[Cite as *Newmyer v. Seitz Design & Constr., Inc.*, 2010-Ohio-6220.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Todd Newmyer, et al.

Plaintiff

v.

Seitz Design & Construction, Inc., et al.

Appellees

[Jackie Newmyer-Appellant]

Court of Appeals No. E-09-045

Trial Court No. 2004-CV-497

DECISION AND JUDGMENT

Decided: December 17, 2010

* * * * *

Darrel Bilancini, for appellees, John Seitz and Seitz Design & Construction, Inc.

Patrick M. Roche, for appellee, Central Mutual Insurance Company.

D. Jeffery Rengel and Thomas R. Lucas, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This matter is before the court on appeal of the trial court's July 2, 2009 judgment entry, journalized on August 6, 2009, which, following a jury trial, entered judgment in favor of defendant-appellee, Seitz Design & Construction, Inc., on plaintiff-appellant Jackie Newmyer's breach of contract claim. Appellant also appeals the trial

court's judgment granting a directed verdict to Seitz Design as to appellant's fraud claim and John Seitz, individually, as to appellant's fraud and breach of contract claims. Finally, appellant appeals the court's June 3, 2009 judgment entry, journalized on August 6, 2009, granting summary judgment in favor of appellee, Central Mutual Insurance Company ("Central"), on the issue of subrogation. For the reasons that follow, we affirm the trial court's judgments.

{¶ 2} The relevant, undisputed facts of this case are as follows. In 1986, appellant purchased a home in Willard, Huron County, Ohio. The home was built in 1859 and was in poor repair. Appellant made substantial improvements to the home. Appellant had just begun second-floor renovations when on June 8, 1993, during a heavy rainstorm, a large tree fell onto the house causing extensive damage.

{¶ 3} Appellant contacted appellee, Seitz Design, for a repair estimate. Appellant ultimately contracted with Seitz Design; the contract price was set at approximately $37,000, and included a complete removal and rebuild of the second floor, a new roof, repairs to the side porch, replacement of various windows, replacement of drywall on the first floor, sealing cracks and painting. During the course of the repair work, the family lived at a motel. The family returned to the home in October 1993.

{¶ 4} During the fall of 1993, following a rainstorm, appellant noticed water coming in the first and second floors and a water mark on the first floor ceiling.

Appellant called Seitz Design and appellee, John Seitz, came to the home and caulked some areas. Seitz also had the siding company come out and repair some flashing.

{¶ 5} In January 1994, appellant's husband noticed frost in the attic and in the corner of the living room; there was also frost on the windows. Appellant testified that Seitz came over with the roofer to make sure that the roof was put on correctly. The roofer installed a few attic vents to help alleviate the moisture problem.

{¶ 6} In the spring of 1994, following a rainstorm, additional water came into appellant's home through the door between the living and dining rooms. Seitz came to the home and made some repairs to the door. According to appellant, Seitz also stated that she had "crooked floors" and that the furnace had not been installed properly. Appellant also informed Seitz that she noticed mold in the attic; according to appellant, Seitz informed them to just sweep it up.

{¶ 7} In the fall of 2001, appellant was moving a dresser in a downstairs room when she noticed mold along the wall. Appellant stated that she contacted her insurance company, Central, which, in turn, hired a consulting company to evaluate the problem. The company issued a report which found that Seitz Design, during the initial home reconstruction, failed to remove all of the water soaked building materials which caused moisture to vent into the attic. The report also stated that the roof rebuild was of poor quality.

{¶ 8} Due to the extensive mold infestation, in the summer of 2002, the family was required to move out of the home during the mold remediation process. The family stayed in a trailer that was located on the property. On October 28, 2002, the family moved back into the home. Central made over $90,000 in payments to appellant pursuant to her homeowner's insurance policy.

{¶ 9} On August 10, 2004, appellant[1] commenced the instant action against Seitz Design and John Seitz. Appellant alleged that appellees breached their contract by "fail[ing] to restore the plaintiffs' residence to the same condition it was in prior to structural damage." Appellant also alleged that appellees falsely represented to appellant that the moisture in the home was due to the placement of heating ducts from the original house construction and external weather conditions. Appellant asserted that the representations were false and were made by Seitz with the knowledge of their falsity or with utter disregard as to whether the statements were true or false. In their answer, appellees generally denied the allegations and asserted that appellant was contributorily negligent.

