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IN THE COURT OF APPEALS OF INDIANA

ArcBest Corporation,
Appellant-Respondent,

v.

Richard Wendel,
Appellee-Petitioner.

June 21, 2022

Court of Appeals Case No. 21A-PL-2912

Appeal from the Lake Superior Court

The Honorable Gina L. Jones, Judge

Trial Court Cause No. 45D10-1704-PL-31

Altice, Judge.

Case Summary

[1] Indiana and Illinois each has its own worker's compensation laws, including statutes that allow an employer or its worker's compensation insurance carrier to assert a lien against proceeds due an employee as a result of a compensable injury or death from some other person legally liable to pay those damages. [1] One of the policies behind these statutes is to prevent the employee from obtaining a double recovery.

[2] In the case before us, Richard Wendel injured his back while working in Illinois. Wendel then filed a claim for Illinois worker's compensation benefits with his employer, ArcBest Corporation[2] (ArcBest), and the Local 701 Union (Union). ArcBest and Union subsequently asserted a lien for payments they made to Wendel that they claim were related solely to Wendel's medical malpractice claim in Indiana against a surgeon who operated on the wrong side of his back.

[3] ArcBest is appealing the trial court's judgment with respect to the adjudication of its worker's compensation lien.[3] ArcBest contends that the trial court should have stayed the lien adjudication proceedings because Wendel's worker's compensation case is ongoing, and the total of those benefits is yet to be determined and paid. In the alternative, ArcBest contends that even if the lien

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[1] *See* Ind. Code § 22-3-2-13 and 820 ILCS 305/5(b).

[2] ArcBest is a holding company for various truckload freight, household moving, and transportation management companies.

[3] Union is not a party to this appeal.

adjudication proceedings were proper, the trial court miscalculated the value of its lien and improperly excluded from the evidence a physician's unsworn opinion letter regarding Wendel's injuries.

[4] We affirm.

Facts and Procedural History

[5] On September 25, 2013, Wendel sustained a back injury in Illinois while working for ArcBest. Wendel has received worker's compensation benefits in accordance with his Illinois claim, and additional benefits may be paid in the future.

[6] On November 26, 2013, Wendel underwent back surgery in Indiana for his work injury. A micro diskectomy[4] was to be performed on the right side of Wendel's back. Dr. Dwight Tyndall, an Indiana physician, operated on the left side of Wendel's back. As a result, Wendel required additional treatments and corrective surgery, including a second micro diskectomy by Dr. Harel Deutsch on the right side of his back on July 31, 2014. Wendel also underwent lumbar fusion surgery on July 30, 2015.

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[4] A diskectomy is a procedure to remove the damaged portion of a herniated disk in the spine. A herniated disk can irritate or compress nearby nerves. A diskectomy is most effective for treating pain that radiates down the arms or legs. *Appellant's Appendix Vol. II* at 36.

[7] On October 14, 2015, Wendel filed a proposed complaint with the Indiana Department of Insurance against Dr. Tyndall,[5] alleging medical malpractice. Thereafter, on April 6, 2017, Wendel filed a "petition for payment of excess damages from the Indiana Patient's Compensation Fund," against Stephen Robertson, Commissioner of the Indiana Department of Insurance, as administrator of the Compensation Fund (Respondent). Wendel's petition acknowledged that he had settled his malpractice claim against Dr. Tyndall for $250,000.

[8] Wendel retained Dr. Richard Cristea as his expert to support the malpractice claim. On October 4, 2017, Dr. Cristea concluded in an opinion letter as follows: "I am of the opinion more likely than not the initial surgery either increased or accelerated L4 and L5 (as noted on the MRI scan) and S1 (as noted on the EMG) nerve root impingement, which is now chronic and permanent." *Appellant's Appendix Vol. III* at 183.

