2019 IL App (1st) 180384-U

No. 1-18-0384

Order filed June 21, 2019

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

YOLANDA SILVA PATINO, Administrator of the Estate of Edi Carreto-Silva, Deceased,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 14 L 11515
FLADIMIR VELCANI,	)	
Defendant-Appellee (Fladimir Velcani, Third-Party Plaintiff-Appellee, and Ashley Zaborowski, Third-Party Defendant-Appellee).	)	Honorable Rena Marie Van Tine, Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: 1. Plaintiff's claims in the amended complaint against the third-party defendant were barred by the statute of limitations.

2. In this wrongful death action, the trial court did not err by allowing an occurrence witness to testify about the decedent's alcohol consumption and an expert to testify about the

> decedent's blood alcohol content and opine that his intoxication contributed to the collision.

¶ 2 This appeal involves a wrongful death action on behalf of Edi Carreto-Silva, who was the passenger of a car that was driven by his girlfriend. After the girlfriend stopped her car in the roadway, Carreto-Silva exited the car and shortly thereafter was fatally struck by another vehicle while he was walking on the roadway. The jury found that Carreto-Silva was more than 50% contributorily negligent and returned a verdict in favor of the defendant driver of the moving vehicle. The trial court entered judgment on the verdict in favor of that defendant and the third-party defendant, the girlfriend and driver of the stopped car.

¶ 3 The administrator of Carreto-Silva's estate appealed and argued that the trial court erred by (1) striking the amended complaint against the third-party defendant as time barred; and (2) allowing occurrence witness testimony about Carreto-Silva's alcohol consumption and expert testimony about Carreto-Silva's blood alcohol content and intoxication.

¶ 4 For the reasons that follow, we affirm the order dismissing the amended complaint against the third-party defendant and the judgment of the trial court.[1]

¶ 5 I. BACKGROUND

¶ 6 On September 28, 2014, Carreto-Silva was a passenger in the car driven by his girlfriend, third-party defendant Ashley Zaborowski. She and Carreto-Silva were driving home from a party where alcoholic beverages were served. Zaborowski testified[2] that Carreto-Silva drank multiple

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

[2] The record does not include a transcript of Zaborowski's trial testimony, but does include her deposition testimony. Plaintiff, as the appellant, bears the burden to present a sufficiently complete record of the trial proceedings to support her claims of error and any

shots of vodka and beer at the party and was "kind of drunk" when they left the party. However, Zaborowski neither knew when Carreto-Silva had his last drink at the party nor noticed whether he staggered when he walked. On the drive home, Carreto-Silva fell asleep. At a certain point, he woke up and told Zaborowski to stop the car so he could urinate. Zaborowski, who had been driving eastbound on Higgins Road, stopped her car in the left-turning lane of Higgins Road, in the area of the Busse Woods forest preserve. Carreto-Silva exited the car and crossed two lanes of roadway to find a spot off the side of the road to urinate. The area was very dark, and Zaborowski did not see Carreto-Silva after he exited the car.

¶ 7 Meanwhile, defendant Fladimir Velcani was driving his minivan taxi eastbound on Higgins Road. Carreto-Silva attempted to return to Zaborowski's car by running across the two eastbound lanes of Higgins Road. As Carreto-Silva was crossing the road, he was struck by Velcani's minivan taxi. Carreto-Silva was transported to a hospital where he was pronounced dead.

¶ 8 On November 6, 2014, Carreto-Silva's mother, Yolanda Silva Patino filed, as the administrator of his estate, a wrongful death action against Velcani. Velcani filed an answer and

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doubts arising from the incompleteness of the record will be resolved against her. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

In her brief before this court, plaintiff cites portions of Zaborowski's deposition testimony to support plaintiff's claims of error and states, "At trial, Zaborowski testified consistent with her deposition testimony." The appellees agree that Zaborowski's trial and deposition testimony were consistent and likewise cite portions of that deposition testimony to support their arguments. Plaintiff, however, then complains in her reply brief that citation to the deposition is improper and the contention that Zaborowski's deposition and trial testimony were consistent "is without basis."

