2011 IL App (4th) 101000-U

Filed 8/30/11

NO. 4–10–1000

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ANTHONY DAVID KARA,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ASHLEY DAWN BENTSEN and ILLINI TAXI,	)	No. 07L275
INC., an Illinois Corporation,	)	
Defendants-Appellants.	)	Honorable
	)	Jeffrey B. Ford,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* (1) There was no abuse of discretion on the part of the trial court in limiting one defense counsel's participation at trial.

(2) The trial court did not err in granting summary judgment on the issue of proximate cause.

(3) The trial court did not err in partially directing a verdict on the issue of medical bills.

¶ 2 Plaintiff, Anthony David Kara, obtained a verdict of $155,632.03 against defendants as a result of injuries suffered in an automobile accident in which a vehicle driven by defendant, Ashley Bentsen, and owned by defendant, Illini Taxi, Inc., collided with his vehicle. Defendants appeal, arguing the trial court erred in (1) limiting one defense counsel's participation at trial; (2) granting summary judgment on the issue of proximate cause; and (3) partially directing a verdict on the issue of medical bills. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On May 10, 2006, plaintiff was driving his vehicle in Champaign and stopped at a stoplight. He then was struck from behind by a vehicle driven by defendant Bentsen and owned by defendant Illini Taxi, Inc. Following the collision, plaintiff developed pain in his back and neck, which he did not have prior to the collision.

¶ 5 On May 11, 2006, plaintiff sought relief from his pain by seeing Dr. Richard Gibas, a naprapath. Plaintiff complained of pain throughout his entire back, especially along the spine, from his neck down to his lower back. Plaintiff received treatment from Dr. Gibas until June 29, 2006, with little to no relief.

¶ 6 Plaintiff began seeing Dr. Paul Pride, a chiropractor, on May 30, 2006, complaining of neck, mid-back and low-back pain, as well as left-sided hip and leg pain. Dr. Pride treated plaintiff through November 3, 2006. The chiropractic treatment resolved plaintiff's neck pain and helped with his lower back but did not help the continuing left leg pain. Dr. Pride referred plaintiff to his primary care physician, and plaintiff was then referred to Dr. James Harms, an orthopedic surgeon specializing in the spine.

¶ 7 Dr. Harms first saw plaintiff on November 8, 2006. While reviewing a magnetic resonance image (MRI) of plaintiff's spine, Dr. Harms found preexisting degenerative disc problems, arthritis, and lumbar stenosis. The stenosis was a condition in which plaintiff's spinal canal had narrowed. This narrowing of the spinal canal caused the plaintiff to suffer left leg pain after the collision. The trauma of the accident either gave plaintiff a greater disc bulge where he had barely enough room for his nerves, or the trauma caused the nerves to swell and take up room not available. After attempting more conservative treatment, such as steroid injections,

without permanent success, Dr. Harms eventually performed spinal surgery on plaintiff on July 3, 2007. This surgery was to widen the holes where the nerves exist in the spine.

¶ 8 During the surgery, Dr. Harms noticed the stenosis condition on the right side of plaintiff's spine also and operated to widen that side even though plaintiff was not complaining of pain in his right leg. This was done pursuant to the standard of care required of him as an orthopedic surgeon. Otherwise, plaintiff would eventually come back in the future for surgery on the right side.

¶ 9 Plaintiff recovered well from the surgery. The pain in his left leg was virtually gone by September 18, 2007, when he was released from Dr. Harms' care and returned to work.

¶ 10 On December 28, 2007, plaintiff filed a personal injury lawsuit against both defendants. Plaintiff's discovery deposition was taken on November 18, 2009. He reported continuing stiffness in his back after working in his job as a commercial painter. At that time he did not have any plans for further medical treatment. However, in June 2010, plaintiff again saw Dr. Harms due to continuing problems with back pain. He also resumed chiropractic treatment with Dr. Pride.

