THIRD DIVISION
February 13, 2019

No. 1-18-0157

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STEPHEN ROTH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 10387
	)	
SARAH SMITH,	)	Honorable
	)	Larry G. Axelrood,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court of Cook County; plaintiff failed to preserve his claims of evidentiary error for appeal because he did not make an adequate offer of proof at trial.

¶ 2 BACKGROUND

¶ 3 On February 7, 2014, defendant Sarah Smith's vehicle struck plaintiff Stephen Roth's vehicle injuring plaintiff's neck.

¶ 4 Dr. Neil Allen was plaintiff's treating neurologist. An MRI of plaintiff's neck was performed. Dr. Allen diagnosed plaintiff with left cervical paraspinal spasm and features of a left mild cervical 6 radiculopathy resulting from the February 7, 2014 collision. Dr. Allen recommended physical therapy for plaintiff. Pursuant to Dr. Allen's physical therapy prescriptions, plaintiff engaged in physical therapy at Peak & Balance Centers of America (Peak & Balance) with physical therapy assistants and physical therapists in the practice including Jim Buskirk, the owner of the practice.

¶ 5 On October 13, 2015, plaintiff filed a complaint against defendant seeking damages resulting from the February 7, 2014 collision.

¶ 6 On September 26, 2017, the evidence deposition of Dr. Allen was taken. Plaintiff marked Dr. Allen's curriculum vitae (CV) and the notice of deposition as deposition exhibits 1 and 2 respectively. On September 27, 2017, the evidence deposition of Buskirk was taken. Plaintiff marked three exhibits at the conclusion of the deposition: exhibit 1, identified as Buskirk's CV; exhibit 2, identified as Buskirk's medical chart for plaintiff; and exhibit 3, identified as Peak & Balance's billing statements for plaintiff.

¶ 7 Prior to trial, defendant moved *in limine* to bar the admission of medical bills referenced in Buskirk's and Dr. Allen's depositions. Before trial began, the trial court held a hearing on defendant's motion *in limine* after which the court issued verbal rulings.

¶ 8 There was no court reporter at the pretrial hearing or at trial and, thus, no transcripts exist of the hearing on the motion *in limine*, the trial court's verbal order *in limine*, or any of the proceedings that occurred on the trial date.

¶ 9 It is unclear from the record what evidence the trial court specifically barred in the *in limine* order. Plaintiff contends that the court barred plaintiff from introducing any evidence of his medical charges because plaintiff had not laid an adequate foundation. Based on plaintiff's

briefs, it appears the evidence plaintiff sought to introduce was as follows: (1) certain medical bills unpaid and paid by plaintiff and received from Buskirk and Dr. Allen; (2) plaintiff's MRI bill; (3) a document created by plaintiff and his attorney entitled "Peak & Balance Charges: 3/19/14 – 4/20/16," represented to be a summary of the dates of services and charges incurred by plaintiff at Peak & Balance for physical therapy services, along with calculated totals for said expenses, which plaintiff states correspond to information contained in the billing statements sent to plaintiff by Peak & Balance; (4) bills reflecting charged amounts for physical therapy services received by plaintiff from Peak & Balance; and (5) the testimony of Buskirk and Dr. Allen during their evidence depositions relating to Peak & Balance's billing for physical therapy services rendered to plaintiff. Defendant contends that the trial court's order *in limine* barred plaintiff from introducing at trial (1) the total amount of plaintiff's physical therapy charges resulting from the collision, (2) the "Peak & Balance Charges: 3/19/14 – 4/20/16" summary document, and (3) bills reflecting the charges plaintiff incurred for physical therapy.

¶ 10 It is uncontroverted that during the trial plaintiff made no offers of proof relative to the trial court's order *in limine*.

¶ 11 Defendant admitted negligence, and at the conclusion of defendant's case-in-chief the trial court granted plaintiff's motion for directed verdict on the issue of liability against defendant. The jury found for plaintiff and assessed damages in the amount of $17,000, itemized as $6,000 for loss of normal life experienced and reasonably certain to be experienced in the future and $11,000 for the pain and suffering experienced and reasonably certain to be experienced in the future as the result of the injuries. The court entered judgment on the verdict.

