2018 IL App (2d) 160357-U
No. 2-16-0357
Order filed February 26, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CODY M. SCHLAISS, Plaintiff-Appellant, v. MICHAEL J. McFADDEN, M.D., and FREEPORT REGIONAL HEALTH CARE FOUNDATION, d/b/a Freeport Health Network, and d/b/a FHN Family Healthcare Center-Stockton, Defendants-Appellees.	)	Appeal from the Circuit Court of Stephenson County. No. 12-L-47 Honorable David L. Jeffrey, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decision not to give a nonpattern jury instruction regarding the lost-chance doctrine was not an abuse of discretion; plaintiff's remaining jury-instruction contentions were forfeited. The jury's verdict was not against the manifest weight of the evidence. The trial court did not abuse its discretion in making evidentiary rulings regarding the use of a demonstrative exhibit in closing arguments. Finally, plaintiff forfeited his contentions regarding examination of nursing standard-of-care witnesses and whether the trial court properly directed a verdict on plaintiff's allegations of nursing negligence.

¶ 2 Beginning in 2005, plaintiff, Cody M. Schlaiss (Cody or plaintiff), came under the care of defendant, Dr. Michael J. McFadden, when McFadden administered Cody's high school

freshman physical. At that physical, Cody's urine was tested revealing abnormally high levels of protein and blood present in the sample. McFadden attributed the abnormal result to Cody's participation in freshman football and changes in his exercise and dietary patterns. Over time, Cody's abnormal urine tests persisted, and his blood pressure occasionally edged into abnormal territory, with a general upward trend until it spiked to dangerous levels, at which time, Cody was finally diagnosed with a serious and potentially fatal kidney disease, C3 glomerulonephritis (C3GN). The course of the disease progressed, resulting in kidney failure and, ultimately, a kidney transplant. Cody attributed his injuries to McFadden's failure to initially recognize the warnings presented by the abnormal urine testing and to communicate the issues to Cody and his family. Cody sued McFadden and defendant, Freeport Regional Health Care Foundation, d/b/a Freeport Health Network and d/b/a FHN Family Healthcare Center-Stockton (Freeport), alleging professional negligence against McFadden and vicarious liability against Freeport. The matter advanced to a jury trial at which the jury rendered a general verdict in favor of all defendants and against plaintiff. Plaintiff appeals, arguing that the trial court erred: (1) in rejecting a proposed nonpattern jury instruction regarding the lost-chance doctrine; (2) in refusing a pattern jury instruction regarding aggravation of a preexisting condition; (3) in giving the long-form sole proximate cause pattern jury instruction; (4) the jury verdict was against the manifest weight of the evidence; (5) in sustaining an objection to an exhibit during plaintiff's rebuttal closing argument that had not been objected to during plaintiff's opening closing argument purporting to summarize the effect of blood pressure medication treatment; (6) in directing a verdict on plaintiff's allegations of nursing negligence; and (7) in limiting plaintiff's examination of various physicians regarding nursing standards of care. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 11, 2005, Cody visited McFadden for the first time to receive his ninth-grade physical. As part of the physical, McFadden took a urine sample which revealed the presence of abnormally large amounts of protein and blood. Cody had just started football practice, and McFadden testified that, at that time, he believed that increased heavy exercise and a dietary change could have possibly explained the abnormal result.

¶ 5 On October 27, 2005, Cody accompanied his father to McFadden's office for his father's follow-up visit with McFadden. While there, Cody performed another urine test. This test, too, was abnormal, with large amounts of protein and blood present. The sample was also sent for more detailed analysis. Based on the abnormal result, McFadden ordered Cody to perform a first a.m. urine dip, a test of his first urination in the morning. On October 31, 2005, Judy Holland, a part-time floating nurse working in McFadden's office that day, called Cody's house and left a voice message. Cody called her back and she instructed him to have an adult call the office to discuss the results. Holland testified that she would not have left any information about the results of the test in the voice message. Holland also testified that she did not convey the substance of the results to the then 14-year-old because, based on her experience, a younger person is generally not responsible about following up. Holland testified that she did not schedule another appointment with Cody during the phone call. Holland testified that she attached a note on the front of Cody's medical chart informing the nurse who would be on duty the next day to follow up with Cody's family to schedule a first a.m. urine dip. No one from McFadden's office or Freeport contacted Cody or his family to schedule or perform the test.

¶ 6 Cody did not revisit McFadden until the next year. On August 15, 2006, Cody visited McFadden complaining of a left ankle sprain. McFadden did not mention the abnormal urinalysis results and did not instruct him to provide a first a.m. urine dip.

¶ 7 On August 24, 2007, Cody returned to McFadden for his 11th-grade sports physical. At that time, Cody's blood pressure was measured to be 130/77, which is in the prehypertensive range. Plaintiff's expert, Dr. John Hocutt, opined that the standard of care required McFadden to repeat the blood pressure after waiting for a period of time. Defendants' expert, Dr. Gregg Davis, disagreed. According to Davis, the definition of prehypertension is based upon an average blood pressure taken at a basal state, requiring the patient to sit calmly for up to 30 minutes before the blood pressure reading is repeated. Davis opined that McFadden's decision not to retest Cody's blood pressure complied with the required standard of care. McFadden also did not look through Cody's chart to determine whether the first a.m. urine dip had ever been performed. Defendants' expert Davis opined that the standard of care did not require McFadden to do so.

¶ 8 In 2008, Cody visited McFadden twice for football injuries. On August 26, 2008, Cody visited for right leg pain and a swollen ankle. Cody reported extreme pain from the injury (8 out of 10). Cody's blood pressure was elevated, at 138/88. McFadden attributed the elevated blood pressure to Cody's pain. Davis explained that pain can cause an elevation in blood pressure.

¶ 9 A week later, on September 2, 2008, Cody visited McFadden with a right knee injury. Cody's blood pressure was recorded to be 122/84, which, according to McFadden, was reduced from the week before and was relatively normal. McFadden noted that Cody reported that his pain was 2 out of 10 while sitting, but 10 out of 10 upon movement. Davis testified that McFadden did not violate the required standard of care in any of the 2008 visits.

¶ 10 On October 23, 2009, Cody once again visited McFadden. This visit was apparently for a check-up, and Cody complained that he had experienced some numbness and tingling. The numbness and tingling had resolved by the time of Cody's appointment. Cody's blood pressure

was recorded to be 130/90, which was borderline elevated. McFadden instructed Cody, who was by then 18 years old, to monitor his blood pressure, either at home, by using a public blood pressure device at a pharmacy, or by coming into the office. McFadden also instructed Cody to contact the office if the symptoms returned or if his blood pressure was consistently above 140/90.

¶ 11 On December 31, 2009, McFadden again examined Cody, this time based on complaints regarding his mood and possible depression. Cody's blood pressure was recorded to be 159/89. Based on the examination, McFadden believed that Cody was experiencing depression, mild anxiety, and elevated blood pressure. McFadden suggested that Cody see a counselor, prescribed medications for the depression and anxiety, and advised him to continue to monitor his blood pressure. McFadden explained that the elevated blood pressure was not unusual under the circumstances, because Cody was experiencing significant emotional upset and stress, all of which contributed to the elevated blood pressure. Davis opined that McFadden's actions complied with the standard of care. Davis further opined that the blood pressure reading was not a critical value, and it was not high enough at that time to cause any injury to Cody.

¶ 12 On January 21, 2010, McFadden's nurse called Cody asking him to return the call. McFadden was seeking follow-up on Cody's emotional issues. Cody did not return the call.

