

No. 1-13-2632

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

EMMA LOUISE EVANS and WILLIE)	Appeal from the
LIPSCOMB EVANS, as Co-Special)	Circuit Court of Cook County
Administrators of the Estate of SHARLOTTE)	
LIPSCOMB, Deceased,)	
)	
Plaintiffs-Appellants,)	
)	No. 08 L 7478
v.)	
)	
SUBURBAN SURGICAL ASSOCIATES, LTD.)	
and RYAN HEADLEY, M.D.,)	
)	Honorable Allen Goldberg,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

¶ 1 *Held:* Where no special interrogatories were tendered to jury in medical malpractice action, challenge of general verdict for defendants is precluded by two-issue rule. Trial court did not abuse its discretion in allowing jury questions pursuant to Illinois Supreme Court Rule 243 when testimony was factual and not opinion subject to Rule 213 disclosure requirements. Trial court did not abuse its discretion in allowing defendants' expert witness to testify regarding the cause of injury where he was qualified as expert and testified to factual bases for his opinion. Trial court did not abuse its discretion by instructing the jury on sole proximate cause where there was evidence presented that plaintiff's physical condition may have been the cause of his injuries.

¶ 2 Plaintiffs Emma Louise Evans and Willie Lipscomb-Evans filed a wrongful death and survival action as co-special administrators of the Estate of Sharlotte Lipscomb against defendants Suburban Surgical Associates, Ltd. and Ryan Headley, M.D.¹ alleging negligence in carrying out laparoscopic hernia surgery repair on the decedent Sharlotte Lipscomb. Following a jury trial, the jury entered a verdict in favor of defendants. Plaintiffs appealed, arguing that the trial court improperly allowed testimony in response to the jury's written questions. Plaintiffs also argue that the trial court committed reversible error in allowing defendants' expert testimony on the decedent's cause of death and that the trial court erred in giving the full sole proximate cause instruction to the jury. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Approximately 12 to 18 months following duodenal switch surgery, a bariatric surgery procedure, 46 year-old Sharlotte presented with abdominal pain and was scheduled for laparoscopic extensive adhesiolysis and repair of an incisional hernia. On June 12, 2008, the surgery was conducted on Sharlotte by Dr. Headley at MacNeal Hospital in Berwyn, Illinois. Following complications from the surgery, Sharlotte passed away on June 16, 2008, from multi-organ failure associated with peritonitis, septicemia, and left ventricular dyskinesia. Plaintiffs filed the underlying wrongful death and survival action against defendants on July 10, 2008. Plaintiffs alleged that defendants were negligent in failing to diagnose or recognize a bowel

¹ Defendant VHS of Illinois d/b/a MacNeal Hospital entered into a settlement agreement with plaintiffs and was dismissed from the action.

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injury prior to concluding the laparoscopic incisional hernia repair on Sharlotte and carelessly and negligently failed to treat or repair a bowel injury prior to concluding the June 12, 2008, surgery.

¶ 5 Prior to trial, the parties submitted written discovery and various motions *in limine*. Of importance to this appeal, in his answers to plaintiffs' Rule 213 interrogatories, Dr. Headley indicated that he was expected to testify that he "complied with the standard of care in every respect of his care and management of Sharlotte Lipscomb" and that he bases his opinions on "his knowledge, training and experience as well as review of all documents produced in this case." In addition, the response stated that Dr. Headley would "testify at the time of trial consistently with that which is contained in his deposition, and he will expound on any facts, opinions or logical corollaries therefrom."

¶ 6 In plaintiffs' motion *in limine* 40, plaintiffs moved to bar testimony from "defendants' counsel, parties and witnesses from stating, testifying or eliciting opinions or testimony from any witness as to his personal practices and further barring any testimony as to the standard of care regarding the documentation of a 'final inspection of the entire field.' " With respect to Dr. Headley, plaintiffs asserted that these matters were not addressed in his deposition or 213(f)(3) disclosures. In motion *in limine* 44, plaintiffs also sought to bar testimony by Dr. Constantine Frantzides that Sharlotte was in poor nutrition or had a heart condition. Plaintiffs attached excerpts of Dr. Frantzides' deposition and argued that these opinions would be improper speculation and conjecture as there was no established causal connection or any certainty that either issue was the cause of Sharlotte's death.

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¶ 7 There is no transcript of Dr. Headley's deposition of record and only the excerpts of Dr. Frantzides' deposition are in the record as attachments to plaintiffs' motion for new trial. There also are no orders from the trial court ruling on plaintiffs' motions *in limine*. The case proceeded to trial.

