NOTICE
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2018 IL App (5th) 160508-U

NO. 5-16-0508

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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

ROBERT A. THOMPSON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 06-L-708
	)	
DONALD SEROT, M.D.,	)	Honorable
	)	Vincent J. Lopinot,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Presiding Justice Barberis and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment in favor of the defendant is affirmed. The circuit court did not abuse its discretion in declining to issue missing-evidence jury instruction, and the jury's verdict was not against the manifest weight of the evidence.

¶ 2 The plaintiff, Robert A. Thompson, brought a medical negligence action against the defendant, Donald Serot, M.D., after the defendant performed knee replacement surgery on the plaintiff. Following a jury trial, the circuit court of St. Clair County entered judgment in favor of the defendant. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 In 2002, the plaintiff, a 62-year-old military retiree, suffered from progressively worsening pain in both of his knees. In January 2003, the defendant, a board-certified orthopedic surgeon practicing in Belleville, performed a partial replacement of the plaintiff's right knee, and in April 2004, the defendant performed a total right knee replacement. At the time of trial, the plaintiff voiced no complaints about his right knee surgery.

¶ 5 In April 2005, the plaintiff underwent surgery on his left knee. During the course of the plaintiff's left knee replacement surgery, the defendant installed, removed, and reinstalled a knee prosthetic, which ultimately failed in less than a year. The knee replacement surgery that in 2004 had taken about 1 hour and 15 minutes took over 3 hours in 2005. After the surgery, the defendant told the plaintiff's wife that he had implanted and cemented a prosthetic device into place, did not like the way it worked or felt, and thus, removed and replaced it with another device. Similarly, the defendant thereafter told the plaintiff that after he cemented the implant into place, it did not work properly, so he had to break it, take it out, and replace it. The plaintiff testified that the defendant had also stated that he was required to strap the plaintiff's ankle down in order to break the knee free. The plaintiff testified that his ankle had felt like it was broken. The plaintiff also suffered an infection of the left knee after surgery and was prescribed a high dose of intravenous antibiotics while in the hospital for a week.

¶ 6 At trial, the defendant described the surgery and explained that "after [he] put in the trial components, cut the bones with the appropriate jigs, [cutting devices from the

knee manufacturer], [he] checked it out first with trial components[.] [Because he] thought everything looked quite good and the knee was stable, [he] then put in the real components [and] cemented them in place." The defendant explained that trial components were not fixed with cement but were templates of the actual devices to determine the best implant fit. The defendant testified, however, that after cementing the actual components into place, he evaluated the ligaments' range of motion and concluded that the ligaments were too loose. The defendant testified that the knee was not stable and shifted easily from side to side. The defendant testified that because the knee was not stable enough, he made the determination to remove the total knee and install a more constrained-type total knee. The defendant testified that he then removed the knee and put in a more intrinsically stable knee with a larger post going into the metal component of the femur. The defendant testified at trial that it was the only time in his career that he cemented and then removed a knee component as part of the same surgery. The defendant testified that as a result of the extra surgery time, the plaintiff could have experienced more swelling than usual.

¶ 7 The defendant noted that the plaintiff had genu varum, so his knees were bowed outward. The defendant testified that when correcting the knee of a patient whose knees bow outward, the surgeon must remove more bone from one side than the other, in order to straighten the leg. The defendant testified that a surgeon must line up the knee from the center of the femoral head, or the hip joint, to the center of the ankle joint. The defendant testified that the outside ligament in a patient whose knees bow outward is looser than the ligaments on the inner side, so it is difficult to tighten up surgically. The

defendant testified that no instrumentation measures the tension on the soft tissue on the ligaments, so a surgeon must determine the tension by how it feels.

¶ 8 The defendant acknowledged that hospital policy required that all surgical operations be fully described by the operating surgeon and that the operative report should contain a description of technical procedures used and the specimens removed. The defendant acknowledged that although he prepared an operative note for the April 2005 procedure, he did not describe the implantation or the explantation of the first device. The defendant testified that he described in the operative report the final components that were inserted into the plaintiff's knee. The defendant testified that he believed the operative report was sufficient in that it showed exactly what was inserted at the time of surgery. The defendant further testified that the implant log found in the plaintiff's chart revealed the total knee that he had placed and then removed and the total knee that replaced the previous one.

