SECOND DIVISION
March 21, 2017

No. 1-16-0772

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BOZENA SMITH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	07 L 007113
	)	
MARK GONZALEZ, M.D.,	)	The Honorables
	)	Brigid McGrath,
Defendant-Appellee.	)	John Griffin, and
	)	Elizabeth Budzinski,
	)	Judges Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Reversal of the trial court's ruling denying plaintiff's motion for a new trial not warranted because the trial court properly: (1) barred supplemental discovery, including expert opinions, filed after the close of discovery; (2) instructed the jury; (3) excluded portions of a witness's evidence deposition; and (4) impaneled a juror who was not a party to a cause pending for trial.

¶ 2 In this medical malpractice action against defendant Mark Gonzalez, M.D., plaintiff Bozena Smith appeals the trial court's ruling denying her motion for a new trial. Smith claims that a new trial is warranted because the trial court erred in: (1) striking supplemental discovery

disclosing post-surgery treatments and opinion testimony; (2) using the long form proximate cause instruction where no evidence supported such instruction; (3) rejecting her tendered lost chance doctrine instruction; (4) striking portions of her witness's evidence deposition; and (5) impaneling a juror who had a cause pending in the trial court. Finding no error, we affirm.

¶ 3 BACKGROUND

¶ 4 On June 22, 2006, Smith underwent an elective outpatient surgical procedure (right radius osteoplasty shortening of right forearm to relieve a condition known as Kienbock's Disease[1]) performed by attending surgeon Gonzalez and assisted by Dr. Harold Bach, who was a senior orthopedic resident, at the University of Illinois Chicago Medical Center. Following her discharge around mid-day, Smith experienced severe pain and returned to the hospital after unsuccessfully attempting to contact Dr. Gonzalez three separate times at 3:15 p.m., 6:07 p.m., and 6:12 p.m. Dr. Gonzalez did not respond to the three pages.

¶ 5 At around 7:30 p.m., Smith was evaluated in the emergency room for increased pain and swelling. She was later admitted to the orthopedic surgery floor where several orthopedic surgery residents, including Brian Murphy, M.D. and James McFadden, M.D., evaluated Smith and determined, in their judgment, it was not necessary to contact Dr. Gonzalez about Smith's condition. Smith remained in the hospital overnight and into the following evening for observation. During the evening of June 23, a different doctor called Dr. Gonzalez to inform him about Smith's condition. Shortly thereafter, Dr. Gonzalez examined and diagnosed Smith with right upper forearm and hand compartment syndrome. Dr. Gonzalez, again assisted by Dr.

[1] Kienbock's Disease is a condition that results from an interruption in the blood supply to one of the small bones in the wrist and can cause wrist pain, limited range of motion in the affected wrist, decreased grip strength in the hand and pain or difficulty in turning the hand upward. http://orthoinfo.aaos.org/topic.cfm?topic=a00017 (last visited March 16, 2017).

Bach, performed a second surgery, this time a right volar forearm fasciotomy, carpal tunnel release and dorsal hand fasciotomy.

¶ 6 Because Smith continued to experience pain years after the surgical procedures, she received treatment at Illinois Masonic Medical Center from doctors Saleh Rifai and Kenneth Candido, which included epidural steroid injections and the implant of a cervical spine cord stimulator on August 1, 2013.

¶ 7 On July 10, 2007, Smith filed this medical professional negligence action against Dr. Gonzalez asserting that the inability to contact him caused a delay in diagnosing and treating her right hand and forearm compartment syndrome resulting in a loss of right hand and forearm function. According to Smith, residents McFadden and Murphy should have notified Dr. Gonzalez, as attending surgeon, immediately after discovering the swelling and discoloration of her right wrist and hand, which were classic symptoms of compartment syndrome. Smith asserted that Dr. Gonzalez was vicariously liable—as "captain of the ship"—for the residents' failure to notify him about her condition and return to the hospital. But Smith did not allege that Dr. Gonzalez deviated from the standard of care in performing the surgeries. Smith also raised a negligence cause of action against doctors Murphy, McFadden, and Bach.

¶ 8 During discovery, Smith's previously disclosed expert, Dr. Robert Quinn, withdrew his opinion criticizing the residents' conduct and, instead, testified that in his opinion, the residents who cared for Smith did not deviate from the standard of care.

