2018 IL App (1st) 162029-U
No. 1-16-2029

SECOND DIVISION
May 22, 2018

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRIAN DORE and MARILYN DORE, Plaintiffs, (Brian Dore, Plaintiff-Appellant), v. PRIMARY CARE ASSOCIATES, LTD. and BRADFORD WAINER, D.O., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 13 L 936 The Honorable Lorna E. Propes, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in admitting testimony from Dr. Wainer about an "experiment" he conducted regarding a phone call he claimed not to have received. The "experiment" was not controlled or witnessed, was admitted over plaintiff's objection, and suffered a significant lack of probative value; the error was harmless in light of relevant undisputed expert testimony. We will not order a new trial under these circumstances.

¶ 2 Following a jury verdict in favor of defendants Primary Care Associates, Ltd. and Dr. Bradford Wainer in this medical malpractice action, plaintiff Brian Dore filed a posttrial motion

for a new trial, which the trial court denied over his contention that the admission of Dr. Wainer's testimony about an "experiment" he performed on his cellphone to show that he never received a call about blood test results on a certain date, constituted reversible error warranting a new trial. On appeal, plaintiff solely contends that the trial court abused its discretion by admitting testimony from Dr. Wainer about the experiment because it was not "substantially similar" to the alleged call that he sought to refute. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Because the record is voluminous and plaintiff does not contest the sufficiency of the evidence to support the jury's verdict, we only present the facts and procedural history relevant to the single evidentiary issue raised on appeal. See, *e.g.*, *Blount v. Stroud*, 395 Ill. App. 3d 8, 13 (2009); *Empress Casino Joliet Corp. v. W.E. O'Neil Construction Co.*, 2016 IL App (1st) 151166, ¶ 7.

¶ 5 In April 2012, plaintiff saw Dr. Wainer for a pain in his right shoulder. The next month, plaintiff was admitted to the intensive care unit at MacNeal Hospital and diagnosed with bacterial endocarditis, an infection of the inner lining of the heart muscles and valves. Plaintiff then suffered a stroke and had an aortic valve replacement.

¶ 6 In January 2013, plaintiff and former co-plaintiff, Mrs. Dore, filed their initial complaint against former defendants, Jennifer Sardone, M.D., Vanguard Health Systems, Inc., d/b/a MacNeal Hospital, VHS of Illinois, Inc., d/b/a MacNeal Hospital, alleging professional negligence and loss of consortium arising therefrom. In October, plaintiffs amended their complaint to add defendants Primary Care Associates, Ltd. and Dr. Bradford Wainer and claims of professional negligence and loss of consortium against them. In December, the trial court entered an order granting plaintiffs' motion to voluntarily dismiss Dr. Sardone without prejudice

and costs. In January 2014, the trial court entered an agreed order dismissing MacNeal Hospital with prejudice because the parties had reached a settlement agreement.

¶ 7 In December 2015, plaintiffs filed the underlying, second amended complaint realleging their claims of professional negligence and loss of consortium against the remaining defendants, Primary Care Associates, Ltd. and Dr. Wainer. On January 14, 2016, the trial court entered an order voluntarily dismissing Mrs. Dore's loss of consortium claim without prejudice and costs, and the matter proceeded to trial on the remaining negligence claim, which alleged in pertinent part:

> "From April 18, 2012 to April 28, 2012 and continuing thereafter, defendant, PRIMARY CARE ASSOCIATES, LTD. by and through its agents and employees, including but not limited to BRADFORD WAINER, D.O., was negligent in one or more of the following respects:
>
> a. Failed to properly follow up on the abnormal preliminary blood cultures/results; *or*
>
> b. Failed to admit plaintiff, BRIAN DORE to the hospital on April 27, 2012; *or*
>
> c. Failed to order antibiotics for his patient, BRIAN DORE; *or*
>
> d. Failed to review the medical records to determine whether there were pending blood cultures; *or*
>
> e. Failed to properly work up and treat plaintiff, BRIAN DORE'S infection; *or*
>
> f. Failed to order blood cultures on April 18, 2012." (Emphasis added.)

The complaint further alleged that one or more of the foregoing acts or omissions proximately resulted in plaintiff suffering personal and pecuniary injuries.