[9] In a subsequent opinion letter dated January 10, 2019, Dr. Cristea concluded as follows:

> I am of the opinion that [Wendel's] diagnoses of lumbar radiculopathy and failed back syndrome of the lumbar spine *are directly related to the work injury of September 25, 2013. The requirement for the additional surgery. . . is also related to said work injury.* My opinions are based to a reasonable degree of medical

[5] Wendel also named Orthopaedic Specialists of Northwest Indiana, d/b/a Spine Care Specialists, as a defendant in the complaint.

> certainty, based on the medical records of The Neurological Institute & Specialty Centers, Dr. Thompkins' consultation note, as well as the absence of any medical records provided to me that I have been asked to review predating the work injury of September 25, 2013.

Appellee's Appendix Vol. 2 at 2, 9 (emphases added).

[10] On December 9, 2020, Wendel and the Respondent entered into a mediation agreement (Agreement) and settled the matter for the payment of $450,000 to Wendel in exchange for Wendel's dismissal of all claims against the Respondent. The Agreement stated as follows:

> 3. This mediation agreement, entered into between the parties, is premised on the overwhelming medical evidence that *the Petitioner's alleged damages from malpractice are limited to the finite period of time between the left-sided microdiscectomy at L4-5, which occurred on or about November 26, 2013, and immediately before the right-sided microdiscectomy at L4-5 on or about July 31, 2014. The Petitioner's subsequent treatment, medical expenses and lost wages/inability to work are entirely unrelated to the subject malpractice incident.*
>
> 4. This mediated agreement is also based on the findings and opinions rendered by the Respondent's medical expert, Robert Huler, M.D. of OrthoIndy who drafted a report dated November 11, 2020 which is attached hereto as Exhibit "A." Dr. Huler opined as follows:
>
> > *The Respondent was only responsible for the uncovered damages suffered between November 26, 2013, which is the date of the wrong side surgery, until immediately before the performance of the corrective surgery completed on July 31, 2014.*

> *The Respondent does not have responsibility for the performance of the correct L4/5 right sided surgery completed by Harel Deutsch, M.D. The Respondent's responsibility was terminated the morning before the second surgery was completed.*
>
> The wrong sided surgery at the L4-5 left did not cause a need for any additional surgical procedures beyond the work injury causation of the disc herniation L4-5 right.
>
> *The Petitioner's need for disc surgery L4-5 right was related to the work injury on September 26, 2013 and not related to the improper wrong sided surgery completed on November 26, 2013.*
>
> *The improper wrong sided surgery at the L4-5 left did not cause the need for the lumbar fusion surgery on July 30, 2015 or any subsequent treatments.*

This mediated agreement between the parties is further based on the fact that Dr. Andrew Zelby of Neurological Surgery & Spine Surgery, S.C., who performed an Independent Medical Exam on the Petitioner and drafted a report dated December 1, 2014, which is attached hereto as Exhibit "B." Dr. Zelby opined as follows:

> At your request, I have reviewed an MRI of the lumbar spine with and without contrast of Mr. Wendel performed on November 3, 2014. There is mild degenerative disc disease from L2-S1 with mild loss of disc space height at these levels… At L5-S1 there is a broad-based bulging disc or disc/osteophyte complex. This may abut the left Sl nerve root, but causes no compression or displacement and there is no stenosis at this level.

> Mr. Wendel underwent a bilateral L4-5 decompression with discectomy and his MRI has a typical and satisfactory post-operative appearance. He has otherwise mild degenerative disc disease, no persistent herniated disc and no condition amenable to surgical correction.

Appellant's Appendix Vol. II at 58-60 (emphasis added).

[11] The Agreement further provided that

> *The parties acknowledge that [Wendel's] damages are limited to a finite period of time as noted above for this medical malpractice claim. As a result, the Respondent contends that the Petitioner will be adequately compensated by the settlement payment made by the underlying medical provider(s).* The Respondent has entered into this mediated settlement agreement in an effort to amicably resolve the Petitioner's disputed claims.

