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SIXTH DIVISION
December 29, 2017

No. 1-17-1034
2017 IL App (1st) 171034-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARTIN PEREZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
ATHLETICO OF OAK PARK, LLC and	)	No. 13 L 12099
MAUREEN SCHWEGMAN, PT, DPT,	)	
	)	Honorable
Defendants-Appellants.	)	Ronald F. Bartkowicz,
	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion when it granted defendants' motion for a new trial where the jury's verdict was not against the manifest weight of the evidence because the expert testimony conflicted and it was the province of the jury to resolve any conflicts; it was entirely reasonable that the jury found that plaintiff simply did not meet its burden to prove the elements of medical negligence; reversed and remanded with directions.

¶ 2 Defendants, Athletico of Oak Park, LLC (Athletico) and Maureen Schwegman, PT, DPT (Schwegman), appeal the trial court's order that granted the motion for a new trial brought by plaintiff Martin Perez. After trial, the jury returned a verdict in defendants' favor. However, upon motion by plaintiff, the court below granted a new trial based on its finding that the jury's verdict was against the manifest weight of the evidence. On appeal, defendants assert that the

trial court abused its discretion when it granted plaintiff's motion because there was sufficient evidence to support the jury's verdict. We agree with defendants and find that the trial court abused its discretion when it granted plaintiff's motion for a new trial. Therefore, we reverse the decision of the trial court.

¶ 3 BACKGROUND

¶ 4 The case underlying this appeal is a medical negligence lawsuit brought by plaintiff against Schwegman, a physical therapist who treated plaintiff, and Athletico, her employer, based on plaintiff's allegations that during his physical therapy treatment at Athletico's facility on July 23, 2012, he sustained burns to his back as a result of a hot pack treatment administered by Schwegman and another unknown Athletico employee.

¶ 5 The following evidence was adduced at the jury trial, which took place from September 20, to September 27, 2016.

¶ 6 Plaintiff began treatment with defendants after he was referred to physical therapy for postoperative back pain by his neurosurgeon Dr. Tyler Koski, who had performed plaintiff's fourth spinal fusion surgery in 2012. On July 9, 2012, plaintiff and his wife, Patricia Perez, first visited Athletico and received a tour of the facility. The following day, plaintiff and his wife returned to Athletico and his wife filled out intake forms for him regarding his medical condition and medical history. Plaintiff's wife also filled out a body diagram after plaintiff relayed his various areas of pain. Specifically, plaintiff indicated that he had sharp, shooting pain on the top left side of his back and on the right side of his upper back; dull, aching pain on the mid-lower left side of his back; and numbness in his left thigh. The diagram did not reflect any numbness or loss of sensation in plaintiff's back. Schwegman examined plaintiff for the first time during his visit on July 10, 2012, wherein they discussed his injury in detail. Schwegman performed an

objective evaluation (based on her observations, rather than what plaintiff told her) of plaintiff's condition by physically touching and feeling plaintiff's muscles, tissues, and joints. Schwegman found that plaintiff had increased tightness in his paraspinal muscles, which are the large muscles on either side of the spine, and he had reported to her that he had tenderness to the touch through his paraspinal muscles. Schwegman testified that plaintiff never told her that he had any decreased sensation or numbness in his paraspinal muscles and that if he had, she would have noted it in her evaluation. Schwegman also reviewed plaintiff's prescription from Dr. Koski for physical therapy, which stated "PT 2 times per week for 6 weeks working on core strengthening, stretching, cervical range of motion, general conditioning, gait, balance, posture, local therapies to back paraspinals, including massage, heat, cold, et cetera." The prescription did not contain any restrictions on treatment and did not indicate any decreased sensation anywhere on plaintiff's body. During this first visit with Schwegman, she administered a 10-minute massage, but did not apply any hot packs.

¶ 7 On July 12, 2012, plaintiff returned to Athletico, where he received a 10-minute icepack treatment in the supine position, meaning plaintiff lay on his back on top of the ice packs. He also received a 25-minute massage and did certain isometric exercises, but did not have any hot pack treatment. On July 17, 2012, July 19, 2012, and July 23, 2012, plaintiff received the following treatment: 10-minute moist hot pack treatment in the supine position, 25-minute massage, and some isometric exercises. Plaintiff's alleged injuries stem from his treatment on July 23, 2012. Plaintiff testified that on that day, the Athletico facility was "packed" and he had to wait for his room to be ready. Schwegman was busy with other clients, so an aide, whose name plaintiff did not remember but who he estimated to be of high school age, cleaned the room for plaintiff. The aide also brought in hot packs that plaintiff then laid on in the supine position.

