxicated, based on his observation that plaintiff had slurred speech, trouble standing, "red and glossy" eyes, and the smell of alcohol on his breath. Plaintiff claimed that Gurske punched him once. Plaintiff declined medical attention, and Koertgen did not call for medical treatment.

¶ 15 Koertgen testified that Mauroth told him she saw plaintiff "get upset and spit on Robert." Mauroth also told him that two individuals escorted plaintiff out of the bar peacefully. Dodson told Koertgen that he observed plaintiff spit on Gurske, and that plaintiff "took a swing at him to try to hit him."

¶ 16 On May 8, 2013, plaintiff filed a motion for directed verdict, which was denied. The jury found for the defendants on all counts. On May 23, plaintiff filed a motion for a new trial and "Motion For Rehearing of Punitive Damages." The trial court denied both motions on July 23. Plaintiff timely appealed.

¶ 17

II. ANALYSIS

¶ 18 We note that plaintiff has only provided excerpts of testimony of some of the witnesses at trial. However, the crucial testimony of plaintiff and that of Carissa Mauroth, a non-party eyewitness is *not* contained in the record. Our supreme court has held that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of

error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis.” *Foutch v. O'Bryant*, 99 Ill.2d 389, 391-92 (1984). Under *Foutch*, “[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant.” *Id.* at 392.

¶ 19 Without the testimony of plaintiff and Mauroth we can neither determine if error was committed, nor that any error that might have been committed was prejudicial. The incomplete record provided does not overcome the *Foutch* presumption that no error arose. Assuming *arguendo* that the sundry claims had some apparent validity, plaintiff has not established that he was prejudiced.

¶ 20 For example, plaintiff objects to defendants’ instructions nos. 14, 17, and 18. Defendants counter that he forfeited these objections because he failed to submit proposed alternate instructions and failed to properly preserve his objection. In his brief, plaintiff cites to pages in the common law record that include the instructions, given over objection; his “Motion to Strike Improper or Insufficient Jury Instructions,” filed May 6, 2013; and one page that is the trial court’s order denying his motion. We have gleaned from the record that he argued his motion to strike the jury instructions, but we are unable to locate a transcript. The posttrial motion for a new trial was argued on July 23, 2013, and the report of proceedings includes a transcript for that day. During argument, plaintiff specifically states that he did not tender alternate instructions when he objected during the instruction conference. What is apparent from the record is that plaintiff attempted to relitigate the facts of the case and repeatedly urged the trial court to rule that the jury's verdict was erroneous. Plaintiff’s assertion now that defendants did not provide sufficient evidence to justify utilizing the instructions is contradicted by the record.

¶ 21 In any event, “[t]o preserve an objection to a jury instruction a party must both specify

the defect claimed and tender a correct instruction.” *Deal v. Byford*, 127 Ill.2d 192, 202-03 (1989) (citing *Saldana v. Wirtz Cartage Co.*, 74 Ill.2d 379, 387 (1978)). The party challenging a jury instruction has the responsibility to submit an instruction to the trial judge that states the law for which he argues on appeal. *Deal*, 127 Ill.2d at 203. Failure to object to the instructions given and failure to tender a correct instruction results in a waiver of the issues on appeal. *Id.* We agree with defendants that plaintiff’s objections to the jury instructions as given were waived for failure to tender alternate instructions.

¶ 22 Also, the brief plaintiff filed with this court fails to comply with Illinois Supreme Court Rules. Illinois Supreme Court Rules 341(h)(6) and (7) (eff. Feb. 6, 2013) require an appellant’s brief to include appropriate references to the pages of the record relied on. See *People v. Karim*, 367 Ill.App.3d 67, 94 (2006) (it is neither the function nor the obligation of this court to act as an advocate or search the record for error). Although plaintiff’s brief makes reference to the trial court’s rulings, he has provided us with an incomplete record and limited record citations. See Rule 341(h)(6)) These failures improperly place the burden on the appellate court to search the record for testimony, or, with regard to the testimony not included in the record, improperly assume it is favorable to the appellant. Without a complete record and citations to the record this court is not in a position to consider the merits of appellant’s claims. “This court is not a depository in which the burden of argument and research may be dumped.” *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 80.

¶ 23 We recognize that plaintiff has litigated the action below as well as this appeal *pro se* and that he is not a licensed attorney. However, *pro se* litigants are presumed to have full knowledge of applicable court rules and procedures and must comply with the same rules and procedures as would be required of litigants represented by attorneys. See *In re Estate of Pellico*, 394 Ill. App.

3d 1052, 1067 (2009). As the appellant, he is required to comply with the procedural rules of the Illinois Supreme Court governing appellate review, and his *pro se* status did not excuse his failure to do so. See *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001). Supreme Court rules are not mere suggestions; they are rules that must be followed. *In re Estate of Michalak*, 404 Ill. App. 3d 75, 99 (2010). “Where an appellant’s brief fails to comply with supreme court rules, this court has the inherent authority to dismiss the appeal.” *Epstein v. Galuscka*, 362 Ill.App.3d 36, 42 (2005).

¶ 24 Plaintiff has not met his burden of presenting a record capable of review. *Foutch*, 99 Ill.2d at 391-92. Although plaintiff’s failure to provide a sufficient record and the failure to provide a compliant brief could result in striking his brief as a sanction, we find no reason to do so. However, these failures preclude meaningful review of the issues presented. We can neither determine if the court committed error nor that any error was prejudicial. Thus, we affirm.

¶ 25

III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of McHenry County.

¶ 27 Affirmed.