

2011 IL App (1st) 101051-U

No. 1-10-1051

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FIFTH DIVISION
December 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CAROL MITCHELL, individually and as)	Appeal from the
mother and next friend of)	Circuit Court of
DARRYL HALL, JR., a minor,)	Cook County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 04 L 7440
)	
GUILLERMO FONT, M.D., and)	Honorable
INSTITUTE FOR WOMEN'S HEALTH, Ltd.,)	Randy A. Kogan,
)	Judge Presiding.
Defendants-Appellees.)	
)	

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and McBride concurred in the
judgment.

ORDER

¶ 1 **Held:** The trial court did not abuse its discretion in allowing testimony from defendants' medical expert and the court properly denied plaintiff's motion for judgment notwithstanding the verdict where the evidence raised factual and credibility determinations that were the province of the jury.

¶ 2 Plaintiff Carol Mitchell appeals from a jury verdict in

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favor of defendants Guillermo Font, M.D., and the Institute For Women's Health, Ltd., and from an order denying her posttrial motion for a judgment notwithstanding the verdict, or in the alternative, for a new trial in a medical malpractice lawsuit in the circuit court. For the reasons set forth below, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4

Plaintiff's son Darryl Hall, Jr., was born with a birth defect called Gastroschisis, which occurs when the baby's abdomen does not properly seal in the womb and the bowel becomes located outside the abdomen at birth. Prior to the birth of her son, plaintiff Carol Mitchell came under the care of the emergency room at Norwegian American Hospital (Norwegian) on several occasions because of blood spotting. Doctors Oscar Jara and Farida Ahmed performed ultrasounds on Mitchell during these emergency room visits. Mitchell's obstetrician referred her to Dr. Font, who performed ultrasounds of the unborn baby. Gastroschisis was not diagnosed from any of the ultrasounds.

¶ 5

Mitchell went into labor at approximately 1 p.m. on September 22, 2001. Darryl was born at 4:05 p.m. at Norwegian with gastroschisis. A notation by a nurse indicated the bowel was pink in color. A call was placed to Rush-Presbyterian-St. Luke's Medical Center to transport the baby to have his bowel and

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intestines surgically replaced in his abdomen. The bowel was wrapped in preparation for transport. At 5:35 p.m., an ambulance arrived at Norwegian, at which time the bowel was described as pink with darker, beefy red areas lower in the bowel. The transport team rewrapped the bowel and arrived at Rush at 6:25 p.m.

¶ 6 Darryl's pediatric surgeon, Dr. Katherine Bass, described the bowel in a deposition as congested with patchy areas of black and blue color changes. Dr. Bass performed two surgeries, the first at 7:39 p.m. on September 22, 2001, to "relieve any compression on the blood vessel" as the blue-black appearance indicated a lack of blood flow, and to place the intestines in a silo bag to allow for the bowel to "declare itself viable." A second surgery was performed on September 24, 2001, where Dr. Bass had to resect the entire mid-gut, including most of the small intestines.

¶ 7 Dr. Bass was unable to save the bowel and a portion of Darryl's intestines, resulting in a condition called short gut syndrome. Darryl spent four months at Rush after his birth recovering from the surgeries.

¶ 8 Mitchell filed a two-count complaint against defendants Dr. Font, the Institute For Women's Health, Ltd., and Norwegian, on July 1, 2004, in the circuit court. In count I, titled

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"Negligence," Mitchell alleges, *inter alia*, that the defendants were negligent in failing to timely diagnose gastroschisis in the prenatal period, failing to properly interpret prenatal ultrasounds, and in providing negligent prenatal care.

¶ 9 In count II, Mitchell is seeking to recover medical expenses under the Illinois Family Expense Act (750 ILCS 65/15 (West 2010)).

¶ 10 Mitchell filed an amended complaint on August 16, 2005, adding doctors Jara and Ahmed as defendants.

¶ 11 Defendant Norwegian filed a motion for summary judgment, pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (2004)), on September 19, 2006, claiming it is not liable for doctors Font, Jara and Ahmed under an agency theory.