¶ 8 At trial, Dr. Kenric Murayama testified for plaintiffs on the laparoscopic incisional hernia procedure performed by Dr. Headley and the standard of care for this type of procedure. Dr. Murayama testified that the procedure was a common, routine procedure. He explained that the laparoscopic procedure involves the insertion of small tubes into the abdomen and perform the procedure by viewing the internal organs and repairs on a screen rather than a more invasive incision.

¶ 9 Dr. Murayama testified that during this procedure, adhesions, or scar tissue, also might need to be dissected and repaired. Any bleeding or bile can be seen on and around the intestine or bowl and indicate repair is required. These can be caused by deserosalizations, tears, punctures, or burns caused by the tools, or in the grasping and manipulation of the organs necessary during the procedure, especially for patients that have undergone prior surgeries in the area, such as bariatric procedures. In the hernia repair procedure, the hernia is repaired by placing mesh on the hernia. Mesh or sutures can also be utilized to repair enterotomies, holes that advance all the way through the bowel.

¶ 10 Dr. Murayama testified that Dr. Headley's operative report indicated that two deserosalizations of the bowel caused by the adhesiolysis were repaired. Dr. Murayama testified that it is not negligent to cause tears of intestine or bowel during this procedure. However, he opined that it was proper procedure to go back and review not only wherever adhesiolysis was

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performed or traction was placed to assure that there were not tears, but also review the entire bowel. Dr. Murayama testified that Dr. Headley's operative report indicated that he did not inspect the entire bowel, but only where he performed adhesiolysis and the hernia repair and therefore fell below the standard of care.

¶ 11 Dr. Murayama testified that he read the operative report for June 14, 2008, by Dr. Zawacki who performed follow-up surgery on Sharlotte when she presented with abdominal pain, distended abdomen, dark colored urine, and pericardial effusion, all signs of systemic infection. Dr. Zawacki identified two enterotomies in the bowel at a previous repair site that were missed and not repaired by Dr. Headley. Dr. Murayama agreed that Sharlotte's procedure is known to have consequences of malnutrition, but opined that the injury caused by Dr. Headley lead to peritonitis and sepsis and that was the proximate cause of death.

¶ 12 At the conclusion of Dr. Murayama's testimony, the trial court asked the jury if they had questions they would like Dr. Murayama to answer and to submit them to the court in written form. In chambers, the court and counsel read the questions and determined which questions were proper. When court returned to session, Dr. Murayama was asked several questions from the jury, including whether it was possible to miss a perforation when reviewing the bowel in concluding a surgery. Counsel were then allowed to ask follow-up questions.

¶ 13 Dr. Headley testified about his credentials and experience in performing laparoscopic hernia repairs as well as his relationship and interaction with Sharlotte. Dr. Headley described why hernia repair might be necessary, how the procedure works, and what he looks for while performing the procedure. He also explained the risks involved in such a surgery.

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¶ 14 Dr. Headley testified that he performed adhesiolysis in several areas of the intestine. In addition, there were two deserosalizations to the bowel that were repaired with sutures. The doctor continued to the area of the abdominal wall where the hernia was located and placed mesh over the affected area. Once the mesh was properly in place, Dr. Headley looked for the areas where the sutures were placed to repair the deserosalizations and made sure that the stitches did not obstruct the lumen or "cause a kink" in the intestine and that there was no leakage from the intestine. Dr. Headley continued to testify, without objection, that he "inspected everything at this point, the repair, the hernia, the repair, the intestine in between, the intestine around. So now at that point what I am doing is kind of almost a final survey of everything else in the abdomen to see that everything looks good." Dr. Headley testified that he did not find any bleeding or other signals of injury and completed the surgery.

¶ 15 Following Dr. Headley's testimony, the trial court again asked the jury if they had questions to be asked of Dr. Headley. The jury submitted 14 written questions to the court which were read and discussed by the trial judge and counsel. Many of the questions were similar, asking whether Dr. Headley believed he conducted a thorough exam prior to the completion of the surgery and whether it was possible to miss a perforation or other injury despite a thorough inspection.

