2016 IL App (4th) 141074-U

NO. 4-14-1074

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 23, 2016
Carla Bender
4th District Appellate
Court, IL

KYLA K. DOEDTMAN, f/k/a KYLA K. ORSBORN, Plaintiff-Appellee, vs. JOSEPH S. BORREGGINE, DPM, and TOUCHING GROUND PODIATRY, PC, Defendants-Appellants.	))))))))	Appeal from Circuit Court of Coles County No. 10L1 Honorable James R. Glenn, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the trial court did not err in limiting cross-examination of the plaintiff's expert witness, (2) the defendants were not prejudiced by the introduction of allegedly undisclosed expert opinions, (3) the trial court properly instructed the jury, and (4) the verdict was not the product of passion or prejudice and was not against the manifest weight of the evidence.

¶ 2 In January 2010, plaintiff, Kyla K. Doedtman, filed a medical-malpractice action against defendants, Joseph S. Borreggine and Touching Ground Podiatry. In October 2014, a jury found in favor of plaintiff and awarded $1,269,926.10 in damages.

¶ 3 Defendants appeal, arguing (1) the trial court committed reversible error by refusing to allow defendants to cross-examine plaintiff's expert witness about allegedly perjured testimony given during his discovery deposition; (2) multiple other errors occurred which necessitate a new trial; and (3) alternatively, this court should grant a remittitur and reduce the damages award by $850,000. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2010, plaintiff filed a medical-malpractice action against defendants. In September 2014, the matter proceeded to a jury trial. We summarize only the evidence necessary to resolve this appeal.

¶ 6 A. Plaintiff's Case

¶ 7 1. *Kyla Doedtman*

¶ 8 In February 2008, plaintiff made an appointment to see defendant because she had pain in her right heel. Defendant took X-rays of plaintiff's feet and informed her she had a bunion, hammer toes, and a problem with her ankle. According to plaintiff, defendant told her surgery was the only way to correct all these problems and it would be better to take care of everything at once. Plaintiff testified defendant did not discuss other forms of treatment, such as orthotics or pads.

¶ 9 The following month, plaintiff visited defendant's office for a preoperative visit. According to plaintiff, defendant's nurse came in to explain what defendant would do during the surgery. Plaintiff testified she was not given an opportunity to review any of the papers but the nurse had her sign the documents in multiple places. The consent form contained treatment alternatives.

¶ 10 Plaintiff's surgery took place on March 20, 2008. Upon discharge, she was not to put any weight on her foot. At the first follow-up visit on March 25, 2008, plaintiff voiced her concern that something did not feel right and her big toe was in excruciating pain. Defendant took another X-ray and assured plaintiff she was healing properly. During this time, plaintiff was still not to put weight on her foot, so she had someone come in to care for her children and

clean her house. Plaintiff testified she went several months without being able to take walks or play with her children.

¶ 11 On April 1, 2008, plaintiff saw defendant and she again complained of pain in her big toe and throbbing pain in her ankle. At this point, plaintiff wore a weight-bearing boot. Defendant told her everything looked great and to continue taking pain medication if needed. During one of these first two follow-up appointments, defendant took the staples out of plaintiff's foot. Plaintiff testified defendant "was just preoccupied. He had got a cell phone call while he was in the process of taking my staples out. Got up and left the room, was talking to—on the phone. Came back in. Did not wash his hands. And sat back down and started proceeding to tell me, 'oh, I just had to talk to the cops because my car got broken into.' "

¶ 12 On April 15, 2008, defendant took another X-ray, told plaintiff her foot was "pretty much healed," and fully released her to return to work. According to plaintiff, defendant had no response when she asked why she still had so much pain in her big toe. Plaintiff returned to her job at Subway, but she struggled to get through every day and would have to leave her shift early. Plaintiff had to take her shoe off due to the swelling and had to sit down at a job where she was supposed to be on her feet. Plaintiff described the pain as "extraordinary."

¶ 13 Plaintiff dealt with the pain for four months. She did not schedule an appointment with defendant because she was scared. Plaintiff testified, "I trusted [defendant], and he—he defied that trust by telling me everything was okay, and I was in pain, and it is like he didn't listen to me. It is like he didn't care." In July 2008, plaintiff went to the emergency room because of the pain and swelling in her foot. Following X-rays and an examination, the emergency-room physicians referred plaintiff to a specialist. That same month, plaintiff went to see Dr. John Killough. Killough viewed her X-rays, examined her foot, and sent her for

additional imaging studies the next day. Killough instructed plaintiff not to return to work and referred her to another specialist, Dr. Osaretin Idusuyi.

¶ 14 Idusuyi instructed plaintiff to remain off work and scheduled surgery to repair her damaged foot. In August 2008, plaintiff underwent corrective surgery. Following the surgery, plaintiff was not to return to work or to put weight on her foot. On October 1, 2008, Idusuyi told plaintiff she could put weight on her foot as tolerated with crutches.

