

2004. Susan also alleged malpractice on the part of the hospital in which the surgery was performed—Fairfield Memorial Hospital.

Susan, a 42-year-old woman, went to see Dr. Fulk for the treatment of excessive vaginal bleeding. Dr. Fulk presented treatment options to Susan. One of the options offered to Susan was a hysterectomy. Susan elected to have the hysterectomy and underwent the procedure on February 3, 2004. The operative notes prepared by Dr. Fulk reflect that the surgery was uneventful and successful.

Susan complained of pain with urination and gas pain at her surgical postoperative appointment with Dr. Fulk on February 9, 2004. A urinalysis revealed a bladder infection. Dr. Fulk prescribed antibiotics. On February 16, 2004, Susan returned to Dr. Fulk's office. At this appointment, Susan complained of leaking urine whenever she coughed, sneezed, or laughed. Dr. Fulk felt that Susan needed to be referred to a urologist. Dr. Fulk changed Susan's medication to an antibiotic because a repeat urinalysis showed that the infection was not completely gone. Later that month, Susan saw Dr. Reagan, a urologist. Dr. Reagan scheduled a cystoscopy in order to diagnose Susan's condition. This procedure was performed on an outpatient basis on February 27, 2004. The relevant section of Dr. Reagan's short operative note states as follows:

"The urethra was without any strictures or lesions *** and had no evidence of any *** fistulization. The fistula was noted across the posterior wall of the bladder starting just across the right side of the midline extending to the left posterior wall of the bladder. There were several sutures that appeared visually to be PDS across the fistula site. The Bugbee was used to cauterize in between the sutures in order to try and expedite the healing of the fistula site. Sutures were left intact."

Dr. Reagan referred to the fistula at the trial as a laceration and stated that the laceration was visible from the bladder side and from the vaginal side, which meant that the laceration

extended through the wall of the bladder into the vaginal canal. He testified that in his opinion the "stitches" he visualized were placed in the bladder during the hysterectomy as an attempt to repair the laceration.

Susan testified that Dr. Reagan told her he found stitches in her bladder. Dr. Reagan believed that he had successfully treated the fistula. However, Susan's problems worsened. Within a couple of days, Susan began leaking more urine than before the cystoscopic procedure. Susan continued to treat with Dr. Reagan and did not return to the care of Dr. Fulk.

Dr. Reagan performed another procedure on March 16, 2004—a transabdominal repair of the fistula. In this procedure, Dr. Reagan dissected the bladder away from the vaginal cuff and placed sutures through the bladder wall in order to close the fistula. Following this second urological procedure, Susan continued to leak urine. She had to be readmitted to the hospital later that month for the treatment of an abscess.

In November 2004, Dr. Reagan performed a third surgery—a bladder suspension. However, this procedure also did not successfully stop the urine leakage.

Thereafter, Susan sought out the opinion of a different physician in Indiana, who referred Susan to a urologist in Tennessee at Vanderbilt University Medical Center. Ultimately, Susan underwent a complete surgical bladder repair, which was successful. She had no further urine problems after this final surgery.

Susan filed suit against Dr. Fulk and Fairfield Memorial Hospital on February 1, 2006. She voluntarily dismissed her claim against Fairfield Memorial Hospital by a court order entered April 8, 2009.

The case proceeded to trial in May 2009. At the conclusion of the case, the jury returned a verdict in favor of Dr. Fulk and against Susan. A judgment was entered on the verdict on May 14, 2009.

On June 5, 2009, Susan filed a posttrial motion alleging that the trial court erred in allowing Dr. Fulk's expert witnesses, Dr. Bryan and Dr. Schuster, to testify that Dr. Reagan was incorrect in his belief that he saw a laceration to the bladder. She also argued that there was no scientific support for Dr. Schuster's expert testimony. Finally, Susan argued that the jury's verdict was contrary to the manifest weight of the evidence. On September 2, 2009, the trial court entered an order denying Susan's posttrial motion.