Plaintiff's inconsistent positions notwithstanding, we note that the parties agree about the general substance of Zaborowski's testimony concerning her observations of Carreto-Silva on the date in question. We will address below in our analysis of plaintiff's claims of error the effect of the partial trial transcript in the record on review.

later was granted leave, over plaintiff's objection, to file affirmative defenses. The record on review does not include the document wherein Velcani asserted his affirmative defenses.

¶ 9 On September 7, 2016, Velcani was granted leave to file a third-party complaint for contribution against Zaborowski, and plaintiff "was granted leave to plead against" Zaborowski after she was served with Velcani's third-party complaint. Velcani filed his third-party complaint on September 8, 2016, and Zaborowski was served on November 1, 2016. Plaintiff filed the amended complaint, which added Zaborowski as a defendant, on December 2, 2016.

¶ 10 Thereafter, Zaborowski moved to strike the amended complaint based on the expiration of the statute of limitations; no affidavits or deposition transcripts were attached to her motion. Zaborowski argued that the statute of limitations expired September 28, 2016; plaintiff's amended complaint was filed December 2, 2016; and the court's September 17, 2016 order did not give plaintiff leave to amend the complaint beyond the statute of limitations.

¶ 11 In her response, plaintiff argued that, even though the amended complaint was filed outside the statute of limitations period, she should be allowed to maintain her cause of action against Zaborowski because plaintiff's counsel had advised the court of the statute of limitations issue before the court granted plaintiff leave to file an amended complaint. Plaintiff also argued that, pursuant to section 2-616(d) of the Code of Civil Procedure (Code) (735 ILCS 5/2-616(d) (West 2016)), the lapse of the limitations period did not bar the amended complaint because (1) the original action was timely commenced; (2) Zaborowski received timely notice of the commencement of that action because she testified at a deposition on July 8, 2015, long before the expiration of the limitations period, and knew or should have known that the action would

have been brought against her; and (3) the cause of action in the amended complaint grew out of the same occurrence set up in the original pleading.

¶ 12 The circuit court granted Zaborowski's motion to strike and dismissed plaintiff's amended complaint. Plaintiff moved to reconsider the order striking her amended complaint, and the court denied the motion to reconsider. The court rejected plaintiff's argument that the amended complaint related back to the filing of the original complaint, explaining that, in accordance with the law, the court had focused on whether Zaborowski knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against her. The court found that Zaborowski easily could have believed that she would not be sued in this matter because she was not the driver of the vehicle that struck and killed Carreto-Silva.

¶ 13 Later, Zaborowski moved for summary judgment in her favor against third-party plaintiff Velcani, arguing that (1) her action of stopping her vehicle in the left-turning lane was not the proximate cause of the accident; and (2) she did not have a legal duty to protect or control Carreto-Silva because no special relationship existed. Velcani filed a response to the summary judgment motion.

¶ 14 Before the jury trial commenced in October 2017, the trial court denied Zaborowski's motion for summary judgment, finding that the issues of her negligence and foreseeability were factual issues for the jury to decide. The court stated that Carreto-Silva's alcohol consumption raised a question of fact as to whether his death was foreseeable given Zaborowski's knowledge that he had been drinking earlier that night and her decision to let him out of the car by stopping in the left-turning lane of the roadway instead of pulling over to the side of the road.

¶ 15 The court also considered and ruled on the parties' contested motions *in limine*. Relevant to this appeal, plaintiff moved to bar any evidence of Carreto-Silva's alcohol consumption and intoxication, arguing that the evidence concerning his alcohol consumption would be unduly prejudicial because the relevant issue was not whether he was merely under the influence of alcohol but whether he was impaired. Plaintiff also asserted that the defense would not be able to lay a proper foundation for the admission of the blood alcohol content evidence.

