2011 IL App (5th) 100529-U

NO. 5-10-0529

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MARY ANN OLDFIELD, Plaintiff-Appellant, v. MANNY TRUPIANO, d/b/a Joe's Pizza & Pasta, JOSEPH TRUPIANO, and CHRISTOPHER SANDERS, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Effingham County. No. 08-L-15 Honorable Kimberly G. Koester, Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Justices Donovan and Stewart concurred in the judgment.

O R D E R

¶ 1 *Held*: The jury's verdict for the defendants was not against the manifest weight of the evidence, and the circuit court did not commit reversible error when making certain evidentiary rulings.

¶ 2 The plaintiff, Mary Ann Oldfield, appeals, following a jury verdict in favor of the defendants, Manny Trupiano, doing business as Joe's Pizza & Pasta, Joseph Trupiano, and Christopher Sanders, the decision of the circuit court of Effingham County to deny her motion for a new trial. On appeal, the plaintiff contends that the jury's verdict was against the manifest weight of the evidence presented and that errant evidentiary rulings by the trial judge deprived her of a fair trial. For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal were adduced by both parties at the plaintiff's jury trial and are as follows. On January 2, 2007, at around 5:15 p.m., the

plaintiff drove to the defendants' restaurant in Altamont to pick up an order of food for herself and her husband. She had never visited the restaurant before. She described the day as being mild and dry, with no precipitation on the ground, but noted that it was already dark by the time she arrived at the restaurant. She did not recall if streetlights were present outside the restaurant, but she could see light coming from inside the restaurant. She ascended the outdoor steps leading to the restaurant and entered it with no problems. After paying for and picking up her food, she left the restaurant the same way she had entered. She testified that the outdoor steps were in the same condition as when she had ascended them minutes before, with no debris present on them. As she descended them to return to her car, she did not see the final step, which was painted red, and although she did not actually trip on anything, her heel "lunged" her over, causing her to fall. She testified that there was no guardrail, she could not catch herself, and she ended up falling into the street, where she remained until a passing motorist summoned help for her.

¶ 5 With regard to the plaintiff's health at the time of the incident, the evidence presented demonstrated that the plaintiff was 56 years old, stood five feet tall and weighed 217 pounds, and suffered from diabetes and a condition known as chronic inflammatory demyelinating polyneuropathy (CIDP), also commonly known as muscular dystrophy. She had a total left knee replacement in 2002 and testified that she knew she had to be careful using steps. She testified that despite these physical conditions, prior to the incident, she worked seven days a week as the manager of her husband's restaurant with no physical problems and was very active in her free time as well. She also testified about her substantial rehabilitation from the incident, the pain involved, and the medical expenses she incurred.

¶ 6 Testimony was also adduced from defendant Manny Trupiano, who testified that as a result of his many years of experience in the restaurant industry, he understood the importance of a restaurant having a safe, well-lighted entrance and exit. Although a

floodlight was mounted at the rear entrance to the building, no exterior lighting was present at the front entrance when the defendants purchased the building, nor did they add any exterior lighting at the front entrance. Likewise, when the defendants purchased the building, there was no handrail near the steps used by the plaintiff, and the defendants did not install one. The defendants were aware of the red step and were aware that there were "differences in the vertical height between the sidewalk and the red step and then between the red step and the landing" at the restaurant entrance. Trupiano testified that there were streetlights present outside the front entrance to the restaurant and that the amount of lighting present near the front entrance "was never, never brought up, never an issue, never complained about, never." Defendant Christopher Sanders, who managed the restaurant, testified that he believed the lighting in front of the restaurant was adequate and that he had no reason to believe the entrance was unsafe.