In her notice of appeal, Susan asked "that the Order of September 2, 2009 be reversed or, in the alternative, reversed and remanded for further proceedings." In Susan's brief on appeal, she indicates that there is only one issue—whether Dr. Fulk's expert witnesses, Dr. Bryan and Dr. Schuster, should have been allowed to give opinions countering the observations and resulting opinions of the treating physician, Dr. Reagan. In the conclusion of her brief to this court, Susan "prays that this Court enter an Order reversing the Trial Court and *** remand[ing] for purposes of a trial on the issue of damages only."

ISSUES, ARGUMENT, AND ANALYSIS

Our analysis of this appeal is made difficult because the argument section of Susan's brief on appeal is a mere 1.5 pages. In an effort to address the issues, we are forced to make assumptions about the substance and intent of Susan's arguments on appeal. Furthermore, the manner in which this case is presented to us on appeal is somewhat confusing. Essentially, Susan is asking this court to enter a judgment notwithstanding the verdict. However, she did not ask the trial court to enter a judgment notwithstanding the verdict; instead Susan asked the trial court to find that the jury's verdict was contrary to the manifest weight of the evidence.

A judgment notwithstanding the verdict is an alternative vehicle for posttrial relief allowed pursuant to our Code of Civil Procedure. 735 ILCS 5/2-1202(b) (West 2008). All the relief desired after a trial in jury cases—which would include a judgment notwithstanding

the verdict as well as a new trial—must be included in the same posttrial motion. *Id.* "The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired, as for example, the entry of a judgment, the granting of a new trial or other appropriate relief." *Id.* All posttrial motions must be filed within 30 days after the entry of the judgment. 735 ILCS 5/2-1202(c) (West 2008).

The Illinois Supreme Court has established rules for filing briefs on appeal to the higher courts. Supreme Court Rule 341(h) (eff. July 1, 2008) lists the requirements for an appellant's brief. Subsection (h)(7) covers what is required in the appellant's argument section of the brief on appeal and provides, "Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

The supreme court also provides guidance to this court regarding our scope of review when hearing a case on appeal. Supreme Court Rule 366(b)(2)(iii) (eff. Feb. 1, 1994) provides, "A party may not urge as error on review of the ruling on the party's post-trial motion any point, ground, or relief not specified in the motion."

There are different standards of review if the court is reviewing an order denying a request for a judgment notwithstanding the verdict, as opposed to an order denying a motion for a new trial.

A judgment notwithstanding the verdict should not be granted unless the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favored the movant that no contrary verdict could possibly stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967). A judgment notwithstanding the verdict is inappropriate in situations where " 'reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.' " *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132, 720 N.E.2d 242, 257 (1999) (quoting *Pasquale v. Speed Products*

Engineering, 166 Ill. 2d 337, 351, 654 N.E.2d 1365, 1374 (1995)). The trial court should not reweigh the evidence and set aside a verdict just because the jury could have drawn different conclusions or inferences from the evidence or because the court feels that another result would have been far more reasonable. *McClure*, 188 Ill. 2d at 132, 720 N.E.2d at 257 (relying on *Maple v. Gustafson*, 151 Ill. 2d 445, 452, 603 N.E.2d 508, 512 (1992)). Similarly, the appellate court should not usurp the jury's role on questions of fact that were fairly submitted, tried, and determined from the evidence which did not overwhelmingly favor either position. *McClure*, 188 Ill. 2d at 132, 720 N.E.2d at 257 (relying on *Maple*, 151 Ill. 2d at 452-53, 603 N.E.2d at 512). We apply a *de novo* standard to determinations on motions for judgments notwithstanding the verdict. *McClure*, 188 Ill. 2d at 132, 720 N.E.2d at 257; *Hernandez v. Schitteck*, 305 Ill. App. 3d 925, 930, 713 N.E.2d 203, 207 (1999).

The trial court's ruling on a motion for a new trial should not be reversed on appeal unless the party who is seeking the new trial can affirmatively show that the court clearly abused its discretion. *Maple v. Gustafson*, 151 Ill. 2d 445, 455, 603 N.E.2d 508, 513 (1992). In determining whether the trial court abused its discretion, we must consider whether the jury's verdict was supported by the evidence and whether the complaining party was denied a fair trial. *Maple*, 151 Ill. 2d at 455, 603 N.E.2d at 513.

