2016 IL App (1st) 151058-U

FIRST DIVISION
November 21, 2016

Nos. 1-15-1058 & 1-15-1915
Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IAN HAMMERSMITH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 09 L 15193
	)	
MICHAEL ZENN,	)	Honorable
	)	Deborah Mary Dooling,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's denial of plaintiff's motions for a judgment notwithstanding the verdict and for a new trial where disputed facts on the issue of negligence presented questions for the jury to decide, and the evidence supported the jury's verdict. We also affirm the trial court's denial of defendant's petition for costs related to evidence depositions where defendant failed to demonstrate why such depositions were necessarily used at trial.

¶ 2 Plaintiff, Ian Hammersmith, appeals the order of the trial court denying his motion for a judgment notwithstanding the verdict (judgment *n.o.v.*), and his motion for a new trial. On

appeal, plaintiff contends (1) defense counsel's remarks in his opening statement that the police did not issue defendant a citation or ticket after the accident was prejudicial and denied him a fair trial; (2) he is entitled to a judgment *n.o.v.* or, alternatively, a new trial "based on the facts presented in this case and [d]efendant's concessions and admissions at trial." On cross-appeal, defendant contends that the trial court erred in denying his request for costs related to evidence depositions. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The jury returned a verdict in favor of defendant and judgment was entered on the verdict on November 24, 2014. The trial court denied plaintiff's post-trial motion on March 25, 2015. Plaintiff filed a notice of appeal on April 10, 2014. Defendant filed a motion for costs which the trial court granted in part and denied in part on June 10, 2015. Defendant filed his notice of cross-appeal on July 9, 2015. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 The following facts are relevant to this appeal. Plaintiff and defendant were involved in a three-car collision that occurred on January 2, 2008, at approximately 5:15 pm. The van in front was driven by Jason Dreksler, who is not a party to this appeal. Plaintiff drove his Trans Am behind Dreksler and defendant drove his GMC Envoy behind plaintiff. The accident occurred on Meachum Road in an unincorporated area of Cook County near Palatine, Illinois. The speed limit on that stretch of road is 35 miles per hour (mph).

¶ 7 At trial, defendant testified that on the day of the accident he had left work and it was dark outside. The weather was clear, but very cold as the temperature was two degrees

Fahrenheit. As he drove, defendant found the road conditions clear and the traffic was light. While driving on Meachum Road, defendant was behind a truck. When the truck made a right turn, defendant was at the top of a rise in the road and looking down the valley. At the other end, at the top, defendant observed a single flashing light coming from a police car. Defendant determined that the police car was not moving so he proceeded to drive toward the bottom of the valley. He saw the lights of a van that was stopped or was stopping (Dreksler's) and he took his foot off the accelerator and applied the brakes. Plaintiff's brake lights suddenly appeared from behind Dreksler's vehicle and defendant applied more force to his brakes. Defendant's vehicle slowed and then slid into plaintiff's vehicle. Defendant testified that at the time of impact, he was driving 10-15 mph. Defendant stated that plaintiff's vehicle was difficult to see because it was dark outside and plaintiff's car was black with dim tail lights.

¶ 8 After the collision, defendant got out of his car and called 911. He asked plaintiff if he needed an ambulance and plaintiff replied he was alright and did not need an ambulance. When defendant looked at the roadway behind him and noticed it had a black, crystallized glaze. Officer Perry Triveri arrived about five minutes later and interviewed defendant, plaintiff, and Dreksler. Officer Triveri noted that the road was "wet." In response to plaintiff's questioning, Officer Triveri stated that he wrote in his report that defendant was following too closely. After the investigation, plaintiff, defendant and Dreksler drove their vehicles away from the scene.

¶ 9 Defendant acknowledged that he was distracted by the flashing police light before the accident, but his distraction lasted for "potentially even less than a second." Other than the momentary distraction, defendant kept his eyes on the road and "what was ahead of that on the hill, in terms of the cars that were going up the hill."

¶ 10 Dreksler testified that on the night of the collision, Meachum Road was clear and dry, and the weather was cold. He drove down Meachum Road at 35 mph when he saw a police car coming from the opposite direction on the top of the hill. The police car had its lights and sirens activated, and was moving the entire time. Within a couple of seconds of seeing the police car, Dreksler applied his brakes and moved to the side of the road. He looked in his rear view mirror and saw the vehicle behind him also pulling over to the side. When he pulled to a stop, at least half of his van was on the right shoulder. After Dreksler stopped, his van was hit from behind and pushed forward. He got out of his van and walked around his van and the other vehicles involved in the collision. Dreksler did not notice any ice on the road.