¶ 15 In late October 2008, plaintiff noticed a "pin sized pimple" on her toe. The next day, "[t]he pimple had grown to about a dime size." On November 1, 2008, plaintiff went to the emergency room and the doctors told her it was an infection and put her on medication. The following day, plaintiff's big toe was "completely engulfed," in redness and pus. Plaintiff saw her regular physician, who put her on another antibiotic and took a culture. A culture showed plaintiff had methicillin resistant staphylococcus aureus (MRSA), a bacterial infection resistant to many antibiotics. In November, Idusuyi saw plaintiff and performed another surgery to take all the "hardware" out of her foot. After this last surgery, plaintiff testified she had never been the same. Plaintiff was placed on an extensive course of antibiotics to treat the MRSA.

¶ 16 Plaintiff testified she lost an opportunity to become manager of a Subway due to her surgeries and continuing difficulty walking. She further testified she still had a great deal of pain in her foot and could not regulate the temperature in her foot. Plaintiff returned to Killough in March 2009 after suffering a fall from a foot ladder because she could not properly stabilize herself on her right foot. Finally, plaintiff testified she was in constant pain, she could no longer go on long walks with her daughters or help her daughter practice basketball, she could not stoop down normally anymore, and her toes no longer bend.

¶ 17 2. *Dr. Joseph Borreggine*

¶ 18 During plaintiff's case in chief, defendant testified he treated plaintiff in March 2008 for the following conditions in her right foot: (1) hallux abductovalgus deformity (bunion deformity), (2) talipes valgus, (3) plantar fasciitis, and (4) hammer toe deformities in the fourth and fifth toes. Defendant performed the following surgeries to correct these conditions: (1) bunionectomy with a screw fixation, (2) subtalar joint arthroereisis with a talar fit implant, (3) plantarfascia release, and (4) hammer toe deformity correction with arthroplasty on the fourth and fifth toes with an interphlex stabilization toe rod.

¶ 19 3. *Dr. Kent Mercado*

¶ 20 a. Expert Witness Testimony

¶ 21 Kent Mercado, plaintiff's expert witness, began his testimony by summarizing his education, credentials, and medical practice. Along with being a licensed, board-certified podiatric surgeon, Mercado was a licensed attorney. Plaintiff's counsel asked if Mercado treated patients with conservative management as opposed to surgical management. Mercado agreed, stating "Absolutely. Even when the patients are referred to us for—for surgery, before we even try surgery, we will try to exhaust all forms of conservative treatment." After requesting a sidebar, defense counsel objected, arguing this was a new and undisclosed opinion that Mercado believed it was necessary to exhaust conservative measures before resorting to surgery. Defense counsel further argued the witness was answering in a narrative. Plaintiff argued Mercado was simply describing his clinical practice. The trial court sustained the objection as to a narrative, and indicated that while Mercado could testify as to his practice, counsel should refrain from eliciting an opinion as to that being proper procedure.

¶ 22 Mercado testified it was his professional opinion Borreggine committed professional negligence by deviating from the standard of care in his treatment of plaintiff.

Mercado stated, "[T]he main opinion is the improper fixation of the metatarsal head osteotomy, meaning the cut of the bone where they did the bunionectomy. The screw was too long and prevented the fracture site from healing, which we will show you. You can't—it wouldn't close. The secondary [opinion], and along with early weight bearing, because they allowed her to walk, which can also cause a shifting in it—." Defense counsel objected, arguing Mercado's opinion about early ambulation was new and undisclosed. Counsel argued Mercado disclosed two main opinions: (1) the osteotomy of the great toe was not fixated properly and led to a nonunion of the bone, and (2) the subtalar implant should not have been done because arthritic changes were present. Plaintiff argued the early ambulation contributed to the improper fixation of the osteotomy. Defendants maintained Mercado only disclosed his opinion that the screw fixation was improper. The trial court overruled the objection.

¶ 23 According to Mercado, the procedure performed by Borreggine involved cutting through the metatarsal bone (a v-shaped osteotomy). Then the metatarsal head is physically moved. A screw is inserted across the osteotomy and into the metatarsal head. The cut surfaces of the bone must be very close together in order to properly heal. Mercado testified the cut surfaces of the bone were not right next to each other and it appeared the screw was too long. Defense counsel again objected, this time asserting Mercado never disclosed an opinion as to the length of the screw. The trial court stated, "I am going to give the defense leeway with their expert if he wants to address things that don't strictly conform to the opinions expressed in writing and in the deposition, but I don't find that it is so inconsistent or so different from the opinions that have been disclosed to amount to a violation or calling for a mistrial. So, I will give you that latitude with your expert."

¶ 24 Mercado testified Borreggine used a partially threaded screw, meaning part of the shaft was smooth and part of the shaft was threaded. According to Mercado, when the screw is inserted, the part of the shaft with the threads should be in the metatarsal head, not across the osteotomy. In his professional opinion, Mercado testified Borreggine did not screw the threaded part of the shaft all the way into the metatarsal head. Rather, Borreggine left a portion of the threaded shaft across the osteotomy, holding the cut surfaces of the bone apart from each other. The distance the screw caused between the cut surfaces of the bone was too great to allow the bone to heal, resulting in a nonunion. In Mercado's opinion, the improper placement by Borreggine led to Idusuyi's corrective procedure and plaintiff's subsequent MRSA infection.

