

No. 1-14-1695

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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BYRON LIPSCOMB,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2012 L 014097
	)	
RON GABA, M.D.,	)	
	)	
Defendant-Appellee.	)	
	)	
(Alvin Ruazol, R.N., Alan Ramin Mortezaie, M.D.	)	
and Johanna Fuentes, M.D.,	)	Honorable
	)	Lorna Propes,
Respondents-in-Discovery).	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirmed the judgment entered on the jury verdict in favor of defendant on plaintiff's medical malpractice action, where plaintiff forfeited review by failing to file any posttrial motions, and where, even considering the issue on the merits, the jury's verdict was not against the manifest weight of the evidence.

¶ 2 Plaintiff, Byron Lipscomb, filed a medical malpractice action against defendant, Dr. Ron Gaba, alleging that defendant negligently injured his kidney during the performance of a biopsy. A jury returned a verdict in favor of defendant. Plaintiff appeals the judgment entered on the verdict. We affirm.

¶ 3 The evidence at trial showed that plaintiff had been suffering from chronic end stage kidney disease for several years and that, by December 2010, it had advanced to stage IV or V (stage V being the most advanced stage). On January 12, 2011, defendant performed a real-time ultrasound-guided percutaneous renal biopsy (PRB) on plaintiff's kidney with the long-term aim of preserving his kidney function. During the procedure, plaintiff laid on his stomach and was scanned with the ultrasound machine and the images were projected onto a video monitor. Defendant used the ultrasound images as a guide to the proper positioning of the needle into the kidney, and as a guide to the removal of tissue samples that were examined by the pathologist.

¶ 4 The results of the PRB showed that plaintiff had 80% loss of kidney function secondary to hypertensive glomerulonephritis, a condition that could not be reversed or treated.

¶ 5 Plaintiff suffered significant bleeding and pain in the aftermath of the PRB. On January 14, 2011, defendant performed a renal angiogram on plaintiff, in which he injected dye into the kidney to identify the source of the bleed. Defendant located one vessel that was bleeding and he performed an embolization by inserting a small metallic coil into the vessel to stop the bleed. The same vessel subsequently began to bleed again, necessitating a blood transfusion. Defendant performed another angiogram and embolization on January 16, 2011.

¶ 6 Defendant wanted to perform a third surgery to repair the vessel, but plaintiff refused to undergo an additional surgery by defendant and instead opted for another interventional radiologist, Dr. Owen, to perform a third angiogram. Plaintiff remained in the hospital for two more weeks before going home. He went home with a protruding stomach and swollen legs. He was in severe pain.

¶ 7 A week after returning home, plaintiff was in so much pain that he was admitted overnight at the University of Chicago Hospital. A CAT scan was performed, the results of

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which showed that plaintiff had a very large blood clot on his kidney. Plaintiff went to another hospital where he received medications to shrink the blood clot and regulate his blood pressure. He was informed that he needed to go on dialysis.

¶ 8 Dr. Mark Edelman, an interventional radiologist retained by plaintiff, testified defendant violated the standard of care because he did not have adequate visualization of the kidney when inserting the biopsy needle. Dr. Edelman based his opinion on review of certain still pictures of the ultrasound moving picture; he testified that the images on the still pictures were almost indiscernible. As a result of the poor imaging, defendant inserted the needle in the wrong location, causing the excessive bleeding and necessitating the blood transfusion and embolizations.

¶ 9 Plaintiff also presented the testimony of Dr. William O'Neill, who practices nephrology, which is the diagnosis, study, and treatment of kidney disease. He described a kidney biopsy as a procedure involving the placement of a needle through the skin into a kidney to obtain a tissue sample. The lower portion or, "pole" of the kidney is the target for biopsies because it is the furthest away from organs which should not be punctured, as well as blood vessels, and large portions of the urinary space.

¶ 10 Dr. O'Neill stated that defendant deviated from the standard of care by not properly visualizing the kidney while performing plaintiff's biopsy. As evidence of this deviation, Dr. O'Neill pointed to the still images of the ultrasound and cited the bleeding around the kidney, the urinary tract, and the thoracic cavity which occurred after the procedure. The gross amount of blood in plaintiff's urine indicated that the biopsy needle pierced a large blood vessel and adjacent urinary space resulting in the direct bleeding into the urinary space. The amount of bleeding plaintiff experienced into his ureter occurs in less than 1% of cases.