¶ 7 The evidence deposition of the plaintiff's expert witness, Dr. Arthur Kramer, was read to the jury. Dr. Kramer opined that the indirect illumination near the front entrance to the restaurant was insufficient. However, Dr. Kramer conceded that light was present from multiple sources, including light emanating from within the restaurant and at least one streetlight. He also conceded that the red step appeared to reflect light, even in nighttime photographs. Although the plaintiff testified that prior to the incident, she had not suffered from the "foot drop" that now afflicts her, in a videotaped evidence deposition that was played for the jury, Dr. Daniel Dethmers opined that the plaintiff had "some kind of chronic wasting disease" and "a certain amount" of foot drop before the incident. Dr. Dethmers also opined that the plaintiff "had preexisting muscular dystrophy" and muscle weakness in her foot. At the close of the case, the jury returned a verdict for the defendants, assigning the percentage of negligence/fault for the plaintiff's injuries as follows: 0% to the defendants and 100% to the plaintiff. The plaintiff filed a motion for a new trial, which was denied, and this

timely appeal followed. Additional facts will be provided as necessary throughout the remainder of this order.

¶ 8 ANALYSIS

¶ 9 The plaintiff first contends that the jury's verdict against her, and in favor of the defendants, was against the manifest weight of the evidence presented at the trial and that accordingly the trial court erred when it denied her motion for a new trial. We begin our consideration of her proposition by noting the following fundamental rules of law relating to trials by jury. "Unquestionably, 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." *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). When, following a jury verdict, a party moves for a new trial, the trial court is to weigh the evidence presented to the jury and is to set aside the jury's verdict and order a new trial only if the verdict is contrary to the manifest weight of the evidence. *Maple*, 151 Ill. 2d at 454. A verdict is deemed contrary to 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.' " *Maple*, 151 Ill. 2d at 454 (quoting *Villa v. Crown Cork & Seal Co.*, 202 Ill. App. 3d 1082, 1089 (1990)). "Likewise, the appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way." *Maple*, 151 Ill. 2d at 452-53. Accordingly, we will not reverse a trial court's ruling on a motion for a new trial unless "it is affirmatively shown" that the trial court "clearly abused its discretion" in making its ruling. *Maple*, 151 Ill. 2d at 455. To determine if the trial court so erred, we must "consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial" (*Maple*, 151 Ill. 2d at 455), being mindful as we do so that in ruling upon the motion for the new trial, the judge who

presided over the trial has the benefit of that judge's " 'previous observation of the appearance of the witnesses, [of] their manner in testifying, and of the circumstances aiding in the determination of credibility.' " *Maple*, 151 Ill. 2d at 456 (quoting *Buer v. Hamilton*, 48 Ill. App. 2d 171, 173-74 (1964)).

¶ 10 With these fundamental principles in mind, we turn to the arguments raised by the plaintiff. The plaintiff contends the jury's verdict was against the manifest weight of the evidence because, according to the plaintiff, it was undisputed "that the [d]efendants did not have a well-lighted entrance at night" and "failed to provide a handrail." In making her argument, however, the plaintiff examines only the evidence that would have supported a verdict for the plaintiff. In fact, as described above, the jury heard evidence from which it could have concluded that adequate light was present near the entrance and that other factors, such as the absence of a handrail and the unequal vertical height between the steps, did not contribute to the plaintiff's fall. Moreover, the jury heard evidence about serious health problems that afflicted the plaintiff at the time of her fall, heard the testimony of the plaintiff herself (who testified that she did not actually trip on anything but that her heel "lunged" her over), and was present to evaluate the credibility of the plaintiff and the other witnesses. In short, when the evidence presented is reviewed with deference to the trial court and the province of the jury, we simply cannot conclude that a verdict for the defendants was unsupported by the evidence, nor can we conclude that the plaintiff was denied a fair trial.