¶ 8 At trial, plaintiff first called Dr. Wainer as an adverse witness. Dr. Wainer testified he was plaintiff's primary care physician for many years and the sequence of events at issue began

in April 2012, when plaintiff came in with some pain in his right shoulder. Dr. Wainer acknowledged that on April 16, he ordered a chest x-ray of plaintiff, who reported experiencing shortness of breath. He testified that the x-ray revealed a poorly defined two-to-three-centimeter opacity in plaintiff's right lung that he conceded, in retrospect, could have been an abscess. He testified that the x-ray also revealed an atelectasis, which he defined as a partial collapse of the lung usually due to fluid and acknowledged could be consistent with an infection. After noting that plaintiff previously had iron deficiency anemia and was being treated by a gastroenterologist, Dr. Wainer acknowledged the possibility that anemia could be consistent with a patient with an ongoing infection. He also acknowledged seeing plaintiff on April 17, and that plaintiff's blood work showed an elevated white blood cell count, an increased proportion of neutrophils, and a high sedimentation rate. Dr. Wainer conceded the results of plaintiff's blood work revealed a nonspecific finding of inflammation, but he noted there are many causes of inflammation including infection. Dr. Wainer admitted the possibility that the results of plaintiff's blood work and x-ray suggested a systemic infection, which could be life-threatening. When asked about the requisite standard of care at that point, Dr. Wainer explained that a reasonable person is looking at the individual, not one or two lab results, and he noted that plaintiff showed no signs of systemic infection such as shakes, chills, or fever at that time. Dr. Wainer admitted he did not order blood cultures on April 17 despite the results of plaintiff's blood work and his observation of a new heart murmur, which could be consistent with a patient who has bacterial endocarditis. He acknowledged that on April 18, plaintiff had a CT scan, which the radiologist reported was suspicious for lung cancer.

¶ 9 Dr. Wainer further acknowledged that plaintiff was admitted to the hospital on April 23 because his blood pressure dropped significantly after a fine needle biopsy performed by an

interventional radiologist, and that plaintiff needed a transfusion because his anemia worsened, which could be a sign of severe infection. Dr. Wainer testified that on April 24, he had a conversation with Dr. Sardone, the hospitalist in charge of plaintiff upon his admission to MacNeal Hospital. According to Dr. Wainer, it was his understanding that if something unexpected or significant developed with plaintiff, he would be notified by Dr. Sardone or plaintiff's consulting physician, Dr. Chunduri.[1] Dr. Wainer identified a document shown to him as Dr. Sardone's history and physical examination (hereinafter H and P) of plaintiff on the date of his hospitalization, April 23. He acknowledged the H and P included blood work showing a small reduction in plaintiff's white blood cell count and sedimentation rate, no reduction in the proportion of neutrophils, and a new x-ray revealing a small pleural effusion, or buildup of fluid in the lung, which could be caused by an infection. He also noted the H and P showed that plaintiff was hypothermic, which could be caused by an acute infection. He then acknowledged receiving a voicemail message from Dr. Sardone at 10:45 a.m. on April 25, informing him that the result of plaintiff's fine needle biopsy was "nondiagnostic," or showed no cancerous cells, and that plaintiff was being discharged. Dr. Wainer conceded that his differential diagnosis of plaintiff on April 25 was either cancer or infection but explained that he did not order a blood culture at that time because he "wasn't the one who was taking care of [plaintiff] in the hospital" at that time. He then noted that Dr. Sardone ordered a blood culture at 4:30 p.m. on April 25.

¶ 10 Dr. Wainer acknowledged that at 8:30 a.m. on April 27, he remotely accessed plaintiff's electronic medical record via the MacNeal Hospital portal and did not see plaintiff's discharge summary, or a cytology report from a fine needle biopsy that Dr. Sardone had ordered. He noted that his medical assistant was also unable to locate those reports and he admitted she made no

[1] Dr. Chunduri testified that he is an adult hematologist/oncologist.