¶ 16 Plaintiffs objected to these Rule 243 questions from the jury. Plaintiffs argued that these would elicit a causation opinion from Dr. Headley that was not disclosed prior to trial through either the parties Rule 213 disclosures or Dr. Headley's deposition. The trial court overruled plaintiffs' objections finding that these were fact questions and were allowed. The court opined that plaintiffs could impeach Dr. Headley on this issue based on his operative report and prior

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disclosures. Dr. Headley was asked the questions and responded that he thoroughly inspected the bowel and intestine by advancing throughout the entire intestine to find the injured and repaired areas.

¶ 17 Dr. Constantine Frantzides was qualified and testified as defendants' expert. Dr. Frantzides testified to his qualifications and experience with laparoscopic surgeries such as the one conducted on Sharlotte. Dr. Frantzides reviewed the medical reports and depositions from this case and opined that Dr. Headley properly followed the standard of care in repairing the hernia and deserosalizations and conducted a proper examination prior to completing the surgery. Dr. Frantzides testified that it is a known risk and possibility that a surgeon might miss a perforation of the bowel during this surgery, especially when previous surgeries have been completed in the area of work.

¶ 18 Dr. Frantzides testified that Sharlotte was a proper candidate for surgery. However, Sharlotte's laboratory results indicated that she was in poor nutritional status likely as a result from her prior bariatric surgery and the malabsorption of nutrients. Dr. Frantzides testified that this can make the intestine friable, consistent with the operative report of Dr. Zawacki, who conducted the second surgery on Sharlotte and the autopsy report. Dr. Frantzides stated that this makes the intestine and bowel more susceptible to perforations and can even lead to spontaneous perforations. He opined that if Sharlotte had been in a good nutritional status, she would likely have survived the surgery.

¶ 19 The jury entered a verdict in favor of defendants. Plaintiffs filed a motion for new trial. Plaintiffs asserted that the trial court improperly instructed the jury on sole proximate cause. Plaintiffs also claimed that there was a violation of Rule 213 by allowing Dr. Headley to testify

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to the undisclosed opinion that he analyzed the entire bowel when finishing the surgical procedure in response to the jury's questions.

¶ 20 The trial court denied the motion for new trial. The trial court reasoned that not only did Dr. Headley's testimony that plaintiffs challenged concern facts and not opinions, but that defendant's Rule 213 disclosure indicated that Dr. Headley would testify that he complied with the standard of care. With respect to the issue on the jury instruction on proximate cause, the court noted that defendants denied that Dr. Headley was the sole proximate cause and testimony was presented that Charlotte's prior surgery and malnutrition were potential causes of death or that the perforations could have happened spontaneously. This appeal followed.

¶ 21

II. ANALYSIS

¶ 22 We begin by noting the parties' failure to comply with our Supreme Court rules in briefing this case. We note that “ ‘[a] reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research.’ ” *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 877 (2010), quoting *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1995). Supreme Court Rule 341(h) requires a statement of the facts, "which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). While the appellee need not supply a statement of facts, the rule provides that it may include facts "to the extent that the presentation by the appellant is deemed unsatisfactory." Ill. S. Ct. R. 341(i) (eff. Feb. 6, 2013).

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¶ 23 The rules are not merely suggestions, but are necessary for the proper and efficient administration of the courts. *First National Bank of Marengo v. Loffelmacher*, 236 Ill. App. 3d 690, 691-92 (1992). We will not sift through the record or complete legal research to find support for an issue and ill-defined and insufficiently presented issues that do not satisfy the rule are considered waived. *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007). In fact, for these violations, this court may not only strike portions of the brief or consider arguments waived, but strike a brief in its entirety and dismiss the matter. *Marengo*, 236 Ill. App. 3d at 692.

¶ 24 In the instant matter, a trial on claims of medical malpractice with a record including hundreds of pages of expert testimony and related argument and claims on appeal concerning the admissibility of expert testimony and the jury instructions given by the trial court, plaintiffs have provided a statement of facts of less than two pages. Not only have plaintiffs completely failed to provide sufficient facts necessary to an understanding of the case, the statement of facts contains impermissible argument. Plaintiffs' failures and violation of Rule 341 notwithstanding, defendants also failed to provide any statement of facts as allowed by section (i) of the Rule or any argument that plaintiffs' brief was deficient or should be stricken. This court has discretion to consider a brief and issues presented despite these errors. As a record and argument on the issues were presented to this court, in the interest of finality and fairness to the parties, we consider plaintiffs appeal. *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, ¶ 21.