In this case, Susan filed a motion for a new trial with the trial court. The denial of her motion for a new trial is what she appealed from, as indicated in her notice of appeal. However, in her brief, her reply brief, and argument to this court, she contends that the trial court's error was not in denying her motion for a new trial but was in failing to grant her a judgment notwithstanding the verdict—relief that she never sought from the trial court.

We do not address Susan's contention that the trial court should have entered a judgment notwithstanding the verdict in her favor. Susan did not seek that relief in the trial court within 30 days after the judgment was entered. Consequently, the matter of a judgment

notwithstanding the verdict is forfeited since the trial court was never presented with the opportunity to consider and/or rule on the request. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); Ill. S. Ct. R. 366(b)(2)(iii) (eff. Feb. 1, 1994).

In reviewing Susan's posttrial motion in the trial court and her notice of appeal to this court, she did preserve her claim that the trial court erred in denying her motion for a new trial. Accordingly, we review that ruling of the court to determine if the trial court abused its discretion. On appeal to this court, Susan only alleges one evidentiary ground for overturning the trial court's decision—the matter of the trial court's allowance of testimony by two of Dr. Fulk's expert witnesses, Dr. Bryan and Dr. Schuster, whose opinions conflicted with the testimony of Dr. Reagan. Susan filed a pretrial motion *in limine* regarding this testimony. The trial court denied her motion *in limine* and allowed Dr. Bryan and Dr. Schuster to testify.

To understand this argument, we briefly review the conflict between the relevant testimony of Dr. Reagan and the expert testimony of Dr. Bryan and Dr. Schuster.

Dr. Reagan testified that he performed a cystoscopic examination of Susan. He had the ability to take photos with the cystoscope, but he did not do so during his examination. Dr. Reagan's operative report referred to a fistula in Susan's bladder. He also indicated that he saw intact sutures in Susan's bladder. His report listed "several" sutures, without including a specific number. In court, Dr. Reagan referred to the fistula he saw in Susan's bladder as a laceration. He testified that in his opinion, the laceration at issue must have occurred during Susan's hysterectomy. He testified that the sutures appeared to have been purposefully placed and most likely were an attempt to repair the laceration. He did agree on cross-examination that the sutures could have been placed while suturing the vaginal cuff.

Dr. Bruce Bryan, a board-certified physician in obstetrics and gynecology from St. Louis, Missouri, reviewed all the medical records, as well as the deposition testimony of Dr.

Reagan. Dr. Bryan testified that Dr. Fulk did not deviate from the standard of care required in advising Susan about the risks and possible complications that are associated with a hysterectomy. He also opined that Dr. Fulk met the appropriate standard of care in performing the hysterectomy, even though the complication of placing stitches in the bladder occurred during the procedure. Dr. Bryan testified that most likely, in closing the vagina with stitches (suturing the vaginal cuff), the bladder became caught in the stitches. Although Dr. Bryan provided an explanation for how the stitches could have been introduced into Susan's bladder, he also testified that he was of the opinion that there was no bladder laceration, as described in Dr. Reagan's testimony. He was strictly of the opinion that any stitches in the bladder were not purposeful in the sense that they were deliberately placed as a means of repair but that they were incidental to stitching up the vaginal cuff. Dr. Bryan also explained to the jury that if the bladder accidentally gets caught in the vaginal cuff stitches and the stitches are not removed, a little hole called a vesicovaginal fistula appears as the stitches break down. Repairing the fistula is simply a matter of removing the stitches in the bladder, which then allows the fistula to heal.

Dr. George Schuster is a board-certified urologist who practices in Elk Grove Village, Illinois. He reviewed the medical records of all the treating physicians, and he also reviewed Dr. Reagan's deposition testimony. He testified that Dr. Reagan deviated from the standard of care by performing the fulguration procedure on February 27, 2004. He explained that given the reported 30-millimeter size of the fistula, it was improper to attempt fulguration, because only a fistula less than 5 millimeters should be fulgurated. Additionally, Dr. Schuster took issue with Dr. Reagan's settings on his equipment, which he felt were extremely high. The equipment was set at 60 watts. Fulguration procedures of the type performed by Dr. Reagan should never involve settings above 5 to 7 watts. Dr. Schuster is of the opinion that the use of this very high equipment setting caused a destruction of the

bladder wall and probably also extended into and caused some destruction of the vaginal wall. Dr. Schuster acknowledged that Dr. Reagan thought he visualized a fistula, but Dr. Schuster is of the opinion, in light of his review of the records and his experience, that Dr. Reagan really just saw sutures in the bladder, which he misinterpreted as a fistula.