¶ 12 In an order dated January 25, 2007, the trial court found that no agency relationship with Norwegian exists in respect to Dr. Font, but a question of fact remains as to an agency relationship in respect to doctors Jara and Ahmed.

¶ 13 Mitchell voluntarily dismissed Dr. Ahmed on February 1, 2008.

¶ 14 Norwegian filed a second motion for summary judgment on June 10, 2008, claiming that Mitchell is unable to prove the proximate cause element of negligence because Dr. Bass's

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deposition testimony shows that even if the doctors had diagnosed Darryl's gastroschisis prenatally, he still would have required resection surgery at birth and the outcome would have been the same.

¶ 15 On June 19, 2008, Dr. Font and the Institute for Women's Health, Ltd., filed a motion to join Norwegian's motion for summary judgment. In a written memorandum and order, the motion for summary judgment was denied on November 25, 2008.

¶ 16 An agreed order for the dismissal of Norwegian was entered on June 17, 2009. A settlement was reached with Dr. Jara and he was dismissed from the case on June 22, 2009.

¶ 17 At trial, Dr. Jara testified that he is a radiologist at Norwegian and his job is to interpret ultrasounds. As of September 2001, he had never diagnosed gastroschisis from an ultrasound but was trained to look for the defect. The ultrasounds pertaining to Mitchell that Dr. Jara interpreted in 2001 were level 1 ultrasounds. Dr. Jara testified that a level 1 ultrasound is a basic ultrasound but will show gastroschisis, while a level 2 ultrasound is a more detailed procedure.

¶ 18 He testified that he could not detect gastroschisis on Mitchell's ultrasounds from emergency room visits on May 23 and June 5, 2001.

¶ 19 Plaintiff's expert witness Dr. Harlan R. Giles

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testified that he has been practicing medicine since 1969 and is board certified in obstetrics, gynecology and maternal-fetal medicine. In his 35 years as a physician, he has diagnosed gastroschisis approximately 100 times.

¶ 20 Dr. Giles opined that the easiest time to diagnose gastroschisis is in the second trimester of the pregnancy. He opined that a bowel floating free in the abdomen with exposure to amniotic fluid is not in harms way and grows normally.

¶ 21 He opined that once gastroschisis is diagnosed, the mother is placed into a high-risk category and undergoes frequent ultrasounds to make sure the bowel loops do not dilate abnormally during the last part of the pregnancy. He opined that the most important aspect of gastroschisis diagnosis is that the mother delivers the baby at a level 3 hospital, where the baby will receive immediate surgery.

¶ 22 Dr. Giles testified that he reviewed Mitchell's prenatal records including her ultrasounds prior to trial. He also reviewed Darryl's delivery records and surgical records. Dr. Giles opined to a reasonable degree of medical certainty that Dr. Font did not meet the standard of care for a reasonably careful maternal-fetal medicine physician when he failed to make the diagnosis of fetal gastroschisis.

¶ 23 Dr. Giles opined that had the diagnosis been made

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prenatally, the delivery of the baby would have occurred at a level 3 hospital where the baby would have received immediate attention and the likelihood of the loss of the majority of bowel would have been very small.

¶ 24 Dr. Giles opined that Dr. Font should have diagnosed gastroschisis because he was performing ultrasound scans in the ideal window of time in which to make the definitive diagnosis of gastroschisis, specifically ultrasounds performed on May 12 and July 14. Dr. Giles opined that gastroschisis is a simple diagnosis to make and he observed gastroschisis on Mitchell's ultrasounds from May 12, June 9 and July 14, 2001.

¶ 25 Dr. Giles opined that the bowel in these newborns is pink in color, and can have reddish coloration or yellow film on it. He opined that without surgical intervention, the bowel is at risk for becoming necrotic, meaning the tissue is dead.

¶ 26 In demonstrative testimony, Dr. Giles reviewed the May 12, 2001, ultrasound and opined that he could not observe cord insertion in the fetal abdomen and that little black circles outside the abdomen are bowel loops. Dr. Giles opined that the fetal abdomen should be slightly oval in shape but on the ultrasound it has an irregular contour because of free-floating loops of bowel.

