2017 IL App (1st) 161999-U

THIRD DIVISION
July 26, 2017

No. 1-16-1999

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IDELLA PRICE,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13 L 9635
	)	
BOARD OF EDUCATION OF THE CITY	)	
OF CHICAGO,	)	The Honorable
	)	Thomas E. Flanagan
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's claimed error involving the admission of post-remedial measures in this premises liability case was forfeited. Judgment affirmed.

¶ 2 This appeal arises from a jury verdict in favor of plaintiff Idella Price and against defendant Board of Education of the City of Chicago. The jury awarded her $266,954.44 on her claim that defendant acted willfully and wantonly by failing to maintain Al Raby High School's (Raby) gymnasium balcony in a safe condition. On appeal, defendant asserts the trial court

abused its discretion by admitting evidence of improvements defendant made to the balcony after plaintiff was injured. Specifically, defendant asserts that evidence of post-accident remedial measures was improperly admitted as proof of defendant's liability. Finding that defendant's claim of error in this regard was forfeited, we affirm the court's judgment.

¶ 3 I. BACKGROUND

¶ 4 On March 2, 2013, plaintiff went to Raby's gym to watch her granddaughter play basketball. An event staff member directed plaintiff and her family to sit in the upstairs balcony. The balcony consisted of a 16-inch high concrete platform seating area that was painted black and had three sets of stairs, only one of which contained a handrail. Plaintiff testified that it was difficult to see in the dark balcony. According to plaintiff, her son and her daughter, it was difficult to locate the stairways and find a clear path because the stairs themselves were being used as seating. As soon as plaintiff saw her son sitting in the first row in the middle of the balcony, she attempted to join him. While navigating her way through the crowd in a somewhat serpentine path, owing to the seating conditions, plaintiff stepped down from one platform to another but was unable to successfully descend the 16-inch step. Plaintiff fell on her left side, suffering two distinct fractures to her left leg. After these fractures were treated in a hospital, she spent 75 days in inpatient rehabilitation.

¶ 5 About a year after plaintiff's fall, the City of Chicago Fire Prevention Bureau assessed Raby's balcony and found it violated the Municipal Code of Chicago, because the balcony lacked handrails at the side of the stairwells, the gymnasium had no occupancy placard, and spectators obstructed the stairwells by sitting on them. Subsequently, defendant made the requisite changes to the balcony, added colored tread markings on the stairways, placed guard

rails in front of all balcony seating, placed a guard fence at the front of the balcony and painted the walls a lighter color.

¶ 6 A. Pretrial

¶ 7 Plaintiff's complaint alleged that defendant engaged in willful and wanton misconduct when it failed to maintain its gymnasium, resulting in personal injuries. Prior to trial, defendant filed a motion *in limine* seeking to bar evidence regarding any subsequent repairs or modifications defendant made to the balcony after plaintiff's fall. Contrarily, plaintiff filed a motion to have the court find that evidence of all the repairs were admissible. Specifically, defendant argued that such evidence was inadmissible because Illinois law has consistently held that post-accident remedial measures to a premise are not admissible as proof of liability. *Schaffner v. Chicago & North Western Transp. Co.* 129 Ill. 2d 1, 14 (1989). We note that defendant's motion did not differentiate between repairs that were voluntary and repairs that were involuntary. Plaintiff's motion similarly glossed over the undeniable fact that only some of the modifications to the balcony were involuntary and simply argued that all of the modifications should be admitted, suggesting that they were mandated by the order from the Fire Prevention Bureau, thus arguably falling within an exception to the above-stated general rule. See *Gaunt & Haynes, Inc. v. Moritz Corp.*, 138 Ill. App. 3d 356, 365 (1985) (holding that the general exclusionary rule relating to post-accident remedial measures did not apply because the defendant did not act voluntarily, but was instead required to act by a governmental authority).

