2017 IL App (1st) 162668-U

FIRST DIVISION
September 5, 2017

No. 1-16-2668

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMY ZEHNDER, Plaintiff-Appellant, v. JAY M. DUTTON, Defendant-Appellee,	)	Appeal from the Circuit Court of Cook County, No. 13 L 002760 Honorable Arnette R. Hubbard, Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Justice Harris and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion when it gave the jury the premises liability instruction proffered by the defendant rather than the general negligence instruction proffered by the plaintiff; (2) The bases on which the trial court denied the plaintiff's motion for a new trial are no longer relevant; (3) The trial court did not abuse its discretion by denying the plaintiff's motion *in limine* to bar a portion of testimony from the treating doctor's evidence deposition.

¶ 2 Plaintiff Amy Zehnder, a personal trainer and fitness instructor, had been on a few dates with defendant Jay Dutton when she accepted his invitation to see the home gym in his basement. When they arrived, the two took turns showing each other various exercises. One

piece of equipment Mr. Dutton possessed was a pull-up bar, marketed as the "Iron Gym," which was meant to be hung on a door frame. Instead, Mr. Dutton hung the pull-up bar on an I-beam in his basement. Ms. Zehnder was injured when she and the bar both fell from the I-beam.

¶ 3 Ms. Zehnder filed a personal injury lawsuit against Mr. Dutton alleging a single claim of what her complaint labeled as "Premises Liability." The jury found in favor of Mr. Dutton. On appeal, Ms. Zehnder requests a new trial, contending that the trial court (1) abused its discretion by giving the jury Mr. Dutton's proffered instruction on premises liability rather than her proffered instruction on general negligence; (2) relied on an improper basis in denying her motion for a new trial; and (3) abused its discretion by denying her motion *in limine* to bar part of the deposition testimony of one of her treating physicians from being read to the jury. For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 In the operative complaint in this case, filed on May 5, 2015, Ms. Zehnder alleged that she sustained personal injuries "on March 19, 2011, while lawfully at [Mr. Dutton's] home using a pull-up bar." Ms. Zehnder asserted a single claim, labeled "Premises Liability" against Mr. Dutton, alleging that he "owned, maintained, operated and controlled" a premises in Willow Springs, Illinois, and that he invited her onto his premises on March 19, 2011. Ms. Zehnder alleged that she accepted his invitation and acted "at all times with reasonable care for her safety and free from contributory negligence." Ms. Zehnder alleged that, while there, Mr. Dutton invited her to use a pull-up bar, and that she fell to the ground along with the pull-up bar while using it, resulting in "serious injury," including injury to her "thoracic and cervical spine."

¶ 6 Ms. Zehnder alleged that Mr. Dutton owed her a duty "to exercise reasonable care in the upkeep and maintenance of the premises" for her safety, and that he breached that duty by

carelessly and negligently doing the following: "installing the pull-up bar in a manner inconsistent with the manufacturer's instructions for installation"; inviting Ms. Zehnder to use the pull-up bar "despite [his] knowledge that it had not been properly installed in a manner consistent with the manufacturer's instructions"; failing to inspect the safety of the pull-up bar; and failing to warn Ms. Zehnder that the pull-up bar had not been installed according to the manufacturer's instructions. Ms. Zehnder alleged that, as a direct and proximate result of Mr. Dutton's negligence, she sustained "injuries of a permanent and lasting nature."

¶ 7 The record on appeal provided by Ms. Zehnder is far from complete. The record lacks a transcript of the parties' opening statements, the majority of the witness testimony at trial, and Mr. Dutton's closing argument. The record does not include transcripts from some of the relevant hearings before the trial court. Some motions are not in the record. Where missing portions of the record are relevant to our analysis, we will make note. We discuss the background of this case and trial testimony to the extent we are able to, based on this incomplete record.

¶ 8 Before trial, Ms. Zehnder filed a motion *in limine* to strike a portion of the deposition testimony of one of her treating physicians—Dr. Martin Luken—in which Dr. Luken testified, as Ms. Zehnder phrased it, "that patients involved in personal injury litigation tend to make complaints of pain longer, or greater complaints of pain, than people who are not involved in personal injury litigation." Ms. Zehnder argued that the testimony was both irrelevant and highly prejudicial. The trial court denied motion.

