

NOTICE
Rule 23 order filed July 8,
2014. Modified upon denial of
rehearing August 21, 2014.

2014 IL App (5th) 130132-U

NO. 5-13-0132

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

COUNTRY MUTUAL INSURANCE COMPANY,)	Appeal from the
a/s/o DAWN KEHRER and JOSEPH KEHRER, and)	Circuit Court of
CONTINENTAL CASUALTY COMPANY, a/s/o)	Clinton County.
KEHRER BROTHERS CONSTRUCTION, INC.,)	
)	
Plaintiffs,)	
)	
and)	
)	
DAWN KEHRER, JOSEPH KEHRER, and)	
KEHRER BROTHERS CONSTRUCTION, INC.,)	
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 09-L-11
)	
SANTEL CONSTRUCTION COMPANY,)	Honorable
)	William J. Becker,
Defendant-Appellee.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justice Chapman concurred in the judgment.
Justice Spomer dissented.

ORDER

¶ 1 *Held:* The circuit court erred in giving the missing evidence instruction, and the error resulted in prejudice, requiring that the judgment be reversed and the cause remanded for a new trial.

¶ 2 The plaintiffs, Joseph Kehrer, Dawn Kehrer, and Kehrer Brothers Construction, Inc., filed an action in the circuit court of Clinton County, against the defendant, Santel Construction Company, and alleged that the defendant's negligence during a remodeling project was the proximate cause of a fire which damaged a building and its contents. The jury returned a verdict in favor of the defendant. On appeal, the plaintiffs claim that the trial court erred in giving Illinois Pattern Jury Instructions, Civil, No. 5.01 (2011) (hereinafter IPI Civil (2011) No. 5.01), often called the "missing evidence instruction," and that the instructional error resulted in prejudice and requires a new trial. For reasons that follow, we reverse the judgment of the circuit court and remand the case for a new trial.

¶ 3 In July 2006, Joseph Kehrer and Dawn Kehrer purchased a farm property in Germantown, Illinois. There were several buildings on the property, including a pole barn. Joseph Kehrer decided to convert the pole barn into a facility where he could service, repair, and garage stock cars. The pole barn was a simple structure, with a timber frame and a corrugated metal exterior skin. The frame consisted of 6x6 timber poles and 2x4 horizontal purlins. The timber poles were set nine feet apart. Six tiers of horizontal purlins were attached to the timber poles. Sheet metal panels formed the exterior walls. The plans for the renovation included the addition of an office and improvements to the interior walls and electrical wiring. Joseph Kehrer hired the defendant to complete the structural work, and J&R Appliances, Inc. (J&R), an electrical contractor, to install the wiring.

¶ 4 The renovation work commenced in late 2006, and continued through July 2007. J&R electricians ran a 220-volt distribution line along the top of the third tier of horizontal purlins, approximately 6 feet above the ground. The line was held in place by staples. The staples were loosely driven into the purlins, at intervals of 6 to 10 feet, in order to secure the line without squeezing or breaching it.

¶ 5 After the wiring was completed, the defendant's workers began renovations on the interior walls. They attached a layer of insulation to the horizontal purlins with double-headed nails. A second layer of insulation was laid next to the first, and vertical 2x4s were intermittently placed along the third tier of purlins to secure the insulation and prevent it from bowing. Eight-inch roofing screws were driven through the vertical 2x4s and layers of insulation, and into the third-tier purlins. Because the wall cavity was approximately 7½ inches in width, the screws were driven at an angle so that they would not penetrate the corrugated metal exterior skin. Interior sheet metal was then laid over the insulation to finish the interior walls.

¶ 6 On March 21, 2008, a fire broke out at the renovated facility. The Germantown Fire Department responded. Firefighters tore out sections of the exterior sheet metal along the west wall in order to reach the fire and extinguish it. Sometime after the firefighters left the scene, the fire rekindled. The firefighters returned. They tore through more of the exterior sheet metal and extinguished the fire.

¶ 7 Joseph Kehrer was among those who went out to the facility within hours after the fire was extinguished to assess the damage. As Kehrer inspected the fire damage along the west wall of the building, he observed an 8-inch screw of the type used to secure the

vertical 2x4s to the horizontal purlins dangling in burnt 220 line in the area of the fire's origin. Kehrer removed the screw so that he could inspect it, and he then dropped it on the ground.

¶ 8 Jim Schomaker, the owner of J&R Appliances, also went to the scene to assess the damage. Schomaker observed a nail or screw near the location where the horizontal purlin was heavily damaged. He inspected the section of the 220 line near that damaged purlin. He noticed that the line's rubber coating had melted away, and that its conductor wires had arc damage. He also noticed a hole in a conductor wire. Schomaker raised the line so that it was even with the top of the horizontal purlin, and he found that the arc damage matched up to the location where an eight-inch screw had been driven.

