FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LORRI ZELAZNIK, ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, and ALLSTATE INSURANCE COMPANY, Appellants, v. DENISE ISENSEE, Appellee.	)	Case No. 2D12-2590

Opinion filed June 11, 2014.

Appeal from the Circuit Court for Pasco County; Linda Babb, Judge.

Betsy E. Gallagher and Courtney A. Umberger of Kubicki Draper, Tampa, for Appellant Lorri Zelaznik.

Mark D. Tinker and Charles W. Hall of Banker Lopez Gassler, P.A., St. Petersburg, for Appellants Allstate Property and Casualty Insurance Company and Allstate Insurance Company.

Michael J. Winer of Law Office of Michael J. Winer, Tampa, and Stephan A. Barnes of Barnes Trial Group, Tampa, for Appellee.

DAVIS, Chief Judge.

Lorri Zelaznik, Allstate Property and Casualty Insurance Company, and Allstate Insurance Company challenge the trial court's final judgment after jury verdict awarding Denise Isensee $1,165,452.50 in Ms. Isensee's action for damages. Ms. Isensee's claims stem from an automobile accident during which Ms. Zelaznik rear-ended Ms. Isensee's vehicle. Prior to trial, Ms. Zelaznik admitted liability but contested whether the accident was the cause of Ms. Isensee's claimed injuries.

On appeal, Ms. Zelaznik challenges the following three evidentiary rulings made by the trial court during trial: (1) limiting the testimony of her expert witness, Michael Foley, M.D.; (2) limiting the testimony of the officer who responded to the accident; and (3) publishing to the jury a fifteen-minute video of excerpts from Ms. Isensee's surgery.[1] We find no error in the showing of the video and conclude that any errors committed by the trial court in conjunction with the other two rulings were harmless. We therefore affirm the final judgment.

With regard to her first argument, Ms. Zelaznik sought to present the expert testimony of Dr. Foley, a board-certified physician in diagnostic radiology, nuclear medicine, and interventional radiology. At the hearing on Ms. Isensee's motion in limine to exclude his expert opinion, Dr. Foley testified that his reading of the MRI taken of Ms. Isensee twenty-two days after the accident led him to conclude that Ms. Isensee suffered from degenerative changes of the discs rather than a permanent injury suffered as the result of the accident. He based that opinion on his experience, which

[1]Ms. Zelaznik also alleges error in the awarding of attorney's fees and costs; however, her argument is based solely on the premise that if the final judgment should be reversed, so should the fees and costs award. Since we affirm the final judgment, we need not address this argument.

indicated that some physical manifestation—such as swelling, bleeding, or other sign of trauma—would be seen in an MRI taken within a short period of time following an injury. He testified that disc abnormalities without other physical signs indicate a chronic condition rather than an injury brought on by sudden trauma. He further testified that what he saw on Ms. Isensee's MRI fell into the category of a chronic degenerative condition.

Ms. Isensee sought to exclude this portion of Dr. Foley's testimony pursuant to section 90.705, Florida Statutes (2011), arguing that Dr. Foley did not present any medical literature supporting his theory that the absence from an MRI of signs of swelling, edema, or hemorrhaging indicates that no trauma had taken place. Ms. Isensee further pointed out that Dr. Foley's opinion failed to take into account the many variables that may affect swelling, edema, and other changes in the soft tissue. She maintained that although the presence of changes in the soft tissue may support the finding of an acute injury, i.e., the result of a sudden trauma such as would be sustained in an accident, the absence of such a finding does not support a conclusion that there was no acute injury.[2]

The trial court agreed with Ms. Isensee and noted that Dr. Foley's testimony could not include any opinion as to the significance of the absence of swelling, edema, or hemorrhage from the MRI.[3] This was error.

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[2]Ms. Isensee also sought to exclude Dr. Foley's testimony under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), but the trial court concluded that Frye did not apply because Dr. Foley's testimony was purely opinion evidence.

[3]Dr. Foley's testimony at trial was presented in the form of a video deposition played for the jury. Pursuant to the trial court's ruling on this issue, certain portions of the video deposition were edited out before the testimony was played for the jury.

