2017 IL App (4th) 160446-U

NO. 4-16-0446

FILED
April 10, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

CAROL A. ROY,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
CHELSEA N. SACKMAN,	)	No. 13L174
Defendant-Appellant.	)	
	)	Honorable
	)	Michael Q. Jones,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) By not citing applicable authority, defendant forfeited her argument the trial court should have *sua sponte* ordered a mistrial when plaintiff's counsel, during opening statement, made a factually correct but irrelevant statement defendant was "under the influence" when their automobile collision occurred.

(2) The trial court erred in denying defendant's motion for a new trial, as the record shows defendant was substantially prejudiced by plaintiff's counsel's irrelevant remark defendant was "under the influence."

¶ 2 On April 5, 2012, plaintiff, Carol A. Roy, and defendant, Chelsea N. Sackman, were involved in a motor-vehicle accident. While plaintiff was stopped, preparing to make a left turn, defendant's vehicle collided with the rear of plaintiff's car. In March 2016, a jury trial was held only on the issue of damages. During plaintiff's opening statement, counsel began a sentence by stating defendant was "under the influence." The trial court sustained defendant's

objection. Trial ensued, and the jury returned a damages award of $170,000—$65,000 more than plaintiff requested.

¶ 3 Defendant appeals, arguing the trial court erred by (1) not granting a mistrial *sua sponte* when plaintiff's counsel intentionally introduced the accusation defendant was "under the influence" when the collision occurred; (2) denying defendant's posttrial request for a mistrial; (3) allowing the jury to award damages for "future" or "permanent" injuries; and (4) allowing plaintiff's counsel to argue during closing for a "per diem" award. We agree with defendant's second argument and reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 The trial began on March 7, 2016. The day of trial, defendant admitted causing the rear-end collision. Defendant, however, disputed the nature and extent of plaintiff's injuries.

¶ 6 At trial, plaintiff was represented by two attorneys, David Steigmann and Elizabeth Holder. Holder provided plaintiff's opening statement. About four pages of transcript into the opening statement, Holder stated the following: "As a result of this collision, what the defendant testified to in her deposition was that she was reaching down to grab her chap stick and had taken her eyes off of the road, slamming into [plaintiff]. [Plaintiff] said she never heard brakes. She'll testify to that. The defendant in her deposition also admits to being under the influence—." At this point, defendant's counsel [who], objected, stating, "That's irrelevant to this. We've admitted we're at fault for the accident."

¶ 7 The trial court held a bench conference and sustained the objection. Holder continued the opening statement.

¶ 8 After defendant's opening statement, plaintiff called defendant as her first

witness. Defendant, age 24 at the time of the collision, testified she was driving a 2002 Toyota Camry on April 5, 2012. Before the collision, defendant was driving 35 miles per hour. She dropped her lip balm and reached down to retrieve it. Defendant did not remember whether she had time to touch the brakes before hitting plaintiff's 1998 Buick. Defendant's air bag deployed, and an ambulance arrived at the scene. Defendant went to the hospital. She was issued a citation for failure to reduce speed.

¶ 9 Plaintiff presented the videotaped evidence deposition of Victoria J. Johnson, M.D., for the jury. Dr. Johnson testified she was board certified in physical medicine and rehabilitation. In April 2013, Dr. Johnson first saw plaintiff, who was 66 years old, for plaintiff's neck pain. Plaintiff reported she first experienced neck pain several hours after the April 2012 collision with defendant. Plaintiff's pain complaint was neck pain, which she rated as 3 on a 10-point scale. The pain did not last long, but it occurred about 10 times a day. Plaintiff told Dr. Johnson she had been in physical therapy and had taken some medications, but the medications made her sick. Plaintiff thereafter only took Tylenol for her pain.

¶ 10 According to Dr. Johnson, the first examination showed plaintiff "had mild degenerative disc disease at two levels, C5-6 and C6-7." Dr. Johnson explained the body contains seven cervical vertebrae, and plaintiff's mild degenerative disc disease was found in the lower two-thirds of her neck. After the first visit, Dr. Johnson believed plaintiff suffered arthritis that was likely preexisting but "made worse" by the collision. Dr. Johnson opined to a reasonable degree of medical certainty plaintiff's discs were injured by the collision. Dr. Johnson further opined, although treatment helped address some of plaintiff's pain, the injuries would remain and progress. Dr. Johnson believed it was possible the pain would continue the rest of her life and

opined it was more likely than not plaintiff's pain would worsen over time. Dr. Johnson recommended plaintiff see Scott Erickson, a chiropractor, for additional treatment.

