FIRST DIVISION
June 13, 2011

No. 1-10-2799

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL LYNN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Respondent,	)	Cook County.
	)	
v.	)	No. 06 L 12389
	)	
JAMES L. MILLER,	)	Honorable
	)	Clare E. McWilliams,
Defendant-Petitioner.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justice Hoffman and Lampkin concur with the judgment.

O R D E R

HELD: Plaintiff, Michael Lynn, brought this personal injury suit against defendant, James Miller. The jury returned a verdict for defendant. The trial court granted plaintiff's motion for a new trial. Defendant petitioned this court for leave to appeal from that order, pursuant to Illinois Supreme Court Rule 306 (a)(1) (eff. February 26, 2010). The petition was granted.

I. BACKGROUND

A. The Pleadings

In his complaint, plaintiff, Michael Lynn, alleged that, on September 6, 2006, he was standing on the southwest corner of the intersection of 33rd Street and Wentworth Avenue, Chicago,

when he was struck by a car driven by defendant. Plaintiff claimed defendant was negligent for operating his car at an unreasonable speed, under the circumstances, and for failing to: (1) keep a proper lookout; (2) give plaintiff any warning that he was approaching; and (3) keep control of his car. Plaintiff further alleged that defendant's negligence was the proximate cause of his injuries. In his original answer, defendant denied he was in any way negligent, and, in an amended answer, denied his claimed negligent acts were the proximate cause of plaintiff's injuries.

Defendant filed a third-party complaint against Ionel Pusca, who was riding a bicycle in the intersection at the time of the occurrence. According to discussions in the report of proceedings, this third-party complaint was never served. Defendant dismissed the third-party complaint against Mr. Pusca on the day before the trial on plaintiff's complaint. The third-party complaint is not included in the record on appeal. Although Mr. Pusca was dismissed as a party, he continued to be a central issue in the case. As discussed below, Mr. Pusca was a subject of motions *in limine*, jury instructions and a special interrogatory, and plaintiff's motions for directed verdict and new trial. Mr. Pusca's conduct was central to the defense of this case. In the end, issues surrounding Mr. Pusca are the reasons for granting a new trial.

B. Motions *In Limine*

Prior to trial, the parties brought motions *in limine*. Plaintiff's initial motions *in limine* are not contained in the record on appeal. However, the report of proceedings as to the parties' motions reveal plaintiff's motion *in limine* number 17 pertained to Mr. Pusca. Defense counsel objected to the motion *in limine* number 17, stating that he wished to make an argument that Mr. Pusca "the nonparty bicyclist was the proximate cause of the accident." The trial court reserved ruling on this

motion, finding that the issue would be best addressed after the presentation of the evidence and at the instruction conference. Contrary to the trial court's oral ruling that the motion would be reserved, a typed order has the word "reserved" crossed out after motion *in limine* number 17 and "denied" written in.

Defendant's motion *in limine* number 11 sought "to bar any testimony that defendant attempted to file a third-party complaint against Ionel Pusca as irrelevant." The trial court granted defendant's motion *in limine* number 11. Before the trial began, plaintiff brought a motion which sought: (1) reconsideration of the order granting defendant's motion *in limine* number 11; and (2) an order granting plaintiff's motion *in limine* number 21. Plaintiff stated that he would have no objection to the granting of defendant's motion *in limine* number 11 if, pursuant to his motion *in limine* number 21, defendant was barred from introducing "evidence, argument or innuendo relating to plaintiff not filing suit against Mr. Pusca, choosing not to file suit, or that he could have sued Mr. Pusca." At the hearing on plaintiff's motion, defense counsel objected to plaintiff's motion *in limine* number 21 and stated that any "commentary" he would make about plaintiff's failure to bring suit against Mr. Pusca would not be made until his closing argument. The court responded:

> "THE COURT: ***. I don't know when that third-party action was filed and I don't know if there was any effort to make service and I don't know if the plaintiff relied on that lawsuit coming down to leave to sue or if you never had any intention to sue. I don't know the facts on that so we can [] kick that to the back burner."

