NO. 5-10-0168

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CARRIE ZANG, Plaintiff-Appellant, v. R. CRAIG McKEE, M.D., and PLASTIC & HAND SURGERY ASSOCIATES, S.C., Defendants-Appellees.	)	Appeal from the Circuit Court of Madison County. No. 01-L-1731 Honorable A. A. Matoesian, Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Welch and Donovan concurred in the judgment.

RULE 23 ORDER

Held: The plaintiff was not entitled to a new trial, because an expert's evidence deposition testimony was properly excluded at the trial, an improper reference to Medicaid was brief and not prejudicial, and the trial court's answers to jury questions, while not ideal, accurately instructed the jury on the law.

The plaintiff, Carrie Zang, filed a medical negligence action against the defendants, R. Craig McKee, M.D., and Plastic & Hand Surgery Associates, S.C. A Madison County jury rendered a verdict in the defendants' favor. The plaintiff appeals, contending that she is entitled to a new trial because the circuit court improperly barred the reading of an evidence deposition and improperly replied to jury questions and because the defendants improperly failed to exclude a witness's reference to Medicaid. We affirm.

FACTS

On October 2, 2008, after the trial had begun, the plaintiff filed a second amended complaint, alleging that the defendants violated the medical standard of care owed to the plaintiff in performing a bilateral breast reduction. Specifically, the plaintiff alleged that the

defendants improperly removed excessive breast tissue during the breast reduction surgery and failed to sufficiently disclose the risks and alternatives to the proposed bilateral breast reduction surgery to obtain the plaintiff's informed consent.

Dr. Michael Edward Beatty's Deposition

On September 29, 2008, prior to the trial, the defendants filed a motion *in limine* to bar, *inter alia*, "[a]ny expert opinion testimony, including the basis of opinions and testimony from treating physicians, that was not disclosed in the discovery depositions, Rule 213 interrogatories[,] or expert disclosure statements." The defendants sought to exclude "[a]ny testimony by Dr. Michael Beatty as to whether or not defendant[s] violated an applicable standard of care." The defendants explained as follows:

> "Plaintiff's 213 interrogatory answers state only that Dr. Beatty will testify about his treatment of the plaintiff, the appearance of the plaintiff's breast area when he observed plaintiff, and to plaintiff's condition. Further, Dr. Beatty acknowledged in his deposition *** that he does not have adequate information to develop an opinion in this case. Additionally, in his deposition *** Dr. Beatty acknowledged that in order to assert an expert opinion in this case he would need to have the medical records and as much information as he could get, all of which he has not reviewed."

The circuit court agreed with the defendants and precluded the testimony of Dr. Beatty "for standard of care, because, as he stated in the deposition *** he could not give an opinion without the records, and the records were provided later."

After the circuit court granted the defendants' motion *in limine*, the plaintiff submitted as an offer of proof Dr. Beatty's June 24, 2008, evidence deposition transcript. In the deposition, Dr. Beatty testified that he examined the plaintiff on August 23, 2004, and again in December 2004. When he examined the plaintiff, she had lost over 150 pounds, weighing approximately 277 pounds, and he did not know what the plaintiff's breasts looked like prior

to his examination. When asked whether he had an opinion with regard to Dr. McKee's care and treatment of the plaintiff in 1999, Dr. Beatty answered, "I don't know that I have adequate information to develop an opinion at this point in time." Dr. Beatty acknowledged that he did not have a copy of Dr. McKee's chart, the plaintiff's deposition, Dr. McKee's deposition, the complete hospital chart from the surgery, or prior photographs or photographs taken after the surgery. When asked if he had enough information to render an opinion to a reasonable degree of medical certainty, Dr. Beatty answered as follows:

> "If you are asking me to represent myself as an expert on this particular case, then, obviously, I would need to have medical records and as much information as I could get to be in a position to do that for all the reasons that we have just talked about."

Despite this statement, Dr. Beatty testified that it did "not appear that [the plaintiff] was given information that would be considered within the standard of care prior to undergoing" the breast reduction surgery. Dr. Beatty testified that the American Society of Plastic Surgery, of which Dr. McKee is a member, promulgated patient resource material and informed-consent information. Dr. Beatty testified that these disclosure forms "represent what is considered to be the standard of care for informed consent among plastic surgeons who are board certified members of the American Society of Plastic Surgery in their management of patients." Dr. Beatty testified that a plastic surgeon need not necessarily use the forms but that the forms would meet the standard of care.