¶ 11 On cross-examination, Dr. Johnson testified, during her physical examination of plaintiff, she did not elicit a pain response. Dr. Johnson agreed it was possible plaintiff could be pain-free after her treatment was completed. At plaintiff's second appointment with Dr. Johnson, on May 29, 2013, plaintiff reported she was 20 to 30% better. At the third and final visit with plaintiff on July 17, 2013, plaintiff reported feeling much better. She rated her pain at 1 out of 10 and stated her headaches had gone away.

¶ 12 Plaintiff testified on her own behalf. At the time of her testimony, plaintiff was 69 years old. She had been married to her husband, Russell Roy, for over 50 years. Plaintiff was a homemaker during most of her marriage. Russell retired from his job at Illinois Concrete in July 2011. Plaintiff and Russell had one daughter and two male grandchildren, aged 13 and 14. Before the collision, plaintiff loved gardening. Plaintiff dug holes and planted flowers and shrubs. She weeded, trimmed, and fertilized the garden. Plaintiff also enjoyed walking with her husband. Before the accident, they planned to join a walking club. Plaintiff also crocheted afghans and dish rags, used the computer, and cleaned her home.

¶ 13 According to plaintiff, on the day of the accident, she had been grocery shopping. Plaintiff was driving a 1998 Buick Park Avenue Ultra. On her way home, she stopped to turn left, and while waiting, she was hit. It sounded like a bomb. Plaintiff's car was pushed into the lane of oncoming traffic. Plaintiff feared getting hit again, so she pulled her car into a church parking lot. Plaintiff did not hear brakes squealing. A fire truck and an ambulance arrived.

¶ 14 Plaintiff testified she hurt after the accident. Plaintiff's neck and shoulder felt

sore. She also felt pain in her knee. Plaintiff had bruising from the top of her knee down the side of her leg. Before the collision, plaintiff had not suffered nor sought medical treatment for neck or back pain or for headaches.

¶ 15 Plaintiff stated she went to the emergency room for treatment two days after the accident. She had not felt well since the accident. Plaintiff spent the day after the collision in bed. When she went to apply lotion to her face the following day, plaintiff noticed her "neck hurt real bad here in the front" and her neck was swollen. At the time, plaintiff's pain was at a 6 or 7 out of 10. Plaintiff decided to go to the emergency room. The doctor prescribed pain medication, which nauseated plaintiff. Plaintiff did not continue taking that medication.

¶ 16 According to plaintiff, at some point after going to the emergency room, she saw a physician's assistant. After that visit, she began taking Tylenol. Plaintiff testified Tylenol did not help much with the pain. Plaintiff later met with her physician, Dr. Scott Cinnamon, who recommended physical therapy. Her initial treatment plan involved working with a physical therapist three times a week. Plaintiff's treatment was decreased until she no longer went to therapy but did at-home exercises to improve her neck pain. As of the date of her testimony, plaintiff continued doing those exercises and exercises prescribed by Dr. Erickson every day. Plaintiff anticipated doing the same exercises the rest of her life.

¶ 17 Plaintiff testified the physical therapy helped ease some of the pain, but she still suffered pain. Plaintiff no longer suffered headaches every day. Plaintiff did not have "a headache problem" before the collision. After the physical-therapy sessions ended, Dr. Cinnamon referred plaintiff to Dr. Johnson. Dr. Johnson referred plaintiff to Dr. Erickson, who performed chiropractic treatment on plaintiff. Dr. Erickson's treatment helped with plaintiff's

mobility, but plaintiff continued to feel pain. After a treatment, plaintiff would feel better, but the pain would return.

