2019 IL App (5th) 180492-U

NO. 5-18-0492

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JESSICA MUSGRAVE, Plaintiff-Appellant, v. CALLIE C. CARTER and CARTER, LTD., d/b/a Lemonds Yamaha-Honda-Kawasaki-Suzuki-Kubota-Exmark, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Wayne County. No. 17-L-6 Honorable Kimbara G. Harrell, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Moore and Boie concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's denial of the plaintiff's motion for new trial is reversed where the verdict form as to the defendant Callie Carter was internally inconsistent. We affirm the court's denial of the motion for new trial as to the defendant Carter, Ltd., and all other issues raised by the plaintiff on appeal.

¶ 2 The plaintiff, Jessica Musgrave, filed a negligence action for injuries she suffered in an automobile accident on April 9, 2017, between her and the defendant Callie Carter (Carter). Carter was driving a vehicle owned by the defendant Carter, Ltd. (dealership). Following a trial, the jury found the defendant Carter to be 50% liable for the plaintiff's

damages; however, it awarded no money damages and entered an award amount of "$-0" on the verdict form. The jury found no liability as to the dealership. Judgments were entered on the jury's verdicts on September 14, 2017, *nunc pro tunc* to May 31, 2018. The plaintiff appeals arguing that the trial court erred in denying her motion for new trial. For the following reasons, we affirm in part, reverse in part, and remand for a new trial on all issues involving Carter.

¶ 3 On May 15, 2017, the plaintiff filed a two-count civil complaint in the circuit court of Wayne County against Carter. In the first count, she alleged that: (1) on April 9, 2017, at approximately 9:43 a.m., she was operating her 2010 Ford Fusion on County Road 100 North; (2) at the same place and time Carter was operating a 2008 Honda Odyssey; (3) it was the duty of Carter to exercise ordinary care in the operation of her vehicle; (4) the defendant breached that duty where she (i) failed to keep a proper lookout for other vehicles on the roadway, (ii) failed to reduce the speed of her vehicle to avoid an accident, (iii) operated her vehicle at a speed greater than reasonable in light of the conditions and in violation of section 11-601(a) of the Illinois Vehicle Code (625 ILCS 5/11-601(a) (West 2016)), (iv) failed to operate her vehicle in her own lane of traffic in violation of section 11-701(a) of the Vehicle Code (*id.* § 11-701(a)), and (v) was otherwise careless and negligent; (5) one or more of the foregoing was the proximate cause of the collision between her and the plaintiff's vehicle; and (6) Carter's negligence was the direct cause of harm caused to the plaintiff. Count II of the complaint against the dealership alleged in relevant part that the vehicle operated by Carter was owned by the dealership and that Carter was acting as an agent of the dealership at the time of the

accident. On June 19, 2017, the defendants filed an answer denying that she was negligent and denying that Carter was acting as an agent of the dealership.

¶ 4 On October 10, 2017, during discovery, the defendants filed responses to the plaintiff's requests to admit. In response to paragraph 9—which read "[t]hat prior to this April 9, 2017, auto accident, Plaintiff JESSICA MUSGRAVE had never had any muscle spasms"—the defendants responded that they had "no personal knowledge of the facts set forth in Paragraph 9 and, therefore, can neither admit nor deny same." The plaintiff later filed a supplemental request to admit. On January 19, 2018, the defendants filed responses to the plaintiff's supplemental requests to admit wherein the response to paragraph 9 quoted above was "admit." The plaintiff filed a motion to deem facts admitted, which the trial court granted. On April 20, 2018, the defendants filed a motion for the court to reconsider its ruling on paragraph 9 only and asked for leave to amend the answer to "can neither admit nor deny same." The defendants argued that they lacked the necessary personal knowledge that would allow them to respond truthfully. The court granted the motion, and the response was amended.

¶ 5 Prior to trial, the plaintiff filed a motion *in limine* wherein she asked the trial court to allow her to present evidence of the dealership's insurance coverage which would show that Carter was an agent of the dealership at the time of the accident. In response, the defendants argued that the introduction of any evidence to show liability coverage would be highly prejudicial. The plaintiff also filed a motion to declare the dealership's insurance agents, John Bosch and Nick Carter, as witnesses under section 2-1102 of the Code of Civil Procedure (735 ILCS 5/2-1102 (West 2016)). The plaintiff later filed a