After the circuit court's ruling precluding the admission of Dr. Beatty's evidence deposition testimony, the plaintiff's attorney asked whether the plaintiff could use portions of the evidence deposition testimony "that don't get past your ruling." The court stated that it would take up the matter at a later time. The plaintiff did not thereafter identify the portions of Dr. Beatty's evidence deposition testimony that she wished to use.

Trial

At the September 20, 2008, jury trial, the following evidence was adduced.

Pursuant to a video evidence deposition, Dr. Phillip Witkop, the plaintiff's family physician, testified that when he first examined the plaintiff in 1999, she weighed more than 400 pounds and complained of chronic, daily, or even hourly chest pain, in addition to neck and back pain and rashes, which had occurred for years. Dr. Witkop referred the plaintiff to Dr. Rocha-Singh, a cardiologist, whose records revealed that the plaintiff had "reproducible chest wall tenderness" which "may represent an element of arthritis which may be produced by large pendulous breasts and potential ligamentous strain." Thereafter, considering Dr. Rocha-Singh's conclusion that a breast reduction surgery might improve the plaintiff's symptoms, Dr. Witkop referred the plaintiff to Dr. McKee for breast reduction surgery.

Dr. Witkop testified that Dr. Rocha-Singh's records had indicated that the plaintiff had reported major depression for the previous five to eight years. In reading Dr. Rocha-Singh's notes to the jury at the trial, Dr. Witkop also relayed the following: "[The plaintiff] was seen by a physician who recommended a breast reduction as possible improvement of her chronic discomfort. She states[,] however[,] this is not paid for by Medicaid. Additionally, diet pills, including Xenical[,] were recommended[;] however again these are not paid for by Medicaid." Despite the parties' intention to exclude this reference to Medicaid, the testimony was nevertheless played to the jury due to the videographers' failure to redact it.

Pursuant to Dr. Witkop's referral, the plaintiff met with Dr. McKee at St. Francis Hospital on October 12, 1999. During this visit, Dr. McKee noted that the plaintiff was five feet eight inches tall, weighed 404 pounds, had lost 20 pounds in the previous five months, and wore a 56 DD bra, which she described as tight. The plaintiff told Dr. McKee that her

mother had died of breast cancer in 1975 and that she had experienced chest, back, and neck pain, in addition to rashes, for many years. From his examination, Dr. McKee prepared a plan stating that he would perform a bilateral breast reduction with a free nipple graft[1] and would remove 1,000 grams, or 2.2 pounds, of tissue from each breast.

William Zang, the plaintiff's husband, testified that he accompanied the plaintiff for the 20-minute consultation with Dr. McKee and that Dr. McKee asked the plaintiff about her general medical history and examined and photographed her breasts. William testified that Dr. McKee had stated that he was planning to remove 1,000 grams from each breast and that the removal would result in "no less than a C cup."

Dr. McKee testified that during this initial meeting, he told the plaintiff that the surgery would be difficult, considering her size and breasts and that "there [was] no guarantee about the volume–the weight that [would] be taken off." Although Dr. McKee acknowledged that he had not performed the surgery on someone as large as the plaintiff, he did not discuss with the plaintiff all the difficulties presented by a breast reduction surgery performed on someone of her size. Dr. McKee stated: "This is a medically indicated procedure and it has its difficulties. You can't expect a patient to understand all of the difficulties that I might be thinking of in my mind. We don't go into that very far I would say."

On November 17, 1999, pursuant to a dictated office note from the previous month's examination of the plaintiff, Dr. McKee transcribed a plan to remove 1,200 to 1,500 grams of breast tissue from each of the plaintiff's breasts, as opposed to the 1,000-gram reduction indicated in his initial notes. In this document, Dr. McKee also noted that the plaintiff "would like to be rid of as much of her breasts as possible." Dr. McKee's notes indicated

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[1]A free nipple graft involves removing the nipples, preserving them in a sterile environment, and then reattaching them on the mound of the breast.

that he discussed with the plaintiff the risks associated with breast reduction surgery. During the trial, Dr. McKee acknowledged that he inadvertently entered the plaintiff's 1,200 to 1,500 caloric intake as the grams to be removed.