¶ 12 Plaintiff timely filed a posttrial motion requesting the vacatur of the October 12, 2017 judgment and verdict arguing that evidence of plaintiff's medical expenses were improperly excluded. Specifically, in his motion, plaintiff asked the trial court to reconsider its pretrial order

in limine excluding evidence related to plaintiff's medical expenses. In plaintiff's posttrial motion, no reference is made to Dr. Allen's billing or the cost of plaintiff's MRI. However, in his reply and during argument on the motion, plaintiff asked for reconsideration of the trial court's pretrial ruling barring any evidence related to plaintiff's medical billing from coming into evidence.

¶ 13 On December 18, 2017, the trial court entered an order denying plaintiff's posttrial motion. On January 16, 2018, plaintiff timely filed his appeal.

¶ 14 ANALYSIS

¶ 15 On appeal, plaintiff argues the trial court committed reversible error by barring him from introducing evidence related to plaintiff's medical expenses stemming from the February 7, 2014 collision. Prior to considering the merits of the instant appeal, we must first address defendant's argument that plaintiff failed to preserve for appeal the issue of exclusion of evidence because plaintiff made no competent offer of proof at trial. In response to defendant's claim, plaintiff argues that he was not required to make a specific offer of proof because it is apparent that the trial court understood the nature and character of the evidence sought to be introduced. Plaintiff also argues, in the alternative, that he made an offer of proof, not at trial, but during the proceedings on his posttrial motion. We agree with defendant that plaintiff's failure to make an adequate offer of proof at trial has resulted in a forfeiture of his claims of evidentiary error on appeal.

¶ 16 Necessity of an Offer of Proof to Preserve a Claim of Error on Appeal

¶ 17 Illinois Rule of Evidence 103(b) provides for the preservation of a claim of error on an evidentiary ruling for appeal and states in relevant part as follows:

> "(3) Civil Cases. In civil trials, even if the court rules before or at trial on the record concerning the admission of evidence, a contemporaneous trial objection or offer of proof must be made to preserve a claim of error for appeal.

> (4) Posttrial Motions. In all criminal trials and in civil jury trials, in addition to the requirements provided above, a claim of error must be made in a posttrial motion to preserve the claim for appeal. Such a motion is not required in a civil nonjury trial.
> (c) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form." Illinois Rule of Evidence 103(b) (eff. Oct. 15, 2015).

¶ 18 Accordingly, in a civil jury case such as the case *sub judice*, to preserve a claim of error for appeal, Rule 103(b) requires that (1) a contemporaneous offer of proof be made at trial even where the court has ruled before trial on the record excluding the evidence, and (2) the claim of error be raised in a posttrial motion. See Ill. R. Evid. 103(b) (eff. Oct. 15, 2015). An adequate offer of proof informs the circuit court of what the offered evidence is or what the expected testimony will be, by whom it will be presented, and its purpose. *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444, 451 (2004).

¶ 19 Notwithstanding Rule 103(b), plaintiff argues that an offer of proof was not required to preserve the issue of the trial court's exclusion of evidence relating to plaintiff's medical bills because it is apparent that the trial court clearly understood the nature and character of the evidence plaintiff sought to introduce. In support of this argument, plaintiff cites *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495 (2002) (holding that "an offer of proof is not required where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced"). However, *Dillon* is readily distinguishable. There, the objection was to the further testimony of a witness on the stand who had testified at length and would only be giving cumulative evidence previously provided by another witness. *Id.* Having heard the previous witness testify, it follows that the trial court understood the nature of the evidence. *Id*. Unlike in *Dillon*, here it is not clear from the record that the trial court clearly understood at trial or even during the pretrial proceedings the nature and character of the

evidence sought to be introduced by plaintiff or what witnesses would be called by plaintiff to introduce such evidence.

¶ 20 Moreover, as noted above, there are no transcripts of the pretrial hearing to include the trial court's oral order *in limine*, nor are there transcripts from the actual trial. In the absence of a transcript or bystander's report, there is nothing in this record to show what was presented to the trial court during the hearing on the motion *in limine* or the trial. It is the appellant's burden to present a sufficiently complete record of the proceedings below to support his or her claim of error and, in the absence of such a record, we presume that the trial court's decision was legally and factually correct. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391–92 (1984).