¶ 9 On direct-examination, Ms. Zehnder testified that she worked as a personal trainer and a group fitness instructor. She met Mr. Dutton online in January 2011. They exchanged emails and eventually phone numbers. She met him once for dinner and saw him one other time before her March 2011 injury. On March 19, 2011, Ms. Zehnder and Mr. Dutton went for a 40-mile bike

ride in the afternoon, starting at Mr. Dutton's house. They returned to his home sometime in the evening. Ms. Zehnder testified that Mr. Dutton invited her inside and they went to the home gym Mr. Dutton had set up in his basement.

¶ 10 Ms. Zehnder testified that she did not recall whether the pull-up bar was hanging on the I-beam when she first entered Mr. Dutton's gym and that she first noticed it when Mr. Dutton completed some pull-ups. Ms. Zehnder explained that she and Mr. Dutton "were showing each other exercises." She watched Mr. Dutton complete "numerous" pull-ups before he "got down, and it was then [Ms. Zehnder's] turn to demonstrate." Ms. Zehnder said that the two traded places and Mr. Dutton then "stood and watched her." Ms. Zehnder testified that Mr. Dutton did not remove the pull-up bar from the I-beam when he was done with his pull-ups, and that she "absolutely [did] not hang the pull-up bar on the I-beam" herself before completing her pull-ups.

¶ 11 Ms. Zehnder testified that she had to "[j]ump up to grab ahold [*sic*] " of the pull-up bar and was able to "pull [her]self straight up and down two to three times," but was not able to complete another pull-up that way. Ms. Zehnder testified: "if you can't do pull ups anymore, you can't pull yourself straight up and down, you engage your core. You swing your legs forward to try to pull yourself up, *** which is what I did." When Ms. Zehnder swung her legs forward, "the bar fell, and I fell with the bar." She testified that she did not feel the bar move when she was using it and did not know that the pull-up bar could fall. Ms. Zehnder testified that, after she fell, she knew something was wrong because her "upper back and neck were stiff." Mr. Dutton drove Ms. Zehnder to the hospital. At the hospital, Ms. Zehnder went through medical tests, including a CT scan, and she was transferred to the intensive care unit because she was told "after the CT scan that [she] had indeed broke [her] neck." She was in the hospital for two or three days. Defense counsel's cross-examination of Ms. Zehnder is not included in the record on

appeal.

¶ 12 Mr. Dutton's testimony on direct examination is similarly not included in the record on appeal. In his cross-examination, which is included, Mr. Dutton agreed that he invited Ms. Zehnder into his basement to show her his home gym. Mr. Dutton also agreed that the pull-up bar was intended to be used in a door frame, but that he preferred to hang it from the I-beam in his basement. Mr. Dutton admitted that, when installed according to the manufacturer's instructions, the pull-up bar is supposed to rest against the vertical part of the door frame for support and that, as it was hung on his I-beam, the vertical pieces had nothing to rest against. Instead, the bar was "mostly" supported by a piece of plastic that hung on the lip of the I-beam. Mr. Dutton testified that, as installed, he "always knew th[e] risk existed" that the pull-up bar might fall.

¶ 13 Mr. Dutton agreed that when he was demonstrating pull-ups for Ms. Zehnder on the day of the incident, he was using the bar in a manner that was inconsistent with the instructions. He testified that he hung the pull-up bar on the I-beam and completed a few pull-ups as Ms. Zehnder watched, and then he believed he removed the bar from the I-beam and placed it on the ground. Mr. Dutton said that even if Ms. Zehnder was too short to reach the I-beam, she could have placed the pull-up bar on top of the I-beam herself by stretching to reach, or by "kind of hop[ping] up a little bit." Mr. Dutton testified that he was "seven or eight feet" away from Ms. Zehnder when she began to use the pull-up bar. When asked whether he told Ms. Zehnder that it would be dangerous to use the pull-up bar to do "anything other than a straight up and down pull-up because the bar could fall," Mr. Dutton responded: "I didn't give her any instruction on exercise. She was the personal trainer showing me things." He later stated that he "in general explained that [they] were using it outside of its indicated use."