¶ 13 On February 12, 2010, Cody returned to McFadden to discuss the medications for his mood and anxiety. Cody's blood pressure was recorded to be 143/88, which was well below the December 31, 2009, blood pressure. McFadden testified that, because of the improvement, he considered the blood pressure reading to be reasonable. McFadden persisted in his diagnosis of depression and anxiety, noting that they were improved with medication, and he noted the continued elevation in Cody's blood pressure. McFadden instructed Cody to continue to monitor

his blood pressure.

¶ 14 On July 18, 2010, Cody's grandmother called McFadden's office and spoke with nurse practitioner Luann Jordan. She reported that Cody had not been taking his medications and his blood pressure readings were 200/127 and 214/139. In addition, Cody was experiencing bad headaches and other symptoms consistent with high blood pressure. On July 19, 2010, Jordan examined Cody, and she prescribed a blood-pressure medication along with further testing.

¶ 15 On July 21, 2010, Cody underwent testing at the Jo Daviess Health Department. Cody was referred to a nephrologist. On July 26, McFadden saw Cody once again. Cody, now 19 years old, and his father were present at that appointment. McFadden consulted with Dr. Farhan Khan, a nephrologist, and explained the additional testing needed with Khan to make a diagnosis.

¶ 16 As it turned out, Cody was unable to schedule an appointment with Khan for about six months because Khan's office would not accept Cody's insurance. This information was not presented to the jury and defendants were barred from raising any sort of comparative negligence argument based on the six-month gap in coverage; as well, defendants were barred from raising a negligence argument against Cody's father for the six-month gap.

¶ 17 In January 2011, Cody was admitted to the hospital complaining of elevated blood pressure. He was then diagnosed with C3GN,[1] and Khan began to treat Cody with

[1] C3GN is the current name of the kidney disease with which Cody was diagnosed. At the time of the initial diagnosis, the disease was called membranoproliferative glomerulonephritis type III (MPGN-3). The nomenclature was changed after Cody's original diagnosis, but all the witnesses agreed that the disease remained the same throughout.

corticosteroids. In August 2011, Cody's kidneys failed, and he began dialysis, which continued until shortly before trial, when he received a kidney transplant.

¶ 18 On December 13, 2012, plaintiff filed his original complaint against McFadden and Freeport. In January 2015, plaintiff filed the second amended complaint at issue in the jury trial. Plaintiff alleged that McFadden was negligent in treating him, particularly regarding the failure to follow up the abnormal urine test results or to take other actions that could have led to a quicker diagnosis. Plaintiff also alleged that Freeport was vicariously liable for McFadden's errors. In addition, for the first time in the litigation, the second amended complaint alleged that Freeport was vicariously liable for the negligence of "members of [Freeport's] nursing staff" during his treatment; however, no members of the nursing staff were individually identified. The allegations against the nursing staff focused on their alleged failures to properly take a complete history of his symptoms and the communication issues regarding the abnormal test results. Finally, plaintiff alleged that Freeport was negligent for failing to promulgate policies about testing and following up on the results with patients and communicating with patients and their parents.

¶ 19 As noted, the allegations of nursing negligence arose for the first time in this case in the second amended complaint, even though plaintiff had not disclosed any nursing-care experts. As the trial date neared, defendants moved *in limine* to bar any of the disclosed expert physicians from testifying about the standard of nursing care required in the case. Plaintiff did not file a response to the motion *in limine*, and, at the motion-*in-limine* hearing, the motion was granted with no objection.

¶ 20 At trial, plaintiff presented the testimony of Dr. Kenneth Miller, a pediatric nephrologist. According to Miller, the progression of Cody's disease could have been slowed if treatment had

begun in 2005. Miller testified that treatment with steroids administered every other day would have been effective in slowing the progress of the C3GN that ultimately destroyed Cody's kidneys. Miller also testified that early treatment for Cody's high blood pressure would have slowed the damage caused by C3GN to Cody's kidneys. Miller opined that, to a reasonable degree of medical certainty, Cody would have still had working kidneys at the time of trial if Cody had received steroid therapy and blood-pressure medications. Despite this testimony, Miller conceded that he could not opine to a reasonable degree of medical certainty that earlier treatment would have reversed or prevented injury to Cody's kidneys or that Cody's kidneys would not have failed even with some sort of treatment. In fact, Miller admitted that there are as yet no therapies to treat C3GN, only supportive therapies that would have slowed the progress of the disease.

¶ 21 Miller conceded that he had no formal training relating to C3GN and that he had not published any papers on the topic of C3GN. Regarding the earlier nomenclature, Miller testified that he had most recently published a paper relating to MPGN during the 1980s, and his most recent research into topics related to MPGN occurred during the 1970s. Miller acknowledged that, aside from giving an opinion in this case, he had never treated a patient with C3GN and had only treated one patient with a diagnosis of MPGN-3.

¶ 22 Miller also acknowledged that his opinions were based on research completed in the 1980s and 1990s. This research predated the change in nomenclature from MPGN-3 to C3GN, and the earlier studies did not separate the subjects who had C3GN from those who did not. Additionally, Miller agreed that the studies on which he relied for his opinion on the efficacy of steroidal therapy had relatively low quality evidence to support that conclusion.

¶ 23 Dr. Jose Torrealba, a pathologist who testified on plaintiff's behalf, diagnosed Cody's

illness. He, too, testified that, based on his review of the literature, steroidal therapy could benefit a patient diagnosed with C3GN. Torrealba, however, conceded that he had not conducted research into C3GN. As a pathologist, he did not see or treat patients; rather, he analyzed tissue samples. Torrealba testified that he would also defer to a nephrologist regarding the treatment of any C3GN patient.

¶ 24 Khan, Cody's treating nephrologist, testified that, when Cody was diagnosed with C3GN, he prescribed a steroidal therapy regimen. On direct examination, Khan offered the opinions that steroids could have halted or slowed the progression of Cody's C3GN and that earlier intervention could have resulted in a different outcome. Khan admitted that, before Cody, he had not treated a patient with C3GN. On cross-examination, Khan conceded that, "knowing now that Cody has C3GN," he could not, to a reasonable degree of medical certainty, state that an earlier intervention in Cody's case would have changed the outcome (end-stage renal failure, dialysis, and transplantation).

¶ 25 Defendants' pathology expert, Dr. Tibor Nadasdy, testified that he was currently at the Ohio State University and had specialized in renal pathology for more than 30 years. He testified that MPGN was not a disease itself, but a pattern of injury, of which there were three types classified. Around 2012, doctors began to realize that the MPGN nomenclature did not adequately describe the disease process, and the various illnesses encompassed by the MPGN descriptions were renamed.

¶ 26 Defendants' nephrology expert, Dr. Lee Hebert, testified that he had spent his career investigating kidney diseases and treated patients with illnesses like Cody's (including specifically C3GN) "all the time." He, too, worked at the Ohio State University, currently as a professor emeritus. At the time of the trial, Hebert was actively treating five patients with

C3GN.

¶ 27 Hebert testified that, around 2012, doctors and researchers no longer looked only at the pattern of injury of the renal anatomy, but they also began to consider how the disease might have been caused in attempting to name and classify it. Specifically, they considered the presence or absence of immunoglobulin or various other proteins (called "complement") in leading to the classification of the diseases that bore the MPGN patterns of injury. In Cody's case, C3GN, a very rare disease occurring in only a few patients out of every million, was caused by the C3 protein spilling into and destroying the glomerulus, the structure that filters the urine and other waste from the blood in the kidney.