Dr. McKee performed the plaintiff's bilateral breast reduction surgery on November 22, 1999. Prior to the surgery, the plaintiff signed a hospital consent form that stated the following:

> "The nature and purpose of operation or diagnostic procedure, possible alternative methods of treatment, the risks involved and the possibility of complications despite precautions have been explained to me. I understand that all procedures are associated with certain risks and acknowledge that no guarantee or assurances have been made as to the results that may be obtained."

According to the operative report, Dr. McKee removed 2,553 grams from the plaintiff's right breast and 2,957 grams from her left breast, totaling approximately six pounds from each breast.

During the trial, Dr. McKee acknowledged that if a physician told a patient that he would be removing 1,000 grams of breast tissue in each breast, which would result in a C cup, but thereafter removed more than 2,900 grams on one side and more than 2,600 on the other side, that physician would have deviated from the standard of care by removing too much tissue. Dr. McKee testified, however, that he did not tell the plaintiff that he would be removing 1,000 grams of breast tissue in each breast, did not intend to remove 1,000 grams of breast tissue during the reduction, and would not have had an accurate way of estimating how much breast tissue he planned to remove during the surgery. Dr. McKee testified that the plan to remove 1,000 grams was "a very gross estimate, which is meant to be a reminder *** that it's a large reduction, and it's a little note to the person who gets the chart and communicates with the payor that it's a large reduction and it's not going to be

anywhere near cosmetic." With regard to the 1,000-gram notation on his medical records, Dr. McKee explained as follows:

> "That's the note that goes to the clerk, and that's to insure that she can state to the third-party payor that this is being done for medical reasons. It's not a cosmetic procedure. It meets the minimum standard."

Dr. McKee testified that he believed he adequately discussed with the plaintiff the operation, the expectations, the potential risks, the breast size, and the possibility of complications from the surgery. Dr. McKee testified that he would have explained the procedure in some detail to the plaintiff, providing pamphlets about breast reduction surgery or drawings regarding what to expect during the procedure. Dr. McKee testified that he could not have estimated the cup size of the breast after the surgery because there would have been too many variations to estimate. Dr. McKee testified that he advised the plaintiff that the axillary rolls, the tissue that extends from the breast around to the back, would not be removed and therefore would accentuate and negatively affect the look of the breast.

Dr. McKee testified that there was no fixed scale to indicate how much breast tissue to remove to alleviate back and neck pain, although some articles suggested that as little as 300 grams may alleviate back pain. Dr. McKee acknowledged that most patients are in a C-cup range after breast reduction surgery.

The plaintiff testified that if she would have known the problems that could have resulted from the reduction surgery, she would never have consented to it. The plaintiff testified that, despite her bad memory, she was sure she never requested Dr. McKee to remove all of her breast tissue, although, in a previous deposition, she might have testified that she had requested a B cup. The plaintiff acknowledged that prior to the surgery, she was having significant neck and back pain and that after the surgery, she no longer had significant neck and back pain nor did she experience the rash discomfort that she had

experienced before the surgery.

William testified that before the surgery, the plaintiff was outgoing but that afterwards, she became a "hermit" because she felt as if she looked "freakish." William testified that the plaintiff's attitude caused a rift in their marriage. They separated, and they divorced in 2005, but then they reunited in March 2007. William acknowledged that the surgery eliminated the chest pains, back pains, and rashes from which the plaintiff had sought relief. Dr. Witkop testified that he continued to periodically examine the plaintiff until November 2000. Dr. Witkop testified that the surgery relieved the plaintiff's physical problems with chest and neck pain. Although Dr. Witkop testified that the plaintiff did not associate her anxiety, depression, or suicidal ideation with her breast reduction surgery, he acknowledged that on December 14, 1999, the plaintiff had stated that she was "unhappy with Dr. McKee" and did not "understand why so much was taken off." Dr. Witkop testified that on April 18, 2000, she requested anxiety medication because the "kids [were] driving [her] crazy."

Expert Testimony

Pursuant to a video evidence deposition, the plaintiff presented the expert testimony of Dr. Hubert Weinberg. Dr. Weinberg testified that during breast reduction surgery, the scales in the operating room ensure that the proper amount of tissue is removed and that equal amounts of breast tissue are taken from each side. Dr. Weinberg testified that although Dr. McKee indicated that he would remove 1,000 grams of tissue from each breast, the removal of tissue would vary with the size of the breast. Dr. Weinberg nevertheless testified that, while the removal amount cannot be estimated exactly, it should be approximate, within "50, 75 percent, 80 percent of that number." Dr. Weinberg nevertheless testified that breast reduction surgery is not an exact science and that the surgeon cannot guarantee, for example, a C-cup result.

