2018 IL App (1st) 172446-U

THIRD DIVISION
December 12, 2018

No. 1-17-2446

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DR. STEPHEN MAYERI, Plaintiff-Appellant, v. ERIE INSURANCE EXCHANGE, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 15 L 1385 Honorable Patrick Lustig, Judge Presiding

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Affirmed. Trial court did not err in denying motion for new trial. Defense counsel's reference to plaintiff's expert as "hired gun" and alleged vouching for defense expert did not constitute reversible error. *Frye* objection was forfeited and was not error in any event.

¶ 2 After he was involved in a low-speed, rear-end collision while driving from Los Angeles to San Francisco in August 2002, plaintiff-appellant Dr. Stephen Mayeri sued his insurance company, defendant-appellee Erie Insurance Exchange, seeking payment under an underinsured motorist provision of his insurance policy. A jury awarded Mayeri $35,000 in damages, an

amount representing a mere fraction of Mayeri's claimed damages. And because Mayeri had received over $100,000 from the at-fault motorist's insurance company, the court subjected the jury's verdict to an off-set that reduced the jury's award to zero.

¶ 3 On appeal, Mayeri contends that the jury's damages award was the product of an unfair trial, for three reasons: (1) during closing argument and in violation of a motion *in limine*, defense counsel referred to one of Mayeri's retained expert witnesses as a "hired gun," (2) again during closing argument, defense counsel improperly vouched for one of defendant's experts, and (3) the court allowed improper and inadmissible expert testimony. We disagree with each of these arguments and affirm.

¶ 4 BACKGROUND

¶ 5 On August 10, 2002, Mayeri was driving on Interstate 5 in Orange County, California, when he was rear-ended by a vehicle driven by Megan Erdman. According to his complaint, Mayeri "made claims" against Erdman, and Erdman's insurance company ultimately paid Mayeri $100,000, the coverage limit of Erdman's insurance policy.

¶ 6 At the time of the accident, Mayeri had an automobile insurance policy with Erie that provided underinsured motorist coverage, capped at $1,000,000 per accident. The Erie policy also contained a mandatory arbitration provision, but the policy stated that arbitration awards would only be binding up to the minimum financial responsibility limits of the Illinois Vehicle Code.

¶ 7 In 2006, Mayeri initiated arbitration proceedings against Erie. In February 2009, Erie filed a declaratory judgment action against Mayeri. That case was terminated in 2010.

¶ 8 In October 2014, Erie disclosed Dr. Charles Bain, a medical/biomechanical expert, as a 213(f)(3) witness. See Ill. S. Ct. R. 213(f)(3). The disclosure stated that Dr. Bain "will testify as

to the force or lack of force from the impact of the accident upon [Mayeri], including but not limited to [Mayeri's] spine as a result of the August 10, 2002, accident and the fact that the impact did not have sufficient force to cause the injuries of which Mr. Mayeri complains." The disclosure further stated that Dr. Bain would opine:

(1) "[Dr.] Mayeri had progressive degenerative disease of the spine prior to and after the motor vehicle accident in August of 2002";

(2) "The August 10, 2002, accident did not cause [Dr.] Mayeri's alleged condition and did not alter or change said pre-existing condition";

(3) "Testing shows that the impact related change of velocity [during the accident] was less than 3 miles an hour and that Defendant's vehicle was traveling at less than 5 miles an hour at the moment of impact";

(4) "The event in question was a very, low-speed rear end collision that would not have subjected Mr. Mayeri's lower back to any forces that would cause injury";

(5) "[Dr.] Mayeri would have put far greater compressive force and motion on his lumbar spine, by getting out of his car, than that which he was subjected to by the subject impact"; and

(6) "The forces exerted on Plaintiff's lumbar spine by the August 10, 2002, accident did not cause any injury to his spine."

¶ 9 In December 2014, Erie suggested that the arbitration proceeding be canceled and that Mayeri instead proceed with a jury trial. Mayeri agreed and, on February 10, 2015, filed this lawsuit against Erie.

¶ 10 Before trial, the parties filed motions *in limine*. Two are relevant to this appeal. First, Mayeri filed a motion *in limine* to bar Dr. Bain from testifying. The motion was brought pursuant

to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and argued that the principles and methodology on which Dr. Bain's opinions were based were not generally accepted in the medical/biomechanical fields. The court denied this motion.

¶ 11 Second, Mayeri filed a motion *in limine* seeking to bar any and all argument that his "expert witnesses are 'high-priced' experts or 'hired-gun doctors.' " Erie did not object to this motion, and the circuit court granted it.

¶ 12 At trial, Mayeri testified that on August 10, 2002, he was driving with his 85 year-old father on Interstate 5 in Orange County, California. At some point, Mayeri encountered traffic congestion and came to a stop. When he stopped, there was approximately "a car length" between his vehicle and the vehicle in front of him. According to Mayeri, five seconds later, a car "slammed" into the rear of his car. Mayeri stated that as a result of the impact, he "was throw back into [his] seat" and his neck "went back." He described the impact as "pretty strong" and stated that he "immediately felt neck pain, and then *** within 20 minutes I started to feel lower back pain."

¶ 13 After the accident, Mayeri checked on his father, who Mayeri described as "not 100% cognitively due to [a] stroke." Mayeri's father said he was "okay," and Mayeri exited the car and spoke to the driver who hit him. Mayeri testified that the driver appeared to be okay. Mayeri then looked at his car and saw "some scratches to the bumper and perhaps a dent." Mayeri testified that he did not call the police and he did not go to the hospital "right away."

¶ 14 In September 2002, after returning to Chicago, Mayeri went to the emergency room because he began feeling "pins and needles" in his right leg and foot. During the course of treatment, Mayeri told the emergency room physician that he had "pre-existing neck problems,

and that the pain that I have had in the past would radiate to my upper back between my shoulder blades."

¶ 15 Later that month, Mayeri had a follow-up appointment with Dr. Cerulo, the physician had previously treated Mayeri's neck pain. Dr. Cerulo ordered an MRI. Mayeri testified that "in the *** couple of weeks after [he] saw Dr. Cerulo, [his] pain was actually getting worse." Nonetheless, from September 2002 through May 2003, Mayeri continued working as an emergency room physician. Mayeri's MRI was taken in November 2002.