¶ 25 In addition, our rules require an appellant to provide a sufficiently complete record of the proceedings before the trial court to support a claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Where the record on appeal is incomplete, it will be presumed that the order

entered by the trial court conformed with the law and had a sufficient factual basis. *Id.* Doubts that arise from the incompleteness of the record will be resolved against the appellant. *Id.* at 392.

¶ 26

A. The Two-Issue Rule

¶ 27 To succeed in a medical negligence action, a plaintiff must prove: (1) the standard of care against which the medical professional's conduct must be measured; (2) the negligent failure to comply with that standard; and (3) that the negligence proximately caused the injuries for which the plaintiff seeks redress. *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289, 292 (2008). Defendants contend that because the jury entered a general verdict in their favor without any specified findings of fact, under the "two-issue rule," it is presumed the jury found in favor of defendants on all defenses and the verdict must be upheld where there is sufficient evidence to support either theory. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 102 (2010).

¶ 28 The two-issue rule precludes review of a jury's general verdict because "the basis for the verdict" is unknowable in the absence of a special interrogatory. *Strino v. Premier Healthcare Assoc.*, 365 Ill. App. 3d 895, 904 (2006). For the instant matter, the two-issue rule applies because there were two distinct issues, *i.e.*, whether defendants were negligent in meeting the appropriate standard of care and the proximate cause of Sharlotte's death; however, the jury returned only a general verdict. Because the mental processes of the jury were not tested by special interrogatories to indicate which of the two issues was resolved in favor of defendants, defendants assert that plaintiffs' claims on appeal cannot support reversal for a new trial. See *Taber v. Ausman*, 388 Ill. App. 3d 398, 402 (2009), citing *Strino*, 365 Ill. App. 3d at 904.

¶ 29 Defendants contend that because there were no special interrogatories tendered to the jury in this case, plaintiffs cannot argue they suffered any prejudice from testimony of Dr. Headley because it is unclear whether the jury decided the case based upon the standard of care or

proximate cause. Plaintiffs assert that this argument was rejected by this court in *Nassar v. County of Cook*, 333 Ill. App. 3d 289, 296 (2002), when that court ruled that the issue of whether the jury was properly instructed on sole proximate cause did not require tendering a special interrogatory to preserve the issue for appeal.

¶ 30 However, the *Nassar* court rested its holding on the fact that the case cited by the defendant did not hold that a plaintiff must tender special interrogatories to preserve an issue regarding proximate cause instructions and the defendant failed to present any case in support of that position. Unlike *Nassar*, defendants in the instant matter have cited to a case to support its argument in *Strino*, which was decided after *Nassar*. Based on the record and the parties' arguments to this court, we agree that the two-issue rule forecloses plaintiff's arguments for a new trial. Moreover, considering each asserted issue independently, it is clear from the record that the trial court did not abuse its discretion in its rulings and the jury verdict must stand.

¶ 31 **B. Rule 243 Juror Questions**

¶ 32 Plaintiffs argue that the trial court erred in allowing defendants' expert to testify in response to written questions from the jury pursuant to Rule 243. Rule 243 was recently adopted in 2012 following the lead from other jurisdictions in giving trial judges discretion in civil cases to permit jurors to submit questions for witnesses in an attempt to improve juror comprehension, attention to the proceedings, and overall juror satisfaction. Ill. S. Ct. R. 243, Committee Comments (adopted April 3, 2012). Pursuant to the rule, following the conclusion of a witness's testimony, the trial judge must determine whether the jury will be able to question the witness and if so, collect written questions without discussion among the jury, read the questions with counsel outside the presence of the jury, and then ask the witness any proper questions with follow-up questions from counsel limited to the scope of new testimony. *Id.* at 243(b), (c), & (d).

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Rule 243 specifically provides that the limitations on direct examination set forth in Rule 213(g) apply to any juror-submitted questions. *Id.* at 243(c).

¶ 33 We agree with the trial court that the testimony plaintiffs complain of was not opinion testimony from Dr. Headley subject to Rule 213, but was factual testimony. Dr. Headley did disclose that he would testify that he performed the surgery and in compliance with the standard of care. Dr. Headley testified to the facts of the operation, namely how he completed the procedure including how he inspected the bowel and intestine after making the hernia repair. He did not render an opinion. To the extent his testimony differed from his operative report, plaintiffs were free to impeach Dr. Headley as the trial court advised, but this did not render his factual testimony an undisclosed opinion and the trial court did not abuse its discretion in allowing the jury questions on this issue.