Dr. Weinberg testified that if Dr. McKee had told the plaintiff that he would remove 1,000 grams of tissue from each breast, Dr. McKee deviated from the standard of care in removing the greater amount of tissue during the surgery. Dr. Weinberg testified that the removal was too far afield from the plan to be within the standard of care.

Dr. Weinberg testified that aesthetics comprises a strong component of breast reduction surgery. Dr. Weinberg testified that a patient seeking breast reduction surgery seeks functional relief from back and neck pain but is also clearly interested in the aesthetic component, wanting to have breasts that look normal. Dr. Weinberg described the plaintiff's breasts as "flat," having "little contour," and "pancake[-]like." Dr. Weinberg testified that the plaintiff had lateral fullness but a complete absence of medial fullness, when the opposite is appropriate.

Dr. Weinberg testified that although a 1,000-gram reduction would not have relieved the plaintiff's neck and back pain, the 1,200 to 1,500 grams of breast tissue, which was indicated in Dr. McKee's subsequent surgery plan, would have adequately relieved her pain. Dr. Weinberg testified that if Dr. McKee had removed 1,200 to 1,500 grams of breast tissue, leaving the breast tissue centrally located, as opposed to laterally located, then the plaintiff would have had large C-cup or small D-cup conical breasts that would have looked proportional to her body. Dr. Weinberg testified that Dr. McKee deviated from the standard of care when he removed almost all the plaintiff's breast tissue.

Dr. Weinberg testified that if the plaintiff had requested a B-cup breast, then it would have been appropriate to comply with her request, indicating so in the chart. Dr. Weinberg testified that if Dr. McKee had obtained the plaintiff's informed consent after explaining to her that he would be removing most of her breast tissue and that she would be left "flat" but that she would be comfortable from a functional point of view, there would have been no deviation from the standard of care. Dr. Weinberg testified that if the patient is seeking a

goal outside of the norm, *i.e.*, that she wants to be flat, that goal should be discussed and memorialized in writing.

Pursuant to a September 4, 2008, video evidence deposition of the defendants' expert, Dr. Thomas Mustoe testified that he believed that Dr. McKee did not remove excess breast tissue but performed an appropriate breast reduction, considering the plaintiff's goal of back, neck, and chest pain relief. Dr. Mustoe testified that Dr. McKee clearly did not remove all the plaintiff's breast tissue but left "a significant amount." Dr. Mustoe testified that although the plaintiff's breasts have "a flattened appearance right now," this appearance must be considered in context of the plaintiff's gastric bypass surgery and substantial weight loss that had occurred since 2002. When reviewing postoperative photographs of the plaintiff, Dr. Mustoe testified that the plaintiff's breast shape, considering her size, was quite acceptable. Dr. Mustoe testified that the plaintiff's weight of 400 pounds presented challenges. Dr. Mustoe testified that if the breasts were to be proportionate for her size, the physician would have lifted the breasts but left the volume; however, the plaintiff would not have been relieved from her symptoms.

Dr. Mustoe opined that Dr. McKee performed the plaintiff's surgery within the standard of care by demonstrating an appropriate operative plan, interviewing her, and listening to her goals. Dr. Mustoe testified that considering Dr. McKee's office notes, the information booklet the plaintiff received, and the consent form the plaintiff signed, the plaintiff was properly advised of the complications and risks of the procedures and discussed the outcomes she desired. Dr. Mustoe testified he believed that if a physician reviews the risk of severe problems, such as tissue loss, death, infection, and bleeding, the physician need not be "exhaustively inclusive in discussing every complication." Dr. Mustoe testified that, in his opinion, "informed consent is subject to interpretation." Dr. Mustoe testified that the physician must discuss the major complications and the most severe complications, as

Dr. McKee did. Dr. Mustoe acknowledged that although the hospital's consent form met the standard of care for hospital operative consent, it was inadequate on its own to inform a patient what a breast reduction would involve. Dr. Mustoe testified, however, that the standard of care for informed consent did not require the use of guidelines promulgated by the American Society of Plastic Surgery. Dr. Mustoe testified that from his review of the case, he believed that the plaintiff was properly informed regarding the operation and that she gave her informed consent.

