

**NOTICE**

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2017 IL App (4th) 170032-U

NO. 4-17-0032

**FILED**

October 25, 2017  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

DONALD WILLIAMS, as Executor of the Estate of	)	Appeal from
Nancy Williams,	)	Circuit Court of
Plaintiff-Appellant,	)	Champaign County
v.	)	No. 13L170
KENNETH DOLS, M.D.; and CARLE HEALTHCARE	)	
INC., a Corporation, d/b/a CARLE PHYSICIAN	)	
GROUP, f/k/a CARLE CLINIC ASSOCIATION,	)	Honorable
Defendants-Appellees.	)	Michael Q. Jones,
	)	Judge Presiding.

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PRESIDING JUSTICE TURNER delivered the judgment of the court.  
Justices Knecht and DeArmond concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The trial court did not abuse its discretion in denying plaintiff's attempt to introduce the county coroner's report and death certificate and the titles and authors of articles plaintiff's expert relied on for his opinion.

(2) The trial court did not abuse its discretion in denying plaintiff's "issues" and "missing evidence" jury instructions.

¶ 2 In September 2013, plaintiff, Donald Williams, as executor of the Estate of Nancy Williams, filed a complaint against defendants, Dr. Kenneth Dols and Carle Healthcare Inc., d/b/a Carle Physician Group, f/k/a Carle Clinic Association (Carle), as a result of Nancy Williams's death. In September 2016, a jury returned a verdict for defendants. On December 9, 2016, the trial court denied plaintiff's posttrial motion. Plaintiff appeals, arguing the court abused its discretion by not allowing plaintiff to introduce (1) the titles and authors of articles on which plaintiff's expert witness relied in forming his opinion and (2) the county coroner's report and

death certificate for Nancy Williams. Plaintiff also argues the court abused its discretion by denying plaintiff's proposed "issues" and "missing evidence" jury instructions. According to plaintiff, the trial court erred in not ordering a new trial because of these errors. We affirm.

¶ 3

## I. BACKGROUND

¶ 4 On September 1, 2011, Nancy Williams fell and injured her knee. Donald Williams, Nancy's husband, took her to Carle Foundation Hospital. Nancy's leg was x-rayed, and she was discharged. The X-rays were forwarded to an orthopedic surgeon for review. Later that morning, the orthopedic clinic asked Nancy to come to the clinic right away.

¶ 5 Dr. Dols diagnosed Nancy with a fractured patella and recommended surgery, a patellar fixation. On September 2, 2011, Dr. Dols performed the surgery. After the surgery, Dr. Dols prescribed Nancy with Lovenox injections while she was in the hospital. Lovenox is a blood thinning medication designed to prevent blood clots and deep venous thrombosis, an inherent risk of a patellar fixation surgery.

¶ 6 On September 4, 2011, Nancy was discharged from the hospital and returned home. She was given an additional seven-day prescription for Lovenox and a prescription for pain medication. Nancy spent most of her time on the couch, and her husband responded to her needs, including administering her Lovenox injections. Aside from trips to the bathroom and one trip to her son's house for a shower, Nancy did not walk often after returning home from the hospital.

¶ 7 On September 13, 2011, Nancy saw Dr. Dols. Dr. Dols did not recall the visit and no narrative note existed for the appointment. Donald Williams testified Dr. Dols examined Nancy's knee and ordered her a new knee brace, which allowed for a greater range of motion. Dr. Dols also asked about Nancy's physical therapy. According to Donald, Dr. Dols indicated he

would enter an order for therapy to begin when told her therapy had not started. Nancy received the new knee brace before leaving Dr. Dols's office.

¶ 8 Nancy's activity level did not change after the appointment. She still spent most of her time on the couch. Donald called Dr. Dols's office on September 15, September 19, and September 20, 2011, to ask about Nancy's physical therapy. Dr. Dols ordered physical therapy on September 22, 2011. On September 23, between 3:30 and 4 a.m., Donald heard Nancy call for help. He called 9-1-1. Emergency personnel responded and took Nancy to the hospital. She died at approximately 5:30 p.m. that day. No one disputes the cause of her death was a pulmonary embolism.

¶ 9 Dr. Harish Hosalkar, an orthopedic surgeon and plaintiff's expert witness, testified Dr. Dols deviated from accepted medical practice in Nancy's treatment and caused Nancy's death. In his evidence deposition, Dr. Hosalkar offered the following opinion:

“Ms. Nancy Williams was an elderly patient, 66 years old, with a fracture of her left knee or patella, which is one of the bones of the knee joints. \*\*\* So she had a complete fracture of the patella which was separated.

