2014 IL App (1st) 122871-U

THIRD DIVISION
April 16, 2014

No. 1-12-2871

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

EVELYN HART, Independent Administrator of the Estate of Michael Hamilton, Deceased, Plaintiff-Appellant, v. EXCEL EMERGENCY CARE, LLC, and JOSE ALMEIDA, M.D., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 07 L 6654 Honorable Richard J. Elrod, Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman concurred in the judgment. Justice Pucinski dissented.

ORDER

¶ 1 *HELD*: The plaintiff was not entitled to entry of judgment notwithstanding the verdict nor was the verdict in favor of defendants against the manifest weight of the evidence where conflicting evidence was presented on the elements required to establish a medical malpractice claim. The trial court did not abuse its discretion in refusing to give the missing witness instruction where the defense called an alternative expert with the same area of expertise and the plaintiff was allowed to use the testimony of the expert who testified at the first trial. Finally, the plaintiff has forfeited or waived the remaining allegations of error.

¶ 2 Plaintiff-appellant Evelyn Hart, as independent administrator of the estate of Michael Hamilton, deceased, filed a medical malpractice action against defendants-appellees Excel Emergency Care, LLC and Jose Almeida, M.D. Hart alleged that Dr. Almeida failed to diagnose Hamilton's aortic dissection when he treated Hamilton in the emergency room and that Hamilton died as a result of Dr. Almeida's negligence. The jury returned a verdict in favor of Hart in the first trial, but the judgment on the verdict was vacated and, following a second trial, the jury reached a verdict in favor of defendants. On appeal, Hart contends that (1) the trial court erred in denying her motion for judgment notwithstanding the verdict or, in the alternative, (2) the jury's verdict was against the manifest weight of the evidence. Hart further contends that the trial court erred in refusing to give the "missing-witness" jury instruction (Illinois Pattern Jury Instructions, Civil, No. 5.01 (2008) (hereinafter, IPI Civil (2008) No. 5.01)) and in allowing improper closing argument. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On May 15, 2001, at approximately 2 p.m., Michael Hamilton was at work at the Behr Process Corporation in Chicago Heights when he began to experience severe pain. Whether the pain was initially in Hamilton's chest or abdomen is an issue that is disputed by the parties. A coworker who observed Hamilton's distress tried to assist him and an ambulance was called. The paramedics transported Hamilton to St. James Chicago Heights hospital, where he was treated by the emergency room physician on duty, Dr. Jose Almeida. By 6 p.m., Hamilton's pain had resolved and he was discharged with instructions to follow up with a primary care physician the

next day. On May 21, 2001, Hamilton was found dead in his mother's apartment. An autopsy determined that Hamilton died of pericardial tamponade, or blood surrounding the heart, caused by an aortic dissection.

¶ 5 Evelyn Hart, Hamilton's mother and the independent administrator of his estate, filed a medical malpractice claim against Dr. Almeida and Excel Emergency Care, LLC (Excel) on June 30, 2006.[1] The complaint alleged that Dr. Almeida negligently failed to diagnose Hamilton's aortic dissection when Hamilton was treated in the emergency room on May 15, and this failure led to Hamilton's death. The matter proceeded to trial in May 2011, the jury returned a verdict in favor of Hart in the amount of $3,767,792 and judgment was entered on the verdict. However, on September 23, 2011, the trial court granted the defendants' posttrial motion, vacated the judgment and ordered a new trial. The second trial commenced on March 20, 2012.

¶ 6 The following evidence was adduced at trial. Staci Goveia was one of Hamilton's coworkers. On May 15, Goveia was in her office when she received a call to go to the receiving docks because an employee was having chest pains. When Goveia reached the docks, she saw Hamilton pacing back and forth. He was sweating profusely and said that he was feeling dizzy and nauseous, so Goveia asked what he had eaten for lunch. Hamilton was pounding on his chest and making motions to indicate that the pain was moving between his chest, back and abdomen. He said it was a sharp, stabbing pain and that he had never felt pain like that before. Goveia told another employee to call for an ambulance and to report that an employee was

[1]St. James Hospital and Health Centers, Inc., was also named in the lawsuit but settled with Hart prior to trial and is not a party to this appeal.

experiencing chest pain. Hamilton said he was too uncomfortable to sit in a chair, but Goveia convinced Hamilton to lie down on the ground and she sat next to him and held his head in her lap. She asked another employee to bring wet paper towels and she used the towels to try and cool Hamilton down and make him comfortable. When the paramedics arrived, Hamilton told them that on a scale of 1 to 10, his pain was an 11.