Dr. Mustoe testified that, even though written as a plan in Dr. McKee's notes, he did not believe that Dr. McKee told the plaintiff that he would remove 1,000 grams of tissue or that he intended to remove 1,000 grams of tissue from the plaintiff's breasts. Dr. Mustoe testified that, considering the plaintiff's extreme obesity, it would be difficult for a physician to accurately estimate, prior to the breast reduction surgery, the amount of weight that would be removed. Dr. Mustoe testified that if Dr. McKee did estimate the amount he planned to remove from the plaintiff's breast and then removed more, Dr. McKee was not acting outside the standard of care to "be off by this much," considering that the plaintiff weighed 400 pounds.

Dr. Mustoe testified that the primary reason that a physician would list in a chart the intended weight of a breast reduction is for insurance purposes. Dr. Mustoe testified that, as a rule of thumb, in Illinois, one standard to qualify a breast reduction surgery for insurance coverage has been the removal of 1,000 grams. Dr. Mustoe testified that the critical issue is not how much the physician will remove but the minimum amount that will be covered by insurance. Dr. Mustoe testified that the amount to be removed "doesn't come up otherwise."

The defendants also presented the testimony of Dr. Robert Young, who testified that he examined the plaintiff after the plaintiff had undergone gastric bypass surgery in 2003.

Dr. Young testified that when he examined the plaintiff, she weighed approximately 300 pounds. Dr. Young opined that when the plaintiff first sought breast reduction surgery and weighed 400 pounds, a 1,000-gram reduction from each breast would not have alleviated her physical symptoms. Dr. Young testified that to relieve the aforementioned physical symptoms of a patient weighing more than 400 pounds, a surgeon would need to remove 2,000 to 2,200 grams of breast tissue from each breast. Dr. Young testified that, when considering the preoperative pictures in evidence, the plaintiff's breasts were large, but not disproportionately large, in that they were reasonably proportioned for her body size at that point. Dr. Young testified that when reduced, her breasts would look smaller than the rest of her. Dr. Young testified that in a patient like the plaintiff, it often takes another stage to improve the cosmetic result of the breast reduction surgery and that her loss of weight added another complicating factor to adjust for. Dr. Young testified that with regard to the plaintiff's treatment, Dr. McKee acquired a reasonable result within the standard of care.

Jury Questions

During jury deliberations, the jury submitted its first question, asking these questions: "Is verbal consent the same as written consent? And did she give verbal consent?" The circuit court answered as follows: "Your question has 2 parts. (1) Verbal consent is the same as written consent. (2) Insofar as whether she gave verbal consent, that is for you to decide."

The jury's second communication requested clarification of the word "injury", and the circuit court directed the jury to read the instructions. The jury's third communication stated, "Can we get Dr. McKee's deposition[] [a]nd his cross by Mr. Perica[][--][t]he part where he talked about dictating[?]" The circuit court answered in the negative. The court also denied the jury's fifth communication requesting a transcript of Dr. McKee's testimony.

In the jury's seventh communication, the jury asked whether it could reach "a different verdict on each count."

Despite an objection by the plaintiff, the circuit court sent a note to the jury stating as follows: "It is undisputed that the Plaintiff gave consent to the surgery. What you are to decide is whether the Plaintiff has met her burden of proof under informed consent. See Instruction 1.05.07.03 which is attached to this note. Also see attached the document labeled instruction 1A." The circuit court attached instruction 1.05.07.03, which had been previously provided to the jury and read as follows:

"The plaintiff has the burden of proving each of the following propositions:

First, that the defendant[s] failed to inform the plaintiff of those risks of and/or alternatives to the bilateral breast reduction which a reasonably well-qualified plastic surgeon would have disclosed under the same or similar circumstances;

Second, that if the defendant[s] had disclosed those risks and/or alternatives, a reasonable person in the plaintiff's position would not have submitted to the bilateral breast reduction;

Third, that the plaintiff was injured; and

Fourth, that the defendant[s'] failure to disclose those risks and/or alternatives was a proximate cause of the plaintiff's injury.

If you find from your consideration of all the evidence that all of these propositions have been proved, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant[s]."

The circuit court also attached instruction 1A, which read as follows:

"Count 1 and Count 2 are separate and distinct. You need only to decide one of them for the plaintiff to award damages. If you find for the plaintiff on Count 1 or Count 2, your verdict should be for the plaintiff. If you find for the defendant[s] on both Count 1 and Count 2, your verdict should be for the defendant[s]."