Id. at 60 (emphasis added). Finally, the Agreement stated that Wendel "is responsible for the payment of any and all liens." *Id.*

[12] As the Agreement called for Wendel to resolve all liens, Wendel sought a declaratory judgment to adjudicate ArcBest's lien on July 16, 2021. In support of the motion to adjudicate the lien interest, Wendel submitted the deposition of Robert Huler, M.D. Dr. Huler testified that he is an orthopedic surgeon with a subspecialty in the field of spine surgery that he has been performing exclusively for thirty years. Dr. Huler also testified as to his schooling including his internships and residencies, his fellowship in spine surgery, and his certification with the Board of Orthopedic Surgery.

[13] Dr. Huler reviewed 1500 pages of medical records, 5 MRIs, 1 lumbar x-ray, 3 CTs, and 2 EMGs that required him to spend approximately 15 hours to complete his review and develop his expert opinions regarding Wendel's injuries. Dr. Huler was asked to address the issue of Wendel's lumbar surgery that was performed on the wrong side of the back and what the financial responsibility of the Indiana Patient Compensation Fund should be. In response, Dr. Huler concluded that

> The . . . Patient Compensation Fund bears responsibility for uncovered damages suffered by Wendel from November 26 of 2013, which was the date of the . . . wrong side surgery, until immediately before the time of the performance of the corrective and correct right-side surgery done July 31 of 2014. *The Patient Compensation Fund did not have responsibility for the costs or recovery of the correct side surgery. They weren't responsible for that. That was a work-related injury.* There's another carrier that would cover . . . those costs. But for the negligence, that was the responsibility for the Patient Compensation Fund.

Id. at 102-03 (emphasis added).

[14] Dr. Huler also concluded that "the wrong side surgery at L4-5 on the left did not cause a need for additional surgery beyond the work-related disc herniation at L4-5 on the right…. The L4-5 left surgery did not impact the need for the correct surgery at L4-5 on the right." *Id.* at 103-04. Dr. Huler further noted that "the need for disc surgery at L4-5 on the right was related to the work injury of September 26 of 2013 and not related to the improper wrong side surgery done November 26 of 2013…. The improper wrong side surgery at L4-5 on the left

did not cause the need for future lumbar fusion surgery on July 30 of 2015 or subsequent treatments." *Id.* at 104-05.

[15] Wendel maintained in his motion for the adjudication of the lien that ArcBest must prove through expert testimony that there is a causal nexus between the medical malpractice claim and any claimed payment to and/or on behalf of the claim for worker's compensation benefits. In light of the undisputed medical evidence that was set forth in the Agreement, Wendel argued that the period of possible compensation relating to the worker's compensation payment that was directly related to him is "limited to the finite period of time between the left-sided microdiskectomy at L4-5, which occurred on or about November 26, 2013, and immediately before the right-sided microdiskectomy at L4-5 on or about July 31, 2014." *Appellant's Appendix Vol. II* at 38. Hence, Wendel claimed that the total amount of ArcBest's lien for this period was limited to $34,138.34.

[16] Wendel also maintained that ArcBest failed to provide any admissible expert testimony to prove how much of the $34,138.34 was related to the work-related injury versus the medical malpractice claim. Therefore, Wendel claimed that ArcBest's failure to produce evidence of that causation nexus constituted a waiver of the entire lien. Moreover, Wendel asserted that "without question," a large portion of the payments were due to his work-related injury. *Id.* at 43. For all these reasons, Wendel claimed that the trial court was obligated to conduct a hearing, consider the evidence, and resolve ArcBest's lien.

[17] ArcBest responded that litigating its lien was premature because the worker's compensation case "is still ongoing, with the full worker's compensation benefits yet to be determined by the Illinois Worker's Compensation Commission." *Appellant's Appendix Vol. III* at 3. ArcBest pointed out that although an employee may receive the amount to which he is entitled under worker's compensation, plus any additional funds in excess of the lien, double recovery is prohibited. ArcBest explained that to hold otherwise would allow Wendel to unfairly recover the same amounts from the third party (here, Dr. Tyndall *et. al* on the malpractice claim) and the employer.