¶ 27 In respect to the July 14, 2001, ultrasound, Dr. Giles

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opined that bowel is visible as a markedly irregular mass going out into the amniotic fluid.

¶ 28 On cross-examination, Dr. Giles testified that he does not perform surgery on babies with gastroschisis. After birth, he hands them over to a neonatologist and a pediatric surgeon.

¶ 29 Plaintiff's witness Dr. Jean Marie Silvestri, a board certified neonatologist, which is a pediatrician who specializes in intensive care for preterm infants, testified that Rush is a level 3 neonatal intensive care unit that provides pediatric surgical specialists 24-hours a day.

¶ 30 Dr. Silvestri, the clinical director of the prenatal intensive care unit at Rush, testified that she was the admitting physician when Darryl arrived at Rush on September 22, 2001. Dr. Silvestri testified that her notes from that day indicate that upon Darryl's arrival at Rush, his bowel was ischemic, meaning it did not have good blood flow and may have had areas that were necrotic.

¶ 31 Dr. Silvestri testified that staff unwrapped and rewrapped the intestines in warm saline and the intestines appeared bright red in color with small dark patches throughout.

¶ 32 On cross examination, Dr. Silvestri testified that Rush regularly receives children born at other hospitals with gastroschisis.

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¶ 33 The plaintiff called Dr. Font as an adverse witness. Dr. Font, a board certified maternal fetal specialist, testified that had he diagnosed gastroschisis prenatally, he would have recommended to Mitchell's doctor that the delivery occur at a level 3 hospital. Dr. Font testified that he did not diagnose gastroschisis from any of Mitchell's ultrasounds.

¶ 34 Dr. Font opined that Darryl's gastroschisis formed at birth. He opined that the color of the bowel depends on how long it had been in the amniotic fluid and that when the bowel is in the amniotic fluid for a long period of time it becomes swollen and changes in color. Dr. Font opined that a bowel from a recent gastroschisis is pink in color.

¶ 35 Dr. Font opined that if the baby's abdominal wall is weak during birth, a gastroschisis can occur when the baby goes through the birth canal.

¶ 36 Dr. Font disputed plaintiff's expert witness Dr. Giles' demonstrative testimony and opined that one area Dr. Giles found as depicting the bowel is actually the baby's face. In another area where Dr. Giles opined bowel was depicted, Dr. Font opined that the area is not bowel but an insertion of the umbilical cord. Dr. Font opined that the ultrasound shows normal cord insertion and that there cannot be gastroschisis with normal cord insertion.

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¶ 37 Plaintiff's expert witness Dr. Nicholas Saenz, a board certified pediatric surgeon, testified that he has treated gastroschisis about 70 times. Dr. Saenz opined that the goal of surgical treatment of gastroschisis is to either place the bowel back into the abdomen on the day of birth or place the bowel in a container called a silo which houses all of the intestine and is gradually reduced, usually on a daily basis, until the abdomen has stretched up large enough to accommodate all the bowel without compressing other structures.

¶ 38 Dr. Saenz opined that short gut syndrome occurs when the patient does not have enough bowel to absorb nutrients and the intestines are shorter than normal. Dr. Saenz opined that babies born with gastroschisis are rarely at risk of developing short gut syndrome.

¶ 39 Dr. Saenz opined that a baby born in a tertiary care center can be in surgery within two hours and that had Darryl been born at a tertiary care center, the vast majority of his intestines and bowel would have survived. Dr. Saenz opined that the two hours and 25 minutes Darryl spent from birth at Norwegian until his arrival at Rush was wasted time because it could have been used at a tertiary care center to prepare Darryl for the operating room.

¶ 40 On cross-examination, Dr. Saenz opined that he could

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not say to a reasonable degree of medical certainty that the outcome would have been different had the surgery been done within two hours of birth rather than three.

¶ 41 Dr. Saenz opined that he is unaware of any medical literature that states there is a difference in outcome between a child born in a community hospital and then transferred to a tertiary care center from a child who was born at a tertiary care center.

