2011 IL App (5th) 100485-U

NO. 5-10-0485

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DAVID COFFEY and MAUREEN COFFEY,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	St. Clair County.
	)	
v.	)	No. 07-L-341
	)	
CASINO QUEEN, INC.,	)	Honorable
	)	Lloyd A. Cueto,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Chapman and Justice Wexstten concurred in the judgment.

O R D E R

¶ 1 *Held*: In this premises liability action the circuit court did not abuse its discretion in denying the plaintiffs' motion for a new trial where the circuit court cured any prejudice by striking testimony and giving a curative instruction and where the plaintiffs were given the opportunity to add a spoliation of evidence claim but declined to do so, opting instead for the missing evidence instruction.

¶ 2 The plaintiffs, David Coffey and Maureen Coffey, brought this premises liability action against the defendant, Casino Queen, Inc., seeking to recover for personal injuries and loss of consortium allegedly suffered when David slipped and fell on a puddle of liquid in the men's bathroom, hitting his head and suffering a traumatic brain injury, resulting in severe disabling bipolar depression and chronic headaches. The case was tried before a jury in the circuit court of St. Clair County on May 10, 2010, through May 17, 2010. The jury returned a verdict in favor of the defendant and judgment was entered thereon.

¶ 3 On June 14, 2010, the plaintiffs filed a posttrial motion for a new trial because during trial it had become evident that the defendant had destroyed a surveillance videotape which would have shown all of the men entering and exiting the men's bathroom in which the defendant had fallen, including David Coffey and employees of the defendant who were charged with maintaining the bathroom. The motion alleged that the videotape would have allowed the plaintiffs to investigate more fully how long the puddle had been on the floor. The motion further alleged that the court's missing evidence/adverse inference instruction to the jury was insufficient to cure the error. The plaintiffs sought to reopen the evidence to allow the plaintiffs to present evidence in support of a claim of spoliation of evidence.

¶ 4 The motion also sought a new trial because the testimony of the defendant's expert witness, Dr. Katz, had been so prejudicial as to deprive the plaintiffs of a fair trial. Dr. Katz had twice violated motions *in limine* by mentioning that David Coffey had submitted medical records to social security and by stating directly to the jury that there was some evidence he was prohibited from telling them about. The motion alleged that the actions of the circuit court in striking only a portion, and not the whole, of Katz's testimony and instructing the jury to disregard it was insufficient to cure the error.

¶ 5 On September 3, 2010, the plaintiffs' posttrial motion for a new trial was denied. The plaintiffs filed their notice of appeal on October 4, 2010. They raise on appeal the same issues raised in their posttrial motion. For reasons that follow, we affirm. Only proceedings and evidence necessary to decide the issues on review will be discussed herein.

¶ 6 Prior to trial, the circuit court entered a motion *in limine* prohibiting any mention of the plaintiff receiving social security disability benefits or the fact that he

had been deemed disabled by the Social Security Administration.

¶ 7 David Coffey testified at his jury trial that he was born in 1960. He began working as a machinist at age 19. He worked for the same employer for the next 27 years.

¶ 8 On the evening of December 31, 2005, David and his wife met other family members for a concert at the Casino Queen. They arrived there at approximately 4 p.m. and planned to stay the night in the Casino Queen Hotel. After spending some time in their hotel room, David and his wife went to the casino and gambled and socialized for a while. The concert began at 10 p.m.

¶ 9 At approximately 11:30 p.m., David left the concert to use the restroom inside the Club Seven area. He did not see anyone leaving the restroom as he went in. He was feeling fine and having a good time. As he walked toward the urinal he slipped and his legs went out from under him and his head hit the floor. He does not know if he lost consciousness. When he stood up, the back of his clothing was wet from liquid that had been on the floor.

¶ 10 David was walking to the one of three urinals that was closest to the toilet stall, on the far right. He fell two steps from it. The urinals had privacy barriers between them. Not only did David hurt his head in the fall, but he cut his leg. David did not see any liquid on the floor before he fell, but he believed that he slipped in liquid because his clothing and hair were wet after the fall.