¶ 9 The trial court entered an order closing discovery as of May 24, 2011, and set October 17, 2011 as the trial date. Dr. Gonzalez filed a summary judgment motion asserting that Smith's vicarious liability claim (which he claimed was the only theory of liability against him) predicated on his alleged liability for the conduct of the residents was not a cognizable claim and courts had previously rejected the same theory. The residents also moved for summary judgment

given that Smith's expert withdrew all negative opinions concerning the care the residents provided to her.

¶ 10 On October 14, 2011, Smith filed her response to the summary judgment motions and attached the affidavit of Dr. Selim El-Attrache, a previously undisclosed expert, who averred that in his opinion and to a reasonable degree of medical certainty, residents McFadden and Murphy deviated from the standard of care in failing to notify Dr. Gonzalez of Smith's post-surgery complications and that she had returned to the hospital. Smith, without leave of court, also supplemented her answers to Rule 213(f)(3) Interrogatories to disclose Dr. El-Attrache. The residents moved to strike the affidavit because Smith sought to admit new evidence even though discovery had been closed since May 24, 2011, and Smith made no prior effort to disclose Dr. El-Attrache. The trial court barred Dr. El-Attrache's affidavit because discovery was closed, the matter had been set for trial, and Smith disclosed Dr. El-Attrache in response to the summary judgment motion. With respect to Dr. Gonzalez, Smith argued that she was proceedings not only on a theory of vicarious liability, but also based on Dr. Gonzalez's claimed failure to train residents on the appropriate protocol for contacting him regarding his patients, thus resulting in the delay in treating her post-operatively.

¶ 11 The trial court later denied Dr. Gonzalez's summary judgment motion. The trial court also denied Dr. Gonzalez's motion to reconsider, but clarified that Dr. Gonzalez could not be held vicariously liable for the residents' failure to diagnose the compartment syndrome or the care they provided to Smith, finding that the residents were not under Dr. Gonzalez's direct control.

¶ 12 As to the residents' summary judgment motion, the trial court granted the motion and entered a Rule 304(a) finding. Smith appealed that ruling. While Smith's appeal was pending, the parties appeared in court numerous times for status hearings and other matters relating to the

trial court's ruling on Dr. Gonzalez's motion for summary judgment. But the trial court on its own motion, stayed trial pending the outcome of Smith's appeal against the residents.

¶ 13 In an opinion dated July 16, 2013, this court affirmed the trial court's grant of summary judgment in the residents' favor. *Smith*, 2013 IL App (1st) 121839, ¶ 39. The central issue on appeal was whether the trial court abused its discretion in barring Dr. El-Attrache's affidavit that Smith attached to her response to the summary judgment motion. *Id*. ¶ 15. This court found no error. *Id*. ¶ 39.

¶ 14 On January 13, 2014, Smith advised the trial court of "new" medical treatments that she was undergoing at Illinois Masonic and requested to supplement the record with the relevant medical records and Dr. Candido's testimony regarding the cause of her injuries. Over Dr. Gonzalez's objection, the trial court entered an order permitting Smith to obtain records relating to the subsequent treatment provided by doctors at Illinois Masonic after discovery closed in May of 2011. Smith then filed a supplemental disclosure of medical records and supplemental answers to Rule 213(f) Interrogatories. Because discovery had closed in May of 2011, Dr. Gonzalez objected to the introduction of Smith's new evidence and moved to bar the supplemental disclosures. Dr. Gonzalez argued that the "new" treatment was actually provided on several occasions before the close of discovery, but Smith neglected to timely supplement the record waiting instead nearly three years to disclose new opinions and records. The trial court granted Dr. Gonzalez's motion to strike and barred the admission of any medical care and testimony not disclosed by the discovery cutoff date as a sanction for violating discovery rules.[2]

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2 During the pendency of Smith's appeal, the case was reassigned from Judge Brigid McGrath, who ruled on the summary judgment motions, to Judge John Griffin, who ruled on Dr. Gonzalez's motion to strike.