¶ 42 Dr. Saenz also testified that he had never heard of late onset gastroschisis.

¶ 43 Plaintiff's witness Dr. Kathryn Bass, a board-certified pediatric surgeon, testified that she performed about 20 surgeries for gastroschisis prior to the two surgeries she performed on Darryl shortly after his birth. Dr. Bass testified that when she first observed Darryl's bowel, it was blue and black in color and that her pre-operation diagnosis was gastroschisis with ischemic bowel while her post-operation diagnosis was gastroschisis with necrotic bowel. Dr. Bass performed a second surgery on Darryl on September 24, 2001, to remove a dead portion of the bowel.

¶ 44 On cross examination, Dr. Bass opined that there are studies that show babies with gastroschises fare the same whether they were born at a tertiary care center or transported to a

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tertiary care center after birth.

¶ 45 Dr. Bass opined that surgery for a baby with gastroschisis is urgent after birth but not an emergency. Dr. Bass opined: "In surgical terms the difference between emergency and urgency is a timing issue of one hour for emergent and within six to twelve hours within urgent."

¶ 46 Dr. Bass opined that Darryl's surgery was prompt and not unduly delayed.

¶ 47 Defense expert witness Dr. Juda Jona, a pediatric surgeon at Evanston Hospital and Children's Memorial Hospital, testified that he has observed a few hundred cases of gastroschisis. Dr. Jona opined that a transfer of a baby with gastroschisis after birth does not have an adverse affect on the baby and that Darryl's transfer from Norwegian to Rush was timely. Dr. Jona opined that the outcome in this case would have been the same no matter where Darryl was born.

¶ 48 A second defense expert witness, Dr. Donald Taylor, a maternal fetal medicine specialist, testified he reviewed the ultrasounds given to Mitchell during the pregnancy by Dr. Font.

¶ 49 Dr. Taylor, who is board certified in obstetrics, gynecology and maternal fetal medicine, testified that in his own practice he performs 15 ultrasounds a day looking for birth defects and sees approximately five cases of gastroschisis a

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year.

¶ 50 Dr. Taylor testified that in a level 1 ultrasound, doctors will measure the head, belly and the leg bone, view the spine, kidneys, bladder and stomach, look to see if there are four chambers of the heart, look at the umbilical cord insertion, and some doctors will briefly view the brain.

¶ 51 Dr. Taylor opined that gastroschisis would be one of the defects a doctor would look for on an ultrasound. He opined that most cases of gastroschisis are diagnosed prenatally.

¶ 52 Dr. Taylor testified that he was unable to observe gastroschisis on Mitchell's ultrasounds. He opined that gastroschisis can occur any time during a pregnancy and that doctors do not know why gastroschisis occurs. He opined that there are different theories such as a flap did not completely seal around the umbilical cord or a membrane can rupture or a vein that normally goes away, does not.

¶ 53 The following testimony then occurred:

"A. [Dr. Taylor] And then there's theories like because there has been association with cocaine and certain drugs, there has been -

MR. NAPLETON [plaintiff's attorney]:

Objection.

THE COURT: Objection sustained. The jury

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will disregard. There's no evidence of that in this case at all.

A. [Dr. Taylor] I am just saying theories.

MR. NAPLETON: Objection.

MS. RAMSON [defense attorney]: We will stop.

This is not a theory, doctor. We won't go there."

¶ 54 Dr. Taylor opined to a reasonable degree of medical certainty that gastroschisis does not appear on Mitchell's ultrasounds and that gastroschisis could have occurred after Mitchell's last ultrasound on September 1, 2001. Dr. Taylor opined that Dr. Font met the standard of care for all the ultrasounds.

¶ 55 On cross examination, Dr. Taylor opined that Darryl experienced a rupture of an umbilical cord hernia. He opined that the hernia is different than gastroschisis.

¶ 56 Near the end of the trial, the trial court noted that a juror had been sleeping during testimony and that another juror had to wake him up. The trial court also instructed the sheriff to sit next to the juror to keep him awake. The trial court stated:

"So what he is doing is he's distracting the other jurors from the witness's testimony,

and I don't think that's fair to plaintiff or defendant nor do I think that he is going to be any more respectful of the system when he gets into the juror room to deliberate."