¶ 14 On the morning of the fourth and last day of the trial testimony, during what appears from the record to be the middle of Mr. Dutton's cross-examination, the trial court held a jury instruction conference. Ms. Zehnder proffered a jury instruction on general negligence, modeled after Illinois Pattern Jury Instructions, Civil (IPI Civil), No. 20.01 (2012), and Mr. Dutton proffered an instruction modeled after IPI Civil 120.08 (2012), on premises liability. The trial court indicated that it was not inclined to allow Ms. Zehnder's instruction, as she had filed a complaint for "premises liability," not general negligence. After much argument and debate, Ms. Zehnder's counsel moved to amend her complaint and the trial court adjourned to allow her to prepare a motion to file an amended complaint. That afternoon, the motion and proposed amended complaint were tendered, and there was further argument. The trial court then denied the motion to amend, noting prejudice to Mr. Dutton if it were to allow the amendment because a "premises liability theory requires a different burden of plaintiff and therefore, intermingled with that, a different burden for the defendant."

¶ 15 After deliberating, the jury found for Mr. Dutton and against Ms. Zehnder. The jury also answered two special interrogatories, answering the first, whether Mr. Dutton was "guilty of negligence," in the affirmative and the second, whether that negligence was "the proximate cause" of Ms. Zehnder's injuries, in the negative.

¶ 16 On March 2, 2016, Ms. Zehnder filed a motion for new trial, arguing that she was unfairly prejudiced because the jury was given the premises liability instruction instead of her proffered instruction on general negligence. Ms. Zehnder also argued that the trial court abused its discretion by denying her motion *in limine* to bar portions of Dr. Luken's testimony. No transcript is included in the record on appeal of the May 26, 2016, hearing on Ms. Zehnder's motion for a new trial. That day, the court entered a written order allowing the parties to file

supplemental briefs "on the issue of whether headings in pleadings are relevant."

¶ 17 In her supplemental brief in the trial court, Ms. Zehnder argued that the allegations of her complaint clearly alleged general negligence and that the title of the claim in her complaint should not have controlled which instruction was given to the jury. In response, Mr. Dutton argued that the content of the amended complaint alleged premises liability because Ms. Zehnder "clearly alleged in her complaint that the [pull-up] bar was *installed*; it was a condition of the premises." (Emphasis in original.) Mr. Dutton further argued that if the wrong instruction was given to the jury, it was harmless based on the jury's responses to the special interrogatories.

¶ 18 Ms. Zehnder filed a motion to strike Mr. Dutton's supplemental brief on the grounds that, by referencing the responses to the special interrogatories, it exceeded the scope of the trial court's order, which she argued called for supplemental briefing only on "the relevance of headings in a pleading." Ms. Zehnder alternatively argued that the response to the special interrogatory could not be relied upon because the jury was asked whether Mr. Dutton's negligence was "the" proximate cause of her injury, and she only needed to prove that he was "a" proximate cause.

¶ 19 On August 19, 2016, the trial court denied Ms. Zehnder's motion for new trial in a written order. The court held that "the record demonstrate[d] that the verdict would not have changed" even if the general negligence instruction had been given, based on the special interrogatory finding that Mr. Dutton was not "the proximate cause" of Ms. Zehnder's injuries.

¶ 20 On August 31, 2016, the court stayed its August 19 order for 30 days pending its consideration of Ms. Zehnder's motion to strike. Then, on September 30, 2016, the court granted Ms. Zehnder's motion to strike Mr. Dutton's supplemental brief in response to the motion for a new trial but also stated that its order of August 19 would stand.

¶ 21 JURISDICTION

¶ 22 The trial court entered its final order in this case on September 30, 2016, and Ms. Zehnder timely filed her notice of appeal on October 3, 2016. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered by the circuit court in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015).

¶ 23 ANALYSIS

¶ 24 A. Jury Instruction

¶ 25 On appeal, Ms. Zehnder first argues that the trial court committed reversible error when it used Mr. Dutton's proffered premises liability instruction instead of her general negligence instruction. Although, "[g]enerally speaking, litigants have the right to have the jury instructed on each theory supported by the evidence" (*Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007)), a trial court need not give an instruction "concerning issues not raised by the pleadings" (*Blackburn v. Johnson*, 187 Ill. App. 3d 557, 564 (1989)). "[I]t is within the discretion of the trial court to determine which issues are raised by the evidence presented and which jury instructions are thus warranted." (Internal quotation marks omitted.) *Mikojczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 549 (2008). As the reviewing court, we "will not disturb the trial court's determination unless the trial court has abused its discretion, and a new trial will be granted only when the refusal to give a tendered instruction results in serious prejudice to a party's right to a fair trial." *Heastie*, 226 Ill. 2d at 543.

