

Case Summary

Tammy Stewart and Aydrian Howard were involved in an automobile accident. At trial, the jury found for Tammy and awarded her \$10,000 in damages. Tammy appeals the jury's award and asks for a new trial. Tammy contends that the trial court abused its discretion by refusing to allow the chiropractor she called as an expert witness testify on cross-examination regarding evidence of a spinal surgeon's diagnoses and opinions as preserved in the surgeon's notes. Tammy also contends that the trial court abused its discretion by denying her request for a mistrial on the ground that she had appeared before the trial judge previously in a criminal matter. Because we find that the trial court properly excluded the spinal surgeon's opinions and diagnoses and that Tammy has failed to show any actual bias or prejudice, we affirm the trial court.

Facts and Procedural History

On April 18, 2005, Tammy was driving south on Seventh Street in Terre Haute, Indiana. While stopped at a traffic light, Tammy's car was struck from behind by a vehicle driven by Aydrian. Aydrian had accelerated the car without noticing, until it was too late, that Tammy's car was stopped in front of him. Aydrian's air bag deployed, and he then exited his vehicle to check on Tammy. The impact caused Tammy's vehicle to cross the road, and it finally came to rest in a parking lot. Aydrian crossed the street to reach Tammy. He apologized to her, asked if she was injured, and then permitted her to use his cell phone to call her family.

Unfortunately, only ten days before the accident, Tammy had undergone surgery performed by Dr. James Hardacker of the Spine Institute of Indianapolis to fuse several

vertebrae in an attempt to alleviate her chronic neck pain. Tammy had been instructed to refrain from driving until ten days after her surgery and to wear a neck brace. Tammy was wearing the neck brace at the time of the accident, which occurred on the first day she was permitted to drive after the surgery.

After the accident, Tammy went to Regional Hospital for an examination and x-rays and was then released. She called Dr. Hardacker to inform him of the accident and schedule an appointment for an examination. Dr. Hardacker later examined Tammy and ordered an MRI and physical therapy. Tammy attended physical therapy until September 2005. After attending to a series of family misfortunes over the next few months, Tammy began seeking chiropractic care for the pain in her neck, shoulders, and back. Tammy went to Anderson Chiropractic in December 2005 and received treatment from Dr. John Bright until he left the practice. Tammy then began receiving treatment from Dr. Travis Howard at Anderson Chiropractic.

Tammy brought suit against Aydrin in March 2007. By the time of the jury trial, Tammy had incurred over \$16,000 in medical expenses. Ex. p. 4-37. Before trial, Aydrin submitted a Motion in Limine to exclude evidence of his liability insurance coverage, “[a]ny opinion with regard to medical diagnosis, the causes and effects of any alleged condition or injury, and any other matters of medical science, skill, and practice, the knowledge of which is confined to those trained for the profession, for which a proper foundation has not or will not be provided,” and “[a]ny claim for injuries/damages not previously disclosed and/or any expert opinion not previously disclosed but requested . . .

.” Appellant’s App. p. 10. The trial court granted Aydrian’s motion to exclude this evidence.

At trial, the main point of contention between the parties was whether Tammy’s neck pain was caused by the accident or a pre-existing condition. Tammy called as a witness Dr. Howard, who testified that he believed the majority of her symptoms were directly related to the car accident. Tr. p. 133. Dr. Howard also testified regarding Tammy’s consistent complaints of neck pain and headaches, the steps involved in performing a cervical fusion surgery like the one performed by Dr. Hardacker, and the effects a whiplash would have on a fused neck as opposed to a normal neck. On cross-examination, Aydrian’s counsel questioned Dr. Howard regarding an MRI report and a record prepared by Dr. Hardacker. Tammy’s counsel objected to the admissibility of these documents for lack of foundation and identification and argued that, if the documents were found admissible, Aydrian had opened the door for Tammy to question Dr. Howard regarding all of Dr. Hardacker’s notes regarding Tammy from both before and after the surgery and accident. The trial court ruled that the documents were admissible but must be redacted to exclude any doctor’s opinions or conclusions. Tammy made an offer to prove by submitting Plaintiff’s Exhibit 3, which included Dr. Hardacker’s notes.