Plaintiff testified he would lay on top of the hot packs and sometimes would fall asleep. He would know that the hot pack treatment was over because a timer would go off. Plaintiff stated that he remembered "sweating a lot" and "sweating more than usual" on the July 23 visit. Plaintiff further testified that on occasions prior to July 23, Schwegman would come in the room "right away" after the timer went off, but on that date, plaintiff estimated that four to five minutes went by before Schwegman came in the room. Plaintiff testified that he told Schwegman that it was hotter than usual in the room and that he believed she said something to the effect of "maybe because there is a lot of people and the more people in the room there is[,] the more the air conditioning has to work." Plaintiff did not notice any sort of sensation, burning, or irritation to his back.

¶ 8 Schwegman testified that plaintiff always lay in the supine position because it was uncomfortable for him to lie on his stomach. Schwegman also testified that she could not remember if she brought the hot packs to plaintiff on July 23, but she remembered removing them and at the time she removed them, the packs were no longer hot. She stated that they were properly wrapped like she always wrapped them, meaning that they were covered in two covers that were each three to four towels' thickness plus two more hand towels as outer wraps, for a total of about six to eight towels' thickness. Schwegman testified that she was sure that she returned to plaintiff's room less than 30 seconds after the timer started to go off because the beeping sound that the timer made was "loud and obnoxious," and that "we usually have eight to nine therapists out there working, plus two to three aides. They're not going to let a timer go off for five minutes." Schwegman then proceeded with plaintiff's regular course of treatment, including a 25-minute hands-on massage to plaintiff's bare skin. Schwegman testified that during the 25-minute massage, she did not see any blistering, swelling, excessive redness, or

excessive heat and plaintiff did not complain of any pain. After the massage, plaintiff completed his usual exercises and ice pack treatment with no complaints of any burning or discomfort.

¶ 9 On the evening of July 23, 2012, plaintiff's wife noticed "blisters" on his back. Plaintiff testified that he did not seek medical treatment upon discovery of the blisters because "[a]t this point I had come to the conclusion that the kid might have done something wrong and I burned [] my back with the hot pack" so "[m]y intention was to go to [Schwegman] somehow I thought, well, she is going to see this and she is going to send me to their doctor."

¶ 10 On July 25, 2012, plaintiff returned to Athletico for his regularly-scheduled physical therapy treatment. Schwegman testified that based on her notes from that treatment session, the first complaint that plaintiff had was that he "fell out of his computer chair landing on his right shoulder and hit his head on the wall. Patient is in more pain today secondary to the fall." Schwegman also made a note that "[p]atient states he had open blisters on his mid-back that he is guessing is from the hot packs." Schwegman testified that she observed the blisters on plaintiff's back on July 25, but that they were not there on July 23, when she last saw plaintiff. Schwegman also testified that on July 25, for the first time since she had been treating him, plaintiff informed her that he has had decreased feeling in his back since his surgery. Schwegman also testified that on that day, she only applied moist hot pack treatment to his neck and performed stretching and massage only to his neck.

¶ 11 Plaintiff's next and final physical therapy treatment at Athletico was on July 31, 2012. On that date, Schwegman reported in her notes that "[p]atient reports the blisters have [gotten] worse and seem to be wider and are bleeding. Patient states he has been stretching his neck and feels better." Schwegman testified that she saw the blisters on plaintiff's back and did not do any therapy to his back that day. Schwegman's notes stated "[p]atient with yellow edges of blisters

on back and encouraged to followup [*sic*] with his primary physician." Schwegman testified that she added an addendum to her notes on August 3, 2012, that stated, "[p]atient followup [*sic*] with dermatologist in regards to blisters and diagnosed with first to second degree burn and is to put therapy on hold." When asked why she made the addendum, Schwegman responded that "they had called me and said they were putting physical therapy on hold because of the blisters. And so I just wanted to make sure there was a record of what I recalled seeing from them." Specifically, plaintiff's wife had come to Athletico to ask for an updated note regarding plaintiff's treatment because plaintiff was going to see Dr. Koski. In addition to updating her notes, Schwegman also prepared a discharge summary to Dr. Koski that did not mention plaintiff's burns.