The jury returned a verdict in favor of the defendants. On October 6, 2008, the court entered a judgment on the jury's verdict. On March 12, 2010, the circuit court denied the plaintiff's posttrial motion. On April 6, 2010, the plaintiff filed a notice of appeal.

ANALYSIS

Dr. Beatty's Deposition

The plaintiff argues that the circuit court erred in barring the use of Dr. Beatty's evidence deposition because Dr. Beatty was competent to testify about the proper standard of care for the breast reduction procedure and to obtain informed consent.

" 'The elements necessary to establish a negligence case for medical malpractice are the same as in other negligence actions. The plaintiff must prove that the medical professional owed him or her a duty, that the person failed to exercise the skill and care of a reasonable professional, and that damages were proximately caused by the breach of the standard of reasonable care. The crucial difference between medical malpractice and other negligence actions is the necessity of expert testimony to establish the standard of care and that its breach was the cause of plaintiff's injury.' [Citations.] 'Generally, expert testimony is needed to support a charge of malpractice because jurors are not skilled in the practice of medicine and would find it difficult without the help of medical evidence to determine any lack of necessary scientific skill on the part of the physician.' " *Benison v. Silverman*, 233 Ill. App. 3d 689, 693 (1992).

"A motion *in limine* is a pretrial motion that seeks an order excluding inadmissible evidence and prohibiting questions concerning such evidence, without the necessity of having the questions asked and objections thereto made in front of the jury." *Schuler v. Mid-Central Cardiology*, 313 Ill. App. 3d 326, 333-34 (2000). The trial court has broad discretion to grant a motion *in limine* as a part of its inherent power to admit or exclude evidence. *Stapleton v. Moore*, 403 Ill. App. 3d 147, 164 (2010). A reviewing court will not

reverse a trial court's order allowing or excluding evidence *in limine* absent a clear showing of an abuse of that discretion. *Sher v. Deane H. Tank, Inc.*, 269 Ill. App. 3d 312, 317 (1995). Likewise, "[t]he decision of whether to admit expert testimony is within the sound discretion of the trial court [citation], and a ruling will not be reversed absent an abuse of that discretion [citation]." *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003). The circuit court abuses its discretion if its ruling is arbitrary or unreasonable or if no reasonable person would take the view adopted by it. *Pancoe v. Singh*, 376 Ill. App. 3d 900, 913 (2007).

"When a motion *in limine* is granted, the key to saving for review an error in the exclusion of evidence is an adequate offer of proof in the trial court." *Snelson*, 204 Ill. 2d at 23. "The purpose of an offer of proof is to disclose the nature of the offered evidence to which an objection is interposed for the information of the trial judge and opposing counsel, and to enable the reviewing court to determine whether the exclusion was erroneous and harmful." *Chicago Park District v. Richardson*, 220 Ill. App. 3d 696, 701 (1991). "Counsel makes an adequate offer of proof if he informs the trial court, with particularity, of the substance of the witness'[s] anticipated answer; an offer of proof that merely summarizes the witness'[s] testimony in a conclusory manner is inadequate." *Snelson*, 204 Ill. 2d at 23.

Here, the defendants do not dispute that Dr. Beatty's credentials were sufficient to qualify him as an expert. See 735 ILCS 5/8-2501 (West 2008); *Snelson*, 204 Ill. 2d at 24. Instead, the defendants argue that Dr. Beatty was not competent to testify regarding the standard of care, per his own acknowledgment, because he lacked the necessary foundational materials to do so. Where an expert is affirmatively shown to be unfamiliar with the facts upon which he has rendered an opinion, his testimony may be stricken. *Tierney v. Community Memorial General Hospital*, 268 Ill. App. 3d 1050, 1059 (1994). Dr. Beatty clearly testified that he did not have enough information to form an opinion that the defendants deviated from the standard of care with regard to the removal of the plaintiff's

breast tissue, and the circuit court properly held that Dr. Beatty's testimony in this regard was inadmissible. Further, considering Dr. Weinberg's testimony, Dr. Beatty's testimony in this regard would have been, at best, cumulative. See *Robinson v. Greeley & Hansen*, 114 Ill. App. 3d 720, 729 (1983) (although the expert was qualified to render an opinion, striking his testimony did not require a reversal because the opinion was based on misinformation and was cumulative in nature).

