2018 IL App (1st) 173072-U

SIXTH DIVISION
DECEMBER 14, 2018

No. 1-17-3072

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LARRY BRUMFIELD,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14 L 11015
	)	
GREENLEE DIAMOND TOOL COMPANY,	)	Honorable
	)	Arnette R. Hubbard,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the order of the circuit court of Cook County granting defendant's motion to reconsider, in which the circuit court determined that plaintiff's contributory negligence was more than 50% of the proximate cause of his injury.

¶ 2 Following a bench trial in this personal injury action, the trial court originally found in favor of plaintiff-appellant Larry Brumfield (plaintiff) but found that plaintiff's contributory negligence was 50% of the proximate cause of his injury. After defendant-appellee Greenlee Diamond Tool Company (defendant) filed a motion to reconsider, the trial court revised its findings and concluded that plaintiff's negligence was more than 50% of the proximate cause of

his injury, thus barring plaintiff from any recovery. Plaintiff appeals from the order granting the motion to reconsider and entering judgment in defendant's favor. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 Plaintiff, a truck driver, was injured in the course of delivering a load of freight at defendant's premises in Elk Grove Village on October 3, 2013. Plaintiff initiated this lawsuit against defendant, which alleged, *inter alia*, that defendant breached its duty to exercise ordinary care for plaintiff's safety by negligently failing to provide a "dock plate" or other safety equipment during the unloading process and negligently instructing plaintiff to unload freight under unsafe conditions.

¶ 5 The circuit court conducted a bench trial in February 2017. At trial, plaintiff testified that, on the date of his injury, he delivered a load of freight with his truck, a 53-foot semi-tractor with a trailer. Upon arrival at defendant's premises, he maneuvered his truck, so that the rear of the trailer approached defendant's loading dock. Plaintiff testified that the trailer was approximately one foot higher than the loading dock.

¶ 6 Plaintiff explained that, due to the presence of another vehicle in the area, he was unable to position his trailer so that its rear was directly aligned with, or flush against, the edge of the loading dock. He explained that there "were two bumper guards" attached to the loading dock, but that his trailer was parked at an angle, such that it touched only one of the bumpers. Plaintiff acknowledged that, due to the angle of the trailer, there was a gap between the right edge of the trailer and the loading dock. However, plaintiff stated that he was told by one of defendant's workers that he "was close enough" to unload his delivery.

¶ 7 Plaintiff recalled speaking to one of defendant's workers, who was operating a forklift at the loading dock. Plaintiff asked the man for a dock plate; plaintiff described a dock plate as "the apparatus that's used to cover the gap between the building and the trailer so that something can roll in and roll out." Plaintiff testified that a dock plate "allows the safe operation of a forklift into the back of a trailer for loading and unloading purposes," and he agreed that a dock plate would have "eliminated" the gap between his truck and the loading dock.

¶ 8 According to plaintiff, when he asked for a dock plate, the worker at defendant's loading dock told him "We don't have one." When plaintiff asked how they would unload the freight, the worker replied: " 'I'm gonna push the pallet jack onto the back of your trailer. You push the freight to the end, I'll take it off with the forklift.' " Plaintiff testified that a pallet jack is a four-wheeled device that is used "to move pallets around in the back of" a trailer.

¶ 9 Plaintiff recalled that one of defendant's workers brought a pallet jack and placed it on the trailer. Plaintiff then used the pallet jack to move the delivery pallets to the rear of the trailer. One of defendant's workers then used a forklift to lift the pallets from the trailer and onto the loading dock.

¶ 10 Plaintiff recalled that, after the delivery pallets were successfully moved onto the loading dock, the forklift operator told him to " 'Go ahead and just push the pallet jack off the back of your truck, and I'll be back with your paperwork.' " Plaintiff did not know why he was expected to get the pallet jack off the trailer, but testified that he "was just following instructions."