¶ 16 Between November 2002 and May 2003, Mayeri's pain "became a little more tolerable." However, in May 2003, Mayeri went to the Chicago Rehab Institute because "the pain that had let up a little bit started to come back really badly." In July 2003, Mayeri stopped working as an emergency room physician "because the pain became unbearable." From July 2003 to July 2005, Mayeri continued to experience pain. During that time, Dr. Cerulo ordered three injections and physical therapy for Mayeri. Mayeri stopped seeing Dr. Cerulo in July 2005 when he moved out-of-state to begin a psychiatry residency.

¶ 17 On cross-examination, Mayeri testified that he did not see a doctor when he was in California, "even though [his] back pain had started within 20 minutes of the accident." He explained that at the time of the accident, he was 51 years old and his wife was pregnant, and that on April 15, 2003, his wife gave birth to a son. Mayeri acknowledged that a month after his son was born, he went to his doctor complaining that his back pain had gotten worse, and that within two and half months of his son being born, his pain had gotten so bad that he could no longer be an emergency room physician. In addition, Mayeri admitted that he "had neck pain approximately 50 percent of the time before the accident."

¶ 18 Mayeri further testified that when he visited Dr. Cerulo in September 2002, he ordered physical therapy and a return visit in six weeks. Mayeri testified, however, that he never attended physical therapy or returned for the follow-up visit.

¶ 19 Mayeri further testified that four weeks after he visited Dr. Cerulo in September 2002, he visited his primary care physician and told her his back pain "has gotten better." Mayeri then testified that in May 2003, he returned to his primary care physician and told her that his back pain had worsened since he had started lifting his son. Mayeri then acknowledged that "before going to [his primary care physician] and reporting to her that [his] back is worse since lifting [his] son, [he] had been working in all of the months preceding that and doing all of the bending, lifting of patients, and being on [his] feet 85 percent of the time."

¶ 20 Mayeri then testified that around this time, he was working obtain his pilot's license and become certified by the Federal Aviation Administration (FAA). In February 2003, Mayeri completed an application with the FAA that included questions about his medical history. In the form that Mayeri signed, he did not disclose that he had been treated by a doctor within the last three years, even though he had been treated by Dr. Cerulo and his primary care physician only a few months prior.

¶ 21 Mayeri then acknowledged that in 2005, he began seeing Dr. Michael Murphy pursuant to an "arrangement made by [his] lawyers." Mayeri testified that between 2005 and 2010, he saw Dr. Murphy every eight to 12 months to sign disability forms.

¶ 22 Mayeri then testified that his 85 year-old father did not complain of any injuries after the accident. He then acknowledged that after the accident, he checked his car and saw only some scrapes. He testified that when he returned his car to the rental agency, he did not tell the

company that the car sustained any damage, and the company never came to him after the fact to make a claim or demand payment for damage to the car.

¶ 23 On re-direct, Mayeri testified that at the time of the accident, he was already suffering from neck pain due to an accident that occurred in 1995.

¶ 24 Dr. Murphy testified on behalf of Mayeri via video deposition as a retained expert in orthopedic medicine. Dr. Murphy testified that he does medical/legal consulting and that he was retained by Mayeri. According to Dr. Murphy, Mayeri first visited his office in October 2005 complaining of lower back pain. After the visit, Dr. Murphy sent a letter to David Kauffman, one of Mayeri's attorneys, stating that he believed Mayeri's back pain was caused by the August 2002 accident.

¶ 25 In June 2006, Mayeri returned to Dr. Murphy's office and stated that there had been no change in the level of pain he was experiencing. In June 2007 and 2008, Mayeri again returned complaining of back pain. Dr. Murphy testified that Mayeri's last visit was in January 2010. Dr. Murphy testified that he did not believe that injuries which were revealed on Mayeri's MRIs pre-existed the August 2002 accident, explaining, "I think if they prexisted his motor vehicle accident he would have had significant back and right leg pain." Dr. Murphy explained that vehicular accidents can aggravate a pre-existing spinal conditions because "the impact in a motor vehicle accident *** can contort the spine in ways that is [*sic*] unnatural. And again, structures that are subjected to abnormal stress and strain and can give out or give way." Dr. Murphy then opined that all the pain Mayeri reported during the time he saw Mayeri was "related" to the August 2002 accident.

¶ 26 On cross-examination, Dr. Murphy testified that he was being paid $500 an hour to work on the case. He explained that between his deposition, meeting with Mayeri's attorneys, and

preparing for trial, he had spent four to five hours working on the case. Dr. Murphy testified that in August 2005, he received a letter containing some medical records from one of Mayeri's attorneys. At some point, Mayeri's attorney sent Dr. Murphy a check for $750.00. Dr. Murphy agreed that he "considered [himself] *** as being hired by the lawyer to examine Mayeri as opposed to him walking into your office and treating him as a treating physician."

¶ 27 Thereafter, Dr. Murphy testified that the first time he actually saw Mayeri was in October 2005. In preparation for that meeting, Dr. Murphy reviewed, among other documents, Mayeri's November 2002 MRI and a note prepared by Dr. Cerulo. In the note, Dr. Cerulo stated that Mayeri's MRI revealed "significant degenerative disease particulary in L5/S1. Dr. Murphy acknowledged that "degenerative disease of the spine is not something that occurs in a matter of months." He agreed with defense counsel that "that is something that occurred over the course of time, such that the spine, whether the disc or bones or whatever, that level of the spine is degenerating." In addition, Dr. Murphy acknowledged that the medical records he received showed that between September 30, 2002 and May 19, 2003, Mayeri did not see the doctor for back pain, attend physical therapy, or engage in other form of treatment.

¶ 28 Thereafter, Dr. Murphy testified that after he saw Mayeri in October 2005, he wrote a report for Mayeri's lawyers. Dr. Murphy admitted that he wrote the report in response to a request from Mayeri's attorneys to "provide opinions in that regard." However, when asked by defense counsel whether he opined in the October report that the August 2002 accident caused Mayeri's injuries, Dr. Murphy stated "[n]ot directly, no." In addition, Dr. Murphy acknowledged that in August 2005, he received a letter from Mayeri's attorney stating that Dr. Murphy's discussions with Mayeri and his attorneys, as well as his findings, notes, conclusions, and opinions were to be kept confidential and instructing Dr. Murphy not to prepare any written

reports unless Mayeri's attorney "was first aware of the contents" and "approved their final form before preparation." Dr. Murphy then acknowledged that he knew that Mayeri was involved in litigation and that he had been consulted by Mayeri's attorneys to "sign forms to confirm that [Mayeri] was disabled." On that point, Dr. Murphy testified that Mayeri came to his office once a year between 2005 and 2010 so that Dr. Murphy could sign forms stating that Mayeri was disabled. In response to a question from defense counsel, Dr. Murphy conceded that each of Mayeri's visits "coincide[d] with [a] request" to "sign a physician statement of disability." Thereafter, Dr. Murphy admitted that he was not providing Mayeri with any treatment other than examining him.

