



reconstruct the accident for the jury; and whether the circuit court erred in denying the defendant's posttrial motion where the jury's verdict was not supported by any evidence of negligence on the part of the defendant.

¶ 3 On May 2, 2007, vehicles driven by Floyd Jeffries and Jessie Abbott collided. Jeffries sustained injuries and his vehicle was damaged. On August 1, 2007, Jeffries filed a complaint in the circuit court of St. Clair County against Abbott seeking damages for his personal injuries and property damage. The complaint alleged that both vehicles were operating in a westerly direction and that when Jeffries attempted to turn left in front of Abbott, she ran into him. The complaint alleges that Abbott was negligent in failing to keep her vehicle under control, improperly initiating a passing maneuver before the oncoming lane was clearly visible and free of traffic, improperly operating her vehicle on the left side of the roadway in a no-passing zone, improperly operating her vehicle on a roadway designated for one-way travel in the opposite direction, improperly changing lanes before ascertaining said lane change could be made safely, and otherwise failing to exercise due care and caution in operating her vehicle. At the time of the accident, Abbott was just three days short of her ninety-first birthday.

¶ 4 On May 19, 2008, Jeffries' daughter, Ledeila Newsome, filed a motion to substitute herself as special representative for Jeffries, who had died of causes unrelated to the motor vehicle accident. This motion was granted on June 12, 2008.

¶ 5 On September 3, 2008, a letter was filed from the defendant's doctor stating that she was recovering from a stroke suffered after heart surgery just a few months earlier, and that to go through a trial and perhaps have to testify would be very difficult for her. Accordingly, the defendant's doctor asked that she be excused from having to go through any arbitration or trial settings due to her medical condition. Based on this letter, the circuit court excused the defendant from attending the scheduled arbitration hearing. Arbitration was unsuccessful

and the matter proceeded to a jury trial.

¶ 6 On October 19, 2009, prior to commencement of the jury trial, the defendant's attorney presented the court with a letter from the defendant's doctor stating that he was not "in favor" of her appearing in court and testifying because it would be deleterious to her health. The letter recites that the defendant was elderly and had undergone bypass surgery in 2008. She had subsequently had a stroke and has problems with atrial fibrillation and congestive heart failure, and her heart pumps only approximately one-half of what it normally should. The defendant was very weak and debilitated, and the doctor "strongly urge[d] that if [at] all possible she not be required to testify." Based on this letter, the defendant's attorney asked that she be excused from attending the trial and testifying. The court pointed out that the plaintiff had not filed a notice to have her appear pursuant to Illinois Supreme Court Rule 237(b) (eff. July 1, 2005), and therefore she was not required to appear or testify. Accordingly, the circuit court declined to rule on the defendant's request.

¶ 7 At the jury trial, the following evidence was adduced. There were no witnesses to the accident, the plaintiff having died and the defendant being unavailable due to her medical condition. Police officer Jaye Harrison testified that she responded to the scene of the accident after it happened. The accident occurred at approximately 11:54 a.m. on a rainy day. Photographs of St. Louis Avenue in the vicinity of the accident showed that the only striping on the roadway was a double yellow line in the middle, indicating a no-passing zone. The roadway in this vicinity is a two-lane roadway, a single lane in each direction. There should not be two vehicles traveling side-by-side in the same direction, and if one vehicle was attempting to pass another going the same direction, it would be an improper use of the lanes, even if the passing vehicle did not cross the centerline.

¶ 8 The plaintiff's attorney asked Officer Harrison, "[C]an you just tell us generally the actions as you understood them of the two vehicles on St. Louis Avenue." Defense counsel

objected that Harrison did not witness the accident and was not an accident reconstruction expert and that she had not been disclosed as an accident reconstructionist and the question went well beyond her scope. The circuit court overruled the objection and allowed the testimony. Harrison testified that there was one vehicle stopped in the roadway waiting to make a left turn. The vehicle was traveling in a westerly direction and its driver turned on his blinker and slowed down to make a left turn. The defendant's vehicle was also traveling in the same direction, and she attempted to go around Jeffries' vehicle on the left side as he was turning. Her car ran into the side of Jeffries' car. Photographs showed damage to the driver's side front quarter panel and the driver's side door of Jeffries' vehicle.

¶ 9 Harrison further testified that the defendant told her that Jeffries had cut in front of her. The defendant told Harrison that she was traveling in a westerly direction when she observed Jeffries' vehicle traveling in front of her on the far right side of the roadway, in the parking lane. Jeffries' vehicle came over into the defendant's lane, causing the collision. Harrison testified that although the far right lane was a parking lane, if no cars were parked there vehicles sometimes would use it as a travel lane. However, at the time of the accident, there were vehicles parked in the parking lane in the vicinity of the accident. When Harrison arrived at the scene the parties' vehicles had not been moved. The defendant's vehicle was on the wrong side of the road, in the eastbound lane.