¶ 26 The general negligence instruction Ms. Zehnder sought, which was modeled after IPI Civil No. 20.01, provided in pertinent part:

"1. The plaintiff claims that she was injured and sustained damage, and

that the defendant was negligent in one or more of the following ways:

a) For installing the pull-up bar in a manner that was inconsistent with the manufacturer's instructions for installation;

b) For installing the pull-up bar in a manner that the defendant knew was not safe;

c) For allowing the plaintiff to use the pull-up bar despite knowledge that it was not properly installed consistent with the manufacturer's instructions; and

d) For failing to warn the plaintiff that the pull-up bar, as installed on the I-Beam, was unsafe.

2. The plaintiff further claims that one or more of the foregoing was a proximate cause of her injuries."

¶ 27 Mr. Dutton's requested instruction on premises liability, which the trial court gave, was modeled after IPI Civil 120.08 (2012). This instruction included the above-quoted portion of Ms. Zehnder's proffered instruction in its entirety, and prefaced that part of the instruction with the following:

"[T]he plaintiff has the burden of proving:

First, there was a condition on the property which presented an unreasonable risk of harm to people on the property.

Second, the defendant knew or in the exercise of ordinary care should have known of both the condition and the risk.

Third, the defendant could reasonably expect that people on the property would not discover or realize the danger or would fail to protect themselves

against such danger."

¶ 28 As the parties' tendered instructions make clear, the premises liability jury instruction included three additional elements, not set out in the general negligence instruction, dealing with a condition on the property that created an unreasonable risk, the defendant's knowledge of that condition, and the defendant's knowledge that people on his property would not realize the danger. Ms. Zehnder points to recent cases and the comments to the pattern jury instructions that have recognized that when the landowner's conduct or activity created the hazard that caused the injury, the claim is one of negligence, rather than premises liability, and proof of these three additional elements is not required. See *Smart v. City of Chicago*, 2013 IL App (1st) 120901, ¶¶ 55-57; *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712 (1998), *Wind v. Hy-Vee Food Stores, Inc.*, 272 Ill. App. 3d 149 (1995); see also IPI Civil 120.00 (2012) Intro. 1 ("Case law departs from the 'notice' requirement of Restatement § 343 when the plaintiff shows, through direct or circumstantial evidence, that the dangerous condition arose from the defendant's acts or as part of his business.")

¶ 29 Mr. Dutton continues to argue that the allegations in Ms. Zehnder's complaint could only support a claim for premises liability. He cites, for example, *Qureshi v. Ahmed*, 394 Ill. App. 3d 883, 886 (2009), in which the court analyzed a claim based on a child's injury from a homeowner's treadmill as one for premises liability. Mr. Dutton also argues, as the trial court found in denying the motion for a new trial, that, even if it was the wrong instruction, the premises liability instruction did not prejudice Ms. Zehnder because the special interrogatory answers show that the jury found that Mr. Dutton was negligent but that his negligence was not the proximate cause of Ms. Zehnder's injuries.

¶ 30 Ms. Zehnder acknowledges that her complaint could be read as a claim for premises

liability, but argues that it also supports a claim of general negligence and that she, as the plaintiff, was entitled to pursue the negligence claim since the evidence supported that claim. In response to the argument that she was not prejudiced, Ms. Zehnder argues that the basis for the jury verdict was unclear because the special interrogatory rested on the finding that Mr. Dutton was not "the" proximate cause of her injury when, legally, he only needed to be "a" proximate cause.

