

No. 1-23-0683

NOTICE: This order was filed under Supreme Court Rule 303 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MELINDA CARDELLA,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	
)	No. 19 L 5848
CITY OF CHICAGO,)	
)	Honorable
Defendant-Appellee.)	Jerry A. Esrig
)	Judge, presiding.

JUSTICE C.A. WALKER delivered the judgment of the court.
Justices Hyman and Gamrath concurred in the judgment.

ORDER

¶ 1 **Held:** The circuit court's finding that the plaintiff's spoliation claim failed because she could not show a reasonable probability of success at the underlying trial, but for the missing evidence, was not against the manifest weight of the evidence.

¶ 2 Following a jury trial, in which a jury found for the appellee City of Chicago (“the City”), appellant Melinda Cardella filed a lawsuit against the City under a theory of spoliation. The circuit court denied the claim following a bench trial. Cardella appeals, arguing the court’s ruling was against the manifest weight of the evidence. For the following reasons, we affirm.

¶ 3 **BACKGROUND**

¶ 4 On August 30, 2013, a tree limb fell and struck Cardella near the 7300 block of West Howard Street in Chicago. On December 9, 2015, Cardella filed a negligence claim against the City in the Circuit Court of Cook County as Case No. 2015 L 012437 (“underlying case”). Cardella alleged that the City negligently maintained the tree and this negligence caused the limb to fall and injure her. The City did not preserve the limb, and it was unavailable for inspection by Cardella and her expert witness, Mark Duntemann.

¶ 5 During the jury trial, Michael Dutkin, a local resident of Cardella’s neighborhood, testified that he reported a fallen branch from the same tree to the City about a year prior to Cardella’s injury. An inspector arrived within five minutes of Dutkin’s report. Dutkin confirmed he made no other reports about the tree. Jessica Ligammari, another local resident, also testified that she had lived in the area since 2011 and did not notice any issues with the tree before Cardella’s injury.

¶ 6 John Kirchner, a Senior City Forester for Chicago, testified regarding the City’s receipt of Dutkin’s report, confirming that an inspector was dispatched following the report. Kirchner also stated that during the two years for which records were produced, no other reports concerning the tree had been filed with the City. Kirchner detailed the City’s procedures, explaining that the City typically removes trees within 50-60 days of a citizen’s report. He asserted that the City conducts annual “windshield surveys” to assess trees, employs more certified arborists than any other U.S. municipality, and has nearly half a million trees under its forestry division’s care. Kirchner further

testified that the City's response to Dutkin's report followed City policies and did not necessitate a full tree assessment, even though no specialized equipment was used at the time. He did not see any signs of rot or disease, and believed that Cardella's injury came from a clean cut at the end of the branch indicating that the branch was "perfectly sound wood, and the likely cause of breakage was the wind."

¶ 7 John Harris, the City's expert witness, opined that the City properly followed its procedures in maintaining the tree, and, at the time of Cardella's accident, nothing about the tree's appearance or history indicated that the City should have removed it.

¶ 8 Duntemann testified for Cardella. Duntemann's analysis included reviewing photographs and conducting his own inspection of the tree at issue. He criticized the City's actions, arguing that the tree, a silver maple, was unsuitable for urban environments due to its high failure risk and maintenance challenges. Duntemann contended that after the 2012 branch fall that Dutkin reported, the City should have thoroughly inspected and then removed the tree.

¶ 9 Regarding the tree's health, Duntemann testified that he identified signs of rot and disease, such as "epicormic branching" (a stress indicator), extensive decay, and deadwood. He concluded that the limb of the tree broke due to a combination of poor structural union, loss of protection from a nearby tree, insufficient past arboriculture care, and the high winds from the storm that triggered the breakage. Duntemann noted that weather conditions were likely only a superficial factor in the tree limb's failure and that, "the tree was in poor condition."