¶ 29 Dr. Murphy then testified that lifting things, including an infant, could cause a herniated disc. He then testified that when he rendered his opinion that the accident caused Mayeri's back injury, he had not (1) looked at pictures of the cars involved in the accident, (2) reviewed estimates of the damage, or (3) obtained "knowledge of the severity of the impact." Instead, Dr. Murphy arrived at his opinion based on Mayeri's statements that he began complaining about pain in his lower back around August 10, 2002. Dr. Murphy acknowledged, however, that Mayeri never mentioned whether the impact during the accident was severe.

¶ 30 Thereafter, Dr. Murphy acknowledged that when Mayeri presented to the emergency room in September 2002, in a medical history form he filled out as part of the hospital's intake procedure, Mayeri disclosed "back pain, neck pain, facet injection '97." Dr. Murphy then acknowledged that the degeneration he observed in Mayeri's MRI existed before the August 2002 accident. In addition, Dr. Murphy testified that a CT scan of Mayeri that was performed four to five years before the accident "showed significant degenerative disease in [Mayeri's]

cervical spine." Dr. Murphy acknowledged that a degenerated disc "could" cause lower back pain.

¶ 31 At the conclusion of Dr. Murphy's testimony, Dr, Mayeri rested his case in-chief. Erie then presented its case, beginning with the testimony of its expert, Dr. George Dohrmann. Dr. Dohrmann began by discussing the anatomy of the spine and progressive degenerative disease. He explained that bulging discs, protruding discs, and herniated discs are all symptoms of progressive degenerative disease. He further explained that by its very nature, progressive degenerative disease does not get better, only worse—as Dr. Dohrmann put it, "[i]t's relentlessly progressive." He also explained that progressive degenerative disease is not instantly symptomatic: "[I]t can be there not causing any symptomatology. It gets to a certain point, and then you can start to get symptomatology from it." Dr. Dohrmann testified unequivocally that progressive degenerative disease cannot be caused or worsened by trauma.

¶ 32 Dr. Dohrmann then testified to a reasonable degree of neurological certainty that he believed the only injury Mayeri sustained as a result of the accident was a muscle pull that would have resolved itself within three months. Dr. Dohrmann further opined that, based on his review of Mayeri's November 2002 MRI, he believed Mayeri had progressive degenerative disease and that it was not caused by the accident.

¶ 33 Dr. Dohrmann specifically noted that the MRI film showed "disc space narrowing" with "degenerative marrow changes" in the L5S1 disc—the same disc Mayeri claimed was injured in the accident. In addition, Dr. Dohrmann explained that the disc immediately above the L5S1 also showed signs of progressive degenerative disease. Specifically, the disc at L4L5 was protruding and bulging, which was causing "left neural foraminal stenosis." Dr. Dohrman explained that "the foramen is just a medical term for hole, and it's the hole through which the nerve goes.

Stenosis means narrowing. So the hole through which the nerve goes is narrowed by this." Similarly, the disc at L5S1 was bulging and showed signs of right foraminal disc protrusion which was causing an additional onset of foraminal stenosis. Dr. Dohrmann testified that these conditionsn "most certainly" existed before August 2002 "because it takes time for them to develop, and looking at how they look on the MRI of 11-4-02 the disease has been present for a matter of years."

¶ 34 Dr. Dohrmann then testified that "virtually all" instances of disc herniations, bulges, and protrusions are the result of progressive degenerative disease. Defense counsel then asked Dr. Dohrmann, "if you have a situation like this where you have an individual claiming herniation or protrusion was caused by an accident, what do you do? How do you determine whether *** this was caused by an accident versus the progressive degenerative process that you've already explained Mayeri has?" In response, Dr. Dohrmann testified that "you have to be able to see that there was trauma" and "to do that you would look at an MRI, and two things must be present"—first, "the supporting soft tissue of the spine" has to be "discontinuous in a certain area," and second, "you must have some disruption at least to the outermost layer of bone at that same level."

¶ 35 Dr. Dohrmann then testified that Mayeri's November 2002 MRI did not reveal any discontinuity in spinal tissue or bone at L5S1. As a result, Dr. Dohrmann opined that based on Mayeri's November 2002 MRI, there was "no evidence of trauma here." Dr. Dohrmann then reviewed Mayeri's July 2003 MRI and reached the same conclusion: "[T]here's no evidence of trauma here. He just has degenerative disease, but there's nothing that trauma caused." Dr. Dohrmann then testified that the degenerative condition itself could have caused Mayeri to have pain. Dr. Dohrmann then noted that the emergency room doctor diagnosed Mayeri with a

musculoskeletal spasm, which Dr. Dohrmann explained was consistent with his opinion that Mayeri sustained a muscle spasm as a result of the accident.

¶ 36 On cross-examination, Dr. Dohrmann testified that it was possible for a person with progressive degenerative disease who undergoes a "sudden movement" to experience radiating pain. Dr. Dohrmann admitted that the "sudden movement" of a car accident could trigger such pain, but he qualified that testimony. He explained that radiating pain related to progressive degenerative disease that was trigged by the sudden movement of a car accident "would be lasting and not just one episode." He then noted that Mayeri's radiating leg pain "wasn't something that was there and constantly present," and he also pointed out that Mayeri did not report his pain "right at the time of the accident," which is "the time when you'd expect it." Later, Dr. Dohrmann explained that a sudden movement can cause a person with progressive degenerative disease who has been asymptomatic to become symptomatic because the sudden movement can cause the protruded or herniated disc to interact with a nerve.

