2013 IL App (4th) 121076-U

NO. 4-12-1076

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 2, 2013
Carla Bender
4th District Appellate
Court, IL

KRISTIN DOHSE, Plaintiff-Appellant, v. OBONORUMA EKHAESE, M.D.; and SARAH BUSH LINCOLN HEALTH CENTER, Defendants-Appellees, and SARAH BUSH LINCOLN HEALTH SYSTEM; SARAH BUSH LINCOLN HEALTH MANAGEMENT SERVICES; SARAH BUSH LINCOLN MEDICAL GROUP, S.C.; SARAH BUSH LINCOLN FOUNDATION; and SARAH BUSH LINCOLN HEALTH FOUNDATION, Defendants.	)	Appeal from Circuit Court of Coles County No. 09L15 Honorable Brien O'Brien, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The jury's verdict was not against the manifest weight of the evidence where the jury could have found defendants' evidence regarding the doctor's care more credible than plaintiff's.

¶ 2 Plaintiff was not entitled to a new trial where she failed to establish any error occurred during the trial.

¶ 3 In April 2009, plaintiff, Kristin Dohse, sued defendants, Obonoruma Ekhaese, M.D.; Sarah Bush Lincoln Health System; Sarah Bush Lincoln Health Management Services; Sarah Bush Lincoln Medical Group, S.C.; Sarah Bush Lincoln Health Center; Sarah Bush Lincoln Foundation; and Sarah Bush Lincoln Health Foundation, for medical malpractice,

claiming Dr. Ekhaese negligently treated her gastric ulcer (a hole or perforation in the stomach), causing her severe injuries, pain, and suffering. In November 2009, the Coles County circuit court granted summary judgment in favor of most of the defendants, leaving Dr. Ekhaese and Sarah Bush Lincoln Health Center as the remaining defendants in the case. Following a June 2012 trial, a jury returned a verdict in favor of defendants Dr. Ekhaese and Sarah Bush Lincoln Health Center.

¶ 4 Plaintiff appeals, asserting she is entitled to a new trial because (1) the verdict was against the manifest weight of the evidence both as to (a) Dr. Ekhaese's failure to provide the standard of care and (b) proximate causation based on the "loss of chance" doctrine; and (2) the trial court made the following prejudicial errors during trial: (a) denied plaintiff's motion *in limine* related to beer consumption and allowed defendants frequent references to plaintiff's beer consumption, (b) did not allow the issue of future harm to be submitted to the jury, (c) denied jury instructions related to plaintiff's preexisting condition, (d) failed to answer the jury's question, and (e) confused the jury on the applicable standard of care. We affirm.

¶ 5 I. BACKGROUND

¶ 6 Plaintiff's April 14, 2009, complaint asserted a medical-negligence claim against defendant Dr. Ekhaese and contended the other defendants were vicariously liable for Dr. Ekhaese's negligence on the theories of *respondeat superior* and apparent agency. In November 2009, the trial court granted summary judgment in favor of defendants Sarah Bush Lincoln Health System; Sarah Bush Lincoln Health Management Services; Sarah Bush Lincoln Medical Group, S.C.; Sarah Bush Lincoln Foundation; and Sarah Bush Lincoln Health Foundation, which left Dr. Ekhaese and Sarah Bush Lincoln Health Center as the remaining defendants.

¶ 7 In June 2012, plaintiff filed her motion *in limine* No. 11, asserting any reference to plaintiff's beer or alcohol consumption on the night she became sick would be unfairly prejudicial to plaintiff and should be barred. Plaintiff noted no opinion had been disclosed that the alcohol caused or contributed to the cause of plaintiff's condition. On June 5, 2012, the trial court held a hearing on pretrial motions, including plaintiff's motion *in limine* No. 11. A transcript of that hearing is not included in the record on appeal. The docket entry for the June 5, 2012, hearing shows the court denied motion *in limine* No. 11.

¶ 8 On June 11, 2012, the trial court commenced plaintiff's jury trial. Plaintiff testified on her own behalf and presented the testimony of the following: (1) Dr. Ekhaese, defendant; (2) Dr. Fred Zar, an infectious disease doctor and plaintiff's expert on nonsurgical matters; (3) Dr. Christopher Pruett, a general surgeon and plaintiff's surgery expert; (4) Dr. Wendy Binstock, a pediatric anesthesiologist and plaintiff's expert on the anesthesia reports; (5) Colleen Salzman, plaintiff's sorority sister; (6) Dr. Daniel Pacella, a general surgeon who saw plaintiff about a hernia repair; (7) Dr. David Dohse, a family practice physician and plaintiff's father; (8) Kaitlin Dohse, plaintiff's sister; (9) Laurel Dohse, plaintiff's mother; and (10) Dr. Curtis Green, the surgeon that assisted Dr. Ekhaese in the April 19, 2007, surgery. Defendants presented the testimony of (1) Dr. Ekhaese; (2) Dr. Marc Shapiro, a general surgeon and defendants' surgery expert; (3) Dr. Michael Cox, a critical-care doctor and defendants' expert on nonsurgical matters; (4) Dr. Sherif Malek, an obstetrician and gynecologist who examined plaintiff during her stay at Sarah Bush Lincoln Health Center; and (5) Rebecca Clement, a surgical nurse at Sarah Bush Lincoln Health Center. Both parties presented numerous exhibits. A summary of the evidence at trial follows.