¶ 11 On July 6, 2010, plaintiff filed a motion for summary judgment on the issues of agency, liability, proximate cause, and negligent entrustment. At an August 25, 2010, hearing, the trial court granted the motion. In regard to the issue of proximate cause, the court relied on plaintiff's discovery deposition testimony that prior to the collision, he was not suffering from any neck or back pain and afterwards he was.

¶ 12 On September 9, 2010, a final pretrial conference was held. The date for this conference had been set on October 7, 2009, as part of the written case-management order. The

order specified, "[t]he attorney who intends to actually try the case shall attend the final pre-trial conference and shall be prepared to address each of the foregoing subjects." Katherine Ress of the law firm representing defendants appeared for the pretrial conference. She attended other hearings in this case and had just attended the hearing on the motion for summary judgment. At that hearing she was reminded orally by the trial court the attorney who intended to try the case *must* be present at the pretrial conference.

¶ 13 The pretrial memorandum prepared for defendants indicated Kurt Koepke would be trying the case. The trial court explained to Ress, if Koepke was not present for the final pre-trial conference, he would not be allowed to try the case. Ress was allowed to call her office in Springfield, Ilinois, to ascertain who would be responsible for trying the case. Ress then came back and represented to the court Koepke would be trying the case, and defendants did not object to anything the plaintiff had submitted in the way of pretrial motions. Ress told the court Koepke had a personal emergency that morning and was unable to attend the conference as he had to put his dog to sleep. Koepke was found to have not complied with the court's pretrial order. The court indicated Koepke could attend the trial but would not be allowed to talk in front of the jury, including opening statement, closing argument, or make objections.

¶ 14 Ress did not object further to the court's ruling. She did not seek a continuance either before or after the court's ruling.

¶ 15 On September 13, 2010, the jury trial began. During pretrial preparations, Ress presented a motion *in limine* and Koepke did also. Before he began his argument, he stated "First of all, I understand I'm actually not [*sic*] do anything in front of the jury but I am allowed to argue outside the presence of the jury?" The trial court responded Koepke would be allowed some

argument outside the presence of the jury. Koepke replied "All right. Great."

¶ 16 During the trial, plaintiff testified, as did all of his treating physicians and Dr. David Fletcher, an occupational medicine specialist who evaluated plaintiff and all of the medical care he received. All of the medical providers and Dr. Fletcher agreed plaintiff's pain and suffering were the result of the trauma he received in the collision with defendants' vehicle. Dr. Harms and Dr. Fletcher, who reviewed the MRI taken prior to plaintiff's surgery, were in agreement plaintiff had the preexisting condition of stenosis in his spine, the smaller than normal openings for the nerves to go through. Plaintiff testified he was asymptomatic prior to the collision, and both doctors again agreed this was entirely possible and highly likely. They concluded the collision aggravated plaintiff's existing condition.

¶ 17 Dr. Harms testified, due to his preexisting condition, had the collision not occurred, there was a 95% chance plaintiff would have needed the surgery at some time in the next 20 years. Dr. Fletcher disagreed with this opinion and gave his opinion plaintiff may have remained asymptomatic and never needed any surgery for his stenosis.

¶ 18 Testimony from plaintiff, Dr. Harms, and Dr. Pride indicated after a 2 1/2–year gap, plaintiff again sought treatment for pain in his lower back. Plaintiff stated he went to see Dr. Harms in June of 2010 because he wanted to make sure the pain he was experiencing was not something unusual. Dr. Harms told plaintiff he could not give him the back of an 18 year old, nor could he even give him a completely asymptomatic back. Plaintiff no longer had the pain in his leg but contended with pain in his back aggravated by his job and household chores. While he still went hunting and fishing, favorite activities he had always enjoyed, plaintiff could not do those activities the same way and suffered some back pain while doing them. Dr. Harms

suggested plaintiff seek out chiropractic care when his pain was too much. Plaintiff began seeing Dr. Pride again and was receiving treatments which appeared to help with the pain. Dr. Pride testified these treatments would probably be a lifelong activity for plaintiff.