¶ 10 On cross-examination, Harrison testified that she is not a certified accident reconstructionist. She did not witness the accident. She did not know the exact point of impact and admitted that vehicles can move after collision. She did not believe that Jeffries could have been in the far right parking lane when he initiated his turn because there were vehicles parked there. Based on where his vehicle was, she did not believe he could have turned out of a parking spot.

¶ 11 Portions of the discovery deposition of the defendant, who was not present to testify,

were read to the jury. The defendant testified that she was traveling west on St. Louis Avenue. She had observed Jeffries' car traveling westbound on St. Louis Avenue in front of her. She believed that there were two lanes of travel westbound and that Jeffries was in the right lane while she was in the left lane. She stated that the accident occurred right in front of the building where Jeffries lived. She was passing him in the left lane of westbound travel and he was in the right lane of westbound travel. Jeffries' car was stopped in the right lane when she began to pass. She was trying to avoid hitting him, and she "carried [her] car simultaneously within the rim of his turn." She swerved with Jeffries' car, trying to avoid hitting it. She made a perpendicular turn trying to avoid hitting him. When her car stopped it was partially in the eastbound lane, where she left it until the police arrived. She stepped on the brakes as she turned the steering wheel. Her right headlight struck Jeffries' left door. She denied that she was trying to pass Jeffries in the eastbound lane at the time of the accident. She stated that she was driving in the left lane of westbound traffic when he cut across in front of her. She only ended up in the eastbound lane because she swerved to avoid hitting him.

¶ 12 Evidence was also presented pertaining to the plaintiff's personal injuries and property damage.

¶ 13 At the jury instruction conference, the plaintiff tendered her instruction number 17, Illinois Pattern Jury Instructions, Civil, No. 5.01 (2006) (hereinafter IPI Civil (2006) No. 5.01), the "missing witness" instruction. The instruction as tendered and as presented to the jury read:

"If a party has failed to appear within her power to do so, you may infer that her testimony would be adverse to that party, if you believe each of the following elements:

1) The witness was under the control of the party and could have been produced by

the exercise of reasonable diligence.

2) The witness was not equally available to the adverse party.

3) A reasonably prudent person under the same or similar circumstances would have appeared if she believed her testimony to be favorable to her.

4) No reasonable excuse for the failure to appear has been shown.”

The defendant objected, stating: "There was no 237 issue. Defendant is not required to be here. She was never listed as a witness on a 222 or 213 disclosure as someone the plaintiff intended to call." The court gave the instruction over the defendant's objection. The defendant did not seek to reopen the proofs to present evidence of the defendant's medical condition which prevented her appearance and testimony at trial.

¶ 14 In closing argument, the plaintiff emphasized the "missing witness" instruction to the jury, arguing that because the defendant had not been there to testify, there was no evidence that Jeffries had done anything wrong and he could not have been at fault. The jury returned a verdict in favor of the plaintiff.

¶ 15 On November 16, 2009, the defendant filed a posttrial motion for a judgment notwithstanding the verdict in which she argued that the "missing witness" instruction had been given improperly and had prejudiced the defendant. The defendant argued that this instruction does not apply to the failure of a *party* to a civil suit to testify in her own behalf, and that, in any event, the foundational requirements for the giving of the instruction were not satisfied. Finally, the motion argued that the jury's verdict was contrary to the manifest weight of the evidence. The defendant's motion was denied on December 31, 2009.

¶ 16 On appeal, the defendant first argues that the circuit court abused its discretion by reading to the jury the plaintiff's "missing witness" instruction, IPI Civil (2006) No. 5.01, because the plaintiff failed to establish the required foundational requirements for the giving of the instruction. Specifically, the defendant argues that she had a reasonable excuse for her

failure to appear and testify: her grave medical condition prevented it. The defendant further argues that the circuit court abused its discretion in giving the instruction because the adverse inference is not applicable to the failure of a *party* to a civil suit to testify in her own behalf. The defendant also argues that the giving of the instruction is not appropriate where the defendant's testimony would have been merely cumulative to evidence already admitted. Finally, the defendant argues that she was prejudiced and deprived of a fair trial by the circuit court's giving of the instruction.