¶ 9 Around 7 p.m., on April 14, 2007, plaintiff, a then-20-year-old Eastern Illinois University student, began experiencing sharp abdominal pain while at a Greek event. When the pain continued to get worse, plaintiff had a friend take her to the emergency department at defendant Sarah Bush Lincoln Health Center at around 2:30 a.m. on April 15, 2007. There, plaintiff complained of sharp, stabbing periumbilical pain that radiated into the lower quadrants of her abdomen. Dr. Ekhaese was the general surgeon on call that morning, and when he learned plaintiff had pneumoperitoneum (free air) under her diaphragm, he immediately asked for an operating-room team. Free air indicated plaintiff had a hole in one of her hollow organs. A hole in a hollow organ was a medical emergency because it could result in death. Dr. Ekhaese's differential for plaintiff included "perforated appendix versus gastric ulcer versus perforated bowel."

¶ 10 At around 5:30 a.m., Dr. Ekhaese began an exploratory laparotomy. His incision started below the umbilicus and extended to a few centimeters above her pubis. That incision was consistent with plaintiff's scarring, Dr. Ekhaese's operative report, and Dr. Ekhaese's trial testimony. In his September 2010 deposition, Dr. Ekhaese had testified his incision was above plaintiff's umbilicus. Plaintiff's counsel questioned Dr. Ekhaese at length about the differences in his deposition testimony and trial testimony about the incision cite and extension of it. Once Dr. Ekhaese opened plaintiff's abdomen, free air rushed out. Dr. Ekhaese was able to see plaintiff's appendix, small bowel, large colon, and the anterior part of her stomach. Plaintiff had turbid fluid (unclear) in her pelvis that looked infectious. Dr. Ekhaese sent some of the fluid to the laboratory for cultures. Dr. Ekhaese isolated plaintiff's small bowel but did not find anything. He then visually examined the appendix, which was "long, but not overly inflamed." Dr.

Ekhaese removed plaintiff's appendix. He then examined the cecum (the junction of the small and large intestines) and the ascending colon. Dr. Ekhaese then inspected the anterior stomach and the left upper quadrant. He did not find any holes.

¶ 11 During the laparotomy, Dr. Ekhaese testified he performed a leak test, which consisted of forcing air into an orogastric tube (OG tube) and down into the stomach. Plaintiff pointed out the anesthesiologist's report did not indicate plaintiff had an OG tube during the surgery and the operative report did not mention a leak test. Clement did not recall if plaintiff had an OG tube at the time of surgery but noted OG tubes were typically used in emergent surgeries such as plaintiff's. With the leak test, Dr. Ekhaese had submerged the abdominal cavity with irrigation fluid and was looking for bubbles in the fluid. He had not opened the lesser sac when he performed the leak test. Plaintiff questioned Dr. Ekhaese how air from the back of the stomach would be seen with the lesser sac closed. Dr. Ekhaese stated it would be seen because of the copious fluid in the abdominal cavity. Dr. Shapiro agreed one should theoretically see bubbles because the lesser sac has a hole in it. During the leak test, Dr. Ekhaese saw no evidence of a hole in the back of plaintiff's stomach. He saw no need to further the surgery and put plaintiff at risk. Dr. Ekhaese did admit there was a way one could enter the lesser sac with little risk to the patient. Around 6:30 a.m., Dr. Ekhaese ended the surgery without finding a hole in any of plaintiff's organs.

¶ 12 Dr. Pruett testified a larger incision than the one performed by Dr. Ekhaese was necessary to see more anatomy and appropriately look at every organ to see what was the source of the free air. According to Dr. Pruett, a general surgeon is responsible for looking at the entire stomach. The back side of the stomach can be visualized by entering the lesser sac. Dr. Pruett

opined the hole in plaintiff's stomach would have been seen if the lesser sac had been opened. Dr. Pruett had examined the back of 75 to 100 stomachs, and none of his patients had lost a spleen. Dr. Pruett opined that, if Dr. Ekhaese had followed the standard of care, he would have found and repaired the hole in plaintiff's stomach on April 15, 2007.

¶ 13 Dr. Shapiro opined Dr. Ekhaese's decision to not open the lesser sac did not fall below the standard of care because doing so created a small risk of injury to the spleen and the exposure of that area to infection. He further testified a surgeon wants to continue to search for the hole but the surgeon does not want the patient in the operating room for two days trying to find it. In his opinion, other options existed such as studies and getting a second surgeon. In Dr. Shapiro's opinion, Dr. Ekhaese followed a "very well-thought-out plan."

¶ 14 Dr. Ekhaese explained he ended the surgery without finding a hole because he decided to manage plaintiff medically. He was not completely satisfied she had only appendicitis. Dr. Ekhaese did not let plaintiff eat or drink to allow the area to heal. He gave plaintiff broad-spectrum antibiotics to prevent a recurrent infection and sepsis, to cover whatever caused the ulcer, and to help heal the ulcer. Further, he gave her a proton-pump inhibitor to suppress acid to allow the ulcer to heal. He also planned to do daily X-rays to see if she was getting better on her own. Moreover, Dr. Ekhaese ordered incentive spirometry to encourage plaintiff to take deep breaths to keep her lungs expanded. Sequential compression devices for plaintiff's legs were also ordered to prevent blood clots. Dr. Pruett testified the standard of care is to continue with the surgery until a hole is found, and in his opinion, Dr. Ekhaese failed to meet it. In Dr. Pruett's opinion, it was below the standard of care to medically manage plaintiff's perforation.