¶ 19 Plaintiff rested and defendants declined to put on any witnesses or introduce any evidence. Plaintiff then moved for a partial directed verdict and asked the court to award plaintiff all claimed medical bills. The trial court partially granted the motion by finding plaintiff was entitled to all claimed medical-special damages except those incurred by Dr. Pride. Defense counsel's cross-examination of Dr. Pride questioned whether the chiropractic treatments prior to plaintiff's surgery may have been excessive. The question of Dr. Pride's bills was left for the jury.

¶ 20 The jury awarded plaintiff total damages of $155,632.03, which included damages for medical bills directed by the trial court, all of Dr. Pride's bills, future medical expenses, pain and suffering occasioned by plaintiff's injuries, future pain and suffering, loss of normal life experiences, and future loss of normal life experiences.

¶ 21 On October 12, 2010, defendants filed a motion for a new trial. In the motion, they raised the issue of the trial court barring attorney Koepke from trying the case. Defendants also raised, *inter alia*, the issue of the trial court's granting of plaintiff's motion for summary judgment as to proximate cause and directing a verdict on medical special damages. The motion for a new trial was denied in its entirety.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Limitations on Defense Counsel's Representation

¶ 25 Defendants argue the trial court erred in barring attorney Koepke from representing them at trial as lead counsel. Defendants characterize the court's actions as a violation of Illinois Supreme Court Rule 219 (eff. March 8, 2002) governing consequences for a party's refusal to comply with rules or orders relating to discovery and pretrial conferences and as improper punishment of defendants.

¶ 26 A decision on whether to impose sanctions for failing to follow court orders pertaining to procedures is reviewed for an abuse of discretion. *Chabowski v. Vacation Village Ass'n.*, 291 Ill. App. 3d 525, 528, 690 N.E.2d 115, 118 (1997). A trial court will be found to have abused its discretion if it acts arbitrarily without conscientious judgment, exceeds the bounds of reason, ignores recognized principles of law, or if no reasonable person would take the court's position. *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39, 64, 890 N.E.2d 1256, 1278 (2008).

¶ 27 Rule 219(c) applies when a party unreasonably fails to comply with pretrial discovery or other pretrial orders, and upon motion or its own initiative, a trial court may impose sanctions. Ill. S. Ct. R. 219(c) (eff. March 28, 2002). Before Rule 219 sanctions may be imposed, however, written notice is required and, absent such notice, the sanctions will be deemed void. *Buffington v. Yungen*, 322 Ill. App. 3d 152, 154-55, 748 N.E.2d 844, 847 (2001). Defendants argue the sanction in this case was imposed by the trial court on its own initiative. Defendants point out plaintiff never asked for the sanction, nor did he express the opinion he would be somehow prejudiced if Koepke tried the case without being present at the final pretrial conference. Defendants further claim the court gave no notice it would impose such a sanction if Koepke did not attend the final pretrial conference.

¶ 28 The requirement the attorney who intended to try the case attend the final pretrial conference was part of the case-management order entered October 7, 2009, and is also found in local rule 3.5(a) (6th Judicial Cir. Ct. R. 3.5(a) (eff. Nov. 1, 1992)), which has the force of a statute and is binding on the parties. *Premier Electrical Construction Co. v. American National Bank of Chicago*, 276 Ill. App. 3d 816, 834, 658 N.E.2d 877, 891 (1995). Koepke was bound by both the trial court's case-management order and local court rules.

¶ 29 Although Rule 219 applies to pre-trial conferences through its application to Rule 218 (Ill. S. Ct. R. 218 (eff. Oct. 4, 2002)), governing pretrial procedure, especially case-management procedures, the case law involving sanctions under Rule 219 deals with discovery violations, not barring a specific attorney from participating in a case. Instead, the cases deal with sanctions governing limitations on what evidence may be admitted at trials due to discovery violations or default judgment entered for egregious violations; true punishments for parties to a lawsuit. In those cases, there was a need for notice prior to sanctions being entered.