[18] The trial court denied ArcBest's request to stay the proceedings and conducted a hearing on September 23, 2021 to adjudicate the lien. The trial court also granted Wendel's motion to strike Dr. Cristea's unsworn opinion letter of October 4, 2017.

[19] ArcBest called no live witnesses at the hearing; nor did it offer any deposition testimony. It did, however, submit an affidavit of Tammy Kaelin who claimed to have knowledge of business records relating to Wendel's worker's compensation claim. Kaelin, who represented herself as ArcBest's compensation manager, averred that ArcBest's lien totaled $75,760.71. But there was no discussion about the contents of the records and/or how the worker's compensation payments had a nexus to Wendel's medical malpractice claim.

[20] At the hearing, Wendel's counsel commented that

> Your Honor, based upon our discussions, we were unable to come to an agreed outcome of the case. I do stand by the proposition that I said earlier that the time period that we agree that they're entitled to receive a lien reimbursement is from November 26, 2013 through July 31, 2014, based upon the sworn deposition testimony of Dr. Huler. . . .

Id. at 24.

[21] Following the hearing, the trial court entered the following order:

> *From the briefing, it appears that both parties agree that [ArcBest's] lien on the settlement proceeds involves the time period from November 26, 2013 to July 31, 2014.* Moreover, it appears that both parties agree that the underlying medical malpractice claim was brought as the result of the surgery performed on Petitioner on November 26, 2013; both parties agree that said surgery was mistakenly performed on the wrong side.
>
> Exhibit A to Petitioner's Brief setting forth the sum of $34,138.34 as the potential amount of [ArcBest's] lien does not clearly demonstrate to the Court which, if any, charges are a result of the subject malpractice case and which, if any, charges are unrelated to the same. [ArcBest's] Exhibit 4 to its Response indicates the amount that has been paid for Petitioner's worker's compensation claim is $75,760.71, with an itemization, that, again, does not clearly reflect which, if any, charges are a result of the subject malpractice case and which, if any, charges are unrelated to the same.
>
> The Court does not agree that [Arc-Best] waived its lien as to the surgery subject to the underlying medical malpractice suit, as, clearly, all parties acknowledge that the surgery on November 26, 2013 is the subject of the same. In fact, in his Reply, Petitioner states that (t)he only admissible evidence before this Court is the

> deposition of Robert Huler, M.D. taken on June 9, 2021 and attached to Plaintiff's brief. Petitioner pointed out that Dr. Huler found the Patients' Compensation Fund responsible for damages suffered by Petitioner from November 26, 2013 until immediately before the correct surgery done July 31, 2014. Taking that stated admissible evidence into account, the Court must then agree that [ArcBest] paid for the first "unnecessary" surgery, and that it should have a lien for that medical expense. *To be specific, the Court agrees that the costs paid by [ArcBest] for the surgery on November 26, 2013 and other costs directly related to that surgery, only, should constitute a lien for [ArcBest] against the settlement proceeds. The Court, also, agrees that [ArcBest] has failed to provide this Court with expert medical testimony to support any other claimed or perceived expenses*.
>
> However, the itemized statements of expenses paid by [ArcBest] during that time period ([Wendel's] Exhibit A and [Arc Best's] Exhibit 4) vary so greatly that *based on the supported evidence, this Court can only determine that [ArcBest's] lien against the settlement proceeds is limited to an amount not to exceed $34,138.34.*
>
> THEREFORE, *[ArcBest] is entitled to a lien against the medical malpractice proceeds in the amount of $34,138.34.*

Appellant's Appendix Vol. II at 16-18 (emphases added).

[22] ArcBest now appeals, claiming that adjudicating its lien was premature and/or that the trial court did not accurately calculate the amount of its lien.

Discussion and Decision

I. Adjudication of the Lien

[23] ArcBest contends that the trial court should not have proceeded with the lien adjudication hearing. ArcBest alleges that the proceedings should have been stayed because although it asserted a current lien, the lien was not yet final because Wendel's worker's compensation case was ongoing and additional benefits would likely be paid to Wendel that would be attributed to the medical malpractice claim.