¶ 12 Testimony from plaintiff's treating physicians was presented at trial through videotaped evidence depositions. On August 1, 2012, plaintiff sought treatment from dermatologist Dr. Anthony Peterson. Dr. Peterson testified that according to his records, plaintiff came to see him "for a burn to the upper back" and that plaintiff had "stated at the time that he was burned during a physical therapy treatment and couldn't feel the burn at the time that it occurred, and then his wife noticed the blistering that happened later that day, in the evening." Plaintiff also told Dr. Peterson that he had pain, itching, and stinging in the affected area. Dr. Peterson noted "three square-shaped, shallow burns to the mid back" that he diagnosed as second degree burns, and ordered wound care consisting of an antibiotic ointment called Silvadene to prevent infection, Vasoline application to keep the wound moisturized, and coverage of the wound with a manufactured dressing called Duoderm to help accelerate healing. When asked if he could opine whether the burns were consistent with burns suffered during a physical therapy session involving hot packs, Dr. Peterson responded, "I can only attest to what the patient had told me

was the cause of the burns." When further pressed about whether plaintiff's burns were consistent with the history he provided, that he had been burned by hot packs at physical therapy, Dr. Peterson acquiesced and responded, "[y]es." He further clarified that his opinion was "[j]ust based upon what he had told me when he came in the room that this had occurred and I took him at his word for it."

¶ 13 Dr. Koski, the neurosurgeon who performed plaintiff's 2012 spinal fusion surgery, testified that in addition to treating plaintiff after his surgeries, he also saw plaintiff on August 14, 2012, due to plaintiff's burns. Dr. Koski stated that plaintiff said he thought heating packs or hot pads were the cause of the burns. Dr. Koski also testified that his records did not contain any notes that indicated that plaintiff had complained of loss of sensation in his back, but that he would have made a note if plaintiff had.

¶ 14 The trial court allowed plaintiff's attorney to recall Schwegman to testify regarding an incident report that was produced at trial by Athletico but had not been previously produced in discovery. Schwegman testified that the incident report was filled out through Athletico's intranet, and that prior to trial she had not been asked to turn over a copy of the incident report. Schwegman stated that she filled out the incident report on August 3, 2012, but listed July 25, 2012, as the date of the incident. In relevant part, the description of plaintiff's injuries contained in the report was as follows:

> "Patient was seen for a physical therapy visit on July 23, 2012. He was given heat for his back, then was massaged (skin exposed to therapist), and performed full treatment session with no problems or injuries/occurrences noted.

> The patient was next seen July 25, 2012, and he stated he has two blisters in his mid back that his wife noticed in the evening following his previous session and he believed were from the hot pack."

Schwegman testified that she checked the box reflecting that the occurrence was "modality-related" and involved redness/burn because plaintiff had told her that he believed the burns were caused by the hot packs. Schwegman testified that she did not make the assessment that the hot packs burned plaintiff.

¶ 15 Plaintiff and defendants each presented their own expert testimony. James Gallegro, a New York-based physical therapist who had been practicing for nearly 17 years, testified on behalf of plaintiff. Gallegro opined that it was a breach of the standard of care for Schwegman to place hot packs on plaintiff without first assessing his level of sensation, which is part of the neurological examination. Gallegro testified that a neurological examination consists of "checking for sensation, checking for strength and checking for reflexes" in order to make sure that the nervous system is "communicating with that part of the body." Gallegro stated that sensation could be tested by brushing a portion of a patient's skin with a piece of tissue paper to test superficial sensation. He also opined that a patient should never be placed in the supine position on top of hot packs because the heat has nowhere to go when it is "sandwiched between a solid object and the patient's skin." Gallegro further testified that the standard of care requires that a "skin check" of the patient be conducted every five minutes when a thermal modality, whether hot or cold, is used. Gallegro also stated that the standard of care requires a physical therapist "to refer a patient to a provider that handles an issue that's outside of your scope of practice." Thus, he did not believe Schwegman met the standard of care when she did not call or "tak[e] the initiative to get [plaintiff] to a physician with either the expertise to diagnose and treat

his burns." When asked if Schwegman's failure to meet the standard of care was the proximate cause of plaintiff's injuries, Gallegro responded, "The failure to check sensation and then putting the patient on top of the hot packs definitely places them in a position where you can burn them. He has burns. They seem to be in the areas of the hot pack. You know, in my opinion that could have led to those burns, yes."