¶ 30 Here, defendants were not punished, and no one was sanctioned. No limitations were placed on the evidence which could be used in their case or the theories or defenses they could argue. The court simply enforced its order requiring the attorney trying the case be present at the final pretrial conference. The court noted its reasons included orderly case management, including avoiding the situation where the attorney trying the case wants to reargue issues decided at the pretrial conference or bring up new issues which should have been addressed at the conference but were not. The court noted it wanted a pattern of orderly case management and did not want to start making exceptions to its rules and orders.

¶ 31 Koepke gave no prior notice he would not be at the conference, and no one

requested a continuance. The court noted the drive from Springfield, where he was located, to Champaign County generally took about 1 1/2 hours, and attorney Ress made it to the conference in Koepke's stead in a timely manner. There was sufficient time to let the court or plaintiff's counsel know Koepke could not attend the conference and, if necessary, ask for a continuance or other accommodation for his personal emergency.

¶ 32 Defendants argue they were punished by not having the attorney of their choice represent them. They contend a client is always entitled to representation of his own choosing, citing *Corti v. Fleisher*, 93 Ill. App. 3d 517, 523, 417 N.E.2d 764, 769 (1981). However, employment of one member of a law firm, even if specially consulted, is employment of all, except where there are special circumstances to the contrary. *Corti*, 93 Ill. App. 3d at 521, 417 N.E.2d at 768.

¶ 33 Here, no evidence shows special circumstances existed to find defendants employed Koepke exclusively. Defendants argue they hired Koepke, specifically, to be their attorney and were deprived of his representation by the trial court's order. However, pleadings filed on behalf of defendants show defendants appearing by their "attorneys, Koepke & Hiltabrand." The signatory lines of the pleadings indicate the documents were filed by "Koepke & Hiltabrand" and then signed, sometimes by Koepke and sometimes by others in the firm. During the pendency of this case, several different attorneys from Koepke's firm represented defendants at depositions and court appearances. Defendants presented no evidence Koepke had been employed exclusively.

¶ 34 Defendants were not deprived of the representation of the firm Koepke & Hiltabrand. The restriction simply required the member of the law firm representing defendants

at trial be the same lawyer who attended the final pretrial conference. Koepke was allowed to be present during trial and to present arguments to the trial court outside the presence of the jury. Ress was the attorney who attended the final pretrial conference, and she became the attorney responsible for trying the case. Koepke was there in the position of "second chair" and was available to provide any advice and help Ress may have needed. A review of the trial record indicates Ress cross-examined witnesses and made objections effectively throughout the trial, competently presenting defendants' theory of the case, *i.e.*, plaintiff had a preexisting medical condition that would have required the medical treatments he received even without the intervening event of the collision.

¶ 35 A trial court's decision on its court rules and how rules of procedure should be applied are entitled to considerable deference upon review (*In re Estate of Smith*, 201 Ill. App. 3d 1005, 1009, 559 N.E.2d 571, 573 (1990)), and we need not agree with a court's decision in order to affirm it. Given the record before us, we find the court's decision to bar attorney Koepke from full participation at trial was not an abuse of discretion.

¶ 36 B. Summary Judgment

¶ 37 Defendants contend the trial court erred in granting plaintiff's motion for summary judgment, finding there was no question of fact as to the proximate cause of plaintiff's injuries. Plaintiff's motion in regard to the issue of proximate cause stated

> "It is undisputed that the Plaintiff suffered some degree of injury in his accident. In his deposition the Plaintiff described his injuries including stiffness and pain in his back and neck as being the day of the accident [citation omitted]. There is no evidence in this case

> to contradict this fact. Therefore the Plaintiff is entitled to summary judgment on the basic issue that the Defendants' negligence proximately caused injury to the Plaintiff though the nature and extent of those injuries remains a question for the jury."