¶ 34 C. Expert Opinion Testimony

¶ 35 Plaintiffs also assert that the trial court erred in allowing testimony from defendants' surgical expert on the cause of death. A challenge made to the trial court's ruling on the admissibility of evidence is reviewed under an abuse of discretion standard. *Mulloy v. American Eagle Airlines, Inc.*, 358 Ill. App. 706, 711 (2005). The trial court is vested with the discretion to determine the relevance and admissibility of this evidence regardless of whether it is expert or lay testimony. *Id.* at 711-12.

¶ 36 Where relevant evidence has any tendency to make the existence of any material fact more or less probable, any testimony grounded in guess, surmise, or conjecture is irrelevant for this purpose. *Petraski*, 382 Ill. App. 3d at 27. With foundation, it is not improper for experts to opine on probabilities or possibilities based on assumed facts. *Buford v. Chicago Housing Authority*, 131 Ill. App. 3d 235, 245 (1985). A trial court abuses its discretion only when no

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reasonable person would agree with the trial court. *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 177 (2003). If we determine the trial court erred in resolving an evidentiary issue, we will remand for a new trial only if the error was substantially prejudicial and affected the outcome of the trial. *Liberty Mutual Ins. Company v. American Home Assurance Company*, 368 Ill. App. 3d 948, 960 (2006).

¶ 37 Plaintiffs present an undeveloped argument on this issue, simply lifting language from their motion for new trial that "[t]he mere 'possibility' of a causal connection is not enough. The causal connection must not be contingent, speculative or merely 'possible.' [Citations.]" Plaintiffs fail to provide any context for these statements or how they apply to the issue of expert testimony, particularly that of Dr. Frantzides in the instant matter. Plaintiffs then cite to the excerpts of Dr. Frantzides's deposition testimony to demonstrate that he could not say that malnutrition or a heart condition were the sole cause of Sharlotte's death, only that they contributed to her death. Without any citation to the record concerning either Dr. Frantzides' trial testimony or any objections thereto, plaintiffs conclude that the trial testimony that Sharlotte's malnutrition caused or were related to Sharlotte's death should have been barred as based upon speculation.

¶ 38 Both Dr. Frantzides and plaintiffs' expert Dr. Murayama testified that a bariatric procedure causes malabsorption of nutrients and can result in malnutrition. Dr. Frantzides reviewed laboratory results demonstrated that Sharlotte was not maintaining proper nutritional status and that could have lead to the friable condition of her bowel, which in turn could lead to the enterotomies. Dr. Frantzides was properly qualified as a medical expert and presented a factual basis for his opinion. Accordingly, the trial court did not abuse its discretion in allowing the testimony and plaintiffs were free to cross examine Dr. Frantzides and question his opinion.

¶ 39

D. Jury instructions

¶ 40 A party has the right to have the jury clearly and fairly instructed on any theory that is supported by evidence at trial. *Snelson v. Kamm*, 205 Ill. 2d 1, 27 (2003). Whether the issues and evidence have been raised at trial is a matter within the sound discretion of the trial court. In fact, the " 'evidence may be slight; a reviewing court may not reweigh it or determine if it should lead to a particular conclusion.' " *Id.*, quoting *Leonardi v. Loyola University*, 168 Ill. 2d 83, 100 (1995).

¶ 41 Plaintiffs argue that the trial court erred in instructing the jury on the long form of Illinois Pattern Instruction 12.05 (IPI Civil No. 12.05), which states in full:

"If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that something else may also have been a cause of the injury.

[However, if you decide that the sole proximate cause of injury to the plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant.]" IPI Civil No. 12.05.

The notes on use for this instruction state that "[t]he second paragraph should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was something other than the conduct of the defendant." IPI Civil No. 12.05, Notes for Use. Plaintiffs argue that there was no evidence of a specific cause or instrumentality of Sharlotte's injury other than defendants' negligence.

¶ 42 Plaintiffs' conclusory statements aside, in this case there was evidence presented that something other than defendants' actions caused Sharlotte's death. The experts for both sides explained the nature of the procedures that Sharlotte underwent and the negative impact they

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could have on Charlotte's nutrition. Furthermore, the experts also testified to the mortality risk of the surgery whether or not a bowel injury is left untreated. Accordingly, there was evidence that Charlotte's death may have been caused by something other than by defendants' negligence and therefore the trial court did not abuse its discretion in instructing the jury.

¶ 43

III. CONCLUSION

¶ 44 For the reasons stated, we affirm the judgment of the circuit court.

¶ 45 Affirmed.