¶ 21 As evidence that the trial court clearly understood the character and nature of the evidence plaintiff sought to introduce, plaintiff highlights the fact that Buskirk's and Dr. Allen's evidence deposition transcripts were presented to the trial court and the testimony therein was discussed by the court during the posttrial proceedings. The record supports only that the trial court was presented the transcripts at the time of the posttrial proceedings. During posttrial proceedings, plaintiff also asserted that he personally could have laid a proper foundation for his paid and unpaid medical bills to be admitted into evidence as well as the "Peak & Balance charges: 3/19/14 – 4/20/16" summary document. We are not persuaded by plaintiff's arguments. At issue is whether the trial court clearly understood the nature and character of the evidence sought to be introduced by plaintiff so as to obviate the requirement that an offer of proof be made to preserve the evidentiary issues for appeal. As discussed *infra*, an offer of proof made during posttrial proceedings does not satisfy the requirement in our evidence rules that a contemporaneous objection be made at trial. Thus, it follows that the relevant timeframe concerning the trial court's understanding of the nature and character of the evidence sought to be introduced is also prior to the conclusion of trial.

¶ *22* In the absence of a record of proceedings or bystanders report we are unable to find that the trial court clearly understood the nature and character of the evidence sought to be introduced by plaintiff necessary to invoke the exception to Rule 103(b)(3)'s requirement that an offer of proof be made to preserve a claims of evidentiary error for appeal. *Foutch*, 99 Ill. 2d at 391–92.

¶ 23 Timing of an Offer of Proof

¶ 24 Plaintiff also argues that, even if an offer of proof was necessary to preserve his claims of evidentiary error for appeal, such an offer of proof was made by plaintiff during the posttrial proceedings. In support of his argument, plaintiff cites *Williams v. BNSF Railway Co.*, 2015 IL App (1st) 121901-B, wherein an offer of proof was found to be timely when made during the trial after the last witness testified. *Williams*, 2015 IL App (1st) 121901-B, ¶ 41. The court in *Williams* specifically states that "[w]hile the better practice is to make a contemporaneous offer of proof while the witness is on the stand, there is no set requirement for when an offer of proof must be made." *Id.* ¶ 41. Again, the offer of proof in *Williams* was made during the trial. *Id.* ¶ 31. We do not accept plaintiff's broad reading of the *Williams* court's decision to mean that an offer of proof can be made during posttrial proceedings.

¶ 25 The two primary functions of an offer of proof are to disclose to the trial judge and opposing counsel the nature of the offered evidence, enabling them to take appropriate action, and to provide the reviewing court with a record to determine whether exclusion of the evidence was erroneous and harmful. *People v. Thompkins*, 181 Ill. 2d 1, 10 (1998).

¶ 26 As noted above, Illinois Rule of Evidence 103(b)(3) requires a contemporaneous objection or offer of proof to preserve an issue for appeal even where an order *in limine* has been made concerning the admission of such evidence. Ill. R. Evid. 103(b) (eff. Oct. 15, 2016). Because the order *in limine* may limit the jury's access to certain evidence, orders *in limine* are a "powerful and potentially dangerous weapon" and remain subject to reconsideration throughout

the trial. *Beasley v. Huffman Manufacturing Co.*, 97 Ill. App. 3d 1, 5 (1981). The requirement that a contemporaneous objection to evidence allegedly violating an order *in limine* be made at trial is necessary to allow the reviewing court to benefit from the trial court's interpretation of the order and for the trial court to facilitate the resolution of objections at the moment they arise. *Id*. This same reasoning applies where an order *in limine* is granted and an offer of proof is required to preserve the issue. *Miller v. Chicago Transit Authority*, 78 Ill. App. 3d 375, 383 (1966) (stating just as the objection is the key to saving any error in admitting evidence, the offer of proof is the key to saving error in excluding evidence).

¶ 27 Plaintiff's failure to make an offer of proof at trial deprived the trial court of an opportunity to consider the evidence in the context of the trial and to take appropriate action to ensure that its orders *in limine* were specific to preclude introduction of inappropriate evidence while not restricting plaintiff's presentation of his case. Moreover, the trial court was prevented from adding any other or further statements to show the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon, in addition to directing that plaintiff make the offer of proof in question and answer form as allowed by Illinois Rule of Evidence 103(c). Ill. R. Evid. 103(c) (eff. Oct. 15, 2016). This, in turn, has further limited this reviewing court's access to a sufficient record to determine whether the trial court's exclusion of the evidence was erroneous.

¶ 28 In the instant case, no competent offer of proof was made by plaintiff at trial to preserve the alleged evidentiary errors for appeal and the record does not disclose that the trial court clearly understood the nature and character of the evidence sought to be introduced sufficiently to obviate the need for an offer of proof. As such, plaintiff has failed to preserve for appeal his claims of error in the trial court's exclusion of evidence and the issues are forfeited.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 31 Affirmed.