¶ 28 Hebert opined that there was no evidence that would support the efficacy of steroidal therapy on the progress of C3GN, because it was not caused by the patient's immune system but by an overactivation of the C3 protein. The early studies, according to Hebert, had mixed patients with immune-system mediated diseases with those who had diseases like C3GN, which were not caused by immune system issues. Thus, according to Hebert, the studies that showed steroidal therapy for MPGN-3 was effective were flawed, because those studies did not and could not identify those patients with C3GN. Hebert denigrated the earlier studies and further stated that no current expert in the field would suggest that steroidal therapy would be effective in the treatment of C3GN and that any "notion that [steroids] should be used [to treat C3GN] is based on totally outdated and incorrect inferences, understandings of what [C3GN] is." Hebert further reviewed the records of Cody's treatment and concluded that they showed no benefits from the steroidal therapy initiated by Khan following the diagnosis in January 2011.

¶ 29 Hebert opined that C3GN had no cure and no proven effective treatment existed. Cody's disease could not have been reversed or its progression slowed. There was nothing that could

have been done to prevent Cody's ultimate kidney failure, no therapy existed that would have had any significant effect in prolonging the function of Cody's kidneys or delayed his time to dialysis or transplant, and no therapy existed that would have made a difference in Cody's outcome.

¶ 30 On the issue of hypertension, Miller testified that McFadden's failure to treat Cody's high blood pressure hastened his kidney failure. During defendants' direct examination, Hebert testified that early treatment for high blood pressure could have preserved Cody's kidney function for perhaps another month, qualifying that statement with the conclusion that such blood pressure treatment "would have had no clinically important effect on [Cody's] outcome." However, continued questioning clarified that statement and Hebert opined that "Cody's blood pressure was out of control for a very short period of time. I looked at his EKGs. They were totally normal. There was no sign of hypertension-induced injury to his heart. So it's very unlikely that he had hypertension-induced injury to his kidneys." Moreover, when defendants' counsel asked the hypothetical question that, assuming Cody had C3GN in 2005, whether blood pressure medications prescribed at that time would have changed Cody's outcome, Hebert said, "no," and explained that randomized trials had established that blood pressure medications had little to no effect on the progress of C3GN.

¶ 31 Plaintiff presented evidence that the medical community is advancing its knowledge of the causes of C3GN and how it progresses, along with the possibility of developing either effective treatments or a cure for the disease. Hebert, for example, agreed during cross-examination that it was reasonable to hope that, within five years, a cure would be developed. Similarly, Torrealba opined that the medical community was "closer than ever" to developing a cure or effective treatment to slow the progression of C3GN.

¶ 32 Turning to the issue of nursing negligence, plaintiff asserts that he was able to obtain testimony about the relevant nursing standards of care from Holland (a nurse who had worked for defendants), Davis (defendants' expert regarding family practices), and Hocutt (plaintiff's family practice expert). Holland had testified about the October 2005 attempts to communicate the abnormal urine test results to Cody and his family. Holland had noted that she was not able to communicate the results to Cody's father or other responsible adult, so she attached a note to Cody's chart instructing the nurse on shift the next day to complete the follow-up. Holland opined that the standard of care required the nurse on the next shift to follow up with Cody's family, although she also testified it would not have been a deviation from the standard of care for the next-day nurse not to have followed up.

¶ 33 Plaintiff also points to Davis's testimony that, if the nurses did not follow Freeport's custom and practice in informing a patient about abnormal test results, this would constitute a deviation from the standard of care. However, this answer was stricken by the trial court on defendants' motion, and the jury was instructed to disregard that answer. Davis also testified that he would expect his nurses to communicate abnormal test results to his patients. We note, however, that Davis unequivocally testified that both McFadden and Freeport complied with the standard of care at all times with respect to Cody's treatment, including the creation of practices and procedures for the Freeport staff.

¶ 34 Hocutt, a physician and not a nurse, testified that, where a patient has had an abnormal test result, the standard of care requires the practice, either through the physician, a nurse, or other assistant, to communicate the result to the patient. According to Hocutt, a "team approach" is used by doctors and their nurses and assistants in following up with the patients. This testimony, too, was stricken by the trial court on defendants' motion, and the jury was instructed

to disregard that testimony. According to Hocutt, the standard of care required the "team" to make sure that Cody knew of the result and that the further testing was critical and needed to be completed.

¶ 35 At the close of plaintiff's case-in-chief, defendants moved for a directed verdict on the nursing allegations. Plaintiff's counsel conceded that he presented no evidence on any of the allegations except the allegation involving communication of the abnormal test results, but he argued that there was sufficient evidence adduced to allow that allegation to go to the jury. The trial court granted defendants' motion, noting that there was no argument regarding Holland's purported statement of the standard of care and that there had been no expert evidence regarding the standard of care.

¶ 36 The matter went to the jury on the first and third counts of the second amended complaint: the negligence claim against Freeport and the negligence claim against McFadden (and against Freeport under a vicarious liability theory). The jury returned a general verdict in favor of defendants. Plaintiff's timely posttrial motion was denied, and plaintiff timely appeals.

¶ 37 II. ANALYSIS

¶ 38 On appeal, plaintiff challenges the trial court's refusal to give a jury instruction explaining the lost-chance doctrine in addition to the pattern instructions regarding proximate cause. Plaintiff also argues that the trial court erred in refusing to instruct the jury about the aggravation of a preexisting condition and in giving a long-form instruction regarding sole proximate cause. Turning from the jury-instruction issues, plaintiff contends that the jury verdict was against the manifest weight of the evidence. Plaintiff next argues that the trial court erred when it allowed the objection to the use of an exhibit during the rebuttal closing argument where the same exhibit had been used during the opening closing argument without objection. Finally,

plaintiff challenges the trial court's rulings regarding his allegation of nursing malpractice, first contending that the trial court erred in granting defendants' motion for a directed verdict on the nursing-negligence allegations and last contending that the trial court erred in limiting plaintiff's examination of physician-witnesses about the applicable nursing standards of care. We address each contention in turn.

¶ 39 A. Preliminary Issues

¶ 40 Before addressing the substantive merits of plaintiff's arguments on appeal, we must first consider defendants' challenge to plaintiff's statement of the nature of the case and statement of facts. See Ill. S. Ct. R. 341(h)(2), (6) (eff. Feb. 6, 2013). The nature-of-the-action section is supposed to comprise an "introductory paragraph" relating the nature of action and the judgment appealed from and whether it was the result of a jury verdict. Ill. S. Ct. R. 341(h)(2) (eff. Feb. 6, 2013). Similarly, the statement-of-facts section is to be a fair and accurate recitation of the facts necessary to understand the case and the issues presented on appeal presented without argument or comment. Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013).

¶ 41 In this case, plaintiff's statement of the nature of the case is not the required introductory paragraph, but a 3-page, 10-paragraph argumentative presentation of his position regarding the lost-chance doctrine and the alleged errors committed by the trial court. Such a presentation is not the simple, brief orientation contemplated by the Supreme Court Rules and it violates Rule 341(h)(2).

¶ 42 Similarly, the statement of facts does not review the pertinent testimony adduced at trial; rather, it presents a significantly one-sided view of all of the facts favoring plaintiff's position and omits contradictory testimony from defendants' witnesses. The statement of facts also treads

on and perhaps over the line of argument. We conclude the statement of facts violates Rule 341(h)(6).

¶ 43 The Illinois Supreme Court Rules are not suggestions; they have the force of law and must be complied with. *Szczesniak v. CJC Auto Parts, Inc.*, 2014 IL App (2d) 130636, ¶ 8. Defendants urge us to strike the noncomplying sections of Cody's brief. We decline to do so because, while the violations are irksome, they do not frustrate our ability to understand the facts of the case and the issues presented, so the sanction of striking is not warranted. With that said, however, we admonish counsel to carefully follow the applicable rules in the future.