A. Standard of Review

[24] With respect to findings of fact, we apply a clearly erroneous standard of review. *Beam v. Wausau Ins. Co.,* 765 N.E.2d 524, 528 (Ind. 2002). When the trial court enters findings in favor of the party bearing the burden of proof, the findings are clearly erroneous if they are not supported by substantial evidence of probative value. *Eakin v. Reed,* 567 N.E.2d 148, 149 (Ind. Ct. App. 1991), *trans. denied*. "[W]e will reverse such a judgment even where we find substantial supporting evidence, if we are left with a definite and firm conviction a mistake has been made." *Id.*

[25] We also note that a clearly erroneous judgment can result from application of the wrong legal standard to properly-found facts, and in that situation we do not defer to the trial court. *State v. VanCleave,* 674 N.E.2d 1293, 1296 (Ind. 1996). We are not bound by the trial court's characterization of its results as "findings of fact" or "conclusions of law." *Id.* Rather, we look past these labels to the substance of the judgment and will review a legal conclusion as such even if the judgment wrongly classifies it as a finding of fact. Conclusions of law are

reviewed de novo. *Beam,* 765 N.E.2d at 528. In this instance, we review whether the trial court properly applied the law in determining whether it should have stayed the lien adjudication hearing.

B. Worker's Compensation Lien

[26] We initially observe that Wendel's worker's compensation injury was in Illinois, and Wendel did not pursue any worker's compensation benefits in Indiana. Therefore, he has no worker's compensation claim or case in Indiana. And in accordance with Illinois law[6], the burden of proof is on ArcBest, the lienholder, to establish a causal nexus between its worker's compensation payments and Wendel's injury in the medical malpractice case. *See Hunt v. Herrod,* 125 N.E.3d 436, 442 (Ill. App. 2019).[7]

[27] By way of illustration, in *Hunt*, an on duty police officer for the City of Peoria (the City), Hunt, was injured in an automobile accident caused by Herrod. Hunt subsequently suffered another injury to his back while at police training. Hunt sued Herrod and the City intervened. Hunt and Herrod settled their action for $75,000. The City then asserted a worker's compensation lien of

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[6] The parties do not dispute that Illinois law applies in this case.

[7] Somewhat analogous is the well-established principle in Indiana that a plaintiff bears the burden of establishing at trial that claimed medical expenses incurred as the result of any injury were both reasonable and necessary. *Smith v. Syd's, Inc.,* 598 N.E.2d 1065, 1066 (Ind. 1992). The requirement of a "reasonable connection between a defendant's conduct and the damages which a plaintiff has suffered" is also an essential element in a negligence action. *Daub v. Daub,* 629 N.E.2d 873, 877 (Ind. Ct. App. 1994), *trans. denied.*

$125,899.50 on the settlement. That amount represented the total it had paid to Hunt in worker's compensation benefits. The trial court determined that the City was entitled to the entire lien amount, and Hunt appealed.

[28] The Illinois Court of Appeals noted that a trial court may hold an evidentiary hearing to adjudicate a lien where there are multiple claims that could be attributable to the injured party's condition. *Id.* at 441. It determined, however, that the City was not entitled to a lien merely because it had paid worker's compensation benefits. *Id.* at 442; *see also Fret v. Tepper,* 618 N.E.2d 526 (Ill. App. 3d 1993). Rather, it was the City's burden to establish that the payments it made were connected to the injury for which the employee recovered from the third party. *Id.* at 442-43. Because the trial court did not have that medical evidence, it could not adjudicate the City's lien. *Id.* Thus, it was determined that the trial court erred in determining that the City was entitled to the entire settlement amount because the City had failed to establish a nexus between the payments it had made and the settlement proceeds that Hunt had recovered in the personal injury case. *Id.*

[29] In light of *Hunt*, it is clear that in accordance with Illinois' worker's compensation case law, a trial court can conduct an evidentiary hearing to adjudicate a lien where there are multiple claims that could be attributable to the injured party's condition in order to decide what amount of the worker's compensation lien attached to the settlement. As were the circumstances in *Hunt,* we agree that ArcBest was required to establish that the payments it made were connected to the injury for which Wendel recovered from the medical

malpractice tortfeasors. *See id.* at 442. And there is nothing to prohibit a lien adjudication merely because a worker's compensation benefits claim is ongoing and future benefits might be paid to the claimant.