Section 90.705(2) provides as follows:

> Prior to the [expert] witness giving [an] opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for the witness's opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

Dr. Foley based his opinion testimony on thirty years of experience in studying traumatic injuries and chronic conditions as shown on MRIs. He testified that he had compared the signs shown in MRIs taken shortly after accidents with those taken months later in more than a thousand cases. This experience provides a sufficient basis to support Dr. Foley's opinion. We therefore conclude that the trial court erred in limiting Dr. Foley's testimony. Ms. Isensee's objection went to the weight the jury should afford the opinion, not the admissibility of the testimony. See Quinn v. Millard, 358 So. 2d 1378, 1382 (Fla. 3d DCA 1978) ("[T]he sufficiency of the facts required to form an opinion must normally be decided by the expert himself because neither trial judges nor appellate judges are usually in a position to determine precisely which facts are dispensable and which are essential to the validity of the opinion reached. Therefore, it is usually up to the opposing side to refute these conclusions, and[ ] unless the omissions are glaring, such deficiencies relate to the weight rather than the admissibility of the expert's testimony."), abrogated on other grounds as recognized by Ridley v. Safety Kleen Corp., 693 So. 2d 934, 938 n.5 (Fla. 1996).

Nevertheless we must agree with Ms. Isensee that the error was harmless. In doing so, we note that the current test for harmless error in a civil case in

the Second District is set forth in Damico v. Lundberg, 379 So. 2d 964, 965 (Fla. 2d DCA 1979), in which this court stated that for an error to be harmful, it must be "reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed." It is up to the appellant to establish that the error is harmful. See, e.g., Fla. Inst. for Neurologic Rehab., Inc. v. Marshall, 943 So. 2d 976, 978-79 (Fla. 2d DCA 2006). In the instant case, that translates to us focusing on whether the appellants established that the admission of Dr. Foley's testimony would probably have resulted in a different verdict. That is, is it reasonably probable that the verdict would have been different but for the exclusion of this testimony?

In considering that question, we note that Ms. Isensee's surgeon, Dr. Gary Moskovitz, testified that during her surgery, he found a torn ligament which would have been too small to show up on the earlier MRI—the one reviewed by Dr. Foley.[4] It was Dr. Moskovitz's opinion that the tear in the ligament indicated that Ms. Isensee had suffered trauma rather than a chronic condition. The basis of this opinion was that in "traumatically-caused disc herniation, . . . you can get a herniated disc and you can also get all types of ligamentous injuries. . . . It's usually caused by hyperflexion" or whiplash.

To counter the testimony that the accident caused a ligament tear that was too small to be seen on the MRI, Ms. Zelaznik sought to introduce Dr. Foley's testimony that if there had been a tear, there would have been swelling, edema, or hemorrhaging and that because none of those were seen on the MRI, there was no ligament tear as of twenty-two days after the accident. The inference then would be

[4]The surgery was performed approximately four years after the accident.

that Ms. Isensee's degenerative condition led to the tear sometime between the MRI taken twenty-two days after the accident and her surgery four years later.

However, although Dr. Foley was prohibited from explicitly testifying as such, the theory that the absence of swelling, edema, and hemorrhaging meant the absence of a tear was placed before the jury through other testimony. Dr. Mark Herbst, an expert called by Ms. Isensee, testified that swelling generally can be seen on an MRI. Additionally, Dr. Robert Martinez, the doctor who performed a compulsory medical exam of Ms. Isensee for the defense, testified at trial that "with a ligament in the neck, if there's a tear, there would be bleeding, there would be swelling, and the neck would become immobile." He further testified that he reviewed Ms. Isensee's two MRIs and saw no evidence on those MRIs of recent or acute trauma. In fact, he testified that the only thing he saw on those MRIs was evidence of longstanding conditions. And finally, although Dr. Foley's testimony was limited, he did testify that after reviewing Ms. Isensee's x-rays and her first MRI, "I felt that everything that we were seeing, especially with regard to the discs, was secondary to chronic degenerative changes." Dr. Foley then gave detailed testimony as to evidence of degenerative changes he saw on Ms. Isensee's MRI.