¶ 7 Michael Smith was Hamilton's supervisor in May 2001. Smith was notified via radio of Hamilton's situation and went back to the receiving area. When he arrived, Smith saw Hamilton sitting in a chair with Goveia assisting him. Hamilton appeared to be in a significant amount of pain and was grabbing his stomach and saying it "hurt a lot." Hamilton gave Smith telephone numbers for family members and asked Smith to let them know that he was being taken to the hospital. Smith returned to his office to make the phone calls and was not present when the ambulance arrived.

¶ 8 Frank Enright was one of the paramedics who responded to the call at Behr on May 15. When he and his partner arrived, they found Hamilton alert and lying on the floor. Hamilton's primary complaint was stomach pain. The paramedics took Hamilton's vitals and assessed his condition. They noted that Hamilton was diaphoretic, which Enright explained meant he was sweating, and that his skin was pale and cold to the touch. Once Hamilton was in the ambulance, the paramedics started advanced life support measures, which included starting an IV and using a cardiac monitor.

¶ 9 Enright confirmed that if Hamilton had complained of chest or back pain it would have been noted in the report. Similarly, if Hamilton had complained of dizziness or had said that his

pain was 11 on a scale of 1 to 10, that would also have been noted in the report. Enright further explained that if Hamilton had complained of chest pain, the call would have been upgraded to a cardiac call. The report indicated that Hamilton's blood pressure was normal and the cardiac monitor readings were also normal. There was no change in Hamilton's condition while he was being transported to the hospital.

¶ 10 Kathleen Rice was the triage nurse assigned to Hamilton when he was brought to St. James. Although Rice did not remember Hamilton, she explained that it was usual and customary to first ask the patient what brought him to the emergency room. According to the notes Rice took that day, Hamilton told her he began having abdominal pain at 2:30 p.m. and that he had eaten chicken for lunch. Hamilton stated that he felt like he was having abdominal cramping. Rice testified that if Hamilton had mentioned chest pain or shortness of breath, she would have recorded that in her notes. According to a checklist Rice completed, Hamilton's vital signs were normal and he was alert and oriented. His skin color was normal and his skin temperature was warm. There was a section on the checklist where the choices were "emergent," "urgent," or "nonurgent" and Rice had checked "urgent." She explained that emergent would have indicated a life-threatening event, while urgent would be checked when a patient complains of pain, because that is something that needs to be addressed quickly. However, if a patient appeared to be in "severe dire straits" because of the pain, that would be considered emergent.

¶ 11 Vanessa Scheidt was the registered nurse who was assigned to care for Hamilton on May 15 after he was taken back into the emergency room area where he would be seen by a doctor. Scheidt reviewed the triage nurse's report, which indicated that Hamilton began having

abdominal pain at 2:30 p.m. The report further indicated that Hamilton was alert and oriented, his skin color was normal and his skin was warm, and the box to indicate whether Hamilton was diaphoretic was not checked.

¶ 12 Scheidt also entered some notes on Hamilton's chart, indicating that the doctor had seen Hamilton and that the tests the doctor ordered had been completed. Scheidt indicated on the chart that she had given Hamilton a combination of Mylanta, Donnatal and Lidocaine, commonly referred to as a "GI cocktail," for complaints of abdominal pain. The chart further indicated that Hamilton vomited a small amount after taking the medication and then reported that his abdomen felt better. Scheidt confirmed that if Hamilton had complained of back or chest pain, she would have noted it on his chart.