mention of pending blood culture results. He added that he called MacNeal Hospital and spoke to Dr. Hashmi, who texted Dr. Sardone at 9:25 a.m. about plaintiff's missing reports. Dr. Wainer identified his personal cellphone record and an incoming call at 9:31 a.m. from MacNeal Hospital extension 783-0000. He acknowledged Dr. Sardone's deposition testimony that she called him at 9:30 a.m. and an audit trail showed that she was viewing the lab results section of plaintiff's electronic medical record at 9:29 a.m. Dr. Wainer maintained he did not remember who was on that incoming call to his cellphone or any parts of the conversation. He then acknowledged seeing plaintiff around 11:30 a.m. and ordering blood work, which continued to show an elevated white blood cell count and an increased proportion of neutrophils. He acknowledged reviewing the second cytology report the following day and that it was negative for cancer. He conceded that the opacity observed in plaintiff's right lung "went away," "like an abscess where you treat it with antibiotics and that mass goes away." Dr. Wainer noted that he made a followup appointment for plaintiff to see Dr. Chunduri, an oncologist, on May 1 and that plaintiff was admitted to the hospital on that date because he was disoriented. Dr. Wainer acknowledged that plaintiff was subsequently diagnosed with bacterial endocarditis, then suffered a stroke and had an aortic valve replacement. Dr. Wainer identified an email he received from Dr. Bareis, the chief medical officer of MacNeal Hospital, and he admitted the attached timeline of events showed that at 9:30 a.m. on April 27, the hospitalist viewed the preliminary abnormal blood culture, which was available in plaintiff's electronic medical record by 11:15 a.m., and spoke with plaintiff's primary care doctor. On redirect examination by defense counsel, Dr. Wainer acknowledged his deposition testimony that his conversation with Dr. Sardone occurred on April 23 when plaintiff was admitted.

¶ 11 Two weeks later, when defendants recalled Dr. Wainer as a witness in its case-in-chief, the trial court first heard arguments outside the presence of the jury regarding the admissibility of "Dr. Wainer's test where he went to the doctors' lounge and called his own cellphone to see what number popped up." The trial court noted the dispute was that "the call that's on [Dr. Wainer's] cellphone was made to him either by Dr. Sardone or Dr. Hashmi," and that each party had a position on who called. Defendants argued for the admission of Dr. Wainer's testimony about his experiment as circumstantial evidence that a call placed from the doctors' lounge would not appear on Dr. Wainer's cellphone record like the one documented call from the hospital. Plaintiff contended Dr. Wainer's experiment, which occurred 19 or 20 months after the disputed call, was too remote in time to be relevant and lacked a proper evidentiary foundation. Plaintiff asserted the requisite foundation was "substantial similarity" and explained it was defendants' burden, as the proponent of the evidence, "to show that the [hospital's phone] system didn't change from April '12 to December '13." Plaintiff argued this foundation could not be laid by Dr. Wainer, "who is a physician, not the phone specialist, especially a guy who isn't really—he is on staff at MacNeal but he has an office-based practice, so he is not familiar."

¶ 12 The trial court admitted Dr. Wainer's testimony about his experiment during the following colloquy:

> "THE COURT: Here's the problem. The fact is that we know that hospital—we know because the proof is here that hospital—calls made from the hospital were appearing on his cellphone records on that date. If there was another call from the hospital, I don't care what extension it was from, this would not be the same situation. But there was a call from the hospital. Even you want to argue that the call from the hospital which is from a different extension I guess than the doctors' lounge was Dr. Sardone's call.

So there is no dispute that calls from the hospital—made from the hospital were appearing on a person's cellphone record at that point in time regardless of whether it was the same extension number for want of a better word. So, for example, if there were four more calls from the hospital and Mr. Hickey [defense counsel] was trying to say the number that we did on our experiment showed that the last four digits popped up are 1234 and none of these are 1234, well, then you might say well, but you don't know, it might have been gone through as a different extension two years later. But there is – But we know any call made from the hospital would have gone on his cellphone record in some form, your argument exactly when you say that the call that is on there is from Dr. Sardone, and so we know that they can be on there.

All [Dr. Wainer] is showing is yes, that in this point in time it showed up, this is the number it showed up with and not that or any other number from the hospital showed up save one and that's the one he says is from Dr. Sardone—I mean is from Dr. Hashmi.

MR. NAPELTON [PLAINTIFF'S COUNSEL]: It's just that I am going to object during the course of [Dr. Wainer's] testimony. There can't be a foundation to his familiarity with a phone system. He said that in his deposition. The transcript is attached to our motion *in limine*. He can't lay it. If he says it today it's in direct contradiction to what he said in the deposition.