¶ 11 The plaintiff next contends that a series of errant evidentiary rulings by the trial court deprived her of a fair trial. Specifically, she claims the trial court erred in (1) refusing the plaintiff's tender of what is commonly known as the "missing witness" instruction, (2) prohibiting the plaintiff from cross-examining the defendants' expert regarding whether the unequal vertical distance of the steps constituted an unsafe condition, (3) overruling the plaintiff's objection to the introduction of a photograph of the building in which Dr. Kramer

worked, (4) refusing to allow Dr. Kramer to explain and clarify the absence of handrails at the building in which he worked, (5) overruling the plaintiff's objections to the defendants' questioning of Dr. Kramer about an authoritative text, and (6) allowing the defendants to "appeal to the jury's sympathy" with some of the testimony they elicited. The plaintiff contends that each of these purported errors deprived her of a fair trial or, in the alternative, that cumulatively the errors did so. We shall address each of her contentions in turn.

¶ 12 The plaintiff first takes issue with the trial court's refusal to give the jury Illinois pattern instruction 5.01 (Illinois Pattern Jury Instructions, Civil, No. 5.01(2006)), which is commonly known as the "missing witness" instruction and which states that when one of the parties to a case "has failed to offer evidence within his power to produce, [the jury] may infer that the evidence would be adverse to that party" if the jury believes the following: (1) the evidence was under the control of that party and could have been produced with reasonable diligence, (2) the evidence was not equally available to the other party, (3) a reasonably prudent party under the same or similar circumstances would have offered the evidence, if that party believed that the evidence was favorable to it, and (4) the party has not shown a reasonable excuse for the failure to offer the evidence. In the case at bar, the plaintiff contends she was entitled to this instruction because even though the defendants had listed architect Paul Lunsford as an expert who would testify on their behalf at the trial, the defendants did not call Lunsford or "abandon" him as an expert. The defendants counter that they had a reasonable excuse for failing to call Lunsford: the day prior to the beginning of the trial, the court granted in part and denied in part the plaintiff's motion *in limine*, precluding any testimony from Lunsford that would allow the inference that the restaurant's entrance violated no building codes, which was "the defendants' entire reason to call the witness." According to the defendants, although the court's ruling would have allowed Lunsford to offer testimony regarding the adequacy of the entrance's lighting, Lunsford had

not evaluated the lighting and, in any event, any testimony he rendered regarding lighting would have been cumulative of the testimony of other witnesses. The trial court agreed with the defendants and refused to give the missing-witness instruction. The trial court also held, in response to the plaintiff's posttrial motion, that Lunsford was within the control of both parties and that his testimony would not have affected the jury's verdict.

¶ 13 The decision regarding which instructions are to be given to a jury rests within the discretion of the trial court, and we will not disturb a ruling of the trial court with regard to jury instructions unless the trial court has abused its discretion in rendering that ruling. *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007). "[T]he standard for reversing a judgment based on failure to permit an instruction is high," and we will grant a new trial to a party "only when the refusal to give a tendered instruction results in serious prejudice to a party's right to a fair trial." *Heastie*, 226 Ill. 2d at 543. Moreover, the appellate court has previously held that the missing-witness instruction is not warranted where the unproduced witness's testimony "would be cumulative of facts already established" and that there is no requirement that a party "produce every expert it lists as a possible witness in order to avoid" the missing-witness instruction. *Betts v. Manville Personal Injury Settlement Trust*, 225 Ill. App. 3d 882, 901 (1992). In the case at bar, we cannot conclude that the trial court abused its discretion in refusing the instruction. Although the plaintiff posits that even after the trial court's ruling on the plaintiff's motion *in limine*, "a significant portion of Mr. Lunsford's anticipated testimony was not barred," we find nothing in the plaintiff's argument, or anywhere else in the record on appeal, that contradicts the position of the defendants that their "entire reason" for calling Lunsford was to elicit his testimony that the restaurant's entrance did not violate any building codes and was therefore safe. The plaintiff, having successfully barred the very testimony the defendants sought to elicit from their expert, can hardly be heard to complain when the defendants chose not to call that witness. Moreover, although the plaintiff relies

on the case of *Taylor v. Kohli*, 162 Ill. 2d 91, 97 (1994), that case dealt only with the issue of the plaintiff's control over the witness in question, not with whether the plaintiff had a reasonable excuse for failing to call the witness. Accordingly, we find the case inapposite to the question before us.