¶ 44 B. Jury Instruction Regarding the Lost-Chance Doctrine

¶ 45 Plaintiff's primary argument on appeal is that the trial court erred in refusing his tendered nonpattern jury instruction regarding the lost-chance doctrine. Generally, the trial court's decision regarding whether to give an instruction to the jury is reviewed for an abuse of discretion considering whether, as a whole, the instructions fairly and correctly stated the law and were clear enough not to mislead the jury. *Eid v. Loyola University Medical Center*, 2017 IL App (1st) 143967, ¶ 56. Whenever the court determines that a pattern jury instruction is applicable to an issue in the case on which the jury should be instructed, the pattern instruction "shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 239(a) (eff. Apr. 8, 2013). However, a nonpattern instruction may be used if the pattern instruction does not correctly state the law or is otherwise inadequate. *Eid*, 2017 IL App (1st) 143967, ¶ 57. This is because every litigant is entitled to have the jury instructed as to the law governing the case. *Lambie v. Schneider*, 305 Ill. App. 3d 421, 427 (1999). If the trial court departs from the pattern instructions, it should carefully consider the proposed nonpattern instruction, using it cautiously and only when necessary to provide a fair trial. *Id.* Even if a

nonpattern instruction correctly states the law, it must be clear enough not to mislead the jury, and it must not unduly emphasize any part of the matter. *Id.* This means that, if the jury instruction given by the court fairly and accurately states the law, reversal is not required even though the jury could have been instructed in an alternative manner that would have been equally acceptable, for instance, by using a proposed nonpattern instruction instead. *Id.*

¶ 46 As an initial matter, we note that the record does not include a copy of the jury instructions submitted by the parties and given, modified, or refused by the trial court, as required by section 2-1107(b) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1107(b) (West 2016)). See also Ill. S. Ct. R. 239(c) (eff. Apr. 8, 2013) (requiring both a clean copy of the instruction and a copy marked with the party's numbering, which party tendered the instruction, and a notation whether the instruction was a pattern instruction, a modified pattern instruction, or a nonpattern instruction). Despite the failure of the record to contain an actual written copy of plaintiff's proposed nonpattern lost-chance instruction, the parties extensively briefed the issue and plaintiff submitted the proposed instruction as part of that briefing. Additionally, the trial court read the proposed nonpattern lost-chance instruction into the record during one of the hearings. Normally, the failure to include in the record the copies of the instructions tendered to the trial court would result in the forfeiture of any issue arising from those instructions missing from the record. *Nika v. Dane*, 199 Ill. App. 3d 296, 310 (1990); *Tarshes v. Lake Shore Harley Davidson*, 171 Ill. App. 3d 143, 150-51 (1988). However, in this case, the record contains enough information about plaintiff's proposed nonpattern lost-chance instruction to discern the content of the instruction to enable us to consider this issue. In addition, defendants appear to acquiesce to plaintiff's representation of the form of his proposed nonpattern lost-chance instruction, and this reinforces our conclusion that we can rely on the portions of the record

dealing specifically with this proposed instruction even though the actual instructions tendered to the trial court were not included in the record and plaintiff made no attempt to supplement the record with the missing actual instructions.

¶ 47 Before we grapple with plaintiff's proposed nonpattern jury instruction, it is helpful to review the law surrounding the lost-chance doctrine. In *Holton v. Memorial Hospital*, 176 Ill. 2d 95 (1997), our supreme court resolved the issue of "whether application of the 'loss of chance' doctrine in medical malpractice cases lessen[ed] the plaintiff's burden of proving proximate cause" because the issue had created conflicting opinions among panels of the appellate court. *Id.* at 98. Simply stated, the lost-chance doctrine "refers to the harm resulting to a patient when negligent medical treatment is alleged to have damaged or decreased the patient's chance of survival or recovery, or to have subjected the patient to an increased risk of harm." *Id.* It must be firmly kept in mind, however, that the lost-chance doctrine "is not a separate theory of recovery but rather a concept that enters into proximate cause analysis in medical malpractice cases when a plaintiff alleges a defendant's negligent delay in diagnosis or treatment has lessened the effectiveness of treatment." *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 467 (2001). Thus, plaintiff's contention questions whether the standard pattern instructions on proximate cause were sufficient, or whether they needed to be supplemented by his proposed nonpattern instruction supplementing the jury's instructions regarding proximate cause.

¶ 48 At the time *Holton* was decided, there were two lines of thought regarding the lost-chance doctrine and how it related to proximate cause: one line held that proximate cause could be established by evidence, to a reasonable degree of medical certainty, that the defendant either increased the risk of harm to the plaintiff or lessened the effectiveness of the plaintiff's treatment by the defendant's negligent conduct; the other line rejected the lost-chance doctrine altogether

as giving rise to a relaxed standard of proximate cause which was too conjectural to satisfy the more-likely-than-not traditional test of proximate causation. *Holton*, 176 Ill. 2d at 104-05 (citing cases). Our supreme court held that the traditional statement of proximate cause, that the defendant's negligent conduct more probably than not caused the plaintiff's injury, encompassed the lost-chance doctrine. *Id.* at 107.

¶ 49 The court also addressed the issue of how the lost-chance doctrine was to be applied where the patient already had a less than 50% chance of recovery or a successful outcome. The supreme court acknowledged that, pursuant to the two lines of thought, the courts that rejected the lost-chance doctrine had held that, where the plaintiff had a less than 50% chance of recovery, absent the malpractice, the plaintiff would be unable to prove proximate causation because he or she would have experienced the unfavorable outcome regardless of the defendant's negligent conduct. On the other hand, the courts that had embraced the lost-chance doctrine had recognized that victims of medical malpractice should be able to recover damages for the defendant's negligent conduct even though the victims' chance of recovering from the existing illness or injury was less than 50%. *Id.* at 111-12. Analyzing the split, our supreme court framed the issue as whether the lost-chance doctrine relaxed the traditional proximate cause standard or whether the traditional principles of proximate cause were satisfied by and could be harmonized with the lost-chance doctrine. *Id.* at 113. Our supreme court reasoned that the lost-chance doctrine was properly viewed in harmony with traditional principles, holding that evidence which showed to a reasonable certainty that the negligent delay in diagnosis or treatment lessened the effectiveness of treatment or deprived the patient of a chance of recovery or survival conformed to traditional principles of proximate cause. *Id.* at 115-16. Thus, in order to establish proximate cause under the lost-chance doctrine, the plaintiff must show with a reasonable degree

of medical certainty that the negligent conduct of the defendant lessened the effectiveness of the medical services rendered to the plaintiff or decreased the plaintiff's opportunity to recover or to survive. *Id.* at 118-19.

¶ 50 Plaintiff argues that the instruction on proximate cause given by the trial court was insufficient to explain to the jury the subtle intricacies of the lost-chance doctrine. The trial court instructed the jury with Illinois Pattern Jury Instructions, Civil, No. 15.01 (2011) (hereinafter IPI Civil (2011)). IPI Civil (2011) No. 15.01 states:

> "When I use the expression 'proximate cause,' I mean that a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.]"

Plaintiff argues that, given the struggles courts have had with the concept of the lost-chance doctrine and how it relates to proximate cause, the jury cannot have been expected to understand the legal principles involved based simply upon IPI Civil (2011) No. 15.01. Instead, according to plaintiff, the jury needed more education to properly inform them of the state of the law.