¶ 57 The trial court removed the juror and replaced him with an alternate juror. While noting the juror had "moments of inattentiveness," Mitchell's counsel objected to the juror's removal. The trial court noted that the alternate juror was originally a part of the 12 that were selected prior to trial.

¶ 58 At the close of the trial, the jury returned a verdict in favor of the defendants. In Mitchell's motion for a new trial she claimed she was prejudiced by Dr. Taylor's testimony that brought the use of drugs into the trial. In a written memorandum from March 26, 2009, the trial court denied Mitchell's motion.

The trial court stated:

"The claim that this testimony was so inflammatory and prejudicial as to warrant a new trial was taken with great seriousness by this court. Counsel's claim that the courtroom atmosphere was markedly changed after the testimony necessitated this court to review her trial notes where any such impact would have been indicated. None was

found. Nor does this court recall any change in atmosphere in the courtroom."

¶ 59 The trial court further stated:

"While the testimony was not technically a violation of Plaintiff's motion *in limine*, the subject matter is serious enough to be considered by this court. The cases cited by the Plaintiff address prejudicial comments made directly about a party. Here, the words were used in the beginning of a sentence that was never allowed to be finished. There is no use of language that would imply use of drugs by this plaintiff.

Plaintiff's counsel promptly objected, and this court immediately admonished the jury to disregard the comment, that there was no evidence of that (cocaine and drugs) in this case at all. At no time before or after Dr. Taylor used the words 'cocaine and drugs' did Defendants make any negative comment about Carol Mitchell. Defendants never questioned Carol Mitchell's prenatal conduct in any way. In fact, Defendant's counsel was most

deferential toward Darryl Hall and his entire family, during the trial and during her closing argument. No inference can be made that the jury, hearing 'cocain and drugs' would conclude that cocaine or drugs was used by Darryl's mother or that any drug use caused the injuries in this case."

¶ 60 The trial court found that the evidence supports the jury's verdict.

¶ 61 Mitchell filed this timely appeal of the judgment and the trial court's denial of its motion for JNOV or in the alternative a new trial.

¶ 62 ANALYSIS

¶ 63 I. Prejudicial testimony

¶ 64 Mitchell claims she did not receive a fair trial due to prejudicial testimony from defense expert witness Dr. Taylor concerning the use of drugs and she is requesting a new trial.

¶ 65 Admission of evidence is largely a matter within the discretion of the trial court and evidentiary rulings will not require reversal absent an abuse of discretion. *Jackson v. Pellerano*, 210 Ill. App. 3d 464, 471 (1991). New trials can be ordered only when the improperly admitted evidence appears to have affected the outcome. *J.L. Simmons Company, Inc. v.*

Firestone Tire & Rubber Company, 108 Ill. 2d 106, 115 (1985).

Where it appears that an error did not affect the outcome below, or where the reviewing court can determine from the entire record that no damage has been done, the judgment will not be disturbed.

Cairns v. Hansen, 170 Ill. App. 3d 505, 511 (1988). The burden is on the party seeking reversal to establish prejudice. *Id.*

¶ 66 Upon review of the record, we cannot say Mitchell was prejudiced by Dr. Taylor's testimony because he did not testify that Mitchell used drugs while pregnant with Darryl, rather he offered his opinion as to how gastroschisis theoretically occurs. In addition, when Dr. Taylor mentioned drugs, Mitchell's counsel objected immediately, the trial court instructed the jury to disregard the testimony, the trial court told the jury that there was no evidence that drugs were used in this case, and defense counsel ceased the line of questioning.

¶ 67 Mitchell, however, offers a series of cases in her appellate brief in support of her claim of prejudice.

¶ 68 In *Jackson v. Pellarano*, 210 Ill. App. 3d 464 (1991), plaintiff's husband received treatment in a hospital following an automobile accident. *Jackson*, 210 Ill App. 3d at 465-66. During the course of the evening, the patient's condition deteriorated dramatically and he died later that night. *Id.* at 466-67.