The court granted the motion because defendants failed to present any evidence, facts, interrogatories, depositions, or affidavits in support of their position the accident did not proximately cause injury to plaintiff.

¶ 38 A trial court's decision to grant a motion for summary judgment is reviewed *de novo*. *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 322, 943 N.E.2d 752, 756 (2010). Summary judgment is appropriate where the pleadings and discovery on file, together with any affidavits, show there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Irwin Industrial Tool Co. v. Illinois Department of Revenue*, 238 Ill. 2d 332, 339-40, 938 N.E.2d 459, 465 (2010). A party moving for summary judgment bears the initial burden of proof (*Evans v. Brown*, 399 Ill. App. 3d 238, 243, 925 N.E.2d 1265, 1271 (2010)), but the nonmoving party must present a factual basis arguably entitling it to a judgment in its favor. See *Evans*, 399 Ill. App. 3d at 244, 925 N.E.2d at 1271.

¶ 39 Defendants argue in order to succeed in a case of negligence, plaintiff must prove a duty of care owed by defendants to him, a breach of that duty, and an injury proximately caused by that breach. *Thompson v. Gordon*, 241 Ill. 2d 428, 438, 948 N.E.2d 39, 45 (2011). Defendants contend in order to determine whether there is a causal link between defendants' conduct and plaintiff's injury, plaintiff must first identify a specific injury. As the motion for summary judgment was supported only by plaintiff's deposition testimony, defendants argue

there was no evidence of a specific injury, and plaintiff specifically states "the nature and extent of [his] injuries remains a question for the jury."

¶ 40 Contrary to defendants' assertions, plaintiff presented uncontradicted evidence he suffered injury in the collision, namely stiffness and pain in his neck and back from which he did not suffer prior to the collision, and this is sufficient to satisfy the requirement he show defendants' actions proximately caused his injuries. Plaintiff, as a layperson and not a medical expert, refrained from expressing his views as to the specific anatomic causes of the stiffness and pain, but he identified his injuries as stiffness and pain. The full extent of his injuries and the damages he should receive were left for the jury's consideration.

¶ 41 Defendants also contend the trial court erred in granting summary judgment on the issue of proximate cause because plaintiff failed to provide expert testimony to establish causation. They argue a plaintiff in personal injury cases must present the testimony of a medical expert to establish causation if the relationship between the claimed injury and the event requires special knowledge and training. *Brown v. Baker*, 284 Ill. App. 3d 401, 404, 672 N.E.2d 69, 71 (1996). They contend plaintiff is not competent to testify to his injuries because he is not a medical expert.

¶ 42 When challenging a summary judgment ruling, the nonmoving party is restricted to the record as it existed at the time the trial court ruled. See *Simmons*, 406 Ill. App. 3d at 322, 943 N.E.2d at 756. Defendants supplied no evidence to contradict plaintiff's testimony. There was no reason to doubt his credibility.

¶ 43 No special knowledge or training were necessary to establish the fact plaintiff had stiffness and pain in his back and neck. He did not attempt to explain this was due to a

completely new injury to any specific area of his anatomy, due to aggravation of a prior condition, or due to any other anatomical reason. The previously existing condition upon which defendants pinned their theory of the case was left to the jury and was explained by medical professionals, not plaintiff. Plaintiff contended defendants' actions caused him some injury because it triggered stiffness and pain. He left the "why" to the medical professionals and the determination of how much of his pain was caused by defendants' actions and how much might have been caused by other sources to the jury. There was no factual question defendants' actions triggered pain in plaintiff's neck and back, and plaintiff's testimony was sufficient to support a finding those actions were the proximate cause of that pain.

¶ 44 C. Directed Verdict

¶ 45 Defendants chose not to present any evidence in defense of this case. At the close of evidence, plaintiff moved for a partial directed verdict as to all of his claimed medical bills. The trial court granted the motion as to all of the bills, except for those for Dr. Pride, as they were undisputed. Defendants' cross-examination of Dr. Pride had raised some questions as to possible excess treatment, and claims for his bills were left for the jury.

