



## STATEMENT OF THE CASE

Liberty Mutual Fire Insurance Company (“Liberty”) appeals, following a jury trial, from the award of \$100,000.00 in damages in favor of its insured, Gloria D. Tussey (“Tussey”), in her claim for underinsured motorist benefits.

We affirm.<sup>1</sup>

### ISSUE

Whether the trial court erred in admitting into evidence the deposition of Tussey’s doctor taken pursuant to prior litigation in which Liberty was not a party.

### FACTS

In the late 1990s, Tussey underwent arthroscopic surgery on her right knee. She recovered fully and resumed the very active social lifestyle that she had previously enjoyed with her husband, family and friends. On May 21, 2004, Derek Mish crashed his vehicle into the vehicle in which Tussey was a passenger. The impact of the crash forced Tussey’s knees into the dashboard of the vehicle. Her injuries included a fractured left patella and serious contusions to her right leg. At the time of the accident, Tussey had an automobile insurance policy with Liberty, which included “underinsured motorist coverage providing for payment of up to \$250,000.00 damages.” (App. 12-13).

On May 22, 2004, orthopedic surgeon, Dr. Upendra Patel, removed fragments of Tussey’s patella, repaired a torn tendon beneath it, and rebuilt her knee.

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<sup>1</sup> We heard oral argument on March 1, 2011, and we commend the parties for their able presentations.

Later, he removed her initial cast, placed and adjusted her brace(s), and referred her for physical therapy. In the ensuing months and years, Dr. Patel consulted with Tussey several times. Tussey's pain persisted, and she was unable to resume her active lifestyle. Her knees swelled and ached when she walked; she became heavily dependent upon her family and friends; she could not return to work on a full-time basis; and she could no longer climb stairs, bowl, exercise, dance, or enjoy a healthy intimate relationship with her husband. Tussey also became depressed and fearful of venturing onto the expressway.

On January 20, 2006, Tussey filed a complaint for damages against Mish. On February 25, 2008, her counsel, Rick Morgan, deposed Dr. Patel regarding his treatment of her injuries.<sup>2</sup> Liberty did not receive notice of or attend the deposition. Only Dr. Patel, Morgan, and the court reporter were present at the deposition.

On February 26, 2008, Tussey and Mish advised the trial court that they had reached a settlement, wherein Mish's insurer, State Farm, agreed to pay Tussey its policy limit of \$100,000.00. Before accepting Mish's settlement offer, Tussey notified Liberty of the terms. With Liberty's approval, Tussey later accepted the settlement offer and, thereby, released all claims against Mish.

On March 17, 2009, Tussey filed suit against Liberty, alleging that Mish was an underinsured motorist and that she would be seeking underinsurance coverage from Liberty for her damages in excess of \$100,000.00. In its answer, filed on June 5, 2009,

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<sup>2</sup> The record reveals that Rick Morgan represented Tussey in her lawsuits against both Mish and Liberty.

Liberty asserted as its defense that the State Farm settlement had fully compensated Tussey for her injuries. The parties participated in several pretrial conferences, and on August 4, 2009, the trial court scheduled a jury trial for April 12, 2010.

The jury trial commenced on April 12, 2010, wherein the trial court stated the following:

For the record, I would indicate that on this day, [Liberty] filed a motion to exclude the deposition transcript of Dr. Patel. That was heard in Chambers, and argument<sup>[3]</sup> of Counsel was heard, and the Court overruled and denied that motion. There is still pending [Liberty]'s motion in limine and [its] motion to strike a portion of the testimony of Dr. Patel.

(Tr. 3). The trial court then heard argument concerning Liberty's motion to strike a specified portion of Dr. Patel's testimony. Liberty argued that the objectionable excerpt contained speculative testimony regarding the possibility that Tussey may need knee replacement surgery. The trial court denied the motion to strike, and Liberty did not move for a continuance of the trial.