¶ 15 On April 16, 2007, around 6 a.m., Dr. Ekhaese ordered an X-ray and a nasogastric

tube (NG tube). The NG tube was used to help deflate plaintiff's gastrointestinal tract. The X-ray still showed some air in plaintiff's abdomen. Dr. Ekhaese also ordered a computed tomography (CT) scan to look for a source of the free air still in the abdomen. During the CT scan, contrast dye was used to see any extravasation, something on the inside moving outside. No dye was seen leaking from a hole. Plaintiff's stomach was still distended.

¶ 16 On April 17, 2007, the results of the fluid cultures showed plaintiff had Candida albicans and methicillin-resistant Staphylococcus aureus, neither of which are typically associated with a ruptured appendix. Plaintiff was still having stomach distention and abdominal pain, which seemed more than just her bowel being slowed down.

¶ 17 On April 18, 2007, Dr. Ekhaese ordered a gynecology consult, which was done by Dr. Malek. In his report, Dr. Malek noted plaintiff stated her abdominal pain started while she was at a Greek party having a few beers. Dr. Malek found no gynecological problems. Also, on that day, Dr. Ekhaese discontinued the NG tube and ordered an esophagogastroduodenoscopy (endoscopy) for the next morning. Dr. Cox opined Dr. Ekhaese's medical management of plaintiff from April 16 through 18, 2007, was within the standard of care.

¶ 18 On April 19, 2007, Dr. Ekhaese performed the endoscopy and found a hole in the superior posterior aspect of plaintiff's stomach. Plaintiff had no risk factors for a gastric ulcer, and the location of the ulcer was very unusual. Dr. Ekhaese then took plaintiff for a second surgery. With the second surgery, the incision began at the end of the breast bone and went six centimeters down. Free air again escaped when Dr. Ekhaese opened the abdominal cavity. A filmy infectious material was on several of plaintiff's abdominal organs. Dr. Ekhaese examined the stomach but could not find the hole he observed during the endoscopy. Dr. Ekhaese then

asked for the endoscope to be brought to surgery. He performed another endoscopy and tried to find the hole on the outside of the stomach with his assistants. Dr. Ekhaese still could not find the hole and requested another surgeon. Dr. Green came to the operating room and could not initially see the hole with the lesser sac open. After Dr. Ekhaese forced air into the area of the hole, Dr. Green saw bubbles and found the hole. Dr. Green marked the hole with a stitch. Due to the location of the hole, Dr. Green was concerned about cancer and suggested a section of the gastric wall be sent for testing. Dr. Ekhaese did so, and cancer was not found. Dr. Ekhaese closed the hole in plaintiff's stomach. After surgery, plaintiff went to the intensive care unit.

¶ 19 Later in the day of her second surgery, plaintiff was transferred to the intensive care unit at Provena Covenant Medical Center. Plaintiff was having fluid overload and experiencing respiratory distress. She was on the ventilator until the night of Sunday, April 22, 2007. On Friday, April 27, 2007, plaintiff was transferred to a regular floor at Provena. The next day, tests showed plaintiff had multiple abscesses in her abdomen, a clot in her leg, and bilateral clots in her lungs. Plaintiff then returned to the intensive care unit. On Tuesday, May 1, 2007, plaintiff was transferred to the University of Chicago Hospital and was discharged on May 15, 2007. While recovering at the hospitals, both of plaintiff's surgical incisions opened and drained pus. After returning home, plaintiff was on antibiotics for another four weeks and had to have her wounds cleaned for four months. According to Dr. Pruett and Dr. Zar, if Dr. Ekhaese had found the hole during the April 15, 2007, surgery, plaintiff would have gone home from the hospital in three to five days with two weeks of antibiotics.

¶ 20 Dr. Pacella testified plaintiff has an incisional ventral hernia under her umbilicus, which does not need immediate surgical intervention. Plaintiff would need to see a plastic

surgeon about her surgical scars. Dr. Pacella could not say to a reasonable degree of medical certainty plaintiff would suffer a bowel obstruction or be more likely to have obstetrical or gynecological problems as a result of her abdominal surgeries.

¶ 21 After the case was submitted to the jury, the jury wrote a question on the jury instruction sheet containing the instruction based on Illinois Pattern Jury Instructions, Civil, No. 20.01 (2011) (hereinafter, IPI Civil (2011) No. 20.01), which stated the following:

> "The plaintiff claims that she was injured and sustained damage, and that the defendant was professionally negligent in one or more of the following respects:
>
> a. failing to find a perforated stomach at the time of the April 15, 2007 surgery;
>
> b. failing to order tests to timely and properly diagnose plaintiff's stomach perforation;
>
> c. failing to properly treat plaintiff's perforated stomach by closing same surgically;
>
> d. failing to prevent formation of blood clots.
>
> The plaintiff further claims that one or more of the foregoing was a proximate cause of her injuries.
>
> The defendant denies that he was professionally negligent in doing any of the things claimed by the plaintiff and denies that any claimed act or omission on the part of the defendant was a proximate cause of the plaintiff's claimed injuries.

> The defendants further deny that the plaintiff was injured and sustained damages to the extent claimed." (Plaintiff's instruction No. 3A)

The jury's question was the following: "Do these points all refer to the April 15th date?" The trial court responded as follows: "To answer your question, please refer to your collective memories of the opinion testimony from qualified witnesses who spoke to these issues." After further deliberations, the jury found in favor of defendants.