{¶ 10} On March 31, 2008, two weeks prior to the trial date, appellant's insurer, Central, filed a motion to intervene in the case in order to protect its subrogation rights. The motion was granted and the trial date was continued to June 8, 2009. Thereafter,

[1]Appellant's ex-husband, Todd Newmyer, was a named plaintiff but, during the course of the proceedings, dismissed himself as a party.

Central filed a motion for summary judgment as to its right to subrogation. On June 3, 2009, and journalized on August 8, 2009, the court granted Central's motion.

{¶ 11} Also prior to trial, appellant filed a motion in limine to prevent appellees from referring to appellant's insurance coverage or payments. Appellant also wished to exclude the testimony of Michael Zenk of Central, James Seitz, Jr., and appellee John Seitz. In her motion, appellant argued that evidence regarding insurance payments was barred by the collateral-source rule. Regarding James Seitz, Jr., appellant argued that he was not properly disclosed and, thus, his expert testimony should be excluded. Finally, as to appellee Seitz, appellant argued that he should be excluded from testifying because he did not make himself available for deposition. Central opposed the motion noting that as a party to the action, testimony regarding insurance payments was relevant, admissible, and did not violate the collateral-source rule.

{¶ 12} The Friday prior to trial, Central and appellees entered into a settlement agreement, the terms of which were not disclosed to appellant. On June 8, 2009, just prior to the start of the trial, a hearing was held on the motion in limine. Appellee contended that the collateral-source rule was not implicated because Central's claim was a part of the lawsuit and appellant should only be permitted to assert damages beyond what had been paid. Appellant contended that she should be entitled to all of her damages with a post-trial setoff as to the amounts paid by Central. The court denied the motion in limine as to the insurance payments made by Central.

{¶ 13} The court then considered the motion in limine as to the testimony of Zenk and appellee Seitz; the court granted the motion, in part, preventing John Seitz and any other unnamed witnesses from testifying. Zenk and James Seitz were permitted to testify. The case then proceeded to trial. Appellee, John Seitz, was not present. At the close of appellant's case, the trial court granted a directed verdict in favor of appellee Seitz as to both the breach of contract and fraud claims, and in favor of Seitz Design as to the fraud claim. Thereafter, the jury found in favor of Seitz Design as to the breach of contract claim. On July 2, 2009, and journalized on August 6, 2009, the trial court entered its judgment entry as to the jury's findings. This appeal followed.

{¶ 14} Appellant now raises the following five assignments of error for our review:

{¶ 15} "Assignment of Error #1: The trial court erred when it allowed evidence of appellant's insurance coverage and payment to be admitted at trial, in violation of the collateral source doctrine, while simultaneously issuing closing jury instructions that any payment amount is irrelevant.

{¶ 16} "Assignment of Error #2: In the alternative, the trial court erred when it prohibited any disclosure of the settlement terms between appellees and intervenor Central Insurance Company in settlement of Central Insurance's subrogation claim.

{¶ 17} "Assignment of Error #3: The trial court erred in allowing testimony of Central Insurance claims adjuster Michael Zenk and of appellee James Seitz while

refusing to allow appellant's counsel to question witness Zenk regarding subrogation and the terms of settlement.

{¶ 18} "Assignment of Error #4: The trial court erred when it granted a directed verdict of appellee John Seitz for fraud and breach of contract and of Seitz Design and Construction for fraud."

{¶ 19} "Assignment of Error #5: The trial court erred when it granted intervenor Central Insurance's motion for summary judgment on the issue of subrogation."