¶ 11 Dr. O'Neill stated that plaintiff's three angiograms (necessitated by defendant's negligence) involved the injection of dye into the kidney to locate the bleeding, and that such dye is quite toxic to the kidney. The embolizations necessitated by defendant's negligence also damaged plaintiff's kidney and, likely, hastened his need for dialysis.

¶ 12 Defendant testified on his own behalf, stating that he has performed more than 100 PRB procedures in the course of his career. Defendant stated he had adequate visualization by ultrasound when he performed the PRB on plaintiff. The entire ultrasound film was not saved after the procedure. Rather, certain still images were retained. The still images were not of the same quality as the ultrasound film he viewed when performing the procedure. Defendant testified he complied with the standard of care when performing the PRB on plaintiff, notwithstanding that a blood vessel was injured.

¶ 13 Dr. Adam Finkelstein, an interventional radiologist retained by the defense, testified he has performed more than 200 ultrasound-guided PRBs and is familiar with the standard of care applicable to defendant in the performance of the procedure. Dr. Finkelstein opined that defendant's visualization of plaintiff's kidney was adequate during the PRB and that defendant complied with the standard of care. Dr. Finkelstein pointed out that the still images of the ultrasound that were retained did not reflect what defendant saw when he made his needle passes during the biopsy, because defendant was watching a motion picture.

¶ 14 Dr. Steven Korbet, a nephrologist at Rush University Medical Center retained by the defense, testified that plaintiff suffered a significant bleeding complication following the biopsy, and that such a complication occurs in 5% to 10% of all such biopsies. Dr. Korbet opined, to a reasonable degree of medical certainty, that the biopsy and complication did not accelerate plaintiff's need for dialysis. Dr. Korbet plotted the course of plaintiff's progressive kidney

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disease and explained it had progressed to stage V by December 2010, a month before the biopsy. Dr. Korbet projected that plaintiff would have needed dialysis within three to six months, regardless of whether he had the biopsy or the complication. Plaintiff started dialysis exactly six months after the biopsy.

¶ 15 On May 2, 2014, following all the evidence, the jury returned a verdict in favor of defendant.

¶ 16 Plaintiff did not file any posttrial motions. Instead, plaintiff directly appealed the jury verdict and filed his appellant's brief claiming that the jury's verdict was against the manifest weight of the evidence. Because plaintiff had not raised this issue in a posttrial motion, defendant moved for dismissal of the appeal.

¶ 17 On September 17, 2015, the appellate court granted defendant's motion to dismiss.

¶ 18 On January 15, 2016, plaintiff filed a petition for leave to appeal with the Illinois Supreme Court (Ill. S. Ct. No. 120319). On April 1, 2016, the petition was denied, however our supreme court entered a supervisory order that the dismissal of the appeal be vacated. The supervisory order further stated: "The appellate court is directed to permit the parties to complete briefing and then to resolve the appeal. This order is without prejudice to any subsequent finding of waiver/forfeiture by the appellate court, if appropriate."

¶ 19 Pursuant to our supreme court's supervisory order, we vacated our earlier dismissal order. We now proceed to address plaintiff's appeal.

¶ 20 On appeal, plaintiff argues that the jury verdict was against the manifest weight of the evidence. Plaintiff acknowledges that by not filing any posttrial motions, he failed to preserve the issue for appellate review. However, he asks that we set aside the forfeiture rule in the interest of justice.

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Section 2-1202 of the Illinois Code of Civil Procedure (Code) sets out strict rules for filing post-trial motions in jury trials. 735 ILCS 5/2-1202 (West 2016). Section 2-1202(b) states that "[r]elief desired after trial in jury cases, heretofore sought by reserved motions for directed verdict or motions for judgment notwithstanding the verdict, in arrest of judgment or for new trial, *must* be brought in a single post-trial motion." (Emphasis added.) 735 ILCS 5/2-1202(b) (West 2016).