¶ 15 In its written order, the trial court also noted Smith's prior attempt to admit Dr. El-Attrache's affidavit after discovery closed, and held that Smith's later attempt to supplement the record should be excluded as untimely consistent with the court's earlier ruling. Smith filed a motion to reconsider arguing that the records and testimony she sought to admit related to treatments she received after discovery closed. The trial court denied Smith's motion, and noting this court's holding in *Smith I*, found that the supplemental disclosure would be prejudicial to Dr. Gonzalez. The trial court also set February 2, 2015, as the trial date, but later entered an order setting the case for a jury trial on September 10, 2015.

¶ 16 Before trial started, the trial court[3] ruled on objections made during the evidence deposition of Smith's witness, Dr. David Fabi, who at the time of Smith's surgery was a first year orthopedic resident reporting to Dr. Gonzalez and who also treated Smith. At trial, the issues for the jury to decide were whether Dr. Gonzalez was negligent because he failed to: (1) establish a proper communication system to alert him that Smith returned to the hospital and (2) return Smith's post-surgery telephone calls. During trial, the jury heard testimony from the residents stating that they could have contacted Dr. Gonzalez had they thought his input and guidance regarding Smith's condition were necessary.

¶ 17 As to jury instructions, the trial court, at Dr. Gonzalez's request, gave the long form Illinois Pattern Jury Instruction 12.04 (IPI 12.04) (IPI, Civil (2006) No. 12.04))—the conduct of some other person—over Smith's objection. The trial court rejected Smith's tendered non-pattern jury instruction on the lost chance doctrine, which posited that she suffered permanent nerve damage and complex regional pain syndrome because of Dr. Gonzalez's delayed diagnosis and

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[3] The case was reassigned to Judge Budzinski, who ruled on Dr. Gonzalez's objections to Dr. Fabi's deposition testimony and presided over trial.

treatment. Following a two-week trial, the jury returned a verdict and judgment in Dr. Gonzalez's favor. After the trial court denied Smith's motion for a new trial, she timely appealed that ruling.

¶ 18 ANALYSIS

¶ 19 Smith contends that her motion for a new trial should have been granted because the outcome of her trial was negatively impacted by the following trial court errors: (1) striking supplemental discovery disclosures regarding post-surgery treatment and causation opinions; (2) providing the jury with faulty instructions; (3) striking portions of her witness's evidence deposition; and (4) impaneling a juror who had a case pending in the trial court. We will reverse a trial court's denial of a motion for a new trial only where it is affirmatively shown that the trial court abused its discretion. *Crowley v. Watson*, 2016 IL App (1st) 142847, ¶ 29. A trial court abuses its discretion where its "ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Seymour v. Collins*, 2015 IL 118432, ¶ 41.

¶ 20 A. Supplemental Discovery

¶ 21 Smith first contends that a new trial is warranted because the trial court abused its discretion in barring Dr. Candido's testimony and medical treatment records at Illinois Masonic given the fact that treatments began after the close of discovery and Dr. Candido's causation opinions were unknown before the discovery cutoff date. Regardless, Smith claims that the medical records and Dr. Candido's testimony were disclosed 20 months in advance of the actual trial date. Smith asserts that the outcome of her trial was negatively impacted due to the lack of evidence presented to the jury regarding the proximate cause of her injuries that would have been offered through Dr. Candido's testimony and subsequent medical treatment records.

¶ 22 Dr. Gonzalez claims Smith forfeited review of this claim because she failed to make an offer of proof at trial about the specific evidence and testimony she sought to have admitted through Dr. Candido. We disagree because Smith sufficiently informed the trial court with specificity that went beyond a mere summation of Dr. Candido's anticipated testimony, and the nature of the treatment records were revealed to the trial court. Moreover, the parties briefed this issue for the trial court's consideration before trial began. Consequently, Smith has preserved this issue.

¶ 23 A trial court may impose a sanction for a party's violation of discovery rules and court orders. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 110 (2004). As a sanction, the trial court may exclude a witness's testimony. *Id*. We review a trial court's imposition of such a sanction for an abuse of discretion. *Id*.; *In re D.T.*, 212 Ill. 2d 347, 356 (2004).