¶ 16 On cross-examination, when Gallegro was asked if it was proper to have an aide prepare a moist heat pack in therapy, he replied, "God, we need them, yes." Also, Gallegro agreed that the standard of care is met by a therapist if he or she has between six to eight layers between the moist heat pack and the patient's skin. Gallegro further testified that Dr. Koski's prescription for physical therapy did not contain any restrictions on the therapy to be provided and did not indicate that plaintiff had a condition of decreased sensitivity in his thoracic spine. Similarly, Gallegro also testified that the only place where plaintiff or his wife indicated numbness on plaintiff's body chart was in the left thigh.

¶ 17 The physical therapy expert who testified on behalf of defendants was Peter McMenamin, an Illinois-licensed physical therapist and a full-time faculty member at Northwestern University Feinberg School of Medicine, Department of Physical Therapy and Human Movement Sciences. McMenamin had been a physical therapist for 37 years, including 27 or 28 years in private practice as an outpatient physical therapist. McMenamin stated that, in his opinion, placing moist hot packs underneath a patient's body was within the standard of care and was "common practice." McMenamin also opined that Schwegman's approximately eight layers of wrapping around the hot packs on July 23, 2012, was "definitely within the standard of care." He explained that "eight layers of toweling were on [plaintiff] and that would be sufficient for his body weight being on top of the packs." Contrary to Gallegro's testimony,

McMenamin stated that he had never seen any evidence to support the idea that when a patient is placed on top of hot packs, circulation in the skin is reduced thus reducing convective cooling. McMenamin also contradicted Gallegro by opining that the standard of care required that a patient be monitored every 10 minutes while hot pack treatment is administered, and Schwegman complied with the standard of care. McMenamin also opined that Schwegman acted within the standard of care when she evaluated plaintiff's level of sensation by reviewing the body chart that he and his wife had completed when he first came to Athletico. McMenamin further noted that neither plaintiff, nor Dr. Koski, nor Dr. Peterson mentioned any numbness in plaintiff's back. McMenamin stated that because Schwegman had received no information from anyone regarding suspected numbness in plaintiff's back, the tissue test that Gallegro described was not required under the circumstances.

¶ 18 McMenamin testified that he "couldn't see any evidence that the hot packs in this case caused the burns that [plaintiff] got." When asked what the basis for this opinion was, McMenamin stated there were "a lot of things" that informed his opinion, such as Schwegman not noticing anything unusual after the hot pack treatment and plaintiff again receiving hot pack treatment a few months after he was injured. McMenamin also noted that "just because *** the blisters appeared two days following [the therapy session at issue] doesn't mean it had to have happened in therapy. There is other things that could cause that." Further, McMenamin stated that it was "[t]otally" within the standard of care for Schwegman to merely tell plaintiff to go see his doctor rather than making an appointment for him.

¶ 19 After closing arguments, the jury was provided with instructions and began its deliberation. Shortly thereafter, the jury sent out a question that stated:

> "With respect to Element A on the alleged offenses: Question: 'Is it intended for us to only consider a neurological exam for the purpose of the intake form, are we to include the fact that there were not neurological exams at any point or during any appointment which contained hot packs."

The trial judge answered the question by telling the jury "that they should read the instructions, check their notes, and review the evidence, and that is it." When the trial judge informed the parties' attorneys that this was the response he provided to the jury, plaintiff's counsel responded, "Okay."

¶ 20 On September 27, 2016, after approximately four hours of deliberation, the jury returned a unanimous verdict in favor of defendants. In addition to their general verdict, the jurors were also presented with a special interrogatory that stated, "Do you find that the burns to Plaintiff Martin Perez's back were caused by the professional negligence of Defendants Maureen Schwegman, Athletico of Oak Park, LLC or any of its agents?" The jury responded, "no."

