

No. 1-17-1307

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MAXIMA SALAZAR,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 12 L 14496
)	
GIOVANNI GIANNOTTI, M.D.,)	The Honorable
)	Elizabeth M. Budzinski,
Defendant-Appellee.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Griffin and Walker concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court did not abuse its discretion by denying plaintiff's motion for a new trial.
- ¶ 2 Plaintiff Maxima Salazar sued defendant Giovanni Giannotti, M.D. to recover damages for allegedly leaving a piece of gauze in plaintiff's neck following a hematoma removal. A jury returned a verdict in favor of defendant. The circuit court denied plaintiff's posttrial motion for a new trial. Plaintiff appeals, arguing that the circuit court abused its discretion by denying her motion for a new trial. For the following reasons, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 Plaintiff filed her initial complaint on December 27, 2012, and ultimately proceeded to trial on her second amended complaint, filed in January 2016. Plaintiff asserted that defendant¹ performed a thyroidectomy, also known as a thyroid lobectomy, on plaintiff on December 28, 2010. Plaintiff developed a hematoma in her neck. On January 19, 2011, defendant performed a hematoma extraction, wound culture, and packing. On March 15, 2011, defendant performed a wound exploration and removal of a piece of gauze from plaintiff's wound. Plaintiff alleged that defendant was negligent by failing to properly pack plaintiff's wound after the January 19, 2011, hematoma extraction, failing to properly perform a wound exploration, failing to properly remove a foreign body, and otherwise acted in a careless and negligent manner. Plaintiff alleged that defendant's negligence was a proximate cause of her injuries, including damage to her left recurrent laryngeal nerve, which caused vocal cord paralysis. Plaintiff's theory was that defendant was responsible for leaving a piece of gauze in plaintiff's wound after the January 19, 2011, hematoma extraction, that the gauze that was left in her neck on January 19, 2011, was the same gauze removed from her neck on March 15, 2011, and that the gauze injured her left recurrent laryngeal nerve, causing her to suffer from unilateral vocal cord paralysis.

¶ 5 Defendant answered the complaint, the parties engaged in discovery, and the matter proceeded to a jury trial. Prior to trial, the parties filed numerous motions *in limine*, two of which are relevant to the issues before us on appeal. Defendant's motion *in limine* No. 2 sought to bar any reference to defendant failing his critical care board examinations on his first two attempts. Defendant argued that the evidence was irrelevant and that any probative value was outweighed by its prejudicial effect. At the hearing on defendant's motion *in limine* No. 2, defendant argued

¹Plaintiff also asserted claims against Presence Saints Mary and Elizabeth Medical Center. Those claims were settled prior to trial and are not at issue in this appeal.

that he failed his critical care board exams twice before passing, and that he passed his surgical board exam on the first try. Defendant further argued that this case did not involve critical care and that defendant passed the critical care board exam five years before the events giving rise to plaintiff's claims. The circuit court granted defendant's motion *in limine* No. 2 and barred any reference at trial to defendant having twice failed his critical care board exams.

¶ 6 Defendant's motion *in limine* No. 4 sought to bar plaintiff's pathology expert, James Bryant, M.D., from giving any testimony as to the cause of plaintiff's injuries. Defendant argued that Bryant's testimony was cumulative of plaintiff's other expert witness, Robert Stephens, M.D., a general surgeon. Defendant also argued that Bryant was not qualified to provide opinions about surgical care. Bryant had not treated a live patient since at least 1984,² and had no staff privileges at a hospital since 1986. Defendant contended that Bryant had never removed a surgical sponge or gauze from a live patient, had not reviewed any surgical specimens since 2015, and was not familiar with the postoperative care of patients or follow up wound care following a thyroidectomy. Plaintiff disclosed that Bryant would testify that defendant's alleged negligence caused "permanent injuries, including but not limited to permanent scarring and permanent loss of [plaintiff's] vocal [cords] and use of her voice." Bryant, however, had never treated a patient with vocal cord paralysis, acknowledged at his discovery deposition that he was not familiar with the causes of vocal cord paralysis, and did not know whether vocal cord paralysis was a known and recognized complication of a thyroidectomy. Furthermore, defendant argued that Bryant was not familiar with the facts that formed the basis of his opinion that a piece of gauze removed from plaintiff's neck on March 15, 2011, caused her vocal cord paralysis, as he could not say when the gauze was placed in her neck, how long it would have to

²Defendant also pointed to our opinion in *Alm v. Loyola University Medical Center*, 373 Ill. App. 3d 1, 6 (2007) in which we noted that Bryant "had not evaluated a live patient since 1978."

be present to cause vocal cord paralysis, whether the injury occurred due to inflammation or scarring, whether there was in fact any scarring present, and whether the injury was to the vocal cords or to the nerve that controls them. After hearing argument on defendant's motion *in limine* No. 4 and reviewing Bryant's deposition transcript, the circuit court barred Bryant from testifying as to the standard of care, causation, and damages, finding in part that his causation opinions were cumulative of Stephens's opinions, and that there was no adequate foundation for Bryant's opinions.

¶ 7 On the first day of trial and immediately before opening statements, plaintiff sought leave to amend her complaint to assert a theory of *res ipsa loquitor*. Plaintiff does not direct our attention to a written motion for leave to file a third amended complaint or a proposed third amended complaint in the record on appeal. The circuit court denied plaintiff's motion for leave to amend, stating on the record that plaintiff could not demonstrate that defendant had exclusive control over the gauze because plaintiff had been instructed by defendant to change her wound dressing at home.