After the parties' opening remarks, Tussey moved to publish the deposition to the jury and the following exchange ensued, outside the presence of the jury:

[Counsel for Tussey]: \* \* \* At this time, I will file and ask the Court to publish the deposition of U-p-e-n-d-r-a Patel, M.D., taken on February 25, 2008, at his office in Hammond, Indiana.

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<sup>3</sup> In its written motion, Liberty argued that the deposition violated Indiana Trial Rule 32(A) because "[t]he deposition was taken before the commencement of [the instant action]"; "[n]o attorney was present for the deposition and no notice was ever sent to [Liberty] or its representative"; "[t]he deposition fails to meet the requires [sic] of T.R. 32(A), and its use at trial should be disallowed"; and "none of the exceptions set forth in T.R. 32[(A)](3) is applicable." (App. 81-82).

THE COURT: The deposition of Dr. –

[Counsel for Tussey]: Patel.

THE COURT: (Continuing) – Patel is filed and deemed published.

[Counsel for Liberty]: And we're raising the same objections as before, your Honor.

THE COURT: Right. So noted.<sup>4</sup>

(Tr. 34) (emphasis added).

During Tussey's case-in-chief, Liberty asked that the jury be excused in order that the parties could "resolve that preliminary issue" concerning Dr. Patel's deposition. (Tr. 68). Outside the presence of the jury, the trial court heard argument on Liberty's objection and motion to strike a portion<sup>5</sup> of Dr. Patel's testimony. Specifically, Liberty

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<sup>4</sup> This is the extent of the record, and we can only assume that Liberty's objection concerning Trial Rule 32 was more thoroughly discussed in the trial court judge's chambers. Trial judges are presumed to know and correctly apply the law; they are also presumed to be fair and impartial in making their rulings. *See In re H.M.C.*, 876 N.E.2d 805, 807 (Ind. Ct. App. 2007); *see also Flowers v. State*, 738 N.E.2d 1051 (Ind. 2000).

<sup>5</sup> Liberty sought to strike "all mention of a right knee replacement" (lines 17 – 20 below) from Dr. Patel's testimony, (app. 84):

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1 Q Then you saw her again on January 16 of 2007;  
2 is that correct?  
3 A Yes.  
4 Q What was going on that day that she came to  
5 see you?  
6 A She stated that her right leg is swollen and  
7 could not able [sic] to get out of bed and is  
8 still swollen, right knee worse than left  
9 knee.  
10 Q Now, she had an extensive hematoma to that  
11 right leg in the accident – firm [sic] the trauma  
12 of the accident, could that be still  
13 contributing to this swelling two years later?

Mutual argued that its “problem with any testimony about a knee replacement” was that “no place in [the deposition] does it say that [Tussey]’s going to have the knee replacement or . . . that the knee replacement would be the result of any of the trauma from this accident.” (Tr. 70). In addition to challenging the excerpted testimony as speculative in nature, Liberty also argued that it should be excluded pursuant to Indiana Evidence Rule 403 because such testimony might encourage jurors to speculate as to damages and causation. (App. 85). Tussey countered that Dr. Patel had discussed possible knee replacement procedures with her during a prior<sup>6</sup> medical consultation, and that the possibility of knee replacement surgery was, therefore, admissible as part of her medical records. The trial court overruled the objection and denied Liberty’s motion to strike.

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14 A No, no.  
15 Q That’s something unrelated.  
16 A Unrelated, yeah.  
17 Q Thank you, Doctor. You have had discussion  
18 with her of having a knee replacement, which  
19 knee are we talking about?  
20 A Right knee.  
21 Q Doctor, does the trauma that she sustained  
22 in this accident of May 21, 2004, that  
23 aggravated this right knee, is that a factor  
24 in this whole scenario of a possible knee  
25 replacement?

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1 A Yes.

(Dr. Patel Depo. p. 19-20) (emphasis added).

<sup>6</sup> The medical chronology reveals that Dr. Patel discussed the procedure with Tussey on January 16, 2007.