¶ 10 Harris disputed Duntemann's conclusions and testified that he saw no signs of significant rot or decay in the more than 250 photographs entered into evidence. Harris concluded the tree branches were "healthy branches at the time they tore off," that "the tree had suffered damage from

a windstorm” and “the majority of those limbs . . . did not have any kind of rot or disease or physical damage that was part of the reason that they broke off in a windstorm.”

¶ 11 At the close of evidence, Cardella requested a spoliation jury instruction based on Illinois Pattern Jury Instruction, Civil, No 5.01 (2024) (hereinafter IPI Civil 5.01 (2024)) regarding the lost limb. The City admitted that they informed Cardella that certain portions of the tree (including the limb that fell and struck Cardella) were initially stored at the City’s Bureau of Forestry Warehouse but could no longer be located and presented for inspection. The court granted Cardella’s request and instructed the jury that it “may infer that the limb would be adverse to the [the City]” if it concluded the limb was under the City’s control, not equally available to Cardella, and should have been produced.

¶ 12 The jury returned a verdict in favor of the City on December 21, 2018. The circuit court denied Cardella’s post-trial motion. Cardella appealed, but the appeal was dismissed for want of prosecution on December 10, 2020. Following the judgment in the underlying case, Cardella filed the present lawsuit on May 29, 2019, which contained one count for spoliation of evidence. Cardella argued the City’s loss of the tree limb was the cause of her inability to prove the underlying negligence case.

¶ 13 The matter proceeded to a bench trial, at which the parties agreed not to present additional evidence. During closing arguments, the court and Cardella’s attorney had an extensive exchange regarding whether the City’s loss of the tree limb significantly impacted Duntemann’s expert testimony. On this topic, the court stated, “I’m not in any way condoning what the City did here, and I’m not in any way saying that things wouldn’t have been better if [Duntemann] had the branch. But what I am saying is that I don’t think it would have made any difference to the outcome

of the case, because [Duntemann] did not say that he couldn't render an opinion as to what happened.”

¶ 14 The court denied Cardella's spoliation claim on March 17, 2023, finding that she failed to meet her burden to prove the City's loss of the tree limb was the cause of her inability to prove her underlying negligence case. In reaching this conclusion, the court emphasized that the jury was given the spoliation instruction, allowing for a negative inference from the limb's absence, and Duntemann testified to at least six evidentiary bases available to him even without the limb which allowed him to reach his conclusions and opinions, including his ability to determine the tree's health issues even without the limb. The court noted that Duntemann could have testified in the bench trial as to what impact the absence of the limb had on his testimony and opinions, but Cardella chose not to present additional evidence. This appeal followed.

¶ 15 JURISDICTION

¶ 16 After a bench trial, the circuit court entered judgment in favor of the City on March 20, 2023. Cardella filed a notice of appeal on April 17, 2023. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 303 (eff. July 1, 2017).

¶ 17 ANALYSIS

¶ 18 On appeal, Cardella argues the circuit court's decision in favor of the City was against the manifest weight of the evidence. In a negligence action for spoliation of evidence, our supreme court has stated that a plaintiff need only establish that but for the loss or destruction of the evidence, he would have had a reasonable probability of succeeding in the underlying suit. *Boyd v. Travelers Insurance Co.*, 166 Ill.2d 188, 194-196 (1995).

¶ 19 Because the spoliation trial here was conducted via bench trial, our standard of review is the manifest weight of the evidence. See *In re Estate of Jackson*, 2022 IL App (1st) 211132, ¶ 16.

(The appellate court “will not substitute its judgment for that of the circuit court in a bench trial unless the judgment is against the manifest weight of the evidence.”). “A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented.” *Best v. Best*, 223 Ill. 2d 342, 350 (2006).