¶ 14 The plaintiff next contends the trial court erred by prohibiting the plaintiff from cross-examining the defendants' expert, engineer Charles Grunloh, regarding whether the unequal vertical distance of the steps constituted an unsafe condition. Grunloh had been hired by the defendants to perform a survey of the restaurant's entrance to determine, with regard to the steps in question, where the defendants' property ended and the city of Altamont's right-of-way began. He testified, during his discovery deposition, that he and his firm sometimes design steps in connection with construction and that when they do so, they design the vertical distances between the steps to be equal "for safety purposes." He also testified, in his discovery deposition, that the vertical distances between the steps outside the defendants' restaurant were substantially unequal. At the trial, the plaintiff wished to elicit testimony from Grunloh that it was his design practice to keep the vertical distance between steps equal and that the steps in question in this case presented "an unsafe condition." The defendants objected to that questioning at the deposition and raised their concerns again at the trial prior to Grunloh's testimony, noting that the questioning would be beyond the scope of their direct examination regarding the survey done by Grunloh. The trial judge agreed, ruling that testimony beyond the scope of direct examination would not be allowed, nor would testimony that violated her previous ruling that prohibited the mention of building codes not applicable to the defendants' circumstances.

¶ 15 On appeal, the plaintiff focuses in her opening brief on the latter half of the trial judge's ruling–regarding building codes–and makes no argument that the testimony she sought to elicit would not have been beyond the scope of the defendants' direct examination.

However, as the defendants point out, "[t]he scope of cross-examination is generally limited to the subject matter of direct examination and to matters that affect the witness's credibility." *Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 915 (2007). Moreover, "[t]he scope of cross-examination is within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion resulting in manifest prejudice." *Bauer*, 377 Ill. App. 3d at 915. In the case at bar, we find no error on the part of the trial court, because the testimony the plaintiff sought to elicit was beyond the scope of direct examination and did not affect Grunloh's credibility. At the trial, the defendants limited their direct examination of Grunloh to his education and experience as a professional engineer and land surveyor and to his survey of the area outside the defendants' restaurant, which, as noted above, was done to determine, with regard to the steps in question, where the defendants' property ended and the city of Altamont's right-of-way began. The questioning sought by the plaintiff clearly had nothing to do with Grunloh's survey, nor did it in any way call into question Grunloh's credibility as a witness. Accordingly, it was not permissible on cross-examination.

¶ 16 The plaintiff next argues that the trial judge erred in overruling the plaintiff's objection to the introduction, by the defendants, of a photograph of the building, known as the Beckman Institute, in which the plaintiff's expert witness, Dr. Kramer, worked, as well as related questioning of Dr. Kramer. The defendants sought to introduce the photograph to show that stairs leading to the "middle south entrance" to the building contained no handrail, a point that the defendants contended undermined the credibility of Dr. Kramer–who was scheduled to become the director of the Beckman Institute–with regard to his position that the lack of a handrail at the defendants' restaurant was a contributing factor to the plaintiff's injury. The plaintiff points out that Dr. Kramer did not own or design the Beckman Institute, nor was he even the institute's director at the time of his deposition, and that therefore the photograph and related questioning were irrelevant. The plaintiff also points out that no

foundation was laid to show a similarity of circumstances between the Beckman Institute and the defendants' restaurant, a prerequisite to the admission of otherwise irrelevant evidence. The defendants counter that because Dr. Kramer testified in his evidence deposition (which, as noted above, was read to the jury at the trial) that handrails can be used to prevent falls and that in his opinion, from a "human factors" standpoint, it is a good practice to have handrails for steps, it was appropriate on cross-examination to call into question his credibility by pointing out that the building in which he worked had no handrails. Dr. Kramer testified that the field of "human factors" was like a "combination of engineering and psychology" and that the Beckman Institute housed researchers from 43 fields at the University of Illinois, including "engineering, life sciences, physical sciences, and behavioral sciences." Accordingly, the defendants posit, the lack of handrails at one of the institute's entrances was probative of the general soundness of the opinion rendered by Dr. Kramer in the case at bar.