¶ 21 On November 30, 2016, plaintiff filed his motion for a new trial, arguing that the trial court's errors resulted in prejudice to him. Plaintiff asserted the following bases for the grant of a new trial: (1) the verdict was against the manifest weight of the evidence; (2) the court erroneously barred plaintiff's counsel from asking Schwegman questions about her false interrogatory answers; (3) the court erroneously limited the jury's consideration of pain and suffering to the time period of July 23, 2012, to November 26, 2012, when there was ample evidence of pain and suffering to date; (4) the court erroneously answered a jury question outside the presence of counsel; (5) the court erroneously fined Athletico $500 (which was inadequate) for withholding evidence and failed to sanction Schwegman; (6) the cumulative effect of the foregoing errors deprived plaintiff of a fair trial; and (7) judgment notwithstanding the verdict

should be granted on the issue of liability. Regarding his argument that the verdict was against the manifest weight of the evidence, which is most relevant to this appeal, plaintiff specifically contended that there was no evidence to the contrary that the burns came from anything other than the hot packs administered by defendants. Additionally, plaintiff asserted that the jury ignored evidence that defendants violated the standard of care because both experts agreed that a skin check was required and Schwegman testified that she never performed one.

¶ 22 On December 27, 2016, defendants filed their response, arguing that plaintiff's motion lacked merit because the jury reasonably concluded that defendants did not cause plaintiff's burns and there was no indication that the jury disregarded any of the evidence, including expert testimony, when reaching its decision. Defendants also pointed out that plaintiff ignored the jury's answer to the special interrogatory, which clearly expressed their finding that defendants' professional negligence was not the cause of plaintiff's injuries. Additionally, defendants stressed that a jury's verdict must be given substantial deference.

¶ 23 Plaintiff's reply in support of his motion for a new trial was filed on January 11, 2017. The reply pointed out that Dr. Peterson was the only doctor to testify that the burns were consistent with hot packs, and that Schwegman and McMenamin were not doctors. Thus, the jury must have ignored Dr. Peterson's testimony when it determined that defendants' professional negligence did not cause plaintiff's injuries.

¶ 24 The trial court did not entertain oral argument on the motion and entered its order granting a new trial on March 30, 2017. The court found that its "alleged trial errors—failures to instruct the jury on future pain and suffering, failure to allow cross examination of Schwegman regarding the incident report, and instructing the jury to rely on jury instructions—either individually or cumulatively did not deny Perez a fair trial." Conversely, the court also found the

jury's verdict "to be contrary to the manifest weight of the evidence, notwithstanding the jury's general and special findings of no negligence, and therefore Perez is entitled to a new trial." In reaching these decisions, the court's order stated that it had considered the following events:

> "1. Perez appeared for approximately three treatments before July 23, 2012, without any impression of burns to his back;
>
> 2. The physical therapy session on July 23, 2012, was initiated by an aide at Athletico and Defendants could not testify who specifically applied the hot packs, and Schwegman could not recall if she was present during this treatment;
>
> 3. Burns and blisters were discovered by Perez's wife the evening of July 23, 2012;
>
> 4. Defendants viewed the burns and blisters during Perez's visits to Athletico on July 25, 2012, and July 31, 2012;
>
> 5. Perez was referred to Peterson for examination and treatment;
>
> 6. Peterson diagnosed and opined that the physical therapy hot pack treatment caused the burns and blisters on Perez's back;
>
> 7. There was no evidence establishing a cause or event other than the heat pack treatments; and
>
> 8. Perez's recovery was complicated by his pre-existing back problems not associated with the burns and blisters on his back."

The court's order stated that defendants' challenge to Dr. Peterson's testimony that hot packs were consistent with the burns on plaintiff's back (as opposed to the cause of the burns) "[did] not foreclose Peterson's opinion of the cause of the burns. It is true that consistency is not equivalent to causation, but having testimony that hot packs are *consistent* with the burns

suffered by Perez is sufficient to infer that the hot packs could have caused the burns." (Emphasis in original.) Additionally, the court's order stated:

> "More importantly, Peterson rendered his opinion to a reasonable degree of medical certainty that the hot packs caused the burns. [Citation.] There was no evidence of any other event that could have caused the blisters during the time period between the physical therapy and the discovery of the blisters that evening at home."

The court's order also contained the following finding:

> "The [c]ourt finds the burns akin to the feeling of a sunburn—where an individual can be out during the day in the sun, but not find that he or she has a sunburn until the evening, because it takes some time for the burn to develop (i.e., it takes time for the skin to appear red and feel sensitive)."