¶ 31 We agree with Ms. Zehnder that we cannot be certain from the interrogatory answers that none of the three additional elements in the premises liability instruction played a role in the verdict, although we also agree with Mr. Dutton that it is most unlikely. We need not decide this issue. We also need not disagree with Ms. Zehnder that she could have pursued a claim for negligence rather than premises liability. We affirm the jury's verdict in this case because Ms. Zehnder has not shown the trial court abused its discretion in refusing her proffered instruction. We find no abuse in the trial court's determination that Mr. Dutton would be unfairly prejudiced by Ms. Zehnder's negligence instruction when her sole claim was titled "Premises Liability," which put Mr. Dutton on notice that she intended to prove a claim not for general negligence, but for premises liability.

¶ 32 Ms. Zehnder acknowledges that the operative complaint at trial set forth only one claim, titled "Premises Liability." Ms. Zehnder points to cases in which this court or our supreme court have recognized that the title of a claim is not necessarily dispositive of what theories may fairly be said to be alleged in a complaint. But, as the trial court observed in denying the motion for new trial, in the cases that Ms. Zehnder relies on, "the court found a plain, obvious disjunction between the title given and the content of the allegations made." Moreover, none of those cases dealt with the impact of the claim's title on the opposing party when that title may have led the

opposing party to prepare for trial with certain assumptions. In *In re Scarlett Z.-D.*, 2015 IL 117904, ¶¶ 63-65, the court held that the plaintiff could not circumvent statutory standing requirements by labeling his claims—in which he sought custody, visitation and child support—as claims for breach of contract. Similarly, in *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 496 (2005), the court held that the plaintiffs' standing depended on the true nature of their claims, not the labels attached. In *Madigan v. Yballe*, 397 Ill. App. 3d 481, 488-89 (2009), we held that the plaintiff could not avoid the applicable statute of limitations by calling her claim something that it was not. And in *Aebischer v. Zobrist*, 56 Ill. App. 3d 151, 154 (1977), we held that the trial court properly denied a motion to dismiss a complaint which met all of the elements of a claim for an easement despite the claim being improperly titled as one to quiet title. In none of these cases was there any concern, as the trial court found there was here, that the title of the plaintiff's claim prejudiced the defendant into thinking that the plaintiff intended to prove certain elements that the plaintiff then sought to be relieved from proving at trial.

¶ 33 Moreover, in this case, in contrast to the cases Ms. Zehnder relied on, as the trial court noted, the title of the claim—premises liability—was in keeping with the allegations. Ms. Zehnder's one count complaint included allegations that Mr. Dutton "owned, maintained, operated and controlled" his premises; that he invited her onto the premises; that Mr. Dutton, as the owner of the premises, "owed a duty to [Ms. Zehnder], as an invitee on the premises, to exercise reasonable care in the upkeep and maintenance of the premises for the safety of [Ms. Zehnder] of the premises"; that Mr. Dutton had "knowledge that [the pull-up bar] had not been properly installed in a manner consistent with the manufacturer's instructions for installation"; and that Mr. Dutton failed to warn Ms. Zehnder "that the pull-up bar was not installed according to the manufacturer's instructions." As Ms. Zehnder acknowledges in her opening brief, the

allegations in the complaint "support the elements of premises liability."

¶ 34 Mr. Dutton's counsel argued at the jury instruction conference that, in light of the title of the claim and the allegations, Mr. Dutton would be prejudiced by Ms. Zehnder's proposed general negligence instruction because "all along" he had prepared his defense based on the premises liability claim alleged. The trial court agreed. On the incomplete record we are presented with—which does not include Ms. Zehnder's testimony on cross-examination, Mr. Dutton's testimony on direct examination, or the opening statement and closing argument from Mr. Dutton's counsel—it is impossible for us to independently assess the strength of Mr. Dutton's claim of prejudice. As the appellant, Ms. Zehnder "has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error" and "[a]ny doubts which may arrive from the incompleteness of the record [must] be resolved against [her]." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). The trial court heard all of the testimony and the argument from both sides and was convinced that Mr. Dutton would be prejudiced if Ms. Zehnder was relieved of her burden of establishing the three additional elements required by the claim of premises liability that she had pleaded in her complaint. On this record, we cannot say this finding was wrong or that the trial court's denial of Ms. Zehnder's proffered general negligence instruction on the basis of this prejudice was an abuse of discretion. See *Foutch*, 99 Ill. 2d at 392 (absent a sufficient record, we "presume[ ] that the order entered by the trial court was in conformity with [the] law and had a sufficient factual basis").