¶ 11 When David exited the restroom he could see his wife sitting at a table and waved her over. He then spoke with an employee of the defendant who was standing just outside the restroom door. David reported that he had fallen and hit his head and cut his leg, which was bleeding. The employee asked David if he wanted to go to the hospital and David responded that he did not because he did not want to ruin the

evening for his wife and family. He admitted that he was not feeling very well and that his head was starting to really hurt.

¶ 12 While David was talking with the defendant's employee, he observed two other employees enter the restroom with buckets to clean it up. The casino employee offered David a free room, free dinner, or free chips, all of which David declined. He stated that he simply did not want anyone else to be injured.

¶ 13 When the concert ended David was feeling pretty bad and he and his wife went to their hotel room without even saying goodbye to anyone. David vomited several times during the night. His head hurt very much and he felt dizzy. In the morning David and his wife got ready to leave the casino but first stopped at the security department to make a report of the incident. They gambled briefly while their car was being retrieved and then left. David did not want to go to the hospital; he just wanted to go home. When he got home, his head continued to hurt and he continued to feel dizzy. David's wife called his doctor, Dr. Raghavan, who advised David to go to the emergency room, which he did. David saw his doctor the next day who advised him not to return to work. David continued to suffer the same symptoms for weeks after his fall. He was referred to a neurologist who sent him to other specialists.

¶ 14 David continues to suffer severe depression and chronic pain from headaches. He has anxiety and has been diagnosed with bipolar disease. These symptoms started after his fall when he was unable to return to work, and they continued to get worse. David did try returning to work but his boss did not believe he was able to do the work. David had worked at that job for 27 years before his fall. He loved his job and wished he could go back. David had never had any of these problems prior to his fall.

¶ 15 On cross-examination, David admitted that he did not actually see any liquid

on the floor prior to his fall, but he surmised it was present because his clothing and hair were wet after the fall. He does not know what the liquid was, how much was present, how it came to be on the floor, or how long it had been there prior to his fall.

¶ 16 David also admitted on cross-examination that on August 17, 2005, prior to his fall at the Casino Queen, he had seen Dr. Raghavan for "stress-related" problems related to his work that had existed for some years. David told Dr. Raghavan that the last year had been the worst and the main stressor was work. The medical record indicated a past history of anxiety and stress. Nevertheless, David denied ever having suffered from anxiety prior to his fall. Dr. Raghavan prescribed Prozac for David at that visit. David denied ever taking the Prozac. David admitted taking lorazepam, which was prescribed for sleep. David was not taking any medication at the time of his fall.

¶ 17 David could not remember returning to see Dr. Raghavan in September 2005 and being prescribed a different medication for anxiety. David stated that if that was true he probably did not take the medication.

¶ 18 David denied having 11 short-term disability claims in his work file before his fall and believed he might have had 2.

¶ 19 Garrett Cizek testified that he was the individual to whom David spoke outside the restroom after the fall. Cizek was employed as the director of marketing. He remembered David coming out of the restroom and telling him that he had fallen and hit his head. Cizek immediately called the security department and the surveillance department, which has security cameras throughout the facility. These cameras cover everything except the interior of the bathrooms. Cizek was told by the surveillance department that his conversation with David had been captured on a surveillance

camera. Cizek was sure the surveillance cameras would have captured who was going into and out of the bathroom throughout the evening, but he had never seen the videotape.

¶ 20 Cizek then went into the bathroom and observed a two-foot-by-two-foot puddle of water near the urinal on the far right closest to the toilet stall. His first impression was that the water was from a toilet or urinal that had leaked, but he did not see any such leak. He does not know how the water got on the floor or how long it had been there. The liquid was clear and the floor was a light color tile. Cizek called for someone to clean up the water. An employee arrived within 10 minutes to clean it up.