¶ 51 To that end, plaintiff proposed to give the following nonpattern instruction: "If you find that the plaintiff has proven that the delay in diagnosis and treatment of plaintiff's condition lessened the effectiveness of the medical services he received, you may consider this delay one of the proximate causes of his injuries." This instruction is properly rooted in our supreme court's language in *Holton*. See *Beard v. Barron*, 379 Ill. App. 3d 1, 21, n.4 (2008) (noting that the following lost-chance instruction was given: " 'If you decide or if you find that the plaintiff has proven that a delay in diagnosis and treatment of [the patient's] brain bleed lessened the effectiveness of the medical services which she received, you may consider such delay as one of

the proximate causes of her claimed injuries and death.' "). Following extensive briefing and argument, the trial court refused the proposed nonpattern instruction.

¶ 52 Plaintiff argues that the trial court had the authority to give nonpattern instructions. Defendants do not challenge this statement, and we believe plaintiff correctly states the law. However, the fact that a court has the authority to do something does not mean that it must do that thing. The key part to plaintiff's argument is bridging the gap between can and must.

¶ 53 In order to bridge that gap, plaintiff posits that the pattern jury instruction on proximate cause is insufficient to adequately apprise the jury of all aspects of proximate causation, including the lost-chance doctrine. To support that idea, plaintiff notes that the courts have struggled with whether the lost-chance doctrine fit within the traditional notion of proximate cause. Plaintiff also suggests that the wording of the pattern instruction is fraught with complexity that could mislead the jury and that the shortfall in comprehension cannot be made up through counsels' closing arguments. Plaintiff then argues that, because defendants received a requested (pattern) instruction clarifying proximate cause, he should have been allowed to submit a (nonpattern) instruction regarding the lost-chance doctrine. Plaintiff concludes that, for all of these reasons, he was entitled to have the trial court give his proffered nonpattern lost-chance instruction. We will deal with each step of plaintiff's argument in turn.

¶ 54 Plaintiff first attempts to convince us that IPI Civil (2011) No. 15.01 did not adequately inform the jury about the law of lost chance. Plaintiff argues, without citation to authority (see Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (a party's argument will be forfeited if it is not supported with citation to pertinent authority)), that IPI Civil (2011) No. 15.01 is "not intuitive," apparently meaning that the jury could not understand that the definition of proximate cause encompassed the lost-chance doctrine. That argument is directly refuted by extensive authority.

Cetera v. DiFilippo, 404 Ill. App. 3d 20, 45 (2010) (appellate courts have "consistently affirmed refusals of similar proffered nonstandard [lost-chance] instructions because IPI Civil 3d No. 15.01 properly states the law in lost-chance medical malpractice cases"); see also *Sinclair*, 325 Ill. App. 3d at 466; *Lambie v. Schneider*, 305 Ill. App. 3d 421, 429 (1999); *Henry v. McKechnie*, 298 Ill. App. 3d 268, 277 (1998). These cases all held that IPI Civil (2011) No. 15.01 (or its relevant predecessors) accurately defined proximate cause. In addition, we note that, in the roughly 20 years since our supreme court decided *Holton*, it has not amended the pattern instructions to include a specific lost-chance instruction. Indeed, *Holton* expressly held that the traditional principles of proximate cause encompassed the lost-chance doctrine. *Holton*, 176 Ill. 2d at 115. Finally, neither Cody's nor our own research has uncovered a reported case expressly holding that a specific lost-chance instruction was necessary to supplement the IPI Civil (2011) No. 15.01 pattern instruction on proximate cause.

¶ 55 Therefore, plaintiff stumbles on the first step of his logical chain of reasoning. Courts have uniformly and consistently held that IPI Civil (2011) No. 15.01 (or its predecessors) accurately defined proximate cause for lost-chance cases. Moreover, since *Holton* has been decided, no court in a reported case has determined that a specific lost-chance instruction has been necessary to supplement IPI Civil (2011) No. 15.01 (or its predecessors). Thus, we conclude that plaintiff's analysis fails in its first step.

¶ 56 Plaintiff next purports to examine the cases from the "multiple Illinois courts [that] have given *Holton* instructions." Plaintiff identifies only two cases in which lost-chance instructions were given: *Beard*, 379 Ill. App. 3d at 21, n.4, and *Hall v. Choi*, No. 1-00-1871 (Sept. 6, 2002) (unreported under Supreme Court Rule 23). While "two" qualifies as "multiple," we reiterate here that our own research (as well as that of the parties) has found no cases in which a court

held that it was error for the trial court to refuse to give a lost-chance instruction where it had given the proximate cause pattern instruction, IPI Civil (2011) No. 15.01 or its predecessors.

¶ 57 In *Beard*, the trial court gave a lost-chance instruction. *Beard*, 379 Ill. App. 3d at 21, n.4. However, *Beard* did not address whether the lost-chance instruction was properly given. Here, the trial court refused the instruction. Thus, procedurally, *Beard* is distinct from this case and can provide no guidance, even if it can be construed in some fashion as approving of giving a lost-chance instruction when the plaintiff is pursuing a lost-chance theory of the case.

¶ 58 Turning to *Hall*, we note that it is a Rule 23 order and is, therefore, not precedential. Plaintiff's counsel attempts to circumvent the prohibition against citing Rule 23 orders by arguing that it is raised only for its inherent logic and persuasiveness. *Hall*, however, is nonprecedential and, by the terms of Illinois Supreme Court Rule 23 (eff. July 1, 2011), cannot be cited for any purpose in this case. Accordingly, we do not consider plaintiff's argument based on *Hall*.

¶ 59 Plaintiff also argues that *Lambie*, *Henry*, *Sinclair*, and similar cases do not hold that a lost-chance instruction is improper. We agree that plaintiff correctly characterizes this line of cases as not precluding trial courts from giving lost-chance instructions when such an instruction is warranted.

¶ 60 For this portion of his argument, then, plaintiff posits that "multiple" courts have given lost-chance instructions and such instructions are not prohibited. This chain of reasoning, however, is incomplete because it does not provide an answer to the issue in this case, namely, whether a lost-chance instruction was required under the circumstances, or, to phrase it more appropriately, whether the trial court abused its discretion in refusing to give plaintiff's tendered lost-chance instruction. The vast weight of authority holds that IPI Civil (2011) No. 15.01

provides a correct statement of proximate cause (see, *e.g.*, *Cetera*, 404 Ill. App. 3d at 45; *Sinclair*, 325 Ill. App. 3d at 466; *Lambie*, 305 Ill. App. 3d at 429; *Henry*, 298 Ill. App. 3d at 277), and where a legally correct instruction on proximate cause is given to the jury, a specific lost-chance instruction is not necessary. We thus reject plaintiff's argument on this point.

¶ 61 Finally, as regards the lost-chance instruction issue, plaintiff considers a number of foreign authorities. First, and most expansively, plaintiff considers a Texas case, *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851 (Tex. 2009). In that case, the trial court refused the hospital's tendered lost-chance instruction, and the Texas Supreme Court held that the trial court erred. *Id.* at 859-62. Cody argues that, despite the fact that Texas requires that the patient must have a greater than 50% chance to recover, the case is instructive because it illustrates the principle that jurors cannot be expected to understand how the generic proximate cause instruction includes the lost-chance doctrine and that attorney argument cannot be expected to remedy the jury's inability to tease out the lost-chance doctrine from generic proximate cause instructions.