The written court order relating to plaintiff's motion for reconsideration and motion *in limine* number 21 states that the court reserved it's ruling. However, in his response to plaintiff's motion

for a new trial, defendant stated that his counsel agreed to plaintiff's motion *in limine* number 21. On appeal, defendant denies that there was an agreement as to the motion.

C. Trial Testimony

The only trial testimony in the record on appeal is that of defendant. Defendant testified that, on the morning of September 6, 2006, he was traveling southbound on Wentworth Avenue in the far-left easternmost lane. Defendant entered the intersection of Wentworth Avenue and 33rd Street on a green light. Wentworth Avenue has two traffic lanes and one parking lane going south. On 33rd Street, there is one traffic lane and one parking lane in each direction. Defendant's car was traveling at 25 to 30 miles per hour. As defendant entered the intersection, Mr. Pusca, traveling westbound on 33rd Street on a bicycle, came from defendant's left. Defendant swerved his car sharply to the right, the car veered and struck plaintiff, who was on a bicycle stopped and facing eastbound on 33rd Street, at or near the southwest corner of the intersection. After veering, defendant never regained control of his automobile, did not brake, and did not sound his horn for warning. Defendant's car crossed all lanes on Wentworth Avenue and on 33rd Street and the parkway and sidewalk on 33rd Street. The car did not stop until hitting a tree. Defendant did not know where plaintiff was located before or at the time of the collision. Defendant did not observe Mr. Pusca until "a second before" Mr. Pusca was in front of defendant's car.

D. Plaintiff's Motion for Directed Verdict

At the close of all the evidence, plaintiff moved for a directed verdict on the issue of liability. Plaintiff, in part, argued that, even if defendant swerved to avoid Mr. Pusca, the evidence established defendant's negligent conduct was the proximate cause of plaintiff's injuries. The trial

court took this motion under advisement. The parties, in their posttrial motion briefs, state that there was never a ruling on the motion for directed verdict.

E. Jury Instructions

The court held a jury instruction conference after the evidence had been presented and just before closing arguments. The transcript from the jury instruction conference shows that defendant tendered, and the court approved over plaintiff's objection, the long form of Illinois Pattern Jury Instructions, Civil, No. 12.04 (Supp. 2009) (hereinafter, IPI Civil (Supp. 2009) No. 12.04), which stated:

> "More than one person may be to blame for causing an injury. If you decide that the defendant was negligent and that his negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.
>
> However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant."

In his posttrial motion, plaintiff stated that the long form of Illinois Pattern Jury Instructions, Civil, No. 15.01 (Supp. 2009) (hereinafter, IPI Civil (Supp. 2009) No. 15.01), was also read to the jury as follows:

> "When I use the expression 'proximate cause,' I mean a cause that, in the natural and ordinary course of events, produced the plaintiff's injury. It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another

cause resulting in the injury."

The transcript shows that defendant offered a statutory violation instruction, Illinois Pattern Jury Instructions, Civil, No. 60.01 (Supp. 2009) (hereinafter, IPI Civil (Supp. 2009) No. 60.01) and a special interrogatory both of which related to Mr. Pusca. Plaintiff objected to both the IPI Civil No. 60.01 instruction and the special interrogatory. The court found that the statutory violation contained in the instruction applied to Mr. Pusca's actions, and allowed the instruction but directed that the IPI Civil No. 60.01 instruction be amended to delete any reference to negligence. The trial court said:

> "THE COURT: *** it's really not his [Mr. Pusca's] negligence, it's his conduct. *** They're not here to judge the negligence of that particular -- that's a different burden, that's a different standard. They're here to judge the conduct of that person and if that, in fact, was the sole proximate cause."

Defendant, based on the court's statements as to the IPI Civil No. 60.01 instruction, offered to retender a modified special interrogatory, which would omit negligence and use the word "conduct." The court approved the submission of a special interrogatory which asked: "On September 6th, 2006, was the conduct of Ioneal Pusca the sole proximate cause of the occurrence?" The record on appeal does not include a complete set of the written instructions and the verdict forms which were submitted to the jury. Copies of the IPI Civil Nos. 12.04 and 15.01 instructions are attached as exhibits to posttrial pleadings in the record, and the returned verdict form B is in the record.