¶ 9 Larry Santel, the owner of the defendant construction company, learned about the fire through a former employee. He went to the scene during the afternoon on March 21, 2008. While there, he took photographs of the damage. He also talked with Joseph Kehrer. During the conversation, Kehrer reported that he had seen an 8-inch screw in contact with the 220 line in the area where the fire started. Kehrer informed Santel that he looked at the screw and then dropped it on the ground. Kehrer advised Santel that he was anxious to clean up the debris and refurbish the building because the stock car racing season was approaching. He asked Santel to help with the cleanup and reconstruction work. Santel agreed to assist with the cleanup and rebuilding. Santel had known Kehrer for more than 25 years and had worked with him on several projects. He considered Kehrer to be trustworthy, and he did not believe Kehrer manipulated the evidence at the fire scene.

¶ 10 On March 22, 2008, Jeffry Johnson, the fire chief of the Germantown Fire Department, contacted the State Fire Marshal's office and requested assistance in determining the cause of the fire. Agent Greg Vespa was assigned to the investigation, and he phoned Chief Johnson that day. During the conversation, Chief Johnson notified Vespa that he had determined the cause of the fire and no longer required assistance from the fire marshal's office. A day or two later, Chief Johnson contacted Vespa and asked for assistance with regard to a question that had arisen about the cause of the fire. Vespa inspected the scene on March 24, 2008. He then prepared a written report describing his investigation, and relating his findings and conclusions. In the written report, Vespa documented the substance of his initial phone conversation with Chief Johnson. Chief Johnson reported that he had seen a screw penetrating an electrical line near the point of origin and that he determined the fire was most likely electrical in nature. In his report, Vespa noted that he was not asked to inspect the scene until a few days after the fire, and by that time the cleanup had already begun. He also noted that he did not see a screw in or near the 220 line in proximity to the point of the fire's origin during his inspection. Vespa listed the cause of the fire as "undetermined" in his report.

¶ 11 By all accounts, this was an electrical fire which started inside the west wall of the facility. There was a distinctive "V" pattern, indicating that the flames burned up and out. The point of origin was near the base of the "V," approximately 6 feet above the ground, in an area where one of the horizontal purlins intersected with a vertical 2x4. A section of the vertical 2x4, just above the area where the 220 line had been laid, was completely consumed by the fire, and the intersecting purlin was badly charred. While

there was general agreement that a short in the 220 line created arcing and sparked the fire, there was no consensus as to what created the short in the 220 line. The disagreement led to the filing of this lawsuit.

¶ 12 In the complaint, the plaintiffs alleged that during a remodeling project, the defendant negligently and carelessly drove an 8-inch screw into or in close proximity to a 220-volt electrical line, and that the misdriven screw penetrated the line, causing a short which resulted in the electrical fire. The defendant filed an answer and a counterclaim for spoliation of evidence. In the spoliation claim, the defendant alleged that it was unable to defend itself because Joseph Kehrer failed to preserve the alleged misdriven screw as evidence. The trial court dismissed the spoliation claim on the plaintiffs' motion. The court found that there were insufficient facts to impose a duty on the plaintiffs to preserve the evidence for the benefit of the defendant.

¶ 13 The case was tried before a jury. The main issue in dispute was whether the 8-inch screw had created a short in the 220 line. The plaintiffs' expert, Will Truss, testified that he had considered five potential causes for the short in the 220 line and determined that the more probable cause of the short was that a misdriven 8-inch screw penetrated conductor wires in the 220 line. During cross-examination, Truss acknowledged that as he formulated his opinions regarding potential ignition sources, it may have been helpful to have seen the screw as it existed in its original position immediately after the fire.

¶ 14 The defendant's expert, Robert Helmkamp, testified that there were several potential sources for the short in the 220 line, and that the more likely sources were a misdriven screw or a misdriven staple breaching the 220 line. Helmkamp opined that the

source of ignition was undetermined. He stated that he did not have sufficient physical evidence to identify a distinct cause. He said there was a high probability that he would have been able to identify a cause for the fire if he had been able to view the screw in its original position immediately after the fire.

¶ 15 Helmkamp testified that several weeks after the fire, a bent, eight-inch roofing screw was discovered on the ground in the area where the fire started. He noted that the area was muddy and had been trampled upon and that the bent screw was discovered using a metal detector. Helmkamp testified that he examined the bent screw, and noted that it was heavily oxidized, but had no arcing damage. Helmkamp stated that the oxidation indicated that the screw had been through the fire. He testified that he would expect to see evidence of arcing on the screw if it had caused the short in the 220 line. He opined that the bent screw did not spark the fire. Helmkamp testified that there were only two screws placed in the vertical 2x4 in the area of the fire's origin, and that since the screw at the four-foot level had been accounted for, there was an inference that the bent screw was the one that had been placed at the six-foot level. After Helmkamp identified the bent screw, it was admitted into evidence and passed to the jury.