THE COURT: Here's the thing. He is not going to say that he is familiar with anything about the phone system at all except that he went there, called the number and it popped up on his cellphone. That's all he is going to say.

MR. NAPELTON: Okay.

THE COURT: Okay. You know, I really have given this a lot of thought and I have analyzed it and there is nothing I can do except do what I think is the right thing to do under the evidence and the law and that is it goes to the weight not the admissibility and it will be admitted, but—it will be admitted and you understand my ruling.

MR. NAPELTON: Okay. But it is subject to a proper foundation being laid. I mean, obviously he can't get up there and talk about this experiment without laying a foundation for it.

THE COURT: But you see what I am saying is that he does not—a part of the foundation here is not in these circumstances have to be that he knows exactly the way numbers from the hospital would pop up on his phone in 2012 as opposed to 2013, just that a call from the doctors' lounge in 2013 was on his phone. Now, that's it. He is not going to testify the system hadn't changed because he doesn't know that, right?"

¶ 13 After the jury reconvened, Dr. Wainer testified that on Friday, April 27, he received a call on his cellphone from Dr. Hashmi to discuss an unstable, complex patient who had bit her tongue. Dr. Wainer maintained he did not receive a call from Dr. Hashmi via her cellphone or the hospital phone system on the night of April 26, and when shown his cellphone records, he confirmed the same. He identified an incoming call at 9:31 a.m. on April 27 to be from a MacNeal Hospital extension, *i.e.*, 783-0000, which he believed was from Dr. Hashmi.

¶ 14 Over plaintiff's standing objection, Dr. Wainer testified that around December 2013, when he learned that Dr. Sardone claimed she called him from the doctors' lounge on April 27, he went to the doctors' lounge and called his cellphone "from all the different numbers in the doctors' lounge" and "[a]ll of them had very specific four digits at the end," none of which were 0000. He added that he called each different number from his cellphone and "they all rang

exactly as you could expect," and he repeated the experiment at later times with the same results. When asked about Dr. Sardone's testimony that she did not make a note of her alleged phone conversation with him on April 27 because she did not have plaintiff's paper medical chart, Dr. Wainer agreed that Dr. Sardone could have walked down the hall from the doctors' lounge to the medical records office to ask for the chart, or she could have called the records office and dictated a note of her conversation with him. However, according to Dr. Wainer, "Dr. Sardone did not call me to – and discuss this preliminary positive blood culture on Friday morning," and he first learned of a blood culture from Dr. Chunduri on May 2. He also explained that plaintiff's new-onset heart murmur could have been caused by age and or smoking, but not endocarditis.

¶ 15 Dr. Wainer admitted he did not order a blood culture on April 18 but explained that the standard of care for a family practice physician such as himself did not require a blood culture at that time. He also noted that plaintiff never reported suddenly feeling sick when they spoke each day on April 16-18.

¶ 16 Dr. Wainer further testified that on the morning of April 27, before seeing plaintiff, he called MacNeal Hospital for plaintiff's missing reports and was referred to Dr. Hashmi because Dr. Sardone was unavailable. He testified that he was not told at that time about a blood culture or a preliminary positive gram stain for bacteria.

¶ 17 On cross-examination, Dr. Wainer acknowledged his role as plaintiff's primary care physician for more than 25 years and the one who makes the referrals to different physicians. He admitted being listed as the attending physician when plaintiff was hospitalized on April 23 but explained it was mostly for communication purposes. He also acknowledged asking Dr. Sardone to consult with Dr. Chunduri on April 24. He testified that his likely diagnosis of plaintiff on April 24 was a cancerous tumor in his lung. He conceded that Dr. Sardone's voicemail message

the next day, April 25, sought his objection to ordering another biopsy of the opacity in plaintiff's lung, and he did not return her call because he had no objection to a second biopsy.