¶ 11 Plaintiff explained that, as he attempted remove the pallet jack from the trailer, he lost control of it, and his left foot fell in the gap between the trailer and the loading dock:

> "And as I was walking to the edge of the trailer, I knew that the drop was there, so I put my arms underneath of the – the weight of

> the arms on top of the *** pallet jack. *** And because I knew I had the drop, I stepped out of the trailer with my right foot. It turned my body as I stepped out because of the weight of the pallet jack, and it kept rolling so when my left leg stepped down, it went down between [the] trailer and the building."

Plaintiff testified that he had placed two wheels of the pallet jack on the dock, but the pallet jack "continued to roll onto the dock" and its momentum pulled him forward. His right foot was on the loading dock, but his left foot fell in the gap between the trailer and the loading dock. Plaintiff's left arm struck the trailer bed; he heard a "series of pops" in his left arm. An ambulance arrived and took plaintiff to the emergency room. Plaintiff described his subsequent treatment for the injury, including physical therapy and surgery on his left shoulder.

¶ 12 On cross-examination, plaintiff agreed that a van parked nearby made it more difficult for him "to square [his] truck up with the dock," but acknowledged he had not asked anyone whether the van could be moved. Plaintiff also agreed that he did not suggest unloading the trailer elsewhere, even after he was told there was no dock plate available. Plaintiff agreed that he was aware that the trailer was "not squared up with the dock" but stated that he did not try to reposition his truck, because he was told that he "was close enough." He agreed that, generally, when positioning a trailer, "You want to be in contact with both of the dock bumpers." Plaintiff also admitted that, when he initially stepped into the trailer, he saw the gap between the loading dock and the trailer.

¶ 13 Plaintiff also agreed that he has a "choice" not to follow directions from a dock worker, and that he can refuse to follow instructions if he feels they threaten his safety. Defense counsel attempted to ask plaintiff how long it would have taken to reposition the truck so that it would

have been "square with the dock." Plaintiff answered that he did not have to do so, because defendant's worker said that he was "close enough."

¶ 14 Vincent Pecis testified that he is a general manager for defendant. Pecis explained that, as of October 2013, defendant accepted deliveries through loading docks located on the east side of the defendant's premises. Pecis did not personally supervise deliveries, but stated that defendant's employees, Xavier Jaimes and Roger Valdez, worked on the loading dock.

¶ 15 Pecis was asked who was responsible for unloading the freight from a delivery truck; he stated that it was "a mutual responsibility to be worked out between the driver and our dock personnel." Pecis testified that pallet jacks and a forklift were available at defendant's premises. He stated that dock plates were also available, but that they were kept on the west side of the building, not on the east dock that was usually used for deliveries. He acknowledged that a dock plate could be brought from the west side of the building to the east side in "minutes." Pecis also testified that if a truck driver requests use of a dock plate, defendant makes one available. However, Pecis testified that he did not believe it was necessary to use a dock plate to safely unload the freight that plaintiff delivered in this case.

¶ 16 Pecis testified that it is possible for a trailer to be positioned so that its rear is flush against the loading dock, without any gap between the trailer and the dock, "other than the bumpers." He described the bumpers as "rubber mechanical devices attached to the side of the building to prevent the trailer from running into the building."

¶ 17 Pecis was shown a number of photographs that he took on the date of plaintiff's injury, showing the relative positions of plaintiff's trailer and the loading dock. The photographs showed that the trailer was parked at an angle, such that the left rear of the trailer touched the left bumper, but the right side did not touch the right bumper. Pecis testified that the gap between

the right rear of the trailer and the edge of the dock was approximately ten inches wide. Pecis estimated that plaintiff's trailer was "four to five inches" higher than the dock.

¶ 18 Pecis did not witness any interaction between plaintiff and dock workers leading up to the fall, and he did not witness plaintiff's injury. Pecis interviewed Jaimes and Valdez on the same date of the incident, and stated that he took handwritten notes based on those interviews, which were contained in trial exhibit 14.