¶ 17 The plaintiff responds that the defendant has waived any error in the giving of the instruction because at the jury instruction conference she did not state her objection to the instruction with sufficient specificity. The plaintiff argues that the defendant did not inform the circuit court of its objection that the instruction does not apply to *parties*. Finally, the plaintiff argues that the instruction does, indeed, apply to parties and that the circuit court did not abuse its discretion in giving the instruction because the defendant presented to the jury no evidence of the defendant's reasonable excuse for failure to appear, and even if the defendant's testimony would have been cumulative, giving the instruction was not reversible error but, if error at all, was harmless

¶ 18 The decision to give or deny a jury instruction is within the circuit court's discretion. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505 (2002). The standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law. *Dillon*, 199 Ill. 2d at 505. A circuit court's decision whether to give or deny the instruction will not be reversed absent a clear abuse of discretion. *Nasrallah v. Davilla*, 326 Ill. App. 3d 1036, 1042 (2001). An abuse of discretion occurs where no reasonable person would agree with the position adopted by the circuit court. *Nasrallah*, 326 Ill. App. 3d at 1042.

¶ 19 The "missing witness" instruction allows the jury to draw an adverse inference from

a party's failure, without reasonable excuse, to produce evidence in that party's control and not equally available to the other party. *Tuttle v. Fruehauf Division of Fruehauf Corp.*, 122 Ill. App. 3d 835, 843 (1984). The instruction is only warranted when some foundational evidence is presented on each of the four elements: (1) the evidence was under the control of the party and could have been produced with the exercise of due diligence, (2) the evidence was not equally available to the adverse party, (3) a reasonably prudent person under the same or similar circumstances would have produced the evidence if he believed it would have been favorable to him, and (4) there was no reasonable excuse for the failure to produce the evidence. *Tuttle*, 122 Ill. App. 3d at 843. However, the instruction is not warranted when the evidence that has not been produced is merely cumulative of the facts already established. *Tuttle*, 122 Ill. App. 3d at 843.

¶ 20 We first address the plaintiff's waiver argument. The plaintiff argues that, although the defendant objected to the giving of the missing-witness instruction at the jury instruction conference, her objection was not specific enough to apprise the court that she was objecting for the reason that the instruction did not apply to a *party*, and for the reason that the defendant had a reasonable excuse for her failure to appear and testify. The plaintiff argues that where the proper specific objection is not made at the conference on instructions, error as to the instruction is not preserved for review and that this failure to object at the time of conference cannot be cured by making the point later in a posttrial motion. *Russo v. Kellogg*, 37 Ill. App. 2d 336, 341-42 (1962)

¶ 21 The defendant's objection, though inartfully stated, was sufficient to apprise the circuit court of its specific nature. The defendant's counsel stated:

"I do object your Honor. There was no [Rule] 237 issue. Defendant is not required to be here. She was never listed as a witness on a 222 or 213 disclosure as someone the plaintiff intended to call."

We think this objection is sufficient to apprise the circuit court of the defendant's argument that the missing-witness instruction does not apply to a party to a civil suit in the absence of a Rule 237 notice to appear from the opposing party.

¶ 22 We conclude that the circuit court did abuse its discretion in giving the instruction in the case at bar because it has long been the law in Illinois that the adverse presumption or inference against a party failing to produce proof apparently within his own power does not apply to the failure of a *party* to a civil suit to testify in his own behalf. *Ronan v. Rittmueller*, 105 Ill. App. 3d 200, 207 (1982). As the *Ronan* court stated, there are other motives that may influence a party to forego becoming a witness in his own behalf than the consciousness that the facts within his knowledge would be damaging if disclosed, and the presumption that testimony would have been prejudicial to the party's case arises only when that party has willfully withheld such evidence. *Ronan*, 105 Ill. App. 3d at 207-08. The defendant in the case at bar did not willfully withhold her testimony. She did not fail to comply with a Rule 237 notice to compel her appearance. The plaintiff did not serve her with any such notice.

¶ 23 The case at bar is similar to *Ronan*, but distinguishable from *Nasrallah v. Davilla*, 326 Ill. App. 3d 1036, 1041-45 (2001), where the appellate court held that the missing-witness instruction was properly given where the party to a civil suit failed to testify in his own behalf because that party had failed to comply with the plaintiff's Rule 237 notice. The *Nasrallah* court pointed out that, where there is a wilful withholding of evidence after the opposing party provides a notice to produce such evidence, the adverse inference arises. *Nasrallah*, 326 Ill. App. 3d at 1043. In a civil proceeding, where a party is required to testify by virtue of a Rule 237 notice, and refuses to comply with that notice, he must suffer the consequences of his refusal and the jury may draw negative inferences against that party. *Nasrallah*, 326 Ill. App. 3d at 1044.