During trial, Tammy’s counsel submitted a motion for a mistrial on the basis that the trial court judge had also presided over Tammy’s trial several years earlier for a misdemeanor charge. The trial court denied this motion. After the trial was concluded,

the jury awarded a verdict in Tammy's favor against Aydrian for \$10,000. Tammy now appeals.

Discussion and Decision

On appeal, Tammy contends that the trial court abused its discretion by refusing to allow her to question Dr. Howard regarding Dr. Hardacker's diagnoses and opinions, as presented in his report. Tammy also contends that the trial court abused its discretion by denying her request for a mistrial.

I. Admission of Evidence

Tammy contends that the trial court abused its discretion by refusing to admit during Dr. Howard's testimony Dr. Hardacker's opinions and diagnoses as contained in a report prepared by Dr. Hardacker. Tammy argues that Dr. Howard was qualified as an expert to testify regarding Dr. Hardacker's opinions and diagnoses. Tammy also argues that Aydrian opened the door to the introduction of the entire report by asking Dr. Howard to testify regarding certain portions of the report.

As a general matter, the decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal. *Southtown Props., Inc. v. City of Fort Wayne ex rel. Dep't of Redev.*, 840 N.E.2d 393, 399 (Ind. Ct. App. 2006), *trans. denied*. A trial court's decision to exclude evidence constitutes an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the court or if it misinterprets the law. *Id.* Similarly, the trial court has discretion to determine the scope of cross-examination, and we review the trial court's determination for an abuse of discretion. *Walker v. Cuppett*, 808 N.E.2d 85, 92 (Ind. Ct. App. 2004).

Cross-examination is permissible as to the subjects covered on direct examination, including matters which tend to elucidate, modify, explain, contradict, or rebut testimony given by the witness during direct examination. *Id.*

A. *Chiropractor's Testimony*

Medical records may be admissible under the business records exception to the hearsay rule. Ind. Evidence Rule 803(6). However, these records are not *per se* admissible. *Schlott v. Guinevere Real Estate Corp.*, 697 N.E.2d 1273, 1277 (Ind. Ct. App. 1998). For medical opinions and diagnoses contained within medical records to be admitted, they must meet the requirements for expert opinions pursuant to Indiana Evidence Rule 702 because their accuracy cannot be evaluated without the safeguard of cross-examination. *Id.* Indiana Evidence Rule 702 provides as follows:

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

Further, two requirements must be met for a testifying witness to qualify as an expert: (1) the subject matter must be distinctly related to some scientific field, business, or profession beyond the knowledge of the average person and (2) the witness must have sufficient skill, knowledge, or experience in that area so the opinion will aid the trier of fact. *Taylor v. State*, 710 N.E.2d 921, 923 (Ind. 1999).

Dr. Howard is a chiropractor, and Dr. Hardacker is a surgeon. Tammy called Dr. Howard, but not Dr. Hardacker, to testify. On cross-examination, Aydrian's counsel

presented Dr. Howard with several medical records, including a report prepared by Dr. Hardacker which contained both Tammy's complaints of pain as recorded by Dr. Hardacker and Dr. Hardacker's diagnoses and opinions. The trial court ruled that the diagnoses and opinions were to be redacted from the document and that Tammy could not introduce Dr. Hardacker's records in their entirety. Aydrin's counsel then asked Dr. Howard about Tammy's complaints. Tammy argues that because Dr. Howard is a chiropractor, he is qualified as an expert to testify regarding Dr. Hardacker's opinions and diagnoses.

A chiropractor does not have the same education, experience, and training as a medical doctor. *Brooks v. Friedman*, 769 N.E.2d 696, 702 (Ind. Ct. App. 2002), *trans. denied*. Our Court has decided that chiropractors are not qualified to serve as experts in cases involving physicians' opinions. *Stackhouse v. Scanlon*, 576 N.E.2d 635, 639 (Ind. Ct. App. 1991) (noting the differences in licensing between physicians and chiropractors), *trans. denied*. As a result, chiropractors cannot testify concerning medical doctors' reports. *Faulkner v. Markkay of Ind., Inc.*, 663 N.E.2d 798, 801 (Ind. Ct. App. 1996), *trans. denied*. Dr. Hardacker or another physician was not present to testify regarding the medical opinions and diagnoses, so Dr. Hardacker's report was not admissible in its entirety and Dr. Howard could not testify regarding Dr. Hardacker's opinions and diagnoses. Thus, the trial court did not abuse its discretion by refusing to allow Tammy to introduce the evidence in its entirety or Dr. Howard to testify regarding Dr. Hardacker's opinions and diagnoses as contained in the report.