¶ 62 *Hawley* is inapposite to this case. The primary reason is the fact that, in Texas, a patient must be more likely than not to recover. *Id.* at 861. In Illinois, by contrast, the alleged negligence only needs to decrease the efficacy of the treatment or diminish the patient's likelihood of recovery, even if that chance was less than 50%. *Holton*, 176 Ill. 2d at 115. The lost-chance instruction in *Hawley* was critical precisely because whether the patient had a greater than 50% chance to recover absent the alleged negligence was hotly contested; therefore, the jury was required to understand the parameters of the lost-chance doctrine in Texas in order to render a reasonable verdict. *Hawley*, 284 S.W.3d at 862. The precise fear voiced by the Texas Supreme Court was that the jury would simply determine that the patient had lost some chance of

cure and survival, thus applying the law as it exists in Illinois rather than the law as it exists in Texas. See *id.* Thus, the proposed instruction in *Hawley* was necessary to help the jury understand how to apply the lost-chance doctrine in Texas.

¶ 63 As to whether closing argument would be an adequate alternative, the Texas Supreme Court voiced concern that the law was contained in the instructions and the jury would be presumed to follow those instructions, including that only the court would give the jury the legal principles. *Id.* To the extent that the attorneys' argument presented the law to the jury, it would necessarily be insufficient in the absence of an actual instruction from the court. *Id.* The particular concern in *Hawley* is not present in this case. Here, the jury was accurately instructed in proximate cause (see *Cetera*, 404 Ill. App. 3d at 45; *Sinclair*, 325 Ill. App. 3d at 466; *Lambie*, 305 Ill. App. 3d at 429; *Henry*, 298 Ill. App. 3d at 277), and the parties' arguments did not present the law to the jury, but demonstrated how the jury might apply the law given by the trial court to the facts each party believed had been established. Thus, here, there was no concern that the attorneys would improperly attempt to instruct the jury regarding the applicable legal principles, and the lost-chance doctrine was ripe for argument rather than legal instruction. For these reasons, *Hawley* is inapposite and provides no guidance.

¶ 64 Plaintiff also cites four other foreign cases from our sister states, all under the rubric that, "because the lost chance doctrine is a complex legal doctrine, juries should be instructed on this issue." See *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 313 P.3d 431 (Wash. App. 2013); *Braud v. Woodland Village L.L.C.*, 54 So. 3d 745 (La. App. 2010); *Borkowski v. Sacheti*, 682 A.2d 1095 (Conn. App. 1996); *Aasheim v. Humberger*, 695 P.2d 824 (1985). In light of the ample Illinois authority holding that IPI Civil (2011) No. 15.01 is an accurate statement of the law but not forbidding the use of a lost-chance instruction, plaintiff's

foreign authority adds little to our discussion. As we stated at the outset, requiring a lost-chance instruction in these types of cases is a policy decision properly deferred to our supreme court. Thus, under the facts of this case, we cannot say that the trial court abused its discretion in refusing the tendered instruction.

¶ 65 Summing up, plaintiff has argued that his proposed nonpattern instruction correctly stated the law, the trial court had the discretion to give the proposed nonpattern instruction, either in lieu of the pattern instruction or as a supplement to it; he had the right to have the jury correctly instructed, including about the lost-chance doctrine; the legal principles underlying the lost-chance doctrine have proven difficult for the courts and legal scholars to understand and utilize, so a jury comprised of lay persons cannot be expected to readily understand the legal principles behind the lost-chance doctrine; Illinois courts have provided lost-chance instructions; there is no authority holding that giving a lost-chance instruction based on *Holton* is reversible error; and selected foreign authority supports the proposition that a lost-chance instruction may be appropriate in the correct circumstances. Plaintiff's argument circumlocuted the precise issue here, whether the trial court abused its discretion in refusing to give the proposed nonpattern lost-chance instruction. Critical to our determination that it did not are the facts there is ample authority holding that IPI Civil (2011) No. 15.01 (and its predecessors) provides a correct statement of the law, even in lost-chance cases; that no pattern lost-chance instruction has been added to the Illinois Pattern Jury Instructions since *Holton* was decided; and that neither the parties nor our own research has identified a case in which the failure to give a lost-chance instruction even where IPI Civil (2011) No. 15.01 (or its predecessors) was given was deemed to be reversible error. Accordingly, we reject plaintiff's contentions and hold that the trial court did not abuse its discretion in refusing plaintiff's proposed nonpattern lost-chance instruction.

¶ 66 C. Jury Instruction Regarding Aggravation of a Preexisting Condition

¶ 67 Plaintiff next argues that the trial court erred in refusing his pattern instruction for aggravation of a preexisting condition, IPI Civil (2011) No. 30.21. Preliminarily, defendants argue that, contrary to section 2-1107(b) of the Code (735 ILCS 5/2-1107(b) (West 2016)), plaintiff has not included in the record a copy of the instructions submitted by the parties and given, modified, or refused by the trial court. See also Ill. S. Ct. R. 239(c) (eff. Apr. 8, 2013) (requiring both a clean copy of the instruction and a copy marked with the party's numbering, who tendered the instruction, and notating whether the instruction was a pattern instruction, a modified pattern instruction, or a nonpattern instruction). The failure to include in the record the copies of the instructions tendered to the trial court and particularly the instruction claimed to be erroneously refused by the trial court results in forfeiture of any issue arising from the instruction. *Nika*, 199 Ill. App. 3d at 310; *Tarshes*, 171 Ill. App. 3d at 150-51. Plaintiff does not explain why the instructions were not included in the record and has not attempted to supplement the record with the missing instructions. See Ill. S. Ct. R. 329 (eff. Jan. 1, 2006) (describing procedure to supplement the record on appeal).

¶ 68 In response to this argument, plaintiff argues that the issue is properly preserved because the transcript of the instructions conference and the trial court's decision, along with various briefing concerning the instruction regarding the aggravation of a preexisting condition were all included in the record. While true, the argument is nonresponsive to the failure to include in the record copies of the jury instructions proposed by the parties. In fact, plaintiff does not address section 2-1107(b), Supreme Court Rule 239(c), or *Nika* or *Tarshes*, arguing only that his arguments in support of giving IPI Civil (2011) No. 30.21 are discernible in the record. We therefore deem plaintiff's argument to be insufficient to explain why we should not consider the

issue forfeited for failing to include the jury instructions in the record and hold that plaintiff has, indeed, forfeited any issue regarding IPI Civil (2011) No. 30.21.

¶ 69 Forfeiture aside, any error arising from the trial court's refusal of IPI Civil (2011) No. 30.21 is harmless. IPI Civil (2011) No. 30.21 is an instruction on the measure of damages. *Dabros v. Wang*, 243 Ill. App. 3d 259, 269 (1993). Where the instruction relates to damages, a finding in favor of the defendants on the issue of liability means that the jury would not need to consider the issue of damages so any instructional error would be harmless. *Id.* at 269-70. Here, the jury rendered a verdict in favor of defendants on the issue of liability and obviating its need to consider damages. Thus, even if the issue had not been forfeited, any error in refusing IPI Civil (2011) No. 30.21 was harmless in light of the jury's verdict in favor of defendants on the issue of liability.

¶ 70 D. Jury Instruction Regarding Sole Proximate Cause

¶ 71 Plaintiff next argues that the trial court erred in giving the long-form IPI Civil (2011) No. 12.05 instead of the short-form IPI Civil (2011) No. 12.04 that plaintiff proposed. We hold that plaintiff has forfeited the issue because copies of the jury instructions were not included in the record. *Nika*, 199 Ill. App. 3d at 310; *Tarshes*, 171 Ill. App. 3d at 150-51. Forfeiture is extremely appropriate here, because we cannot see what the proposed language is and the parties referred to numbered instructions during the argument, and we are unable to recreate what those numbers are. See *Nika*, 199 Ill. App. 3d at 310 (where "the issue involves instructions which are not properly marked 'given or refused,' or by number as required by the rules, the reviewing court need not consider any issues involving the instructions"). Indeed, in his opening brief, plaintiff points only to IPI Civil (2011) No. 12.05 and does not reveal, until his reply brief, that he may have made the alternate proposal of IPI Civil (2011) No. 12.04 (short form); the

argument is also unclear as to what is being proposed, with defendants proposing two instructions and plaintiff challenging defendants' proposals. Accordingly, we hold this issue to be forfeited.