¶ 25 Mercado further testified the subtalar implant should not have been used because the X-rays showed an arthritic condition on the talus and the navicular joint. Mercado stated, "if you have arthritis in a joint, that is the number one contraindication for putting [in] subtalar joint implants. According to Mercado, a pre-operative X-ray shows narrowing in the space in plaintiff's joint, an arthritic change. Arthritic changes contraindicate a subtaler implant because "if you lift up the bone by putting an implant in, you will wedge it in. You will have a very rigid foot." The implant was done to correct plaintiff's valgus deformity. According to Mercado, "the sequela of this surgery [was] an overcorrection of the valgus deformity into a varus, meaning turning [plaintiff's heel] in, creating an entirely new problem."

¶ 26 b. Alleged Discovery Deposition Perjury

¶ 27 During his discovery deposition, Mercado stated he began podiatry school at Scholl College. After his first year, he transferred to the Ohio College of Podiatric Medicine. Counsel asked Mercado why he transferred, and Mercado stated it was "an opportunity to move on." The following exchange occurred:

"Q. [DEFENSE COUNSEL:] To move on from what?

A. [MERCADO:] Just to move on. There's no—just my own personal reasons. Nothing—nothing specific.

Q. You didn't have any difficulty at the Scholl College?

A. No.

Q. Grades were not a problem ***?

A. No.

Q. There was no sort of administrative problem at the Scholl College with any activity you had engaged in?

A. Nothing that I personally engaged in. Unfortunately, my father was the chairman of the department of surgery at the time, and they had—they had basically removed his position, and so he was no longer that chairman. And the politics and the—all the politics that were going on, I didn't want to be at the school ***."

Defense counsel later took Dr. John Pryme's evidence deposition. Pryme served on the Scholl College academic review and promotions committee. According to Pryme, Mercado was caught cheating and the members of the committee were asked to evaluate the situation. The committee recommended Mercado be expelled and removed from the institution. That recommendation went to the executive committee. Pryme knew Mercado transferred to another school, but had no knowledge of the actions the executive committee took.

¶ 28 Prior to trial, plaintiff filed a motion *in limine* to exclude this evidence, arguing it would impeach Mercado on a collateral matter and asserting the specific act of cheating was inadmissible under Illinois Rule of Evidence 608 (eff. Jan. 1, 2011). Defendants objected,

arguing the impeacheable event was not the act of cheating itself, but the fact that Mercado lied about why he left Scholl College while under oath at his deposition. The trial court found the cheating evidence irrelevant and too remote (and did not amount to a crime) to be admitted as a crime involving dishonesty under Illinois Rule of Evidence 609 (eff. Jan. 1, 2011). The court further stated, "[Mercado] may well have perjured himself in the deposition, and that can be addressed criminally or professionally but not to the detriment of the plaintiff by providing irrelevant evidence of a collateral matter to the jury."

¶ 29 Prior to concluding cross-examination at trial, defense counsel sought to make an offer of proof regarding this evidence. The trial judge warned Mercado, "I guess I should tell you that I anticipate what the answers are going to be. If your answer would tend to incriminate you of a crime, you do have certain Fifth Amendment rights. From my knowledge of what I think your answers are going to be, that doesn't appear to me to incriminate *** yourself. But I do want you to be aware that you have your right not to incriminate yourself." Thereafter, Mercado asserted his fifth-amendment privilege in response to questions about why he left Scholl College, whether he encountered any problems there, and whether there was an academic finding he had cheated on exams.

¶ 30 4. *Dr. John R. Killough*

¶ 31 Killough testified he first saw plaintiff in July 2008. Killough took X-rays of plaintiff's foot, which revealed, among other things, "a relatively large gap at the first metatarsal, the dorsal aspect, where she had previously had surgeries" and an implant in the subtalar joint. Killough's first assessment was "previous multiple surgeries to the right foot performed by Dr. Borreggine with complications of internal fixation. It does appear that the screw placed into the first MPJ [(metatarsophalangeal joint)] may be a little bit too long, and it may be digging into the

fibular sesamoid, and that may be a major contributor of her pain." On redirect, plaintiff's counsel asked Killough, "In the big toe *** when you are talking about the screw, and you are talking about the length of it, I am asking you if it is possible that the placement of the screw could be the cause of the gap if it was not properly placed or aligned?" Killough responded, "It could have been."

¶ 32 Plaintiff visited Killough later in July 2008 to follow up on a computerized tomography (CT) scan. According to Killough, the CT scan revealed "a nonunion of the osteotomy site of the bunion performed by Dr. Borreggine." Killough advised one treatment option was to send plaintiff "to Dr. Idusuyi and give him a chance to look at this, and he may want to pull out the pin and redo the procedure."

¶ 33 Killough testified, "Once a person has MRSA, if they ever have an infection with staff [*sic*] again, it is probably MRSA again for the rest of their life." According to Killough, MRSA does not lie dormant in the body but, as part of a person's normal flora, there is a staph the body is constantly keeping out. Once a person's staph normal flora becomes resistant to methicillin, it is highly likely any future staph infection will also be methicillin resistant (MRSA).

¶ 34 5. *Dr. Osaretin Idusuyi*

¶ 35 Dr. Osaretin Idusuyi testified, in July 2008, he diagnosed plaintiff with a nonunion of the metatarsal bone following a previous osteotomy. He also diagnosed a problem with the subtalar implant. Idusuyi testified he performed surgery to remove the screw inserted by defendant, cleaned out the nonunion site, took a bone graft from plaintiff's heel, and packed it into the osteotomy site. He explained he used a bone graft because a bone on bone position is needed to heal and it is preferable to fill a space rather than shorten the overall length of the

bone. Idusuyi also removed the subtalar implant to "manipulate the heel out of varus and bring it to more of a valgus positioning."