Ultimately, plaintiff's motion for a new trial was granted and their request for judgment notwithstanding the verdict was denied.

¶ 25 Defendants' petition for leave to appeal pursuant to Illinois Supreme Court Rule 306 (eff. Mar. 8, 2016) was filed on April 27, 2017, and plaintiff's answer thereto was filed on July 6, 2017. This court granted defendants' petition for leave to appeal on July 24, 2017.

¶ 26 ANALYSIS

¶ 27 Defendants argue that the trial court abused its discretion when it granted plaintiff's motion for a new trial because the jury's verdict was not against the manifest weight of the evidence where the expert evidence conflicted and substantial evidence supported the jury's verdict. Defendants also argue that the other alleged errors upon which plaintiff based his motion for a new trial were insufficient to merit granting a new trial because the record is clear that plaintiff was not prejudiced by any alleged error.

¶ 28 “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.) *Redmond v. Socha*, 216 Ill. 2d 622, 651 (2005). The decision of whether a new trial should be granted rests within the sound discretion of the trial court, whose ruling will not be reversed absent an abuse of discretion. *Id.* It is well settled that “it is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony.” (Internal quotation marks omitted.) *Id.* at 652.

¶ 29 Pointing to the conflicting expert testimony, defendants argue that there is nothing in the record that shows that the jury failed to consider all the evidence, and thus the trial court should not have usurped the role of the jury. Plaintiff responds that the expert testimony did not conflict on the issue of proximate cause because both experts testified that the standard of care requires that a physical therapist do a neurological examination of the patient to test for sensation.

¶ 30 In order “[t]o prevail on a medical negligence claim, it is incumbent upon the plaintiff to establish: (1) the standard of care against which the medical professional's conduct is to be measured; (2) a negligent failure by the medical professional to comply with that standard of care; and (3) that the medical professional's negligent conduct proximately caused the injuries that plaintiff seeks to redress.” *Gulino v. Zurawski*, 2015 IL App (1st) 131587, ¶ 60. Unless the medical professional's negligence is so grossly obvious or the treatment so common as to be within the knowledge of a layperson, expert medical testimony is required to establish the standard of care and the defendant medical professional's deviation from that standard. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 112 (2004).

¶ 31 This case involved a classic battle of the experts. We reject plaintiff's contention that the experts agreed regarding the standard of care because the record does not indicate such consistency among the experts' opinions. There were a few pertinent topics upon which Gallegro and McMenamin agreed. For example, they both agreed that between six and eight layers of wrapping around the hot packs complied with the standard of care. They both also testified that it was proper to allow an aide to prepare a hot pack for physical therapy.

¶ 32 The differences in the experts' testimony were far more numerous. Plaintiff's expert Gallegro testified that a patient should never be placed on top of hot packs in the supine position, but defendants' expert McMenamin stated that doing so was "common practice." In fact, McMenamin testified that he had never seen any evidence to support the idea that when a patient is placed on top of hot packs, circulation in the skin is reduced, which reduces convective cooling. Additionally, Gallegro opined that it was a breach of the standard of care for Schwegman to place hot packs on plaintiff without first assessing his level of sensation. McMenamin testified that Schwegman complied with the standard of care when she reviewed the body chart filled out by plaintiff and his wife in order to evaluate plaintiff's level of sensation. McMenamin further testified that the tissue test suggested by Gallegro was not required under the circumstances of this case because Schwegman had not received any information from anyone regarding suspected numbness in plaintiff's back. Gallegro gave the opinion that the standard of care requires a therapist to perform a skin check on a patient after five minutes anytime a thermal modality, such as a hot pack, is involved. McMenamin conversely opined that the standard of care only requires that a patient be checked on every 10 minutes. The experts' testimony also diverged regarding whether Schwegman complied with the standard of care when she merely told plaintiff to go see his doctor, rather than taking the

initiative to get plaintiff to a doctor. McMenamin opined that Schwegman's advice complied and Gallegro opined that it did not.