¶ 19 Pecis testified that he learned of plaintiff's fall after Jaimes and Valdez told him to come to the loading dock. After he saw plaintiff, Pecis told an employee to call an ambulance. Pecis testified that he interviewed Jaimes and Valdez approximately 30 minutes after the incident. According to Pecis' handwritten interview notes, plaintiff fell while Valdez was "putting [the] pallet jack away" and while plaintiff "was exiting trailer to close trailer door and leave." Elsewhere, the notes indicated that plaintiff was the one who "took [the] pallet truck off [the] trailer" and that "Roger [Valdez] took pallet jack out of way."

¶ 20 Pecis agreed that a driver can refuse to complete a delivery, if the driver believes there is an unsafe condition. Pecis testified that, on the date of the incident, he did not observe any other vehicles or obstructions in the area that would have prevented plaintiff "from squaring up his truck" so that it was flush with the loading dock. Pecis agreed that "typically" truck drivers are "able to pull their truck in so that the rear of the trailer is square with the loading dock."

¶ 21 Jaimes testified at trial that he is a forklift driver for defendant. He stated that there are two loading docks at defendant's premises, one on the east side and one on the west side. Jaimes testified that dock plates are kept on the west dock, but that they can be moved to the east dock. Jaimes testified that a delivery truck will usually back up to one of the bays on the east dock. When receiving a delivery, Jaimes usually discusses the method of unloading with a truck driver.

He stated that he had never been asked by a truck driver to use a dock plate for unloading a delivery.

¶ 22 Jaimes stated that, on the date of plaintiff's injury, Jaimes did not see plaintiff's truck until it was already parked. He recalled that plaintiff's truck "wasn't squared to the building" but he did not mention this to plaintiff, and he denied that he and plaintiff discussed repositioning the truck. Jaimes testified that he and plaintiff discussed unloading the truck, and they decided to use a pallet jack. Jaimes did not recall whether plaintiff mentioned a dock plate.

¶ 23 Jaimes testified that he put the pallet jack on the trailer, and then plaintiff used the pallet jack to move the delivery load to the rear of the trailer. Jaimes then used a forklift to move the load from the trailer and onto the dock. Jaimes did not see who removed the pallet jack from the trailer.

¶ 24 Jaimes did not witness plaintiff's fall. He recalled that he heard a yell, turned, and saw that plaintiff was "between the gap" between the trailer and the dock. Jaimes testified that, seconds later, he saw Valdez "taking the pallet jack to an area where we usually keep our pallet jacks."

¶ 25 On cross-examination, Jaimes said that Valdez was the person who brought the pallet jack to the area. Jaimes agreed that plaintiff's truck was parked at an angle, and he estimated that the gap between the trailer and the loading dock was nine or ten inches at its widest point. Jaimes saw no obstacle that would have made it difficult for plaintiff to position the truck closer to the dock. Jaimes agreed that a dock plate was available, but again denied that plaintiff requested one. Jaimes testified that after plaintiff fell, he noticed that the rear trailer door was "halfway closed" and "partially pulled down."

¶ 26 Valdez was the final live witness at trial. Valdez testified that he saw plaintiff back up his truck to the loading dock but that he did not speak to plaintiff. Valdez acknowledged that he brought the pallet jack to the area, but stated that he was otherwise not involved in unloading the truck. Valdez did not hear the substance of anything said between Jaimes and plaintiff.

¶ 27 Valdez testified that after he brought the pallet jack, plaintiff put it on the trailer, while Jaimes waited near the forklift. Valdez agreed that plaintiff's trailer was at an angle, rather than flush with the dock. Valdez testified that, at the time of plaintiff's fall, plaintiff had already taken the pallet jack off the trailer, and Valdez "was putting the pallet jack back in its place." Valdez did not see plaintiff's fall.

¶ 28 Valdez agreed that generally, a pallet jack is used to unload a truck. Valdez testified that dock plates were "rarely" used on the east loading dock, but agreed that they are available if requested by a driver. He agreed that, normally, a delivery truck will pull in so that the rear of the trailer is in contact with both of the dock bumpers.

¶ 29 Following closing arguments, the court indicated that it would render a decision after reviewing the exhibits, including the deposition transcript of plaintiff's medical witness.