¶ 9 At trial, the plaintiff testified that prior to 2005, he worked in the yard, power-washed the house, and bowled in two different leagues. The plaintiff testified that after the April 2005 surgery, he felt extreme pain while still in the hospital bed and that he felt pain in his leg and throughout his body thereafter. On November 1, 2005, about seven months after the plaintiff's left knee surgery with the defendant, the plaintiff consulted Dr. Forbes McMullin, who recorded the plaintiff's complaints of constant pain and instability of the left knee since the April 2005 surgery. In April 2006, Dr. McMullin performed a revision of the left knee surgery, removing the defendant's implant and installing another one. Dr. McMullin testified that he sought to resolve instability in the

plaintiff's left knee by replacing the tibia and patella components of the plaintiff's knee. The plaintiff testified that after Dr. McMullin's surgery on his left knee, it felt "100 percent better than before."

¶ 10 Wanda Thompson, the plaintiff's wife, testified that during the one-year period of time from the left knee surgery performed by the defendant and the left knee surgery performed by Dr. McMullin, the plaintiff could not help her carry in groceries, could not perform the yard work, and could not walk without pain. Thompson testified that once the plaintiff healed from the second knee surgery performed by Dr. McMullin, the plaintiff experienced relief from the pain in his left leg and was able to resume his prior activities.

¶ 11 At trial, the plaintiff presented Dr. McMullin's expert testimony. Dr. McMullin explained that "maybe one percent [of total knee replacements] may fail in the first year." Dr. McMullin testified that the plaintiff's cement failed in a very short time, within a couple of months, which was very unusual.

¶ 12 Through Dr. McMullin's testimony, the plaintiff asserted that during the April 2005 total left knee replacement, the defendant did not comply with the standard of care to be exercised by an orthopedic surgeon. Dr. McMullin testified that the defendant improperly cemented the prosthesis before determining its stability. Dr. McMullin testified that defendant should have used different trials and should not have cemented the permanent knee until he determined that the trial components were stable. Dr. McMullin testified that trial testing should have rendered the exact same result as the permanent knee.

¶ 13 Dr. McMullin explained that removing a prosthesis is difficult and requires a saw and chisel to take as little bone as possible because "the cement at that time is really adhering the prosthesis to the remaining bone." Dr. McMullin testified that "it [is] time consuming[,] and it usually involves removing more bone than you like to." Dr. McMullin also testified that explantation of the components results in missing bone and alterations in the anatomy. Dr. McMullin opined that the increased time to perform the extraction procedure caused increased swelling, increased pain, and increased time of recovery for the plaintiff. Dr. McMullin acknowledged, however, that in his 25 or 30 surgical knee revisions, he had removed cement to remove a previous prosthesis and nevertheless ended with a good result.

¶ 14 Through Dr. McMullin's testimony, the plaintiff further asserted that the defendant improperly positioned the tibial component of the left knee replacement. Dr. McMullin testified that during his revision surgery, "[b]ecause of the knee going into valgus, [he] had to take out the patella and put a new patella in because it was all ragged because of the *** of the valgus positioning of the knee."

¶ 15 Through Dr. McMullin's testimony, the plaintiff further asserted that the defendant improperly performed the tibial cut during the surgery and that a malaligned cut to the tibia is a violation of the standard of care. Dr. McMullin testified that the malalignment to the defendant's cut caused pressure to be placed upon the cement and created the likelihood of failure. Dr. McMullin testified that the cut "should be perpendicular to the long *** length of the tibia." Dr. McMullin testified that there was a gap, with "no cement or anything really" for support. Dr. McMullin opined that the

cement in the plaintiff's leg failed because of the forces that were put on the knee because of the gap underneath the tibia and the increased stress on the lateral side of the tibial prosthesis. Dr. McMullin opined that poor cement technique and the cut eventually caused the knee to go into valgus as the cement collapsed.

¶ 16 Dr. McMullin testified that when he treated the plaintiff, he had not seen the defendant's operative report. Dr. McMullin acknowledged, however, that the plaintiff and his wife had notified him of the problem during the previous surgery. Dr. McMullin testified that "the operative note didn't go into any detail of specifically what happened with regard to the first operation except that when it was all in there solidly, it was not acceptable to [the defendant], so he removed it and put another prosthesis in."