¶ 24 Although the evidence Smith sought to admit against Dr. Gonzalez and the residents differed, the relevant law regarding the admission of evidence is equally applicable in both cases. Indeed, Smith, in both instances, sought to admit previously undisclosed expert testimony after discovery was closed and the case set for trial. *Smith v. Murphy*, 2013 IL App (1st) 121839, ¶¶ 20, 22 (*Smith I*). *Smith I* held that Dr. El-Attrache's affidavit attached to Smith's response to the residents' summary judgment motion "was nothing more than a thinly veiled attempt to circumvent the trial court's discovery orders and its authority to reasonably regulate the parties' discovery process in the interests of justice during litigation." *Id*. ¶ 36. *Smith I* affirmed the trial court's exclusion of evidence offered in violation of discovery rules. *Id*. ¶ 39.

¶ 25 Here, Smith is again attempting to circumvent the trial court's discovery orders by offering another undisclosed expert opinion and medical records under circumstances nearly identical to those in *Smith I* despite our admonishment in that case. Smith again sought to admit evidence after the close of discovery and after the parties represented that the case was ready for

trial. A different outcome after applying the reasoning of *Smith I* to the facts of this case is not warranted because, like *Smith I*, the supplemental evidence that Smith sought to admit was not timely disclosed.

¶ 26 Moreover, the trial court considered the relevant factors used to determine whether barring testimony was the appropriate sanction for untimely disclosure and after weighing those relevant factors, properly found that the appropriate sanction was to exclude Dr. Candido's testimony and bar the admission of any new medical treatment not disclosed as of the close of discovery. Although Smith contends that Dr. Candido began treating her in 2012, after the close of discovery, we cannot ignore the fact that Smith did not disclose Dr. Candido's anticipated testimony until January of 2014 despite her appearance in court numerous times from 2012 to 2014. The fact that Smith's claims against the residents were on appeal and that trial was stayed pending the outcome of that appeal was not an invitation to Smith to seek out new expert opinions and medical evidence after the close of discovery. And, in any event, Smith offers no excuse for her delay in disclosing information regarding new medical treatment nor did she ever seek to reopen discovery to address this new information. Nothing in the record reveals that Smith was diligent in timely disclosing the "new" evidence. Consequently, the trial court acted within its sound discretion in barring Smith's untimely supplemental discovery of an undisclosed expert opinion and medical records.

¶ 27 B. Jury Instructions

¶ 28 Smith claims that a new trial is warranted because the trial court improperly instructed the jury by: (1) giving the long form proximate cause instruction set forth in IPI 12.04 and (2) rejecting her tendered lost chance doctrine instruction.

¶ 29 First, Smith claims that use of long form IPI 12.04 was improper because Dr. Gonzalez offered no competent evidence demonstrating that the conduct of another person was the sole

proximate cause of her injury. The long form IPI 12.04 included the instruction's second paragraph stating: "However, if you decide that the sole proximate cause of injury to the Plaintiff was the conduct of some person other than the Defendant, then your verdict should be for the Defendant." Smith contends that the long form instruction is only appropriate where the *sole*—and not an additional—proximate cause of a plaintiff's injury is the conduct of another person. *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 134 (1997). Smith asserts that a new trial is warranted because the trial court gave the jury a faulty instruction not supported by the required proximate cause evidence.

¶ 30 It is within the trial court's discretion to give or reject a tendered instruction and the trial court's decision will not be disturbed absent an abuse of that discretion. *Schultz v. Northeast Illinois Regional Commuter Railroad Corp.*, 201 Ill. 2d 260, 273 (2002). A party is entitled to have the jury instructed on any theory of the case supported by the evidence provided the instructions given clearly and fairly instruct the jury. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 549 (2008). This court will reverse a trial court for giving a faulty instruction where the instruction clearly misled the jury and resulted in prejudice to the appellant. *Schultz*, 201 Ill. 2d at 274.

¶ 31 We find that the jury was properly instructed with long form IPI 12.04 because, contrary to Smith's claim, there was *some* evidence in the record that another person may be the sole proximate cause of Smith's injuries. Specifically, the defense conveyed that the residents "might be the sole proximate cause" of Smith's injuries because the residents testified that they never contacted Dr. Gonzalez about Smith's condition after she returned to the hospital. The minimum threshold required to tender a jury instruction is that there must be *some* evidence in the record supporting the instruction. *Leonardi v. Loyola University of Chicago*, 262 Ill. App. 3d 411, 417 (1993). Here, that threshold was met. Smith's theory of the case was that Dr. Gonzalez's delay

in diagnosing her proximately caused her injuries. But the defense offered evidence revealing that the residents never contacted Dr. Gonzalez regarding Smith's condition and that the first he learned of Smith's re-admission was during the evening of June 23, approximately 24 hours after she was admitted. Because the jury could find that one of the residents who failed to contact Dr. Gonzalez regarding Smith's condition was the sole proximate cause of her injuries that she claimed were caused by the delay, there was some evidence supporting use of long form IPI 12.04. Consequently, we cannot say that the trial court abused its discretion in instructing the jury with IPI 12.04.