¶ 16 The court denied this motion *in limine*, ruling that (1) the issue of alcohol consumption was relevant to the foreseeability issue involving Zaborowski; (2) Carreto-Silva's blood alcohol content, which was twice the legal limit, was unusually high and Illinois precedent permitted opinion testimony concerning a person's alcohol consumption in such situations; and (3) other evidence would likely be elicited to show Carreto-Silva's impairment, such as his alcohol consumption prior to the collision and his unusual conduct, *i.e.*, getting out of the car in the middle of the road and crossing two lanes of traffic in the dark to urinate in a public place. Concerning whether the defense would lay a proper foundation for the admission of the blood alcohol content evidence, the trial court indicated that it would address this issue if it was raised at the appropriate time during the trial.

¶ 17 Plaintiff also moved *in limine* to bar, as irrelevant, speculative and unduly prejudicial, Dr. Jerrold Leikin's expert opinion testimony that Carreto-Silva's mental and physical faculties were so impaired by alcohol at the time of the collision that he was incapable of maintaining ordinary care for his own safety. The trial court denied plaintiff's motion, finding that Carreto-Silva's blood alcohol level was twice the legal limit and there was additional relevant evidence to show that he was intoxicated or impaired. This evidence included Carreto-Silva's unusual

conduct just prior to the collision and Zaborowski's deposition testimony that Carreto-Silva drank alcohol at the party and was "kind of drunk" when they left the party. The trial court also found that Dr. Leikin had the requisite training and experience to give his expert opinion, and the weight to be given to his opinion was a matter for the jury to decide.

¶ 18 During the trial, Dr. Leikin testified about his education, training, and experience as the director of medical toxicology at NorthShore University HealthSystem. The trial court found that he was an expert in the field of toxicology in terms of intoxication. Dr. Leikin further testified that, in reaching his conclusions in this case, he reviewed the Illinois traffic crash report, the reconstruction report, and the autopsy records, which contained the toxicology report. Based on his review of the records, Dr. Leikin opined to a reasonable degree of medical certainty that Carreto-Silva was intoxicated at the time of the accident. In reaching this conclusion, Dr. Leikin relied on specific calculations of the alcohol concentration in Carreto-Silva's body taken from two samples: his blood and his vitreous, a clear colorless fluid that fills the space between the lens and retina of the eye. Carreto-Silva's blood alcohol content was tested and shown to be 165 milliliters per deciliter, which corresponded to .165 grams percent. Further, the vitreous testing yielded a fluid alcohol content of 181milligrams per deciliter, which corresponded to the 165 of the peripheral blood.

¶ 19 Dr. Leikin then testified that, based on a reasonable degree of medical certainty, Carreto-Silva's intoxication rendered him incapable of maintaining ordinary care for his own safety at the time of the collision. Dr. Leikin's opinion was based upon his experience with OMEGA Services, a company that offers specialized services for occupational medicine needs, including drug and alcohol testing. Dr. Leikin testified that he followed the same procedures in this case

that he does in every medical review as part of his job with OMEGA Services when testing a person's fitness for duty in an employment safety sensitive position. Dr. Leikin also testified that, as a medical physician, he would not allow a person with a blood alcohol level of 165 in terms of blood and 181 in terms of fluid in the eye to drive a vehicle or operate any other safety sensitive position. Lastly, he testified that, based upon a reasonable degree of medical certainty, Carreto-Silva's alcohol consumption was a contributory factor in this accident.

¶ 20 After all the parties rested, the trial court denied Zaborowski's motion for a directed verdict. After closing arguments, the jury returned a verdict in favor of defendant Velcani and answered special interrogatories finding that Carreto-Silva was contributorily negligent, his contributory negligence was a proximate cause of his injuries, and he was more than 50% contributorily negligent. Based on the verdict and special interrogatory answers, the court entered judgment in favor of defendant Velcani and third-party defendant Zaborowski.