¶ 18 Plaintiff described her pain as intermittent. She suffered pain every day. At times, the pain was light. The pain was "probably worse" at the end of the day. Plaintiff noticed pain when she cooked or sat too much. Sometimes the pain lasted an hour; other times it lasted minutes. The night before she testified, she experienced pain from 8:30 p.m. until midnight. Some days the pain was tolerable.

¶ 19 According to plaintiff, the collision changed her life. She used to be able to clean the entire house in a day, but now she could only do part of it at a time before needing to lie down. Plaintiff's husband did more of the housekeeping tasks that required bending. Plaintiff no longer gardened, other than directing her husband in what to do. Plaintiff no longer took walks, because she was afraid of falling. Plaintiff no longer crocheted, because crocheting was hard on her neck. Plaintiff's pain impacted her relationship with her grandsons. She no longer went to their games, because the cold affected her, causing pain, and she could not sit on the bleachers. Before the accident, plaintiff and her husband attended their grandsons' athletic events, including soccer games, football games, and swimming meets. The pain also affected Russell, who took on more of the work.

¶ 20 On cross-examination, plaintiff testified she did not leave the accident in the ambulance. Russell arrived at the scene and took plaintiff home. Plaintiff last saw Dr. Erickson in July 2013. Dr. Erickson moved. She had not sought treatment from another chiropractor since that date.

¶ 21 Plaintiff's counsel then read the evidence deposition of Dr. Erickson to the jury.

Dr. Erickson first saw plaintiff on May 31, 2013. Plaintiff presented for examination and treatment of her neck. Plaintiff's pain was localized to her neck and bothered her occasionally. The pain was described "as a combination of sharp, dull, achy, shooting, stiff, sharp with motion, and shooting with motion." Plaintiff rated the pain at a 4 on a 10-point scale, and she said the pain moderately interfered with her life.

¶ 22 Dr. Erickson testified his "diagnostic impression was that of cervical sprain/strain and myofacial pain." He was reasonably certain plaintiff's problems were related to the April 5, 2012, automobile accident. Dr. Erickson recommended and treated plaintiff with chiropractic adjustments, acupuncture therapy, and laser therapy. Dr. Erickson further recommended exercises to strengthen the spine.

¶ 23 According to Dr. Erickson, between May 31 and July 10, 2013, plaintiff was seen by him or another chiropractor in his stead 13 times. Plaintiff reported feeling very well and pleased with her recovery. Plaintiff was performing her daily activities without pain. Dr. Erickson testified the symptoms had resolved. He agreed it was absolutely possible plaintiff could start feeling the symptoms again. The injury suffered by plaintiff is technically a lifelong or chronic injury. Plaintiff suffered symptoms of what some would call whiplash injury. If plaintiff began suffering the symptoms again, she should seek additional care. Dr. Erickson recommended plaintiff continue the at-home treatment and exercises regularly.

¶ 24 On cross-examination, Dr. Erickson testified he did not have an opinion on plaintiff's health before the accident. At his last visit with plaintiff, Dr. Erickson opined plaintiff reached maximum medical improvement and discharged her from his care.

¶ 25 Russell Roy testified on his wife's behalf. Before the collision, the two walked

together, going on walking trails and around the neighborhood. They did not walk far, but they went out two or three times each week. The two did yard work together, and at times, they would spend a full day together planting flowers. They went on antique trips and other day trips three or four times each year. Russell and plaintiff were also involved in their grandsons' lives, seeing them every weekend. In addition, they went to all of their games and other activities. Plaintiff did the majority of the housework.

¶ 26 According to Russell, after the accident, he observed his wife in pain. Russell testified he could tell when the pain was "coming on." Plaintiff would place her head on the back of the sofa. Plaintiff suffered pain daily.

¶ 27 Russell testified the collision and resulting pain were life-changing events for plaintiff. Plaintiff could only function for four or five hours per day, whereas before she would be moving all day. Plaintiff could no longer sit on bleachers to watch her grandsons' activities. She could not go to activities when the weather was cold. She no longer gardened. They no longer went on long day trips. Before the accident, they would stay out after 6 p.m., but now they had to return by 2 p.m., when plaintiff would require rest or a heat pad.