¶ 21 On cross-examination, Cizek testified that he had been in that bathroom 30 minutes prior to David's fall and, as part of his job, checked around to make sure it was clean. He believed he would have noticed the water had it been there at that time, but he did not see it. He admitted that he was not specifically looking for the water at that time.

¶ 22 Edward Muzzey is the director of security for the Casino Queen. He testified that he became aware of David's fall on January 2, 2006, when he reviewed security reports in the normal course of his job. He prepared a report concerning the incident dated January 6, 2006, after interviewing employees of the defendant. Muzzey interviewed Cizek and John Swims, an employee who had been assigned to clean the restroom on the night in question. Swims had cleaned up the puddle in front of the urinal at 11:55 p.m., after David's fall. Swims provided Muzzey with his "porter sheet," which indicated every time Swims had been in the restroom to clean it on that evening. The sheet indicated that Swims had been in the restroom at 5:35, 6:45, 8, 10:50, 11:55, and 12:55.

¶ 23 Muzzey admitted that although Cizek called a security officer after David reported the fall, and the security officer went to the scene of the incident immediately, he did not prepare a report that evening, in violation of policy. The report was made the following day when David and his wife went to the security office to file one. At that point it would have been too late to locate witnesses to the incident or the condition of the bathroom or to take photos of the bathroom before the water was cleaned up.

¶ 24 Muzzey was then questioned about Cizek's testimony that he had been told by the surveillance department that his conversation with David had been recorded and that Cizek was sure this recording would have shown everyone entering and leaving the restroom that evening. Muzzey testified that the surveillance cameras are moved around by the surveillance agents and so different areas are being surveilled at different times. Muzzey was not aware of the existence of any videotape of David's conversation with Cizek or of people entering and leaving the restroom that evening. Muzzey admitted that had the surveillance camera been trained at the area of the bathroom door, it would have shown possible witnesses entering and leaving the restroom that evening who could have been questioned as to what they saw on the floor of the restroom that evening. Muzzey also admitted that the Coffeys were recorded the next morning at the security office when they filed their report and as they were leaving the Casino Queen and that this video recording was saved.

¶ 25 Muzzey testified that proper procedure dictates that on the evening of David's fall when the security officer was notified of the incident, he should have notified surveillance to follow David's activities for the rest of the evening. Muzzey was confused as to why this procedure was not followed. In any event, Muzzey was not aware of the existence of the tape that contained David's conversation with Cizek

reporting the incident.

¶ 26 Muzzey testified that there were no repairs made in the restroom where David fell in the week before his fall or the day after his fall. There are no records indicating that either the urinals or the toilets were in disrepair on the day of the incident or the day after.

¶ 27 Irving Thompson was the porter supervisor on the evening in question. He was charged with supervising the employees who do the cleaning of the facility, including the restroom on the night in question. He did not know about David's fall on the night in question. He did not learn of it until two months prior to trial. He was not aware that evening that one of his porters had been called to clean up the liquid in which David fell. Thompson testified that he would have been in the restroom at least 10 or more times over the course of that evening. There were no plumbing issues on the night of or the day after the incident.

¶ 28 Asfar Malik, David's treating psychiatrist, testified that David suffers from severe disabling bipolar depression caused by a closed head injury resulting from his fall at the Casino Queen. The condition is permanent and David will continue to require future treatment and supervision or attendant care. He will need medication the rest of his life. David is and will remain unable to work.

¶ 29 David's wife, Maureen, testified that on the evening of the incident, David indicated at approximately 11:30 p.m. that he was going to the restroom. Maureen thought he was gone an unusually long time and began to watch for him. When he came out of the restroom, he waved her over to him and she went. David was speaking with a casino employee, Garrett Cizek. David told Maureen that while in the restroom his feet went straight out from under him and he fell straight back and hit his head. David's clothes were wet. She did not see any security officer speak to

David. When the concert ended, she and David went directly to their hotel room. David said his head was hurting and he was vomiting. Prior to his fall, David had been feeling fine.