¶ 8 During a lengthy proceeding discussing the opposing motions, defendant and plaintiff each clearly took an all-or-nothing approach to the admissibility of the evidence. Defendant argued that all the of its post-accident remedial measures were voluntary and therefore inadmissible, while plaintiff argued that none of those measures were voluntary. The court

initially found a jury might improperly draw the inference that the post-accident remedial measure implied liability. The court stated as follows:

> "How would it be if we just put it in as a matter of fact. It's evidence. It did happen. It got repaired 14 months later. And then leave out or bar any indication that it was done out of the bleeding heart of the defendant and their concern about safety. They won't get away with putting that in because we know that there was a governmental order, and we will not utilize it as proof positive that [defense] was negligent 14 months earlier, that is to say, deficient in safety. Put it that way, by the word negligence. In other words, it wasn't up to snuff."

Accordingly, it appears that at that point, the court found such evidence to be admissible to show the fact of the alterations but not to support an inference of liability.

¶ 9 That being said, plaintiff persisted in arguing that the modifications were mandated by a governmental authority and fell within the exception to the rule against the admission of post-accident remedial measures for the purpose of showing a defendant's liability. Although the record is a bit muddled, the court then vacillated, agreed with plaintiff's argument and stated that the post-remedial evidence could be admitted for the purpose of showing defendant's liability, again without distinguishing between the voluntary and involuntary repairs. As to the admission of the photographs that showed the modifications, defense counsel objected on the basis of foundation, claiming he would "hold them to laying a proper foundation. I'm going to challenge the proper foundation on that for the Court's examination." The Court decided the photographs could not be used in opening statements and would only be allowed after proper foundation was established.

¶ 10 Both parties prepared written orders for the judge's signature. The order prepared by plaintiff stated that the motion to admit this evidence was granted and modified in that the photographs could not be used in opening statements. The order handwritten by defense counsel simply stated that defendant's motion was "denied," without any distinction made about whether any of the changes were voluntary. The court entered both orders. Thus, before trial, it appeared the court's position was that, assuming the absence of any foundational defects, evidence of post-accident remedial measures could be admitted to show defendant was wilful and wanton.

¶ 11 B. Trial

¶ 12 During plaintiff's opening statement, counsel addressed defendant's post-accident remedial measures:

> "You're also going to learn another way the Board knew that this was a dangerous condition and that's because after Miss Price encountered it in the March of 2013, they fixed it. Now there are railings. There's grit on the tape that is multicolored to indicate to people that there are stairs there. They're less slippery. They repainted so that it was brighter. There are signs up that say Watch Your Step. They waited until Miss Price suffered serious injury, but they brought balcony up to code."

Despite the lengthy arguments on the motions *in limine*, defendant did not preserve its claim of error by objecting to these rather loaded contentions, suggesting that the voluntary and involuntary remedial measures were undertaken in response to plaintiff's injuries.

¶ 13 Prior to examination of Femi Skanes, Raby's principal, defendant argued against the admission of the photographs outside the presence of the jury. Defense counsel stated, "I'm just renewing our motion to bar those pursuant to our motion *in limine*. As the Court will recall, you've already ruled that they *can be used for a limited purpose*, but I want the record to reflect

that I'm objecting to those, but Principal Skanes will identify the photos." (Emphasis added.) To this, the court similarly responded, "we tried to make it clear that it was not as a proof of prior deficiencies or any admission of any kind." Instead of reminding the court of its prior ruling that plaintiff could present evidence of post-accident remedial measures to show defendant's liability, plaintiff's attorney responded, "Yes, your honor. The ruling is quite clear. [Defense counsel] is just extending a courtesy to plaintiff by making his record so that he doesn't need to interrupt the examination with objections. So we're all on the same page, your Honor." With the benefit of retrospect, we simply state the fact that they were clearly *not* on the same page. Apparently speaking to defense counsel, the court then stated that during closing arguments, "you can simply point out we were showing those for a purpose to show that we had improved it or whatever without conceding anything." Thus, at this point in time, it appeared the court again modified its prior ruling and returned to its rather vague "limited purposes" rationale. Neither counsel sought to clarify or redirect the court on this seemingly critical trial issue at this or any other time during the trial.