¶ 17 The defendant presented the expert testimony of Richard Rende, M.D., an orthopedic surgeon with extensive experience in hip and knee replacement. Dr. Rende opined that with regard to the April 2005 surgery, the defendant did not deviate from the standard of care ordinarily used by a reasonably careful orthopedic surgeon. Dr. Rende testified that the defendant complied with the standard of care in testing the stability of the plaintiff's knee following the use of trial components, in replacing the first device after detecting instability, and in implanting a second device. Dr. Rende testified that it would have been a violation of the standard of care if the defendant would have detected a wobbly knee and did not replace it.

¶ 18 Dr. Rende noted that the defendant replaced the original prosthesis with a device having a stem that accommodated a thicker piece of plastic. Dr. Rende explained as follows:

> "[T]he original prosthesis was a Zimmer [manufactured] device known as a resurfacing tibia[,] and a resurfacing tibia is merely this piece of metal with a tiny little nipple on each side that sticks down about eight or nine millimeters. You put two of them in[,] and it does help control some rotational stabilities, but you're only allowed to go up to a certain thickness of polyethylene with that because this is a lever that we're using when we bend our knees. So when he discovered that that thickness was not affording him the correct stability, he removed that prosthesis[,] and he went with a prosthesis that had a stem so he could put in this thicker piece of plastic. This device is essentially the same as the one he put in the first time. This one had to be augmented."

Dr. Rende testified that he had removed a prosthesis after cementing it during surgery approximately 10 times over his 25-year career.

¶ 19 Dr. Rende disagreed with Dr. McMullin's testimony that the defendant's cut was malaligned. Dr. Rende testified that the defendant's cut met a reasonable standard of care because there was appropriate alignment and appropriate contact in the front, back, and sides. Dr. Rende testified that when there is appropriate alignment and use of the device to make the cut, the knee manufacturer's equipment permits only one cut, which cannot be malaligned when using the jig down the center of the bone.

¶ 20 Dr. Rende opined that the prosthesis in the plaintiff's left knee failed in about three months because of osteolysis, meaning that the calcium in the bone had broken down as a reaction to the cement used to affix the components of the knee. Dr. Rende concluded that the plaintiff had premature failure of the mantel because he developed an

increased foreign body reaction to the cement. Dr. Rende testified that a surgeon cannot predict or prevent the occurrence of such a reaction.

¶ 21 At trial, noting that the defendant did not fully describe the knee replacement surgery in an operative report, the plaintiff tendered Illinois Pattern Jury Instructions Civil, No. 5.01 (2011) (hereinafter IPI Civil (2011) No. 5.01), arguing that an adverse inference should be drawn from the defendant's failure to produce this evidence. The plaintiff thus characterized the omitted information in the defendant's operative report as missing evidence. The circuit court found that evidence as to what occurred was clear; therefore, an additional explanation in the operative note would constitute cumulative evidence. The circuit court also noted that the case did not involve the failure to produce evidence, but instead involved the failure to create evidence. The circuit court thus denied the plaintiff's request to tender the missing-evidence instruction to the jury.

¶ 22 Thereafter, the jury returned a general verdict in favor of the defendant. On September 2, 2016, the plaintiff filed a motion for new trial arguing, *inter alia*, that the circuit court improperly failed to offer IPI Civil (2011) No. 5.01, regarding the adverse inference to be drawn from the failure to provide certain evidence, and that the jury's verdict was against the manifest weight of the evidence. On November 1, 2016, the circuit court denied the plaintiff's motion for new trial. On December 1, 2016, the plaintiff filed a timely notice of appeal.

¶ 23 ANALYSIS

¶ 24 The plaintiff argues that the circuit court abused its discretion in refusing to issue to the jury IPI Civil (2011) No. 5.01, which provides that an adverse inference should be

drawn from the defendant's failure to produce evidence. The plaintiff argues that although the defendant had a duty to make a complete surgical note of the April 5, 2005, operation, he omitted details of the first two procedures, the initial prosthesis installation and its removal, from his operative note. The plaintiff argues that an adverse inference should be drawn from the defendant's failure to create this evidence and that the jury should have been instructed accordingly.