The plaintiff argues, "Dr. Beatty's knowledge of the procedure and his experience as a board certified plastic surgeon gave him the necessary qualifications to proffer his opinions on informed consent even thought [*sic*] he had not examined the [plaintiff's medical records]." Accordingly, the plaintiff suggests that the circuit court should have allowed Dr. Beatty's evidence deposition to demonstrate that the standard of care for plastic surgeons required the use of the American Society of Plastic Surgery forms, which the defendants did not utilize, and that the defendants therefore did not provide the plaintiff with sufficient information to be considered within the standard of care.

Initially, we note that Dr. Beatty did not testify that the standard of care for plastic surgeons required the use of the American Society of Plastic Surgery forms. Further, when the circuit court ruled on the motion *in limine*, the plaintiff did not inform the court of this purpose in her offer of proof. Indeed, the plaintiff concedes in her reply brief, "the trial court did not consider this testimony when it ruled that Dr. Beatty was barred as a witness in the case." "To be adequate, an offer of proof must apprise the trial court of what the offered evidence is or what the expected testimony will be, by whom it will be presented[,] and its purpose." *Chicago Park District*, 220 Ill. App. 3d at 701. Absent such an offer of proof, the issue of whether the court erred in excluding the testimony is forfeited. *Downey v. Dunnington*, 384 Ill. App. 3d 350, 383-84 (2008). Here, the court specifically allowed for a revisiting of the issue; however, the plaintiff failed to renew or sufficiently clarify her

argument opposing the defendants' motion *in limine* and has therefore forfeited the issue on appeal. See *Stapleton*, 403 Ill. App. 3d at 164.

Medicaid Reference

The plaintiff argues that the defendants' failure to redact Dr. Witkop's Medicaid reference violated the court's *in limine* order and the collateral source rule and denied her a fair trial. The defendants counter that the plaintiff has forfeited the review of this issue by failing to object and, notwithstanding forfeiture, that the plaintiff was not prejudiced by the brief reference to Medicaid.

A new trial may be granted for a violation of an *in limine* order only if the order's prohibitions are specific, the violation is clear, and the moving party is prejudiced by the violation. *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 872 (2004). "In order for a violation of an *in limine* order to serve as the basis for a new trial, the party seeking the exclusion of the evidence must have been deprived of a fair trial." *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1132 (2000). The trial court's decision to grant or deny a new trial based on a violation of an order *in limine* will not be disturbed absent an abuse of discretion. *Tucker v. Division Sales, Inc.*, 315 Ill. App. 3d 472, 476 (2000).

"Because an *in limine* order always remains subject to reconsideration by the court during trial, an *in limine* motion, whether granted or denied, does not preserve issues for review." *Jones*, 316 Ill. App. 3d at 1132. "Once a motion *in limine* is granted, the movant must be vigilant and object when evidence is presented which may violate the order." *Compton*, 353 Ill. App. 3d at 871. "Failure to object to the evidence at trial forfeits the issue on appeal." *Jones*, 316 Ill. App. 3d at 1132. "The purpose of an *in limine* order is to exclude inadmissible evidence, not to create a trap that results in a new trial if the court determines in retrospect that the order was violated." *Compton*, 353 Ill. App. 3d at 871.

The circuit court granted the plaintiff's pretrial motion *in limine* to bar testimony that

portions of the plaintiff's medical expenses had been paid by collateral sources such as Medicaid. Specifically, the plaintiff had requested that evidence "that the plaintiff at any time for any purpose was a recipient of Illinois Public Aid or Medicare" be disallowed at the trial. However, at the trial, Dr. Witkop read Dr. Rocha-Singh's notes to the jury, and these notes referenced that while a breast reduction and diet pills had been recommended to the plaintiff to improve her chronic discomfort, Medicaid did not pay for these alternatives. The plaintiff did not object to this testimony at the trial.

The plaintiff's failure to object to the Medicaid reference during trial forfeits the issue on appeal. *Jones*, 316 Ill. App. 3d at 1132. Notwithstanding forfeiture, however, we find no reversible error. " 'Under the collateral source rule, benefits received by an injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor.' " *Arthur v. Catour*, 216 Ill. 2d 72, 78 (2005) (quoting *Wilson v. The Hoffman Group, Inc.*, 131 Ill. 2d 308, 320 (1989)). As a rule of evidence, it prevents juries from learning anything about collateral income that could affect their assessment of damages. *Arthur*, 216 Ill. 2d at 79. In the present case, the evidence, as presented, did not demonstrate that the plaintiff's surgery was paid for by public aid funds or Medicaid but, instead, suggested the contrary. Although we recognize that the evidence lacked probative value, we cannot say that the brief reference was so egregious that it deprived the plaintiff of a fair trial or substantially impaired the integrity of the judicial process. See *Cunningham v. Millers General Insurance Co.*, 227 Ill. App. 3d 201, 207 (1992).