¶ 22 On October 1, 2012, plaintiff filed a motion for a judgment notwithstanding the verdict and/or a new trial, asserting (1) the jury's verdict was against the manifest weight of the evidence, (2) the trial court made material errors during the jury-instruction phase of trial, (3) the court erred by denying the jury instruction related to plaintiff's preexisting condition, (4) the court failed to address the jury's question on liability, (5) the court confused the jury on the applicable standard of care, (6) she was entitled to have the issue of future harm submitted to the jury, (7) the court erred by denying her motion *in limine* No. 11, and (8) defendants' introduction of plaintiff's alcohol usage was unfairly prejudicial. After an October 29, 2012, hearing, the trial court denied plaintiff's posttrial motion and entered a written order of denial on that date.

¶ 23 On November 26, 2012, plaintiff filed a timely notice of appeal in compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008). On November 28, 2012, plaintiff filed a timely amended notice of appeal under Illinois Supreme Court Rule 303(b)(5) (eff. May 30, 2008), adding a copy of the order denying her posttrial motion. Thus, this court has jurisdiction of plaintiff's appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 24 II. ANALYSIS

¶ 25 A. Jury's Verdict

¶ 26 While plaintiff's conclusion requests a judgment notwithstanding the verdict, which would be a reversal without remand, her analysis of the issue asserts she is entitled to a new trial because the jury's verdict was against the manifest weight of the evidence. See *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶¶ 37-38, 983 N.E.2d 414 (explaining the difference between the two types of posttrial relief). With a motion for a new trial, the trial court weighs the evidence and will order a new trial if the jury's verdict is contrary to the manifest weight of the evidence. *Lawlor*, 2012 IL 112530, ¶ 38, 983 N.E.2d 414. Since plaintiff's argument focuses on a new trial, we will address plaintiff's argument as a motion for a new trial. "A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary and not based upon any of the evidence." *Lawlor*, 2012 IL 112530, ¶ 38, 983 N.E.2d 414. A reviewing court will not reverse the trial court's ruling on a motion for a new trial unless the moving party affirmatively shows the trial court abused its discretion. *Lawlor*, 2012 IL 112530, ¶ 38, 983 N.E.2d 414. "A trial court abuses its discretion only where no reasonable person would take the view adopted by the trial court." *In re Marriage of Schneider*, 214 Ill. 2d 152, 173, 824 N.E.2d 177, 189 (2005).

¶ 27 With medical malpractice, the plaintiff must prove the following: (1) the proper standard of care in the medical community by which the physician's treatment should be measured; (2) the physician negligently breached or deviated from that standard of care; and (3) the resulting injury to the patient was proximately caused by the physician's deviation from that standard of care. *Johnson v. Ingalls Memorial Hospital*, 402 Ill. App. 3d 830, 843, 931 N.E.2d 835, 847 (2010). Plaintiff contends she presented uncontroverted evidence Dr. Ekhaese breached

the established standard of care because he did not repair a known hole in her stomach that could have resulted in her death. Specifically, she asserts (1) Dr. Ekhaese misrepresented he had performed a diagnostic test, (2) Dr. Ekhaese admitted he failed to explore the part of plaintiff's stomach where the hole was ultimately discovered, (3) Dr. Ekhaese's failures constitute overwhelming evidence of a deviation from the standard of care, and (4) medical management of plaintiff's life-threatening condition was a "failed litigation strategy" and never a viable medical treatment for plaintiff. Additionally, plaintiff contends she established proximate cause under the "loss of chance" doctrine.

¶ 28 Plaintiff's standard-of-care argument is basically a reargument of her case to this court. However, the jury had the responsibility of resolving conflicts in the evidence, assessing the witnesses' credibility, and deciding what weight should be given to the witnesses' testimony, and we will not usurp that function. *Maple v. Gustafson*, 151 Ill. 2d 445, 452, 603 N.E.2d 508, 511-12 (1992). As we will explain, defendants presented evidence supporting the conclusion Dr. Ekhaese provided plaintiff the requisite standard of care.

¶ 29 Whether Dr. Ekhaese did or did not do the leak test during the April 15, 2007, surgery came down to credibility and a resolution of conflicting evidence, both of which were to be assessed by the jury and not this court. Dr. Ekhaese stated he did do the leak test, which required the placement of an OG tube. Plaintiff presented the testimony of Dr. Binstock, the anesthesiology expert, who noted the anesthesia records for both the April 15 and 19, 2007, surgeries did not indicate an OG tube had been placed during the surgery. However, other medical records indicated an OG tube was placed "at the end" of the April 19, 2007, surgery while plaintiff was in the surgery suite. Dr. Binstock further admitted she could not rule

something out that was not documented. Moreover, defendants presented Clement's testimony. She had been in the inpatient surgery department for seven years and was present for plaintiff's surgery on April 15, 2007. She remembered plaintiff's emergent surgery. While she could not recall whether an OG tube was used during plaintiff's surgery, she stated they typically used an OG tube in all emergent surgeries to ensure the patient's safety. Clement also testified placement of the OG tube was typically done and charted by the anesthesiologist. While documentation of the OG tube is lacking, defendants presented sufficient evidence for the jury to find Dr. Ekhaese performed the leak test.

¶ 30 Moreover, regarding credibility, plaintiff highlights Dr. Ekhaese's inconsistent testimony about the location of the incision he made during the April 15, 2007, surgery. Dr. Ekhaese explained why he changed his statements regarding the first incision. We note Dr. Ekhaese's explanation was given before Dr. Pruett testified the size and location of Dr. Ekhaese's incision prevented him from getting a complete view of the stomach. This was again a credibility issue to be determined by the jury, and not this court.