F. Defense Closing Argument and Jury Verdict

Counsel for defendant began his closing argument with the following remark:

"MR. BATTEN (Defense Counsel): *** Mr. Miller had the right of way at this intersection. Mr. Miller was traveling at an appropriate speed, 25 to 30 miles an hour. He had the green light. He had every right and intention to go right through that intersection. Why isn't Mr. Puska here? That's something you should ask yourself.

The plaintiff has structured ---"

Plaintiff's counsel objected. The court sustained the objection and instructed the jury to disregard "that last" statement. However, defense counsel made similar comments to the jury again, asking them to consider why Mr. Pusca was not present:

"MR. BATTEN: ****. [Defendant] didn't fail to keep control of the intersection [sic]; it was taken from him by this man who ran the red light just as much as if you were walking thorugh [sic] the store and someone pushed you into the counter of melons and they all fell down. Is that your fault? No. It was [Mr. Pusca's] fault. Where is he?"

Defense counsel also questioned plaintiff's reasons for bringing the suit and said:

"MR. BATTEN: *** And this is an opportunistic lawsuit by somebody who knows that Mr. Miller did not cause the accident. *** And to haul someone into court who's a victim to a car accident just as much as the plaintiff is wrong."

Defense counsel ended his remarks to the jury in this way:

"MR. BATTEN: *** Again, the person who caused the accident is not here

> in court. That is not something you should hold against Mr. Miller. Mr. Miller was a reasonable driver under the circumstances. What occurred between Miller and the plaintiff, that was an accident and Miller should not be the one to have to be responsible for these damages."

The jury returned a verdict for defendant and judgment was entered on the verdict. Additionally, the jury answered the special interrogatory affirmatively.

G. Posttrial Motion

Pursuant to section 2-1202 of the Code of Civil Procedure (735 ILCS 5/2-1202 (West 2008)), plaintiff, in a posttrial motion, renewed his motion for a directed verdict on liability and sought a new trial on damages, or, in the alternative, moved for judgment notwithstanding the verdict and a new trial on damages or a new trial on liability and damages. Plaintiff argued, in part, that the jury verdict was against the manifest weight of the evidence, the special interrogatory conflicted with the proximate cause instructions and was confusing, misleading and prejudicial, and defendant's closing argument was prejudicial and deprived plaintiff of a fair trial.

The trial judge granted the motion for a new trial based on defense counsel's repetitive comments during closing argument relating to the absence of Mr. Pusca. The trial judge concluded defense counsel had urged the jury to find for defendant because plaintiff had not brought suit against Mr. Pusca or called him as a witness. The trial judge found that counsel's remarks to the jury were "highly prejudicial" to plaintiff's case. The trial court also found that the comments were unfair to plaintiff because defendant had filed a third-party complaint against Mr. Pusca, failed to pursue it, and then dismissed the third-party action as the case went to trial. The trial court found

it unnecessary to rule on the other arguments raised in plaintiff's posttrial motion. Defendant now appeals.

II. ANALYSIS

Defendant raises a number of arguments on appeal. However, as the appellant, he has the burden of providing a sufficiently complete record to support his claim that the trial court erred in granting a new trial. See *Cardona v. Del Granado*, 377 Ill. App. 3d 379, 386 (2007); *Mother Earth, Ltd. v. Strawberry Camel, Ltd.*, 98 Ill. App. 3d 518, 520 (1981). In determining the propriety of an order granting a new trial, we may consider all grounds alleged by plaintiff in his posttrial motion. *Mykytiuk v. Simon*, 196 Ill. App. 3d 928, 932-33 (1990).