¶ 13 Dr. Almeida was the emergency room physician on duty when Hamilton was brought to St. James Hospital on May 15. According to Dr. Almeida's notes, Hamilton was alert, able to communicate, and oriented to time and place. Hamilton's chief complaint was abdominal pain over the epigastric area that started around 2:30 p.m. The pain was moderate and constant. He did not have nausea, chest pain or vomiting. Dr. Almeida ordered a complete blood count and comprehensive metabolic panel, as well as a cardiac profile.

¶ 14 Dr. Almeida testified that he did not know whether Hamilton had an aortic dissection at the time he was in the emergency room. However, he explained that when a person has an aortic dissection, even though the pain is typically worse at onset, the pain does not completely go away and the person would have significant pain even after onset. Patients experiencing an aortic dissection would also typically have an elevated pulse rate and would not have normal vital

signs. Hamilton's blood pressure, pulse and respiration rate were all within normal range.

¶ 15 The cardiac profile included a chest x-ray, and Dr. Almeida noted that the x-ray showed that Hamilton had cardiomegaly, or an enlarged heart, typically caused by chronic high blood pressure. Based on the complete clinical picture, Dr. Almeida concluded that the cardiomegaly was secondary to chronic hypertension. Dr. Almeida ordered a GI cocktail because of the abdominal discomfort Hamilton was experiencing. Dr. Almeida explained that the fact that Hamilton vomited after drinking the GI cocktail and told the nurse he felt better was an indication that the irritation was in the stomach area, because a GI cocktail would not alleviate pain from an aortic dissection or other heart pain.

¶ 16 Dr. Almeida then examined Hamilton again and noted that he reported no more abdominal pain. Hamilton was discharged with instructions to follow up with a primary care doctor for cardiomegaly. Dr. Almeida testified that there was nothing in Hamilton's presentation to the emergency room that suggested aortic dissection and Hamilton was discharged because his symptoms had resolved. Moreover, there was nothing in the lab or x-ray results that would indicate a more serious condition, and his vital signs were stable.

¶ 17 Dr. Gary Johnson, a specialist in emergency medicine and the author of several textbook chapters on aortic dissection, testified as an expert witness for Hart. Dr. Johnson explained that Hamilton had a type A[2] aortic dissection, involving the ascending aorta. The aorta is made up of

[2]Type A and type 1 are used interchangeably in the record across the testimony of various experts. For consistency, we will refer to this type of dissection as a type A dissection throughout.

three layers and aortic disease generally begins with a small tear in the inner layer. In some cases, the tear can be repaired but in others, blood can enter through the tear and advance through the second layer, dissecting the aorta. The most common cause of death after someone has suffered an aortic dissection is pericardial tamponade, where the blood goes into the pericardium and occupies space in the lining around the heart. The pressure around the heart prevents the heart from beating and the condition is usually fatal. Type A dissections involving the ascending aorta require surgery to prevent the blood from entering the pericardium.

¶ 18 Dr. Johnson testified that even in type A dissections, the symptoms can stabilize and abate completely for a period of time, of short or even long duration. Symptoms of an aortic dissection typically include a sharp stabbing or ripping pain in the chest with the pain then migrating to the back or abdomen. Other symptoms include dizziness, nausea and profuse sweating.

¶ 19 Based upon his review of the medical records and the deposition transcripts of various medical personnel and Hamilton's coworkers, Dr. Johnson testified that it was his opinion that Hamilton suffered an aortic dissection on May 15, 2011. Dr. Johnson also opined that Dr. Almeida violated the standard of care because he should have taken the history of Hamilton's symptoms at onset from his coworkers at the scene and, if he had, he would have known there was a potentially fatal condition.

¶ 20 But on cross-examination, Dr. Johnson acknowledged that a doctor is not permitted to contact coworkers to obtain a patient's medical history without the patient's consent. Dr. Johnson also acknowledged that if a patient is alert and able to give his own history, a doctor should

obtain that history from the patient. Dr. Johnson conceded that, according to the medical records, Hamilton was alert and oriented and able to give his own medical history.