¶ 35 Ms. Zehnder argues that she was prejudiced by the trial court's denial of her instruction because she was required to prove the three additional elements, on which she claims "the evidence was conflicting and closely balanced." It does not appear to us that any of these three elements were really at issue since Mr. Dutton admitted that the pull-up bar presented a risk and

that he was aware of this risk, and he also testified, with no contradictory testimony that we are aware of, that he told Ms. Zehnder the pull-up bar was not properly installed. The special interrogatory answers made clear that the jury thought that Mr. Dutton was negligent. Although the second special interrogatory improperly asked about "the" proximate cause, rather than "a" proximate cause, we agree with the trial court that it is quite likely that proximate cause was the basis for the jury verdict in favor of Mr. Dutton. However, it is precisely because of the possibility, however remote, that one of these three additional elements might have been an issue for the jury that we cannot say that the trial court abused its discretion in refusing to give an instruction that would have relieved Ms. Zehnder of a burden that she had indicated to Mr. Dutton in her complaint that she intended to carry in this case.

¶ 36 Of course the general negligence instruction might have matched the complaint if Ms. Zehnder had been allowed to amend her complaint as she sought leave to do in the midst of the instruction conference on the fourth day of trial. The proposed amended complaint is not in the record so we do not know what changes were made to it beyond a change to the title of the claim. The trial court denied the motion to amend because of concern that an amendment at that late date would also prejudice Mr. Dutton. Surprise or prejudice to the opposing party is the most important factor a court considers when determining whether to allow a party to amend. *Paschen Contractors, Inc. v. City of Kankakee*, 353 Ill. App. 3d 628, 638 (2004). "Prejudice may be shown where delay before seeking an amendment leaves a party unprepared to respond to a new theory at trial." *Id.* Thus, for the same reasons that the trial court did not abuse its discretion in refusing Ms. Zehnder's instruction during the instruction conference, it did not abuse its discretion in refusing her request to amend her complaint later that same day.

¶ 37 The cases Ms. Zehnder relies on are distinguishable from this case. The procedural

posture of *Smart*, 2013 IL App (1st) 120901, ¶¶ 21-22, 46, was entirely different, as there the trial court *had* given the general negligence instruction proffered by the plaintiff and the question on appeal was whether that was an abuse of discretion. In *Wind*, 272 Ill. App. 3d at 157, the court concluded that the plaintiffs' complaint stated a cause of action in plain negligence and that "nothing in the complaint" asserted a claim for premises liability. And in *Reed*, 298 Ill. App. 3d at 717, the court stated that "the plaintiffs' complaint alleged active negligence and did not confine their cause of action to premises liability." It thus appears that the courts in those cases were comfortable that the defendants were on notice that the plaintiffs could attempt to prove their case by showing simply that the defendants were negligent without proof of the additional elements necessary to show premises liability. The opinions in those cases have no indication that there was a finding by the trial court, as there was here, that giving a general negligence instruction would have been prejudicial to a defendant. Accordingly, these cases do not alter our decision that, under the circumstances before us, the trial court did not abuse its discretion in refusing to instruct the jury according to Ms. Zehnder's proffered general negligence instruction.

¶ 38 B. Motion for New Trial

¶ 39 Ms. Zehnder next argues that the trial court improperly relied on the jury's response to the special interrogatories when it denied her motion for a new trial. She points out that the trial court struck Mr. Dutton's brief which relied on the special interrogatories but kept in place its ruling that denied Ms. Zehnder a new trial, in large part on the basis that the special interrogatories demonstrated that there was no prejudice to Ms. Zehnder.

¶ 40 As a reviewing court, we may "sustain the decision of a lower court on any grounds which are called for by the record, regardless of whether the lower court relied on those grounds and regardless of whether the lower court's reasoning was correct." (Internal quotation marks

omitted). *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 16. Whether the trial court relied, in whole or in part, on an argument made in a brief that was later stricken is thus immaterial. On the record presented, we have concluded that the trial court did not abuse its discretion in denying Ms. Zehnder's proffered instruction and the issue of whether or not the trial court improperly considered Mr. Dutton's argument based on the special interrogatories is completely irrelevant.