{¶ 20} In appellant's first assignment of error, she argues that the trial court erred when it allowed evidence of the insurance payments made to appellant while instructing the jury that such payments were not relevant. Appellant asserts that this violates the collateral-source rule. Conversely, appellee maintains that, because the jury failed to find that appellee breached its contract with appellant, the issue of the admissibility of collateral benefits is moot. Alternatively, appellee asserts that R.C. 2315.20 specifically permits evidence of collateral payments subject to certain exceptions. Appellee opines that appellant merely provides a "conclusory statement" that R.C. 2315.20 prevents the introduction of insurance payments where there is a contractual right of subrogation. Appellee further argues that, during trial, appellant "opened the door" by introducing evidence of collateral benefits.

{¶ 21} We note that the property damage in this case and even the commencement of this action predates the April 7, 2005 effective date of the statute. Absent clear

language expressing that the legislature intended the statute to be applied retroactively, legislative enactments are prospective in nature. Accordingly, R.C. 2315.20 is inapplicable. See *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 10, fn. 1.

{¶ 22} The common-law collateral source rule is embodied in *Pryor v. Webber* (1970), 23 Ohio St.2d 104, wherein the Supreme Court of Ohio held that in a tort action, "evidence of compensation from collateral sources is not admissible to diminish the damages for which a tortfeasor must pay for his negligent act." Id. at paragraph two of the syllabus. However, where a party initiates testimony regarding insurance benefits, she cannot complain of alleged errors she provoked. See *Ogle v. Bassett Furniture Indust., Inc.* (Dec. 18, 1981), 6th Dist. No. WD-81-16.

{¶ 23} In the present case, we agree that appellant's counsel vigorously argued against the admission of Central's insurance payments. However, appellant introduced such evidence during its case-in-chief. In addition, appellant's expert testified that he worked for SEA, which was hired by Central to investigate appellant's claim. Moreover, at the close of appellant's case the trial court granted a directed verdict on appellant's fraud claims. Thus, the only remaining issue was whether Seitz Design breached its contract with appellant. The collateral source rule is not applicable to contract actions. *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, ¶ 38.

{¶ 24} Based on the above, we find that the trial court did not abuse its discretion when it allowed evidence of the payments made by Central. Appellant's first assignment of error is not well-taken.

{¶ 25} Appellant's second assignment of error contends that the trial court erred when it prohibited any disclosure of the settlement between appellees, Seitz Design, and appellant's insurer, Central. Appellant asserts that once the trial court allowed testimony of the amounts paid by Central, it should have allowed testimony regarding the settlement agreement.

{¶ 26} Initially we note that the admission or exclusion of evidence is a matter solely within the discretion of a trial court, and a reviewing court may reverse a court's decision on this issue only upon a showing of an abuse of that discretion. *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66. Further, although relevant, evidence may be inadmissible where the danger of prejudice outweighs the evidentiary value. See Evid.R. 403(A).

{¶ 27} During trial, the following discussion occurred:

{¶ 28} "MR. BILANCINI [appellees' attorney]: Whether there was settlement, whether there was a claim even made is not relevant and I again would argue to the Court that it's- it's highly prejudicial to- to allow that in and to allow him to argue they paid money, they acknowledge the liability.

{¶ 29} "MR RENGEL [appellant's attorney]: If they didn't want to have acknowledgement of liability then they should have never paid the money. Obviously that was a choice that they made and it is obviously prejudice- highly prejudicial but then most evidence is prejudicial to one party or another. Doesn't mean it's inadmissible.

{¶ 30} "THE COURT: Because the jury instructions read Central Insurance Company is not a party to this lawsuit and they're not. So other than what was paid I'm not going to allow you to talk about this settlement between the Plaintiff because we have no knowledge.

{¶ 31} " * * *.

{¶ 32} "MR RENGEL: * * *. We've not received anything from [Central] saying they're dropping that subrogation claim. As we sit here today-

{¶ 33} "MR. BILANCINI: I – I received that. I can represent to the Court that I received it-

{¶ 34} " * * *.

{¶ 35} "THE COURT: All right. But we're all aware that Central Insurance Company has settled, they've been dismissed from this lawsuit although that hasn't been accomplished."

{¶ 36} On June 16, 2009, a notice of settlement was filed in the court.

{¶ 37} Upon review, we cannot say that the trial court abused its discretion when it excluded evidence of the settlement between Seitz Design and Central. Central was no

longer a party to the action and had no right of subrogation. Moreover, the admission of such evidence would have had the effect of appellees admitting liability. This result would have been highly prejudicial. Appellant's second assignment of error is not well-taken.