She had risk factors including the fact that she was obese. She underwent surgery for fixation of this fracture. And based on the risk factors that she had, she required to be protected to decrease her risk, if not eliminate, of getting a clot in the leg that could possibly go to her heart.

In my opinion, she did have risk factors at the time of surgery that demanded protection, and subsequently, given the way she was not ambulating adequately, not moving her joints and doing physical therapy modalities, these

prophylactic measures should have been continued until the point that she was adequately ambulant.

She received prophylaxis in the hospital and then seven days following discharge. And then when she was seen on 13th of September, the records which are somewhat unclear to me, the prophylaxis clearly was not ongoing at the time and then she eventually developed a fatal pulmonary embolism.”

¶ 10 According to Dr. Hosalkar, the standard of care required Dr. Dols to prescribe prophylaxis to Nancy for a minimum of two weeks after surgery, which was when Dr. Dols planned on seeing Nancy. Even after two weeks, because of Nancy’s lack of mobility, the prophylactic measures should have been continued until she was adequately ambulant. His opinion, to a reasonable degree of medical certainty, was that Dr. Dols’s failure to conform with accepted medical practice was a cause of Nancy’s death.

¶ 11 Dr. Tad Gerlinger, also an orthopedic surgeon and defendants’ expert witness, testified Dr. Dols did not deviate from the standard of care in his treatment of Nancy.

¶ 12 After hearing the evidence presented, the jury returned a verdict for defendants.

¶ 13 In December 2016, the trial court denied plaintiff’s posttrial motion. This appeal followed.

¶ 14 **II. ANALYSIS**

¶ 15 We generally will only disturb a trial court’s rulings on jury instruction and evidentiary issues if the court abused its discretion. *Schnitker v. Springfield Urban League, Inc.*, 2016 IL App (4th) 150991, ¶ 33, 67 N.E.2d 583; *Jackson v. Graham*, 323 Ill. App. 3d 766, 773, 753 N.E.2d 525, 531 (2001). A trial court abuses its discretion if it ignores recognized legal principles and exceeds the bounds of reason, acts arbitrarily, or takes a position no reasonable

person would adopt. *Adams v. Sarah Bush Lincoln Health Center*, 369 Ill. App. 3d 988, 1000, 874 N.E.2d 100, 110 (2007).

¶ 16 A. Evidentiary Rulings

¶ 17 1. *Expert Witness Testimony*

¶ 18 We first address plaintiff's argument the trial court abused its discretion in not allowing his expert witness, Dr. Hosalkar, to recite the titles and authors of peer review articles he relied on as foundation for his opinion. Plaintiff cites our supreme court's decision in *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 298-99, 775 N.E.2d 964, 986-87 (2002), for the proposition an expert witness must be allowed to testify with regard to the basis for his opinion, the content of material he reasonably relied upon to explain his opinion, and the facts or data upon which his opinion is based.

¶ 19 The trial court did not abuse its discretion. *Schultz* does not say a trial court must allow an expert witness to list the title and author of every secondary source he reviewed to reach his opinion. In addition, as pointed out by defendants in their brief to this court, Dr. Hosalkar did not testify he was relying on any specific facts or data from those articles. He simply wanted to bolster his own testimony with impressive titles and the names of other doctors.

¶ 20 Even if plaintiff was able to establish the trial court abused its discretion, plaintiff could not establish he suffered any prejudice as a result. "[T]he burden is on the party seeking reversal to establish \*\*\* prejudice." *Downey v. Dunnington*, 384 Ill. App. 3d 350, 389, 895 N.E.2d 271, 302 (2008). The trial court in this case did not prohibit plaintiff from providing the jury with information regarding the basis for Dr. Hosalkar's opinion.

¶ 21 Dr. Hosalkar was able to provide the jury with the bases for his opinion, including information regarding his own expertise in the field and his review of authoritative articles on this topic when preparing his opinion. The trial court let the jury hear Dr. Hosalkar testify:

“I reviewed articles published in literature mainly from orthopedics as well as from nonorthopedic sources related to venous thromboembolism following orthopedic surgeries. I also reviewed the guidelines from the American Academy [of Orthopedic Surgeons], although there are no specific guidelines as such for patella fractures.”

Based on the record in this case, the trial court did not strip plaintiff of his ability to provide the bases for his expert’s opinion.

¶ 22 *2. Coroner’s Report and Death Certificate*

¶ 23 Plaintiff also argues the trial court erred in refusing to admit the coroner’s report and death certificate into evidence. Defendants objected to this evidence and tendered a motion *in limine*, arguing both documents were inadmissible pursuant to section 8-2201 of the Code of Civil Procedure (735 ILCS 5/8-2201 (West 2016)), which states:

“In actions or proceedings for the recovery of damages arising from or growing out of injuries caused by the negligence of any person, firm or corporation resulting in the death of any person or for the collection of a policy of insurance, neither the coroner’s verdict returned upon the inquisition, nor a copy thereof, shall be admissible as evidence to prove or establish any of the facts in controversy in such action or proceeding.” 735 ILCS 5/8-2201 (West 2016).