¶ 21 Dr. Johnson testified that aortic dissection is a rare condition, most commonly seen in individuals over the age of 60 or in individuals over the age of 50 who have chronic hypertension. It is typically only seen in younger people if they have a connective tissue disorder or a specific risk factor for the disease. Dr. Johnson acknowledged that it was very unusual for an individual such as Hamilton, who was only 35, to have an aortic dissection. He further acknowledged that the history recorded by both the triage nurse and Dr. Almeida did not suggest aortic dissection.

¶ 22 Dr. Gary Schaer, an interventional cardiologist, testified as an expert witness for defendants. Based on his review of the medical records, Dr. Schaer testified that there was nothing in Hamilton's presentation to the emergency room that would suggest aortic dissection, because the records specifically indicated that Hamilton did not have chest pain. Dr. Schaer also reviewed all of the cardiac test results and did not see any evidence of an acute coronary problem. Dr. Schaer agreed that it was appropriate in this case to recommend that Hamilton follow up with a doctor for issues related to hypertension.

¶ 23 Once pericardial tamponade occurs, death usually results within minutes. Dr. Schaer further testified that pain from a type A dissection would not recede prior to death. Finally, Dr. Schaer concluded that Hamilton had been asked by Dr. Almeida about his pain at the time of onset, because Dr. Almeida's notes indicated that the abdominal pain started at 2:30 p.m. and was moderate and constant.

¶ 24 Defendants also presented expert testimony from Dr. Axel Joob, a cardiac and thoracic surgeon. Dr. Joob typically sees 7 to 10 aortic dissections a year, with only two or three of them being a type A dissection. Dr. Joob explained that a person suffering from a type A dissection has a 50% chance of not surviving past the first 24 hours without emergency surgery.

¶ 25 Hamilton's autopsy report described the white blood cells in the area of the tear as neutrophils, a type of white blood cell that is usually seen within the first 24 to 36 hours after an injury. Because neutrophils are the "first responders" when there is any type of injury, Dr. Joob would not have expected to see neutrophils in an area that was torn a week earlier. The fact that Hamilton died of pericardial tamponade, or blood in the area around his heart, suggests that the dissection was acute. The combination of the neutrophils and the blood in the pericardium indicated that Hamilton suffered an acute tear up to 36 hours before his death on May 21, 2001, which then ruptured into the pericardium, a catastrophic event that would have caused death almost immediately. Given these conclusions, Dr. Joob opined that Hamilton's aortic dissection was not present at the time he was treated in the emergency room on May 15.

¶ 26 Dr. Mark Cichon, an emergency room physician, also testified as a defense expert witness. Dr. Cichon concluded that Dr. Almeida met the standard of care in his treatment of Hamilton. Dr. Cichon explained that, based on the medical records and the history obtained by the paramedics, nurses and Dr. Almeida himself, Dr. Almeida appropriately ruled out aortic dissection. Moreover, Dr. Almeida appropriately ordered a cardiac workup and ruled out other serious coronary conditions. There was nothing in the test results that would suggest the need for hospitalization but merely follow-up care for the cardiomegaly. There was also nothing in the

test results that would indicate a need for additional testing.

¶ 27 Dr. Cichon further believed that the aortic dissection was not present at the time of Hamilton's emergency room visit on May 15. In Dr. Cichon's experience, a patient with an acute type A aortic dissection would present to the emergency room with excruciating, unrelenting pain and unstable vital signs. Moreover, in one of the depositions Dr. Cichon reviewed, there was an indication that on Friday, May 18, Hamilton had more discomfort to the point that he finally called a physician for follow-up. On cross-examination, it was established that nobody had testified that Hamilton called the physician on Friday and a friend of Hamilton's testified in a deposition that he called her on Wednesday or Thursday, May 16 or 17, and asked her to take him to his doctor's appointment the following Monday, May 21.

¶ 28 Finally, Dr. Bruce Silver, a diagnostic radiologist, testified for the defendants. Dr. Silver reviewed Hamilton's chest x-ray films. Dr. Silver explained that there are several findings on a chest x-ray that could suggest the presence of an aortic dissection. These findings include (1) an abnormal widening of a structure called the mediastinum, (2) calcifications (if present) in the aortic arch that measure more than 3 to 4 millimeters from the inner liner to the outer lining, (3) inflammatory changes or bleeding around the aortic knob, (4) some deviation of the trachea, and (5) fluid in the chest around the aorta. One or more of these findings are present in approximately 90% of aortic dissections. This means that approximately 10% of patients with aortic dissection will have a normal chest x-ray.