After the jury returned to the courtroom, Dr. Patel's deposition was read to the jury. Liberty did not raise a contemporaneous objection at the time of its reading to the jury. Before resting its case, Liberty introduced into evidence the written report of its own medical expert witness, Scott Andrews, M.D., to rebut Dr. Patel's deposition testimony. Dr. Andrews had reviewed Tussey's medical records at Liberty's request. Dr. Andrews' conclusions were, in pertinent part, as follows: (1) that Tussey's course of treatment was "reasonable and necessary"; (2) "that Ms. Tussey has reached maximum medical improvement from the injury she sustained on May 21, 2004"; (3) that the automobile accident "did not cause the need for the knee replacement as [Tussey] does not feel that she is a candidate for that on the left [knee]"; and (4) that "[Tussey] had significant preexisting condition in her right knee [which] ultimately would be the cause of her needing a knee replacement on the right side." Liberty's Exhibit 1 at 2.

On April 13, 2010, the jury returned a verdict for Tussey, awarding her \$100,000.00 in underinsured motorist damages. Liberty now appeals.

Additional facts will be provided as necessary.

### DISCUSSION

Liberty argues that the trial court's admission of Dr. Patel's deposition testimony into evidence violated Indiana Trial Rule 32 because Liberty was not given the opportunity to cross-examine Dr. Patel. Tussey argues<sup>7</sup> that Liberty has waived this

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<sup>7</sup> Tussey also argues that Liberty failed to demonstrate that Dr. Patel's testimony failed the requirements of Indiana Evidence Rule 702 and/or presented a risk of unfair prejudice or jury confusion under Evidence Rule 403. We do not reach this claim because the waiver issue is dispositive.

claim because “[n]o objection under Trial Rule 32 was raised contemporaneous to the admission of Dr. Patel’s deposition testimony, or at any other time during the trial.” Tussey’s Br. at 1, 6. Liberty responds that its basis for objecting to Dr. Patel’s testimony was apparent from the context. We disagree.

Indiana Evidence Rule 103(a) provides that “[e]rror may not be predicated on a ruling which admits evidence unless a substantial right of the party is affected,” and “[i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.” Ind. Evid. R. 103(a). “To preserve a claimed error in the admission of evidence, a party must make a contemporaneous objection ‘that is sufficiently specific ‘to alert the trial judge fully of the legal issue.’” *Raess v. Doescher*, 883 N.E.2d 790, 797 (Ind. 2008).

## 1. Prejudice to Substantial Rights

### *a. Battle of Experts*

First, Liberty has not demonstrated that it suffered prejudice to its substantial rights pursuant to Indiana Evidence Rule 103(a). Contrary to its assertion that the “admission of Dr. Patel’s deposition testimony at trial greatly prejudiced [its] defense” because “Dr. Patel’s deposition testimony stood alone as the sole expert testimony regarding causation presented by Tussey at trial,” (Liberty’s Br. at 16, 17); however, the record reveals that the parties presented conflicting expert testimony before the jury.

Here, at Liberty's request, the trial court admitted into evidence the written medical report of its expert witness, Dr. Scott Andrews, who had reviewed Tussey's medical records on behalf of Liberty. It is undisputed that Dr. Andrews' report was offered to rebut Dr. Patel's deposition testimony. His critical conclusions -- that the automobile accident "did not cause the need for the knee replacement"; and that "[Tussey] had [a] significant preexisting condition in her right knee [which] ultimately would be the cause of her needing a knee replacement on the right side," -- directly contradicted Dr. Patel's testimony regarding the possibility that Tussey might require knee replacement surgery in the future. Liberty's Exhibit 1 at 1.

Thus, it appears from the record that the instant matter essentially boiled down to a classic "battle of the experts" in which Dr. Patel's testimony for Tussey was counterbalanced by Dr. Andrews' assessment and testimony for Liberty. *See Dughaiish ex. Rel. Dughaiish v. Cobb*, 729 N.E.2d 159, 170 (Ind. Ct. App. 2000). Given the jury's consideration of conflicting expert testimony regarding Tussey's prospects for knee replacement surgery, we cannot say that Liberty suffered prejudice to its substantial rights from the trial court's admission of Dr. Patel's deposition testimony.