In his posttrial motion, plaintiff renewed his motion for directed verdict, sought a judgment notwithstanding the verdict and a new trial, and argued that the verdict was against the manifest weight of the evidence. The record on appeal is inadequate to review all of the issues raised by plaintiff's posttrial motion. Notably, the record on appeal does not include a complete report of proceedings at trial, a full copy of proposed and submitted jury instructions and verdict forms, the third-party complaint against Mr. Pusca, and plaintiff's original motions *in limine*. Although, as stated in *Mother Earth*, we may dismiss or affirm an appeal from an order granting a new trial where the record is insufficient, we have nevertheless chosen to review the issues raised here.

A. Standard of Review

A trial court's decision as to a motion for a new trial will be reversed only upon a showing of a clear abuse of discretion. *Cardona*, 377 Ill. App. 3d at 385. The appellant has the burden of affirmatively demonstrating that the trial court abused its discretion. *Boren v. BOC Group, Inc.*, 385

Ill. App. 3d 248, 254 (2008). An abuse of discretion is found where the ruling is " ' arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the court's view.' " *Cardona*, 377 Ill. App. 3d at 385 (quoting *Evitts v. DaimlerChrysler Motors Corp.*, 359 Ill. App. 3d 504, 513 (2005)).

We defer to a trial court's decision on the matter of a new trial because " ' the trial court has had the opportunity to consider the conduct of the trial as a whole [ ] and therefore is in a superior position to consider the effects of errors which occurred, the fairness of the trial to all parties, and whether substantial justice was accomplished.' " *Boren*, 385 Ill. App. 3d at 254 (quoting *Magnani v. Trogi*, 70 Ill. App. 2d 216, 220 (1966)). "The cumulative effect of errors may deprive a party of a fair trial, and in those circumstances, a new trial is necessary." *Boren*, 385 Ill. App. 3d at 254.

B. Closing Argument

In granting plaintiff a new trial, the trial court found that defendant's closing argument included improper and highly prejudicial comments relating to Mr. Pusca not being present at trial. On appeal, defendant argues that: (1) any prejudice was cured by the trial court's direction to the jury after sustaining plaintiff's objection to the first comment; (2) plaintiff waived any allegations of error by failing to object to certain challenged comments about Mr. Pusca; (3) the comments were proper as they related to his "empty chair" defense; and (4) the trial court granted the motion for new trial because of the incorrect belief that the comments violated plaintiff's motion in limine 21, which had not been ruled upon.

In the assessment of the accuracy and effect of statements made in closing argument, we again defer to the trial court because of its superior position. *Weisman v. Schiller, DuCanto & Fleck*,

368 Ill. App. 3d 41, 62 (2006). A trial court does not abuse its discretion when granting a new trial when errors in closing argument significantly prejudice the opposing party. *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 872 (2004). "We may not substitute our judgment for that of the trial court, or even determine whether the trial court exercised its discretion wisely" as to the determination of prejudice caused by remarks in closing argument. *Id.*

Defense counsel, on three separate occasions, stated to the jury that Mr. Pusca was not present at trial. Defense counsel told the jury to ask themselves, where was Mr. Pusca, and to not hold the fact that Mr. Pusca was not part of the litigation against defendant. Defense counsel also described plaintiff's suit as "opportunistic" and brought by a plaintiff "who knows that [defendant] *** did not cause the accident." The lawsuit was described as "wrong" because defendant was a "victim" of the incident because of Mr. Pusca. At the time of trial, Mr. Pusca was not under the control of plaintiff and his availability as a witness was equal as to both parties.

The trial judge found these remarks improper because defendant gave the jury the impression that they should find for defendant because plaintiff had failed to call Mr. Pusca as a witness and bring suit against him. The trial court also found the remarks unfair because Mr. Pusca had been a third-party litigant until defendant dismissed the third-party suit at the time of trial.