¶ 24 Plaintiff argues this statute was not applicable here. According to plaintiff, section 8-2201 “simply prohibits a coroner’s verdict upon inquisition to be admitted to prove a fact in

controversy in a separate proceeding.” Plaintiff argues he sought to admit the coroner’s report and death certificate, not a coroner’s verdict upon inquisition. According to plaintiff, the county coroner prepared the coroner’s report and death certificate pursuant to the coroner’s mandate as a public official and the records were kept in the ordinary course of the coroner’s business. As a result, plaintiff argues both the report and the death certificate should have been admitted as business records pursuant to section 115-5.1 of the Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/115-5.1 (West 2016)) or Illinois Rules of Evidence 803(6) or (8) (eff. Apr. 26, 2012).

¶ 25 We note plaintiff did not make these arguments during the trial. It was not until the hearing on his posttrial motion that plaintiff argued the records should have been admitted under the business records exception. Regardless, plaintiff’s reliance on section 115-5.1 (725 ILCS 5/115-5.1 (West 2016)) is misplaced. Under section 115-5.1, the admissible records to establish the cause of death are limited “to the records of the results of post-mortem examinations of the findings of autopsy and toxicological laboratory examinations.” 725 ILCS 5/115-5.1 (West 2016). We are not dealing with either of these here.

¶ 26 The First District has commented on the interplay between section 8-2201 of the Civil Procedure Code and section 115-5.1 of the Code of Criminal Procedure, stating, in part, as follows:

“The statements of relevant and material fact in certified records of the coroner or medical examiner, kept in the ordinary course of business, are all admissible in evidence, as long as the preparers of the reports are available for examination upon the request of either party. Such admissible facts include measurements of the scene, descriptions of the wounds, and medical reports, including toxicology

reports, concerning the deceased. Assessments of the cause of death have more limited admissibility: the coroner's verdict, concerning the cause and material circumstances surrounding the death (see 55 ILCS 5/3-3025 (West 1994)), is entirely inadmissible in all civil proceedings for damages. 735 ILCS 5/8-2201 ([West] 1994). Only the coroner's protocol or autopsy report is admissible as evidence of the cause of death, again providing that the preparer is available by subpoena for examination." *Steward v. Crissell*, 289 Ill. App. 3d 66, 72, 681 N.E.2d 1040, 1044 (1997).

We agree. In this case, plaintiff was trying to introduce the death certificate and the coroner's report as evidence of the cause of Nancy's death. This was improper, and the court did not abuse its discretion in denying the admission of these records for that purpose.

¶ 27 Plaintiff also mentions in his brief to this court the records should have been admitted pursuant to Illinois Rules of Evidence 803(6) and (8) (eff. Apr. 26, 2012). However, he provides no analysis with regard to these two subsections of Rule 803. Because an appellant may not simply pass the burden of argument and research to this court, we find plaintiff forfeited any argument with regard to Rule 803. *Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 521-22 (2001).

¶ 28 Regardless, as stated earlier, even if plaintiff was able to establish the trial court abused its discretion in not allowing the admission of the coroner's report and death certificate, plaintiff could not establish he suffered any prejudice as a result. "[T]he burden is on the party seeking reversal to establish \*\*\* prejudice." *Downey v. Dunnington*, 384 Ill. App. 3d 350, 389, 895 N.E.2d 271, 302 (2008). Plaintiff introduced evidence regarding the cause of death through his expert witness, Dr. Hosalkar.



¶ 29

## B. Jury Instructions

¶ 30 Plaintiff also takes issue with some of the trial court's rulings on his proposed jury instructions, arguing the court erred by giving defendants' "issues" instruction as opposed to his and refusing to give a "missing evidence" instruction. We will not disturb a trial court's ruling with regard to jury instructions unless the trial court abused its discretion. In determining whether the trial court abused its discretion, we look at whether the jury instructions as a whole were sufficiently clear so as not to mislead the jury. *Sharbono v. Hilborn*, 2014 IL App (3d) 120597 (2014). "Even if the trial court errs by giving an improper instruction, a reviewing court will ordinarily not reverse the trial court unless the instruction 'clearly misled the jury and resulted in prejudice to the appellant.' " *Schnitker*, 2016 IL App (4th) 150991, ¶ 35, 67 N.E.3d 583 (quoting *Schultz*, 201 Ill. 2d at 274, 775 N.E.2d at 973).