B. Opening the Door

Tammy also argues that the trial court abused its discretion by excluding Dr. Hardacker's opinions and diagnoses as contained in the medical report because Aydrian's counsel opened the door by asking Dr. Howard questions concerning the portions of the report containing Dr. Hardacker's recording of Tammy's descriptions of her pain.¹ A party may "open the door" to otherwise inadmissible evidence by presenting similar evidence that leaves the trier of fact with a false or misleading impression of the facts related. *Walker*, 808 N.E.2d at 98. We do not agree that Aydrian's questions opened the door to the introduction of Dr. Hardacker's diagnoses and opinions as contained in the medical report.

On direct examination, Dr. Howard testified that Tammy had consistently complained of neck and upper back pain since he began treating her in July 2006. Dr. Howard explained that Tammy had undergone a vertebrae fusion surgery, and he described the surgical procedure and the consequences a car accident might have on a fused neck as opposed to a normal neck. Dr. Howard concluded that a majority of the symptoms that Tammy experienced were directly related to the car accident. Tr. p. 133. However, on cross-examination, Dr. Howard admitted that he had not looked at any of Tammy's medical records from before or connected with the fusion surgery. *Id.* at 142. Aydrian's counsel then presented Dr. Howard with an MRI report from March 18, 2005.

¹ Tammy also argues that the entire report should have been admitted under Indiana Evidence Rule 106, which provides that when a portion of a writing is introduced, the adverse party may require the introduction of any other part which in fairness ought to be considered contemporaneously with it. However, under Indiana Rule 106, the redacted portions are still subject to the normal rules of admissibility before they may be admitted. *Walker v. Cuppett*, 808 N.E.2d 85, 97 (Ind. Ct. App. 2004). As discussed previously, because Dr. Howard was not qualified to testify regarding Dr. Hardacker's opinions and diagnoses, the redacted portion was not admissible under the normal rules and this argument is unavailing.

Aydrian asked Dr. Howard what Tammy had been complaining of, and Dr. Howard responded “Patient having lower neck [pain] since February, no recent injury is what the history states.” *Id.* at 163. Aydrian’s counsel then presented Dr. Howard with a medical report prepared by Dr. Hardacker on March 31, 2005. Aydrian questioned Dr. Howard about Tammy’s complaints as recorded in the report, and Dr. Howard read from the report that Tammy had complained of neck pain and numbness in both her arms. *Id.* at 167. Tammy had indicated that her pain was so severe that she could not work with or ride the horses she owned. After review of these records, Dr. Howard testified that “I can’t say one hundred percent . . . of what she’s feeling now is directly from the motor accident.” *Id.* at 173.

Tammy has not demonstrated that the introduction of statements she made to Dr. Hardacker regarding her neck pain has created a false and misleading impression that would justify the introduction of otherwise inadmissible evidence, nor has Tammy demonstrated how the introduction of Dr. Hardacker’s opinions and diagnoses would cure a false and misleading impression. Tammy argues that the *Walker* case, 808 N.E.2d 85, is directly on point. In that case, the plaintiff sought damages for injuries she received as a result of an automobile accident with the defendant. By granting a motion in limine, the trial court allowed the plaintiff to introduce evidence showing that her neck pain was related to her car accident with the defendant but redacted to remove any evidence that her neck pain was related to pre-existing conditions. At trial, the trial court refused to allow the defendant to introduce the unredacted records. Our Court reversed the jury’s award of damages, finding that the plaintiff’s redactions “were not motivated

by a desire to separate inadmissible evidence from admissible evidence, but to exclude any suggestion that the neck pain and headaches [plaintiff] claims were caused by [defendant's] negligence actually may have had another source.” *Walker*, 808 N.E.2d at 98. We observed that the opinions of doctors or other expert witnesses can be questioned or refuted by other evidence, even if that evidence does not come in the form of another expert's testimony. *Id.* at 95. Assuming that the evidence was otherwise inadmissible, our Court also found that the plaintiff had opened the door to the contrary medical opinions because her redactions left the trier of fact with the misleading and false impression that her doctors all agreed that the accident was the only possible cause of her pain. *Id.*