¶ 36 B. Defendants' Case

¶ 37 1. *Dr. Borreggine*

¶ 38 During the defense's case, counsel sought to elicit testimony regarding the consent forms plaintiff signed. Plaintiff's counsel objected, arguing the case did not involve informed consent. Defense counsel argued the evidence went to credibility and said he would not object to a limiting instruction. The trial court admitted the testimony, telling the jury the evidence was to be considered "solely as to whether or not the plaintiff received various documents." The court further instructed the jury informed consent was not a defense.

¶ 39 Defendant testified he did not agree with Mercado's assessment. He acknowledged the threads of the screw were on both sides of the osteotomy, but maintained there was sufficient compression to properly heal. Defendant further testified the X-rays he took of plaintiff's feet prior to surgery showed no signs of joint space narrowing or other evidence of arthritis. At the first postoperative appointment, plaintiff reported the boot was rubbing on her foot and also reported a burning sensation in her big toe.

¶ 40 On April 1, 2008, defendant's records showed "the patient is doing well. No signs of any problems. Incisions are closed. No sign of any drainage. Pain is minimal. Skin staples will be removed. The patient is discontinued [*sic*] the walker boot and go to surgical shoe. The patient may return to work April 7, sitting only, and then return to us in two weeks." According to defendant, plaintiff's X-rays from April 1, 2008, and April 15, 2008 (shown to the jury as defendants' exhibits Nos. 83 and 84), showed the bones were still touching. These exhibits are not in the record on appeal.

¶ 41 2. *Dr. Louis Sorto*

¶ 42 Defendant's expert witness, Dr. Louis Sorto, testified it was "perfectly acceptable in good practice, and certainly well within the standard of care to have the threads across the osteotomy site." According to Sorto, the contention concerned compression of the fracture site and, in this case, he would not want to compress the fracture site. Sorto testified compressing the fracture site can elevate the metatarsal head, leading to complications. Sorto further testified the postoperative X-rays showed no sign of arthritis whatsoever.

¶ 43 On cross-examination, Sorto expressed his disagreement with a radiologist report reviewing plaintiff's July 2008 CT scan. The radiologist report indicated a nonunion of the right first metatarsal head. Sorto "absolutely" disagreed with this finding. Sorto also disagreed with Killough's and Idusuyi's findings of a nonunion at the osteotomy site.

¶ 44 C. Jury Instructions

¶ 45 The trial court, over defendants' objection, instructed the jury on three matters relevant to this appeal. First, the court gave a nonpattern instruction which read, "It is not a defense to plaintiff's claims of professional negligence against the defendants that the defendants obtained informed consent from the plaintiff to perform the surgery on her right foot." Second, the court instructed the jury, "If a defendant negligently causes injury to the plaintiff, then the defendant is liable not only for the plaintiff's damages resulting from that injury, but is also liable for any damages sustained by the plaintiff arising from the efforts of health care providers to treat the injury caused by the defendant." See Illinois Pattern Jury Instructions, Civil, No. 30.23 (2012) (hereinafter, IPI Civil No.__).

¶ 46 Third, the trial court further gave instructions regarding future damages. One such instruction provided for damages for (1) loss of normal life experienced and reasonably

certain to be experienced in the future, (2) pain and suffering experienced and reasonably certain to be experienced in the future, (3) reasonable expenses for necessary medical care, and (4) the value of earnings lost. See IPI Civil Nos. 30.01, 30.04.01, 30.05, 30.06, 30.07 (2012). The other instruction, verdict form A, provided damages for (1) loss of normal life experienced, (2) loss of normal life reasonably certain to be experienced in the future, (3) the pain and suffering experienced, (4) the pain and suffering reasonably certain to be experienced in the future, (5) the reasonable expense of necessary medical care, and (6) the value of earnings lost. See IPI Civil No. B45.01.A (2012).

¶ 47 D. Verdict

¶ 48 Following deliberations, the jury returned a verdict in favor of plaintiff and against defendants. The jury awarded damages in the sum of $1,269,926.10. For loss of a normal life experienced, the jury awarded $150,000. For loss of a normal life reasonably certain to be experienced in the future, the jury awarded $600,000. For the pain and suffering experienced, the jury awarded $200,000. For the future pain and suffering, the jury awarded $250,000. The jury awarded $45,235.19 for medical expenses. Finally, the jury awarded $24,691 for the value of earnings lost.

¶ 49 This appeal followed.

¶ 50 II. ANALYSIS

¶ 51 On appeal, defendants argue (1) the trial court committed reversible error by refusing to allow defendants to cross-examine plaintiff's expert witness about his alleged perjury during his discovery deposition; (2) multiple other errors occurred which necessitate a new trial; and (3) alternatively, this court should grant a remittitur and reduce the damages award by $850,000.

¶ 52 A. Limitation of Cross-Examination

¶ 53 Defendants argue the trial court erred in precluding defense counsel from cross-examining plaintiff's expert regarding his alleged perjury during his discovery deposition. Defendants ask this court to reverse and enter a judgment in their favor notwithstanding the verdict. Alternatively, defendants request a new trial.

