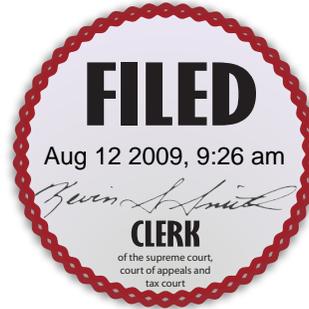


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CELADON TRUCKING SERVICES)
OF INDIANA, INC. and)
CLEMENTE CARRISALEZ,)

Appellants-Defendants,)

vs.)

No. 49A02-0812-CV-1075

JULIE KIRSH and CAROLINE KIRSH,)

Appellees-Plaintiffs.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David J. Dreyer, Judge
Cause No. 49D10-0310-CT-1820

August 12, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Celadon Trucking Services of Indiana, Inc. (“Celadon”) and Clemente Carrisalez (collectively “the Defendants”) appeal from the verdict in favor of Julie Kirsh (“Kirsh”) in her negligence action against the Defendants arising from a vehicular accident, following a jury trial.¹ The Defendants present three issues for review, which we consolidate and restate as whether the trial court abused its discretion when it did not allow the Defendants to cross-examine Kirsh regarding medical treatment she received between January and August 2003 that was unrelated to the accident.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 25, 2002, Kirsh was driving north on Spring Mill Road in Indianapolis with her daughter Caroline in the front passenger seat. When Kirsh reached the four-way stop at the intersection of Spring Mill and 96th Street, she attempted to turn left onto 96th Street. At the same time, Carrisalez, an employee of Celadon Trucking, was traveling a Celadon Trucking semi-tractor eastbound on 96th Street. Carrisalez failed to stop at the Spring Mill intersection and struck Kirsh’s Lincoln Navigator on the left front side. The impact spun Kirsh’s Lincoln Navigator around and forced it into the yard of a home on the southeast corner of the intersection. When Kirsh’s vehicle stopped, it was facing south.

At the time of the accident, in her vehicle, Kirsh had possessions that she was moving from her house into storage. When the ambulance arrived, Kirsh declined the

¹ Kirsh’s daughter, Caroline Kirsh, also filed a complaint against the Defendants, and the two actions were later consolidated through a joint motion to consolidate. Because Caroline Kirsh’s claims have been settled, she is not party to this appeal.

service because she did not want to be separated from her daughter and wanted to secure the possessions in her car. A friend of Kirsh lived near the site of the accident. The friend's husband, a neurologist, told Kirsh she was safe to decline the ambulance service if she sought treatment on her own right away. After Kirsh secured the possessions in her car, her friend drove her to the hospital emergency room.

At the emergency room, Kirsh complained of a "huge egg" on the left side of her forehead from hitting the windshield in the accident, a badly sprained ankle, neck and back injuries and pain, as well as pain on the right side of her face and jaw, in her right knee, and in her right thumb. Transcript at 211. Kirsh was treated and released from the emergency room the same day. As advised by emergency room personnel, Kirsh saw a neurologist in September 2002. Her neurologist, Dr. Robert Alonzo, ordered three tests, including a hearing test. Between October and December, Kirsh saw Dr. Trainer at Orthopedics Indianapolis for neck and back pain; Dr. Thomas Fischer² at the Indy Hand Center for her right thumb; and Dr. Ron Sheppard at the Castleton Chiropractic Clinic for neck and back pain.

Kirsh did not seek further medical attention for her accident-related injuries from January 3 through August 18, 2003. During that time she was the sole caretaker of her father, who had to be placed in a nursing home, and she handled his estate following his death in March 2003. She was also a single parent to three children, two of whom were in college and one of whom was still living at home. Despite having constant pain, Kirsh hoped that her injuries would get better with time.

² Kirsh had also seen Dr. Fischer in 1988 for tennis elbow.

In August 2003, Kirsh still suffered from pain in her neck, lower back, right hand, right knee, and jaw. On August 18, she saw Dr. Rick Sasso, an orthopedic surgeon and neurosurgeon for her neck and back pain. Dr. Sasso recommended physical therapy. Thereafter, Kirsh saw numerous doctors to obtain treatment for her back, neck, knee, jaw, and thumb injuries.