motion to compel Pekin Insurance Company and Mitchell Insurance Agency (Nick Carter) to produce the information, including purported altered documents, that were withheld from her. She noted that a subpoena had been previously served on the two insurance companies for "any and all information that relates in any way to the defendant Callie Carter and the 2008 Honda Odyssey for the years 2008 to 2017." According to her, the companies failed to comply with that subpoena and withheld documents, claiming that the documents were deliberately altered by the insurance company and/or the dealership to conceal the fact that she was an agent at the time of the accident. In response, the defendants argued that Pekin Insurance, Nick Carter, and Mitchell Insurance were not served with the motion to compel; that a typo in an email led the plaintiff to erroneously conclude that the 2015 audit paperwork had been altered to add Carter's name; that the 2017 audit was not produced because it did not contain Carter's name or reference to the Honda; that several of the documents do not exist, as the plaintiff merely assumed the 2015 audit had been altered and therefore documents existed proving such alteration; and that the court should bar any mention of insurance coverage, introduction of any of the documents subpoenaed by the plaintiff from any insurance entities, and quash the subpoenas for trial testimony of the insurance entity representatives. The plaintiff filed a supplement to her motion to compel arguing that two email attachments had been withheld by the insurance companies. Ultimately, following a hearing on these issues, the trial court barred all evidence related to insurance coverage at the time of the accident.

¶ 6 On April 23, 2018, the defendants filed a motion for leave to amend their answer to add the affirmative defense of contributory negligence. The trial court granted the motion. On May 9, 2018, the plaintiff filed a motion to dismiss the defendants' affirmative defense of contributory negligence arguing that the allegation was devoid of facts. The court denied the motion.

¶ 7 A jury trial was held, and, in relevant part, the following evidence was received at trial. Deputy Justin Curry testified that on April 9, 2017, at approximately 8:32 a.m., the Wayne County sheriff's department was notified that an automobile crash had occurred on County Road 100 North. He responded to the call and remembered that the weather was sunny that day and the pavement was dry. He spoke with both the plaintiff and Carter. Carter told him that she had been traveling on the road. She was speaking with one of her children, looked back towards them, and when she turned back around, there was a vehicle approaching from the other direction as she had crossed over into oncoming traffic. On Deputy Curry's report, he indicated that there was over $1500 in damages and that there was an injury and/or tow due to the crash. These assessments were based on his interview of the drivers involved in the crash. During his direct examination, the following interaction occurred:

> "[PLAINTIFF'S COUNSEL]: So the narrative here is based on your interviews with each of the drivers?
>
> [DEPUTY CURRY]: Correct.
>
> [PLAINTIFF'S COUNSEL]: I would ask he be allowed to read that.
>
> [DEFENSE COUNSEL]: It's the same thing. The distinction between reading that and testifying as to what she said, I mean there's a distinction.
>
> THE COURT: I think he can testify as to what the parties told him, but I am not sure reading adds anything."

Deputy Curry testified that the plaintiff left the scene in a Wayne County ambulance and was transported to Fairfield Memorial Hospital. She was eventually diagnosed by Dr. Scott Glaser with facet joint pain, neck straightening attributable to muscle spasms, and a lower back disc herniation. She had a spinal stimulator implanted for the pain and spasms.

¶ 8 The defense called Dr. Timothy Van Fleet, an orthopedic spine surgeon, to testify as an expert witness. He testified that he reviewed various medical records and performed an independent medical examination of the plaintiff on March 7, 2018. Based on the physical examination and his review of the records, and within a reasonable degree of medical certainty, it was his opinion that a spinal cord stimulator should have been a last resort for a patient such as the plaintiff. He opined that:

> "Usually, an individual such as this, after a motor vehicle accident, would be treated non-operatively for many, many months, perhaps pursuing some facet blocks because there is thinking that after a motor vehicle accident the facet capsules are stretched during a motor vehicle accident, the neck and the back. ***
>
> ***
>
> The mitigating factor in this setting, too, is her [body mass index (BMI)] was 54, and it is—that's a very significant part of pain. And perhaps people come in and say, 'I didn't have any pain before I fell or I was rear-ended or what have you, but now I have pain, pain, pain.' And the problem is that when you have a BMI of 54—which, by the way, morbid obesity is considered to be 40. That means bad things will happen to your body if your BMI is above 40. So as you get further and further along that spectrum, up to 54, that's literally the size of almost two bodies on one skeleton.
>
> So back pain, once it starts, is going to be very difficult to eradicate."