¶ 11 Plaintiff testified that on the night of the collision, he was driving on Meachum Road when he noticed a police car approaching from the opposite direction with its lights and siren activated. Plaintiff applied his brakes and slowed in order to pull to the side of the road and stop. He stopped his vehicle approximately eight feet from Dreksler's van. Approximately five seconds later, plaintiff looked in his rear view mirror and saw headlights approaching. He then felt an impact from behind and the force of the impact propelled his vehicle forward into Dreksler's van. Plaintiff believed defendant was driving 20-25 mph at the time of impact. Plaintiff testified that the police car with the flashing lights was moving the entire time and passed him several seconds before the collision while he was stopped. Plaintiff got out of his car and did not notice any ice on the road. The back of his car sustained "a lot of crumpling and twisting" and the front end also suffered damage.

¶ 12 Plaintiff went to the hospital later than evening for bruising on his knee, chest and abdomen from the seat belt. Plaintiff subsequently had surgery, on March 28, 2010, to repair a labral tear in his left hip. Defendant challenged plaintiff's claim that he suffered the labral tear as

a result of the accident, and argued that the condition was pre-existing. Plaintiff continues to suffer constant pain and walks with a limp. He stated that he will have hip replacement surgery in the future and his medical bills at the time of trial total $185,698.28.

¶ 13 Plaintiff filed a negligence complaint against defendant and the case was tried by a jury. In opening statements, defense counsel stated that "the police officer then interviews each of them. They all drive their cars away. No one is given a ticket. No one is given a citation." After opening statements, plaintiff called a witness. There was a lunch break and before the next witness, plaintiff's counsel objected to defense counsel's remarks that defendant was not issued a ticket or citation. Counsel stated that he did not object at the time because he did not want to call more attention to the statements, and he moved for a mistrial. The trial court denied the motion, but instructed the jury that the statement was improper and they should disregard it when considering the case.

¶ 14 After the conclusion of defendant's case, plaintiff moved for a directed verdict arguing that (1) defendant conceded that he was distracted while driving 35 mph on Meachum Road when it was dark, cold and wintery outside; (2) defendant did not see plaintiff's vehicle in front of him until it was too late to stop; and (3) defendant was driving too fast for the conditions. The trial court denied plaintiff's motion because there was conflicting testimony on material factual issues. After the jury returned a verdict in favor of defendant, plaintiff filed a motion for judgment NOV and a new trial on damages only, or alternatively, a new trial based on errors that occurred during trial. The trial court denied plaintiff's motions and plaintiff filed this timely appeal.

¶ 15 ANALYSIS

¶ 16 On appeal, plaintiff first contends that defense counsel's remark in his opening statement that the police did not issue defendant a ticket or citation was improper and prejudiced him. An opening statement may include a discussion of the expected evidence and reasonable inferences drawn therefrom. *Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412, ¶ 29. "Absent deliberate misconduct, incidental and uncalculated remarks in opening statement cannot form the basis of reversal." *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). Even if the remark was improper, such remarks made during an opening statement rise to the level of reversible error only if they substantially prejudice the other party such that the result would have been different absent the complained-of remarks. *People v. Phillips*, 392 Ill. App. 3d 243, 268 (2009).

¶ 17 In his opening statement, defense counsel remarked, "[s]o the police officer then interviews each of them. They all drive their cars away. No one is given a ticket. No one is given a citation." Plaintiff's counsel did not object to the statement at the time. Rather, counsel called a witness and then the court had a recess for lunch. After the recess, outside the presence of the jury, plaintiff's counsel moved for a mistrial arguing that defense counsel improperly "brought out the fact that there were no traffic tickets issued, which is clearly objectionable, never admissible in a civil case." Defense counsel responded that no objection was made at the time, when the trial court could have addressed the objection. Plaintiff's counsel stated that he did not object at the time because "that would bring more attention to it."

¶ 18 The trial court noted counsel's objection but denied his motion for a mistrial, stating that instead it "would tell the jurors to disregard any mention of who did or did not get a traffic ticket in this case" and admonished counsel that "[i]f you want to object, you have to object at the time and [the court] can handle it." Plaintiff's counsel then moved "to bar any evidence of the issuance

or non-issuance of traffic citations" which the trial court granted. The trial court asked whether it should tell the jury that the statement about the traffic ticket was "improper. It's not a matter that you should consider. That's not relevant to this case." Plaintiff's counsel answered, "Yes, I'd like you to tell them that, please." When the jury returned to the courtroom, the court instructed them that defense counsel's remark during opening statement that "Nobody got a ticket" was "improper. That's wrong. That's not a matter for your consideration. So as far as that statement by defense counsel, you're to totally disregard it and not make it part of this case." At the end of the day, the trial court once again addressed the jury regarding the statement. The court reminded the jurors that the statement was not evidence and that whether or not the police issued a ticket is not relevant. The court informed them that "it's [the court's] job to make sure you only consider the right evidence, competent evidence. So you can't consider that at all. It's a statement by an attorney. I said it's not evidence, and you can't consider it."