¶ 24 In the case at bar, the plaintiff did not serve the defendant with a Rule 237 notice to

compel her appearance and testimony. Accordingly, the defendant had no obligation to testify and did not willfully withhold any evidence. Under these circumstances, her failure to testify does not give rise to an adverse inference because, as the *Ronan* court stated, there are other motives that may influence a party to forego becoming a witness in her own behalf than the consciousness that the facts within her knowledge would be damaging if disclosed. *Ronan*, 105 Ill. App. 3d at 207-08. Accordingly, we find that under the facts of the case at bar, the circuit court did abuse its discretion in giving the jury the missing-witness instruction.

¶ 25 However, a reviewing court will reverse and grant a new trial based on a trial judge's error in instructing the jury only when the error resulted in prejudice to the appealing party. *Nasrallah*, 326 Ill. App. 3d at 1042. In the instant case, we believe the instructional error did prejudice the defendant because it allowed the jury to draw the inference that there was some hidden, secret evidence that was very damaging to the defendant but of which they were ignorant. The plaintiff exacerbated this prejudice by arguing to the jury that the defendant's failure to appear was because she was unable to give testimony that would help her case.

¶ 26 We do not believe the evidence of liability was overwhelming or clear in this case. Neither of the eyewitnesses to the accident were available to testify. Neither the portions of the defendant's discovery deposition that were admitted into evidence nor police officer Harrison's testimony clearly established how the accident happened or who was liable. The missing-witness instruction may have left the jury with the impression that there was some evidence within the defendant's knowledge and possession that was so damaging to her that she refused to testify in her own behalf. The instructional error prejudiced the defendant. We therefore reverse the judgment of the circuit court of St. Clair County and remand this cause to that court for a new trial.

¶ 27 In light of our reversal of the judgment on this basis, we find it unnecessary to discuss

the other issues raised by the defendant on appeal.

¶ 28 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby reversed and this cause is remanded to that court for a new trial.

¶ 29 Reversed and remanded.

¶ 30 JUSTICE GOLDENHERSH, dissenting:

¶ 31 I respectfully dissent. In particular, I disagree with the majority's position as to the trial court's abusing its discretion in the giving of IPI Civil (2006) No. 5.01.

¶ 32 It is virtually black letter law that the decision to give or decline to give an instruction is within the trial court's discretion and that the effect of an individual instruction must be considered by viewing the instructions as a whole. See *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505, 771 N.E.2d 357, 371 (2002). In my view, the giving of this instruction was not an abuse of the trial court's discretion.

¶ 33 While defendant argued to this court that as a party defendant, Ms. Abbott was not required to appear and testify, the objection to this instruction was limited to whether defendant was required to appear by notice. Defendant at no time entered the medical letter referenced in its argument and, furthermore, at no time argued to the jury any reasons why she did not testify. There was no testimony either from defendant or any medical or caregiver as to any alleged condition that necessitated defendant's absence from this trial. While defendant could have avoided this entire situation by taking any of the actions noted above, it failed to do so as a tactical decision in the trial of this cause, thereby failing to block the giving of IPI Civil (2006) No. 5.01, and should not be heard in our court to disclaim the effects of the tactical decision it made in the trial court. See *Tonarelli v. Gibbons*, 121 Ill. App. 3d 1042, 460 N.E.2d 464 (1984) (adverse-inference instruction was proper as defendant

failed to explain the situation to the jury despite having the right to do so) (citing *Petersen v. General Rug & Carpet Cleaners, Inc.*, 333 Ill. App. 47, 77 N.E.2d 58 (1947)).

¶ 34 While defendant relies on *Ronan v. Rittmueller*, 105 Ill. App. 3d 200, 434 N.E.2d 38 (1982), in my view, the more appropriate case is *Nasrallah v. Davilla*, 326 Ill. App. 3d 1036, 762 N.E.2d 25 (2001), which distinguished *Ronan* and allowed an adverse-inference instruction against a defendant who failed to appear at trial. While the defendant in *Nasrallah* was served with a Rule 237 notice, the reasoning of the court in holding that the trial court did not abuse its discretion in giving the missing-witness instruction since defendant failed to comply with the Rule 237 notice is persuasively analogous to the situation in the instant case in which defendant clearly was informed of this trial, had an argument as to medical circumstances but failed to explain that before the jury, and argued to the trial court that as a party, she was under no obligation to appear. Again, it is not unreasonable that, defense counsel having made a tactical decision as to defendant's nonappearance at trial, the defense bear the consequences of that decision, whether favorable or unfavorable.

¶ 35 Having concluded that the giving of the missing-witness instruction was not an abuse of discretion, I respectfully dissent.