*b. Failure to Depose*

Liberty has also failed to demonstrate that it suffered prejudicial error pursuant to Indiana Evidence Rule 103. Although it appears that Liberty had prior knowledge that

Tussey would rely upon Dr. Patel's testimony at trial,<sup>8</sup> it failed to depose him in advance of trial.

The record reveals that on or about February 26, 2008, Liberty authorized and/or gave permission for Tussey to accept State Farm's settlement offer, and as such, was wholly aware that she had entered into a settlement for the policy limits of Mish's insurance policy. Liberty, therefore, was on notice regarding its potential underinsurance policy exposure. After Tussey filed her lawsuit against Liberty for underinsured motorist coverage, Liberty was definitively made aware that she was seeking damages for her alleged injuries in excess of \$100,000.00, pursuant to underinsurance coverage provided by Liberty. Thus, Liberty reasonably would have known that the testimony of Tussey's medical doctors and/or providers would be critically important in the resolution of damages in the pending lawsuit. In light of this evidence, Liberty has not demonstrated that it was not aware that Tussey would be relying upon Dr. Patel's deposition to prove her damages.

## 2. Objection

Liberty did not properly preserve its Trial Rule 32 claim for appeal. It is well-settled that failure to object at trial to the admission of evidence results in waiver of the error, notwithstanding a prior motion in limine. *Raess*, 883 N.E.2d at 796-97; *see Reid v. State*, 719 N.E.2d 451, 454 (Ind. Ct. App. 1999) (absent a contemporaneous objection at

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<sup>8</sup> The Chronological Case Summary reveals that on October 14, 2009, Tussey filed her List of Witnesses and Exhibits and certificate of service. Liberty does not assert, nor does the record reveal, that Tussey failed to disclose, in advance of trial, her intention to rely upon Dr. Patel's testimony.

trial, a ruling on a motion in limine is a preliminary ruling by the trial court and, without more, does not preserve an issue for appeal). Our Supreme Court has previously explained that

[o]nly trial objections, not motions in limine, are effective to preserve claims of error for appellate review. Failure to object at trial to the admission of the evidence results in waiver of the error, notwithstanding a prior motion in limine.<sup>[9]</sup> Furthermore, a claim of trial court error in admitting evidence may not be presented on appeal unless there is a timely trial objection “stating the specific ground of objection, if the specific ground was not apparent from the context.” To preserve a claimed error in the admission of evidence, a party must make a contemporaneous objection “that is sufficiently specific to alert the trial judge fully of the legal issue.” A mere general objection, or an objection on grounds other than those raised on appeal, is ineffective to preserve an issue for appellate review.

*Raess*, 883 N.E.2d at 797.

Liberty’s objections to Dr. Patel’s testimony were inadequate to preserve its claim of error on the basis of Indiana Trial Rule 32. Not only did Liberty fail to raise a contemporaneous objection at the time of the reading of Dr. Patel’s deposition testimony to the jury, but its trial objection(s) to the deposition were vague and made on alternate legal grounds.

In arguing its motion to strike a portion of Dr. Patel’s testimony, Liberty’s stated basis of challenge was the speculative nature of the excerpt and the potential prejudice that might result from “let[ting] a Jury speculate as to damages and causation.” (Tr. 5).

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<sup>9</sup> See *Brown v. State*, 783 N.E.2d 1121, 1125 (Ind. 2003) (a failed motion in limine to exclude evidence ordinarily does not eliminate the requirement that a party must object at the time the evidence is offered at trial to preserve the issue for appeal).

Subsequently, before the deposition was read to the jury, Liberty stated, “and we’re raising the same objections as before, your Honor.” (Tr. 34). Subsequently, when Tussey moved to admit thirteen other exhibits, Liberty stated, “No additional objections at this point, your Honor, other than those already raised.” (Tr. 35).