{¶ 38} Related to appellant's second assignment of error, in her third assignment of error appellant argues that the trial court erred by allowing the testimony of Central's claim adjuster, Michael Zenk, and of appellee, James Seitz, while preventing appellant from questioning Zenk about the terms of the settlement. Appellant further argues that Zenk was not properly disclosed as a witness prior to trial.

{¶ 39} We will first address the witness disclosure issue. Appellant contends that appellees failed to submit a trial brief, which included a witness list, in direct contravention of the trial court's civil trial order. A trial court may exclude the testimony of an undisclosed witness as a sanction under Civ.R. 37; however, such a harsh sanction is appropriate only where the undisclosed witness caused unfair surprise with resulting prejudice to the complaining party. *Trajcevski v. Bell* (1996), 115 Ohio App.3d 289, 294.

{¶ 40} In the present case, appellant has not demonstrated unfair surprise or prejudice. While Central was still a party to the case (one business day prior to trial), appellant was aware that Zenk was a representative of the company. Further, appellant knew that James Seitz, as a principal of Seitz Design, would likely be a witness. In fact, in her trial brief appellant listed him as a witness on cross-examination. Accordingly, we

find that the trial court did not abuse its discretion when it allowed appellees to present witness testimony.

{¶ 41} Next, we address the substance of the witnesses' testimony. Appellant argues that counsel was not permitted to question Zenk about specifics of the settlement between Central and appellees. As discussed previously, evidence of a settlement, though possibly relevant, would have been unduly prejudicial to appellees. Appellant further refers to Zenk's testimony as "expert" testimony. There is no indication in the transcript that Zenk was qualified as an expert. Zenk testified based upon the conditions he observed at the house. Further, Zenk was cross-examined as to his reliance on the conclusions of appellant's expert regarding the source of the mold.

{¶ 42} Appellant further argues that the testimony of James Seitz should have been excluded because he had no personal knowledge of the matters at issue; rather, it was John Seitz who inspected appellant's home and signed the proposal. Appellant's counsel objected multiple times to the testimony; the objections were sustained based on the witness' lack of personal knowledge. Further, during cross-examination, counsel highlighted the fact that James Seitz had no personal knowledge of the work done on the Seitz home.

{¶ 43} Based on the foregoing, we find that the court did not abuse its discretion when it allowed the testimony of Zenk and James Seitz. Appellant's third assignment of error is not well-taken.

{¶ 44} In appellant's fourth assignment of error, she states that the trial court erred by granting a directed verdict to appellee, John Seitz, for breach of contract and fraud, and appellee, Seitz Design, for fraud. Appellant asserts that John Seitz signed the contract in his personal capacity. Appellant further contends that appellees made false representations regarding the frost and moisture problems in the house and that appellant relied on the representations to her detriment.

{¶ 45} In deciding whether to grant a motion for a directed verdict, the trial court does not weigh evidence or consider the credibility of the witnesses, but rather, reviews and considers the sufficiency of the evidence as a matter of law. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66; *O'Day v. Webb* (1972), 29 Ohio St.2d 215. Because a motion for a directed verdict presents a question of law, we review this assignment of error de novo. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶ 4.

{¶ 46} Directed verdicts are governed by Civ.R. 50(A)(4), which sets out the standard for granting such a motion. That rule states:

{¶ 47} "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such

party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶ 48} We will first address the court's directed verdict award as to the breach of contract action against John Seitz, individually. The court concluded that Seitz signed the contract as an authorized agent of Seitz Design and, thus, could not be liable in his individual capacity. Appellant claims that because Seitz's signature did not designate that he was signing the contract as an agent of the company, it should be presumed that it was signed in his individual capacity. Conversely, appellee asserts that the contract at issue clearly identified the company at the top of the contract; further, the parties clearly intended that the contract was between appellant and Seitz Design.