¶ 31 Plaintiff further contends Dr. Ekhaese did not "explore" the back of the stomach where the hole was ultimately found. She notes Dr. Ekhaese admitted not opening the lesser sac. While Dr. Ekhaese did not visually examine the back of the stomach, he performed the leak test to see if a hole in the stomach existed. Plaintiff's expert, Dr. Pruett, admitted the lesser sac has an opening that allows free air to come out of it, and thus, theoretically free air should make its way out of the lesser sac during a leak test. Dr. Ekhaese did not see any bubbles during the leak test on April 15, 2007. Thus, contrary to plaintiff's suggestion, Dr. Ekhaese did not fail to "explore" the back of the stomach during the April 15, 2007, surgery.

¶ 32 While plaintiff's expert, Dr. Pruett, testified a surgeon should not end a surgery where free air has been found in the abdomen until the hole releasing the air is found, defendants' expert, Dr. Shapiro, testified one cannot have a patient on the operating table for two days searching for a hole. Dr. Shapiro noted other options existed such as studies and getting a second surgeon. Dr. Shapiro testified Dr. Ekhaese "followed a very well-thought-out plan, and I applaud him for it." Dr. Shapiro's testimony was supported by the uncontroverted evidence plaintiff's ulcer was in a very unusual location and Dr. Green's testimony describing how difficult it was to find the hole. Dr. Cox also testified Dr. Ekhaese's postsurgical treatment of plaintiff met the standard of care. He too noted Dr. Ekhaese was doing follow-up studies and described Dr. Ekhaese's postsurgical care as "very thorough." Similarly, plaintiff claims Dr. Ekhaese did not "medically manage" a perforated stomach after the April 15, 2007, surgery because he did not know a stomach perforation was there. However, as noted above, Dr. Ekhaese continued to do studies on plaintiff to see if something was wrong besides her appendix. He also gave her a proton-pump inhibitor used to treat gastric ulcers.

¶ 33 Moreover, plaintiff contends Dr. Ekhaese would have found the hole if he had opened the lesser sac on April 15, 2007. However, the lesser sac was open during the April 19, 2007, surgery and Dr. Green could not see the hole. Only with the endoscope pointed at the ulcer and blowing air through it could Dr. Green see the hole from the outside of the stomach. Dr. Green made a point of marking the hole because he was afraid Dr. Ekhaese would not be able to find it. Dr. Shapiro also explained why one would not want to open the lesser sac unless necessary as it exposes more areas to infection. He further opined it was within the standard of care to not open the lesser sac. Accordingly, the jury could have reasonably found Dr. Ekhaese's

failure to not open the lesser sac did not breach the standard of care.

¶ 34 Plaintiff contends this case is similar to *Reardon v. Bonutti Orthopaedic Services, Ltd.*, 316 Ill. App. 3d 699, 713, 737 N.E.2d 309, 319 (2000), where the trial court found the jury's verdict in a medical malpractice case was against the manifest weight of the evidence. The *Reardon* court noted the jury cannot arbitrarily accept expert testimony but must consider the facts and the evidence upon which the experts base their opinions. *Reardon*, 316 Ill. App. 3d at 711, 737 N.E.2d at 318. There, the Fifth District found the weight of expert testimony would lead a reasonable person to conclude that, at some point in time, the plaintiff suffered from compartment syndrome. *Reardon*, 316 Ill. App. 3d at 713, 737 N.E.2d at 319. The plaintiff established both (1) the time period in which the defendant-doctor was responsible for plaintiff's care and (2) that during that period of time the defendant-doctor could have diagnosed the plaintiff's condition. *Reardon*, 316 Ill. App. 3d at 713, 737 N.E.2d at 319. Further, the evidence demonstrated the defendant-doctor did not personally come to the hospital to examine the plaintiff, even when requested to do so by the plaintiff's nurses. *Reardon*, 316 Ill. App. 3d at 713, 737 N.E.2d at 319. Accordingly, the reviewing court found the plaintiff had proved, at the very least, the chances of saving his foot would have been greater had the defendant-doctor physically examined his foot. *Reardon*, 316 Ill. App. 3d at 713, 737 N.E.2d at 319.

¶ 35 Here, the experts evaluated the same medical records. They agreed plaintiff had a hole in a visceral organ that needed to be closed. Plaintiff's surgical expert testified the standard of care is the surgeon should not stop the surgery until he finds the hole. Defendants' surgical expert testimony indicated that was not always the case as one cannot keep a patient on the operating table two days and applauded Dr. Ekhaese's plan. Thus, in this case, a conflict of the

evidence existed that the jury had to resolve. Further, unlike in *Reardon*, Dr. Ekhaese was constantly monitoring plaintiff after the April 15, 2007, surgery and ordered further studies and a consult. Additionally, Dr. Green, who assisted with the second surgery and thus was in a better position than the experts, described how difficult it was to find plaintiff's gastric ulcer. The evidence showed this was not a typical gastric-ulcer case.

¶ 36 Accordingly, we find plaintiff has failed to show the manifest weight of the evidence demonstrates Dr. Ekhaese did not meet the standard of care. Since her standard-of-care argument has failed, we need not address her proximate-cause issue.

¶ 37 B. Trial Errors

¶ 38 Since our supreme court has instructed us to begin our review of a case by determining whether any issues have been forfeited (see *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008)), we first address plaintiff's issues that defendants assert are forfeited or cannot serve as the basis for a new trial.