¶ 54 1. *Standard of Review*

¶ 55 Defendants contend our review is *de novo* where the trial court based its ruling on an erroneous conclusion of law. Plaintiff contends a court's decision to grant a motion *in limine* is reviewed for an abuse of discretion.

¶ 56 As a general rule, a trial court's decisions regarding motions *in limine* are reviewed under an abuse-of-discretion standard. *Smith v. Illinois Central R.R.*, 2015 IL App (4th) 140703, ¶ 43, 37 N.E.3d 445. "A reviewing court may find an abuse of discretion only where 'no reasonable person would take the position adopted by the trial court.' " *DiCosola v. Bowman*, 342 Ill. App. 3d 530, 536, 794 N.E.2d 875, 880 (2003) (quoting *Taxman v. First Illinois Bank of Evanston*, 336 Ill. App. 3d 92, 97, 782 N.E.2d 803, 807 (2002)).

¶ 57 2. *Excluding Evidence of Perjury*

¶ 58 Defendants contend the trial court relied on an erroneous conclusion of law in excluding cross-examination regarding Mercado's alleged perjury. In making this argument, defendants rely primarily on *Flynn v. Edmonds*, 236 Ill. App. 3d 770, 602 N.E.2d 880 (1992). In *Flynn*, the plaintiff's expert witness testified, both at his deposition and at trial, he had recently taken his board certification exam for the first time and was waiting for the results. *Id.* at 783, 602 N.E.2d at 887-88. At the time of the expert's deposition, he had been notified more than two months before that he had failed the exam. *Id.* at 787, 602 N.E.2d at 889. At trial, the expert

witness persisted in this testimony on cross-examination. *Id.* at 783, 602 N.E.2d at 887-88. The defendant thereafter called another witness, over the plaintiff's objection, who testified the plaintiff's expert had taken and failed the board certification exam three times. *Id.* at 783, 602 N.E.2d at 888. The jury delivered a verdict in favor of the defendant and the plaintiff appealed, arguing the defense counsel perpetrated a fraud upon the court by not disclosing the expert's perjury during deposition and instead waiting until trial to expose the perjury. *Id.* at 783-84, 602 N.E.2d at 888.

¶ 59 This court found the defense counsel had no duty to disclose the perjured deposition testimony because there was no duty "to disclose the *possibility* that a witness might lie on the stand." (Emphasis in original.) *Id.* at 785, 602 N.E.2d at 889. Moreover, defense counsel was put in a difficult situation. "If they disclose the impeaching information before trial, they can rest assured that the falsely testifying witness will never appear or will testify truthfully on the point that could be subject to impeachment." *Id.* This court concluded the burden of obtaining truthful witnesses rested with the party calling the witness and found the plaintiff had the ability to verify the expert's certifications (or lack thereof) and failed to do so. *Id.* at 786, 602 N.E.2d at 889.

¶ 60 Defendants also rely on *Herington v. Smith*, 138 Ill. App. 3d 28, 485 N.E.2d 500 (1985). In *Herington*, the defendant presented an expert witness who testified "the abundance of treatment rendered the plaintiff [w]as unreasonable, unnecessary[,] and an abuse of professional privilege." *Id.* at 29, 485 N.E.2d at 501. The defendant's expert "was presented to the court and the jury as a licensed chiropractor and a licensed medical doctor." *Id.* at 30, 485 N.E.2d at 501. The expert lied under oath regarding (1) the year he graduated from college; (2) the school he graduated from; (3) the school he received his medical degree from; and (4) his licensure in

Florida (he testified he was licensed to practice medicine when his only license related to homeopathic medicine). *Id.* Upon learning of this "misstatement of credentials," the trial court ordered a new trial. *Id.*

¶ 61 Defendants contend these cases unequivocally establish the trial court erred in precluding defense counsel from cross-examining Mercado about the alleged perjury given during his deposition. We find both *Flynn* and *Herington* distinguishable. In both cases, the opposing party sought to elicit testimony regarding the expert witness's credentials. It appears the expert in *Flynn* had never actually passed the board-certification exams, a matter which speaks not only to the witness's credibility but to the witness's qualifications to even testify as an expert. Similarly, the expert in *Herington* provided perjured testimony regarding the universities he received degrees from and his status as a licensed medical professional. Here, the allegedly perjured testimony regarded Mercado's first year of podiatry school, not the ultimate issue of whether he was qualified to testify as an expert.

¶ 62 Further, defendants assert, "it is error for a trial judge to preclude a party from cross[-]examining the opposing party's expert witness on relevant matters relating to credibility, bias, financial interest[,] and the like." In support, defendants cite *Washington v. Yen*, 215 Ill. App. 3d 797, 799, 576 N.E.2d 61, 63 (1991). We agree the law is well settled that opposing counsel should be given wide latitude to cross-examine expert witnesses, "includ[ing] the opportunity to probe bias, partisanship[,] or financial interest." *Trower v. Jones*, 121 Ill. 2d 211, 217, 520 N.E.2d 297, 300 (1988). In *Washington*, plaintiff's expert repeatedly evaded questions regarding his fees in the matter. The situation was exacerbated when in spite of the trial court's direction that counsel for plaintiff prepare plaintiff to testify regarding the fees, plaintiff testified to a lack of knowledge regarding the fees. Thus, defendant was deprived of the opportunity to

impeach plaintiff's expert regarding his financial interest in the case. *Washington*, 215 Ill. App. 3d at 799, 576 N.E.2d at 63.