¶ 29 Based on his review of Hamilton's chest x-rays, Dr. Silver concluded that there was evidence of cardiomegaly, something that is consistent with someone who has a history of

hypertension, but no evidence of aortic dissection. Hamilton's mediastinum did not show any widening, he had no calcifications in his aortic arch, the aortic knob was clearly defined and showed no evidence of bleeding or inflammation, the slight deviation seen in the trachea could be accounted for by the rotated position of the patient at the time of the x-ray (as demonstrated by how the other structures lined up), and there was no fluid around the aorta.

¶ 30 Closing arguments (spanning roughly two-and-a-half hours) were presented and the jury was instructed in the morning of March 27, 2012. At 2:30 p.m. that day, the jury returned a verdict in favor of Excel and Dr. Almeida and the trial court entered judgment on the verdict. The trial court subsequently denied Hart's posttrial motion, which sought judgment in favor of plaintiff notwithstanding the verdict or, alternatively, a new trial. Hart timely filed this appeal.

¶ 31 ANALYSIS

¶ 32 A. Judgment Notwithstanding the Verdict or New Trial

¶ 33 Hart first contends that the evidence conclusively demonstrated that Dr. Almeida violated the standard of care, and that she is therefore entitled to a judgment in her favor notwithstanding the verdict or a new trial. The standards for granting these alternative forms of relief differ.

¶ 34 "Judgment notwithstanding the verdict should not be entered unless the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence can ever stand." (Internal quotation marks omitted.) *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999) (quoting *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 109 (1997)). A judgment notwithstanding the verdict is not appropriate in situations where reasonable minds may draw different conclusions or inferences

from the evidence presented. *Id*. Our review of a trial court's denial of a motion for judgment notwithstanding the verdict is *de novo*. *Id*.

¶ 35 In contrast, a new trial is warranted only if, after weighing the evidence, it is determined that the verdict is contrary to 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." (Internal quotation marks omitted.) *Id*. (quoting *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992)). We will only reverse a trial court's denial of a motion for a new trial if we determine that the trial court abused its discretion. *Id*. at 132-33.

¶ 36 To establish medical malpractice, a plaintiff must show a deviation from the standard of care and a causal connection between the deviation and the injury. *Simmons v. Garces*, 198 Ill. 2d 541, 556 (2002). Hart cites legal authority for the proposition that the jury may not disregard uncontroverted evidence, and then argues that because Hamilton's coworker testified that he experienced sharp, stabbing pain in his chest, Dr. Almeida was clearly negligent in not eliciting information regarding the pain at onset from Hamilton. However, we note that the evidence was not at all conclusive on the issue of whether Dr. Almeida asked Hamilton about his symptoms at the time of onset. Hart points to various statements made by Dr. Almeida which could be interpreted as admissions that Dr. Almeida did not, in fact, ask Hamilton about his symptoms at the time of onset. However, it is also uncontroverted that Dr. Almeida, who examines thousands of patients in emergency room settings, did not remember Hamilton and had to rely solely on the medical records to refresh his memory regarding what questions he may have asked at the time

he examined Hamilton.

¶ 37 Hart contends that because Hamilton's coworker, Goveia, testified that Hamilton described symptoms consistent with a type A aortic dissection, and because those symptoms are not reflected in Dr. Almeida's notes, it follows that Dr. Almeida must not have asked Hamilton about his symptoms at onset. We disagree. The jury could have just as reasonably concluded that if Hamilton, who was alert and oriented, had indeed experienced symptoms consistent with an aortic dissection, including chest pain, he would have described such symptoms to the paramedics, who were first on the scene within minutes of the onset of his symptoms, the triage nurse who saw him immediately upon his arrival at the emergency room, the nurse who subsequently cared for him, or the doctor who treated him. In fact, none of the medical records are consistent with the testimony of Goveia, the only witness to testify that Hamilton was experiencing chest pain. Indeed, the testimony of Smith, Hamilton's supervisor who arrived on the scene shortly after Goveia, was that Hamilton's pain appeared to be in his stomach.