¶ 32 Smith also claims that the trial court erred in denying her tendered lost chance doctrine instruction. Smith contends that the proximate cause instructions given to the jury were inadequate because the jury was not sufficiently instructed on the theory that Dr. Gonzalez's malpractice (*i.e.*, the delay in treating her) proximately caused the increased risk of harm or lost chance of recovery. Smith claims that because the jury was not instructed on the lost chance of recovery theory, it was not adequately instructed on proximate cause, thus warranting a new trial.

¶ 33 In medical malpractice actions, the lost chance doctrine refers to injuries the plaintiff sustained from medical providers who negligently "deprived the plaintiff of a chance to survive or recover from a health problem, or where the malpractice has lessened the effectiveness of treatment or increased the risk of an unfavorable outcome to the plaintiff." *Holton*, 176 Ill. 2d at 111. The lost chance doctrine is not a separate theory of recovery, but a factor that enters into the probable cause analysis in medical malpractice cases when the plaintiff claims that the defendant's negligent delay in diagnosis or treatment has lessened the effectiveness of otherwise appropriate treatment. *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 466 (2001). For example, in *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 108 (1997), testifying doctors stated that had they received complete and accurate information regarding the gradual onset of the patient's paralysis,

they would have had the opportunity to properly treat her condition increasing the probability of avoiding or minimizing her paralysis. To prevail in lost chance medical malpractice cases, the plaintiff need only demonstrate with a reasonable degree of medical certainty that the malpractice lessened the effectiveness of the treatment to plaintiff. *Lambie v. Schneider*, 305 Ill. App. 3d 421, 426 (1999).

¶ 34 An instruction addressing the lost chance doctrine is a non-pattern jury instruction. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 45 (2010). But a trial court is required to use an IPI instruction, giving due consideration to the facts and the prevailing law, unless the trial court finds that it does not accurately state the law. Ill. S. Ct. R. 239(a) (eff. Jan. 1, 1999); *Matarese v. Buka*, 386 Ill. App. 3d 176, 179 (2008). Only where there is no IPI instruction covering an issue for the jury's consideration does the trial court have discretion to give a non-pattern jury instruction. Ill. S. Ct. R. 239(b) (eff. Jan. 1, 1999); *People v. Hudson*, 222 Ill. 2d 392, 400 (2006).

¶ 35 Importantly, this court has consistently rejected Smith's claim of error that the given IPI on proximate cause inadequately instructed the jury on the lost chance doctrine. *Cetera*, 404 Ill. App. 3d at 45 (citing *Sinclair*, 325 Ill. App. 3d at 463–64); *Lambie*, 305 Ill. App. 3d at 429; *Henry v. McKechnie*, 298 Ill. App. 3d 268, 274 (1998)). Indeed, the proximate cause instruction set forth in IPI 15.01 (IPI Civil (2006) No. 15.01) given to Smith's jury has been found to accurately state the law in lost chance medical malpractice cases. *Id.*; see *Sinclair*, 325 Ill. App. 3d at 467 (finding that the lost chance doctrine, as a form of proximate cause, was encompassed within IPI 15.01 given to the jury.) Smith offers no compelling reason to depart from the soundly reasoned decisions rejecting a non-pattern jury instruction on the subject of the lost chance doctrine. Likewise, nothing in the record supports Smith's claim that the combined use of long form IPI 12.04 and IPI 15.01 confused and misled the jury on how to decide proximate

cause. Consequently, the trial court did not abuse its discretion in rejecting Smith's alternative non-pattern lost chance doctrine instruction where the pattern jury instructions on proximate cause (long form 12.04 and 15.01) properly instructed the jury and encompassed the lost chance doctrine.