¶ 63 A witness may not be cross-examined on irrelevant or collateral matters. *People v. Santos*, 211 Ill. 2d 395, 403-04, 813 N.E.2d 159, 163-64 (2004). "A matter is collateral if it is not relevant to a material issue of the case." *Esser v. MacIntyre*, 169 Ill. 2d 292, 305, 661 N.E.2d 1138, 1144 (1996). The determination of whether a matter is collateral rests within the sound discretion of the trial court. *Whiting v. Coultrip*, 324 Ill. App. 3d 161, 170, 755 N.E.2d 494, 501 (2001). The trial court concluded the evidence of the alleged cheating scandal was irrelevant and collateral and would not be provided to the jury. We agree. Neither the alleged cheating incident, nor the fact Mercado may have lied about it during his deposition, have absolutely anything to do with Mercado's qualifications as an expert, his medical opinions, nor any other material fact in this case. Thus, we conclude the trial court did not abuse its discretion in excluding cross-examination on this point.

¶ 64 3. *Judgment Notwithstanding the Verdict*

¶ 65 Defendants request this court enter judgment in their favor notwithstanding the verdict below. The argument is premised on this court finding the trial court erroneously excluded impeachment evidence of Mercado's perjury. The argument further assumes such a finding somehow eradicates the remainder of Mercado's testimony. However, the standard for granting a judgment notwithstanding the verdict requires this court to view all the evidence in the light most favorable to the nonmoving party. *Smith v. Marvin*, 377 Ill. App. 3d 562, 569, 880 N.E.2d 1023, 1030 (2007). We may not reweigh the evidence and set aside the verdict because the jury could have come to a different conclusion or because we feel a different result is more reasonable. *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 46, 995 N.E.2d

381. We grant a judgment notwithstanding the verdict only where the evidence, viewed in a light most favorable to the nonmoving party, "so overwhelmingly favors the moving party that no other verdict based on the evidence could stand." *Id.*

¶ 66 We cannot say the evidence, viewed in a light most favorable to plaintiff, overwhelmingly favors defendants. Mercado testified consistently regarding his opinion about the screw threads causing a nonunion at the osteotomy site and regarding the presence of arthritic changes contraindicating the subtalar implant. His testimony was supported by the other physicians who testified to the nonunion at the osteotomy site. The only physician who disagreed with that particular finding was defendants' witness. Idusuyi testified he performed surgery to correct the nonunion and remove the subtalar implant. He and Killough also testified about plaintiff contracting MRSA during the corrective surgery. We acknowledge Idusuyi and Killough did not agree with all Mercado's opinions, but that fact supports denying entry of judgment notwithstanding the verdict. We will not enter a judgment notwithstanding the verdict " 'where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome.' " *Velarde v. Illinois Central R.R.,* 354 Ill. App. 3d 523, 537, 820 N.E.2d 37, 52 (2004) (quoting *Maple v. Gustafson,* 151 Ill. 2d 445, 454, 603 N.E.2d 508, 512 (1992)). We decline to set aside the verdict and grant defendants a judgment notwithstanding that verdict based on Mercado's testimony.

¶ 67 B. Miscellaneous Errors

¶ 68 Defendants also challenge alleged miscellaneous errors. These include (1) introduction of new and undisclosed opinions during Mercado's testimony, and (2) improper jury instruction.

¶ 69 1. *New and Undisclosed Theories of Liability*

¶ 70 Illinois Supreme Court Rule 213 "requires parties to furnish, among other things, the subject matter, conclusions[,] and opinions of controlled expert witnesses who will testify at trial." *Foley v. Fletcher*, 361 Ill. App. 3d 39, 47, 836 N.E.2d 667, 674 (2005). An expert witness is limited at trial to the disclosed information. *Id.*

¶ 71 Defendants contend Mercado intentionally and repeatedly offered new and undisclosed opinions regarding (1) the length of the osteotomy screw Borreggine used, (2) whether Borreggine allowing plaintiff to ambulate after the surgery deviated from the standard of care, and (3) whether conservative measures should have been exhausted. Accordingly, defendants assert the trial court abused its discretion in refusing to declare a mistrial because these undisclosed opinions deprived defendants of a fair trial.

¶ 72 Our review of the record reveals defendants have forfeited the latter two claims by failing to include the alleged errors in the written posttrial motion. To properly preserve an issue for review, "[*both*] a trial objection *and* a written posttrial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphasis in original.) *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988). Failing to contemporaneously object and preserve an alleged error in a posttrial motion deprives the trial court of the opportunity to cure the error. *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 99, 995 N.E.2d 381. Because defendants did not properly preserve their claims regarding early ambulation and exhaustion of conservative measures, we decline to address whether the trial court abused its discretion in refusing to declare a mistrial.