¶ 18 Dr. Wainer further testified on cross-examination that while he was on staff at MacNeal Hospital, he maintained an office-based practice, which he rarely left except for rare circumstances, "[l]eaving the care to the hospitalist." He added that he still went to the hospital on a regular basis and that he made calls from the doctors' lounge on a regular basis. When asked about a six-minute call from MacNeal Hospital to his cellphone at 9:31 a.m. on April 27, Dr. Wainer maintained the call was from Dr. Hashmi to discuss a complex patient, notwithstanding Dr. Hashmi's deposition testimony that their conversation lasted 35 minutes. He then conceded the possibility that Dr. Hashmi initially called his cellphone regarding the complex patient and they continued their conversation over his office telephone line. However, Dr. Wainer denied the possibility that Dr. Sardone informed him about the preliminary positive gram stain and he simply forgot about it. When asked, *hypothetically*, "if you had known on April 27, 2012, that [plaintiff] had a positive blood culture you would have had him hospitalized that day," Dr. Wainer answered affirmatively but noted that a *positive blood culture* is different from a *preliminary positive gram stain*. He also noted that when a call is placed from the doctors' lounge, that phone number would display on a caller identification system. He then conceded that patient-related matters were not discussed on the phones in the doctors' lounge for privacy reasons. When plaintiff asked Dr. Wainer about "toggling" the hospital phone system to display a general line number, *i.e.*, 0000, defendants objected and plaintiff withdrew the question during a sidebar conference.

¶ 19 On redirect-examination, Dr. Wainer clarified that there were two conversations with Dr. Hashmi on the morning of April 27, when he first called MacNeal Hospital to speak with Dr.

Sardone about plaintiff's missing reports, and subsequently when they discussed another patient. He added that he would never make a note of that discussion in plaintiff's medical chart.

¶ 20 Dr. Wainer further testified that there was a "hand-off" procedure for transferring patient care whereby Dr. Sardone was required to call him on April 25, when plaintiff was being discharged, and apprise him of any pending tests and plaintiff's condition. He then noted that Dr. Sardone did not call him in accordance with the "hand-off" procedure.

¶ 21 Following closing arguments, the trial court instructed the jury with a modified version of Illinois Pattern Jury Instructions, Civil, No. 20.01 (2017) (hereinafter IPI Civil No. 20.01 (modified)):[2]

> "The plaintiff, Brian Dore, claims that he was injured [*sic*] that the defendant, Bradford Wainer, D.O. was negligent in one or more of the following respects:
>
> a. Failed to order a blood culture on April 18, 2012; *or*
>
> b. Failed to personally access the MacNeal physician portal on April 27, 2012 in order to obtain information about the blood cultures, *or*
>
> c. On April 27, 2012, failed to admit plaintiff, Brian Dore, to the hospital, and order antibiotics, in response to the preliminary positive blood culture.
>
> The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.
>
> The defendant, Bradford Wainer, D.O., denies that he was negligent in failing to do any of the things claimed by the plaintiff and denies that any claimed act or omission on his part of [*sic*] was a proximate cause of Brian Dore's claimed injuries.

[2] According to a footnote in plaintiff's brief, whether Dr. Wainer was negligent for failing to check plaintiff's lab results by accessing the hospital computer portal is not at issue in this appeal.

The defendants further deny that the plaintiff was injured to the extent claimed." (Emphasis added.)

No special interrogatories were submitted or given. The jury returned a verdict in favor of defendants on the remaining negligence claim in plaintiff's second amended complaint, and the trial court entered judgment thereon plus costs.

¶ 22 Shortly thereafter, on February 26, 2016, plaintiff filed a posttrial motion pursuant to section 2-1202 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1202 (West 2016)), asking the trial court to vacate the judgment entered on the jury verdict in favor of defendants and order a new trial on all issues. Citing *Solis v. BASF Corp.*, 2012 IL App (1st) 110875, plaintiff contended that defendants failed to meet their "fundamental, foundational, condition precedent burden of proof" of showing that the hospital's phone system had not changed, or was substantially similar, 20 months later when Dr. Wainer conducted his experiment. Plaintiff also alleged that the admission of Dr. Wainer's testimony about his "self-styled experiment" had no basis in fact and undermined the fairness and integrity of the trial.