¶ 9 He generally agreed with the plaintiff's entire course of treatment. He indicated that the plaintiff did not receive enough physical therapy before having invasive surgery, that the spinal stimulator would have been more appropriate for a patient suffering from

neuropathic pain—pain shooting down the leg—and is less appropriate for a patient with axial back pain, such as the plaintiff. It was his opinion that:

> "It would have been more appropriate to have physical therapy transitioning into a work conditioning program for a month, and at the end of the work conditioning, then do the functional capacity evaluation because now you are going to get a true measure of what the individual is capable of doing.
>
> If you came off of the disabled list and you went back out and tried to throw nine innings, you're not going to handle it. You need to get back into condition, and you have to get yourself back into shape. Then you can get back in the game."

¶ 10 He was of the opinion that the plaintiff should have received non-operative treatment (*i.e.*, physical therapy) for many months before ever being considered as a surgical candidate. Also, had she received a longer course of physical therapy and workplace conditioning prior to her functional capacity evaluation, she may have been in better shape and been given fewer permanent work restrictions. Normally, in the medical community, elective procedures are not usually performed on patients with a BMI of 40 or greater. He noted several reasons for this general rule:

> "Number one, is that the technical complications increase as the body mass increases. It's technically harder to do a procedure on somebody who is very large. Secondly, the preoperative complications increase. It's harder to ventilate those patients for the operation. The anesthesiologists have a more difficult time, greater pulmonary complications, greater cardiovascular complications. The rate of post-operative infections, and also, 30-day return to the hospital go up for a variety reasons; urinary tract infections, things of that nature. So there is a lot higher risk, and so we tend to really recommend—and this is not just in our community, this is a national movement—to recommend that individuals optimize their body condition.
>
> It's a well-established fact that goes back many decades that weight is an associative factor of back pain. If your weight is BMI of 54, there is going to be an association towards having back pain irrespective of anything else and purely based on weight."

However, he did acknowledge that none of the documents he reviewed indicated in any way that the plaintiff had previously complained of back, lower back, or neck pain.

¶ 11 On May 30, 2018, at the close of the evidence, the dealership filed a motion for directed verdict, arguing that the presumption that Carter was its agent had been rebutted and the plaintiff failed to offer any additional evidence of an agency relationship. The trial court denied the motion, and the trial proceeded to closing argument.

¶ 12 Prior to closing argument, the trial court gave the jury the following admonishment:

> "Ladies and gentlemen of the Jury, you have heard all of the evidence in this case, but the trial has not ended. At this time the lawyers have the opportunity of making final arguments. First the plaintiff, then the defendant, and then the plaintiff will have a chance to respond to the defendant's argument.
>
> What the lawyers say during the arguments is not evidence and should not be considered by you as evidence. They are arguments of the lawyers as to what they believe [the] evidence has shown. After you have heard the arguments, you will then retire to the jury room to consider your verdicts."

¶ 13 In closing argument, the defendants' counsel argued, in relevant part, that with regards to the medical treatment received by the plaintiff:

> "You know, it seems to a certain extent that perhaps there's some bad advice being given. Let's go up to Chicago five days after the accident. Let's have all this—have an implant done, like that. Let's drive back and forth 20 or 30 times that causes problems in and of itself. You know, those are all issues you have to think about."

¶ 14 After closing argument, the jury retired to deliberate. During deliberations, the jury sent out a note asking: "If we voted verdict B who does the settlement go to or if any. If we do 51% who gets the 51% who gets 49%." The trial court responded with: "You have already been instructed in this matter. I am attaching another copy of the

instruction that addresses this issue that I think may be helpful. Please consider this along with all the other instructions."

¶ 15 The jury returned a verdict finding the plaintiff 50% liable for the accident and Carter 50% liable for the accident. It awarded "-$0-" in money damages to the plaintiff despite finding Carter liable. It found no liability for the dealership.

¶ 16 On June 27, 2018, the plaintiff filed a posttrial motion arguing: (1) that a new trial on all issues was necessary; (2) that defense counsel's statement "she got bad advice" during closing argument was so prejudicial that it deprived her of a fair trial; (3) that the court erred in barring the narrative on the police report; (4) that the court erred in allowing the defendants to amend the answer to add an affirmative defense; (5) that the court erred in barring evidence of agency; (6) that the court erred in allowing the defendants to amend admission 9 (that the plaintiff had never had muscle spasms prior to the accident); and (7) that the court erred in allowing Dr. Van Fleet to offer undisclosed opinions. The trial court denied the motion, and the plaintiff appeals.