¶ 73 Assuming, *arguendo*, the trial court erred when it ruled Mercado's testimony regarding the length of the screw did not amount to a discovery violation, we conclude defendants have failed to show this error deprived them of a fair trial and resulted in actual

prejudice. *Kamp v. Preis*, 332 Ill. App. 3d 1115, 1126-27, 774 N.E.2d 865, 876-77 (2002). Accordingly, we find the trial court did not abuse its discretion in refusing to declare a mistrial. *Topp v. Logan*, 197 Ill. App. 3d 285, 296, 554 N.E.2d 454, 462 (1990). First, Mercado's reference to the length of the screw was made in passing as he described his undisputedly disclosed opinion regarding the improper placement of the screw. The mere mention of the length of the screw was not of such magnitude as to deprive defendants of a fair trial. Defendants also fail to provide a sufficient showing of actual prejudice beyond a bare assertion the undisclosed opinion was prejudicial. Moreover, the comment regarding the length of the screw was cumulative. Dr. Killough testified, without objection from defense counsel, that the screw appeared to be "a little bit long." *Curran Contracting Co. v. Woodland Hills Development Co.*, 235 Ill. App. 3d 406, 413, 602 N.E.2d 497, 502 (1992) ("[T]he record demonstrates that [the witness]'s testimony was cumulative in nature and thus not such that its inclusion was especially prejudicial to defendants."). In their reply brief, defendants argue Mercado's new opinions are not a minor issue because Killough did not testify as to his opinion regarding the standard of care, so Mercado's allegedly new opinion was the only evidence that Borreggine breached the standard of care by using a screw that was too long. However, as we note above, defendants fail to present any argument as to actual prejudice whatsoever beyond a conclusory statement. Moreover, Mercado's testimony primarily related to the threads of the screw in the osteotomy site and how that prevented a nonunion. The passing mention of the length of the screw was hardly enough to prejudice the jury.

¶ 74 2. *Improper Jury Instructions*

¶ 75 Defendants further contend the trial court erred in giving improper jury instructions regarding (1) informed consent, (2) defendants' liability for damages arising from the

efforts of health-care providers to treat the injury negligently inflicted by defendants, and (3) future damages.

¶ 76 "The question of what issues have been raised by the evidence is within the discretion of the trial court. The evidence may be slight; a reviewing court may not reweigh it or determine if it should lead to a particular conclusion." *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 100, 658 N.E.2d 450, 458 (1995). To determine the propriety of the instructions given to the jury, we "consider whether the jury was fairly, fully[,] and comprehensively informed as to the relevant legal principles." *Smith*, 377 Ill. App. 3d at 567, 880 N.E.2d at 1029. Giving an instruction not based on the evidence is error. *Leonardi*, 168 Ill. 2d at 100, 658 N.E.2d at 458.

¶ 77 a. Informed Consent

¶ 78 First, defendants argue the trial court erred in giving plaintiff's requested instruction regarding informed consent. This instruction read, "It is not a defense to plaintiff's claims of professional negligence against the defendants that the defendants obtained informed consent from the plaintiff to perform the surgery on her right foot." Because plaintiff did not allege a claim regarding informed consent, defendants assert this instruction should not have been given, as its only purpose was to confuse the jury. We disagree. Plaintiff testified she signed blank consent forms in passing as she described her second visit with Borreggine. On cross-examination, defense counsel sought to introduce the signed consent form and asked plaintiff numerous questions about the content of the form. During Borreggine's direct testimony, defense counsel sought to ask him questions regarding the consent form. Plaintiff's counsel objected, arguing the level of detail in the questioning was over the top and would confuse the jury. The trial court overruled plaintiff's objection and, with defendants' agreement,

gave the jury a limiting instruction, informing the jurors "informed consent is not a defense in a case of professional negligence."

¶ 79 We conclude the trial court did not abuse its discretion in finding the nonpattern instruction appropriate and supported by the evidence. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 550, 901 N.E.2d 329, 349 (2008). "Whether a court has abused its discretion will depend on whether the nonpattern instruction tendered is an accurate, simple, brief, impartial, and nonargumentative statement of the law." *People v. Shelton*, 401 Ill. App. 3d 564, 581, 929 N.E.2d 144, 162 (2010). No pattern instruction applies to the instant case where the claim does not involve informed consent and where defendants do not raise informed consent as a defense, yet both parties raised the issue of the signed consent form. See *Lauman v. Vandalia Bus Lines, Inc.*, 288 Ill. App. 3d 1063, 1073, 681 N.E.2d 1055, 1063 (1997) ("If a unique factual situation or point of law is presented, *** a trial court may give a non-IPI instruction if it is accurate and has no improper effect on the jury."). The instruction does not unduly emphasize any issue particularly in favor of plaintiff—if anything, it emphasized she was fully informed of the potential risks associated with the surgery, a fact which could have prejudiced her. We cannot say the court abused its discretion in giving this accurate nonpattern instruction.

¶ 80 b. Defendants' Liability

¶ 81 Further, defendants argue plaintiff's proposed instruction regarding defendant's liability for damages arising from the efforts of other health care providers to treat the injury served only to confuse the jury. We disagree. As plaintiff argued, and the trial court agreed, this instruction was necessary because plaintiff suffered further damage as a result of corrective surgery—namely, the MRSA infection she contracted. The instruction ensured the jury would

not infer someone else acted negligently and, accordingly, fail to hold defendants liable for the infection or subsequent surgery.