Comments during closing argument relating to why a person was not sued are improper. *Rapacki v. Pabst*, 80 Ill. App. 3d 517, 522 (1980); *Rutledge v. St. Anne's Hospital*, 230 Ill. App. 3d 786, 791 (1992). Furthermore, "[c]omments in closing argument have been held improper where a party draws attention to an opponent's failure to call a witness when that witness is not under the opponent's control." *Rutledge*, 238 Ill. App. 3d at 791. Finally, defendant errs where, without

factual basis, his argument infers plaintiff is "hiding evidence from the jury that will favor defendant." *Id.* at 791-92, citing *Mykytiuk v. Stamm*, 196 Ill. App. 3d 928, 936 (1990). We find that the trial court did not abuse its discretion in finding that defense counsel's remarks in closing argument, as to Mr. Pusca's not being present at trial, were improper.

A new trial is warranted where improper comments in closing arguments cause prejudice to the complaining party resulting in an unfair trial. *Boren*, 385 Ill. App. 3d at 257; *Crutchfield v. Meyer*, 414 Ill. 210, 214 (1953). The trial judge, who was in a superior position to observe and weigh the impact of the offending statements, found that defendant's closing argument was "highly prejudicial." We agree. Defense counsel's remarks cast suspicion on plaintiff and his case. The remarks as to Mr. Pusca appealed to the emotions of the jurors rather than argue the evidence in the case.

We also note that, because of defendant's motion *in limine* number 11, plaintiff was barred from mentioning the third-party litigation which defendant dismissed against Mr. Pusca just as the case went to trial. Thus, plaintiff was deprived of an argument which may have diminished or cured the prejudice caused by defendant's insinuations that plaintiff had improper motives as to Mr. Pusca's absence from the trial. We disagree with defendant's contention that any prejudice to plaintiff was erased by the trial court when it sustained plaintiff's objection to defendant's first comment about Mr. Pusca and gave the jury a simple direction to "disregard the last statement". Defendant, twice more, made similar comments about Mr. Pusca and further inflamed the jury by saying defendant was a victim and the lawsuit was "opportunistic" and "wrong."

Defendant has argued that plaintiff did not object to all of the challenged remarks in his

closing argument and waived any error. Generally, the failure to object to alleged improper comments in an opponent's closing argument results in waiver of the objection unless the comments are so inflammatory or prejudicial that a plaintiff was deprived of a fair trial. *Limanowski v. Ashland Oil Co.*, 275 Ill. App. 3d 115, 118 (1995). "[A] reviewing court may override waiver considerations in order to carry out its responsibilities to provide a just result." *Rutledge*, 230 Ill. App. 3d at 798; Ill. S. Ct. R. 366 (eff. Feb. 1, 1994). Plaintiff attempted to prevent the harm caused by defendant's comments by bringing a motion *in limine* but ruling on the motion was reserved. Plaintiff did object to the first comment about Mr. Pusca not being present and challenged each of the comments in his posttrial motion. As we have discussed, defendant's closing argument contained improper remarks which were inflammatory and prejudicial and resulted in an unfair trial. We find that our responsibility to provide a just result overrides any waiver considerations. See, generally, *Boren*, 385 Ill. App. 3d at 258. ("[Plaintiff's] failure to make a contemporaneous objection during closing arguments does not preclude us from considering the comments in reviewing the circuit court's order granting a new trial.")

Defendant argues that the challenged comments were proper as relating to his "empty chair defense" that Mr. Pusca, a non-party, was the "sole proximate cause of the accident." Defendant has misstated the proximate cause issue. An "empty chair defense" seeks to establish that the proximate cause of the plaintiff's *injuries* is solely the act of a person who is not a party to the litigation. See *Tabe v. Ausman*, 388 Ill. App. 3d 398, 407 (2009). The challenged comments, however, did not relate to any conduct or act of Mr. Pusca and did not go to whether the evidence showed that Mr. Pusca was the sole proximate cause of plaintiff's injuries. Instead, the challenged comments asked

the jury to infer plaintiff had an improper motive in failing to bring suit against Mr. Pusca or call him as a witness.

Defendant also argues that the trial court's order granting the new trial was based on the court's erroneous belief that an order had been entered granting plaintiff's motion *in limine* 21. The record does show confusion as to this point. Plaintiff argued in his posttrial motion that defendant's closing argument "violated a motion *in limine* which barred all statements or argument regarding Pusca being sued or not being sued." Defendant, in his response to the posttrial motion, stated that his counsel had agreed to plaintiff's motion *in limine* and presented argument that, nonetheless, the challenged comments about Mr. Pusca not being part of the litigation did not violate plaintiff's motion *in limine*.