¶ 14 During plaintiff's direct examination of Skanes, plaintiff utilized at least four photos of the balcony area, two of which were specifically identified as representing the condition of the balcony at the time of plaintiff's fall. Two others, however, showed defendant's modifications in the form of the colored tread markings on the stairways, guardrails in front of all the seating in the balcony, a guard fence at the front of the balcony and painted walls. Plaintiff questioned Skanes about what was depicted in the photographs, and the principal described the current condition of the balcony. Defense counsel made no objection on the basis that plaintiff was improperly attempting to admit these photographs as proof of liability. During cross-

examination, defense counsel did nothing to undercut the attempted foundation laid by his adversary.

¶ 15 While plaintiff's counsel was wrapping up his rather brief, two-day case, the court and the parties discussed the formal admission of the various exhibits including the before-and-after photographs. At this time, defense counsel did not object on the basis of foundation or that plaintiff was improperly using the photographs as evidence of liability. Instead, defense counsel only asked that the photos not be given to the jury during its deliberations. Plaintiff acceded to that request. Defendant rested its case without presenting any evidence.

¶ 16 Plaintiff's closing arguments proceeded without a single objection, even though plaintiff's counsel used the post-remedial photographs in a manner most detrimental to the defense, suggesting that the photos singlehandedly established defendant's willful and wanton conduct. For example, plaintiff's counsel showed a post-accident photograph and stated:

> "Everyone's heard the expression a picture says a thousand words. I feel like I don't even have to stand up here today. If I just stood up here today and showed that picture, that's conscious disregard. Is that even the same balcony? *** Talk about darkness, right? They painted the walls white. Why? Because it was dark."

Plaintiff's counsel also noted, "what are those things *** on the floor right there? That's that tread edge delineation we were talking about. That's all they had to do and they didn't even do that." Counsel went even further by saying, "But what's telling about that picture? They didn't just put handrails. They did bars all the way across, all the way across the seats. Why? Because they knew it was too steep." Defense counsel remained silent. In his closing argument, defense counsel did not mention the repairs and instead focused on plaintiff's contributory fault. The jury found in favor of plaintiff and against defendant, awarding plaintiff $266,954.44 in damages.

¶ 17 Defendant filed a motion for new trial, arguing that the trial court erroneously admitted evidence of modifications and that this evidence affected the outcome of the trial. The posttrial motion was the first time defendant made a distinction between voluntary and involuntary measures, arguing that the painted walls, tread delineation and guard rails were voluntarily implemented and therefore inadmissible for any purpose, especially to establish liability. Defendant conceded in the motion that some changes were involuntary as mandated by the Fire Prevention Bureau. The trial court denied the motion and defendants filed a timely notice of appeal.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant asserts the trial court abused its discretion by admitting evidence of voluntary improvements defendant made to the balcony, entitling defendant to a new trial as voluntary improvements are inadmissible as evidence of wilful and wanton conduct. As noted above, the court and counsel made several markedly inconsistent statements regarding this issue. Initially, the court held that the evidence would be admissible for a "limited purpose," but failed to succinctly state what that limited purpose would be. Later, it suggested that plaintiff could use the evidence as proof of liability. Before Skanes testified, defense counsel stated that the court's ruling was "clear" that it would only be admitted for a "limited purpose." Then, during the examination of Skanes, the court suggested that the post-accident remedial measure evidence would only be admissible for a limited purpose. Succinctly stated, the court was vacillating on this issue, which might strike one as unfortunate, but it is quite illustrative of the interlocutory nature of a motion *in limine*. *Cetera v. DiFilippo* 404 Ill. App. 3d 20, 40 (2010) (stating that if the court makes a ruling before trial pursuant to a party's motion *in limine*, the rulings remain subject to reconsideration by the court throughout the trial). The only question that may possibly

remain is whether plaintiff violated the court's ultimate ruling on the admissibility of the evidence, a distinct legal issue for which neither party has cited any case law. Regardless of what the court's ultimate ruling was on the admissibility of the evidence, defendant failed to preserve any assertion that the jury was permitted to consider the evidence at issue for an improper purpose.[1]