¶ 37 On re-direct, Dr. Dohrmann testified that the 2002 accident did not aggravate Mayeri's progressive degenerative disease. Elaborating, he stated "trauma to an area *** doesn't the change rate" of the disease's progression. He further noted that between when Mayeri went to the emergency room in September 2002 and May 2003, Mayeri did not make any further complaints of right leg numbness, which, as Dr. Dohrmann stated "just tells me that it had nothing to do with that." And he explained that the fact Mayeri continued working as an emergency room physician played a role in his analysis, because "[Mayeri] wouldn't do that if he had symptomatology [for progressive degenerative disease]."

¶ 38 Dr. Charles Bain testified as an expert in biomechanical science. He testified that he was retained by Erie to perform an "injury causation analysis." His analysis proceeded in four steps:

(1) accident reconstruction, which includes considering "what happened to the cars," "[w]hat type of forces were generated," and "the peak acceleration of the vehicles";

(2) "occupant kinematics," *i.e.*, how the person "moved] inside the vehicle" and "[w]hat types of forces and from which direction were [those forces] applies to various parts of the body";

(3) "biomechanical analysis," *i.e.*, "the effect of those forces that the person was subjected to"; and

(4) a review of the person's medical records "looking for objective evidence of injury, time line, [and] objective complaints."

¶ 39 With respect to the first step, accident reconstruction, Dr. Bain testified that he considered witness testimony describing the accident and the damage sustained by both vehicles. Dr. Bain noted that Erdman testified in her deposition that she slammed her brakes on and skidded into the back of Mayeri's car. With respect to the damage, Dr. Bain noted that Erdman testified that one of her headlights was misaligned and Mayeri stated that he saw some scratches on his car. Dr. Bain then stated:

"I don't know if you've rented vehicles and damaged them, but I have, with minimal damage they come chasing after me and want a bunch of money back.

So these scratches must have been fairly minor for them to have not—they would probably conclude that those were just normal wear and tear, which they don't charge for."

¶ 40 Dr. Bain also testified that due to a "phenomenon called break dive," when "you slam your brakes on, the nose of your vehicle drops down and the rear of it comes up." To account for

break dive in his analysis, Dr. Bain conducted "multiple break dives testing with a Saturn." Those tests revealed that Erdman's vehicle likely experienced approximately two inches of break dive as her vehicle collided with Mayeri's vehicle.

¶ 41 Dr. Bain then testified that he obtained actual bumpers for the vehicles from parts dealers and created a mock-up of Mayeri's rear bumper and Erdman's front bumper. Using a hydraulic press, Dr. Bain then compressed the components together to simulate the August 2002 accident. Dr. Bain explained that he "kept pushing the hydraulic press forward until [he] was sure that the damage was greater than what people were describing." He did that because he did not have pictures of the cars, so he "had to base [his] end point on what they said, which was sratches on one and misaligned head lamp on the other one." Ultimately, Dr. Bain applied 4300 pounds of force, which caused eight inches of compression. When Dr. Bain separated the bumpers, he observed that "the damage I created, it's certainly significantly greater than scratches and a misaligned head lamp." Specifically, Dr. Bain observed that the mock-up of Dr. Mayei's rear bumper had been "significantly damaged," to the point that in a real accident the bumper would have had to be replaced, and the mock-up of Erdman's front bumper had sustained two broken head lights and the front grille had been "pushed back considerably."

¶ 42 Based on the simulation, Dr. Bain determined that the peak acceleration during the accident was 4500 pounds. Using "formulas based on Newton's three laws," Dr. Bain determined that to cause the damage that he caused in the simulation, Erdman's vehicle would have had to be traveling "a little over five miles an hour." In addition, Dr. Bain determined that the force applied by Erdman's car to Mayeri's car in the simulation would have caused Mayeri's car to accelerate from 0 miles per hour to three miles per hour with a peak acceleration of 1.3 g that would have lasted "about a tenth of a second." Dr. Bain further calculated that the "delta-v"

for the collision was 3.2. He explained that delta-v measures an object's change in velocity and is used by accident reconstructionsists "as a way of signifying the severity of a car crash." However, Dr. Bain clarified that the numbers he generated during his simulation were "higher than *** the occupants would have seen in this event," *i.e.* in real life during the actual accident, because the damage in the simulation "was greater damage than what occurred in this event."

¶ 43 With respect to the occupant kinematic portion of his analysis, began by noting that the delta-v in the actual car crash would have been less than 3.2 because "[w]e don't have damage describe like I produced in my testing." Dr. Bain explained that ordinarily, he would do a full-scale crash test, but that that was not necessary in this case because "[t]his is such a low severity event. I know how people move in a vehicle. I know what forces are on their bodies both from decades of literature, but also from my own experience doing these type of tests." Thereafter, Dr. Bain testified that in rear-end collisions that produce a delta-v of 15, "you can see between 100 and 200 pounds of compressive loading." He then explained that "when the spine is protected you can go up to horrific acceleration levels, 40 g, and you're not going to injure the spine, you're not going to injure bones, ligaments, disks as long as it's supported." He noted, however, that "[i]n this event you had a 1.3, you'd be lucky to see 25 pounds, and that's probably excessive."

¶ 44 With respect to the biomechanical analysis, Dr. Bain testified that "1.3 g, as a horizontal acceleration that's biomechanically trivial. That's nothing." He then testified:

> "If I sit on the wooden bench over there and do a nice plop down, I can get 500, 600 pounds of compression in my lumbar spine. When I'm out jogging and every time my foot hits the ground, I will get between 300 and 500 pounds of compression in my lumbar spine with each heel strike. It's just for a fracture [*sic*] of a second, but it does go

that high. If I'm walking, it could be 150 to 250 pounds depending on what my gait is like.

***

I'm trying to give the jury an understanding of what 25 pounds of compression is, which is nothing.

You stress your low back far greater with virtually everything you do in life, getting in and out of bed, sitting in and out of office chairs, bending over to pick things up.

In a nutshell, when you look at the motion that happened in Mayeri's spine in this event and the stresses in his spine from this event, he stressed his spine far greater getting into the car that morning than what happened here.

So if he can tolerate getting into the car, he can tolerate the motion and he can tolerate the forces his low back was subjected to."

Thereafter, Dr. Bain testified to a reasonable degree of medical and scientific certainty that "[t]he horizontal acceleration was 1.3g and the vertical compressive loading wouldn't have exceeded 25 pounds," which, he opined, "[f]rom a biomechanical perspective those are trivial forces. If you can tolerate life, you can tolerate that."