¶ 31 Plaintiff's proposed instruction stated defendants were negligent in one or more of the following respects:

"A. Failed to prescribe appropriate deep venous thrombosis prophylaxis.

B. Failed to evaluate and manage Plaintiff's decedent's risk of developing a pulmonary embolism due to a deep venous thrombosis."

Instead, the court gave defendants' instruction, which stated the plaintiff claimed the defendants were negligent because they failed to prescribe deep venous thrombosis prophylaxis to Nancy for an adequate amount of time.

¶ 32 Plaintiff argues its instruction was supported by the evidence in the case and should have been given. According to plaintiff, his instruction

"alerted the jury that the issues for it to determine were whether Dr. Dols adequately prescribed, managed, and treated Plaintiff's decedent's risk of

developing a deep venous thrombosis pulmonary embolism. That instruction was supported by the evidence that Dr. Dols deviated from the standard of care by failing to get NANCY WILLIAMS ambulatory and/or by failing to prescribe blood thinners for an adequate length of time. Defendants' instructions limited the jury's inquiry to whether Dr. Dols prescribed blood thinners for a sufficient period of time. A large portion of the Plaintiff's theory was not presented to the jury as an issue for the jury to determine."

¶ 33 Defendants argue the trial court did not error in providing the jury with their "issues instruction" because plaintiff's proffered "issues instruction" was "vague, ambiguous, would have confused the jury, and was not supported by the evidence." Defendants state plaintiff's instruction ran a substantial risk of confusing the jurors because the jury might question whether Dr. Dols's decision to prescribe Lovenox was appropriate. We agree. Even Dr. Hosalkar agreed Lovenox was an appropriate form of deep venous thrombosis prophylaxis. Defendants argue their "issues" instruction properly framed the only issue supported by the evidence: whether Dr. Dols prescribed deep venous prophylaxis for an adequate length of time. We agree.

¶ 34 As noted by defendants, plaintiffs presented no evidence Dr. Dols breached his standard of care by failing to mobilize Nancy. Dr. Hosalkar only testified Dr. Dols should have used Nancy's mobility to judge how long the prophylaxis should have continued.

¶ 35 Plaintiff also argues the trial court abused its discretion by not providing plaintiff's proposed "missing evidence" instruction, which stated:

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

1. The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence.
2. The evidence was not equally available to an adverse party.
3. A reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed it to be favorable to him.”

At issue is a “narrative note” from Nancy’s September 13, 2011, appointment with Dr. Dols. Dr. Dols’s records for the visit included vital signs, nursing notes, and other information but did not include a progress note from Dr. Vols. Plaintiff argues the lack of a progress note is “missing evidence.”

¶ 36 During the trial, Dr. Dols testified he had no independent recollection of the September 13, 2011, visit and could not provide an explanation why a progress note was not in the computerized medical records. Donald Williams testified Dr. Dols entered notes during this appointment on a "notebook computer type laptop." Donald testified Dr. Dols was typing information into his laptop when he said he would take care of the issue regarding Nancy's physical therapy. Plaintiff does not argue Dr. Dols challenged his version of what occurred during this visit.

¶ 37 Plaintiff offers no real analysis in his brief why the trial court abused its discretion in not giving the jury this “missing evidence” instruction. According to plaintiff’s brief, “Since [Nancy’s] medical records were under the control of the Defendants, no reasonable explanation was given for the failure to produce the narrative note of September 13, 2011.”

¶ 38 Unfortunately for plaintiff, this conclusory statement does not establish the trial court's reasoning for not providing the missing evidence instruction was wrong. The trial court noted the existence of the note was speculative. Further, if the note existed, the court was skeptical of either defendants' power to produce the note. Finally, the court found the contents of the note—and whether the note would have helped or hindered defendants' case—entirely speculative. Plaintiff does not address why the trial court's reasoning is wrong. It is not the obligation of this court to make arguments for an appellant. As stated earlier, an appellant may not simply pass the burden of argument and research to this court. See *Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 521-22 (2001). We find defendant forfeited this issue on appeal.

¶ 39 C. Request for a New Trial

¶ 40 Plaintiff has failed to establish the trial court abused its discretion in denying his posttrial request for a new trial. We already have held plaintiff failed to establish the trial court abused its discretion with regard to the evidentiary and jury instruction issues raised on appeal. Further, plaintiff has failed to establish the evidence in this case did not support the jury's verdict or that he did not receive a fair trial. *Sharbono*, 2014 IL App (3d) 120597, ¶ 24, 12 N.E.3d 530.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated above, we affirm the trial court's judgment as plaintiff failed to establish the trial court abused its discretion with regard to its rulings on the evidentiary and jury instruction issues or erred in denying plaintiff's request for a new trial.

¶ 43 Affirmed.