[30] As discussed above, ArcBest failed to present any admissible expert medical evidence proving that causal nexus. Rather, it was Wendel who demonstrated the limited causal nexus between the medical malpractice claim and certain worker's compensation benefits that had been paid. More specifically, Dr. Huler's undisputed evidence limited those payments from the initial incorrect surgery on November 26, 2013, until immediately before the time of the corrective surgery on July 31, 2014. Dr. Huler further opined that "the wrong side surgery at L4-5 on the left did not cause a need for additional surgery beyond the work-related disc herniation at L4-5 on the right. . . . The L4-5 surgery did not impact the need for the correct surgery at L4-5 on the right." *Appellee's Appendix Vol. 2* at 103-04.

[31] Again, ArcBest did not present any admissible medical evidence establishing that the payments it made were connected to the injury for which Wendel recovered in the medical malpractice case. Therefore, we can only conclude that ArcBest waived any argument that its payments were connected to Wendel's medical malpractice case other than from November 26, 2013, which was the date of the wrong side surgery, until immediately before the time of the performance of the corrective surgery on July 31, 2014. And even though ArcBest did not satisfy its burden of proof, Wendel presented undisputed medical evidence establishing the causal connection between the proceeds that

were paid on his medical malpractice claim and those that were paid on his worker's compensation claim. Wendel's evidence also established that he was not seeking any type of double recovery regarding his medical malpractice case and his worker's compensation claim. Thus, contrary to ArcBest's contention, there is no showing that Wendel was "attempting to manipulate a settlement with a third party in a manner that would circumvent the employer's worker's compensation lien." *Appellant's Brief* at 20. ArcBest's claim that the trial court erred in proceeding to adjudicate its lien fails.

II. Lien Calculation

[32] ArcBest argues in the alternative that even if it was proper to adjudicate the lien, the trial court's calculation of its lien amount was erroneous. As discussed above, we will apply a clearly erroneous standard to findings of fact, and we will review the trial court's conclusions of law de novo. *Beam,* 765 N.E.2d at 528. The issue that ArcBest presents is whether the trial court properly applied the law to the disputed evidence regarding the amount of its lien.

[33] Here, ArcBest presented no evidence regarding the causal connection of its lien to Wendel's malpractice claim; rather, Dr. Huler—Wendel's medical expert—limited the time period from November 26, 2013 through July 31 of 2014 as well as opining that "the wrong side surgery at L4-5 on the left did not cause a need for additional surgery beyond the work-related disc herniation at L4-5 on the right." *Appellant's Appendix Vol. II* at 59.

[34] Notwithstanding Dr. Huler's medical opinions, ArcBest claims that the trial court's determination that the lien amount could not exceed $34,138.34 was erroneous. In this regard, ArcBest merely asserts that Dr. Huler's "opinions should be given little weight . . . and Wendel's employment of Dr. Huler's opinion should be held with suspicious reservation." *Appellant's Brief* at 19. We reject such an invitation to reweigh the evidence. *See Davidson v. Bailey*, 826 N.E.2d 80, 87 (Ind. Ct. App. 2005) (observing that this court will not reweigh the evidence or judge the credibility of witnesses).

