

Illinois Official Reports

Appellate Court

Karn v. Aspen Commercial Painting, Inc., 2019 IL App (1st) 173194

Appellate Court
Caption

SWETA KARN, Plaintiff-Appellant, v. ASPEN COMMERCIAL
PAINTING, INC., and SCOTT GILMAN, Defendants-Appellees.

District & No.

First District, First Division
No. 1-17-3194

Filed

June 28, 2019

Decision Under
Review

Appeal from the Circuit Court of Cook County, No. 13-L-1225; the
Hon. Thomas J. Lipscomb, Judge, presiding.

Judgment

Reversed and remanded.

Counsel on
Appeal

David S. Jasmer, of The Jasmer Law Firm, of Chicago, for appellant.
James P. Marsh, of SpyratosDavis LLC, of Lisle, for appellees.

Panel

JUSTICE GRIFFIN delivered the judgment of the court, with opinion.
Presiding Justice Mikva and Justice Pierce concurred in the judgment
and opinion.

OPINION

¶ 1 Plaintiff filed a personal injury lawsuit against defendant, Scott Gilman, and his employer, Aspen Commercial Painting, Inc., to recover damages she sustained when defendant drove over her left foot at an intersection in Chicago. The case was tried before a jury.

¶ 2 Halfway through trial, the trial court learned that defendants' expert witness, Oleg Petrov, DPM, reviewed a surveillance video of an unidentified person walking and standing without pain or difficulty and assumed it was plaintiff when forming his opinion that her injuries were not severe or permanent. Following a lengthy discussion about the video, the trial court barred "any mention" of it at trial. The trial court, however, allowed Petrov to testify to his opinion finding it had an otherwise independent and reliable basis.

¶ 3 The jury returned a verdict in favor of plaintiff and awarded damages for pain and suffering, disability and disfigurement in a total amount of \$123,375. The jury reduced the award to \$70,500 after finding plaintiff was 40% contributorily negligent and failed to mitigate her damages. Plaintiff filed a motion for a new trial challenging the trial court's evidentiary ruling and the jury's award of damages. The trial court denied the motion.

¶ 4 Plaintiff appeals and argues that the trial court committed reversible error when it limited the cross-examination of defendants' expert witness as to the basis of his opinion. Plaintiff also claims that the jury's award of damages was manifestly inadequate and the trial court's decision to the contrary was incorrect. For the following reasons, we reverse and remand for a new trial.

BACKGROUND

¶ 5 On October 10, 2013, defendant made a left turn at an intersection in Chicago and ran over plaintiff's left foot. A month later, plaintiff sued defendant and his employer in the circuit court of Cook County claiming they were negligent and liable for her injuries. Defendants raised two affirmative defenses: contributory negligence and failure to mitigate damages. Discovery took place, and the case was tried before a jury.

¶ 7 At trial, several expert witnesses testified that, as a result of the accident, plaintiff suffered a nerve injury to her left foot that was severe and permanent. One of those witnesses was plaintiff's podiatrist and surgeon, Dean Stern, DPM. Plaintiff's counsel questioned Stern about a surveillance video taken by defendants' investigators that allegedly showed plaintiff, after the date of the injury, walking and standing for long periods of time without any signs of discomfort or pain.

¶ 8 Plaintiff's counsel asked Stern if "part of [Petrov's] opinions are based upon a surveillance video that was provided him purporting to be my client." Stern answered in the positive. Plaintiff then asked Stern if he was shown the video and whether plaintiff was the person in the video. Stern answered that he viewed the surveillance video and the person in it was "not your client." No further questions were asked about the surveillance video until halfway through trial.

¶ 9 Defense counsel asked plaintiff if she "ever worked at an eyebrow threading place." The trial court struck the question from the record and asked how it was relevant to the case. Defense counsel gave the following answer: "I have video surveillance of someone that my guy thought was Sweta Karn. I don't know if it is her or not. He doesn't know if it was her or

not. So I did a Request to Admit and Plaintiff denied it was her. If it is not her, then there is no issue and let's move on." The surveillance video was part of an investigative report commissioned by defendants that explicitly referred to plaintiff as the "subject" of the investigation. Upon further inquiry, the trial court learned that defendants' expert witness had received the report, reviewed the video, and relied on it when forming his opinion.

¶ 10 Unable to get a clear answer from the parties as to who was depicted in the surveillance video, the trial court reviewed Petrov's written report and found it did not refer to the person in the video as plaintiff. Rather, Petrov referred to "[a]n individual purported to be Ms. Karn," and further stated that the "individual" in the video "appeared to be Ms. Sweta Karn" and he "assumed" it was her. After a lengthy discussion with the parties that continued into the next day, the trial court barred any "mention about the video surveillance, period."

¶ 11 Despite its ruling and the fact that the video formed part of the basis of Petrov's opinion, the trial court allowed Petrov to testify to the severity and permanence of plaintiff's injuries at trial. Plaintiff asked the trial court for permission to cross-examine Petrov about the surveillance video arguing that it formed the basis for his opinion. The request was denied.