¶ 23 At the hearing on plaintiff's motion for a new trial,[3] the trial court noted that Dr. Wainer's cellphone record from April 27 was admitted into evidence as an AT&T business record pursuant to an agreed stipulation by the parties. The trial court also noted that plaintiff considered Dr. Wainer's cellphone record as circumstantial evidence corroborating Dr. Sardone's testimony that she called him that morning, whereas defendants considered the same as circumstantial evidence that the documented call was not made from the doctors' lounge. In denying plaintiff's motion for a new trial, the trial court made the following observations:

[3] The trial court also acknowledged defendants' claim that there was sufficient evidence to support the jury verdict regardless of Dr. Wainer's testimony regarding his experiment but focused the parties' arguments on the only issue raised by plaintiff, *i.e.*, whether a new trial should be granted based on the lack of foundation for that testimony.

"THE COURT: Well, I – to me the *Solis* case is different and – for one reason. And that is the records on which this litigant relied for his then testimony, what the court says is that you couldn't offer testimony about the information contained in the records.

Here the record is the AT&T [cellphone] record. And that we do have a foundation for. His knowledge is about what phone call showed up on his cell phone record. That's the knowledge at issue.

And *** I don't believe that the foundation you are suggesting was needed in order to make his testimony which is that he tried to call his cell phone from the lounge phones, and it didn't show up as—it didn't show up as this number.

It required proof that the phone system hadn't changed. I do not believe that that's so. I think that that is not required, and therefore on those grounds your motion is denied.

But I will also add that even if this evidence had not been admitted, Dr. Wainer had still testified that he did not get this call and had reasons to support it. It was up to the jury to decide the credibility of that testimony between him and Dr. Sardone.

And I heard the testimony. And I heard Dr. Sardone. And so I think the jury could have easily found Dr. Wainer's testimony to be more compelling than Dr. Sardone's in this situation. Maybe not. But it isn't that they didn't have the evidence. And I don't believe that there was error in admitting Dr. Wainer's testimony[.]"

¶ 24 Before this court, plaintiff solely contends that the trial court abused its discretion by permitting Dr. Wainer to testify about his experiment because it was not "substantially similar" to the alleged call that he sought to refute. Plaintiff asserts that the foundational requirement for the admission of experiments or tests, as set forth in *Brennan v. Wisconsin Central Ltd.*, 227 Ill. App. 3d 1070, 1087 (1992), "depends on whether the 'essential conditions' or 'essential

elements' of the experiment are substantially similar" to the original occurrence. He cites *Lorenz v. Pledge*, 2014 IL App (3d) 130137, ¶ 18, for the general propositions that if an experiment is presented as a reenactment of the original occurrence, the proponent must show the test was performed under conditions closely duplicating the original occurrence, and where, as here, only one aspect related to the cause or result of the original occurrence is being tested, that particular aspect must be "substantially similar." Plaintiff argues that defendants failed to demonstrate that Dr. Wainer's experiment was performed under "substantially similar" conditions because they did not show the "continuity" of the hospital phone system, whether the phones in the doctors' lounge could be toggled to display a general line number, or that the hospital phone system had not changed.

¶ 25 Defendants respond that the trial court properly exercised its discretion in permitting Dr. Wainer to testify about his experiment from the doctors' lounge because any witness may testify to facts within his personal knowledge. Citing Illinois Rule of Evidence 602 (eff. Jan. 1, 2011) and *Northern Illinois Gas Co. v. Vincent DiVito Construction*, 214 Ill. App. 3d 203 (1991), defendants argue that the trial court properly exercised its discretion in permitting Dr. Wainer to testify about his experiment from the doctors' lounge because any witness may testify to facts within his personal knowledge, and Dr. Wainer's testimony showed that the essential conditions or essential elements of his experiment were substantially similar.

¶ 26 ANALYSIS

¶ 27 Generally, evidence is relevant and admissible if it has "'*any* 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.'" (Emphasis added.) *Arient v. Alhaj-Hussein*, 2017 IL App (1st) 162369, ¶ 38 (quoting Ill. Rs. Evid. 401, 402 (eff. Jan. 1, 2011)).

However, relevant evidence may nonetheless be excluded where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ill. R. Evid. 403 (eff. Jan. 1, 2011). The decision to admit evidence lies entirely within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Foley v. Fletcher*, 361 Ill. App. 3d 39, 46 (2005) (citing *Snelson v. Kamm*, 204 Ill. 2d 1, 33 (2003)). An abuse of discretion occurs when "'no reasonable person would take the view adopted by the trial court.'" *Id.* (quoting *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 177 (2003)). The same standard of review applies to the trial court's balancing determination pursuant to Illinois Rule of Evidence 403. *Hoffman v. Northeast Illinois Regional Commuter Railroad*, 2017 IL App (1st) 170537, ¶ 49.