¶ 45 With respect to the medical record review, Dr. Bain testified that based on his review of Mayeri's medical records and to a reasonable degree of medical certainty, he believed that Mayeri had "degenerative disc disease that he's had for years." Dr. Bain was then asked how the accident affected Mayeri's condition. He explained:

"Well, it's not going to affect his structure of his low body at all. I think the easiest way to answer that is, I mean, he stressed his low back many, many times more

> that day before this event happened by getting out of bed, sitting down for coffee, getting in his car. And when you look from a compression perspective and motion, think of the bending and twisting you have to do to get into your car, he's able to tolerate that. He's able to tolerate that motion and those forces, therefore, he's easily able to tolerate the minimal forces of motion in this event."

Thereafter, defense counsel asked Dr. Bain if he had formed any opinions as to whether Mayeri was injured in the accident. The following colloquy ensued:

> "A. This event is not going to alter the structure of his back one bit. Having said that, *** these events are loud, the motion is unexpected, and there is a subset of people when they're sitting tgere and they get hit, they suddenly tense up, they can get a muscle strain. *** so that is the injury potential from this event is what I would call a reflexive muscle strain, and in my clinical experience those get better within days as long as people stay active and keep on doing the things they should do normally.
>
> Q. Could the forces that Mayeri's back was subjected to *** cause any injury to his back?
>
> A. Not the forces. Not the forces. Maybe tensing up may have tweaked a muscle, but the structure of his body, the muscles and the spine, disks, ligaments, and bones, ***, none of those were injured by the forces of this event.
>
> ***
>
> Q. Was Mayeri's [pre-existing degenerative condition] in any way affected or changed by the impact from August of 2002?
>
> A. No, as I said, Mayeri stressed his low back far greater many times that morning before this event. He could tolerate those activities, he could tolerate this event."

¶ 46 On cross-examination, Dr. Bain testified that when he performed the accident reconstruction, he took into account Erdman's and Mayeri's statements about the accident. He acknowledged that he disregarded Mayeri's statements about the severity of the impact. He explained, however, that he disregarded those statements because they were not significant to his analysis, stating, "[p]eople have different perceptions of the same event. That's not what you're going to base reconstruction on." Later, Dr. Bain was confronted with testimony that Dr. Cerulo, who was Mayeri's treating physician, gave during a deposition to the effect that the car accident either caused Mayeri's disc injury or exacerbated a pre-existing condition. Dr. Bain acknowledged that he disagreed with Dr. Cerulo, even though Dr. Cerulo actually treated Mayeri. But Dr. Bain explained

> "It's not uncommon that I disagree with the treating physicians. The problem is the treating physicians are giving the causation opinion based on what Mr. Mayeri tells them. If he told them I woke up with this, they'd say, okay, it's degenerative. If I slipped and landed on my butt, oh, well, that's because you were clumsy and fell. If you were in a car crash, oh, it must be the car crash.
>
> They're basing their opinions solely on the information he gives them. they're not basing it on the scientific analysis."

¶ 47 On redirect examination, Dr. Bain reiterated that his analysis considered both Erdman's and Mayeri's accounts of the accident. Dr. Bain noted that Erdman testified that Mayeri "didn't behave like he was hurt" and that neither police nor an ambulance were called to the scene. Likewise, Dr. Bain testified that Mayeri did not testify that he reported to anyone at the scene that he had been involved in a severe car accident and he did not tell Erdman that he was in pain. Dr. Bain further testified that he learned through reading the depositions that a tow truck was not

called and both cars drove away from the accident. Dr. Bain then elaborated on why he gave little weight to Mayeri's description of the accident as "severe":

> "[T]his is subjective testimony, whether someone is saying they're hurt or not, someone says it's mild or severe. In this business when you hit somebody, it's always a minor event and when you're the one being hit, it's the worse [*sic*] thing in the world. That's the type of testimony we get. Whether that's truthful or not, you have to do the analysis to figure it out."

¶ 48 Dr. Bain was then asked whether he saw any statement in Erdman's or Mayeri's description of the damage "that would support the description that it was a severe impact." Mayeri answered in the negative, explaining:

> "This underride that we have here with the Saturn going underneath, the testing I did that Saturn's cooling pack package us getting interfered with by the deforming center piece of the bumper. When you puncture a radiator or damage the cooling package, that vehicle is not being driven. We don't have any testimony that there was fluid running out from the front of the Saturn or she had to get a radiator fixed.
>
> The damage that I caused I would expect to see some radiator damage on the Saturn by how far the rear bumper on the Saturn penetrated."

¶ 49 Dr. Bain then testified that although he only relied on Erdman's and Mayeri's account of the damage, he did so because Mayeri never provided any other records reflecting the extent of the damage to his vehicle. Dr. Bain then testified that he reviewed Dr. Cerulo's and Dr. Murphy's depositions and stated that there was no record in either deposition of Mayeri giving them "details of the impact." Thus, Dr. Bain concluded, Dr. Cerulo and Dr. Murphy offered causation opinions "without knowing anything about [the impact]."

¶ 50 At the conclusion of Dr. Bain's testimony, Mayeri renewed his pretrial motion to strike Dr. Bain's testimony. In response, defense counsel argued that Mayeri waived the issue by failing to make a *contemporaneous* objection at trial in the midst of Dr. Bain's testimony. Defense counsel specifically maintained that Erie was prejudiced by Mayeri's failure to raise a timely objection at trial: "He doesn't get the privilege of not raising an objection to challenge the qualifications where I don't get to rehabilitate or establish a proper foundation if it's called into question." The court ultimately ruled that Mayeri waived the issue, stating:

> "I believe you should have raised the objection again before witness [*sic*] testified to preserve it on appeal, because you are supposed to renew objections to witnesses that have been ruled on in motion in limine to preserve that appeal later on. So I believe you may have waived that objection by not raising it before he testified."

¶ 51 After Erie rested its case, Mayeri called Dr. Stephen Bloomfield in rebuttal. Dr. Bloomfield's testimony was elicited specifically to rebut Dr. Dohrmann's testimony. Dr. Bloomfield testified that he did not believe it was necessary to observe damage to surrounding vertebrae to conclude that a disc herniation was caused by an accident.