¶ 17 As the defendants note, during cross-examination, counsel may probe, *inter alia*, the "general soundness" of an expert witness's opinion. *Halleck v. Coastal Building Maintenance Co.*, 269 Ill. App. 3d 887, 897 (1995). Moreover, as noted above, "[t]he scope of cross-examination is within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion resulting in manifest prejudice." *Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 915 (2007). In the case at bar, we cannot conclude that the trial judge's decision to allow the defendants to cross-examine Dr. Kramer by pointing out the lack of handrails at the building in which he worked was an abuse of discretion that resulted in manifest prejudice to the plaintiff. Dr. Kramer testified without reservation that handrails can be used to prevent falls and that it was his expert opinion that from a "human factors" standpoint, it is a good practice to have handrails for steps; accordingly, the jury was entitled to learn, on cross-examination, that the building in which Dr. Kramer worked–which also housed departments making up the field of human factors–had a public entrance with

steps and no handrails. We do not agree with the plaintiff that this information was irrelevant. To the contrary, we believe it was appropriately probative of the soundness of Dr. Kramer's rendered opinion.

¶ 18 The plaintiff next contends the trial judge erred by refusing to allow Dr. Kramer, on redirect examination, to explain and clarify the absence of handrails at the institute's middle south entrance. Specifically, the plaintiff contends the jury should have been allowed to hear Dr. Kramer's testimony that there exists, on the east side of the Beckman Institute, a public entrance accessible to individuals in wheelchairs. The defendants point out, however, that the trial judge did allow the jury to hear Dr. Kramer testify that the Beckman Institute had a public entrance that was accessible to handicapped individuals. What she did not permit was additional testimony from Dr. Kramer that specifically referenced wheelchairs. The defendants argue that this additional testimony–which mentioned wheelchairs four times in the course of approximately one minute–would have been inflammatory and prejudicial because the plaintiff in the case at bar was not in a wheelchair and there was no basis for the conclusion that the defendants were required to have an entrance that was accessible to individuals in wheelchairs. We agree with the defendants that to the extent the cross-examination of Dr. Kramer regarding the lack of handrails at the middle south entrance might have "opened the door" to testimony about other entrances, the trial judge's decision to allow the jury to hear Dr. Kramer testify that an additional public entrance existed that was accessible to handicapped individuals was a just and proper remedy. Having reviewed the arguments of the parties and the record on appeal, we simply cannot conclude that the trial judge abused her discretion in so ruling.

¶ 19 The plaintiff also contends that the trial judge erred by overruling the plaintiff's objections to the defendants' questioning of Dr. Kramer about an authoritative text. Specifically, the plaintiff argues that no proper foundation was laid for the defendants to

question Dr. Kramer about the following statement found in a publication of the Canada Mortgage and Housing Corporation: "Most stair-related injuries occur on stairs with which the fall victim is familiar, such as those in one's home." The defendants counter that the questioning was proper, because Dr. Kramer listed the publication in question in a section of his written report entitled "Relevant Scientific Publications and Books" and testified on direct examination that the listed publications were peer-reviewed journals, scientific research, and governmental publications that were "considered to be scientifically valid and relied upon by experts in the field of human factors." Therefore, the defendants contend, no additional foundation was needed before the defendants could cross-examine Dr. Kramer about the publication.