Plaintiff filed a claim for medical malpractice. Prior to trial,

the trial court denied plaintiff's motion *in limine* to preclude the introduction of any evidence concerning the decedent's possible intoxication at the time of the accident. *Id.* at 468-69. At trial, the jury heard testimony concerning the decedent's possible intoxication from seven different witnesses. *Id.* at 469.

¶ 69 We found the trial court erred in allowing such testimony because it was inflammatory and irrelevant to the issue of the standard of care provided by the defendants. *Id.* at 472.

¶ 70 The defendants in *Jackson*, unlike the instant case, ignored the issue of the standard of care provided to the decedent after the accident and made the decedent's possible intoxication an issue in the case. Here, unlike *Jackson*, the defense focused on the standard of care and made no attempt to establish Mitchell's prenatal conduct. Also unlike *Jackson*, Dr. Taylor's testimony was not inflammatory, rather it was brief and the jury was immediately admonished by the trial court when Dr. Taylor mentioned cocaine. Moreover, Dr. Taylor mentioned drug use in a theoretical context as to why gastroschisis occurs, unlike *Jackson*, where seven witnesses freely testified as to the decedent's possible intoxication. Also, unlike *Jackson*, here the trial court properly cured any possible prejudice by telling the jury that there was no evidence of drug use in this case. As a

result, unlike *Jackson*, we cannot say Mitchell was prejudiced by witness testimony.

¶ 71 In *Benuska v. Dahl*, 87 Ill. App. 3d 911 (1980), plaintiff Benuska was injured when an automobile driven by co-defendant Dahl struck an automobile that she was riding in as a passenger and driven by co-defendant Jones. *Benuska*, 87 Ill. App. 3d at 912.

¶ 72 At trial, Benuska testified that Jones was intoxicated at the time of the accident, that Jones possessed a can of beer in the automobile and she threw the can out of the vehicle when the accident occurred. *Id.* at 914. The trial court allowed counsel for Jones to ask the passengers of Dahl's vehicle whether the can of beer was thrown from the Dahl vehicle and not from the Jones auto, which the passengers denied. *Id.* One of the Dahl passengers testified that there was beer in the vehicle and this testimony was referred to by counsel for Jones in closing argument. *Id.*

¶ 73 The appellate court found that although counsel for Jones clearly intended to impeach Benuska's testimony by suggesting that a passenger of the Dahl vehicle actually threw out the can of beer rather than Jones, such questioning and argument also "tended to suggest" that Dahl may have been drinking at the time of the accident. As a result, the appellate

court found Dahl was prejudiced by the questioning and argument that suggested he was drinking at the time of the accident. *Id.*

¶ 74 In the instant case, we cannot say defense counsel's line of questioning of Dr. Taylor or Dr. Taylor's testimony as to the theories of the causation of gastroschisis "tended to suggest" Mitchell used drugs. We also cannot say the instant case is even in the same realm as *Benuska*, where counsel for Jones attempted to show that Dahl, not Jones, was intoxicated at the time of the accident. The record shows that defense counsel here did not attempt to show Mitchell used drugs during her pregnancy because counsel ceased the line of questioning after the trial court's admonishment and, unlike *Benuska*, counsel did not seek to establish Mitchell's behavior in any manner or mention the issue in closing argument. Further, as we previously indicated, the trial court cured any prejudice when she told the jury that there was no evidence of any drug use in this case.

¶ 75 In *Coleman v. Williams*, 42 Ill. App. 3d 612 (1976), defense counsel in his closing remarks insinuated that the plaintiff was intoxicated. *Coleman*, 42 Ill. App. 3d at 617. In the instant case, unlike *Coleman*, defense counsel did not insinuate that Mitchell used drugs. In fact, the record shows defense counsel in closing remarks commented on how Mitchell is a good and responsible parent.