¶ 30 On February 14, 2017, the trial court entered a judgment in favor of plaintiff, but also found that plaintiff was "50% contributorily negligent." The court found that plaintiff's damages totaled $307,307.61. Thus, after reducing the damages to account for plaintiff's contributory negligence, the court entered judgment in the amount of $153,653.80.

¶ 31 On April 7, 2017, defendant filed a timely[1] motion for reconsideration under section 2-1203(a) of the Code of Civil Procedure (Code). 735 ILCS 5/2-1203 (West 2016). The motion first argued that "plaintiff failed to prove that his injury was caused by the absence of a dock

[1] Within 30 days of the February 14, 2017 order, defendant moved for an extension of time to file a motion for reconsideration. On March 9, 2017, the trial court granted defendant an extension to file its motion for reconsideration by April 17, 2017.

plate" because the trial evidence "showed overwhelmingly that plaintiff had safely and successfully returned the pallet jack to the dock without incident." The motion argued that since the injury "did not occur while unloading the pallet jack, the presence or absence of a dock plate had nothing to do with plaintiff's injury." Defendant urged that a dock plate "would not have changed the outcome" as "plaintiff was injured because he simply did not watch what he was doing when he stepped off the truck to close the trailer door."

¶ 32 Additionally, the motion for reconsideration argued that "plaintiff's contributory fault exceeded 50% of the total proximate cause of the plaintiff'S injury," barring any recovery pursuant to section 2-1116 of the Code. 735 ILCS 5/2-1116(c) (West 2016). The motion argued that it was "against the manifest weight of the evidence" for the court to conclude that plaintiff's fault constituted only 50% of the proximate cause. Defendant urged that there "were many things" plaintiff should have done to avoid his injury and that "[h]ad plaintiff positioned his truck squarely with the dock, his fall would not have happened." The motion argued that plaintiff's contributory negligence was clear, regardless of whether the court believed plaintiff's testimony that he fell while removing the pallet jack. Defendant argued that, regardless of the precise manner of injury, the reason for his injury "is that plaintiff created, and failed to correct, the gap between the trailer and the dock."

¶ 33 Finally, the motion argued that plaintiff failed to prove the existence of a dangerous condition on the property. Defendant argued that, even if the gap could be considered a dangerous condition, it was "open and obvious" and plaintiff was aware of it.

¶ 34 Plaintiff filed a response in which he argued that the court should not disturb its findings on the apportionment of the parties' negligence. Plaintiff argued that there was evidence that the injury was caused by defendant's failure to provide a dock plate after plaintiff requested one.

Plaintiff argued Valdez' "credibility is questionable" as he was contradicted by both plaintiff and Jaimes with respect to who placed the pallet jack on the trailer. Plaintiff argued that there was no reason to change the court's original determinations as to credibility or its finding of 50% contributory negligence.

¶ 35 Plaintiff's response otherwise argued that defendant's liability for a dangerous condition could be premised upon the "deliberate encounter" exception described in a comment to section 343(A) of the Restatement (Second) of Torts. Restatement (Second) of Torts § 343A, Comment f, at 220 (1965). Plaintiff argued that "there was a dangerous condition, and even though it was open and obvious, the deliberate encounter exception applied" because "[d]efendant could reasonably anticipate that [plaintiff] would proceed with the unloading of the trailer," despite his awareness of the condition.

¶ 36 The trial court heard oral argument on the motion to reconsider on July 6, 2017. On November 16, 2017, the court entered an order granting defendant's motion for reconsideration. The order reflected that the court had reconsidered the trial testimony and revised its determination as to the extent of plaintiff's negligence. Regarding witness credibility, the court explicitly found that plaintiff's account of the incident was "both credible and consistent with the undisputed physical facts." On the other hand, the court noted that Valdez' testimony was "largely lacking in credibility." The court also found that Jaimes "waffled on the matter of a request by Plaintiff for a [dock plate] but was otherwise credible." The court indicated that it believed that plaintiff had, in fact, asked for a dock plate, but was told that none was available. The court also credited plaintiff's testimony that he was instructed to remove the pallet jack from the trailer, and that he fell when when he lost control of it.