¶ 25 The defendant counters that no evidence was withheld, destroyed, or unavailable. The defendant notes that the allegedly missing evidence is an account of events in an operative report of a knee replacement surgery that was fully described elsewhere in the medical records and in the testimony of several witnesses. The defendant argues that the plaintiff fails to meet the criteria for a missing-evidence jury instruction and fails to establish any prejudice resulting from the circuit court's discretionary ruling.

¶ 26 "A litigant has the right to have the jury clearly and fairly instructed upon each theory which [is] supported by the evidence." *Leonardi v. Loyola University*, 168 Ill. 2d 83, 100 (1995). "IPI Civil (2011) No. 5.01, also known as the 'missing-evidence instruction,' allows a jury to draw an adverse inference from a party's failure to offer evidence." *Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168, ¶ 84. IPI Civil (2011) No. 5.01 provides:

> "If a party to this case has failed to offer evidence within his power to produce, you may infer that the evidence would be adverse to that party if you believe each of the following elements:

1. The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence.

2. The evidence was not equally available to an adverse party.

3. A reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed it to be favorable to him.

4. No reasonable excuse for the failure has been shown."

¶ 27 Thus, IPI Civil (2011) No. 5.01 may be properly given where some foundation is presented on each of the listed factors. *Dunning*, 2015 IL App (5th) 140168, ¶ 85. "However, IPI Civil (2011) No. 5.01 is not warranted where the missing evidence is merely cumulative of the facts already established." *Id.*

¶ 28 "The decision whether to tender IPI Civil (2011) No. 5.01 to the jury is within the sound discretion of the trial court, and that decision will not be reversed absent a clear abuse of discretion." *Id.* ¶ 84. "[A]n abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 816 (2008).

¶ 29 In *Anderson v. Chesapeake & Ohio Ry. Co.*, the appellate court affirmed the rejection of an IPI Civil No. 5.01 instruction where the defendant failed to produce an accident report. *Anderson v. Chesapeake & Ohio Ry. Co.*, 147 Ill. App. 3d 960, 973 (1986). The defendant's procedure involved two types of reports that may be completed by railroad employees when a train is involved in an accident—an "accident report" and a "delay report." *Id.* Because the defendant's employee testified that he filled out only one of these reports, and the single report was presented to plaintiffs during discovery, the

appellate court held that there was a reasonable excuse for the defendant's failure to submit a second report to the plaintiffs. *Id.* The appellate court thus concluded that the circuit court did not abuse its discretion in refusing to give Illinois Pattern Jury Instruction No. 5.01. *Id.*

¶ 30 Here, the circuit court did not abuse its discretion in refusing to issue the missing-evidence instruction (IPI Civil (2011) No. 5.01) to the jury because the defendant did not fail to submit an existing operative report containing the initial prosthesis implantation and explantation. Instead, the defendant failed to create such a report. Thus, there was a reasonable excuse for the defendant's failure to submit such evidence, *i.e.*, it did not exist. See *id.*; compare *Graves v. Rosewood Care Center, Inc.*, 2012 IL App (5th) 100033 (instruction properly given where certified nursing assistant's flow sheet was routinely prepared but not produced by the defendant); *Roeseke v. Pryor*, 152 Ill. App. 3d 771, 780 (1987) (court properly tendered instruction when defendants failed to produce a copy of a night manager's report summarizing events at issue).

¶ 31 Moreover, as noted by the defendant, the facts of significance that the plaintiff claims should have been included in the operative report were in evidence at trial. The evidence at trial revealed that the defendant had implanted a prosthesis, determined that it was insufficient, and explanted it before implanting a second device. An operative report including the same information would have been cumulative, and a missing-evidence instruction is not warranted where the missing evidence is cumulative of facts already established. See *Dunning*, 2015 IL App (5th) 140168, ¶ 85 ("IPI Civil (2011) No. 5.01 is not warranted where the missing evidence is merely cumulative of the facts already

established"); *Montgomery v. Blas*, 359 Ill. App. 3d 83, 88 (2005) (missing witness instruction was not warranted where uncalled defense expert's testimony was cumulative of the opinion testimony of the defendant's other witnesses).