¶ 39 1. *Alcohol*

¶ 40 Plaintiff asserts the trial court erred by denying her motion *in limine* No. 11, which sought to prohibit defendants from making any references to her consumption of beer or alcohol. Moreover, plaintiff contends she suffered severe and unfair prejudice by defendants' persistence in raising plaintiff's beer consumption prior to her hospital admission. Defendants note plaintiff did not object to the alcohol evidence at trial. Plaintiff concedes she did not object to the evidence at trial but, citing the fact forfeiture is not a limitation on this court (*Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 504-505, 771 N.E.2d 357, 371 (2002)), asserts we should address the compelling error.

¶ 41 When the trial court has denied a party's motion *in limine* to exclude certain evidence, the moving party must make a contemporaneous objection at trial when the opposing party introduces that evidence to allow the court the opportunity to revisit its earlier ruling. *Guski v. Raja*, 409 Ill. App. 3d 686, 695, 949 N.E.2d 695, 704 (2011). The moving party's failure to object at trial results in the forfeiture of the issue on appeal. *Guski*, 409 Ill. App. 3d at 695, 949 N.E.2d at 704. Plaintiff asserts we should still address the error because defendants changed their defense at trial. Specifically, she argues defendants did not disclose before trial their defense Dr. Ekhaese knew she had a perforation when he decided to end the surgery on April 15, 2007, and medically manage the perforation. Plaintiff contends that, before trial, defendants' defense was Dr. Ekhaese would have focused more on plaintiff's stomach during the April 15 surgery had he known about plaintiff's alcohol consumption on April 14. Even taking plaintiff's arguments as true, Dr. Ekhaese was the first witness at trial, and he testified he believed a perforation "somewhere" still existed when he ended the surgery on April 15, 2007, and thus he treated her as if she had a perforation after surgery. Despite this testimony at the beginning of the lengthy trial, plaintiff did not object to the alcohol testimony. In fact, plaintiff presented (1) the April 18, 2007, report of Dr. Malek that noted plaintiff's beer consumption and (2) presented the testimony of Salzman that plaintiff did not drink alcohol on the evening of April 14. Accordingly, plaintiff has forfeited this issue, and we decline to address it on the merits.

¶ 42 2. *Future Harm*

¶ 43 Plaintiff contends she was entitled to have the issue of future harm submitted to the jury. Defendants assert plaintiff's argument cannot serve as the basis for a new trial because

it relates to damages and the jury decided the case for defendants on liability. We agree with defendants and decline to address the merits of this argument.

¶ 44 Generally, a reviewing court will not consider errors at trial relating solely to damages where the jury, as evidenced by its finding in favor of the defendant as to liability, never reached the issue of damages. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 531, 736 N.E.2d 1074, 1089 (2000). An exception exists for errors related to damages that are " 'so pervasive and prejudicial as to create the likelihood that they may have affected a jury's decision on the issue of liability.' " *McDonnell*, 192 Ill. 2d at 531, 736 N.E.2d at 1089, quoting *Mulvey v. Illinois Bell Telephone Co.*, 53 Ill. 2d 591, 599-600, 294 N.E.2d 689, 694 (1973).

¶ 45 Here, plaintiff's analysis focuses almost solely on how the trial court erred by not allowing evidence and a jury instruction on future harm. She never expressly addresses defendants' assertion the issue is not reviewable. In her briefs, she suggests, without citation to authority, the error affected the jury's decision on liability because, without evidence of the potential need for future surgery, the jury may have minimized plaintiff's damages, making them inclined to accept the not guilty verdict. Accordingly, we find plaintiff has not shown her alleged error is so pervasive and prejudicial it likely affected the issue of liability.

¶ 46 3. *Jury Instructions on a Preexisting Condition*

¶ 47 Plaintiff also contends the trial court erred by refusing to give her proposed jury instruction No. 2, which she asserts was based on the "long form"of Illinois Pattern Jury Instructions, Civil, No. 15.01 (2008) (hereinafter IPI Civil (2008) No. 15.01), and her jury instruction No. 12, which was based on Illinois Pattern Jury Instructions, Civil, No. 30.21 (2005) (hereinafter IPI Civil (2005) No. 30.21). In the trial court, plaintiff asserted the instructions

applied because she had "a preexisting condition." Defendants disagree, asserting those instructions did not apply to the facts of this case.

¶ 48 In a civil case, a trial court must use an Illinois pattern jury instruction if it applies after giving due consideration to the facts and prevailing law, unless the court finds the instruction does not accurately state the law. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 204, 854 N.E.2d 635, 666 (2006). The decision of whether to give a particular instruction to the jury rests within the trial court's sound discretion, and we will not disturb that decision absent an abuse of discretion. *York*, 222 Ill. 2d at 203, 854 N.E.2d at 666. A trial court does not abuse its discretion in ruling on a proposed jury instruction as long as, " 'taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles.' " *York*, 222 Ill. 2d at 203, 854 N.E.2d at 666, quoting *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273-74, 775 N.E.2d 964, 973 (2002).

¶ 49 The so-called "short form" of IPI Civil (2008) No. 15.01 defines proximate cause as "a cause that, in the natural or ordinary course of events, produced the plaintiff's injury." The "long form" adds the following language: "It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury."