¶ 30 The next morning David and Maureen went to the Casino Queen security office and reported the incident. David's head was still hurting and he was nauseous. They went to the casino and gambled while the valet was retrieving their car. Maureen called David's doctor when they got home and the doctor advised that David go to the emergency room, which he did. The next day David saw his doctor, who advised him not to return to work. David never got better.

¶ 31 Maureen testified that prior to his fall David never complained of headaches and never seemed depressed. He now suffers from daily severe headaches.

¶ 32 The plaintiff rested. The defendant's motion for a directed verdict was denied.

¶ 33 The defendant called Dr. Richard Katz, a physician specializing in physical medicine and rehabilitation. At the request of the defendant, he examined David, reviewed his medical records, and offered an opinion about David's problem and his future needs. He determined that David's present issues were a diagnosis of bipolar illness, headaches, neurobehavioral status, and chronic pain. Katz concluded that David suffered from a psychiatric problem, not a neurological injury to the brain. David's results were inconsistent with even a mild traumatic brain injury. He concluded that David suffered from somatization, a disorder similar to hypochondriasis. People who suffer from this disorder complain of physical symptoms with no underlying medical condition. He further concluded that David suffers from tension headaches.

¶ 34 David's exam was consistent with him being depressed, but as to the cause of the depression Katz noted that David's medical records indicated anxiety and

depression existing prior to the fall. Katz did not believe that David was disabled and believed that he should be able to go back to work after counseling.

¶ 35 On cross-examination, Katz acknowledged that somatoform disorder usually presents before the age of 30 years, requires four different unexplained pain symptoms, two unexplained gastrointestinal symptoms, and a pseudoneurological problem. David was 50 years of age and did not appear to meet the other criteria for somatoform disorder. While being questioned about this apparent inconsistency, Katz was asked whether he had reviewed David's medical records from prior to fall or only those from subsequent to the fall. Katz responded:

"Yeah, you know, maybe–I don't know the answer to that question. Certainly there are records from the Social Security Administration that include prior medical records and details about prior medical history so that's a very–a big one–."

¶ 36 At this point the court interrupted and called a sidebar with counsel. The court was concerned that Katz had mentioned social security. An off-the-record discussion ensued. No formal objection is of record.

¶ 37 On further examination, it was clarified with Katz that he had seen records of Dr. Raghavan which were created prior to David's fall. Later on recross-examination, Katz was asked whether David had significant stress or impairment prior to his fall. Katz responded that David had additional stress after his fall but that he also suffered from it prior to his fall. The plaintiffs' counsel then asked, "And all you can point to is when you're [*sic*] talked about distress prior are two prior records of Dr. Raghavan where he said he was stressed and having trouble sleeping at night, is that correct?" Katz responded: "No, ma'am. Those are the two items I'm allowed to talk about." The plaintiffs' counsel asked to approach the bench and the court admonished Katz: "Doctor, you are aware of what was in our disclosure and you're aware of motions *in*

limine and the Court doesn't appreciate an answer when you say that's all you're allowed to talk about."

¶ 38 No formal objection is of record. The plaintiffs' counsel was instructed to move on and ask a different question.

¶ 39 Later outside the presence of the jury, the following occurred:

"THE COURT: Okay. Let's stay on the record. As to the last witness, I'll tell you what the Court doesn't appreciate, and it's none of the attorneys' fault; I don't like a witness sitting on the witness stand, looking at the ladies and gentlemen of the jury and saying, no, that's all I'm allowed to testify to because that gives the impression that we're keeping evidence from them.

* * *

And I'm telling you, I came this close (indicating) to telling him he was going to stick around, this close that he was going to stick around for a show cause hearing. You let an expert look at the ladies and gentlemen of the jury and you say, no, that's all I'm allowed to testify to they think the first thing there's evidence out there they're not allowed to hear.