Susan's motion *in limine*, filed on September 17, 2008, claimed that Dr. Bryan purported to give testimony contrary to "eyewitness testimony" of Dr. Reagan. Susan argued that Illinois did not allow an expert to provide testimony contradicting that of an eyewitness. Susan asked that Dr. Bryan and Dr. Schuster not be allowed to testify to facts contrary to those testified to by Dr. Reagan. The trial court denied this motion *in limine* on May 4, 2009. Susan's posttrial motion reiterated this argument. In ruling on this aspect of Susan's posttrial motion, the trial court noted that its decision to admit the expert testimony of Dr. Bryan and Dr. Schuster involves an analysis of whether or not the experts are qualified and whether their testimony will assist the trier of fact in understanding the evidence. The court also concluded that Dr. Reagan, albeit a treating physician, provided testimony more in the nature of an expert witness rather than an occurrence witness. Furthermore, the court found that Dr. Reagan's testimony was riddled with inconsistencies, and it stated that there was no choice but to allow Susan's expert witnesses to testify because that testimony could serve to assist the jury in understanding the evidence.

The admissibility of evidence is a matter within the trial court's sound discretion and will not be overturned unless the trial judge clearly abused that discretion. *People v. Aguilar*, 265 Ill. App. 3d 105, 109, 637 N.E.2d 1221, 1223 (1994).

When expert witnesses offer different conclusions, the jury is allowed to believe one expert over the other expert, because the jury is the trier of fact. *Hall v. National Freight, Inc.*, 264 Ill. App. 3d 412, 423, 636 N.E.2d 791, 799 (1994).

Allowing contradictory testimony of an expert witness when eyewitness testimony

exists was an issue discussed by this court in the case of *Augenstein v. Pulley*, 191 Ill. App. 3d 664, 547 N.E.2d 1345 (1989). This court found that there is a dichotomy in expert witness testimony between an expert witness in a motor vehicle accident case and expert witness testimony in a medical malpractice case. *Augenstein*, 191 Ill. App. 3d at 679-80, 547 N.E.2d at 1355. *Augenstein* was not a medical malpractice case but was a motor vehicle case and sought an expansion of the typical rule that did not allow expert witness testimony in a motor vehicle case in the event of eyewitness testimony. *Augenstein*, 191 Ill. App. 3d at 664, 547 N.E.2d at 1345. The court explained why expert testimony was routinely allowed in medical malpractice cases despite the fact that doctors, nurses, other hospital personnel, and even family members provided eyewitness testimony that at times conflicted with that provided by the experts. *Augenstein*, 191 Ill. App. 3d at 679-80, 547 N.E.2d at 1355. We stated that expert testimony was not only allowed but was mandated in medical malpractice cases in order to establish a deviation from the applicable standard of medical care. *Id.* "We submit that in the medical malpractice situation the experts, who are generally medical doctors, traditionally have had a great deal of additional training beyond that of the fact finder and there is really no serious question as to their qualifications." *Augenstein*, 191 Ill. App. 3d at 680, 547 N.E.2d at 1355.