¶ 20 A court's evidentiary rulings are unreviewable on appeal if they have not been properly preserved by the moving party. See *Thornton v. Garcini*, 237 Ill. 2d 100, 106 (2009). An *in limine* order has been characterized as a potent weapon because it allows a party, prior to trial, to limit or prohibit interrogation by the other party. *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill. 2d 545, 549-50 (1981). Because of these restrictions, it is crucial that an *in limine* order be clear, so that all parties accurately understand its parameters. *Id*. at 550. When a motion *in limine* is denied, the unsuccessful movant is left with the responsibility of specifically objecting to the evidence when it is offered at trial. *Cunningham v. Millers General Ins. Co.*, 227 Ill. App. 3d 201, 206 (1992).

¶ 21 In short, the mere denial of a motion *in limine* does not preserve an objection to disputed evidence later introduced at trial. *Illinois State Toll Highway Authority v. Heritage Standard Bank and Trust Co.*, 163 Ill. 2d 498, 502 (1994). Absent the requisite objection, the right to raise the issue on appeal is forfeited. *Id*. Furthermore, a party forfeits the presentation of evidence exceeding the scope of a court's evidentiary ruling by failing to make a timely objection. *City of Champaign v. Sides*, 349 Ill. App. 3d 293, 308-09 (2004); see also *Lawler v. MacDuff*, 335 Ill. App. 3d 144, 154 (2002) (stating that a party forfeits claims to the admission of evidence by failing to object when similar evidence is offered). Moreover, when an objection is made,

[1] Contrary to plaintiff's suggestion on appeal, defendant does not challenge the sufficiency of the evidence and the manifest weight of the evidence standard has no bearing on our review.

specific grounds must be stated and other grounds not stated are forfeited on review. *Gausselin v. Commonwealth Edison Co.*, 260 Ill. App. 3d 1068, 1079 (1994). The primary purpose of this forfeiture rule is to ensure that the trial court has the opportunity to correct the error as it occurs. *Id*. A trial court cannot correct the error and prevent prejudice if the objection is not made in a timely fashion. *Id*. at 1080.

¶ 22 Below, defendant persistently failed to defend its overarching argument that evidence of voluntary post-accident remedial measures could not be considered as evidence of defendant's liability. Defendant's motion *in limine* made no argument that even if the court found that evidence of certain involuntary post-remedial measures would be admissible, other modifications were voluntary and therefore inadmissible. We also note that while defense counsel clearly believed that the evidence was only to be used for a limited purpose, this was never stated in any order that was drafted for the court's signature, much less articulated on the record in any of the several arguments during trial on this issue.

¶ 23 The written order prepared by plaintiff’s attorney and signed by the court made no attempt to clarify how the evidence might be used and did not limit the scope this evidence. As stated above, the same is true of defendant's handwritten order, which simply stated that the motion was "denied." Defendant failed to even suggest that the order prepared by plaintiff was overly broad, encompassing voluntary measures as well as involuntary ones. Although the court's equivocation on the admissibility of the evidence left some doubt of the court's intentions, it was incumbent upon defendant to seek clarification, as it was the party seeking to exclude the evidence. See *Cunningham*, 227 Ill. App. 3d at 204.

¶ 24 Although the orders on the motions *in limine* were demonstrably unhelpful to defendant, it still had plenty of opportunities to object to the use of the post-accident evidence. The evidence

was discussed for the first time during plaintiff's opening statements. Defendant made no objection. Before Skanes' testimony, the court appears to have adopted defendant's position that the post-accident photos were not admissible to show defendant had been liable. Curiously, plaintiff's attorney proceeded to suggest that defense counsel was simply making a continuing objection so as not to interrupt direct examination. The remark made by plaintiff's attorney is puzzling given that the court had just stated, favorably to defendant, that the evidence could not be used to support the inference of prior liability. Plaintiff's attorney shed no further light on what he believed the basis defendant's continuing objection to be and defense counsel similarly did not seek clarification of that remark.