¶ 28 In Holder's closing argument, Holder mentioned plaintiff "would probably say I—$1,000,000 wouldn't be enough and I would rather—I would rather have no pain than $1,000,000." Holder asked the jury to award plaintiff $105,000, which included medical expenses and future pain and suffering.

¶ 29 The jury returned a verdict in favor of plaintiff in the total amount of $170,000. The jury assessed damages as follows: (1) $58,649.50 for loss of a normal life experience and reasonably certain to be experienced in the future; (2) $100,000 for past and future pain and

suffering; and (3) $11,350.50 for medical expenses.

¶ 30 In April 2016, defendant filed a motion for a new trial. Defendant acknowledged she testified in her deposition to having taken hydrocodone "[a] couple of hours" before the collision. Defendant asserted, however, she was denied a fair trial when plaintiff's counsel asserted in opening statement she was "under the influence." Defendant contended the phrase "under the influence" was made in bad faith and was highly prejudicial, as she admitted liability and the trial was only on the issues of proximate cause and damages. Defendant emphasized, as evidence of the prejudice, the amount of the verdict. In addition, defendant maintained impermissible damages were considered and awarded, as the testimony was insufficient to allow the jury to award damages for future pain and suffering.

¶ 31 In May 2016, the trial court held a hearing on defendant's posttrial motion. At the hearing, the court explained on the record the discussion among counsel and the court occurring after the objection to Holder's "under the influence" comment. The trial court stated the following:

> "The docket entry reflects that no sooner had the words 'under the influence' come out Ms. Holder's mouth that an objection was made, and I did call counsel up to a sidebar. What I said to counsel at sidebar wasn't recorded but I remember it pretty well, and we'll see if counsel remembers it the same way. I think the first thing I did was inquire of Ms. Holder, 'Am I missing something? Is there a claim for punitive damages here?' And she said, 'No.' And I think my next words were, 'How badly do you

want a mistrial?' "

After counsel for plaintiff and defendant agreed the trial court correctly recounted the discussion, the court further stated the following: "I think after that I sustained the objection having sent the message out of the hearing or the jury that the court strongly disapproved of this line of argument."

¶ 32 During argument, Holder stated defendant did not admit liability until the morning of pretrial. And, despite defendant's admission of having a prescription for hydrocodone and taking hydrocodone hours before the accident, defendant's counsel did not file a motion *in limine* barring any mention of her use of it. Holder denied intending to inflame the jury. Holder asserted, in her opening statement, she intended to set up a counterargument to defendant's position no injuries occurred. Holder maintained it would show defendant struck plaintiff at full speed, which would counter defendant's contention plaintiff suffered no injuries. Holder denied making the comment in bad faith.

¶ 33 Regarding defendant's argument she was denied a fair trial, the trial court stated the following:

> "The words 'under the influence' started to come out of Ms. Holder's mouth at the—in her opening statement. An immediate objection was made and the Court sustained it. The explanation for why counsel thought that might be an appropriate argument borders on the frivolous. I think the justification is she was under the influence that suggest her reaction time was slower, that suggests she was going faster when she impacted the plaintiff,

> that suggests the plaintiff got harmed more. Leaving aside how tenuous that connection might be, the real thrust of that argument is readily apparent."

¶ 34 The trial court hoped counsel was not suggesting in a civil case the trial court should decide for counsel whether or not to declare a mistrial on its own motion. The court noted its practice of "leaving the lawyering to lawyers" and articulated it believed whether to request a mistrial is a tactical decision. The court observed the comment was made once and not commented on again and did not permeate the trial. The court rejected the argument the amount of damages established defendant was substantially prejudiced by Holder's opening remark.

¶ 35 The trial court denied defendant's motion for a new trial. This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 Regarding Holder's opening statement, defendant asserts two errors: (1) the trial court erred in not ordering a mistrial *sua sponte*, and (2) the court improperly denied her motion for a new trial because the "under the influence" remark denied her a fair trial.

¶ 38 We begin with plaintiff's argument the trial court erred by not ordering a mistrial *sua sponte* when the comment occurred and the objection was made. In asserting this claim, defendant cites no relevant authority to support her contention at trial court should *sua sponte* grant a mistrial when a party makes an improper comment during opening statement in a civil trial. By not providing any authority, defendant forfeits this argument. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶ 56, 4 N.E.3d 1 (noting a court of review "is not simply a depository into which a party may dump the burden of argument and research").