¶ 17 The plaintiff first argues that the trial court erred in denying her motion for new trial as to both defendants on all issues. In ruling on a motion for new trial, the court will weigh the evidence and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 38. "A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary and not based upon any of the evidence." *Cimino v. Sublette*, 2015 IL App (1st) 133373, ¶ 102. If the motion for new trial is based on the jury's findings on damages, the court "may order a

new trial when the damages awarded by the jury are manifestly inadequate, it is clear proved elements of damages have been ignored, or the amount awarded bears no reasonable relationship to the loss suffered by the plaintiff." *Id.* On review, we cannot reverse the finding of the court on a motion for new trial absent an abuse of discretion. *Id.* "An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Id.* A reviewing court must take into consideration that the lower court, in making its decision, had "the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility." (Internal quotation marks omitted.) *Id.*

¶ 18 Here, the parties agreed at oral argument that reversal was appropriate as to Carter. Though the jury found her to be liable for 50% of the plaintiff's injuries, it did not award any money damages, even where the cost of her medical treatment was undisputed. Additionally, the question posed by the jurors during deliberations indicates that they were confused as to their role and thought they were awarding money from a "settlement" to both the plaintiff and Carter. These facts clearly indicate the jury's verdict as to her was internally inconsistent and an award of zero money damages cannot be reconciled with a finding of liability. Therefore, the trial court abused its discretion in denying the plaintiff's motion for new trial against Carter.

¶ 19 The primary dispute in this appeal revolves around whether the trial court's determination as to the dealership was also an abuse of discretion. The plaintiff relies on two cases in arguing that a new trial is required as to both defendants because the

unreliability of the verdict against Carter indicates that both verdicts are unreliable. We disagree.

¶ 20 The plaintiff first cites to *Manders v. Pulice*, 44 Ill. 2d 511 (1970). In *Manders*, a wife brought a personal injury claim for injuries she suffered in an automobile accident, and her husband brought a claim for loss of consortium. *Id*. at 513. Following a trial, the jury found the defendant liable as to both plaintiffs, but only awarded the wife money damages. *Id*. On the loss of consortium claim, despite finding that the defendant was liable to the husband, it awarded zero dollars in money damages. *Id*. The appellate court reversed and remanded for a new trial as to both plaintiffs, even though the wife's verdict, standing alone, was not against the manifest weight of the evidence. *Id*. In affirming the appellate court, the supreme court agreed that reversal was required as to both plaintiffs because it could not ascertain whether or not the jury deliberately disregarded the instructions given by the trial court in finding defendant liable but awarding zero money damages. *Id*. at 518.

¶ 21 *Manders* is not applicable to this case where only one defendant was found liable for the plaintiff's injuries. In *Manders*, the supreme court concluded that "it cannot be ascertained with definiteness what the jury here, assuming it to have otherwise acted properly, intended by its verdicts." *Id*. at 519. The case here presents a different situation where there was no finding of fault against the dealership.

¶ 22 Second, the plaintiff cites to *Theofanis v. Sarrafi*, 339 Ill. App. 3d 460, 463-64 (2003), where the family of a patient who suffered a stroke brought an action against the physician and the health care service corporation for its failure to inform the patient's

guardian of a test result showing a mass in the patient's heart. During deliberations, the jury sent out a note to the court stating that no compromise could be met and that no resolution was in sight. *Id*. at 469. The court instructed the jury to continue deliberations, and it eventually found in plaintiff's favor against both defendants but awarded zero dollars in money damages. *Id*. Upon entry of the judgment on the jury's verdict, plaintiff filed a motion for new trial, which the court denied. *Id*. The First District reversed the court's ruling and remanded for new trial as to count I where it found that there was evidence in the record that the verdict was a result of a compromise and was inconsistent. *Id*. at 482.

¶ 23 *Theofanis* supports the argument that the inconsistent verdict against Carter requires remand for a new trial. However, it does not require reversal as to the dealership where the jury found no liability. The verdict for the dealership is not internally inconsistent. Additionally, because the standard of review is abuse of discretion, we cannot reverse the trial court where, as here, the court's decision was reasonable. With regards to the dealership, the jury's finding that no agency relationship existed was not against the manifest weight of the evidence, and, therefore, the court did not abuse its discretion in denying the motion for new trial as to the dealership.

¶ 24 Therefore, we reverse and remand for new proceedings on all issues related to Carter and affirm the trial court's denial of the motion for new trial as to the dealership.

¶ 25 The plaintiff raises six additional issues on appeal: (1) that defense counsel's comment in closing argument was unfairly prejudicial; (2) that the trial court erred in barring the narrative on the police report from being read into evidence; (3) that the court

erred by granting the defendants leave to amend the answer to assert an affirmative defense of contributory negligence; (4) that the court erred in allowing the defendants leave to amend admission 9; (5) that the court erred in allowing Dr. Van Fleet to offer undisclosed opinions; and (6) that the court erred in barring evidence of agency. Because the issues on appeal involved both pretrial matters and matters that could come up again in the new trial, we will address all issues to determine whether there was error.