¶ 20 We find the circuit court’s decision was not against the manifest weight of the evidence because the record supports the conclusion that even if the limb had been available at trial, there is not a reasonable probability this would have changed the jury’s verdict. First, the circuit court here concluded that Duntemann’s expert testimony was not significantly impacted by the limb’s absence, and we find this was a reasonable interpretation of the underlying record. Duntemann testified to a reasonable degree of certainty that he was able to determine what health issues existed with the tree from the available evidence to him, even without the limb. Additionally, as the court pointed out at closing arguments, Duntemann did not testify as to what he might have been able to find if given the chance to inspect the missing limb, and Cardella put on no additional evidence at the bench trial. On this record, a factfinder could reasonably conclude that the limb’s absence did not so affect Duntemann’s analysis that there exists a reasonable probability the trial result would have been different if he had access to the limb. See *Brian J. Wanca, J.D., P.C. v. Oppenheim*, 2023 IL App (1st) 220273, ¶ 49; *Midwest Trust Services, Inc. v. Catholic Health Partners Services*, 392 Ill. App. 3d 204, 211 (2009).

¶ 21 The record further supports the circuit court’s denial of Cardella’s spoliation claim, following the bench trial, because the circuit court in the underlying case instructed the jury regarding spoliation of evidence by giving IPI Civil 5.01 (2024), the adverse inference jury instruction. Due to the instruction, the limb’s absence was brought to the jury’s attention through

an explicit instruction that if it believed the absence of the limb was attributable to the City, it could make a negative inference against the City. IPI Civil 5.01 (2024). The fact that the jury ruled in the City's favor despite this instruction supports the court's finding, in the bench trial, that there was not a reasonable probability Cardella would have succeeded if the limb had been available.

¶ 22 Cardella's primary argument that the circuit court's decision was against the manifest weight of the evidence is that the absence of the limb advantaged the City, who was able to inspect and photograph it, but disadvantaged her, because Duntemann was unable to analyze it to determine definitively if it was decayed and if it was this decay which caused its fall.¹ This argument fails because, as explained above, the record supports the circuit court's conclusion that the presence of the limb would not have changed the evidence at trial to the degree needed to establish she would have had a reasonable probability of success but for the limb's unavailability, meaning reversal is inappropriate. See *Boyd*, 166 Ill. 2d at 194-196; *Best*, 223 Ill. 2d at 350. While Duntemann noted that the photographs in evidence had "visually obvious issues," and he was unable to perform a decay analysis, these issues were not enough to hinder his determination regarding the health issues that existed in the tree from which the limb fell, or his general ability to offer extensive conclusions and opinions in Cardella's favor. See *Wanca*, 2023 IL App (1st) 220273, ¶ 49. Moreover, the evidentiary impact of the limb's absence was directly addressed by IPI Civil 5.01 (2024), which was still not enough to sway the jury to enter a verdict in favor of Cardella.

¹ In both her opening and her reply brief, Cardella argues multiple theories for why her spoliation claim was not "precluded." These arguments are all moot because her claim was not, in fact, precluded, but instead was considered on the merits at the bench trial.

¶ 23 Cardella next argues that the circuit court imposed improper evidentiary burdens on her at the spoliation bench trial. Specifically, she contends the court (1) ruled against her only because the absence of the tree did not prevent her from presenting a case at the initial trial, and (2) required her to prove what the additional testing would have shown, should Duntemann have been able to conduct it. These arguments fail because they are directly rebutted by the record. Cardella points to no portion of the record demonstrating the court gave any negative weight to the fact that Cardella was able to present a case with expert opinion at the underlying trial, or that it refused to rule in her favor without testimony as to what the additional testing would show. Instead, the record shows that the court emphasized repeatedly during the closing arguments of the bench trial that its finding in favor of the City was based on its interpretation of the underlying record, which it believed showed the absence of the limb did not have a substantial impact on Duntemann's analysis. This was a reasonable interpretation of the record (as explained above), and thus not subject to reversal on manifest weight of the evidence review. *Best*, 223 Ill. 2d at 350.

¶ 24 CONCLUSION

¶ 25 The circuit court's finding in favor of the City was not against the manifest weight of the evidence because the underlying record could reasonably be interpreted to support the court's denial of Cardella's spoliation claim. Accordingly, we affirm.

¶ 26 Affirmed.