¶ 37 The court additionally found that "[p]laintiff created the angled gap between his truck and Defendant's dock"; the "gap was open and obvious"; and that "[p]laintiff was aware of the gap having both created and safely traversed the gap prior to his fall." The trial court also held that the "deliberate encounter" exception did not apply.

¶ 38 The court explicitly revised its finding of the plaintiff's contributory negligence, noting that:

> "Plaintiff's contributory acts include *** creation of the gap; proceeding with a dock plate hesitantly but without insisting on safer options; or declining to unload; or repositioning his trailer to eliminate the gap; following what he called 'instructions' to push the pallet jack from his trailer when logically he had another option; matters of his skill in managing the removal process."

The court concluded that its earlier apportionment of negligence "was incorrect" and that the "weight of the evidence supports a finding that Plaintiff's contributory negligence was greater than 50%." Accordingly, the court's November 2017 order granted defendant's motion for reconsideration, vacated its earlier judgment for plaintiff, and granted judgment in defendant's favor.

¶ 39 On December 12, 2017, plaintiff filed a timely notice of appeal. Accordingly, this court has jurisdiction. Ill. S. Ct. R. 303 (eff. July 1, 2017).

¶ 40 ANALYSIS

¶ 41 On appeal, plaintiff seeks reversal of the trial court's decision granting defendant's motion for reconsideration and the resulting judgment in defendant's favor. Plaintiff claims that *de novo* review applies, and that the trial court "clearly erred when it reversed itself on the

question of comparative fault." Plaintiff contends that there was no reason for the court to deviate from its original February 2017 assessment of the evidence, emphasizing that the original order was "rendered less than one week after the court had heard and assessed that evidence."

¶ 42 Plaintiff notes that defendant's motion to reconsider did not rely on any new facts or changes in the law, and suggests that the court should not have altered its assessment of the evidence "fully nine months after trial." He emphasizes that the issue of whether plaintiff "was guilty of some comparable fault is a question for the trier of fact, and was initially determined in the immediate aftermath of the trial, while memory and impression of witnesses was fresh." He argues that the trial court should not have changed its finding on the issue of contributory fault, as the "facts it considered had not changed" since trial, and there "was no credible evidence to refute [plaintiff's] rendition of the events."

¶ 43 Defendant's response argues that the applicable standard of review is deferential, rather than *de novo*. Defendant urges that, since determination of a plaintiff's comparative fault is a factual issue, we should apply a "manifest weight of the evidence" standard of review. Defendant contends that we should affirm the trial court, as it was not against the manifest weight of the evidence to conclude that plaintiff's negligence was more than 50% of the proximate cause of the injury. Alternatively, defendant argues that we can affirm on an independent basis, namely, plaintiff's failure to prove a condition on defendant's property presenting an unreasonable risk of harm.

¶ 44 "Under section 2-103 of the Code of Civil Procedure (Code), '[i]n all cases tried without a jury, any party may, within 30 days after the entry of the judgment ***, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief.' [Citation.] The purpose of a motion to reconsider 'is to bring to the trial court's attention

newly discovered evidence not available at the time of the first hearing, changes in the law, or errors in the previous application of existing law to the facts at hand.' [Citation.]" *Nissan Motor Acceptance Corp. v. Abbas Holding I, Inc.*, 2012 IL App (1st) 111296, ¶ 16. "Generally, a trial court's decision to grant or deny a motion to reconsider will not be reversed absent an abuse of discretion. [Citation.]" *Id.*

¶ 45 However, our court has recognized that " '[a]buse of discretion' is a versatile standard of review in that, depending on what the underlying issue is, it can lead to other standards of review. For example, if the judgment is against the manifest weight of the evidence, a trial court would abuse its discretion by denying a motion to vacate the judgment." *Schulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 22 (discussing the appropriate standard of review upon a motion to reconsider following a bench trial). "If a motion for reconsideration requests the court to change its mind about its factual findings, we will find no abuse of discretion in the grant or denial of the motion unless the court's revised factual findings *** are against the manifest weight of the evidence." *Id.* Thus, in *Schulte*, we explained that, where defendant's motion to reconsider following a bench trial implicated both legal and factual determinations, our court would "give due deference to the finding[s] of the trial court" on factual matters, but would review underlying questions of law *de novo. Id*. ¶ 24.