¶ 33 Perhaps most significant are the experts' differing opinions on whether Schwegman's alleged negligence proximately caused plaintiff's injuries. McMenamin testified that he could not see any evidence in this case that the moist hot packs caused plaintiff's burns. Gallegro, however, testified that "[t]he failure to check sensation and then putting the patient on top of the hot packs definitely places them in a position where you can burn them. He has burns. They seem to be in the areas of the hot pack. Yes, in my opinion that could have led to those burns, yes." In addition to their conflicting testimony, the experts' professional background also differed. McMenamin had been a physical therapist for 37 years, and was licensed in Illinois. On the other hand, Gallegro's practice was based out of New York and he had 20 fewer years' experience.

¶ 34 "[W]here conflicting expert testimony is introduced at trial, it is the province of the jury as the trier of fact to resolve the conflict." *Halowell v. University of Chicago Hospital*, 334 Ill. App. 3d 206, 212-13 (2002). The conflicting testimony creates a question of fact that is to be decided by the jury, and we will not substitute our judgment for that of the jury or reweigh witness credibility. *Bergman v. Kelsey*, 375 Ill. App. 3d 612, 622-23 (2007).

¶ 35 Defendants assert that the experts in this case disagreed as to the standard of care and causation, but there is nothing in the record to indicate that the jury failed to consider all of the evidence; therefore, there was no basis upon which the trial court should have granted plaintiff's motion for a new trial. As mentioned previously, we reject plaintiff's assertion that the experts agreed on the issue of proximate cause. Plaintiff further contends that the jury's decision was arbitrary and not based on the evidence.

¶ 36 We agree with defendants, and find that the jury's verdict should not have been disturbed when there was no evidence the jury did not consider all of the testimony and other evidence presented to it. Plaintiff's assertion that the jury disregarded any certain evidence is complete conjecture where he has failed to present any evidence that indicates lack of consideration by the jury. Merely because the jury did not find in plaintiff's favor does not signify a failure to consider all the evidence. The jury was faced with contradictory opinions from two expert witnesses and it was the jury's function to resolve any conflicts between them. *Halowell*, 334 Ill. App. 3d at 212-13. The jury was required to make credibility determinations and weigh the credentials and experience of the experts in reaching its decision. There is simply no evidence that they failed to do this. In fact, in its March 30, 2017, order that granted a new trial, the trial court stated:

> "The jury was instructed that they can accept or reject the testimony of a retained expert. As both experts—Gallegro and McMenamin—were able to testify, the [c]ourt finds it unlikely the jury did not weight the testimony of both retained experts. To suggest otherwise is pure speculation."

We certainly agree with this statement by the trial court, but are perplexed as to how the court reached its decision that the verdict was against the manifest weight of the evidence in spite of its acknowledgement that the jury properly performed its duty.

¶ 37 It seems that the trial court's decision that the jury's decision was against the manifest weight of the evidence was based on the court's mischaracterization of the evidence, improperly-made findings of fact, and possible misunderstanding of the law. In its order granting plaintiff's motion for a new trial, the trial court made some problematic findings. The first arises from the trial court's recitation of Dr. Peterson's testimony. Dr. Peterson testified that plaintiff's burns

were *consistent* with burns that may have been suffered during a hot pack treatment during physical therapy. He never testified that the hot packs were the *cause* of plaintiff's burns. In response to plaintiff's motion for a new trial, defendants stressed that consistency does not equate with causation. The trial court acknowledged defendants' argument in its order, but then went on to state that "[i]t is true that consistency is not equivalent to causation, but having testimony that hot packs are *consistent* with the burns suffered by Perez is sufficient to infer that the hot packs could have caused the burns." (Emphasis in original.) More problematic is the conclusion that the trial court drew from this logic. Specifically, the court's order stated that "Peterson rendered his opinion to a reasonable degree of medical certainty that the hot packs caused the burns." This statement by the trial court is inaccurate because Dr. Peterson never gave the opinion that the hot packs caused the burns.