¶ 46 Defendants argue some of the medical bills could have been attributed to plaintiff's preexisting condition, and the jury should have been allowed to make that differentiation. They contend evidence as to his preexisting condition created an issue of fact as to whether all of his treatments related to the accident. Of particular concern to defendants is Dr. Harms' statement there was a 95% chance plaintiff would have eventually required back surgery anyway, and Dr. Harms' actions in working on the right side of plaintiff's spine during his operation, though plaintiff only complained of left side pain. In addition, defendants argue the

gap in treatment between 2007 and 2010 is evidence plaintiff came back for more treatment only because this lawsuit was pending. He previously stated he did not feel the need for more treatment. Due to the trial court's ruling on the directed verdict, the jury had no choice but to attribute all pain and suffering from the time of the accident to the accident and nothing else.

¶ 47 A trial court's ruling on a motion for a directed verdict is reviewed *de novo*. *Caruso v. M&O Insulation Co.*, 345 Ill. App. 3d 345, 347, 802 N.E.2d 327, 330 (2003). Verdicts ought to be directed only in cases where all of the evidence, viewed most favorably to the opponent, so overwhelmingly favors the movant no contrary verdict could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967).

¶ 48 All of the medical witnesses testified plaintiff's pain and stiffness were attributable to the collision. They all agreed plaintiff was a trustworthy informant and showed no signs of malingering or untruthfulness in his medical history related to the medical professionals. Dr. Harms and Dr. Fletcher, who both had the benefit of the MRI done on plaintiff and, thus, knew of his preexisting condition, stated he was asymptomatic before the accident, and the accident aggravated plaintiff's condition causing symptoms to appear.

¶ 49 All of the medical witnesses also testified the medical bills were reasonable and related to plaintiff's accident. There was no evidence to the contrary. If defendants wanted to introduce evidence of a prior injury or condition affecting causation or damages, they were required to provide expert evidence demonstrating that fact. See *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 59, 733 N.E.2d 1275, 1280 (2000). Asking jurors to make this kind of distinction without expert evidence, is asking them to speculate and arbitrarily reject unimpeached testimony.

¶ 50 Dr. Harms testified he would not have operated on plaintiff if it had not been for the collision which caused his symptoms. While he corrected the right side of plaintiff's spine while operating for the symptoms on his left side, Dr. Harms stated he would not have made the correction but for the symptoms resulting from the collision. Further, there is nothing in the record to show the work done to correct the asymptomatic condition on plaintiff's right side, while correcting the symptomatic condition on his left side, increased plaintiff's medical costs or pain and suffering in any way.

¶ 51 As for the bills incurred in 2010, the testimony from plaintiff and Dr. Harms showed plaintiff sought out Dr. Harms to see if his recurring back pain was anything out of the ordinary or just residuals from the collision. Dr. Harms was questioned by defense counsel as to whether plaintiff could have been seeking him out again for treatment because his lawsuit was pending. Dr. Harms stated he understood that was a possibility, but he did not get that impression from plaintiff. Plaintiff's behavior throughout his association with Dr. Harms had been one of honesty, with a willingness to resume his normal life as soon as possible. Dr. Harms referred plaintiff to Dr. Pride for continuing chiropractic treatment.

¶ 52 Even viewing the evidence in this case in the light most favorable to defendants, a jury could not have refused to award plaintiff the medical damages directed by the trial court without speculation above and beyond the evidence presented. The trial court did not err in granting plaintiff's partial motion for a directed verdict.

¶ 53 III. CONCLUSION

¶ 54 There was no abuse of discretion on the part of the trial court in limiting one defense counsel's participation at trial; the trial court did not err in granting summary judgment

on the issue of proximate cause; and the trial court did not err in partially directing a verdict on the issue of medical bills.

¶ 55 Affirmed.