¶ 76 In *Wagner v. Zboncak*, 111 Ill. App. 3d 268 (1982), plaintiff was injured when defendant failed to yield his automobile to plaintiff's automobile while making a left turn, resulting in a crash. *Wagner*, 111 Ill. App. 3d at 269. Prior to trial, the court granted plaintiff's motion *in limine* to prohibit the defendant from introducing any evidence of consumption of alcohol by plaintiff prior to the accident. *Id.*

¶ 77 At trial, defendant testified that the accident scene smelled like a brewery and that there were beer bottles all over the place. *Id.* The appellate court found that plaintiff was prejudiced by defendant's testimony because there was no evidence that plaintiff was intoxicated and the plaintiff could not rebut the testimony without violating the motion *in limine*. *Id.* at 925.

¶ 78 In the instant case, we cannot say Dr. Taylor's testimony as to the theories of the cause of gastroschisis is akin to the defendant's testimony in *Wagner*, where the defendant, in violation of plaintiff's motion *in limine*, testified the accident scene smelled like a brewery and there were beer bottles all over the place. The defendant in *Wagner* intended to portray the plaintiff as intoxicated at the time of the accident, unlike the instant case, where there was no such attempt by the defendants to establish Mitchell's behavior, rather, Dr. Taylor

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was in the process of explaining gastroschisis, opining that doctors do not know what causes the defect and offering theories as to the cause of the defect.

¶ 79 Next, Mitchell argues law from other federal and state jurisdictions in support of her claim that she was prejudiced by Dr. Taylor's testimony. However, we find it unnecessary to resort to the law of other jurisdictions because the facts in this case are clear, Dr. Taylor's testimony was not inflammatory or prejudicial. The trial court noted that the mood of the court room did not change and the jury was immediately admonished. We find Mitchell is unable to meet her burden to show she was prejudiced by Dr. Taylor's testimony. *Cairns*, 170 Ill. App. 3d at 511.

¶ 80 Mitchell further argues that she is entitled to a new trial because: (1) Dr. Taylor rendered a "legally defective opinion" that the baby suffered from a ruptured umbilical hernia, (2) the manifest weight of the evidence shows Darryl's loss of bowel was preventable and was a direct result of Dr. Font's failure to comply with the standard of care, and (3) defendants presented inherently contradictory evidence in their own case.

¶ 81 The central theme in these claims by plaintiff is that the testimony by defense expert witness Dr. Taylor is not credible. However, it is the province of the jury to resolve

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conflicts in the evidence, to pass upon the credibility of the witnesses and to decide what weight should be given to the witnesses' testimony. *Id.* at 452. The appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way. *Id.* at 452-53.

¶ 82 Here, the jury examined the evidence, heard the testimony and observed the demeanor of all the witnesses and determined Dr. Font did not violate the standard of care. Furthermore, as the trial court noted, the jury could reasonably infer from the evidence admitted at trial that Dr. Font met the standard of care. As a result, we are unable to reverse the jury's verdict by virtue of plaintiff's claim that Dr. Taylor's testimony is not credible because such determination is the exclusive province of the jury. *Id.* at 452.

¶ 83 II. Judgment Notwithstanding The Verdict

¶ 84 A JNOV should be entered only where "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Suttle v. Lake Forest Hospital*, 315 Ill. App. 3d 96, 102 (2000) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). "In

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ruling on a motion for a [JNOV], a court does not weigh the evidence, nor is it concerned with the credibility of the witnesses; rather it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion." *Suttle*, 315 Ill. App. 3d at 102 (quoting *Maple v. Gustafson*, 151 Ill. App. 3d 445, 453 (1992)). A motion for JNOV presents a question of law and will be granted only if there is a total failure or lack of evidence to prove an essential element of the plaintiff's case. *Suttle*, 315 Ill. App. 3d at 102. The court has no right to enter a JNOV where the assessment of credibility of witnesses or the determination regarding conflicting evidence is decisive to the outcome. *Id.* We review *de novo* a trial court's decision to deny of motion for JNOV. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 100 (2010).