At the hearing on plaintiff's motion for a new trial, the trial judge stated that she had reviewed the case docket and the transcript and had a "recollection of a motion in limine" relating to Mr. Pusca. The trial judge then ruled that, the statements in closing argument as to the absence of Mr. Pusca, were improper and "were overwhelmingly prejudicial to the plaintiff" and granted a new trial. What followed this ruling was a discussion about the motions *in limine* relating to Mr. Pusca. Defense counsel stated:

> "MR. BATTEN: *** this is based on the motion in limine that was made by plaintiff? Because my understanding of the motion in limine .... was that the motion in limine did not preclude me from making an empty chair defense with reference to the third-party, the non-present non-party Ionel [Pusca], the motion in limine itself that we made."

Plaintiff's counsel then stated that her "recollection" was that neither party was to mention the reasons for Mr. Pusca not being sued.

Our reading of the record before us shows that any confusion as to plaintiff's motion *in limine* was caused, in part, by defendant, and the trial court's ruling was not based entirely on a perceived violation of the motion *in limine*. We have found that a new trial is justified based on the remarks of counsel which were improper and prejudicial, even in the absence of an order granting plaintiff's motion *in limine*. We are not limited by the reasoning of the trial court when affirming an order granting a new trial. *Mykytiuk*, 196 Ill. App. 3d at 932-33.

B. Special Interrogatory

Plaintiff was further prejudiced by the special interrogatory. "To be in proper form, a special interrogatory must relate to a material issue of ultimate fact, should use the same terms as those set forth in the court's instruction to the jury, and should not be repetitive, misleading, confusing or ambiguous." *Lundquist v. Nickels*, 238 Ill. App. 3d 410, 434 (1992). In this case, the special interrogatory was not in proper form because an affirmative answer thereto would not have been inconsistent with a general verdict in plaintiff's favor. The special interrogatory asked the jury whether Mr. Pusca was the sole proximate cause of the *occurrence*. However, the relevant inquiry was whether Mr. Pusca's conduct was the sole proximate cause of plaintiff's *injuries*. The special interrogatory therefore conflicted with the 15.01 and 12.04 instructions which defined proximate cause in terms of plaintiff's injury and not the occurrence. Plaintiff was prejudiced by the confusion and conflict caused by the special interrogatory. As defendant himself states on appeal, at trial he "argued vehemently [to the jury] that Mr. Pusca's conduct was the sole proximate cause of the

accident." (Emphasis added). The true issue, however, was the proximate cause of plaintiff's injuries.

Defendant has argued that plaintiff did not preserve this objection to the special interrogatory. The record reveals however, plaintiff objected to the special interrogatory as originally tendered by defendant at the instruction conference. The trial court eventually approved an amended special interrogatory. Even if plaintiff had not preserved a challenge as to the form of the special interrogatory actually given to the jury, "[a] court may properly grant a new trial to correct misleading instructions, considering the fairness of the trial to all parties and whether substantial justice was accomplished, even if neither party objected to those instructions." *Blakely v. Gilbane*, 303 Ill. App. 3d 872, 884 (1999).

III. CONCLUSION

The experienced trial judge had the opportunity to observe the trial proceedings, the demeanor of counsel, the reaction of the jury to the closing argument, and the effect upon the jury of the issues raised by plaintiff in his posttrial motion. After careful and reasoned consideration of the posttrial briefs and transcripts, the trial judge found that plaintiff was deprived of a fair trial and exercised her discretion to order a new trial. We see no reason to overturn this decision, in light of "the several errors in the record discussed above and the cumulative effect of those errors ***." *Boren*, 385 Ill. App. 3d at 259. We therefore affirm the circuit court's order granting plaintiff's motion for a new trial and remand this cause to the circuit court for further proceedings.

Affirmed and remanded.