¶ 20 We begin by noting that although the plaintiff takes issue with the cross-examination of Dr. Kramer about the publication in question, the plaintiff has not included Dr. Kramer's written report in the record on appeal. It is axiomatic that it is the responsibility of the appellant to provide a full and accurate record on appeal from which the points of appeal raised by the appellant may be addressed and that, in the absence of that record, all doubts arising from the incompleteness of the record are to be resolved against the appellant. See, *e.g.*, *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). We note, however, that the plaintiff does not contend that the publication in question does not exist, nor does the plaintiff contend that it was not listed, as the defendants claim, in Dr. Kramer's report. Instead, the plaintiff argues that the defendants should have provided Dr. Kramer with "a copy of the text" or identified the quoted statement from the text with a page number so that Dr. Kramer could "be sure that the [d]efendants were in fact quoting from the learned text." As the defendants note, however, before Dr. Kramer was asked about the quoted statement from the publication, the defendant described the source upon which the defendants' line of questioning on cross-examination was based: "a source that you relied on in your opinions

called the Canada Mortgage and Housing Corporation." Dr. Kramer responded, "Okay." Presumably, therefore, Dr. Kramer was familiar with the publication, and had he believed that the defendants were misquoting it, he certainly would have said so. On cross-examination, it is appropriate and permissible for counsel to probe, *inter alia*, "the weaknesses in the basis of [an expert's] opinion," and "[t]he facts, data, and opinions which form the basis of [an] expert's opinion, but which are not disclosed on direct examination, may be developed on cross-examination." *Halleck v. Coastal Building Maintenance Co.*, 269 Ill. App. 3d 887, 897 (1995). Here, Dr. Kramer testified on direct examination about the validity of the publications listed in his written report. The trial court did not abuse its discretion in allowing the defendants to probe, on cross-examination, the relationship between a statement in one of those publications and Dr. Kramer's ultimate opinion that a lack of familiarity with the restaurant's entrance contributed to the plaintiff's injury.

¶ 21 The plaintiff next contends that the trial judge erred by allowing the defendants to "appeal to the jury's sympathy" with some of the testimony they elicited. Specifically, the plaintiff argues that the defendants should not have been allowed (1) to ask Manny Trupiano and Joey Trupiano how many children they each had, (2) to elicit from Manny the fact that the Trupianos' father had developed lung cancer and that the Trupianos were required to make numerous trips to the hospital to visit him during the renovations to their restaurant, (3) to elicit from Joey the fact that the Trupianos' father passed away in 2006 and that their businesses bear their father's name, (4) to elicit from both Manny and Joey the fact that they brought Chris Sanders into their business because "they felt like he was a brother to them," and (5) to elicit from Manny that he once cried while at college because he did not want to be there, believing that his life was "pizzas," and that he got an apron for a present on his thirteenth birthday. The defendants counter that the plaintiff objected at the trial to only one of the foregoing allegations of error–regarding the diagnosis of the Trupianos' father with

cancer–and therefore forfeited the consideration of the other allegations of error. We agree but note that, even in the absence of forfeiture, we would not find reversible error on the part of the trial court, either with regard to the testimony objected to or that to which no objection was made. When a claim is made that a jury's verdict was based upon sympathy, this court "may set aside a jury determination only if it is clearly satisfied that the jury's finding was occasioned by passion or prejudice or is wholly unsupported by the evidence." *LaPook v. City of Chicago*, 211 Ill. App. 3d 856, 868 (1991). If a plausible basis exists for the result reached by the jury, this court should not engage in speculation that sympathy was the basis for the jury's decision. *LaPook*, 211 Ill. App. 3d at 868. In the case at bar, as described in detail above, there was ample evidence from which the jury could have reached its verdict, and we simply cannot conclude that the verdict was occasioned by sympathy for the defendants or that it is unsupported by the evidence.

¶ 22 The final argument raised by the plaintiff is that cumulative error deprived her of a fair trial. However, because we have found no errors on the part of the trial judge, there can be no cumulative error. See, *e.g.*, *People v. Garmon*, 394 Ill. App. 3d 977, 991 (2009) (no cumulative error is possible where there is no individual error).

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, we affirm the decision of the circuit court of Effingham County to deny the plaintiff's motion for a new trial.

¶ 25 Affirmed.