¶ 72 E. Whether the Verdict Was Against the Manifest Weight of the Evidence

¶ 73 Plaintiff next argues that the verdict was against the manifest weight of the evidence necessitating a new trial.[2] A verdict is against the manifest weight of the evidence only where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon the evidence. *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003). However, the reviewing court may not just reweigh the evidence or substitute its judgment for that of the jury. *Id.* Instead, deference to the jury's resolution of the conflicts in the evidence, its determination of the weight to be given the evidence, and its determinations of the credibility of witnesses is given because, for example, where several reasonable inferences may be drawn from the evidence, the one actually chosen by the finder of fact must prevail. *Noel v. Jones*, 177 Ill. App. 3d 773, 782 (1988).

¶ 74 Plaintiff concentrates on the issues of the breach of the standard of care and causation. In particular, plaintiff focuses on Hebert's testimony on cross-examination that, in 2006, had Cody been treated with blood-pressure medication, his kidney function would have been prolonged by at least a month. Plaintiff argues that this testimony demonstrates that the jury ignored the testimony that the failure to diagnose and treat Cody at the outset lessened the effectiveness of the treatment he ultimately received. Plaintiff concludes that, in light of Hebert's unrebutted

[2] Interestingly, plaintiff does not expressly assign error to the trial court's denial of his posttrial motion for a new trial.

testimony, the jury should have rendered a verdict in his favor, at least for the loss of a month of kidney function.

¶ 75 We believe that plaintiff misconstrues Hebert's cross-examination testimony by reading certain portions of it isolation and without regard to context. Hebert was answering why, in his opinion, steroidal therapy was ineffective, but blood-pressure therapy, administered in July 2010, was a good idea. In fact, Hebert provided the following testimony:

> "[T]here is no question that ACE inhibitors [blood-pressure medications] are kidney protective. If you have got a chronic progressive kidney disease, it will slow down the progression of that kidney disease. I have been a key investigator in trial. I have published on this many, many times, but the big difference here is that the beneficial—the protective effects of ACE inhibitors are small. Oh, you say, who cares about small effects? We care about small effects.
>
> ***
>
> So, for example, if you had a kidney problem that was progressing at a rate at which you were losing 5 percent of kidney function per year, so it goes down 5 percent per year. So in 20 years, you use up all your kidney function, right? 5 years, 5 percent per year. If you put them on an ACE inhibitor, you can pretty much slow down the progression in half. So instead of losing 5 ml of GFR [a measure of kidney function] per year, you will lose only 2.5 per year.
>
> Now, you don't have to be a math major to figure out when you do that, you slow it down, and instead of your kidney function running out in 20 years, it doesn't run out until 40 years. By that time you bought the farm and all this business. So it's a huge benefit. This isn't Cody.

> Cody was losing—he lost—he went from 65 percent of kidney function to, I don't know, 12 percent or 5 percent of kidney function in one year. You do the arithmetic, 65 minus—let's say 15—minus 15 is 50. He lost his kidney function at the rate of 50 percent per year. So if you cut it back by 2 ml—2 percent per year, why, you know, as I mentioned in the previous testimony, I suppose it would have extended his kidney life, you know, instead of going into kidney failure in September, he would have done it in October or something. But it would [not have had a] clinically important effect on the outcome because it's a very mild form of kidney protection."

¶ 76 Responding to the question of whether he would have expected to see the large loss of kidney function Cody experienced in 2010 if blood-pressure medication was expected to halve the decrease in kidney function, Hebert testified that he did not expect that large a loss if the blood-pressure medication was actually going to be effective:

> "No, it was clear it had no demonstrable effect. The kidney function was 65 percent down to 25 percent in a period of six months. And so, no, it was clear that the ACE inhibitor, although it probably helped a little bit, 1 ml, 1 percent, the enalapril was overmatched by the C3 nephritis. It was an out-of-control freight train. It was going right straight down. Enalapril didn't slow it down. Steroids didn't slow it down. Not surprisingly none of those things happened because that's how C3 nephritis behaves or, if you will, misbehaves. It's just uncontrollable once it's set in motion."

¶ 77 Hebert was asked if the outcome would have changed if Cody had been treated with steroids and blood-pressure medications in 2005. Hebert opined that early treatment of Cody's illness with steroids and blood-pressure medications is no better than later treatment.

¶ 78 Thus, while Hebert did suggest that Cody may have had the disease progression slowed by maybe a month had he received early blood-pressure treatment, a more complete review of the colloquy shows that he was not describing Cody's specific disease process. Rather, he opined that C3GN overwhelmed the blood-pressure medications and the blood pressure medications were ineffective. Seen in this light, Hebert's testimony was not unequivocal that early or timely treatment would have preserved Cody's kidney function for another month, but instead, Hebert testified that the blood-pressure medications were ineffective when Cody's kidney function began its precipitous decline. The jury, therefore, was not obliged to pick out the single line of Hebert's testimony emphasized by plaintiff on appeal, but could consider it as a whole and draw the conclusion that there was nothing that medicine could do for Cody.

¶ 79 Indeed, we have carefully reviewed the record and agree with defendants that plaintiff has recast the evidence presented in the light most favorable to himself in presenting his manifest-weight argument. This is exactly opposite of how we review whether a jury's verdict is against the manifest weight of the evidence. *E.g.*, *Cipolla v. Village of Oak Lawn*, 2015 IL App (1st) 132228, ¶ 60 (when reviewing whether a jury verdict is against the manifest weight of the evidence, the reviewing court must consider the evidence in the light most favorable to the appellee). When properly viewed, it is clear that the evidence and expert opinions were conflicting. When, as here, there is a battle between the parties' expert witnesses, it is the exclusive province of the jury to consider and weigh the evidence and come to a decision; a reviewing court should not usurp the jury's function by substituting its own judgment. *Snelson*, 204 Ill. 2d at 36. Where, as here, the expert testimony sharply conflicts and the appellant has attempted to demonstrate that the jury verdict was against the manifest weight of the evidence by retelling the story from the vantage point of his or her own experts and any other testimony

favorable to his or her position, there is no basis to hold that the verdict was contrary to the manifest weight of the evidence based upon the conflict between the parties' expert testimony. *LaSalle Bank, N.A. v. C/HCA Development Corp.*, 384 Ill. App. 3d 806, 829 (2008). Accordingly, we reject plaintiff's contention on appeal.

¶ 80 F. Preclusion of Demonstrative Exhibit During Rebuttal Closing Argument

¶ 81 Plaintiff next argues that the trial court erred by sustaining an objection to a demonstrative exhibit he was trying to use during his rebuttal closing argument where the use of the same exhibit had been allowed without objection during his opening closing argument. Plaintiff argues that the demonstrative exhibit was based on Hebert's testimony regarding how chronic kidney failure progresses in a linear fashion with blood-pressure medications slowing the rate of kidney failure by half. According to plaintiff, the exhibit illustrated this testimony with two linear graphs: one showing the loss of kidney function as it occurred and the other showing as it could have occurred if Cody had begun receiving blood-pressure medication in 2006.