¶ 38 It is significant that the medical records specifically reflect that Hamilton was not suffering from chest pain, a clear indication that he was asked about chest pain. Entries also record the time of onset of the abdominal pain, and the notation that the pain was constant and moderate. A great deal of time was spent at trial going over the meaning of these notations, with experts for the defense testifying that the notations were an indication that Dr. Almeida did, in fact, ask Hamilton about his symptoms at the time of onset.

¶ 39 Thus, conflicting evidence was presented on the issue of whether Dr. Almeida deviated from the standard of care and it was the province of the jury to resolve that issue. This court will

not substitute its judgment for that of the jury. See *Schuchman v. Stackable*, 198 Ill. App. 3d 209, 222 (1990) (the jury is uniquely qualified to resolve conflicting medical testimony concerning the applicable standard of care and a defendant's breach of that standard); *Lisowski v. MacNeal Memorial Hospital Association*, 381 Ill. App. 3d 275, 283 (2008) (it is the jury's role to resolve conflicting expert testimony on the issue of whether the defendant deviated from the standard of care).

¶ 40 Moreover, Hart's contention that the evidence is uncontroverted that Hamilton's aortic dissection occurred immediately prior to his emergency room visit is not supported by the record. Certainly there was evidence presented that could allow the jury to reach that conclusion, but there was also conflicting evidence that the dissection could have occurred at some time within the 24 to 36 hours preceding Hamilton's death. Although Dr. Johnson testified that the symptoms of a type A aortic dissection could recede or even vanish completely for a period of time, multiple defense experts disagreed, testifying that a patient who experiences a type A aortic dissection would continue to experience excruciating, unrelenting pain and would have unstable vital signs until the dissection was either treated or the patient died. Defense experts further testified that a GI cocktail would not resolve symptoms of an aortic dissection, but there was evidence that Hamilton reported feeling better after drinking one. Again, it was the province of the jury to resolve conflicts in the evidence, assess the credibility of the witnesses and determine the weight to be given to each witness's testimony. *Maple*, 151 Ill. 2d at 452.

¶ 41 Given the conflicting evidence presented at trial, we cannot say that the evidence so overwhelmingly favors Hart that no contrary verdict could ever stand. Therefore, the trial court

did not err in denying Hart's motion for judgment notwithstanding the verdict. Similarly, we cannot say that the opposite conclusion is clearly evident or that the jury's verdict was unreasonable, arbitrary and not based on the evidence; thus, the trial court did not abuse its discretion in denying the motion for a new trial.

¶ 42 B. Missing Witness Jury Instruction

¶ 43 Hart next contends that she is entitled to a new trial because the trial court erred in refusing to give IPI Civil (2008) No. 5.01, referred to as the "missing witness" instruction, as to Dr. Mulliken. The defense disclosed two emergency room physician experts, Dr. Mulliken and Dr. Cichon. The trial court only allowed one emergency room expert witness to testify at trial, and Dr. Mulliken testified at the first trial. At the second trial, Dr. Cichon testified. Hart argues that Dr. Cichon's testimony was inconsistent with Dr. Mulliken's testimony and "changed the whole course of the trial;" thus, the trial court's refusal to give the requested instruction was prejudicial error, requiring a new trial.

¶ 44 A missing witness instruction advises the jury that, if a party fails to offer evidence that is within its power to produce, the jury may infer that this evidence would be adverse to that party. IPI Civil (2008) No. 5.01. Nothing in the instruction allows the party requesting it to advise the jury of the substance of the missing witness's testimony. Prior to trial, the defense indicated that Dr. Mulliken might have a scheduling conflict and that if he could not appear, the defense would substitute Dr. Cichon. Hart later asked the court to rule that a missing witness instruction would be given if defendants called Dr. Cichon instead of Dr. Mulliken. Lengthy arguments were heard on this issue.