¶ 41 C. Motion *In Limine* to Bar Dr. Luken's Deposition Testimony

¶ 42 Ms. Zehnder also argues that the trial court abused its discretion by denying her motion *in limine* to bar a portion of the evidence deposition of her treating doctor, Dr. Luken. This kind of an evidentiary ruling is reviewed for an abuse of discretion. *Citibank, N.A. v. McGladrey & Pullen, LLP*, 2011 IL App (1st) 102427, ¶ 13. "The trial court abuses its discretion when the ruling is arbitrary or unreasonable or no reasonable person would agree with the position taken by the court." *Id.*

¶ 43 The heart of the challenged testimony is as follows:

> "[Defense counsel] Q. Doctor, when the patient came to see you on May 3 of 2013, you wrote, quote, Ms. Zehnder explains that her cervical spine fracture is now the subject of personal injury litigation, end quote.
>
> [Dr. Luken] A. Correct.
>
> Q. That was important for you to know, correct?
>
> A. Correct.
>
> Q. That's why you noted it in the records, true?
>
> A. Correct.
>
> Q. And the reason it's important to note is that there is peer-reviewed

literature in the orthopedic and neurosurgical field that indicates that patients involved with either personal injury litigation or workers' compensation cases have a less satisfactory outlook for sustained relief or pain-related symptoms?

* * *

A. It's an adverse prognostic factor.

Q. And in other words, physicians in the practice of following people with personal injury litigation tend to make complaints of pain longer or greater complaints of pain than people who don't have litigation?

***

A. Pain syndromes in such settings are more challenging and difficult to resolve. That's the well-documented clinical experience in the literature."

The trial court denied Ms. Zehnder's motion *in limine*, finding that this was "permissible cross-examination" and "would help the jury evaluate [Dr. Luken's] opinions." The court also found that it was "pertinent to [Mr. Dutton's] implicit theory of the case either that [Ms. Zehnder] was uninjured or the injury [wa]s not to the extent claimed."

¶ 44 On appeal, Ms. Zehnder argues that the challenged testimony should have been excluded because it was not relevant. "Relevant evidence" is defined as "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Ill. R. Evid. 401 (eff. Jan. 1, 2011). Here, in making its ruling, the trial judge stated that the challenged testimony was relevant to Mr. Dutton's theory of the case as she understood it. As we noted above, we do not know what Mr. Dutton's theory was at trial because we do not have a complete record of the trial. Based on the record we do have, we cannot say that the trial court's finding that this was

relevant and admissible evidence was an abuse of discretion.

¶ 45 Ms. Zehnder also argues that the trial court should have excluded the challenged testimony because, even if it was relevant, it was more prejudicial than probative. According to Ms. Zehnder, Dr. Luken's testimony was "highly prejudicial" because "it allowed the jury to infer [Ms. Zehnder's] complaints of pain were fabricated."

¶ 46 The challenged testimony was about a correlation between an increased level of difficulty in resolving injuries and the initiation of personal injury litigation. Dr. Luken advanced no theory of causation to relate these two phenomena. Dr. Luken did not testify that Ms. Zehnder's complaints were fabricated. Moreover, Dr. Luken's statements were isolated; the challenged testimony represents only two pages of an 80-page deposition, most of which seems to have been read to the jury (although we cannot be sure exactly how much of the deposition was read to the jury as no full trial transcript was provided on appeal). We surely cannot say, based on this record, that Dr. Luken's testimony was so unfairly prejudicial that the trial court abused its discretion in allowing it.

¶ 47 Finally, Ms. Zehnder argues that the challenged testimony should have been barred because Dr. Luken failed to identify the literature that he relied on so there was no proper foundation for his testimony. However, even if a foundation for the testimony was lacking, "reversal on appeal is not required unless an erroneous evidentiary ruling was substantially prejudicial, and the burden of establishing prejudice is on the party seeking reversal." *Shachter v. City of Chicago*, 2011 IL App (1st) 103582, ¶ 80. Absent such a showing, "any improper evidentiary rulings may be considered harmless error." *Id.* As noted above, Ms. Zehnder has failed to demonstrate any substantial prejudice from this testimony. Accordingly, the trial court did not abuse its discretion in denying Ms. Zehnder's motion *in limine*.

¶ 48 CONCLUSION

¶ 49 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 50 Affirmed.