Jury Questions

The plaintiff argues that the circuit court's answers to the jury's questions created confusion and prejudiced her with regard to the issue of informed consent.

"The general rule when a trial court is faced with a question from the jury is that the

court has a duty to provide instruction to the jury when the jury has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." *People v. Millsap*, 189 Ill. 2d 155, 160-61 (2000). "When a jury makes explicit its difficulties, the court should resolve them with specificity and accuracy." *People v. Childs*, 159 Ill. 2d 217, 229 (1994); see also *Van Winkle v. Owens-Corning Fiberglas Corp.*, 291 Ill. App. 3d 165, 172 (1997) ("the supreme court's analysis in *Childs* applies fully to civil cases as well"). "If the question asked by the jury is unclear, it is the court's duty to seek clarification of it." *Childs*, 159 Ill. 2d at 229. "The failure to answer or the giving of a response which provides no answer to the particular question of law posed has been held to be prejudicial error." *Childs*, 159 Ill. 2d at 229. The circuit court has discretion regarding its response to a jury question, and we review the court's decision under an abuse-of- discretion standard. *Hojek v. Harkness*, 314 Ill. App. 3d 831, 834 (2000).

"There are four essential elements a plaintiff must prove in a malpractice action based upon the doctrine of informed consent: '(1) the physician had a duty to disclose material risks; (2) he failed to disclose or inadequately disclosed those risks; (3) as a direct and proximate result of the failure to disclose, the patient consented to treatment she otherwise would not have consented to; and (4) plaintiff was injured by the proposed treatment.' " *Davis v. Kraff*, 405 Ill. App. 3d 20, 28-29 (2010) (quoting *Coryell v. Smith*, 274 Ill. App. 3d 543, 546 (1995)). "The gravamen in an informed consent case requires the plaintiff to 'point to significant undisclosed information relating to the treatment which would have altered her decision to undergo it.' " *Davis*, 405 Ill. App. 3d at 29 (quoting *Coryell*, 274 Ill. App. 3d at 546). To prove the third element in an informed consent case, the plaintiff must persuade the jury that a "reasonable person" in her position would have declined to undergo the medical procedure had the additional risk been disclosed. *Davis*, 405 Ill. App. 3d at 29-30. A causal connection is shown only when disclosure would have caused a reasonable person

in the plaintiff's position to refuse the surgery. *Davis*, 405 Ill. App. 3d at 30.

Accordingly, in the present case, the plaintiff was required to show that a reasonable person in her position would have declined to undergo the breast reduction procedure had the additional risk that she would have been left with very small breasts been disclosed. The jury's first question demonstrated confusion over this issue. The jury asked the following questions: "Is verbal consent the same as written consent? And did she give verbal consent?" The circuit court initially answered, "Verbal consent is the same as written consent," and "Insofar as whether she gave verbal consent, that is for you to decide." This answer alone could have further confused the jury because the plaintiff's "consent" was not at issue. At issue was whether a "reasonable person" in her position would have declined to undergo the medical procedure had the additional risk been disclosed. See *Davis*, 405 Ill. App. 3d at 29-30. But the circuit court thereafter clarified its answer and responded as follows: "It is undisputed that the Plaintiff gave consent to the surgery. What you are to decide is whether the Plaintiff has met her burden of proof under informed consent." To this correspondence, the circuit court attached the jury's instruction regarding the law of informed consent, including the element that if the defendants had disclosed the risks and/or alternatives of the surgery, a reasonable person in the plaintiff's position would not have submitted to the bilateral breast reduction. Considering the entirety of the communications, the circuit court accurately advised the jury on the pertinent law, and we find no abuse of its discretion.

CONCLUSION

After carefully reviewing the record and the arguments, we find that none of the issues raised by the plaintiff, nor any combination of them, warrant a reversal. Accordingly, we affirm the judgment of the circuit court of Madison County.

Affirmed.