¶ 21 Plaintiff filed a motion for a new trial, arguing, *inter alia*, that the trial court erred by (1) not barring Dr. Leikin's testimony regarding the blood alcohol content and level of intoxication; (2) allowing evidence of Carreto-Silva's blood alcohol content to be considered by the jury on the issue of his negligence; (3) allowing evidence of alcohol consumption; and (4) allowing Dr. Leikin, Dr. Soriano, and a state trooper to testify to Carreto-Silva's blood alcohol content in violation of statutory provisions. The trial court denied plaintiff's motion and plaintiff timely appealed.

¶ 22 II. ANALYSIS

¶ 23 A. Motion to Strike the Amended Complaint

¶ 24 Plaintiff argues that the circuit court erred when it struck the amended complaint because the court's September 7, 2016 order granted plaintiff leave to plead against third-party defendant Zaborowski once she was served with defendant Velcani's third-party complaint. Plaintiff contends that the September 7 order permitted her to file the amended complaint after the lapse of the statute of limitations period, so the trial court could not use the relation back provisions of section 2-616(d) of the Code (735 ILCS 5/2-616(d) (West 2016))[3] as the basis to grant Zaborowski's motion to strike the amended complaint. Plaintiff also argues that Zaborowski failed to designate her motion to strike as either a section 2-615 or 2-619 motion to dismiss, and that omission resulted in prejudice to plaintiff because the trial court "ignored the terms of its prior order where it specifically granted leave to plaintiff to file the amended complaint after service was effected on" Zaborowski.

¶ 25 Plaintiff's claim on appeal does not challenge the merits of the trial court's finding, after applying the relation back doctrine, that Zaborowski neither received timely notice of the commencement of the action nor knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against her. Instead,

[3] Section 2-616(d) provides in pertinent part that a cause of action against a person not originally named a defendant is not barred by the lapse of time under any statute limiting the time within which an action may be brought if all the following conditions are met: (1) the original action was timely commenced; (2) the person, within the time that the action might have been brought, received such notice of the commencement of the action that the person will not be prejudiced in maintaining a defense on the merits and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against her; and (3) it appears from the original and amended pleadings that the cause of action asserted in the amended pleading grew out of the same occurrence set up in the original pleading.

plaintiff's claim is limited to whether it was erroneous to even conduct a relation back analysis based on the alleged exemption the court granted her from the application of the statute of limitations. Consequently, our analysis is limited to the issue raised by plaintiff and does not include a discussion of the merits of the trial court's finding that the amended complaint did not relate back to the filing date of the original complaint.

¶ 26 A motion to strike pleadings challenges the legal sufficiency of a pleading by alleging defects on the face of the pleading. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). In reviewing the sufficiency of a pleading on a motion to strike, the court accepts as true all well-pled facts and all reasonable inferences that may be drawn from those facts and construes the allegations in the pleading in the light most favorable to the plaintiff. *Id.* This court reviews an order granting or denying a motion to strike *de novo*. *Id*. Further, we review motions to dismiss filed under either section 2-615 or 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2016)) *de novo*. *Stafford-Smith, Inc. v. Intercontinental River Ea*st, LLC, 378 Ill. App. 3d 236, 240 (2007).

¶ 27 We reject plaintiff's assertion that the trial court's September 7, 2016 order allowed her to maintain a cause of action against Zaborowski after the statute of limitations had expired. Plaintiff fails to support this assertion by citing any relevant case law or evidence in the record. Furthermore, the trial court's order does not even mention the statute of limitations or any limit on Zaborowski's ability to raise the lapsing of the statute of limitations as a defense. The clear terms of the order state that plaintiff was allowed to plead against a third-party defendant. Nothing in that order guaranteed that plaintiff's filing would be procedurally proper or could circumvent the statute of limitations.

¶ 28 Also, plaintiff does not show how she suffered any prejudice as a result of Zaborowski's failure in her motion to designate whether she sought a dismissal under either section 2-615 or section 2-619 of the Code. See *Wheaton v. Steward*, 353 Ill. App. 3d 67, 69 (2004) ("While failure to properly label a motion to dismiss is not a pleading practice that should be encouraged, reversal for such a deficiency is appropriate only when prejudice to the nonmovant results.").