¶ 45 In response to the defense argument that Hart could subpoena Dr. Mulliken, the trial court noted the inconsistency in the defendants' position, since the reason given by the defense for calling Dr. Cichon was that Dr. Mulliken was not available. However, the trial court noted that Dr. Cichon was a disclosed emergency room expert, both emergency room experts could not testify because it would be cumulative, and defendants were allowed to choose how to try their case. Therefore, the trial court stated that it would not give the missing witness instruction but it would allow Hart to convert Dr. Mulliken's testimony from the first trial into an evidence deposition and read the testimony at the second trial. Although Hart used Dr. Mulliken's testimony from the first trial when cross-examining Dr. Cichon, she opted not to convert the trial testimony to an evidence deposition to be read to the jury.

¶ 46 In general, the missing witness instruction is available "when the missing witness was under the control of the party to be charged and could have been produced by reasonable diligence, the witness was not equally available to the party requesting that the inference be made, a reasonably prudent person would have produced the witness if the party believed that the testimony would be favorable, and no reasonable excuse for the failure to produce the witness is shown." *Shaffner v. Chicago & North Western Transportation Co.*, 129 Ill. 2d 1, 22 (1989). We note that the two cases relied on by Hart on this issue are distinguishable.

¶ 47 In *Shaffner*, one witness had expertise that no other witness possessed, while the other had inspected the scene of the accident shortly after it occurred. *Id*. at 23-24. Neither witness testified at trial. *Id*. at 22. We further note that the missing witness instruction was neither requested nor given, and the court ruled that it was not an abuse of discretion to allow portions of

the interrogatories from one of the missing witnesses to be read and adverse comments to be made on the absence of both witnesses. *Shaffner*, 129 Ill. 2d at 22, 24.

¶ 48 In *Kersey v. Rush Trucking, Inc.*, 344 Ill. App. 3d 690, 701 (2003), an accident reconstruction expert was retained and disclosed by the defendants to counter testimony by the plaintiff's accident reconstruction expert and make an independent determination, but then did not testify at trial. Because the defendants' expert offered differing opinions from the plaintiff's expert on disputed issues in his deposition testimony and because the defendants did not proffer a reasonable excuse for his absence, the court found that the missing witness instruction should have been given. *Id*. at 701-02.

¶ 49 Here, the trial court determined that the missing witness instruction was not applicable because defendants were not failing to produce a witness, they were simply choosing to call an alternative witness who had also been disclosed and had the same area of expertise. Moreover, in the interest of fairness and because Hart complained that at least one of Dr. Mulliken's opinions was not favorable to the defense, the trial court allowed Hart to present any or all of Dr. Mulliken's testimony from the previous trial.

¶ 50 We note that at trial, Hart did in fact question Dr. Cichon regarding Dr. Mulliken's statement that Hamilton's aortic dissection probably happened prior to his emergency room visit, the one area in which Dr. Mulliken's opinion differed from that of Dr. Cichon's. However, defense counsel was then allowed to ask additional questions about Dr. Mulliken's testimony, including testimony that was in agreement with Dr. Cichon's opinion regarding whether Dr. Almeida deviated from the standard of care and thus, was clearly favorable to the defense.

¶ 51 Hart further elected not to introduce Dr. Mulliken's prior testimony as substantive evidence. Thus, Hart had the opportunity to place before the jury the very evidence she claims was "missing," alleviating any prejudice she may have suffered as a result of defendants' decision to call a different disclosed expert. Therefore, we conclude that the trial court did not abuse its discretion in refusing to give the missing witness instruction.

¶ 52 However, even if the trial court erred in not giving the instruction, a new trial would be warranted only if the error deprived Hart of a fair trial. *Simmons v. University of Chicago Hospitals and Clinics*, 247 Ill. App. 3d 177, 186 (1993). We cannot say that Hart was deprived of a fair trial. Dr. Cichon opined that the aortic dissection was not present at the time of Hamilton's emergency room visit, but Hart was able to use Dr. Mulliken's testimony on cross-examination, and also to show that Dr. Cichon's understanding that Hamilton did not make a follow-up appointment until Friday, one of the bases for his opinion, was erroneous. Moreover, Dr. Joob also opined that the aortic dissection was not present at the time of the emergency room visit, testimony that would not have been diminished by the giving of a missing witness instruction as to Dr. Mulliken. We further note that even if Hart had been able to conclusively establish that the aortic dissection occurred prior to the emergency room visit, there was significant conflicting evidence on the issue of whether Dr. Almeida deviated from the standard of care. Thus, the failure to give a missing witness instruction did not deprive Hart of a fair trial.