¶ 26 The plaintiff first argues that the comment made by defense counsel that she got bad advice in regard to her medical treatment was so overly prejudicial that she was denied a fair trial. In support of her argument, she cites *Manninger v. Chicago & Northwestern Transportation Co.*, 64 Ill. App. 3d 719, 727-28 (1978), wherein during closing argument plaintiff's counsel accused defendant of bribery and providing witnesses with scripts. That case is in no way relevant to defense counsel's conduct here. Counsel made a reasonable comment based on the evidence—specifically, Dr. Van Fleet's opinion that the plaintiff should have undergone additional physical therapy before/instead of surgery. See *id*. at 729. There was no accusation of bad faith, bribery, or dishonesty by defense counsel referencing the actions of the plaintiff. Therefore, we find this argument unpersuasive.

¶ 27 For the five remaining issues, the standard of review on appeal is whether the trial court abused its discretion in its rulings on these issues. See *Redmond v. Socha*, 216 Ill. 2d 622, 651 (2005). "An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view

adopted by the trial court." *Seymour v. Collins*, 2015 IL 118432, ¶ 41 (citing *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560, ¶ 114).

¶ 28 The plaintiff argues the trial court abused its discretion in allowing the defendants leave to amend their answer to add an affirmative defense of contributory negligence. An answer may be amended any time prior to judgment. *Horwitz v. Bankers Life & Casualty Co.*, 319 Ill. App. 3d 390, 399 (2001). In determining whether amendment is appropriate, the court must consider whether the opposing party will be unfairly prejudiced. *Id*. Here, the plaintiff had ample time to prepare for trial after the trial court granted the motion for leave to amend. The plaintiff's decision not to retain an accident reconstructionist, and the number of jury verdict forms, did not prejudice her.

¶ 29 Next, the plaintiff argues that the court abused its discretion by allowing the defendants to amend their answer to admission 9. As the defendant would not have sufficient knowledge to know whether the plaintiff had ever previously complained of back spasms, this argument is unpersuasive and in no way constitutes an abuse of discretion. It is only logical that the appropriate answer from the defendants as to whether "prior to this April 9, 2017, auto accident, Plaintiff JESSICA MUSGRAVE had never had any muscle spasms" would be that they have insufficient knowledge to admit or deny the same.

¶ 30 The plaintiff's next argument is that the trial court abused its discretion in barring the reading of the narrative from Deputy Curry's police report into evidence. Considering that Deputy Curry testified in open court and everything contained in the narrative was

presented through his testimony, we find no abuse of discretion by the court in denying her request that the narrative be read into the record.

¶ 31 Next, the plaintiff argues that the trial court abused its discretion in allowing Dr. Van Fleet to offer undisclosed opinions at trial. The purpose of the rules regulating discovery is to avoid surprise and discourage strategic gamesmanship. *Foley v. Fletcher*, 361 Ill. App. 3d, 39, 46 (2005). At trial, "[a] witness may elaborate on a disclosed opinion as long as the testimony states logical corollaries to the opinion, rather than new reasons for it. [Citation.] The testimony at trial must be encompassed by the original opinion." *Id*. at 47. Here, the plaintiff complains of two opinions offered by Dr. Van Fleet: (1) that the plaintiff should have received more physical therapy and (2) that a high BMI is associated with back pain. As noted above, the report prepared by Dr. Van Fleet contained two notations regarding the plaintiff's BMI and is very clear that it was his opinion that the plaintiff did not undergo a sufficient course of physical therapy. These opinions offered by Dr. Van Fleet correlate to opinions expressed in his report. Therefore, the court did not abuse its discretion in allowing Dr. Van Fleet to testify as to these opinions.

¶ 32 Lastly, the plaintiff argues that the trial court abused its discretion in barring insurance evidence in order to prove agency. As previously stated, the court's determination as to evidence will not be overturned absent an abuse of discretion. Considering there is no indication that the documents the plaintiff alleges were withheld even exist (because the vehicle was covered under a garage policy), it was not an abuse of discretion for the court to bar evidence of insurance coverage.

¶ 33 Therefore, we reverse the trial court's denial of the plaintiff's motion for new trial as to Carter and remand for new proceedings on all issues, and we affirm the court's denial of the plaintiff's motion for new trial with regards to the dealership and all other issues raised on appeal.

¶ 34 Affirmed in part and reversed in part; cause remanded.