On October 14, 2003, Kirsh filed a complaint against the Defendants seeking damages for the injuries she had sustained in the accident. On October 24, 2006, Kirsh filed a motion for partial summary judgment on the issue of the Defendants' liability. In 2007, the trial court denied that motion. On May 15, 2008, Kirsh filed Plaintiff's Supplemental Motion in Limine to preclude reference to, among other things, Kirsh's cosmetic breast augmentation before the accident and breast deflation and an earlobe procedure after the accident. The trial court granted that motion.³ On June 5, 2008, the Defendants filed a motion for leave to file an amended answer. The trial court granted that motion, and the Defendants filed their amended answer admitting liability.

A jury trial was held on the issues of causation and damages on September 16 through 18, 2008. The jury returned a verdict in favor of Kirsh and awarded her \$700,000 in damages. On October 17, the Defendants filed a motion to correct error and a motion to use the deposition of Dr. John Lomas.⁴ The trial court granted the motion to

³ Although there is no order in the record to show that the trial court ruled on Kirsh's motion in limine, at trial the parties and the court treated the motion as having been granted.

⁴ Dr. Lomas' deposition had not been filed with the court prior to or during trial. In this motion, the Defendants argued that the deposition had become relevant "subsequent to the jury verdict" and asked to use it for purposes of their motion to correct error. Appellants' App. at 328.

use Dr. Lomas' deposition but denied the motion to correct error. The Defendants now appeal.

DISCUSSION AND DECISION

The Defendants contend that the trial court abused its discretion by refusing to allow them to cross-examine Kirsh about certain medical conditions and medical procedures unrelated to the accident in the months following the accident. The Defendants argue that such evidence was admissible because it related to Kirsh's credibility; that the excluded evidence "[c]ast[] [d]oubt" on the determination of causation and damages, Appellants' Brief at 24; that Kirsh opened the door to the admission of that evidence; and that the exclusion of such evidence prevented a fair trial. Kirsh counters that the trial court's decision was proper under Rondinelli v. Bowden, 155 Ind. App. 582, 293 N.E.2d 812 (1973), and its progeny. We address each of the parties' contentions in turn.

We review decisions concerning the admissibility of evidence for an abuse of discretion. Walker v. Cuppett, 808 N.E.2d 85, 92 (Ind. Ct. App. 2004). An abuse of discretion occurs if the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. Id. (citation omitted). A trial court may also abuse its discretion if its decision is without reason or is based upon impermissible considerations. Id. (citation omitted).

Similarly, the trial court has discretion to determine the scope of cross-examination, and only an abuse of that discretion warrants reversal. Id. (citing Lowry v. Lanning, 712 N.E.2d 1000, 1001 (Ind. Ct. App. 1999)). "Cross-examination is

permissible as to the subject matter covered on direct examination, including any matter which tends to elucidate, modify, explain, contradict or rebut testimony given during direct examination by the witness.’” Id. (quoting Hicks v. State, 510 N.E.2d 676, 679 (Ind. 1987)) (emphasis added).

In Rondinelli, we held that “[t]he general rule is that cross-examination and other evidence is admissible to lay a basis for impeachment or show that the injury complained of is due to some other cause where the present injury and the prior injury or condition are similar, or where a causal relationship between them can be shown.” Id. at 814-15. If the cross-examiner fails to come forward with evidence showing a logical nexus or causal relationship between the injury sued on and the unrelated injury or condition, the evidence may be excluded. Id. at 815. The test of admissibility is not probability, but the possibility that a plaintiff’s claimed damages resulted from a condition or event unrelated to the defendant’s negligence. See id.; Walker, 808 N.E.2d at 95-96.

Credibility

The Defendants contend that the trial court abused its discretion when it did not allow them to cross-examine Kirsh regarding her failure to seek treatment for accident-related injuries between January 3 and August 18, 2003. Specifically, the Defendants argue that Kirsh’s testimony about the stressors that she had during that period “doesn’t hold water” because she underwent elective medical procedures during that time. Appellants’ Brief at 22. The Defendants argue that the trial court’s refusal to allow them to question Kirsh about the elective medical procedures she had in that time period restricted their ability to challenge Kirsh’s credibility.