¶ 29 Furthermore, plaintiff did not raise an objection in the trial court to either Zaborowski's failure to designate her motion to strike as a 2-615 or 2-619 motion to dismiss, or the trial court's treatment of the motion to strike as a motion to dismiss. The failure to timely object and raise the issue in a posttrial motion results in forfeiture of the issue on appeal. *People v. Johnson*, 218 Ill. 2d 125, 138 (2005). Where, as here, a party contends that the procedure of the trial court was in error, the failure to object to such procedure in the trial court precludes its review. See *Hargrove v. Gerill Corp.*, 124 Ill. App. 3d 924, 929 (1984). "Also, failure to object at any time before the trial court to the form or substance of a motion to dismiss bars an appellant from raising that issue for the first time on appeal as grounds for reversal." *Id.* We conclude that plaintiff has failed to preserve for review her challenges regarding the statutory designation of Zaborowski's motion and the trial court's treatment of the motion as a motion to dismiss.

¶ 30 *Premier Electrical Construction Co. v. LaSalle National Bank*, 115 Ill. App. 3d 638 (1983), upon which plaintiff relies, is distinguishable in that the plaintiff in that case initially raised its objections to the trial court's procedure before the trial court itself, rather than raising the objections for the first time on appeal.

¶ 31 We note that the trial court's order allowing plaintiff leave to file an amended complaint against Zaborowski after she was served with Velcani's third-party complaint may have played

some part in the filing of the amended complaint after the statute of limitations had run. It is not clear why the trial court ruled that the third-party complaint should be served before the amended complaint could be filed. However, plaintiff has not argued that she was lulled into inaction by the order and, thus, has forfeited any argument on such grounds.

¶ 32 We conclude that the trial court did not err by granting Zaborowski's motion to strike plaintiff's amended complaint and dismissing it as time barred.

¶ 33 B. Evidence Regarding Intoxication

¶ 34 Plaintiff argues that the trial court abused its discretion when it allowed Dr. Leikin to testify about Carreto-Silva's blood alcohol content and opine that his intoxication contributed to the accident. Specifically, plaintiff argues that the trial court erred when it allowed into evidence (1) testimony about Carreto-Silva's alcohol consumption at the party because there was no evidence from occurrence witnesses that could give rise to a reasonable inference that Carreto-Silva was intoxicated; (2) inadmissible hearsay evidence of Carreto-Silva's blood alcohol content because the defense did not lay a proper foundation to admit the toxicology report into evidence; and (3) Dr. Leikin's testimony because he had no evidentiary basis to opine that Carreto-Silva's alcohol consumption was a contributory factor to the collision.

¶ 35 Decisions to allow or exclude evidence are reviewed for an abuse of discretion. *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003). "An abuse of discretion may be found where the trial court's ruling is arbitrary, unreasonable, or where no reasonable man would take the view adopted by the trial court." *Petraski v. Thedos*, 382 Ill. App. 3d 22, 26-27 (2008). The party seeking reversal based upon the trial court's evidentiary rulings bears the burden of establishing that the alleged

error substantially prejudiced the aggrieved party and affected the outcome of the case. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 848 (2010).

¶ 36 Illinois courts have recognized "that 'intoxicated' might well have become a prejudicial 'buzz' word," so Illinois courts "subscribe to the proposition that evidence of mere 'drinking' may not be equated with 'intoxication' itself, nor can the intake of alcoholic liquor, standing alone, be used to characterize a person as 'intoxicated.' " *Wade v. City of Chicago Heights*, 216 Ill. App. 3d 418, 429 (1991). Thus, "[the] general rule governing the admissibility of evidence pertaining to the mere consumption of alcohol is that such evidence may not be introduced unless actual intoxication can be proved." *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 803 (1999).