{¶ 49} Upon review, we find that the court did not err when granting a directed verdict in favor of John Seitz on the breach of contract claim. Appellant testified that the proposal was between her and her former husband and Seitz Design. The proposal, which the parties accepted and signed, had the corporate letterhead on each page and was signed by appellee, John Seitz, as an "authorized signature."

{¶ 50} We now turn to the trial court's judgment of a directed verdict as to appellant's fraud claims against John Seitz and Seitz Design. In order to prove fraud, a party must demonstrate the following:

{¶ 51} "* * *(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with

knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Russ v. TRW, Inc.* (1991), 59 Ohio St.3d 42, 49

{¶ 52} Fraud is never presumed, but must instead be affirmatively proved. *Watkins v. Cleveland Clinic Found.* (1998), 130 Ohio App.3d 262, 278.

{¶ 53} Appellant argues that she presented sufficient evidence as to the above elements. First, appellant states that John Seitz, when he came to her home in 1993 and 1994, made a false representation that the frost and moisture problems would be fixed with the additional roof vents and the caulking. Appellant also contends that Seitz falsely stated that part of the problem was with the heating system and the flooring. Appellant claims that she relied on these statements in believing that the problem had been fixed. Appellant admits that she did not take any action regarding the heating system or the flooring. Appellant further admits that her expert testified that the roof had been repaired but that the moisture from the wet insulation left in the walls was what caused the mold.

{¶ 54} Appellant relies upon *Bell v. Holden Surveying, Inc*., 7th Dist. No. 01 AP 0766, 2002-Ohio-5018, to support her argument that the court can infer knowledge where the circumstances dictate that a party should have known of the falsity of the representation. Upon review, we agree with appellees that *Bell* is distinguishable. In

Bell, a summary judgment case, the court concluded that a genuine issue of fact remained as to the landowner's fraud claim where the land surveyor failed to observe an open and obvious stone monument. Clearly, a stone monument is more open in nature than wet insulation which was not discovered for eight years.

{¶ 55} In granting appellees a directed verdict on appellant's fraud claims, the court noted that there was insufficient evidence as to John Seitz making a false statement with knowledge of its falsity or with disregard of its truth or falsity. The court also found that the evidence of reliance was insufficient. Upon consideration, we cannot say that the trial court erred in dismissing the fraud claims. Appellant's fourth assignment of error is not well-taken.

{¶ 56} In appellant's fifth and final assignment of error, she argues that Central's motion for summary judgment on the issue of subrogation should have been denied on both procedural and substantive grounds. Central contends that because it and appellee entered into a valid settlement agreement prior to trial, any alleged errors prior to the agreement are not appealable.

{¶ 57} Reviewing Central's argument and cases cited in support, we find them unpersuasive. Central's reliance on cases where the party alleging error was a participant in the settlement agreement is misplaced. See *Harvest Missionary Baptist Church v. Caver*, 8th Dist. Nos. 89873, 89921, 90149, 2008-Ohio-2369, ¶ 35, citing *Medina v. Bhoaty* (Mar. 5, 1997), 9th Dist. No. 2572-M. Further, appellant did not have an

opportunity to appeal the summary judgment ruling because it was not made a final, appealable order. Accordingly, we will review the merits of appellant's assignment of error.

{¶ 58} At the outset we note that appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

{¶ 59} Appellant first argues that, procedurally, Central's subrogation claim was barred by the relevant limitations periods. Appellant further asserts that the subrogation issue was not "ripe for determination" prior to trial. Appellant argues that the court should not have made such a determination prior to trial because "it could simply not know how a jury would allocate damages and amounts that intervening plaintiff already paid out on appellant's claims." We summarily reject appellant's "ripeness" argument. Certainly, the trial court was entitled to grant summary judgment on the issue of

subrogation; the actual amount that Central would be entitled to could have been determined following the trial.