¶ 82 Plaintiff argues that the exhibit should have been admissible. He contends that, because the exhibit was used during his opening closing argument without objection, when the trial court sustained the objection, the jury was informed that the exhibit was improper and could have inferred that the entire argument pertaining to the exhibit was likewise improper.

¶ 83 The admissibility of evidence, including demonstrative exhibits, is within the sound discretion of the trial court, and its ruling on particular evidence or demonstrative exhibits will not be disturbed absent an abuse of discretion. *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 29. An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would have taken the view adopted by the trial court. *Id.* Even if the trial court abuses its discretion regarding a ruling on particular evidence, a

new trial should be granted only where the trial court's ruling caused substantial prejudice that affected the outcome of the trial. *Id.* With these principles in mind, we consider plaintiff's argument about the demonstrative exhibit.

¶ 84 We discern that plaintiff raises two arguments. First, plaintiff sets up an estoppel-type of argument. Second, plaintiff simply argues that the trial court abused its discretion in sustaining defendants' objection to the demonstrative exhibit. We consider each argument in turn.

¶ 85 In the estoppel argument, plaintiff argues that the exhibit was used without objection during plaintiff's opening closing argument, therefore its use should have been permitted during the rebuttal closing argument. We believe this to be a fair characterization of the argument and note that plaintiff does not cite any authority to support his reasoning, thereby forfeiting any estoppel theory. Ill. S. Ct. R. 347(h)(7) (eff. Feb. 6, 2013) (argument unsupported by pertinent authority is forfeited). To the extent, then, that plaintiff argues that he should have been able to use the demonstrative exhibit during his rebuttal closing argument because its unchallenged use during the opening closing argument either estopped defendants or otherwise precluded any of defendants' later objections to it, the argument is forfeited.

¶ 86 Turning to the abuse-of-discretion argument, we conclude that the trial court did not abuse its discretion. Plaintiff argues that the exhibit illustrated Hebert's testimony about what actually happened and what could have happened had Cody been treated with blood-pressure medication beginning in 2006. The exhibit, however, is based upon a misunderstanding of Hebert's testimony. Hebert consistently testified that blood-pressure medications, while kidney protective, were only slightly so. He illustrated this comment by offering a hypothetical 50% reduction in loss of kidney function due to the use of blood-pressure medication in a general case (from a 5% annual loss without blood-pressure medication to a 2.5% annual loss with blood-

pressure medication). Hebert then expressly testified, "This isn't Cody." Instead of a small loss in kidney function each year, Cody was losing about 50% of his kidney function per year beginning in 2010. Hebert concluded that Cody's blood-pressure medication, enalapril, "had no demonstrable effect." Thus the exhibit, purporting to show what would have happened according to Hebert's testimony, used Hebert's hypothetical general case about which he expressly testified, "This isn't Cody." The exhibit, therefore, did not illustrate Hebert's testimony about Cody, as it purported to, but juxtaposed testimony that was not about Cody against what Cody actually experienced. Based on this, we cannot say that the trial court abused its discretion in sustaining defendants' objection to the exhibit when it was finally raised.

¶ 87 Even if the objection to the demonstrative exhibit were erroneously sustained, plaintiff has not demonstrated prejudice. See *Sharbono*, 2014 IL App (3d) 120597, ¶ 29 (to obtain a new trial for an erroneous evidentiary ruling, the party claiming the error must show substantial prejudice affecting the outcome of the trial accruing from the error). The closest plaintiff comes to demonstrating prejudice is to speculate that, since the use of demonstrative exhibit was allowed during the opening closing argument without objection, when defendants objected to the use of the exhibit during the rebuttal closing argument, and the objection was sustained, the jury could have inferred that, because the exhibit was improper, the argument related to the exhibit was also improper. This is wholly speculative. Plaintiff was allowed to make the argument that the delay in medications significantly affected the outcome of Cody's illness. Thus, even though plaintiff could not use the exhibit, he was still permitted to make, and he did make, the basic argument that defendants' delay in treating him adversely affected the course of his illness and the outcome he experienced. We conclude that, even if plaintiff had demonstrated that the trial court abused its discretion in precluding the use of the demonstrative exhibit, he failed to show

any prejudice affecting the outcome of the trial accruing from that error. Accordingly, we reject plaintiff's contentions on this point.

¶ 88 G. Directed Verdict on Nursing-Care Allegations

¶ 89 Plaintiff next argues that the trial court erred in granting a directed verdict in favor of defendants on the allegations of nursing negligence contained in the second amended complaint. The record shows that, after plaintiff rested, defendants moved for a directed verdict on the nursing allegations of the second amended complaint (count 2). Plaintiff conceded that he had not produced any evidence concerning some of the allegations of nursing negligence, but argued that he had produced evidence in his case-in-chief regarding the allegation that the nursing staff "[c]hose not to communicate abnormal test results to the patient, his father or grandmother."[3] The parties proceeded to argue, limiting their remarks to the communication-of-abnormal-test-results allegation. Plaintiff argued that the standard of care was established by Holland's testimony, deviation of the standard of care was established by McFadden's testimony, and proximate cause was established by Miller's testimony. The trial court ruled:

> "In order to establish a viable cause of action, they have to establish a standard of care and a deviation from standard of care, as well as causation to an injury. I think Dr. Miller, arguably, caused—established causation.

[3] At the hearing on the motion to dismiss, plaintiff also asserted that he would be able to obtain evidence on another allegation, that the nursing staff "[c]hose not to communicate the importance of follow up testing," but he did not raise that issue in his posttrial motion or in this appeal; therefore, the importance-of-follow-up issue is not before us.

> The problem is that the other items with regard to nursing care, the standard of care can't be testified to by Dr. McFadden as to nursing care. It can only be testified to by nurses.
>
> The only potential one we have is Nurse Holland, and Mr. Coplan [(Cody's attorney)] accurately set forth her testimony as he recited it, but he didn't recite all of it, which was that a nurse the next day had not followed up with Cody or his parents to schedule an appointment to have him come in for a urine test, would that have deviated, would that have breached the standard of care, and the answer was no, and then it went on from—from there.
>
> I just don't think that it's been established that—that there has been any deviation from standard of care by any of the nurses in this case.
>
> I'm going to grant the motion for directed verdict as to Count II."

¶ 90 We believe that plaintiff has forfeited the precise argument he raises on appeal. On appeal, plaintiff argues that Holland established the standard of care and Miller established the element of proximate cause. Plaintiff also argues that he did not have to have an expert from the same school of medicine testify about the standard of care or the deviation from the standard of care for reasons not raised in the argument on the motion for directed verdict. Alternatively, he contends that the deviation was established by the testimony of Hocutt and Davis, and makes no mention of McFadden's testimony to establish deviation from the standard of care. Because he did not raise and argue Hocutt's and Davis's testimony in response to the motion for a directed verdict, plaintiff has forfeited the arguments relying on this testimony on appeal. *Golembiewski v. Hallberg Insurance Agency*, 262 Ill. App. 3d 1082, 1091-92 (1994) (failure to raise an argument in response to a motion for directed verdict results in forfeiture).

¶ 91 H. Limitations on Physician Testimony Regarding the Nursing Standard of Care

¶ 92 In his final issue on appeal, plaintiff argues that the trial court erred in sustaining objections to physicians' testimony about the nursing standard of care, relying on his arguments developed in the previous section about whether an expert from the same school of medicine was required to offer standard-of-care and deviation testimony. In light of our conclusion that plaintiff forfeited that argument we similarly conclude this argument is also forfeited.

¶ 93 III. CONCLUSION

¶ 94 For the foregoing reasons, the judgment of the circuit court of Stephenson County is affirmed.

¶ 95 Affirmed.