¶ 37 "To prove intoxication, the evidence must establish that the putatively intoxicated person not only consumed alcoholic liquor, but also displayed some form of unusual behavior, or there must be opinion evidence, from which the trier of fact may reasonably conclude that the subject person was intoxicated at the critical time." *Wade*, 216 Ill. App. 3d at 429. "Evidence of a plaintiff's intoxication is relevant to the extent that it affects the care that he takes for his own safety and is therefore admissible as a circumstance to be weighed by the trier of fact in its determination of the issue of due care." *Petraski*, 382 Ill. App. 3d at 27.

¶ 38 "The evidence of intoxication must reveal actions or conduct which either directly or by reasonable inference establish that the individual's conduct at and before the accident was or may have been affected by the use of alcoholic beverages." *Skelton v. Chicago Transit Authority*, 214 Ill. App. 3d 554, 574-75 (1991). "The supporting evidence necessary to prove intoxication must show an impairment of mental and physical faculties with the resultant diminution in the

ability to think and act with ordinary care." *Id.* at 575. The consumption of intoxicating beverages affects different people in different ways; the same quantity of alcohol could render some drinkers intoxicated but have no effect on other drinkers or their demeanor. *Id.* The impairment may be shown through circumstantial evidence, "either through the opinion testimony of one who observed the person who was drinking to the effect that he was intoxicated [citations], or by presentation of evidence of unusual or erratic behavior on the part of the drinker." *Id.*

¶ 39 Before addressing the merits of plaintiff's claims of error, we note again that plaintiff had the burden to present a sufficiently complete record of the trial proceedings to support her claims of error. *Foutch*, 99 Ill. 2d at 391-92. If the record is not sufficiently complete, then we will presume that the trial court's order conformed to the law and had a sufficient factual basis. *Id*. Furthermore, we will resolve any doubts arising from the incompleteness of the record against plaintiff. *Id.*

¶ 40 First, plaintiff argues that there was no evidence from occurrence witnesses that could give rise to a reasonable inference that Carreto-Silva was intoxicated, so the trial court should not have allowed "evidence" (presumably Zaborowski's testimony) about Carreto-Silva's alcohol consumption at the party. Although plaintiff acknowledges that Zaborowski testified that Carreto-Silva was "kind of drunk," plaintiff emphasizes Zaborowski's testimony that Carreto-Silva did not vomit at the party or in her car after the party; he did not have any alcohol with him in the car; she did not know when he had his last drink before he left the party; and she did not notice whether he staggered when he walked. Plaintiff asserts that there was no direct evidence

introduced through lay witnesses to reasonably infer that Carreto-Silva's ability to think and act with ordinary care was diminished.

¶ 41 The record shows that plaintiff moved *in limine* to bar evidence concerning Carreto-Silva's alcohol consumption, but plaintiff did not provide a complete transcript or bystander's report of the trial. As discussed above, the record lacks a transcript of Zaborowski's trial testimony. Consequently, we can neither confirm that plaintiff timely objected when Zaborowski testified about Carreto-Silva's alcohol consumption at the party nor determine the basis for the trial court's ruling allowing such testimony. Although a party may have objected to the evidence at some pretrial stage in the proceedings or unsuccessfully moved to bar the evidence prior to trial, the party must still renew that objection at the time that the evidence is offered. *Spurgeon v. Mruz*, 358 Ill. App. 3d 358, 360-61 (2005). Failure to renew the objection when the evidence is offered at trial results in forfeiture of the ability to challenge the trial court's consideration of that evidence. *Id*. at 361.

¶ 42 The parties, however, agree that Zaborowski's trial testimony was consistent with her deposition testimony, which is included in the record on review, and agree regarding the general substance of her testimony. Moreover, the appellees do not contend that plaintiff failed to raise a timely objection to Zaborowski's trial testimony, and all the parties address plaintiff's claim of error on appeal as if the basis for the trial court's ruling on this issue during the trial was the same as when the court denied plaintiff's motion *in limine—i.e.*, that Zaborowski's knowledge of Carreto-Silva's alcohol consumption at the party was relevant to the issue of foreseeability where Zaborowski was a third-party defendant and the challenged evidence was not unduly prejudicial given the evidence of Carreto-Silva's unusual behavior prior to the collision.