Liberty maintains that the trial court was aware that Liberty was referring to its previously-raised Trial Rule 32 objection, made in the judge’s chambers. We are not persuaded. As the proponent of the objection at issue herein, Liberty bears the responsibility of providing us with an adequate record on appeal. In a separate concurring opinion in *Davis v. State*, 772 N.E.2d 535, 541 (Ind. Ct. App. 2002), Judge Vaidik provided the following instructive<sup>10</sup> analysis:

Indiana Evidence Rule 103(a)(2) relaxes the somewhat rigid specificity requirement of an offer to prove by merely requiring that “the substance of the evidence . . . [be] apparent from the context within which the questions were asked.” Although Rule 103 eases the proponent’s burden, the proponent must still provide enough information to the trial court to enable it to make an informed decision as to the evidence’s admissibility and to rectify any error in excluding the evidence. However, it is not enough that the proponent provides the trial court with the evidence or makes the substance of the evidence apparent from the context of the questions that were asked. The proponent must also assure that an adequate record is made for our review.

We wholeheartedly agree with Judge Vaidik’s analysis. Because Liberty objected on alternate grounds at trial, failed to raise a specific contemporaneous objection to the reading of Dr. Patel’s deposition testimony into evidence, and because the specific

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<sup>10</sup> Judge Vaidik’s analysis pertains to an offer to prove following a court’s ruling excluding evidence; however, at its essence, it is apposite here.

ground of Liberty's pertinent objection was not apparent from the context, we conclude it has waived its Trial Rule 32 claim by its failure to preserve the issue for appellate review.

### 3. Consistency of Award with Evidence

Moreover, we find no support in the record for a finding that the jury's \$100,000.00 award to Tussey was solely attributable to Dr. Patel's "speculative" testimony that she might possibly have to undergo knee replacement surgery in the future.

Notably, there was no evidence presented at trial regarding any medical expenses or costs that might be associated with knee replacement surgery. Rather, the jury heard testimony from Tussey, her husband, and two family friends that in the years following the accident, Tussey had suffered from extremely painful and swollen knees when she walked; that she can no longer climb or descend stairs or roadside curbs; that she has become heavily dependent upon her family and friends; that she became "despondent" and suffered from depression, (tr. 68); that she was unable to return to work full-time; that she developed a crippling fear of traveling on the expressway; and that she can no longer bowl, exercise, dance; and that her pain interferes with her intimate relationship with her husband, resulting in a significant change in her lifestyle.

Tortfeasors take their victims as they find them, and they are not relieved from liability merely because of an increased susceptibility to injury. *Armstrong v. Gordon*, 871 N.E.2d 287, 293 (Ind. Ct. App. 2007). "Of course, defendants are liable only to 'the extent to which [their] conduct resulted in an aggravation of the pre-existing condition,

and not for the condition as it was.” *Id.* (quoting *Dunn v. Cadiente*, 516 N.E.2d 52, 56 (Ind. 1987)). Here, notwithstanding Tussey’s preexisting arthritic condition, the undisputed fact remains that the jury heard that she suffered considerable pain, fear, depression, and a diminished quality of life following the accident. (*See* Tr. 154) (“[Liberty]’s position isn’t that Mrs. Tussey wasn’t injured and that she didn’t have pain and suffering. Not at all.”).

The record reveals that in determining damages, the jury was instructed, without objection, that it could, “without guess or speculation,” consider the nature and extent of Tussey’s injury; “[t]he physical pain and mental suffering experienced (and reasonably certain to be experienced in the future) due to the injuries; reasonable medical expenses; and whether the injuries were temporary or permanent. (Tr. 177). Up until the time of trial, Tussey had incurred approximately \$27,000.00 in medical bills alone. In light of the evidence presented at trial, an award of \$100,000.00 in damages -- less than six times Tussey’s medical expenses (including the \$100,000.00 settlement from Mish) -- does not seem unreasonable or outside the scope of the evidence.

We find that based upon the facts and circumstances herein, the trial court did not commit reversible error by allowing Dr. Patel’s deposition to be published to the jury over Liberty’s objection and motion to strike. Thus, we conclude that Liberty’s substantial rights were not adversely affected. Moreover, the jury’s award is not inconsistent with the evidence presented at trial. Accordingly, we find no reversible error.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.