¶ 82 c. Future Damages

¶ 83 Finally, defendants argue plaintiff's instructions concerning future damages were confusing because one instruction included four categories of damages and another instruction included six categories of damages. (We note defendants' brief erroneously alleges one instruction included seven categories of damages.) These instructions were not unclear or misleading in any way. One instruction provided for damages for (1) loss of normal life experienced and reasonably certain to be experienced in the future, (2) pain and suffering experienced and reasonably certain to be experienced in the future, (3) reasonable expenses for necessary medical care, and (4) the value of earnings lost. The other challenged instruction, verdict form A, provided for damages for (1) loss of normal life experienced, (2) loss of normal life reasonably certain to be experienced in the future, (3) the pain and suffering experienced, (4) the pain and suffering reasonably certain to be experienced in the future, (5) the reasonable expense of necessary medical care, and (6) the value of earnings lost. These two instructions are consistent, clear, and were unlikely to confuse the jury. As the trial court noted, verdict form A merely breaks down the damages for loss of normal life and for pain and suffering already experienced and expected to be experienced in the future.

¶ 84 C. Damages and Remittitur

¶ 85 Defendants argue the jury's verdict was the result of passion or prejudice due to the multitude of claimed errors. For the reasons set forth above, we conclude no error occurred which affected the outcome of the case. "Where it appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done,

the judgment or decree will not be disturbed." (Internal quotation marks omitted.) *Simmons v. Garces*, 198 Ill. 2d 541, 566-67, 763 N.E.2d 720, 736 (2002).

¶ 86 Defendants also contend the verdict was against the manifest weight of the evidence. We disagree. "A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence." *Snelson v. Kamm*, 204 Ill. 2d 1, 35, 787 N.E.2d 796, 815 (2003). We may not reweigh the evidence and substitute our judgment for that of the jury. *Id.*

¶ 87 The jury heard testimony from plaintiff's expert witness that the surgical screw was improperly inserted, in violation of the standard of care, and resulted in a nonunion at the osteotomy site. Mercado also testified the subtalar implant was contraindicated by arthritic changes, resulting in an overcorrection of the valgus deformity and creating an entirely new problem. The jury heard testimony from plaintiff's two treating physicians, Killough and Idusuyi, who testified to the nonunion at the osteotomy site, the problem with the subtalar implant, and plaintiff's contraction of MRSA during the corrective surgery. On the other hand, the jury also heard testimony from defendants' expert, who disagreed with the other testifying physicians with regard to the nonunion at the osteotomy site.

¶ 88 Ultimately, this case came down to a "battle of the experts," where experts gave their professional opinions as to the standards of care. *Guski v. Raja*, 409 Ill. App. 3d 686, 704, 949 N.E.2d 695, 711 (2011). The jury weighed the conflicting evidence and determined which witnesses were more credible. Ultimately, the jury determined the witnesses supported plaintiff's theory of the case and rendered its verdict accordingly. *Id.* Although there were differing expert opinions, "[c]onflicts in the evidence and disagreements among experts do not make a verdict

against the manifest weight of the evidence." *Downey v. Dunnington*, 384 Ill. App. 3d 350, 389, 895 N.E.2d 271, 303 (2008).

¶ 89 Defendants argue the only evidence of plaintiff's "current limitations" consists of her own testimony and no medical testimony supports any such problems. Defendants cite no authority to support the idea that a plaintiff's testimony about her physical problems requires "medical testimony" to corroborate it. Plaintiff's testimony, coupled with the testimony from the various physicians regarding the complications in the surgery performed by defendant and the corrective surgery performed by Idusuyi, is sufficient to support the jury's verdict. We agree plaintiff's unrelated medical conditions are just that—unrelated.

¶ 90 Defendants finally seek a remittitur, asserting there was insufficient evidence to support the jury's $850,000 award for future loss of normal life and future pain and suffering. Accordingly, defendants ask this court to reduce the damage award to $419,926.10.

¶ 91 Remittitur allows a reviewing court to correct an excessive jury verdict. *Estate of Oglesby v. Berg*, 408 Ill. App. 3d 655, 661, 946 N.E.2d 414, 419 (2011). "The trier of fact determines the amount of damages and, as a reviewing court, we give great deference to a jury's award of damages." *Id.* at 661-62, 946 N.E.2d at 419. "This court will not upset a jury's award of damages 'unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss suffered.' " *Snover v. McGraw*, 172 Ill. 2d 438, 447, 667 N.E.2d 1310, 1315 (1996) (quoting *Gill v. Foster*, 157 Ill. 2d 304, 626 N.E.2d 190, 195 (1993)).

¶ 92 We conclude the evidence was sufficient to support the future damages in this case. Plaintiff testified she can no longer go on walks with her children, play basketball with her daughter, or engage in other activities that require time on her feet. She also testified she was in

pain every day. The fact that plaintiff lost an opportunity for a promotion at Subway could have led the jury to conclude she might have difficulty finding or changing employment in the future. Moreover, plaintiff contracted MRSA during the corrective surgery, a condition Killough testified would make it almost inevitable she would have MRSA if she ever contracts a staph infection again. We cannot say the jury's award of future damages bears no relationship to the loss suffered or was a result of passion or prejudice.

¶ 93 III. CONCLUSION

¶ 94 For the reasons stated, we affirm the trial court's judgment.

¶ 95 Affirmed.