¶ 25 Plaintiff displayed the photographs and questioned Skanes about the current condition of the balcony. Succinctly stated, defense counsel made no contemporaneous objection that plaintiff was using the photographs for improper purposes, notwithstanding that defendant objected with respect to Skanes' personal knowledge regarding the specific kind of tape used in post-accident modifications. The importance of a contemporaneous objection in this case is highlighted by the court's comments, which were in the form of a *sua sponte* limiting instruction.

¶ 26 Rather than specifically addressing whether Skanes had personal knowledge, the court stated, "I think we're interested in what it really was at the time the incidence occurred. So I think that if there's improvements, that's just for the *limited purpose* of showing that something was done." (Emphasis added.) A contemporaneous objection could have been an opportunity to maintain the exact point defendant now attempts to appeal. Defendant concedes that the court's instruction was confusing, to the extent it qualifies as a limiting instruction, yet, defense counsel made no effort during the trial to seek clarification for defendant or for the jury. By remaining silent, defense counsel denied the trial court the opportunity to correct any alleged error.

¶ 27 After the court's comments, it encouraged plaintiff's counsel to "wrap up." A few questions about the color of paint were asked and plaintiff's attorney finally asked the witness if she agreed that the balcony was "a lot less dangerous" than it was when plaintiff was injured. Defense counsel objected, stating that the question constituted an "ultimate conclusion." That being said, counsel did not object on the basis that her answer could be used for an improper purpose. The witness did not answer the question and the court simply stated, "I think it's already been covered." Despite the lack of clarity in the court's response, defense counsel did not seek a more specific ruling or ask that the question be stricken.

¶ 28 Defense counsel continued his inaction when plaintiff formally asked for the admission of the photographs and other exhibits before resting her case. Counsel's only objection related to further publishing the exhibits by sending them with the jury for deliberations. Defense counsel never sought any instruction that would have informed the jury of the purpose for admitting the evidence and did not offer an objection that plaintiff never supplied the necessary foundation either.

¶ 29 Remarkably enough, defendant again forfeited this issue by failing to object in plaintiff's closing argument when plaintiff was certainly using the post-accident remedial evidence as proof of defendant's liability. It remained incumbent on defense counsel to object to the improper use of the evidence. Finally, defendant filed a posttrial motion, asserting in a rather dilatory fashion, that the evidence showed both voluntary and involuntary post-accident remedial measures. Issues not presented to the court during the course of the trial may not be raised for the first time in a motion for a new trial. *Angelini v. Snow*, 58 Ill. App. 3d 116, 118 (1978). Thus, defendant's contention came far too late. Parenthetically, we also find that plaintiff's suggestion at oral

argument, that defendant did not raise this issue until the filing of its reply brief on appeal, is both inaccurate and irrelevant, as the matter would still be forfeited.

¶ 30 Our review of the record, made tedious by the parties' lack of attention and diligence below, shows that defendant thoroughly forfeited any challenge to the jury considering evidence of post-accident remedial measures as evidence of liability. To the extent defendant argues that plaintiff failed to lay a foundation for the photographs and that evidence of the photographs was irrelevant, defendant has failed to cite any legal authority in support of its contentions. *See* Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Accordingly, these contentions are forfeited. *See Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5 (finding a party forfeited the right to review by failing to comply with supreme court rules and to cite pertinent legal authority).

¶ 31 III. CONCLUSION

¶ 32 Defendant's motion *in limine*, and its reiteration in the post-trial motion, was singularly insufficient for purposes of preserving any challenge to the trial court's evidentiary ruling or defendant's violation of that ruling, using post-accident remedial measures as evidence of liability. Defendant has also forfeited review of plaintiff's failure to lay proper foundation for the photographs and defendant's suggestion that the evidence was irrelevant. Because of forfeiture, we need not reach any other related issues raised by defendant on appeal.

¶ 33 We therefore affirm the judgment of the trial court.

¶ 34 Affirmed.