* * *

[A]nd I want to make it real clear, it's not Ms. Mack's fault at all, and it's not the questions that was being asked by plaintiff's counsel either. He did it, and he knows he did it, and you know why I know that? Because he testifies four times a year live and he gives 44 depos [*sic*] a year. He testifies under oath 48 times and he knew damn good and well what he was doing when he did that and I don't appreciate that. He's lucky. He's lucky I let him leave.

* * *

He did it and he knew he did it. Anybody who testifies 48 times a year, he knows

what he's doing. He knows damn good and well what he's doing, he knew damn good and well what he was doing when he looked over at them and said that."

¶ 40 The defendant called Theresa Gaigen to testify. She was employed as a security officer/EMT at the Casino Queen at the time of David's fall and took a report from him the morning after his fall. Her report does not reflect that David told her he hit his head in the fall. He complained of lower back pain, neck pain, and an abrasion on his left shin. He did not complain of a headache at that time.

¶ 41 Chris Stanley testified that at the time of David's fall he was David's brother-in-law. He was with the plaintiffs on the night of the fall. He testified that he was walking out of the bathroom just as David was walking in before his fall. He had used the center urinal and had not see any liquid on the floor. He believed he would have seen a two-foot-by-two-foot puddle of liquid. David never complained to Stanley of any pain after his fall. On cross-examination, Stanley testified that men were standing at the other two urinals when he entered the bathroom. There was no liquid on the floor in front of the center urinal, which he used, but he did not look at the floor in front of the other two urinals.

¶ 42 Dr. Keith Garcia, a psychiatrist, testified on behalf of the defendant. He reviewed David's medical records and examined him. Garcia diagnosed David with major depression recurrent and an unspecified somatoform disorder. Somatoform disorders are diagnosed when someone makes repeated complaints of physical ailments that are not substantiated by a medical examination or if the size of the complaint is out of proportion to what would be expected from the findings. Somatoform disorder is not caused by a fall or trauma to the head. Garcia also opined that David's depression was not caused by his fall at the Casino Queen because his symptoms existed prior to the fall. Garcia did not believe David had a bipolar

disorder, nor did he believe that bipolar disorder could be caused by a fall. Garcia did believe that David was disabled due to his somatoform disorder but that the somatoform disorder preexisted David's fall.

¶ 43 Garcia testified to 11 short-term disability leaves that David had taken from his employment over the years, some of which involved severe headaches. However, David had no such disability leaves in the six years prior to his fall at the Casino Queen.

¶ 44 At the jury instruction conference, the plaintiffs tendered Illinois Pattern Jury Instruction No. 5.01 (Illinois Jury Pattern Instructions, Civil, No. 5.01 (2006)), pertaining to the defendant's failure to produce evidence under its control, the surveillance video taken of the entrance to the men's restroom the evening David fell. The instruction, known as the "missing evidence" instruction, provides that if a party has failed to produce evidence which is was within its power to produce, the jury may infer that the missing evidence would be adverse to that party. The defendant objected on the basis that the existence of any such surveillance videotape had not been proven. The court disagreed, finding that the existence of the tape had been proven. The court further pointed out that the videotape was important evidence because Chris Stanley testified that just before David entered the bathroom, there were two other men in there who could have been identified and deposed about the existence of a puddle on the floor. The tape was also important evidence because it could have confirmed or rebutted the testimony of a Casino Queen porter that he had been in that bathroom 10 times over the course of the evening and not observed any puddle. The court asked the plaintiffs' counsel if he had considered filing a spoliation of evidence count. The plaintiffs' counsel indicated some hesitancy to do so, and the court suggested that the instruction might "cure" the problem and make it unnecessary

to file a spoliation count. The court indicated that unless there was a spoliation count filed it would give the instruction and allow the plaintiffs to argue it. The court further informed the plaintiffs that they could move to amend their complaint to add a count for spoliation of evidence even after the close of evidence. The plaintiffs did not choose to file a spoliation of evidence count, and the "missing evidence" instruction was given.