¶ 28 If we determine that the trial court's evidentiary ruling was erroneous, then we must consider whether that error was harmless or reversible. *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 429 (2009). "If the trial court commits an abuse of discretion in allowing the admission of evidence, we will order a new trial only if the admission of the evidence appears to have affected the outcome of the trial." *McHale v. W.D. Trucking, Inc.*, 2015 IL App (1st) 132625, ¶ 28. "We will not reverse if it is apparent that 'no harm has been done.'" *Jefferson v. Mercy Hospital & Medical Center*, 2018 IL App (1st) 162219, ¶ 39 (quoting *Jackson v. Pellerano*, 210 Ill. App. 3d 464, 471 (1991)). Moreover, we may affirm the judgment of the trial court on any ground found in the record. *Hoffman*, 2017 IL App (1st) 170537, ¶ 42.

¶ 29 In this case, whether or not Dr. Wainer received a call from Dr. Sardone on April 27 does not tend to make more or less probable the allegation that Dr. Wainer was negligent in failing to admit plaintiff to the hospital on that date, "and order antibiotics, in response to the preliminary

positive blood culture." See *Arient*, 2017 IL App (1st) 162369, ¶ 35. Before Dr. Wainer testified in defendants' case-in-chief, the trial court entertained arguments outside the presence of the jury regarding the admissibility of "Dr. Wainer's test where he went to the doctors' lounge and called his own cellphone to see what number popped up." The trial court stated that the dispute was that "the call that's on [Dr. Wainer's] cellphone was made to him either by Dr. Sardone or Dr. Hashmi," and that each side had a position on who called. However, Dr. Wainer's testimony about his investigation into the phones in the doctors' lounge and the inferences arising therefrom, are conjectural and not helpful in proving or disproving a matter in controversy. See *Mulliken v. Lewis*, 245 Ill. App. 3d 512, 519 (1993); accord *Butler v. Kent*, 275 Ill. App. 3d 217, 230 (1995). The trial court admitted the proffered testimony about Dr. Wainer's experiment, which merely showed that the caller identification system on the phones in the doctors' lounge and on Dr. Wainer's cellphone was functioning properly 20 months after the April 27 call at issue. Assuming without deciding, that Dr. Wainer's testimony regarding his "experiment" was admissible as circumstantial evidence that he did not receive a call from Dr. Sardone on April 27, such testimony is not probative of any fact of consequence to a determination of Dr. Wainer's alleged negligence. See *Moore v. Swoboda*, 213 Ill. App. 3d 217, 239 (1991). When the jury reconvened and Dr. Wainer was shown his April 27 cellphone record, he identified an incoming call at 9:31 a.m. from MacNeal Hospital extension 783-0000, which he believed was from Dr. Hashmi to discuss a patient other than plaintiff. It is in this context that Dr. Wainer proceeded to describe his "experiment" supporting that belief. Because Dr. Wainer's testimony about his "experiment" is not probative of a fact of consequence, it was not relevant and should not have been admitted. See *Arient*, 2017 IL App (1st) 162369, ¶ 35; *Dillard v. Walsh Press & Die Co.*, 224 Ill. App. 3d 269, 278 (1991); *People v. Doll*, 126 Ill. App. 3d 495, 502 (1984).

¶ 30 Under these circumstances, we conclude that the trial court abused its discretion in weighing the probative value of Dr. Wainer's testimony against the risk of confusion, waste of time, and unnecessary presentation of cumulative evidence. Although Dr. Wainer's testimony supported his belief that he did not receive a phone call from Dr. Sardone on April 27, his description of the investigative process or "experiment" ran a significant risk of giving " 'layperson observations an aura of scientific validity' " (see *People v. Day*, 2016 IL App (3d) 150852, ¶ 27 (quoting *State v. Meador*, 674 So.2d 826, 832 (Fla. Dist. Ct. App. 1996)), and contributed to the time expended by the trial court in entertaining plaintiff's motion *in limine* number 14, which sought to bar a "phone chart" produced at Dr. Wainer's deposition, and defendant's trial brief seeking the admission of that chart as demonstrative evidence. During trial, the court then heard arguments outside the presence of the jury about the admissibility of "Dr. Wainer's test," and defendants argued for its admission as circumstantial evidence that a call placed from the doctors' lounge would not appear like the one documented call from the hospital on his AT&T cellphone record for April 27. The resulting admission of circumstantial evidence that merely bolstered Dr. Wainer's belief that he did not receive the disputed call from Dr. Sardone is cumulative of properly admitted testimony; Dr. Wainer testified that he believed the April 27 phone call appearing on his stipulated AT&T cellphone record was from Dr. Hashmi, and he recalled the substance of their conversation involving another patient. See *Jefferson*, 2018 IL App (1st) 162219, ¶ 44