¶ 52 On cross-examination, Dr. Bloomfield acknowledged that he was retained by Mayeri's attorneys in September 2015 "to find out my opinions in response to Dr. Dohrmann's opinions." Dr. Bloomfield testified that he has worked with Mayeri's lawyers eight to ten times prior to this case. Dr. Bloomfield testifies that he usually charges a retainer, but due to the volume of his work with Mayeri's law firm, he did not charge his retainer in this case. He acknowledged that he billed nearly $30,000 in this case. He testified that he lives in New Jersey, has never been licensed in Illinois, and that he flew into Chicago the night before his testimony. Dr. Bloomfield admitted that he has never met, spoken with, or examined Mayeri.

¶ 53 During Erie's closing argument, the following colloquy occurred:

"The other thing I want to talk about to address as to Dr. Bain is that plaintiff's said it in opening and he said it again during closing that Dr. Bain's testimony is junk science.

Okay. You guys have sat through this trial. You've heard objections. You've heard the court rule on objections. Do you have any doubt in your mind that if Dr. Bain's testimony was junk science, that Judge Lustig would not have allowed him to testify?

MR. BONAMARTE [Plaintiff's counsel]: Objection, your Honor.

THE COURT: Sustained.

MS. VANDERLAAN [Defense counsel]: Well, the bottom line is he's testifying, so there is a reason why he's testifying, and for plaintiff's counsel to call it junk science is inappropriate."

¶ 54 Later, still during Erie's closing argument, the following colloquy occurred:

"And then you get to Dr. Bloomfield, and I'm at a loss of words what to say about him. Hired gun. I don't even know if that's adequate—

MR. BONAMARTE: Objection, your Honor.

THE COURT: Sustained.

MS. VANDERLAAN: Dr. Bloomfield worked for plaintiff's firm. He gave four depositions in 2016. They used him so much, he never even asked them to give him a retainer. He came into this case in 2015 and billed $30,000 in a year, year and a half. He came in here, and his testimony was not believable. He admits, he admits that he only came in here to rebut Dr. Dohrmann, period. And the he gives testimony that you have to

see the disk torn in order to say it's traumatic, but again, every time you have a herniation, you have a torn disk, so what does that even bring to the table?"

¶ 55 After deliberating, the jury returned a verdict in favor of Mayeri for $35,000. Because Mayeri had already received $100,000 from Erdman's insurance company, the court applied a set-off, reduced the jury's verdict to $0 and entered judgment. This appeal followed.

¶ 56 ANALYSIS

¶ 57 On appeal, Mayeri raises three arguments in support of his claim that he is entitled to a new trial. First, the defense counsel's "hired gun" comment during closing argument was so prejudicial that it denied him a fair trial. Second, defense counsel's statement during closing argument to the effect that the judge presiding over the case would not have allowed Dr. Bain to testify if his opinions were "junk science." And finally, Dr. Bain's testimony was inadmissible under *Frye*. We consider them in that order.

¶ 58 I. The "Hired Gun" Comment

¶ 59 We first consider Mayeri's claim that, in closing argument, Erie's counsel referred to Mayeri's retained expert, Dr. Bloomfield, as a "hired gun." Mayeri makes much of the fact that this comment was made in violation of a motion *in limine* the court had previously granted, prohibiting the exact comment that was made here. True, but the violation of a motion *in limine* is not *per se* reversible error. *Bakes v. St. Alexius Medical Center*, 2011 IL App (1st) 101646, ¶ 40. Instead, as Mayeri himself acknowledges, a purported violation of a motion *in limine* requires a new trial "only where the order is specific, the violation is clear, and the violation deprived [the appellant] of a fair trial." *Id*.; accord *Boren v. BOC Group, Inc*., 385 Ill. App. 3d 248, 257 (2008).

¶ 60 The trial court—the same judge whose *in limine* ruling was violated—did not believe the "hired gun" comment caused significant prejudice to Mayeri, stating on the record: "So while I do believe you violated the motion *in limine* and I did sustain the objection, I do not believe there was any substantial prejudice to the plaintiff with this comment. This is an isolated comment made during a seven[-]day trial. I do not believe it denied plaintiff a fair trial."

¶ 61 The point of this "hired gun" comment, quite obviously, was that the testimony of Mayeri's expert, Dr. Bloomfield, should be given less weight, if not disregarded altogether, because it was motivated by his own financial interest; he was saying what he was paid to say, so the argument would go, not what he really believed. A party is well within its rights to challenge the credibility of an expert witness by showing that the expert's sponsor paid for the testimony. *Trower v. Jones*, 121 Ill. 2d 211, 217 (1988); *Shaheen v. Advantage Moving & Storage, Inc.*, 369 Ill. App. 3d 535, 543–44 (2006). Likewise, a party can demonstrate a testifying expert's financial interest by showing a history of referrals from the law firm that retained him or her in the present case. *Sears v. Rutishauser*, 102 Ill. 2d 402, 411 (1984). Indeed, it is fair game in this regard to show "the amount and percentage of income that [an expert] generates from his work as an expert witness, the frequency with which he testifies as an expert, and the frequency with which he testifies for a particular side, in order to expose any bias, partisanship, or financial interest that may taint his testimony and opinions." *Pontiac National Bank v. Vales*, 2013 IL App (4th) 111088, ¶ 17; see *Trower*, 121 Ill. 2d at 217; *Sears*, 102 Ill.2d at 407.

¶ 62 There is no dispute here that Dr. Bloomfield was paid about $30,000 for his work, and that he had a longstanding professional relationship with the law firm representing Mayeri—to the point that he did not deem it necessary to charge the law firm his customary retainer. Dr. Bloomfield did not treat, examine, or even speak with Mayeri; he was retained solely to rebut the

testimony of Erie's expert, Dr. Dohrmann. We are not being critical of Dr. Bloomfield, but there is no question that Erie was entitled to challenge Dr. Bloomfield's credibility on the basis that he had a financial motive for his testimony.

¶ 63 Indeed, after the trial court sustained Mayeri's objection to the "hired gun" comment during closing argument, Erie's counsel toned down the rhetoric and explained that comment: "Dr. Bloomfield worked for plaintiff's firm. He gave four depositions in 2016. They used him so much, he never even asked them to give him a retainer. He came into this case in 2015 and billed $30,000 in a year, year and a half." Mayeri did not object to that testimony, and rightly so.

¶ 64 So the only question is whether the specific "hired gun" comment, though based on a proper line of argument, was so inflammatory, in and of itself, as to deny Mayeri a fair trial.