¶ 50 In *Harding v. Amsted Industries, Inc.*, 276 Ill. App. 3d 483, 493, 658 N.E.2d 1208, 1215 (1995), the plaintiff argued the " 'failure to give the long form *** may have led the jury to believe that if plaintiff's knee condition was caused in part by his pre-existing condition, then the injury sustained on June 30, 1986 was not a proximate cause of his surgeries.' " The reviewing court found the refusal to give the "long form" was proper, noting the plaintiff had confused the concepts of proximate cause and preexisting medical condition. *Harding*, 276 Ill.

App. 3d at 493-94, 658 N.E.2d at 1215. "The preexisting medical condition was relevant only to plaintiff's damages and not to the issue of proximate cause in this case." *Harding*, 276 Ill. App. 3d at 493-94, 658 N.E.2d at 1215. Additionally, in *Lounsbury v. Yorro*, 124 Ill. App. 3d 745, 752, 464 N.E.2d 866, 870 (1984), the reviewing court noted the "long form" was proper only where evidence was presented that actions of another person had contributed to the injury because the proximate-cause instruction deals only with the conduct that produced the plaintiff's injuries and does not relate to any prior or subsequent injuries. Accordingly, we find the trial court did not err by refusing to give the "long form" of IPI Civil (2005) No. 15.01.

¶ 51 Regarding IPI Civil (2005) No. 30.21, we note it relates to damages. As stated in our previous section, we generally do not consider errors at trial relating solely to damages where the jury found in favor of the defendant on liability. See *McDonnell*, 192 Ill. 2d at 531, 736 N.E.2d at 1089. As also noted, an exception does exist for errors related to damages that are " 'so pervasive and prejudicial as to create the likelihood that they may have affected a jury's decision on the issue of liability.' " *McDonnell*, 192 Ill. 2d at 531, 736 N.E.2d at 1089, quoting *Mulvey*, 53 Ill. 2d at 599-600, 294 N.E.2d at 694. However, plaintiff does not expressly raise that exception and only suggests the jury could have found for defendants after concluding her damages were $0. We again find plaintiff has failed to show her alleged error is so pervasive and prejudicial it likely affected the issue of liability. Thus, we decline to review plaintiff's argument the trial court erred by not giving IPI Civil (2005) No. 30.21.

¶ 52 4. *Jury Question*

¶ 53 Plaintiff further asserts the trial court's answer to the jury's question about the jury instruction based on IPI Civil (2011) No. 20.01 was improper. The jury had asked whether the

points in that jury instruction "all refer to the April 15th date." Defendants assert the court did not err in answering the jury's question.

¶ 54 Illinois reviewing courts employ a two-step analysis in determining the propriety of the trial court's response to a jury question. *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 27, 964 N.E.2d 1174. First, we consider whether the trial court should have answered the jury's question, which we review under the abuse-of-discretion standard. *McSwain*, 2012 IL App (4th) 100619, ¶ 27, 964 N.E.2d 1174. Second, we determine whether the trial court's response to the question was correct, which is a question of law reviewed under the *de novo* standard. *McSwain*, 2012 IL App (4th) 100619, ¶ 27, 964 N.E.2d 1174.

¶ 55 Here, plaintiff contends the trial court's answer to the jury's question was not really an answer as it simply reiterated part of Illinois Pattern Jury Instructions, Civil, No. 105.01 (2011) (hereinafter IPI Civil (2011) No. 105.01). IPI Civil (2011) No. 105.01 provides, in pertinent part, the following: "In reaching your decision, you must rely upon opinion testimony from qualified witnesses ***." The court gave the jury the following answer to the jury's question: "To answer your question, please refer to your collective memories of the opinion testimony from qualified witnesses who spoke to these issues." Plaintiff notes her counsel's initial proposed answer was "no, but they are not intended to be restricted to one date," and she contends that proposal was an accurate answer to the question. Her counsel's second proposal was the following: "No, the opinions rendered in the court by expert witnesses addressed these issues."

¶ 56 Generally, "when a trial court receives a question from the jury during deliberations, the court has a duty to instruct the jury further or clarify the point of law that has caused

doubt or confusion." *Hojek v. Harkness*, 314 Ill. App. 3d 831, 834, 733 N.E.2d 356, 359 (2000). That duty applies even when the court properly instructed the jury. *Hojek,* 314 Ill. App. 3d at 835, 733 N.E.2d at 359. Our supreme court has found "[t]he failure to answer or the giving of a response which provides no answer to the particular question of law posed has been held to be prejudicial error." *People v. Childs*, 159 Ill. 2d 217, 229, 636 N.E.2d 534, 539 (1994).

¶ 57 However, "[w]hile the jury is entitled to have its questions answered, the supreme court has not mandated that the trial court answer all questions." *Hojek,* 314 Ill. App. 3d at 836, 733 N.E.2d at 360. Under appropriate circumstances, a trial court may exercise its discretion and decline to answer the jury's question. *Hojek,* 314 Ill. App. 3d at 836, 733 N.E.2d at 360. The supreme court has declared a trial court should not answer a jury's question under the following circumstances:

> " 'when the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or where the giving of an answer would cause the court to express an opinion that would likely direct a verdict one way or another.' " *Hojek,* 314 Ill. App. 3d at 836, 733 N.E.2d at 360, quoting *People v. Millsap*, 189 Ill. 2d 155, 161, 724 N.E.2d 942, 945 (2000).