¶ 19 Plaintiff's counsel here agreed with the trial court's curative instruction to the jury, and with the procedure followed by the trial court on counsel's motion for a mistrial. Where a party agrees to the trial court's proceedings, "he is not in a position to claim he was prejudiced thereby." *People v. Schmitt*, 131 Ill. 2d 128, 137 (1989). The trial court also granted plaintiff's motion to "to bar any evidence of the issuance or non-issuance of traffic citations" and there is no evidence that defense counsel made that statement again during the trial. A party "may not ask the trial court to proceed in a certain manner and then contend in a court of review that the order which he obtained was in error." *People v. Lowe*, 153 Ill. 2d 195, 199 (1992).

¶ 20 Even if defense counsel made the remark in error, we do not find that plaintiff suffered substantial prejudice requiring reversal. Improper remarks made in opening statements are reversible error only if "the result would have been different absent the complained-of remark."

Cloutier, 156 Ill. 2d at 507. The cases plaintiff cites as support, including *Osborne v. Leonard*, 99 Ill. App. 2d 391 (1968), *Lasswell v. Toledo, P. & W. Railroad Co*., 41 Ill. App. 3d 568 (1976), *Allen v. Yancy*, 57 Ill. App. 2d 50 (1965), *Jacobson v. National Dairy Products Corp.*, 32 Ill. App. 2d 37 (1961), and *Sawicki v. Kim*, 112 Ill. App. 3d 641 (1983), are distinguishable because counsel in those cases engaged in a pattern of deliberate misconduct, including making the challenged remarks, so that the cumulative effect of the errors substantially prejudiced the plaintiffs. Here, the record does not indicate, nor does plaintiff contend, that defense counsel engaged in a pattern of deliberate misconduct when he stated that the police did not issue defendant a ticket or citation in his opening remarks. The trial court also twice instructed the jury that the statement was improper and they should not consider it in their deliberations. Where the trial court sustains an objection or grants appropriate relief such as striking a comment, any potential error was cured. *Simmons v. Garces*, 198 Ill. 2d 541, 567 (2002).

¶ 21 Plaintiff, however, argues that whether defendant was issued a ticket "relates directly and fundamentally to his claim that [defendant] was not negligent," and therefore this inadmissible evidence affected the jury's views of the "other evidence, contested facts, witness credibility, and the weight to be afforded the evidence." Illinois courts have long recognized that a violation of the Illinois Rules of the Road is not negligence *per se*. *Hitt v. Langel*, 93 Ill. App. 2d 386, 396 (1968); *Gullberg v. Blue*, 85 Ill. App. 3d 389, 391 (1980). Furthermore, the trial court is in a better position to determine the prejudicial effect of any challenged remarks. *People v. Simms*, 192 Ill. 2d 348 (2000). "The trial court has discretion to determine the proper character and scope of argument, and every reasonable presumption is indulged that such discretion was properly exercised." *Cloutier*, 156 Ill. 2d at 507. The trial court did not abuse its discretion here.

¶ 22 Next, plaintiff contends that the trial court should have granted his motion for a judgment *n.o.v.* A judgment *n.o.v.* is proper where "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). In ruling on the motion, the court does not reweigh the evidence or consider the credibility of the witnesses. *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). "The court has no right to enter a judgment *n.o.v.* if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Id*. at 454.

¶ 23 In *Thomas v. Northington*, 134 Ill. App. 3d 141 (1985), the plaintiff was struck from behind by the defendant, who was operating a semi-trailer truck. The vehicles were traveling on a downhill ramp leading to the interstate when the collision occurred. The plaintiff filed a negligence complaint against the defendant, and after a trial the jury returned a verdict in favor of the defendant. *Id*. at 142. On appeal, the plaintiff argued that the trial court should have granted the plaintiff's motion for a judgment *n.o.v.* because the fact defendant rear-ended the plaintiff's car indicates he was negligent as a matter of law. *Id*. at 144. This court disagreed, noting that a rear-end collision does not automatically create an inference that the driver of the rear vehicle was negligent as a matter of law, or following too closely, or driving too fast for conditions; rather, it is the trier of fact who must determine these issues. *Id*. at 145. See also *Korpalski v. Lyman*, 114 Ill. App. 3d 563, 566 (1983). The *Northington* court noted the cases cited by the plaintiff, *Burroughs v. McGuinness*, 63 Ill. App. 3d 664 (1978), and *Glenn v. Mosley*, 39 Ill. App. 3d 172 (1976) (cases also cited by plaintiff here), but found that neither one

contradicts the general rule that the issue of negligence is one for the trier of fact to decide when the parties contest material facts. *Id*. at 146. Pointing to the conflicting evidence on whether the plaintiff slowed down for traffic or slammed his brakes prior to the collision, the *Northington* court found that the evidence presented a clear question of fact for the jury as to whether the defendant was negligent in following and striking the plaintiff's vehicle, and therefore the trial court properly denied the motion for a judgment *n.o.v*. *Id*.