¶ 36 Moreover, the jury reached a general verdict in favor of Dr. Gonzalez and there was no special interrogatory on the issue of proximate cause thus rendering any error in jury instructions harmless as the jury may not have reached that issue. *Jones v. Beck*, 2014 IL App (1st) 131124, ¶ 30. In other words, the jury could have concluded that Dr. Gonzalez did not breach the standard of care relative to patient communications or training residents involved in his patient's care regarding such communications, in which case it would not have reached issues relating to proximate cause.

¶ 37 C. Evidence Deposition Objections

¶ 38 Smith claims that the trial court erred in sustaining objections to Dr. Fabi's evidence deposition, and that exclusion of this testimony negatively impacted the outcome of her trial. Smith asserts that the trial court's evidentiary rulings were error because: (1) no leading questions were asked; (2) no questions were asked relating to the vicarious liability ("captain of the ship") theory previously disposed of on summary judgment; and (3) no questions were allowed addressing the crux of her legal theory that Dr. Gonzalez failed to have an adequate communication system in place to alert him of problems with his patients. Smith asserts a new trial is warranted because the cumulative effect of the stricken testimony prevented critical information from being presented to the jury.

¶ 39 Dr. Gonzalez first argues that Smith forfeited this claim because she failed to specify with particularity the testimony that she asserts was erroneously excluded in her posttrial motion. But based on our review of Smith's motion for a new trial, we find that Smith preserved this

claim. We note that Smith elaborated in her reply the rulings she was contesting and, unlike in her motion for a new trial, included specific questions and answers rather than a citation to the excluded portion of Dr. Fabi's transcript. Importantly, the waiver rule's purpose is to ensure that the trial court had the opportunity to rectify errors before they are raised on appeal. *People v. Anderson*, 407 Ill. App. 3d 662, 667 (2011). Here, during the hearing on the motion for a new trial, the trial court noted Smith's claims of error regarding its rulings on Dr. Fabi's evidence deposition and reaffirmed its prior rulings. Consequently, it is apparent that the trial court was aware of and had an opportunity to consider Smith's asserted claims of error. *Id.*; *People v. Minter*, 2015 IL App (1st) 120958, ¶ 43. Accordingly, Smith's asserted claims of error regarding the exclusion of portions of Dr. Fabi's testimony have not been forfeited. We review the trial court's evidentiary rulings for an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 40 Our review of the contested evidentiary rulings reveals that the trial court acted within its discretion in excluding portions of Dr. Fabi's evidence deposition. Regarding Dr. Gonzalez's objections that certain questions were leading, Smith correctly notes that merely because a witness provides monosyllabic answers to questions does not conclusively establish that a leading question was asked, *i.e.*, a leading question may be asked to repeat and confirm what was already said in response to a non-leading question. A leading question is suggestive by definition because it " 'suggests the answer to the person being interrogated; espec[ially] a question that may be answered by a mere "yes" or "no." ' " *People v. Miles*, 351 Ill. App. 3d 857, 866 (2004) (quoting Black's Law Dictionary 897 (7th ed. 1999)).

¶ 41 During his evidence deposition, Dr. Fabi was asked the following series of questions:

> "Q: And then you would have a clinic with him in room 2-A at the University of Illinois from 1:00 to 5:00 on Fridays, correct?
>
> MR. HILL: Objection Leading.

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Q: And do you agree that in June of 2006, any ultimate decision regarding one of Dr. Gonzalez's patients would be ultimately determined by him and him alone?

MR. HILL: Objection Leading."

As these questions demonstrate, Dr. Fabi was asked impermissibly suggestive or leading questions stated in a way to "suggest" the desired answer and requiring nothing more than a simple "yes" or "no" in response. We have examined the remainder of the contested questions and find that the trial court properly sustained objections to form because the questions simply cannot be categorized as non-leading open-ended questions.

¶ 42 Likewise, the trial court properly sustained objections to questions on the subject of Dr. Gonzalez's vicarious liability for the conduct and supervision of residents because the trial court had already considered and rejected that legal theory when it granted partial summary judgment in Dr. Gonzalez's favor. Given the trial court's rejection of that legal theory, the trial court properly excluded this testimony and any additional evidence relating to Dr. Gonzalez's vicarious liability. Contrary to Smith's claims, this line of questioning was not clearly targeted to address her theory that her injuries resulted from an allegedly inadequate communication system.