Kirsh alleges that she sustained injuries to her neck, back, head, right ankle, right knee, and right thumb in the accident. She sought treatment immediately following the accident at an emergency room and continued to receive treatment until January 3, 2003, a little more than four months after the accident. She next sought treatment for her accident-related injuries in August 18, 2003. At the time of trial, Kirsh was still receiving treatment for injuries sustained in the accident. Although those injuries caused her pain between January and August 2003, Kirsh explained that she did not receive treatment for them during that timeframe because she thought her injuries might get better over time and because she was overwhelmed and under great emotional stress. Specifically, during that period, Kirsh was the sole caretaker of her father, who was in poor health, was placed in a nursing home, and died in March 2003. After his death, Kirsh was in charge of handling his estate. She was also the sole provider for her three teenage children.

During cross-examination, the Defendants asked Kirsh about the treatment she had received following the accident. At one point, the Defendants were questioning Kirsh about treatment received for injury to her right knee:

Q: When you saw [Dr. Kunkel] on October 24, 2003, three days after you fell on your right knee was it swollen?

A: Yes.

Q: Was there fluid in there?

A: Yes.

Q: And you're telling this court and jury he [the doctor] injected you [Kirsh's knee] with a steroid?

A: I mean, I—you know, I could be incorrect about that. I don't remember to be very honest but it seemed to me—maybe it was the next

visit because I know that we did put off the surgery. I did not want the surgery. I think I even made an appointment for surgery and then backed out of it because I didn't want to deal with another surgery and . . .

Q: Well how many surgeries had you had up to that point?

A: Well I had had several emergency surgeries that were in my—unrelated to the accident.

Q: What type of surgeries ma'am did you have that were unrelated to the accident?

A: I had an emergency hysterectomy. I was diagnosed with ovarian cancer.

Q: Well did you—did you also—during this period of time, now that you mention it, did you also see a Dr. Thurston between January . . .

[Plaintiff's Counsel]: You're honor, may we approach?

Transcript at 257 (emphasis added). At this point, Kirsh's counsel reminded the court of the order in limine, which barred the Defendants from presenting evidence regarding Kirsh's plastic surgeries. At least some of those surgeries had been performed by Dr. Thurston and occurred in the period between January and August, 2003. The Defendants argued to the trial court that Kirsh had opened the door regarding her elective surgery when she said she had had other surgeries "unrelated to the accident[.]" Id. The trial court enforced its prior order in limine. Defendants made an offer of proof at the close of all of the evidence. Following a jury verdict in Kirsh's favor, the Defendants raised this and other issues in a motion to correct error, which the trial court denied.

Again, the Defendants allege that they should have been permitted to cross-examine Kirsh regarding treatment she received from January 3 to August 18, 2003, including treatment from Dr. Thurston. The Defendants contend that such cross-

examination would have shown that Kirsh had undergone elective cosmetic procedures during the period between January and August 2003, when she testified that she was too overwhelmed by other issues in her life to seek treatment for her accident-related injuries.

But Kirsh's testimony was in response to a general question that asked how many surgeries she had had "up to that point[.]" and she mentioned only the emergency care she undisputedly had received. Transcript at 257. That question followed Kirsh's explanation of why she had not wanted knee surgery, and the last date referenced in that line of questioning was October 24, 2003. Taken in context, the question posed was not limited to the timeframe following the accident, the period of time from January to August 2003, or even the type of surgery she had had. The trial court noted the ambiguity with regard to the timeframe Kirsh meant in her response:

[Defense Counsel]: But she's opened up the door. She said she had other surgeries not related to this accident.

Court: My basis for that is she's talking about her memory. When she talks about ["I've had other surgeries?"] she's talking about her memory.

[Defense Counsel]: Her memory?

Court: Yeah, she's trying to remember—under your question, trying to remember what's happened at different times. [She] said, "I've had other surgeries.[]" That's what I see her answer as, not that ["I'm having problems related to this accident[]"] but ["I'm trying to remember to answer you [sic] question.[]"]

Transcript at 259. We agree with the trial court that the record does not clearly show that Kirsh's answer, that she had had several emergency surgeries "up to that point[.]" referred only to the period between January and August 2003.