¶ 16 During the instruction conference, the defendant tendered IPI Civil (2011) No. 5.01, the missing evidence instruction. In support of the instruction, the defendant noted that Joseph Kehrer claimed that he saw an 8-inch roofing screw dangling from the 220-volt line near the fire's point of origin, and yet, he neither documented this scene nor preserved the screw. The defendant claimed that Kehrer would have preserved the screw had it been favorable to his theory of liability. The plaintiffs argued that the missing

evidence instruction was not proper where they offered a reasonable excuse for failing to produce the screw, and where the defendant did not establish that the missing screw would have been unfavorable to the plaintiffs' case. The plaintiffs also argued that the instruction was not proper where the defendant had introduced evidence which it claimed was the "missing evidence" during the trial. The trial court determined that there was sufficient evidence to support the instruction and gave it over the plaintiffs' objection. The jury returned a verdict for the defendant and this appeal followed.

¶ 17 The sole issue on appeal is whether the trial court erred in giving IPI Civil (2011) No. 5.01, the missing witness instruction.

¶ 18 The purpose of jury instructions is to advise the jury of the correct principles of law to be applied to the evidence admitted at trial. *Peterson v. Ress Enterprises, Inc.*, 292 Ill. App. 3d 566, 577, 686 N.E.2d 631, 639 (1997). Jury instructions must correctly state the law and they must not overemphasize any particular matter. *Peterson*, 292 Ill. App. 3d at 577, 686 N.E.2d at 639.

¶ 19 The decision whether to give the missing evidence instruction is within the sound discretion of the trial court. *Simmons v. Garces*, 198 Ill. 2d 541, 573, 763 N.E.2d 720, 740 (2002). A reviewing court will reverse a judgment and grant a new trial based on an instructional error only where the error resulted in prejudice to the appealing party. *Wilkerson v. Pittsburgh Corning Corp.*, 276 Ill. App. 3d 1023, 1030, 659 N.E.2d 979, 984 (1995).

¶ 20 In this case, the trial court instructed the jury as follows:

"If a party to this case has failed to offer evidence within his power to produce, you may infer that the evidence would be adverse to that party if you believe each of the following elements:

1. The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence.

2. The evidence was not equally available to an adverse party.

3. A reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed it to be favorable to him.

4. No reasonable excuse for the failure has been shown." IPI Civil (2011) No. 5.01.

¶ 21 IPI Civil (2011) No. 5.01 instructs the jury that it may presume that evidence which a party fails to produce at trial would be unfavorable to that party. The instruction may be given when the moving party shows that: (1) the evidence was under the control of the opposing party and could have been produced through the exercise of reasonable diligence; (2) the evidence was not equally available to each party; (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed the evidence to be in his favor; and (4) no reasonable excuse for the failure to produce the evidence has been shown. *Myre v. Kroger Co.*, 176 Ill. App. 3d 160, 165, 530 N.E.2d 1122, 1125 (1988); *Tuttle v. Fruehauf Division of Fruehauf Corp.*, 122 Ill. App. 3d 835, 843, 462 N.E.2d 645, 652 (1984).

¶ 22 After reviewing the record, we find that the defendant did not lay an adequate foundation for the missing witness instruction. In this case, the plaintiffs offered

evidence of a reasonable excuse for failing to produce the evidence. The evidence demonstrated that Joseph Kehrer was concerned with rebuilding for the impending racing season, and that he acted hastily and made a careless mistake when he dropped the screw to the ground at the fire scene. There is no evidence that Joseph Kehrer deliberately and intentionally discarded unfavorable evidence, and there is no evidence that he attempted to conceal unfavorable evidence. The fourth prong of the foundation for the instruction was not met. See *Brown v. Moawad*, 211 Ill. App. 3d 516, 531, 570 N.E.2d 490, 500 (1991). In addition, the defendant presented testimony regarding a bent screw which was discovered at the scene weeks after the fire, and asserted that it was in all likelihood the missing screw. The defendant's evidence contradicts its claim that the evidence was not equally available to it. Under the unique circumstances presented in the record, we find that the missing evidence instruction was not warranted and that the trial court erred in giving it. We further find that the instructional error resulted in serious prejudice to the plaintiffs. During closing argument, the defendant intimated that the plaintiffs had purposefully attempted to conceal evidence that would have harmed their ability to recover. The court then gave the missing witness instruction. We cannot say with confidence that the instructional error had no impact on the jury's deliberations and verdict.

¶ 23 Accordingly, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

¶ 24 Reversed and remanded.

¶ 25 JUSTICE SPOMER, dissenting:

¶ 26 I respectfully dissent. In giving the missing witness instruction to the jury, the circuit court found an adequate foundation for the instruction. As recognized by the majority, the circuit court's decision to give the instruction is within its sound discretion if it finds an adequate foundation was laid by the proponent of the instruction. Here, I would find that a reasonable circuit court could have found that the plaintiff's proffered reason for his failure to produce the screw that was the subject of his allegations of negligence, that he was in a hurry and made a careless mistake in dropping the screw, was not credible or was an unreasonable excuse. The circuit court was within its province when it determined that the credibility or reasonableness of the plaintiff's excuse presented a question of fact for the jury to determine. For this reason, I would affirm the judgment of the circuit court.