¶ 38 The next problem arises from the trial court's subsequent statement that "[t]here was no evidence of any other event that could have caused the blisters during the time period between the physical therapy and the discovery of the blisters that evening at home." This problematic observation is completely irrelevant, and teeters on the brink of another misstatement of the evidence because defendants' expert McMenamin, in fact, testified that although the blisters were shown to Schwegman two days after a physical therapy session involving hot packs does not mean the burns had to have occurred in therapy. McMenamin testified that plaintiff's burns could have been caused by "other things." The court's decision to include such a statement in its order indicates that the court may have misunderstood the law. "A trial court's decision to order a new trial will not be reversed unless the court obviously abused its discretion or clearly misunderstood the law." *Smith v. City of Evanston*, 260 Ill. App. 3d 925,932 (1994). In order to succeed, plaintiff had to prove the elements of a medical negligence action with the most

relevant element here being that the medical professional's negligent conduct proximately caused the injuries that plaintiff seeks to redress. *Gulino*, 2015 IL App (1st) 131587, ¶ 60. The jury returned a unanimous general verdict in favor of defendants, and answered "No" to the special interrogatory that asked, "Do you find that the burns to Plaintiff Martin Perez's back were caused by the professional negligence of Defendants Maureen Schwegman, Athletico of Oak Park, LLC or any of its agents?" Thus, the jury's answer to the special interrogatory clearly indicated their finding that plaintiff did not meet his burden to prove the element of causation. The lack of any evidence showing another cause of plaintiff's injuries is simply immaterial to the primary responsibility of the jury, which was determining whether plaintiff met his burden in proving the elements of a medical negligence case against defendants. Defendants were not required to prove that something else caused plaintiff's burns in order to secure a verdict in their favor. To insinuate otherwise indicates a misunderstanding of which party bore which burden.

¶ 39 We find that defendants presented substantial evidence to cast doubt on plaintiff's theory of the case such that a verdict in their favor would be reasonable. Defendants presented expert testimony from someone with two decades more experience than plaintiff's expert witness. Additionally, defendants' expert unequivocally testified that he did not believe that the hot packs caused plaintiff's burns. He also testified that Schwegman complied with the standard of care in numerous ways. Further, Schwegman testified that she was completely unaware of any burns to plaintiff's skin after the hot pack treatment on July 23, 2012, even though she performed a massage directly afterwards and was therefore able to examine plaintiff's bare skin. Plaintiff himself did not notice the burns and only became aware of them after his wife saw blisters on his back. Plaintiff did not immediately contact defendants to inform them of his injury. Defendants were not made aware of the injury until plaintiff appeared for his regularly-scheduled therapy

session. Simply put, the testimony in this case did not overwhelmingly favor plaintiff, and thus it was not arbitrary or unreasonable for the jury to find in defendants' favor.

¶ 40 The final problem with the trial court's order arises from a finding of fact that was not based on any testimony presented at trial. When addressing defendants' contention that plaintiff could not have suffered the burns from the hot pack treatment on July 23, 2012, because he received a 25-minute massage immediately following the hot packs, the court stated that it "[found] the burns akin to the feeling of a sunburn—where an individual can be out during the day in the sun, but not find that he or she has a sunburn until the evening, because it takes some time for the burn to develop (i.e. it takes time for the skin to appear red and feel sensitive)." It was the jury's responsibility to act as the finder of fact, and thus this conclusion by the trial court was improper. There was no support in the record for such a finding. Neither expert nor plaintiff's treating physicians gave the opinion that plaintiff's burns were similar to a sunburn, and thus we are unsure upon what testimony the trial court based such a finding.

¶ 41 The foregoing mischaracterizations by the trial court amounted to an obvious abuse of discretion. The jury's verdict was entirely reasonable given the evidence presented to it. The experts' testimony conflicted and it was the province of the jury to resolve said conflicts. *Halowell*, 334 Ill. App. 3d at 212-13. We find that where the expert testimony was in conflict, a conclusion opposite of the jury's finding in favor of defendants was not clearly evident, and where the findings of the jury were not unreasonable, it was an abuse of discretion for the trial court to find that the jury's decision was against the manifest weight of the evidence. See *Redmond*, 216 Ill. 2d at 651. There is simply no indication in the record that the jury's decision was arbitrary or not based on the evidence. *Id.* We therefore reverse the trial court's decision to grant plaintiff's motion for a new trial, and order that the jury's verdict in favor of defendants be

reinstated. Because our finding that the trial court abused its discretion in determining that the jury's verdict was against the manifest weight of the evidence requires reversal, we need not address defendants' other arguments regarding alleged errors by the trial court.

¶ 42 CONCLUSION

¶ 43 Based on the foregoing, we reverse the decision of the trial court that granted plaintiff's motion for a new trial and remand with directions to reinstate the jury's verdict in favor of defendants.

¶ 44 Reversed and remanded with directions.