[35] Dr. Huler testified in his deposition that he had had reviewed 1500 pages of Wendel's medical records, 5 MRIs, 1 lumbar x-ray, 3 CTs, and 2 EMGs while spending about fifteen hours in completing his review and developing his opinions. On the other hand, ArcBest chose not to call any witnesses at the hearing, and it did not submit any expert testimony. Instead, ArcBest submitted an affidavit from Kaelin, ArcBest's worker's compensation manager, who averred that she had examined ArcBest's records and concluded that the current lien amounted to $75,760.71 "for payments to date." *Appellant's Appendix Vol. III* at 130. Attached to Kaelin's affidavit was a 2-page exhibit that contained various headings, dates, and payments, labeled "CLAIM, PAYEE, AMOUNT, FROM DOS and THRU DOS." *Id.* at 132-133. Examples of the somewhat confusing payments included those that were made to "MR CONNECT LLC and COPYRIGHT INC." *Id.* In short, there was no testimony that could have explained the reason for the payments. As a result, the trial court was placed in the position of having to speculate as to why the

payments were made and whether they were made in relation to Wendel's medical malpractice claim.

[36] In the absence of such testimony, it was reasonable for the trial court to conclude that the offered exhibits in and of themselves did "not clearly reflect which, if any, charges are result of the subject malpractice case and which, if any, charges are unrelated to the same." *Appellant's Appendix Vol. II* at 16-17. And in light of the undisputed medical evidence before it, i.e., Dr. Huler's deposition testimony establishing the time period involving Wendel's malpractice claim and the $34,138.24 that ArcBest had paid during that time frame, the trial court reasonably concluded that ArcBest's lien was not to exceed that amount. Thus, we find that the trial court did not err in its calculation of ArcBest's lien.

III. Exclusion of Dr. Cristea's Letter

[37] Finally, ArcBest argues that the trial court's judgment must be reversed because it erred in striking Dr. Cristea's October 4, 2017 unsworn opinion letter from the evidence at the lien adjudication hearing. ArcBest asserts that because Wendel retained Dr. Cristea as an expert in the medical malpractice action, and Dr. Cristea opined in the letter that the initial incorrect surgery might have affected Wendel's nerve roots, that opinion letter should have been admitted into evidence.

[38] The admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. *Estate of Carter v. Szymczak,* 951 N.E.2d 1, 5 (Ind.

Ct. App. 2011), *trans. denied*. We will reverse a trial court's decision only for an abuse of discretion, that is, only when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before it. *See id.* We also note that erroneously excluded evidence requires reversal only if the error relates to a material matter or substantially affects the rights of the parties. *Dynes v. Dynes*, 637 N.E.2d 1321, 1324 (Ind. Ct. App. 1994), *trans. denied*.

[39] Dr. Cristea produced two separate unsworn opinion letters regarding Wendel's injuries. Dr. Cristea's October 4, 2017 report regarding the surgery that Dr. Tyndall performed on Wendel, stated that "I am of the opinion more likely than not the initial surgery either increased or accelerated L4 and L5 (as noted on the MRI scan) and SI (as noted on the EMG) nerve root impingement, which is now *chronic and permanent.*" *Appellant's Appendix Vol. III* at 183 (emphasis added). The second letter of January 10, 2019, stated that the "diagnosis of lumbar radiculopathy and failed back syndrome of the lumbar spine *are directly related to the work injury of September 25, 2013*." *Appellee's Appendix Vol.* 2 at 2, 9 (emphasis added).

[40] ArcBest asserts that the trial court erred in excluding the October 4, 2017 letter because "it was used in the underlying medical malpractice case by Wendel himself" and it is "essential to the evaluation of the lien adjudication case." *Appellant's Brief* at 27. ArcBest urges that Dr. Cristea's unsworn letter should have been admitted even though Dr. Cristea was not called to testify at the hearing.

[41] We initially observe that Evid. Rule 801(c) provides that hearsay is an out-of-court statement offered to prove the truth of the matter asserted. If the challenged evidence is hearsay, it is inadmissible unless it meets one of the exceptions to the hearsay rule. *See Evid. R.* 802. Dr. Cristea's opinion letter is clearly hearsay, and ArcBest has offered no exceptions to the hearsay rule that might otherwise allow the admission of the letter into evidence. As an aside, we note that the two unsworn letters are at odds with each other. This circumstance certainly supports the reason for the rule that unsworn hearsay documents not subject to cross examination are not admissible.