¶ 43 Even if we assume that plaintiff renewed her objection to the evidence during Zaborowski's trial testimony and the trial court's basis for overruling the objection had not changed since the trial court denied plaintiff's motion *in limine* to bar this testimony, there is no merit to plaintiff's claim that there was "no evidence" from occurrence witnesses that could give rise to a reasonable inference that Carreto-Silva was intoxicated. Zaborowski's testimony about Carreto-Silva's unusual behavior prior to the collision was a sufficient showing of intoxication to allow the jury to consider the evidence that he drank multiple shots of vodka and beer at the party. Specifically, Zaborowski testified that Carreto-Silva was "kind of drunk" when they left the party and fell asleep during the drive home. Zaborowski's testimony also showed that Carreto-Silva displayed unusual behavior when he woke up, asking her to stop the car so he could urinate in public, exiting the car in the middle of the roadway by a very dark forest preserve, and attempting to cross two lanes of the dark roadway twice. Based on the testimony of Carreto-Silva's unusual behavior before the collision, the trial court's decision to admit evidence of his alcohol consumption could not be deemed arbitrary or unreasonable.

¶ 44 Next, plaintiff argues that the court abused its discretion when it allowed Dr. Leikin to testify about Carreto-Silva's 0.165 blood alcohol content (BAC) despite the lack of foundation to admit the contents of the toxicology report into evidence. The source of the BAC evidence was the toxicology report prepared and signed by Dr. Peter Koin, the Cook County deputy chief toxicologist, on November 26, 2014. Plaintiff argues that the report was not admissible because the defense did not call Dr. Koin as a witness to lay the proper foundation for its admission.

¶ 45 In their response, the defense argues that it met the foundation requirements for the admissibility of the toxicology report because, consistent with section 115-5.1 of the Code of

Criminal Procedure of 1963 (725 ILCS 5/115-5.1 (West 2016)), the defense provided a certified copy of the Cook County medical examiner's report, which included the toxicology report; the defense called Dr. Soriano, who testified at the trial that the report was a record used and relied upon in the ordinary course of business; and plaintiff did not subpoena Dr. Koin, the record's preparer.

¶ 46 We note that plaintiff again failed to include in the record the relevant portion of the trial transcript to support this claim of error. Consequently, we have no way to either confirm that plaintiff timely objected to this evidence or determine the basis of the trial court's ruling. Because the record is not sufficiently complete, we presume that the trial court's order conformed to the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92.

¶ 47 Finally, plaintiff argues that the court abused its discretion by allowing defendant's expert, Dr. Leikin, to testify about Carreto-Silva's level of impairment because Dr. Leikin's testimony was so speculative as to be inadmissible and prejudicial. Plaintiff contends that Dr. Leikin's testimony attributing Carreto-Silva's conduct to the possible effects of alcohol consumption was speculative because there was no evidence to corroborate a finding of impairment aside from Carreto-Silva's BAC.

¶ 48 In *Logan v. U.S. Bank*, 2016 IL App (1st) 152549, ¶ 14, this court stated:

> "[w]hen *** the alcohol level in an individual's blood, although above the statutory level at which an individual is presumed to be under the influence of alcohol, is relatively low, a trial court does not abuse its discretion in barring an expert's opinion that the individual was intoxicated or impaired based solely upon blood-alcohol content. However, when the level of alcohol in an individual's

> blood is unusually high, *** a trial court does not abuse its discretion in permitting an expert to testify to his or her opinion that the alcohol level in the individual's blood would have had a profound effect upon the individual's perception, judgment, and physical abilities." *Id.* (citing *Marshal v. Osborn*, 213 Ill. App. 3d 134, 140-41 (1991)).