¶ 12 The trial resumed and defendants presented their case. Dr. Petrov opined that there were multiple "gaps" in plaintiff's treatment, her physical limitations were the result of "perceived pain," and her injury was not permanent. Plaintiff's counsel made an offer of proof and asked Petrov if he received and reviewed the surveillance video and whether he relied on it when forming his opinion. Petrov indicated that he received the video, "made the assumption that [the person in the video] purported to be the Plaintiff," and "relied upon all of the materials" to form his opinion.

¶ 13 The jury returned a verdict in favor of plaintiff and against defendants and awarded damages in an amount of \$123,375 for pain and suffering (\$72,143.53), disability (\$15,683.06), and disfigurement (\$35,548.41). However, the jury reduced the amount of the award after finding plaintiff was 40% contributorily negligent (\$49,350) and failed to mitigate her damages (\$3525). The final amount of damages awarded by the jury totaled \$70,500. Plaintiff filed a motion for new trial challenging the trial court's decision to limit her cross-examination of Petrov and the adequacy of the jury's award of damages. The trial court denied the motion.

¶ 14 Plaintiff appeals¹ and argues that the trial court's evidentiary ruling constituted reversible error and the jury's award of damages was manifestly inadequate. She seeks a new trial on all issues or, in the alternative, a new trial on damages.

¶ 15 ANALYSIS

¶ 16 On cross-examination, counsel may probe an expert witness's qualifications, experience and sincerity, the weaknesses in the basis of his opinions, the sufficiency of his assumptions, and the general soundness of his opinion. *Halleck v. Coastal Building Maintenance Co.*, 269 Ill. App. 3d 887, 897 (1995). The facts, data, and opinions that form the basis of the expert's opinion, but that are not disclosed on direct examination, may be developed on cross-examination. *Id.* Nonetheless, the scope of cross-examination rests within the sound discretion

¹Defendants' motion to strike the statement of facts contained in plaintiff's opening brief on the basis that it contains argument or unnecessary comment in violation of Illinois Supreme Court Rule 341(h)(6) (eff. May 25, 2018) is denied.

of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 102 (1995).

¶ 17 We hold that plaintiff was clearly entitled to question Petrov about the surveillance video because it formed part of the basis of his opinion. Petrov admitted that the video formed “part of the basis” of his opinion, and the last sentence of his expert report drives the point home: “[g]iven the documented improvement in pain rating, post-operative healing, normal physical examination findings, and surveillance evidence of the individual, assumed to be Sweta Karn, no future pain, suffering, and/or disability are expected to continue beyond October of 2016.” (Emphasis added.) The trial court erred when it precluded plaintiff from cross-examining Petrov as to the basis of his opinion. We note that, as a result of the trial court’s ruling, plaintiff was unable to argue to the jury that Petrov’s reliance on the surveillance video rendered his entire opinion unworthy of belief.

¶ 18 We reject defendants’ argument that plaintiff’s offer of proof failed to provide this court with the information necessary to review the trial court’s ruling. *Lagestee v. Days Inn Management Co.*, 303 Ill. App. 3d 935, 941 (1999) (the purpose of an offer of proof is to disclose to opposing counsel and the trial court the substance of the excluded evidence and to enable the reviewing court to determine if the trial court committed error). Plaintiff’s offer of proof showed that Petrov based his opinion in part on the surveillance video, and it was therefore sufficient.

¶ 19 An incorrect evidentiary ruling does not warrant reversal unless the error materially affected the outcome of the trial. *Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 400 (2007). Defendants argue that reversal is not warranted because Stern told the jury that Petrov relied on the surveillance video to form his opinion and the person depicted in it was not plaintiff. We disagree.

¶ 20 We cannot say that the trial court’s evidentiary ruling had no effect on the outcome of the trial. A central issue in this case was the severity and permanence of plaintiff’s injuries, and the jury was not informed that defendants’ sole expert witness, who refuted the testimony of plaintiff’s experts on that issue, based his opinion in part on the assumption that plaintiff was walking “with a normal gait pattern, and an ability to ambulate in standard shoes without gait assistive devices” after her injury.

¶ 21 The weight to be assigned to an expert opinion is for the jury to determine in light of the expert’s credentials and the factual basis of his or her opinion. *Snelson v. Kamm*, 204 Ill. 2d 1, 27 (2003). Necessary to the performance of this function is the information upon which the expert’s opinion is based. *Inman v. Howe Freightways, Inc.*, 2019 IL App (1st) 172459, ¶ 163 (the opinion of an expert is only as valid as the reasons or basis underlying the opinion). Ordinarily, the basis of an expert’s opinion is elicited through cross-examination. See Ill. R. Evid. 705 (eff. Jan. 1, 2011). In this case, however, the process was not allowed to run its normal course, and as a result, the jury’s ability to perform its function as it related to the central issue of damages was compromised.

¶ 22 The jury assessed the credibility of Petrov’s testimony and weighed his expert opinion based upon *less than* all of the information he used to form it. Consequently, the jury was unaware of the role the video played in the formation of Petrov’s opinion and the potential interplay between the video and the other materials Petrov relied upon. In his report, Petrov compared what he saw in the surveillance video with plaintiff’s “claimed limitations in the ability to stand and walk” and determined they were inconsistent. His report indicates that he