¶ 39 Defendant next argues the trial court erred in denying defendant's posttrial motion for a new trial. A new trial is warranted based on an improper opening statement when the improper remarks (1) were the result of deliberate misconduct and not made in good faith, and (2) caused substantial prejudice. *Davis v. City of Chicago*, 2014 IL App (1st) 122427, ¶ 80, 8 N.E.3d 120. In determining whether to order a new trial, trial courts are vested with broad discretion. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 534, 736 N.E.2d 1074, 1091 (2000).

¶ 40 Regarding the first element, defendant maintains the record establishes Holder's remark was deliberate and not made in good faith. Defendant points to the trial court's comments finding the true purpose of the remark "readily apparent" and concluding Holder's theory "border[ed] on the frivolous." Defendant emphasizes there was no discovery involving her prescription for hydrocodone or expert discovery on its effect on driving. In contrast, plaintiff contends the issue of impact speed was relevant to prove the extent of her damages, and Holder believed defendant was under the influence of a drug known to impair reaction time. Plaintiff further emphasizes defendant did not admit liability until the morning of trial.

¶ 41 Tellingly, the record does not contain an explicit trial court finding Holder's remark was or was not in good faith. However, he labeled the remark as bordering on frivolous and made for an improper purpose. The record shows the trial court did not believe Holder's remark was anything other than deliberate or made for the purpose of establishing "impact speed." As defendant emphasizes in her brief, no discovery occurred involving the prescription for hydrocodone or its effect on driving. There was no evidence of accident reconstruction to assist in determining speed. The record contains no factual basis for the conclusion defendant's use of hydrocodone contributed or caused the accident. We agree with the trial court that "the

real thrust of [Holder's] argument is readily apparent." The first element supports a mistrial.

¶ 42 Regarding the second element, defendant maintains she was substantially prejudiced by Holder's remark. Defendant argues the remark occurred during opening statement, when the jury was highly attentive. Defendant maintains an inference of her being "under the influence" is extremely prejudicial, allowing the jury to believe defendant engaged in illegal or improper behavior. Defendant relies on the award of damages $65,000 over the amount plaintiff requested as proof the jury was affected by the remark. Plaintiff disagrees with defendant's conclusion she suffered substantial prejudice. Plaintiff differentiates "under the influence" from "intoxicated," arguing any statement of being "under the influence" is not as prejudicial as asserting someone is "intoxicated." Plaintiff emphasizes the trial court's findings and the fact no additional references to defendant's prescription-drug use were made during trial or in argument.

¶ 43 We find defendant was substantially prejudiced and denied a fair trial. Defendant's cases, *Marshall v. Osborn*, 213 Ill. App. 3d 134, 140, 571 N.E.2d 492, 497 (1991), and *Bielaga v. Mozdzeniak*, 328 Ill. App. 3d 291, 298, 765 N.E.2d 1131, 1135-36 (2002), though not directly on point, show that references to "intoxication" may have an "extremely prejudicial effect" on a jury. We find unconvincing plaintiff's argument "under the influence" does not mean the same as "intoxication." A reference to being "under the influence," with no evidence to follow to define said influence, has the same effect as asserting defendant was "intoxicated." Such an assertion could not, alone, bolster plaintiff's claim defendant was speeding and that exacerbated the injuries. It raises the specter of marijuana or other illegal drugs rather than a prescription drug. The jury was left to speculate as to what substance, legally or illegally taken, influenced defendant and caused her to harm plaintiff. That remark alone might support a finding

of substantial prejudice, but the fact the jury awarded $65,000 over the $105,000 figure sought by plaintiff leads to the conclusion the jury was unduly affected by Holder's remark and defendant was denied a fair trial.

¶ 44 The trial court erred in denying defendant's motion for a new trial. We therefore reverse the order denying the motion and remand for further proceedings. Having found reversal is warranted on this ground, we need not address defendant's remaining arguments.

¶ 45 III. CONCLUSION

¶ 46 We reverse the trial court's judgment and remand for further proceedings.

¶ 47 Reversed and remanded.