¶ 24 Likewise, the parties here presented conflicting evidence at trial. Defendant testified that he was driving within the 35 mph speed limit and when he spotted the police car with the flashing lights, it was not moving. Plaintiff and Dreksler stated that the police car with the flashing lights was moving at all times. Defendant testified that the flashing lights distracted him for "potentially even less than a second" and that he otherwise kept his eyes on the road and "what was ahead of that on the hill, in terms of the cars that were going up the hill." Defendant stated that it was difficult to see plaintiff's black car with dim taillights in the dark. He stated that he was already applying his brakes in response to the police car when he noticed plaintiff's car stop ahead of him, and as he pushed down harder in an attempt to stop, his vehicle slid on the icy road and slid into plaintiff's car. Officer Triveri also noted that the road was "wet." However, plaintiff and Dreksler stated that they did not notice ice on the road. Defendant stated he was driving 10-15 mph when he struck plaintiff's vehicle, but plaintiff stated he thought defendant was driving 20-25 mph. An assessment of credibility of the witnesses and a determination regarding conflicting evidence was decisive to the outcome. Viewed in the light most favorable to defendant, we cannot say that the evidence and the inferences drawn therefrom so overwhelming favors plaintiff that no contrary verdict could ever stand.

¶ 25 Alternatively, plaintiff argues that he is entitled to a new trial because the jury ignored the considerable evidence of defendant's negligence, mainly that defendant conceded he was driving distracted prior to hitting plaintiff's vehicle. The trial court should grant a motion for a new trial if the jury's verdict is against the manifest weight of the evidence. *Maple*, 151 Ill. 2d at 454. A verdict is against the manifest weight of the evidence if the opposite conclusion is clearly evident or the jury's findings are unreasonable, arbitrary or not based upon any of the evidence. *Id*. A reviewing court will not reverse the trial court's determination on a motion for a new trial unless the trial court abused its discretion. *Id*. at 455.

¶ 26 As discussed above, the evidence presented was conflicting and the opposite conclusion was not clearly evident. Plaintiff, however, argues that defendant's testimony that he was distracted by the flashing lights for "less than a second" was "self-serving," and defendant was clearly distracted because a careful driver would have noticed the stopped traffic and slowed down accordingly. We are mindful that the trial court has the benefit of observing the witnesses and assessing their credibility when ruling on a motion for a new trial. *Id*. We find that the trial court did not abuse its discretion in denying plaintiff's motion.

¶ 27 On cross-appeal, defendant contends that the trial court erred in denying his motion for costs. In his motion, defendant requested a total of $12,419.48 for costs incurred, including (1) appearance filing fee; (2) deposition costs; (3) trial court reporter fees; and (4) trial transcription fees. The trial court set a hearing date; however, although plaintiff's counsel appeared at the scheduled hearing defense counsel failed to appear thereby waiving an opportunity for oral argument on his motion. The trial court mailed its written ruling to the parties in which the court awarded defense counsel's $198 appearance fee, but denied the remainder of defendant's requested costs. Defendant appeals this ruling, but only the denial of costs related to the evidence

depositions of plaintiff's treating physicians (Dr. Patrick Birmingham, Dr. Eunice Dean, Dr. William Brander, Dr. Victoria Brander, and Dr. Mark Dolan).

¶ 28 Illinois Supreme Court Rule 208(d) authorizes the trial court, in its discretion, to tax as costs certain fees related to depositions. The trial court denied defendant's request for costs of the physician's depositions, ruling that defendant "failed to demonstrate why such depositions were necessarily used at trial," and citing *Galowich v. Beech Aircraft Corp*., 92 Ill. 2d 157, 166 (1982). In his brief, defendant simply argues that these physicians were not available to testify at trial and cites *Woolverton v. McCracken*, 321 Ill. App. 3d 440 (2001), and *Myers v. Bash*, 334 Ill. App. 3d 369 (2002), as support for his contention that a physician's evidence report is not a " 'luxury' that a party undertakes for his own benefit, but rather a necessary expense in light of the expressed preference for the use of physician evidence depositions." *Woolverton* and *Myers*, however, are cases where the prevailing plaintiff petitioned against the defendants for costs of the evidence depositions of the plaintiff's physicians. Here, defendant seeks to recover costs related to the evidence depositions of plaintiff's physicians against plaintiff, who "incurred substantial expense" in obtaining the depositions for his case-in-chief. Defendant does not cite cases supporting his contention, or further argue why *Woolverton* and *Myers* should apply to him. We find that the trial court did not abuse its discretion in denying defendant's request for costs related to the evidence depositions.

¶ 29 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 30 Affirmed.