¶ 32 Further, the plaintiff did not suffer prejudice as a result of the circuit court's refusal to offer the instruction. As noted by the defendant, the plaintiff introduced extensive evidence and argument regarding the defendant's omission of the first two procedures from his operative report. The plaintiff offers no reason for this court to conclude that the instruction would have impacted the jury's findings. We will not reverse a trial court's decision where the plaintiff cannot show that he has been prejudiced by the failure to give a specific instruction. See *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 28 (reversal is warranted only if error in giving jury instruction resulted in serious prejudice to the right to a fair trial); *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 274 (2002) ("reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant"); *Anderson*, 147 Ill. App. 3d at 973 ("[w]here plaintiff[ ] cannot show that [he] [has] been prejudiced by the failure to give specific instructions, a case will not be reversed on those grounds alone"). Assuming, *arguendo*, that the circuit court's refusal to tender the missing-evidence instruction (IPI Civil (2011) No. 5.01) was error, it was not an error that influenced the jury warranting a new trial. See *Dunning*, 2015 IL App (5th) 140168, ¶ 88 (even if error for trial court to tender IPI Civil (2011) No. 5.01, it was not an error that influenced the

jury warranting a new trial). Accordingly, we conclude that the circuit court did not abuse its discretion in declining to submit the missing-evidence instruction to the jury.

¶ 33 The plaintiff also argues that the circuit court committed reversible error when it refused to grant a new trial after the jury returned a verdict that, the plaintiff argues, was against the manifest weight of the evidence. The plaintiff asserts that the defendant failed to submit competent evidence to contradict the plaintiff's expert who testified that the defendant deviated from the applicable standard of care. The plaintiff argues that Dr. Rende's opinion was less persuasive because he did not examine the plaintiff, did not see him walk, and did not take any x-rays. The plaintiff contends that without a fully detailed operative note and without the ability to examine the inside of the plaintiff's knee, the jury's verdict, based on Dr. Rende's expert testimony, was against the manifest weight of the evidence.

¶ 34 "It is well established that, in an appeal from a jury verdict, a reviewing court may not simply reweigh the evidence and substitute its judgment for that of the jury." *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003). "Indeed, a reviewing court may reverse a jury verdict only if it is against the manifest weight of the evidence." *Id.* "A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence." *Id.*

¶ 35 In a negligence medical malpractice case, the plaintiff must prove the proper standard of care against which the defendant physician's conduct is measured, an unskilled or negligent failure to comply with the applicable standard, and a resulting

injury proximately caused by the physician's want of skill or care. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 112 (2004). As noted by the defendant, the parties contested whether any breach occurred and whether the defendant's conduct proximately caused the plaintiff's left knee problems in the aftermath of the April 2005 surgery.

¶ 36 Here, the defendant and Dr. Rende testified that the defendant did not deviate from the standard of care ordinarily used by a reasonably careful orthopedic surgeon. Notably, the plaintiff did not challenge the foundation for Dr. Rende's testimony at trial or in his posttrial motion. See *Snelson*, 204 Ill. 2d at 24-25 (failure to object to underlying foundation for testimony at trial forfeits issue on appeal). Dr. Rende reached his standard of care and causation opinions based on the medical records, the pathology report of Dr. McMullin's surgery, the x-rays of the plaintiff's knee, and the transcripts of the depositions of the defendant and Dr. McMullin. The defendant's opinions were based on his treatment of the plaintiff in 2005, his custom and practice, and the plaintiff's medical records.

¶ 37 This case involved a classic battle of the experts. See *Snelson*, 204 Ill. 2d at 36. Witnesses qualified in their fields stated their opinions and provided reasons for those opinions. *Id.* The jury listened to the conflicting evidence and used its best judgment to determine where the truth could be found. *Id.* The jury found in favor of the defendant and against the plaintiff, and this court should not usurp the jury's function to substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly predominate either way. *Id.* Accordingly, we hold that the jury's verdict was not against the manifest weight of the evidence.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, we affirm the judgment of the circuit court of St. Clair County.

¶ 40 Affirmed.