{¶ 60} As to the limitations argument, appellant contends that Central's claim was subject to the same limitations period as appellant's and, because Central's complaint was filed after the expiration of the limitations period, its subrogation claim was time-barred. We disagree. Central filed a motion to intervene pursuant to Civ.R. 24 which provides, in relevant part:

{¶ 61} "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

{¶ 62} Central was granted leave to intervene. Arguing that Central's claim is barred, appellant relies on two Ohio cases which we believe are distinguishable. *Nationwide Mut. Ins. Co. v. Zimmerman*, 5th Dist. No. 2004 CA 00007, 2004-Ohio-7115 and *United States Fid. & Guar. Co. v. Buckeye Union Ins.* Co. (Sept. 30, 1986), L-85-377. In both cases the insurer attempted to independently assert its subrogation claim after the limitations period relating to the injury had expired. Because Central was granted leave to intervene in the pending action and because Central clearly had a

pecuniary interest in the subject of the action, we find that its claim was not barred by the relevant limitations period.

{¶ 63} Appellant further contends that, substantively, the trial court erred in granting Central's motion for summary judgment. Specifically, appellant disputes Central's assertion that, absent its right of subrogation, appellant would be unjustly enriched by any monies she received from Seitz Design. Appellant argues that she could not be unjustly enriched until she was "made whole" for her injuries. The entire theory of appellant's case was that she was damaged beyond the amounts paid for by insurance. Certainly, had the jury awarded any additional amounts, appellant would have been entitled to retain them. Had Central remained a party to the action, the actual amount to be awarded pursuant to Central's subrogation claim would have been determined following trial.

{¶ 64} Based on the foregoing, we find that the trial court did not err when it granted Central's motion for summary judgment on the issue of subrogation. Appellant's fifth assignment of error is not well-taken.

{¶ 65} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J.
CONCUR. _____
JUDGE

Keila D. Cosme, J. _____
CONCURS AND WRITES SEPARATELY. JUDGE

COSME, J.

{¶ 66} I concur in the majority's judgment and in most of its reasoning. I write separately to briefly address two aspects of its analysis.

{¶ 67} First, I disagree with the majority's conclusion that appellant waived the right to challenge the admission of Central's insurance payments by introducing such evidence during its case-in-chief. This case is eminently distinguishable from our decision in *Ogle v. Bassett Furniture Industries, Inc.* (Dec. 18, 1981), 6th Dist. No. WD-81-16. In *Ogle*, we found that the plaintiff had opened the door and invited a violation of the collateral source rule by initiating the testimony regarding insurance. In this case,

appellant did not invite the error. To the contrary, appellant tried everything it could to *prevent* such error when it filed a motion in limine and, as the majority acknowledges, "vigorously argued against the admission of Central's insurance payments."

{¶ 68} Once the trial court denied appellant's motion in limine, however, it became a foregone conclusion that appellee would be permitted to introduce the evidence of collateral payments during its case. At that point, appellant had no real choice but to protect its own credibility by disclosing to the jury its receipt of Central's insurance payments before appellee did. In this situation, where a claimant's motion in limine to exclude evidence of collateral source payments was denied by the trial court, application of the invited-error doctrine produces a Hobson's choice—the claimant must either risk losing credibility with the jury by withholding mention of collateral benefits during its case-in-chief or waive its right to challenge the admission of such evidence on appeal. This is hardly the kind of situation in which the invited error doctrine was designed to apply. Nevertheless, I agree with the majority that any violation of the collateral source rule became irrelevant in this case upon the granting of a directed verdict on the tort claim for fraud.

{¶ 69} Second, I do not believe that the majority has completely resolved the timeliness issue with regard to Central's intervention. The majority goes only part of the way in distinguishing the cases cited by appellant. The majority correctly observes that those cases involved *independent* subrogation actions filed by insurers beyond the statute

of limitations applicable to their insured's underlying claim. However, it needs to be further stated that the subrogation claim of an *intervening* insurer, as well as the motion to intervene, relates back to the time the action was commenced by the insured. Thus, if the insured's claim was timely filed within the applicable limitations period, so is the subrogation claim of the intervening insurer. See *Yeater v. Bob Betson Ent.*, 7th Dist. No. 04-BE-46, 2005-Ohio-6943, ¶ 20; *Kash v. Buckeye Air Compressor* (Feb. 11, 1994), 2d Dist. No. 14123; *Marion v. Baker* (1987), 42 Ohio App.3d 151; *Holibaugh v. Cox* (1958), 167 Ohio. St. 340.