¶ 58 IPI Civil (2011) No. 20.01 sets forth the issues made by the pleadings. See *Hartness v. Ruzich*, 155 Ill. App. 3d 878, 885, 508 N.E.2d 1071, 1075 (1987). The instruction based on IPI Civil (2011) No. 20.01that was given to the jury was the one proposed by plaintiff.

The evidence presented at trial showed Dr. Ekhaese cared for plaintiff from April 15 to April 19, 2007. Despite that fact, plaintiff chose to include a date (April 15, 2007) for only the first of four possible respects in which Dr. Ekhaese was professionally negligent. Thus, the jury's question was not to clarify a point of law but, rather, to clarify how plaintiff framed the issues as plaintiff could have limited everything to April 15 or she could have chosen different dates. To answer "no" to the jury's question would require the trial court to indicate evidence was presented Dr. Ekhaese was possibly negligent on days other than April 15, 2007. The court was concerned about highlighting any particular portion of the evidence. In this case, the jury's question gets at the facts presented at trial, not the legal requirements to prove negligence. Thus, it is distinguishable from the Illinois cases cited by plaintiff, in which the jury's question involved a question of law. See *Van Winkle v. Owens-Corning Fiberglas Corp.*, 291 Ill. App. 3d 165, 173, 683 N.E.2d 985, 991 (1997) (elements of civil conspiracy); *People v. Kamide*, 254 Ill. App. 3d 67, 72, 626 N.E.2d 337, 341 (1993) (definition of "alcohol").

¶ 59 Accordingly, under the circumstances of this case, we find the trial court did not abuse its discretion by not specifically answering the question presented by the jury.

¶ 60 5. *Standard of Care*

¶ 61 Plaintiff last argues the trial court confused the jury on the applicable standard of care by (1) allowing, over her objection, Dr. Cox, an internist, to testify Dr. Ekhaese, a general surgeon, met the standard of care; and (2) using the term "surgeon" as opposed to "general surgeon" in IPI Civil (2011) No. 105.01. Defendants agree Dr. Cox was not a surgeon but assert that fact is not controlling because Dr. Cox did not opine about Dr. Ekhaese's surgical performance. They further assert the jury instruction was a correct statement of law as the terms

"surgeon" and "general surgeon" have no real difference.

¶ 62 a. Dr. Cox

¶ 63 For an expert witness to give standard-of-care testimony about another medical practitioner, the proffered expert must first be scientifically or medically qualified, which means the expert must meet two foundational requirements. *McWilliams v. Dettore*, 387 Ill. App. 3d 833, 843, 901 N.E.2d 1023, 1030 (2009). The first requirement is licensure, meaning the expert must be a licensed member of the school of medicine about which the expert proposes to opine. *McWilliams*, 387 Ill. App. 3d at 843, 901 N.E.2d at 1031. Second, the familiarity requirement mandates the expert "be familiar with the methods, procedures, and treatments that similarly situated physicians as the defendant would ordinarily observe." *McWilliams*, 387 Ill. App. 3d at 843, 901 N.E.2d at 1031. If the expert witness does not meet the two foundational requirements, then the analysis ends, and the trial court must disallow the expert's testimony. *McWilliams*, 387 Ill. App. 3d at 843, 901 N.E.2d at 1031. Whether the foundational requirements have been met presents a legal question, which we review *de novo*. *McWilliams*, 387 Ill. App. 3d at 843-44, 901 N.E.2d at 1031-32. If the expert witness meets the two foundational requirements, the expert must be competent to state his opinion as an expert regarding the standard of care. *McWilliams*, 387 Ill. App. 3d at 843-44, 901 N.E.2d at 1031. The competency requirement rests within the trial court's discretion. *McWilliams*, 387 Ill. App. 3d at 843-44, 901 N.E.2d at 1031. Thus, we review that requirement under the abuse-of-discretion standard previously set forth in this order.

¶ 64 Here, plaintiff asserts Dr. Cox did not meet the familiarity prong because he was not a general surgeon. Defendants contend Dr. Cox's expert testimony was about pre- and post-surgical care, not surgical care. Plaintiff did not respond to defendants' argument in her reply

brief. We note that, on cross-examination, Dr. Cox specifically testified his standard-of-care opinions did not relate to surgery. Dr. Cox's testimony was akin to plaintiff's expert Dr. Zar, who was trained in internal medicine and infectious disease and did not opine on the surgical standard of care. Since Dr. Cox's standard-of-care opinions did not relate to Dr. Ekhaese's surgical care, plaintiff has not shown any error in the admission of Dr. Cox's testimony.

¶ 65 b. Jury Instruction

¶ 66 Plaintiff also challenges the trial court's use of the term "surgeon" as opposed to "general surgeon" in IPI Civil (2011) No. 105.01. Specifically, she contends allowing a critical-care specialist to give standard-of-care opinions after testifying he had performed surgery and then using "surgeon" in the jury instruction confused the jury. Defendants note the use of the term "surgeon" as opposed to term "general surgeon" is a distinction without a difference. We have previously set forth the standard of review for a trial court's decision to give a certain jury instruction.

¶ 67 As stated above, our review of the record indicates Dr. Cox's testimony clearly indicated he was not a general surgeon and was not rendering an opinion on the surgical standard of care. We agree with defendants that "general surgeons" are also referred to as "surgeons," and no real difference exists. Accordingly, we find the jury instruction based on IPI Civil (2011) No. 105.01 was an accurate statement of law and thus proper.

¶ 68 III. CONCLUSION

¶ 69 For the reasons stated, we affirm the Coles County circuit court's judgment.

¶ 70 Affirmed.