Again, “cross-examination and other evidence is admissible to lay a basis for impeachment or show that the injury complained of is due to some other cause where the present injury and the prior injury or condition are similar, or where a causal relationship between them can be shown.” Rondinelli, 293 N.E.2d at 814-15. Kirsh argues that the Defendants have not shown the nexus necessary to meet the Rondinelli test. But the test can also be met if the evidence could be used for impeachment. Here, the Defendants argue that their proposed cross-examination questions, regarding elective cosmetic procedures that Kirsh had received, would have contradicted her statement that she had received only emergency surgeries between January and August 2003. While they contend that Kirsh’s testimony “opened the door,” the Defendants have not shown in the record where Kirsh testified that she had had only emergency surgeries. And Kirsh’s answer regarding emergency surgeries, when read in context with the entire line of cross-examination, does not refer either to the period between January and August 2003 or to her elective surgeries. As a result, the Defendants have not shown that Kirsh opened the door, nor have they shown that further questions would have necessarily impeached her credibility.⁵ The Defendants’ contention in this regard must fail.

The Defendants also argue that the trial court should have allowed them “to fully cross-examine Kirsh to support the testimony of Dr. Lomas that Kirsh’s knee and thumb injuries were not caused by the accident.” Appellants’ Brief at 30. They maintain that,

[h]ad the jury been apprised of Kirsh’s actual medical history, they would likely have concluded that her right knee and thumb injuries were

⁵ The Defendants also contend that the cited response by Kirsh on cross-examination opened the door to further inquiry about medical procedures she received between January and August 2003. For the reasons stated above, the Defendants also have not shown that Kirsh opened the door to further inquiry regarding medical treatment she received during the period in question.

insignificant, or not related to the accident, and that those medical expenses, and her associated pain and suffering, if any, did not warrant compensation. The jury should have been apprised of Kirsh's actual medical treatments during the entire time period she delayed treatment (eight months for the thumb and fourteen months for the knee).

Id. at 31. In support, the Defendants cite to their colloquy with the trial court, outside the hearing of the jury, in which the Defendants argued that they should be allowed to cross-examine Kirsh on treatment she received between January and August 2003. But they have not shown in the record that they made an offer of proof on cross-examination that concerning causation and damages regarding Kirsh's right knee and right thumb. The failure to make an offer of proof results in waiver of an evidentiary issue. Dennerline v. Atterholt, 886 N.E.2d 582, 593 (Ind. Ct. App. 2008). The Defendants have waived their argument regarding the admissibility of cross-examination evidence on causation and damages as to Kirsh's right knee and right thumb.

The Defendants also contend that Kirsh's failure to seek medical attention for alleged accident-related injuries when she had time to obtain medical treatment for elective, cosmetic issues “[c]asts [d]oubt” on the material issues of causation and damages. Appellants' Brief at 24. They further maintain that the evidence that they “sought to introduce [went] straight to the heart of causation and damages—it ha[d] a direct bearing on whether the alleged injuries truly were caused by the accident and whether they were as severe as Kirsh claimed at trial.” Id.

The issues of causation and damages were determined by the jury after hearing evidence from the Defendants' and Kirsh's respective expert witnesses, Kirsh, and the doctors who treated Kirsh's injuries. Both of the expert witnesses agreed that Kirsh's

injuries were permanent. The experts disagreed on the severity of Kirsh's neck injury and whether the right thumb and right knee injuries were related to the accident. But, again, that was a matter for the jury to determine. Although the Defendants were not permitted to cross-examine Kirsh concerning certain medical procedures that were unrelated to her accident, they were allowed to cross-examine her and her doctors and expert regarding all of her alleged accident-related injuries. In sum, the Defendants have not shown that the trial court's refusal to let them cross-examine Kirsh about her unrelated elective medical procedures was without reason or based upon impermissible considerations. Walker, 808 N.E.2d at 92. Therefore, the Defendants have not shown that the trial court abused its discretion. See id.