¶ 43 Because Smith did not address Dr. Gonzalez's objections on the grounds of relevancy and foundation in her opening brief, she has forfeited any claims of error as to those objections. *Vancura v. Katris*, 238 Ill. 2d 352, 369-73 (2010) (appellant forfeits a point by failing to argue the point in the opening brief.) Accordingly, we will not review the trial court's rulings on those grounds.

¶ 44 In sum, the trial court's rulings regarding each contested objection were not an abuse of discretion and the excluded testimony should not have been admitted merely on the basis that the testimony allegedly supported Smith's theory of liability when the contested testimony was

otherwise objectionable. Consequently, a new trial is not warranted based on the trial court's evidentiary rulings excluding portions of Dr. Fabi's testimony.

¶ 45 D. Impaneled Juror

¶ 46 Finally, Smith claims that the trial court erred in impaneling Joseph P., who served as the jury's foreman, while his DUI case was "pending for trial." Smith claims that the trial court had a statutory duty to excuse Joseph P. because he was subject to the trial court's jurisdiction while serving his court imposed supervision, yet acted as foreman of Smith's jury.[4]

¶ 47 Section 14 of the Illinois Jury Act (705 ILCS 305/14 (West 2006)) states in relevant part:

> "It shall be sufficient cause of challenge of a petit juror that he lacks any one of the qualifications mentioned in Section 2 of this Act; or if he is not one of the regular panel, that he has served as a juror on the trial of a cause in any court in the county within one year previous to the time of his being offered as a juror; or *that he is a party to a suit pending for trial* in that court. It shall be the duty of the court to discharge from the panel all jurors who do not possess the qualifications provided in this Act, as soon as the fact is discovered." (Emphasis added.) 705 ILCS 305/14 (West 2006).

¶ 48 One statutory basis for disqualifying a juror is the pendency of a lawsuit. *People v. Lake*, 298 Ill. App. 3d 50, 56 (1998). A prospective juror who has a pending suit must be removed for cause. *Id*. The trial court has no discretion to allow a prospective juror to be part of a jury when he is subject to a statutory disqualification. *People v. O'Malley*, 143 Ill. App. 3d 474, 478 (1986). But this court has routinely stated that "a failure to challenge a juror for cause or by

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4 We, as did the trial court, will assume the Joseph P. who served on the jury was the same individual reflected in the uncertified copies of the docketing statement and sentencing order provided by Smith.

peremptory challenge waives any objection to that juror." *People v. Bowman*, 325 Ill. App. 3d 411, 425-26 (2001) (citing *People v. Wilson*, 303 Ill. App. 3d 1035, 1042 (1999) (quoting *People v. Ford*, 19 Ill. 2d 466, 475 (1960) (a defendant who fails to use his peremptory challenges "is in no position to complain concerning jury selections."))); *People v. Curtis*, 262 Ill. App. 3d 876, 887-88 (1994).

¶ 49 Importantly, Smith acknowledges that Joseph P. did not raise his hand during *voir dire* when the trial court asked if any of the prospective jurors had a case pending. Apparently, after Joseph P. was selected as a juror, he approached Smith's counsel to ask him a question about his own case, which is how counsel learned of Joseph P.'s DUI case and his supervision sentence. But Smith is claiming that the trial court erred in allowing Joseph P. to sit as a juror when no challenge to that juror was raised at all and although Smith's counsel knew of Joseph P.'s DUI case, he failed to raise the issue until Smith's posttrial motion for a new trial.

¶ 50 In any event, Joseph P.'s case was not pending for trial when he served as a juror in Smith's case. The record reflects that Joseph P. signed a jury trial waiver relating to his DUI charge on April 13, 2015, and on that same day, the trial court sentenced him to 18 months of supervision ending on October 17, 2016. By the time Dr. Gonzalez filed his amended jury demand on May 4, 2015, Joseph P.'s case had already been disposed of and was no longer pending for trial. Accordingly, the trial court properly impaneled the juror.

¶ 51 CONCLUSION

¶ 52 For the reasons stated, we affirm the trial court's ruling denying Smith's motion for a new trial.

Affirmed.