¶ 53 For all of these reasons, we conclude that the trial court did not abuse its discretion in refusing to give IPI Civil (2008) No. 5.01.

¶ 54 C. Closing Argument

¶ 55 Finally, Hart contends that the trial court erred in allowing improper closing argument and she is therefore entitled to a new trial. This argument is not well developed and contains a few citations to relevant legal authority for general legal propositions but no discussion of the applicability of the cited authority to this case. Instead, Hart merely lists some of the arguments she claims were improper and includes two paragraphs explaining how defense counsel, in Hart's view, misstated the evidence. In a parenthetical, Hart suggests there were additional misstatements but does not inform this court specifically what additional misstatements were made. Hart then concludes with a paragraph listing other alleged errors committed by the trial court on various evidentiary rulings, with no citations to relevant legal authority and no argument.

¶ 56 It is well established that the failure to argue a point in an appellant's opening brief, in violation of the requirements of Illinois Supreme Court Rule 341(h) (eff. Feb. 6, 2013), results in forfeiture of the issue. See *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010). Both arguments and citations to relevant authority are required, and "[a]n issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule." *Id*. Therefore, we decline to address the majority of the alleged errors in this section of Hart's brief.

¶ 57 As for Hart's argument regarding allegedly improper closing argument, we do not believe this argument is adequately developed and has also been forfeited. Moreover, the failure to object to allegedly prejudicial remarks during closing argument generally waives the issue for review. *Simmons v. University of Chicago Hospitals and Clinics*, 162 Ill. 2d 1, 12 (1994). At

trial, Hart's counsel only objected to one of the allegedly improper remarks; thus, argument regarding any other remarks has been waived. We have examined the one statement to which an objection was made on the grounds that it misstated the evidence, and have found no error where the court reminded the jury that what counsel says in closing argument is not evidence.

¶ 58 We note that even if Hart's arguments regarding closing argument had not been waived or forfeited, the scope and character of closing arguments are within the trial court's discretion and we will not reverse a determination regarding closing arguments absent an abuse of that discretion. *Simmons*, 198 Ill. 2d at 571. Here, Hart has not demonstrated that the trial court abused its discretion.

¶ 59 For the reasons stated herein, the judgment of the circuit court is affirmed.

¶ 60 Affirmed.

¶ 61 JUSTICE PUCINSKI, dissenting.

¶ 62 I respectfully disagree with my colleagues in this matter.

¶ 63 Dr. Almeida admitted that he "did not get that history from Michael" referring to the history of the pain and symptoms at the onset. All he did was chart the time when it started; he did not follow up with any questions about what happened at the onset. If he had he would have recognized a much more serious presentation than what he saw in the ER. The fact that Michael was alert doesn't persuade me, since patients in the ER will naturally just answer the questions that they are asked. If he was not asked about what his symptoms were at the onset he might not have felt they were important, but the doctor and staff knew or should have known that the symptoms at the onset were critical in evaluating what was going on.

¶ 64 Since everyone agrees that getting the history at the onset is a part of the standard of care, I don't see how not getting it leaves the doctor without fault. I am not persuaded by the majority's rationalization that no one else asked these questions either. And, I am not convinced that the majority's assumption that Dr. Almeida must have asked these questions because he noted the time of the onset necessarily follows. Further, the fact that the GI Cocktail alleviated some of Michael's pain/discomfort isn't conclusive since it is known that two of the variables in aortic dissection include the pain lessening, and the pain moving from chest to back to abdomen. The pain may have been naturally lessening after he drank the GI Cocktail, not because of the cocktail but because of the timing.

¶ 65 He admitted he did not ask the questions. It is the standard of care. This case should be reversed.