We find that the cases cited by Susan in support of her claim that the trial court abused its discretion in allowing the testimony of Dr. Bryan and Dr. Schuster are all distinguishable. See *Grant v. Petroff*, 291 Ill. App. 3d 795, 684 N.E.2d 1020 (1997) (the testimony of an expert about the veracity of another witness was inadmissible); *Watkins v. Schmitt*, 172 Ill. 2d 193, 665 N.E.2d 1379 (1996) (the expert witness testimony of a police officer on the issue of the speed of the defendant's motor vehicle at the moment of the collision was properly excluded in light of three eyewitnesses who all had a reasonable opportunity to observe the accident and had reasonable driving experience and offered their opinions of the defendant's

speed that differed from that of the expert); *McGrath v. Rohde*, 130 Ill. App. 2d 596, 265 N.E.2d 511 (1970), *aff'd*, 53 Ill. 2d 56, 289 N.E.2d 619 (1972) (expert testimony in an automobile accident case is not allowed unless the eyewitness testimony is incredible or unbelievable); *Reed v. Jackson Park Hospital Foundation*, 325 Ill. App. 3d 835, 758 N.E.2d 868 (2001) (a summary judgment was affirmed after denying expert witness testimony in a medical malpractice case where the expert's testimony was unreliable and failed to provide the necessary nexus between the treatment and the subsequent damages); *Payne v. Noles*, 5 Ill. App. 3d 433, 283 N.E.2d 329 (1972) (the expert testimony of a police officer about the lane of travel in which the accident had occurred based upon debris in the road was rejected in light of the testimony of four credible eyewitnesses to the accident); *Plank v. Holman*, 46 Ill. 2d 465, 264 N.E.2d 12 (1970) (motor vehicle reconstruction expert testimony may not be used as a substitute for eyewitness testimony).

In this case, Dr. Bryan's testimony was offered to explain to the jury how the stitches could have gotten into Susan's bladder during the hysterectomy performed by Dr. Fulk. Dr. Bryan opined that inadvertently stitching the bladder was within the range of complications of which Susan had been warned by Dr. Fulk and medically did not establish a deviation from the standard of care. Dr. Bryan reviewed all the records and also reviewed Dr. Reagan's deposition testimony. Based upon this review and his experience in performing hysterectomies, Dr. Bryan testified that he disputed Dr. Reagan's testimonial claim that he saw a laceration and that Dr. Fulk must have purposefully placed the stitches in the bladder in an effort to repair the accidental laceration.

Dr. Schuster's testimony was offered to explain to the jury what might have happened with Dr. Reagan's initial fulguration procedure. The testimony provided an alternate explanation for what Dr. Reagan claimed he encountered. This testimony was based upon Dr. Schuster's analysis of the medical records in this case, along with his vast knowledge of

and experience in urologic surgery.

Dr. Reagan's testimony on this point was not consistent. His medical record, prepared almost contemporaneously with the procedure, did not indicate the presence of a laceration—instead referring to the wound as a fistula. The distinction is important. According to expert testimony at the trial, a fistula is a wound that would have developed as a result of the errant stitches, whereas the laceration which Dr. Reagan described would have occurred during the surgery and the stitching would have been an effort by Dr. Fulk to repair the laceration. Dr. Reagan's deposition and trial testimony differed in the character and source of the wound at issue from his operative notes.

Conflicts in medical opinions are part and parcel of medical malpractice cases. Indeed, many of the conflicts revolve around the nuanced meanings of medical terms. The word "laceration" does not appear in Dr. Reagan's medical records, while the word "fistula" does. It was well within the role of an expert such as Dr. Byran to explain the distinction between the two terms and how that impacts his opinion regarding Dr. Fulk's standard of care. We must also defer to the trial court's observation that perhaps Dr. Reagan was more biased than the ordinary treating doctor.

Given the inconsistent testimony and documentation provided by Dr. Reagan and the broad latitude afforded medical expert testimony in medical malpractice cases, we are not able to conclude that the trial court abused its discretion in denying Susan's motion *in limine*. The testimony provided by Dr. Bryan and Dr. Schuster could serve to guide the jury as the trier of fact.

Susan argues no other basis for her claim that the trial court's denial of her posttrial motion was erroneous. Based upon our review of the issues presented, along with the record of the trial and the briefs on appeal, we have no basis to conclude that the trial court abused its discretion in denying Susan's posttrial motion. See *Maple*, 151 Ill. 2d at 455, 603 N.E.2d

at 513. The record of the evidence heard by the jury amply supports the verdict of the jury.

Id. We find no basis to conclude that Susan was otherwise denied a fair trial. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Wayne County is hereby affirmed.

Affirmed.