¶ 46 In this case, defendant's motion for reconsideration asked the trial court to revisit factual findings, including the proportion of plaintiff's contributory negligence. See *Merca v. Rhodes*, 2011 IL App 102234, ¶ 45 ("[W]hen there is a showing of contributory negligence on behalf of a plaintiff the trier of fact makes the determination as to the percentage of contributory negligence.") Accordingly, "we will find no abuse of discretion" in its determination on that factual issue "unless the court's revised factual findings *** are against the manifest weight of

the evidence." *Schulte*, 2013 IL 120132, ¶ 22. In other words, our pertinent inquiry is whether it was against the manifest weight of the evidence for the trial court to determine, upon the motion for reconsideration, that plaintiff's contributory fault was more than 50% of the proximate cause of his injury. If that determination was not against the manifest weight of the evidence, then plaintiff was barred from recovery, pursuant to section 2-116 of the Code. 735 ILCS 5/2-1116 (West 2016) ("The plaintiff shall be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought."). "A judgment is against the manifest weight of the evidence only when an opposite conclusion is clearly evident or the factual findings on which it is based are unreasonable, arbitrary or not based on the evidence. [Citation.]" *1350 Lake Shore Associates v. Mazur-Berg*, 339 Ill. App. 3d 618, 628-29 (2003).

¶ 47 Given the trial record in this case, we cannot say that the trial court's reassessment of plaintiff's contributory negligence was against the manifest weight of the evidence. Plaintiff's brief suggests that the trial court could not simultaneously find that plaintiff's testimony was credible, yet still find that his negligence constituted more than 50% of the proximate cause of his injury. We disagree. We recognize that the trial court explicitly found that plaintiff gave truthful, credible testimony. Nevertheless, even assuming the truth of plaintiff's testimony, there was ample support in his testimony and other evidence for the trial court's conclusion that plaintiff's own negligence was the primary cause of his injury.

¶ 48 Significantly, plaintiff acknowledged that he parked the trailer at an angle; there was undisputed evidence that this action resulted in a gap of several inches between the right end of the trailer and the loading dock. Plaintiff explicitly admitted that he was aware of the gap, yet he took no steps to reposition his truck to correct it. In other words, it was undisputed that plaintiff

created the very hazard that injured him. Further, plaintiff's testimony acknowledged that he could have refused to participate in unloading his truck, if he felt his safety was threatened. In essence, he admitted that he had a choice in whether to proceed, despite the gap and the absence of a dock plate. Nevertheless, plaintiff elected to follow the "instructions" from defendant's worker regarding use of a pallet jack. Given this testimony, we cannot say that it was unreasonable or arbitrary for the trial court to find that plaintiff's negligence was more than 50% of the proximate cause of his injury. Rather, this conclusion was supported by ample evidence.

¶ 49 We further reject plaintiff's suggestion that the trial court could not, upon a motion to reconsider, re-evaluate its factual findings from a bench trial conducted several months earlier. Plaintiff emphasizes that the trial court's initial determination of plaintiff's 50% comparative fault in this case was made "in the immediate aftermath of the trial, while memory and impression of witnesses was fresh," implying that it was improper for the trial court to reconsider that factual determination several months later. However, nothing in the Code prevents this use of a motion to reconsider. Section 2-1203 of the Code simply and broadly states that: "In all cases tried without a jury, any party may, within 30 days *** file a motion for a hearing, or a retrial, or modification of judgment or to vacate the judgment or for other relief." 735 ILCS 5/2-1203(a) (West 2016). Contrary to plaintiff's suggestion, nothing in this Code provision prevents a court from reviewing its earlier factual determinations after a bench trial. Rather, a trial court retains discretion to review its prior findings upon a motion under section 2-1203 of the Code. We will not read into this broad statutory provision the limitations urged by plaintiff.

¶ 50 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County

¶ 51 Affirmed.