¶ 65 It was not. It was a derisive comment, but Erie's counsel made it clear what he meant when he expounded on that point, and it was ultimately based on a proper credibility challenge. We have typically refused to find such comments to be reversible error as long as there was evidence of an expert witness's financial interest in testifying. See, *e.g.*, *People v. Parker*, 113 Ill. App. 3d 321, 327 (1983) (State's reference to defense insanity expert as " 'hired gun' " was not improper, as expert had testified hundreds of times for defense); *Moore v. Centreville Township Hospital*, 246 Ill. App. 3d 579, 595 (1993), *reversed on other grounds*, 158 Ill. 2d 543 (1994) (referring to medical expert witnesses as " 'high-priced' " experts and " 'hired-gun doctors' " was not improper, as it was based on evidence that each doctor was paid to testify and had extensive practice in testifying for defense in similar cases); see also *Fuller v. Lafler*, 826 F. Supp. 2d 1040, 1059 (E.D. Mich. 2011), *aff'd sub nom. Fuller v. Woods*, 528 Fed. Appx. 566 (6th Cir. 2013) (referring to defense expert who had lengthy relationship with defense attorney's firm as " 'hired gun' " was "not so inflammatory that it affected the fairness of the trial");

Balsley v. LFP, Inc., 691 F.3d 747, 762-63 (6th Cir. 2012) (not improper, in closing argument, to refer to defense's legal expert on copyright law as being financially motivated to testify in favor of defendant, the expert's " '$1.5 million client,' " nor was it error to note the " 'million, five' " retainer agreement or that defendant " 'provides a tremendous amount of revenue' to the law firm.").

¶ 66 Mayeri cites two cases that we find distinguishable. In *Regan v. Vizza*, 65 Ill. App. 3d 50, 53-54 (1978), it was reversible error for the defense, in closing argument, to refer to the testifying doctor as a " 'hired gun in the old west' " because that comment was not supported by the evidence—the expert was the *treating* physician, whom the plaintiff visited upon referral not from his lawyer but from the emergency-room doctor; the doctor had not been retained by the plaintiff. See *Parker*, 113 Ill. App. 3d at 327 (distinguishing *Regan* on same basis). Here, unlike *Regan*, there is an evidentiary foundation for the hired-gun comment.

¶ 67 Mayeri also cites *Cancio v. White*, 297 Ill. App. 3d 422, 430–31 (1998), in which the defense counsel in closing argument implied, without any good-faith basis for doing so, that a testifying physician had been hand-picked by the plaintiff's lawyer. The record showed that the plaintiff was referred to that doctor by a physician-referral service, not his lawyer. *Id*. at 431. The plaintiff moved to exclude any implication in closing argument that some unethical connection existed between the testifying doctor and the plaintiff's lawyer, and the trial court granted that motion. *Id*. Nevertheless, defense counsel suggested in closing argument that the plaintiff visited that doctor only after consultation with his lawyer. *Id*.

¶ 68 Defense counsel there also made comments about the testifying doctor's financial interest in testifying, what this court referred to as akin to a "hired gun" comment, stating that " '[w]e all

know what money will do as a motivating factor in swaying testimony' " and noting that the testifying doctor " 'was being paid $500 for the first hour and then $250 thereafter.' " *Id*. This court held that "that defense counsel's cross-examination and closing argument, which insinuated a connection between [the plaintiff's] attorney and [the expert], was improper, unsupported by the evidence, highly prejudicial and deprived plaintiffs of a fair trial." *Id*. at 432.

¶ 69 The *Cancio* decision was not based on a hired-gun comment. No such comment was uttered in that case; it was just a reference the appellate court made. Nor was there any suggestion in that decision that arguing the expert's financial interest in testifying would have been improper, in any event. The decision was based on the clearly impermissible suggestion by defense counsel of a connection between the plaintiff's lawyer and the expert, when the evidence did not support that connection.

¶ 70 In both *Regan* and *Cancio*, it was the lack of an evidentiary basis for the challenged comments that rendered them so prejudicial as to require new trial. That evidentiary foundation is present here.

¶ 71 We would add that the trial court sustained Mayeri's objection to the "hired gun" comment, which went at least some measure toward curing any perceived error, even had error occurred. See *People v. Wheeler*, 226 Ill. 2d 92, 128 (2007) (sustaining objection to closing argument is "generally sufficient" to cure prejudice from improper closing argument).

¶ 72 Because the "hired gun" comment was supported by the evidence, because the trial court sustained the objection to that comment, and because defense counsel later elaborated on that comment in a perfectly acceptable way, the trial court did not abuse its discretion in denying a new trial on damages based on this ground.

¶ 73 While we do not find that the "hired gun" comment rose to the level of reversible error, neither do we condone defense counsel's violation of the trial court's *in limine* order. The order did not bar defense counsel from commenting on the financial incentives of Mayeri's experts *per se*; it merely prevented Erie from using colorful and derisive language in doing so. Whether we would have entered that *in limine* order in the first instance is not the question; it was the order entered, and Erie did not have the option of flouting it. Erie could have asked the court to revisit that ruling before oral argument, as the *in limine* order was interlocutory in nature. See *Spyrka v. County of Cook*, 366 Ill. App. 3d 156, 165 (2006). Erie also could have attempted an offer of proof to preserve the question for appellate review. Directly violating the order was not an option. Nothing we have said above should be interpreted otherwise.

¶ 74 But the trial court—the same judge whose order was violated—did not think the "hired gun" comment rose to the level of prejudice that demanded a new trial. Though we do not find error in the first place, we would agree with the trial court that Mayeri could not establish prejudice, in any event.

¶ 75 II. Improper Vouching

¶ 76 We next consider Mayeri's claim that Erie's counsel impermissibly bolstered Dr. Bain's credibility during closing argument by arguing that the court would not have allowed Dr. Bain to testify if, as Mayeri's lawyer had claimed in closing argument, Dr. Bain's testimony was "junk science." Here again is the relevant portion of the closing argument:

> "The other thing I want to talk about to address as to Dr. Bain is that plaintiff's said it in opening and he said it again during closing that Dr. Bain's testimony is junk science.