¶ 31 Dr. Wainer's testimony about his investigation into the phone in the doctors' lounge and plaintiff's characterization of that testimony as experimental evidence brings to mind the anecdote often attributed to Abraham Lincoln regarding the potential "tyranny of labels," *i.e.*, "If you call a tail a leg, how many legs has a dog? Five? No, calling a tail a leg don't *make* it a leg."

(Emphasis in original.) *AT&T Capital Leasing Services, Inc. v. Brasch*, 912 F. Supp. 395, n.2 (N.D. Ill. 1996). Calling Dr. Wainer's investigative process an "experiment" does not make it so, and the trial court's comments in denying plaintiff's motion for a new trial reflect that awareness.

¶ 32 Although the trial court erred by admitting Dr. Wainer's testimony about his "experiment," we do not find the matter to constitute reversible error because, as the trial court correctly noted, Dr. Wainer testified that he did not get the disputed call from Dr. Sardone, he gave other reasons to support that position, and it was for the jury to decide the credibility of the competing witnesses. See *Rios v. Navistar International Transportation Corp.*, 200 Ill. App. 3d 526, 534 (1990). The admission of Dr. Wainer's testimony about his "experiment" did not unduly prejudice plaintiff's position under these circumstances. See *id.*

¶ 33 Moreover, the error in admitting Dr. Wainer's testimony was harmless because it was cumulative of evidence not probative of a fact of consequence to the determination of Dr. Wainer's alleged negligence and could not have affected the outcome of trial. See *Jefferson*, 2018 IL App (1st) 162219, ¶ 41. Before deliberations, the jury was instructed in pertinent part that plaintiff claimed Dr. Wainer was negligent in failing to admit plaintiff to the hospital and order antibiotics in response to a preliminary positive blood culture. Given the expert testimony about the relevant standard of care and causation, none of which are at issue in this appeal, we cannot say that the erroneous admission of cumulative testimony bolstering Dr. Wainer's belief that he did not receive a call from Dr. Sardone on April 27 was anything more than harmless error. See generally, *People v. Patterson*, 154 Ill. 2d 414, 474 (1992) (the trial court's action was nothing more than harmless error).

¶ 34 In so finding, we will disregard a number of inaccuracies in the statement of facts portion of plaintiff's brief. See Ill. S. Ct. R. 341(h)(6) (eff. Nov. 1, 2017) (statement of facts shall contain

those facts necessary to understanding the case, accurately, and without argument or comment). For instance, plaintiff refers to "[t]he only piece of documentary evidence supplied by defendant WAINER to support his alleged experiment was an unverified diagram he himself created of the Doctors' Lounge" and "[d]espite *** objections, the trial court denied Plaintiff's Motion *in Limine* Number 14 and permitted DR. WAINER to testify about his experiment." Our review of the record shows that the diagram pertains to plaintiff's motion *in limine* number 14, which sought to bar the "phone chart" produced at Dr. Wainer's deposition, and although defendants filed a trial brief about the admission of that chart or diagram as demonstrative evidence, the admissibility of the "phone chart" as demonstrative evidence is not at issue before this court. Having determined that the trial court erred, we also decline to address plaintiff's assertions that he was "summarily barred from inquiring before the jury into the glaring foundational shortcomings of the telephone experiment," and that Dr. Wainer's testimony about his experiment should have been barred as self-serving and tantamount to hearsay.

¶ 35 CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment entered on the jury's verdict in favor of defendants. See *Hoffman*, 2017 IL App (1st) 170537, ¶ 60.

¶ 37 Affirmed.