¶ 49 To support her claim of error, plaintiff cites *Petraski v. Thedos*, 2011 IL App (1st) 103218, where the appellate court affirmed the trial court's ruling that it should have granted the plaintiff's motion to bar the defendants' toxicology expert from testifying about the plaintiff's impairment based solely on her BAC. In *Petraski*, the plaintiff driver was seriously injured when she turned left in front of an on-coming emergency vehicle and the two vehicles collided. *Id.* ¶ 113. The plaintiff's BAC was above 0.08, which was the statutory presumption that an individual is under the influence of alcohol. *Id.* ¶ 114-15. The trial court allowed the defense expert to testify that, to a degree of medical certainty, the plaintiff's BAC was above 0.08 and to the effects of intoxication on the average person. *Id.* at ¶ 111. The court also allowed the expert to attribute those effects to the plaintiff's actual conduct and opine that she was in fact intoxicated and impaired even though the expert had no evidence of the plaintiff's conduct leading up to the collision and there was no evidence that she was speeding or otherwise driving erratically. *Id.* ¶ 111-12, 124.

¶ 50 The jury found for the defendants, but the trial court granted the plaintiff's motion for a new trial, concluding that it had erred in admitting the portion of the expert's testimony where he opined that the plaintiff was in fact intoxicated and impaired. *Id.* ¶ 116. The trial court noted that it was possible for an expert to reasonably opine that a specific person may have been impaired

based on an unusually high level of intoxication. *Id.* ¶ 123. Nevertheless, the trial court found that the plaintiff's BAC level was very low and, thus, the expert's testimony attributing the possible effects of alcohol consumption to her actual conduct was speculative. ¶ 124.

¶ 51 *Petraski*, however, is distinguishable from the case before us. Whereas in *Petraski*, the plaintiff's BAC was just above the 0.08 statutory presumption that an individual is under the influence of alcohol, Carreto-Silva's .165 BAC was approximately twice the legal threshold. Furthermore, unlike in *Petraski*, where the expert had no information regarding the plaintiff's conduct prior to the collision, Dr. Leikin was aware of Carreto-Silva's pre-collision conduct. At trial, Dr. Leikin testified that, in addition to reviewing the toxicology report that was attached to the autopsy records, he also reviewed the Illinois traffic crash report along with the police officer's reconstruction analysis. Thus, Dr. Leikin had evidence of Carreto-Silva's unusual behavior—exiting the car in the middle of a dark road and crossing two lanes to urinate in public before ultimately attempting to run back across two lanes to return to the car.

¶ 52 According to the record, plaintiff objected at trial when Dr. Leikin opined that Carreto-Silva's intoxication rendered him incapable of exercising ordinary care on the grounds that this testimony invaded the province of the jury. The court overruled this specific objection and instructed the jury that this was an issue for the jury to decide. Plaintiff, however, did not object when Dr. Leikin testified about Carreto-Silva's alcohol levels from the medical examiner's toxicology report; when Dr. Leikin opined that Carreto-Silva was intoxicated; or when Dr. Leikin opined that Carreto-Silva's alcohol consumption was a contributory factor to the collision. Consequently, we conclude that plaintiff failed to preserve for review her claim on appeal that Dr. Leikin's testimony attributing Carreto-Silva's conduct to the possible effects of

alcohol consumption was speculative where no evidence corroborated a finding of impairment aside from Carreto-Silva's BAC. *Spurgeon*, 358 Ill. App. 3d at 360-61 (timeliness requires that an objection be made when the evidence is offered at trial, and the failure to renew any pretrial objection results in forfeiture of the ability to challenge the trial court's consideration of that evidence). Furthermore, as discussed above, the admission of Carreto-Silva's alcohol consumption and the toxicology report were not error, so plaintiff's assertion that no evidence supported Dr. Leikin's opinion regarding Carreto-Silva's impairment lacks merit.

¶ 53 Based on the foregoing, we conclude that plaintiff's challenge to the admission of evidence of Carreto-Silva's alcohol consumption lacks merit, and plaintiff failed to preserve for review her challenges to the admission into evidence of the toxicology report and Dr. Leikin's testimony attributing Carreto-Silva's conduct to the possible effects of alcohol consumption.

¶ 54 III. CONCLUSION

¶ 55 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 56 Affirmed.