Because the jury was, in fact, presented with evidence that (1) swelling can be seen on an MRI, (2) ligament tears are commonly accompanied by swelling, and (3) Dr. Martinez and Dr. Foley saw no evidence of a tear on Ms. Isensee's first MRI, we cannot say that it is reasonably probable that the jury would have returned a different verdict had they heard all of the testimony from Dr. Foley himself. We therefore conclude that the error of excluding Dr. Foley's testimony was harmless.

The second error alleged by Ms. Zelaznik is the limiting of the testimony of the investigating officer. At trial, the officer acknowledged that he had no independent memory of the accident and that his memory was not refreshed by reading his accident report. Ms. Zelaznik's counsel then proffered the officer's testimony that his usual practice when responding to an accident is to complete a "short form" report when there are no complaints of injury by any of the parties involved but to complete a longer, more detailed accident report if any injury is indicated. In this case, he used a short form report. Ms. Zelaznik sought to introduce the officer's testimony that he used a short form to infer that there must have been no indication at the scene that Ms. Isensee was injured.

The trial court, however, excluded the testimony. In doing so, the court concluded that because the officer had no independent recollection of the accident—even after counsel attempted to refresh his recollection with his accident report—the accident report privilege applied. See § 316.066(4), Fla. Stat. (2011) ("[E]ach crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in any trial, civil or criminal.").

We need not reach the issue of whether the officer's testimony that he used a short form report in this case was inadmissible as privileged information provided to him by Ms. Isensee at the scene or admissible based on the officer's review of his police report. Either way, any error that may have occurred by excluding that particular testimony was harmless. Ms. Isensee herself testified that after the accident

she moved around the scene, getting in and out of her car and going back and forth to Ms. Zelaznik's car. In light of that testimony, we cannot say that it is reasonably probable that but for the exclusion of the officer's testimony, the jury would have returned a different verdict.

Finally, Ms. Zelaznik argues that the trial court abused its discretion in allowing a fifteen-minute video of excerpts from Ms. Isensee's surgery to be shown to the jury because, she maintains, it was exceedingly graphic and served no other purpose than to inflame and prejudice the jury. We disagree.

"The test for admissibility of photographic evidence is relevancy rather than necessity." Pope v. State, 679 So. 2d 710, 713 (Fla. 1996). However, "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2011). Here, Dr. Moskovitz testified that the video would aid him in explaining the details of Ms. Isensee's surgery to the jury. The trial court viewed the video before ruling on its admissibility and stated that it was "not particularly gruesome," likening it to a surgery one might see on television. On appeal, Ms. Zelaznik does not point to anything in the video that was particularly gruesome, relying rather on the mere fact that it was a video of a surgery. But the video consisted of only fifteen minutes of the surgery, which actually lasted one hour and forty minutes. Based on this record, we cannot say that the trial court abused its discretion in allowing the video. See Coddington v. Nunez, 38 Fla. L. Weekly D1888 (Fla. 2d DCA Sept. 4, 2013) (" '[A] trial court's ruling on a section 90.403 issue will be upheld on appeal absent an abuse of discretion.' " (quoting Ramirez v. State, 810 So. 2d 836, 843 (Fla. 2001))).

In conclusion, we find no error in the trial court's evidentiary ruling on the video of Ms. Isensee's surgery. Furthermore, any errors committed by the trial court in making the other two evidentiary rulings of which Ms. Zelaznik complains were harmless under Damico, 379 So. 2d at 965. We therefore affirm the final judgment. However, we acknowledge that the Fourth District has promulgated a different harmless error standard in civil cases. See Special v. Baux, 79 So. 3d 755 (Fla. 4th DCA 2011). Under the Fourth District's test, the beneficiary of the error in the trial court must show on appeal that "it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict." Id. at 771.[5] Accordingly, in affirming the trial court's decision below, we also certify conflict with Special, 79 So. 3d 755.

Affirmed; conflict certified.

KELLY and KHOUZAM, JJ., Concur.

[5]The Supreme Court of Florida has the Special decision under review. See Special v. W. Boca Med. Ctr., 90 So. 3d 273 (Fla. 2012).