¶ 45 After the jury instruction conference, the plaintiffs made a motion to strike the entirety of Dr. Katz's testimony because he had mentioned social security in violation of a motion *in limine* and because he had indicated to the jury that there was evidence which he was not permitted to reveal to them. The plaintiffs argued that Katz's remarks were extremely prejudicial, especially since the issues of liability and damages were so intertwined. The remark about social security implied either that David was already receiving disability payments or that he had applied for social security disability payments and been denied.

¶ 46 The court agreed that Katz had made the comments knowingly and deliberately but agreed to strike only the portion of Katz's testimony relating to David's psychiatric injuries or conditions.

¶ 47 During closing argument, the plaintiffs' counsel argued repeatedly that the missing surveillance videotape would have supported the plaintiffs' claim. She argued that the tape would have shown what time David entered and exited the bathroom and how long he was in there. This might have supported David's claim that he lost consciousness or was stunned after his fall. It also would have shown who else entered and exited the bathroom during the course of the evening. It would have shown how often employees of the Casino Queen entered the bathroom for cleaning and maintenance. The plaintiffs' counsel argued that the videotape would have

provided important evidence to the jury, evidence which was hidden from them because the tape had been erased by the defendant. She further argued the instruction that the jury could infer that the tape would have been favorable to the plaintiffs or unfavorable to the defendant and that is why the defendant erased the tape. The plaintiffs' counsel explicitly argued that the videotape was favorable to the plaintiffs and that is why the defendant destroyed it.

¶ 48 The plaintiffs' counsel also argued that Dr. Katz had violated two court orders and that the jury would be instructed to disregard everything he had to say about David's psychiatric injuries or conditions. She argued that Katz had intentionally violated the court's orders in order to convince the jury that he was right.

¶ 49 The jury was instructed as follows:

"Because Richard Katz, M.D. violated this Court's orders, I have struck a portion of his testimony. You may not consider nor take into consideration any of his testimony concerning the plaintiff's psychiatric injuries or conditions."

¶ 50 The jury was also instructed as follows:

"If you find for the plaintiff, you shall not speculate about or consider any possible sources of benefits the plaintiff may have received or might receive. After you have returned your verdict, the court will make whatever adjustments are necessary in the regard."

¶ 51 Finally, the jury was instructed:

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

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

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

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

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

¶ 52 Both of the plaintiffs' arguments on appeal relate to the circuit court's denial of their motion for a new trial. Great deference is generally given to decisions of trial judges in granting or denying motions for a new trial. *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill. 2d 545, 548 (1981). A court on review will not reverse the trial court's decision to grant a new trial merely because it would have come to a different conclusion on the facts. *Reidelberger*, 83 Ill. 2d at 548. The decision of a trial court to grant a new trial is an exercise of discretion that should not be disturbed unless a clear abuse of discretion is shown. *Reidelberger*, 83 Ill. 2d at 548. In determining whether that discretion was abused, the reviewing court will consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Reidelberger*, 83 Ill. 2d at 549.

¶ 53 The plaintiffs' first argument on appeal is that the circuit court erred in failing to strike the *entire* testimony of Dr. Katz and in failing to grant the plaintiffs' motion for a new trial on this basis. The plaintiffs argue that striking only a portion of Katz's testimony was insufficient to cure the prejudice resulting from Katz's misconduct. Katz was one of the defendant's retained expert witnesses, offering opinions regarding David's physical condition and his psychiatric condition.

¶ 54 There is no question that Katz's conduct was outrageous and inappropriate, as the circuit court recognized. There is also no question that Katz's behavior was neither encouraged nor condoned by the defendant or its attorney, which the court

also recognized. Nor can there be any question that Katz's behavior was harmful to the plaintiffs' case. The plaintiffs had a particularly difficult burden because David's alleged injuries were psychiatric in nature, not physical. David had no objective evidence, such as X rays or blood test results, to support his claim. Katz's comments about David's social security records and the fact that there was additional evidence of David's preexisting conditions of which the jury would not be apprised made the plaintiffs' burden even heavier. Nevertheless, we find that the circuit court's striking of that portion of Katz's testimony which pertained to David's psychiatric injuries or conditions, precisely the injuries at issue, was sufficient to "level the playing field" and remove any prejudice resulting from Katz's comments.