Tammy argues that, in this case, “defense counsel's reference to certain records of Dr. Hardacker was meant to clearly imply that the injury which [Tammy] complained of was caused by something other than her automobile accident which was the subject of the Complaint.” Appellant's Br. p. 15. But rather than creating a false or misleading impression like the evidence in *Walker* did, this evidence was a proper subject for cross-examination. *Rondinelli v. Bowden*, 155 Ind. App. 582, 293 N.E.2d 812, 814-15 (1973). As a result, Tammy's reliance on *Walker* is inapposite. In fact, we have held multiple times that it was reversible error and inconsistent with substantial justice for the trial court to exclude evidence that a prior injury or condition caused the plaintiff's claimed damages. *See, e.g., Armstrong v. Gordon*, 871 N.E.2d 287, 296-97 (Ind. Ct. App. 2007), *trans. denied*; *Reliable Dev. Corp. v. Berrier*, 851 N.E.2d 983, 989 (Ind. Ct. App. 2006), *reh'g denied, trans. dismissed*; *Walker*, 808 N.E.2d at 101-02. Although a tortfeasor

takes an injured person as he finds her and is not relieved from liability merely because of her increased susceptibility to injury, a defendant is nevertheless liable only for the extent to which his conduct resulted in an aggravation of the pre-existing condition. *Armstrong*, 871 N.E.2d at 293-94. As a result, a defendant in a personal injury action is entitled to challenge a plaintiff's claim as to the nature, extent, and source of her injuries through cross-examination and argument. *Id.* at 294. Thus, Aydrian was entitled to introduce evidence that Tammy's pain was caused, at least in part, by her pre-existing condition. Aydrian did so by introducing evidence of Tammy's own words to show that she had been complaining of similar pain symptoms both before and after the accident. Tammy was also entitled to rebut this evidence by calling a physician to testify, but she did not do so. The evidence presented did not create a false or misleading impression, so the trial court did not abuse its discretion by excluding Dr. Hardacker's opinions and diagnoses.

II. Mistrial

Next, Tammy contends that the trial court abused its discretion by denying her request on the last day of trial for a mistrial on the ground that she had previously appeared before the same trial judge in a criminal matter. A mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify the situation. *Tincher v. Davidson*, 762 N.E.2d 1221, 1226 (Ind. 2002). On appeal, we afford great deference to the trial judge's discretion in determining whether to grant a mistrial because the judge is in the best position to gauge the surrounding circumstances of an event and its impact on the jury. *Hull v. Taylor*, 644 N.E.2d 622, 626 (Ind. Ct. App. 1994). We therefore review the trial court's decision for abuse of discretion. *Id.* To

succeed on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. *City of Indianapolis v. Taylor*, 707 N.E.2d 1047, 1058 (Ind. Ct. App. 1999), *trans. denied*.

A judge is presumed by law to be unbiased and unprejudiced. *Moore v. Liggins*, 685 N.E.2d 57, 63 (Ind. Ct. App. 1997). To overcome this presumption, a party must establish actual bias; a mere allegation of bias is insufficient. *Id.* Further, our Supreme Court has stated in the past that “[t]he fact that a defendant has appeared before a certain judge in prior actions does not establish the existence of any bias or prejudice on that judge’s part.” *Clemons v. State*, 424 N.E.2d 113, 116 (Ind. 1981). Because Tammy has not identified in the record any actual bias or impartiality demonstrated by the trial judge as a result of her previous criminal matter, she has failed to establish grave peril. *See Lawson v. State*, 664 N.E.2d 773, 781 (Ind. Ct. App. 1996), *trans. denied*. We affirm the judgment of the trial court.

Affirmed.

RILEY, J., and DARDEN, J., concur.