¶ 21 Section 2-1202(e) of the code specifies what happens if a party in a jury case fails to file a post-trial motion. Subsection (e) states that "[a]ny party who fails to seek a new trial in his or her post-trial motion, either conditionally or unconditionally, as herein provided, waives the right to apply for a new trial, except in cases in which the jury has failed to reach a verdict." 735 ILCS 5/2-1202(e) (2016).

¶ 22 The Code treats nonjury cases very differently. Section 2-1203, governing the filing of post-trial motions in nonjury cases, states that a party "may" file a post-trial motion within 30 days after entry of judgment. Section 2-1203 does not specify what should be included in post-trial motions and says nothing about forfeiture or waiver. 735 ILCS 5/2-1203 (West 2016). Thus, "the plain language of the Code and its separate sections for jury and nonjury cases" indicate that the legislature intended separate rules and requirements for post-trial motions in jury and non-jury trials, with the failure to file a post-trial motion resulting in forfeiture in jury cases but not in non-jury cases. *Arient v. Shaik*, 2015 IL App (1st) 133969, ¶ 28.

¶ 23 There are two exceptions where a litigant need not file a post-trial motion to preserve his appeal following a jury trial. *Id.* ¶ 29. Under section 2-1202(e), forfeiture does not occur where the jury has failed to reach a verdict. 735 ILCS 5/2-1202(e) (West 2016). Second, the appellate

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court has carved out an exception for directed verdicts, so that it is not necessary for a party to file a post-trial motion after the trial court directs a verdict. *Arient*, 2015 IL App (1st) 133969,

¶ 29. In this case, the jury returned a verdict for defendant, and the trial court did not direct a verdict, so neither exception applies. As such, plaintiff forfeited any issue on appeal when he failed to file any post-trial motions following the jury verdict.

¶ 24 The same result is directed by Illinois Supreme Court Rule 366. Rule 366 states in relevant part that, in jury cases, "[a] party may not urge as error on review of the ruling on the party's post-trial motion any point, ground, or relief not specified in the motion." Ill. S. Ct. R. 366 (eff. Feb. 1, 1994).

¶ 25 Case law is consistent with the clear language of the code and rule. Failure to file any post-trial motion in a jury case consistently results in forfeiture of all arguments on appeal. *Arient*, 2015 IL App (1st) 133969, ¶ 34 (and cases cited therein).

¶ 26 Plaintiff requests that we overlook the forfeiture rule to achieve a just result. See *Levine v. EBI, LLC*, 2013 IL App (1st) 121049, ¶ 24 (forfeiture rule is a limitation on the parties and not the court, which has the responsibility of achieving a just result and maintaining a sound and uniform body of precedent).

¶ 27 Even if we addressed plaintiff's argument for a new trial on the merits, we would still affirm. In a medical malpractice case, plaintiff must prove the proper standard of care to measure defendant's conduct, defendant's negligent breach of the standard of care, and resulting injury proximately caused by defendant's lack of skill or care. *Jones v. Dettro*, 308 Ill. App. 3d 494, 498 (1999).

¶ 28 In reviewing the jury's verdict here in favor of defendant, we will set it aside only if it is against the manifest weight of the evidence. *Claro v. DeLong*, 2016 IL App (5th) 150557, ¶ 21.

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A verdict is against the manifest weight of the evidence when the opposite conclusion is clearly evident or the jury's findings are unreasonable, arbitrary, and not based on the evidence. *Id.*

¶ 29 In the instant case, there was conflicting evidence presented at trial regarding whether defendant violated the standard of care when performing the real-time ultrasound-guided PRB on plaintiff's kidney. Plaintiff's experts testified defendant violated the standard of care by not adequately visualizing the kidney, causing him to insert the needle in the wrong location; however, defendant and his expert stated that his visualization of the kidney was adequate and that he did not violate the standard of care. Another defense expert testified that plaintiff's injuries were not proximately caused by the PRB performed by defendant. The jury made a credibility determination in favor of defendant and his experts. It is the province of the jury to resolve conflicts in the evidence and to determine the credibility of the witnesses, and the reviewing court will not substitute its judgment therefor. *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). The jury's finding in favor of defendant was not against the manifest weight of the evidence.

¶ 30 For the foregoing reasons, we affirm the jury verdict and the judgment entered on the verdict.

¶ 31 Affirmed.