[42] Notwithstanding the hearsay exclusion, ArcBest maintains that the trial court improperly granted Wendel's motion to strike Dr. Cristea's letter from the evidence because the "rule of completeness" necessarily compels the letter's admission. *Appellant's Brief* at 27. ArcBest asserts that because the letter was attached to Dr. Huler's deposition transcript, the admission of the letter would "simply make the record of Dr. Huler's deposition complete." *Id.*

[43] Evid. R. 106 embodies the doctrine of completeness:

> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.

[44] The rule of completeness is designed to avoid misleading impressions caused by taking a statement out of its proper context or otherwise conveying a distorted

picture by the introduction of only selective parts of the document. *Lieberenz v. State*, 717 N.E.2d 1242, 1248 (Ind. Ct. App. 1999), *trans. denied*. "The rule may be invoked to admit omitted portions of a statement in order to (1) explain the admitted portion; (2) place the admitted portion in context; (3) avoid misleading the trier of fact; or (4) insure a fair and impartial understanding of the admitted portion." *Id.* A court need not admit the remainder of the statement, or portions thereof, that are neither explanatory of nor relevant to the portions already introduced. *Id.*

[45] ArcBest has failed to demonstrate how the admission of Dr. Cristea's letter would have rendered the record of Dr. Huler's deposition "complete." *See Appellant's Brief* at 27. Therefore, the provisions of Evid. R. 106 are inapplicable in this instance. We also observe that ArcBest chose not to subpoena or depose Dr. Cristea; nor did it present the trial court with admissible evidence regarding Dr. Cristea's expert qualifications, the basis for his opinion(s) and/or whether his opinions changed—or would have changed—in light of Dr. Huler's expert testimony. Even more compelling, there is nothing to suggest that Dr. Huler's expert opinions on the causation issue gave a misleading impression or conveyed a distorted picture of the circumstances.

[46] Finally, ArcBest claims that Dr. Cristea's letter should have been admitted in accordance with the doctrine of judicial estoppel. The premise of judicial estoppel is that, absent a good explanation, a party should not be permitted to gain an advantage by litigating on one theory and thereafter pursuing an incompatible theory in subsequent litigation. *Price v. Kuchaes*, 950 N.E.2d 1218,

1227-28 (Ind. Ct. App. 2011), *trans. denied*. Judicial estoppel, however, only applies in instances of intentional misrepresentation, so the dispositive issue supporting the application of this doctrine is the "bad-faith intent of the litigant subject to estoppel." *Morgan Cty. Hosp. v. Upham*, 884 N.E.2d 275, 280 (Ind. Ct. App. 2008), *trans. denied.*

[47] In this case, ArcBest could have presented Dr. Cristea's expert opinions by taking his deposition prior to the hearing. Only then could the trial court have known what his opinions would have been, along with the basis for those opinions. Moreover, no showing of intentional misrepresentation or bad faith intent has been established in this case. Thus, ArcBest has failed to demonstrate that Dr. Cristea's letter should have been admitted under the theory of judicial estoppel. For all these reasons, we conclude that the trial court properly granted Wendel's motion to exclude Dr. Cristea's unsworn opinion letter from the evidence.

Conclusion

[48] In light of our discussion above, we conclude that the trial court properly adjudicated ArcBest's lien. And because ArcBest failed to present any admissible evidence demonstrating a causal nexus between the amounts it paid Wendel on his worker's compensation claim and the amount that Wendel recovered in his medical malpractice action, the trial court properly valued the amount of ArcBest's lien when considering the undisputed medical evidence

before it. Finally, we conclude that the trial court did not abuse its discretion in striking Dr. Cristea's unsworn opinion letter from the evidence.

[49] Judgment affirmed.

Vaidik J. and Crone, J., concur.