¶ 55 We note that with respect to Katz's comment about social security, the jury was instructed not to speculate or consider any possible sources of benefits the plaintiff may have received or might receive. With respect to Katz's comment concerning additional evidence of David's preexisting psychiatric condition, the jury was instructed not to consider or take into consideration any of Katz's testimony concerning David's psychiatric injuries or conditions. Generally, any prejudicial impact of an error may be cured if the trial judge sustains an objection and instructs the jury to disregard the objectionable testimony. *Nickon v. City of Princeton*, 376 Ill. App. 3d 1095, 1103 (2007).

¶ 56 We cannot conclude that the jury's verdict in favor of the defendant is not supported by the evidence. Nor do we believe that the plaintiff was deprived of a fair trial as a result of Katz's misconduct. The circuit court struck the most damaging portion of Katz's testimony, that relating to David's psychiatric injuries or conditions. In the sound exercise of its discretion the circuit court took action to mitigate the prejudicial impact of Katz's statements. We cannot conclude that the circuit court

abused its discretion in denying the plaintiffs' motion for a new trial based on Katz's misconduct.

¶ 57 There is yet another reason for affirming the denial of the plaintiffs' posttrial motion for a new trial: the plaintiffs did not ask for or seek a mistrial during the trial but acquiesced in the circuit court's curative instructions. Had the plaintiffs asked for a mistrial during the trial, the circuit court may very well have granted it. Only after receiving an adverse verdict did the plaintiffs seek a new trial. The plaintiffs may not acquiesce in the circuit court's action to cure error and then seek a different curative action after receiving an adverse verdict. The plaintiffs have waived their right to a new trial by not moving for a mistrial during trial. *Village of Oak Park v. Schwerdtner*, 288 Ill. App. 3d 716, 720 (1997) (an issue not timely presented to and considered by the trial court is waived).

¶ 58 The plaintiffs next argue that the circuit court erred in denying their posttrial motion for:

"a new trial in order to reopen the evidence from the Casino Queen with regard to the issue of spoilation [*sic*] including taking the deposition of the former Director of Surveillance for the Casino Queen, and any other persons who have information as to when the videotape was destroyed, what was contained on the videotape, and the policies of the Casino Queen with regard to the destruction of videotapes."

¶ 59 On appeal, the plaintiffs argue that the curative "missing evidence" instruction was not enough to overcome the prejudice to the plaintiffs resulting from the defendant's destruction of the videotape, which would have shown how often Casino Queen employees actually checked and/or cleaned the bathroom. The plaintiffs argue that the circuit court should have granted their posttrial motion to amend their complaint to add a claim for spoliation of evidence.

¶ 60 The plaintiffs were given ample opportunity during the trial to amend their complaint to add a claim for spoliation of evidence. The circuit court suggested such an action but also noted that the "missing evidence" instruction might be sufficient to remove any prejudice as a result of the missing videotape. The circuit court told the plaintiffs that they could so amend their complaint at any time, even after the close of the evidence, but that if they declined to do so, it would give the "missing evidence" instruction. The plaintiffs declined to amend their complaint, an informed and strategic decision, and the "missing evidence" instruction was given. The plaintiffs cannot now, after receiving an adverse verdict, seek a new trial on the ground that their own decision was wrong.

¶ 61 The plaintiffs are not entitled to a new trial where they ask for and receive a remedy from the trial court, the "missing evidence" instruction, and subsequently argue that a different remedy, not requested at trial, is more appropriate. The circuit court did not abuse its discretion in denying the plaintiffs' motion for a new trial on the issue of spoliation of evidence.

¶ 62 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 63 Affirmed.