Fair Trial

The Defendants contend that the trial court's refusal to let them cross-examine Kirsh regarding elective cosmetic procedures prevented them from presenting their theory of the case, thereby depriving them of a fair trial. In support, they cite in part Armstrong v. Gordon, 871 N.E.2d 287 (Ind. Ct. App. 2007), trans. denied, as holding that a defendant in a personal injury suit is entitled to “vigorously defend himself through . . . cross-examination and argument[.]” Appellants' Brief at 26 (quoting Armstrong, 871 N.E.2d at 293-94). They further maintain that “cross-examination is permissible as to the subject matter covered on direct examination, including any matter which tends to elucidate, modify, explain, contradict or rebut testimony given during direct examination by the witness.” Id. (quoting Armstrong, 871 N.E.2d at 293-94) (emphasis original).

But, in this context, the Defendants do not contend that the evidence they sought to elicit on cross-examination related to the direct examination of Kirsh. Instead, they argue that the desired cross-examination helped to develop the Defendants' theory of the case. Specifically, they contend that

[t]he excluded evidence, which demonstrated that Kirsh delayed in seeking medical attention for injuries allegedly related to the accident while she was simultaneously undergoing numerous elective, cosmetic surgeries, demonstrated that either Kirsh did not suffer these injuries until well after the accident or her purported injuries were not as severe as she claimed.

Appellants' Brief at 26-27. In support they again cite Kirsh's testimony, elicited on cross-examination, that she had "several emergency surgeries." Transcript at 257. But Kirsh gave that answer on cross-examination, not direct examination. Thus, Armstrong is inapposite.

Still, the Defendants contend that they were deprived of a fair trial because they were prevented from showing the jury, through the cross-examination of Kirsh described above, that Kirsh was "entirely capable of seeking treatment for medical issues, and thus, the accident-related injuries were nonexistent, insignificant, or caused by later events." Appellants' Brief at 28. Again, the Defendants challenge Kirsh's assertion that she was too overwhelmed by other matters to seek treatment for her accident injuries. In that regard, we note that three of Kirsh's doctors testified that it is not unusual for a patient to delay seeking treatment in order to take care of other issues or because the injury does not immediately present as urgent. In any event, just as we have concluded that the exclusion of testimony about surgeries that were "unrelated to the accident" was not an abuse of

discretion, it follows and we conclude that the exclusion of such evidence did not deprive Defendants of a fair trial.⁶

Conclusion

The Defendants have not shown that the trial court abused its discretion when it did not allow them to cross-examine Kirsh regarding “surgeries . . . unrelated to the accident” between January 3 and August 18, 2003. First, the Defendants have not shown that such cross-examination would have affected her credibility in that they have not demonstrated that Kirsh testified she had had only emergency surgeries or that her testimony referred only to that time period or even the period following the accident. Nor did the Defendants show any nexus between the treatments and conditions about which they wished to cross-examine Kirsh and her accident-related injuries. And the Defendants waived any argument that the same cross-examination would have impacted the case regarding Kirsh’s right knee and right thumb. Specifically, the Defendants made no offer of proof to show that the cross-examination would have had any effect on causation and damages as to Kirsh’s right knee and right thumb. The Defendants also have not shown that the limitation on their cross-examination was without reason or was based upon impermissible considerations. Nor have the Defendants shown that Kirsh opened the door to the testimony that they sought to have admitted on cross-examination. And the Defendants have not shown that the trial court’s refusal to allow the same cross-examination denied them a fair trial. In sum, because the Defendants have not shown

⁶ The Defendants assert in one heading of the argument section of their brief that the trial court abused its discretion under Indiana Evidence Rule 403. But the Defendants did not support that argument with cogent reasoning and citation to relevant authorities and the record on appeal. See Ind. Appellate Rule 46(A)(8)(a). Indeed, this is the only reference to Rule 403 in their brief. As such, the Defendants have waived that argument.

that the court's evidentiary determination was clearly erroneous or that the trial court lacked a rational basis for its decision limiting their cross-examination of Kirsh, the Defendants have not shown that the trial court abused its discretion.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.