¶ 85 In a medical malpractice action, as alleged by plaintiff in the present dispute, Illinois law mandates that plaintiff prove: (1) the proper standard of care by which to measure the defendant's conduct, (2) a negligent breach of the standard of care, and (3) resulting injury proximately caused by the defendant's lack of skill or care. *Id.* Normally, laypersons are not qualified to evaluate professional medical conduct, therefore, it is the plaintiff's duty to present expert testimony

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that will establish the applicable standard of care, a deviation from the standard, and the resulting injury to the plaintiff in order to establish a *prima facie* case of medical negligence. *Id.* at 102-03.

¶ 86 Mitchell claims she established a *prima facie* case of medical negligence because defendants' expert witness Dr. Taylor denied Darryl suffered from gastroschisis and therefore his opinion is not valid.

¶ 87 Mitchell's claim is not persuasive. A review of Dr. Taylor's testimony shows that he opined that Darryl did indeed have gastroschisis at birth and he did not deny that Darryl suffered from gastroschisis, as Mitchell claims. He also opined Darryl had a ruptured umbilical cord hernia. Mitchell claims that Dr. Taylor supported his opinion that Darryl had a ruptured umbilical cord hernia with theories as to the causation of this condition. However, the record shows that Dr. Taylor offered his opinion as to theories on how gastroschisis occurs, not a ruptured umbilical cord hernia.

¶ 88 Furthermore, the lengthy trial record shows that both parties offered conflicting expert testimony relating to the proper standard of care and the defendants' alleged breach or lack of breach thereof. Mitchell's expert witnesses testified that Dr. Font deviated from the standard of care by failing to

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diagnose gastroschisis from Mitchell's ultrasounds. Conversely, defense expert medical witness Dr. Taylor testified that Dr. Font did not deviate from the standard of care because gastroschisis is not present in the ultrasounds.

¶ 89 Mitchell's medical expert witness Dr. Giles testified that Darryl's surgery was unduly delayed. However, Mitchell's second medical expert, Dr. Saenz, testified that he could not say to a reasonable degree of medical certainty that the outcome would have been different had the surgery been done within two hours of birth rather than three. In addition, Darryl's surgeon, Dr. Bass, testified that the surgery was not unduly delayed. The conflicting testimony was sufficient to raise a question of fact to be decided by the jury, and this court will not substitute its judgment for that of the jury and reweigh the credibility of the witnesses. *Dienstag v. Margolies*, 396 Ill. App. 3d 25, 36 (2009). A jury is not bound to accept the opinion of an expert on an ultimate issue. *Id.* A jury is free to disregard an expert witness's conclusions of fact. *Id.* Therefore, we agree with the trial court's finding that the jury could infer from the testimony at trial that Dr. Font did not deviate from the standard of care. We conclude that all of the evidence, when viewed in its aspect most favorable to defendants, does not so overwhelmingly favor the plaintiff that no contrary verdict based

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on that evidence could ever stand. *Suttle*, 315 Ill. App. 3d at 102.

¶ 90 III. Billing Records and Juror Removal

¶ 91 Mitchell claims a new trial is warranted because Dr. Font failed to produce requested billing records and destruction of these records should have been deemed intentional or reckless thereby warranting instructing the jury on Illinois Pattern Jury Instructions, Civil, No. 5.01 (2008) (hereinafter, IPA Civil (2008) No. 5.01).

¶ 92 Mitchell claims the billing records may have shown that Dr. Font did not perform a level 2 ultrasound thus definitively proving his professional negligence. Mitchell's claim is not persuasive because we cannot say it was established at trial that gastroschisis could not be detected on a level 1 ultrasound, therefore, we cannot say the billing records would have changed the jury's verdict.

¶ 93 Lastly, Mitchell claims the trial court erred in removing a juror for being inattentive. The trial court found that the juror in question was sleeping during the trial and not paying attention. The trial court found this juror was also a distraction to the other jurors who continually attempted to wake the sleeping juror. The trial court even instructed the sheriff to sit next to the juror to keep him awake during the trial.

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Also, an alternate juror, who happened to be a part of the original 12 selected, was able to take the excused jurors place. As a result, we cannot say that the trial court's removal of the sleeping juror denied plaintiff of a fair trial.

¶ 94 CONCLUSION

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

¶ 96 Affirmed.