> Okay. You guys have sat through this trial. You've heard objections. You've heard the court rule on objections. Do you have any doubt in your mind that if Dr. Bain's testimony was junk science, that Judge Lustig would not have allowed him to testify?
>
> MR. BONAMARTE [Plaintiff's counsel]: Objection, your Honor.
>
> THE COURT: Sustained.
>
> MS. VANDERLAAN [Defense counsel]: Well, the bottom line is he's testifying, so there is a reason why he's testifying, and for plaintiff's counsel to call it junk science is inappropriate."

¶ 77 In denying Mayeri's motion for a new trial on this point, the trial court ruled:

> "[T]he jury was adequately and accurately instructed that they decide credibility. They were instructed that they determine the weight to be given to the testimony and that the Court does not do that. I also go back to the point that I don't think it was proper [for Mayeri] to call it junk science when the Court's determined that they're going to allow it because it passed the *Frye* test. So I don't think that statement of the defense attorney in closing prejudiced plaintiff to the extent you were deprived of a fair trial."

¶ 78 We agree with the trial court that, in determining whether a comment was so egregious as to warrant a new trial, the challenged comment, like any other, must be placed in the context of the closing argument in its entirety and the trial as a whole. See *Wheeler*, 226 Ill. 2d at 122; *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1065 (2001). Here, as the trial court noted, the challenged comment was made in direct response to Mayeri's statement in closing argument that Dr. Bain's testimony was "junk science." Mayeri had contended, in effect, that Dr. Bain's testimony had no place in a courtroom, and the challenged comment directly responded to it.

Two wrongs don't make a right, but we will not ignore the fact that the challenged statement was invited by the improper "junk science" comment by opposing counsel.

¶ 79 We would also note, again, that the trial court sustained Mayeri's objection. That is not always the cure-all that an appellee would contend, but neither is it meaningless, as an appellant might suggest. The sustaining of the objection would have particular impact when, as here, Erie's counsel was invoking the imprimatur of the very judge who then agreed with Mayeri, in the presence of the jury, that it was improper to do so. It is hard to see how the jury would have appreciated one of those things but not the other.

¶ 80 The trial court also correctly noted that the jury was adequately instructed that decisions of credibility and weight were within its province, not the parties' or the court's. Mayeri raises no challenges to the jury instructions in this regard. Likewise, the trial court reasoned that this isolated comment, in the broader context of the weeklong trial and the rest of the closing argument, was not so significant that it would have prejudiced Mayeri's right to a fair trial.

¶ 81 For all of those reasons, we find no abuse of discretion in the trial court's ruling that Mayeri received a fair trial, notwithstanding the challenged comment.

¶ 82 III. Admissibility of Dr. Bain's Testimony

¶ 83 Finally, we consider Mayeri's argument that he is entitled to a new trial because the circuit court erroneously admitted Dr. Bain's testimony over his objection that Dr. Bain's testimony was inadmissible under *Frye*.

¶ 84 As we stated, Mayeri filed a motion *in limine* claiming that Dr. Bain's testimony was inadmissible under *Frye*. The court denied the motion, and Dr. Bain testified at trial. Mayeri did not lodge a contemporaneous objection to Dr. Bain's testimony at trial. Instead, he waited until

the conclusion of Dr. Bain's testimony and then made an oral motion to strike Dr. Bain's testimony.

¶ 85 "The denial of a motion *in limine* does not in itself preserve an objection to disputed evidence that is introduced later at trial." *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002). Instead, " '[w]hen a motion *in limine* is denied, a contemporaneous objection to the evidence at the time it is offered is required to preserve the issue for review.' " *Id*. (quoting *Brown v. Baker*, 284 Ill. App. 3d 401, 406 (1996)); *Spyrka*, 366 Ill. App. 3d at 165 ("Generally, the denial of a motion *in limine* does not preserve an objection to disputed evidence that is introduced later at trial; a contemporaneous objection to the evidence at the time it is offered is typically required."). The reason for this rule is simple: "[A] ruling on a motion *in limine* is interlocutory and subject to reconsideration." *Spyrka*, 366 Ill. App. 3d at 165. And objecting contemporaneously with the presentation of the challenged testimony allows two things to happen: (1) the trial court has the opportunity to revisit its previous decision, now in a fuller context amid trial rather than pretrial, before the trial has begun to take shape; and (2) the opposing party may address any deficiencies cited by the objecting party and try to cure them.

¶ 86 Here, Mayeri objected to Dr. Bain's testimony in a pretrial motion, but he never renewed his objection at trial until Dr. Bain's testimony was complete, after a lengthy direct examination, cross-examination, re-direct and re-cross. This issue has been forfeited. *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 467 (2001) ("A motion to strike made at the close of the witness's testimony is not timely.").

¶ 87 Forfeiture aside, we would reject this argument, in any event. In his appellate brief, Mayeri devotes considerable space to arguing that a certain portion of Dr. Bain's testimony—that low-impact rear-end car accidents never cause lumbar spine injuries—was new or novel and

thus objectionable under *Frye*. But Dr. Bain never offered the unqualified opinion that low-impact rear-end accidents can never cause injuries to the lumbar spine. He said they might, depending on factors such as wearing a seat belt; whether the seat back was defective; and whether the rear vehicle intruded into the front vehicle. Suffice it to say, we cannot sustain a *Frye* objection to an opinion that was never offered in the first place.

¶ 88 Nor could Mayeri establish that he suffered any prejudice due to the admission of Dr. Bain's testimony. Dr. Bain was a causation witness, and he offered an all-or-nothing opinion that, except for perhaps a muscle strain, the 2002 accident simply did not cause Mayeri to suffer any injuries. If the jury accepted that testimony, if it agreed that Mayeri did not establish a causal link between the accident and his injury, the jury would have returned a defense verdict. But the jury found defendant liable and awarded Mayeri $35,000 in damages. We fail to see how the admission of Dr. Bain's testimony affected the damages award at trial in any meaningful way.

¶ 89 As we find no error here, nor any prejudice even had error occurred, we reject Mayeri's *Frye* objection.

¶ 90 CONCLUSION

¶ 91 We affirm the circuit court's order denying the motion for a new trial.[1]

¶ 92 Affirmed.

[1] We previously had scheduled this case for oral argument. Due to a serious family emergency, one of the parties requested that the argument be postponed. On further reflection, it is our judgment that the briefs in this matter more than adequately convey the parties' positions, and we face no novel or complex question of law. We thus deem our scheduling of the oral argument to have been improvident and unnecessary.