¶ 8 During opening statements, defense counsel stated that prior to the December 28, 2010, thyroidectomy, defendant "conducted a conversation with [plaintiff] about the risks of undergoing a thyroid lobectomy, undergoing [*sic*] the benefits and any surgical options she had short of not going through surgery." At trial, plaintiff called defendant as an adverse witness. Plaintiff's counsel sought to question defendant about whether plaintiff's consent to the surgery "relieve[d] [defendant] from any responsibility to not leave a sponge in the patient's body?" The circuit court sustained defendant's objection. Plaintiff's counsel then asked, "Does the written consent form allow you to make errors during surgery?" The circuit court again sustained defendant's objection. During a sidebar, the circuit court told plaintiff's counsel, "First of all, the

surgery is not at issue and *** there's no risk of leaving a sponge in the surgery [*sic*]." Defense counsel argued that "there's no evidence whatsoever that this surgery had any gauze left behind ***. It was the postoperative care after the development of the hematoma that we are talking about." The circuit court stated that plaintiff's line of questioning was misleading and barred plaintiff's counsel from pursuing a line of questioning regarding informed consent to the surgery. Plaintiff made an oral motion for a mistrial, which the circuit court denied.

¶ 9 The following evidence was presented during the seven-day jury trial.

¶ 10 Plaintiff testified that defendant performed a thyroidectomy on her on December 28, 2010. Plaintiff followed up with defendant on January 5, 2011, and defendant replaced the bandages on plaintiff's neck. Plaintiff followed up with defendant again on January 17, 2011, and her throat "started to get inflamed." Plaintiff went to defendant's office on January 19, 2011, and her throat was "very red," "very inflamed," and she could hardly speak. On that date, defendant removed a hematoma from plaintiff's neck. Defendant packed the wound with gauze. On January 20, 2011, plaintiff removed the bandage and saw the gauze on top of her wound. On January 21, 2011, plaintiff visited defendant's office and he removed the gauze he placed on the wound on January 19, 2011. Defendant instructed plaintiff to change her own bandages every day by placing a piece of gauze over the wound and covering it with a band-aid. She purchased gauze and bandages from Walgreens. Plaintiff testified that she never put any gauze into the wound. She followed up with defendant on five occasions after the removal of the hematoma. Her voice was hoarse, but improving. On March 11, 2011, plaintiff's wound had still not healed and "was leaking." On March 15, 2011, defendant performed another surgery to remove a piece of gauze from her wound.

¶ 11 Plaintiff's expert, Robert Stephens, M.D., testified that when a hematoma is removed, it leaves a cavity that is then filled, or "packed," with gauze, which allows fluid "to find its own way out." He believed that here, defendant put gauze into plaintiff's wound on January 19, 2011, which was the same gauze removed from plaintiff's neck on March 15, 2011. Stephens opined that plaintiff deviated from the standard of care by leaving the gauze in plaintiff's wound for that long. He further opined that by placing a foreign body in a wound, the foreign body causes scarring as part of the healing process. Plaintiff's left recurrent laryngeal nerve became encapsulated in the scar tissue caused by the gauze, and the nerve was injured when defendant removed the gauze on March 15, 2011, resulting in paralysis of the vocal cord, which made it difficult for plaintiff to speak. On cross-examination, Stephens conceded that recurrent laryngeal nerve injuries are a known and recognized complication of a thyroidectomy and that such injuries can occur in the absence of negligence. He also conceded that there was no way to prove his theory that plaintiff's vocal cord injury was the result of the placement and removal of the gauze. Stephens did not know the size of the gauze that plaintiff used to change her own wound dressing, and acknowledged that Walgreens sold gauze that matched the description of the gauze removed from plaintiff's neck.

¶ 12 Defendant testified that the gauze he removed from plaintiff's neck on March 15, 2011, was not the same gauze that he used to pack plaintiff's wound on January 19, 2011. He further stated that he did not have any gauze in his office that matched the size of the gauze removed from plaintiff's neck, and that he did not cut his gauze into pieces the same size as the piece removed from plaintiff's neck. Defendant explained that he packs wounds by creating a tip in the gauze "that goes down into the wound, more like a pencil. *** [T]hen the rest easily folds on top" and is covered with tape or a bandage.

¶ 13 Defendant's expert, Alan Loren, M.D., a surgeon, testified that the gauze removed from plaintiff's neck was nowhere near plaintiff's left laryngeal nerve, as the gauze was removed from plaintiff's subcutaneous tissue and not from deep within plaintiff's neck. He opined that plaintiff's left laryngeal nerve was partially injured during her initial thyroidectomy in December 2010.

¶ 14 After hearing all of the evidence, the jury returned a verdict in favor of defendant and the circuit court entered judgment on the verdict. Plaintiff filed a timely posttrial motion to vacate the judgment, for judgment notwithstanding the verdict, and alternatively for a new trial. The posttrial motion asserted, in relevant part, that (1) defendant's objections to plaintiff's questions regarding informed consent should not have been sustained and plaintiff's motion for a mistrial should have been granted, (2) plaintiff should have been permitted to file an amended complaint to assert a theory of *res ipsa loquitor*, (3) Bryant was improperly barred from offering opinions on the issue of causation, (4) plaintiff should have been permitted to question defendant about twice failing his critical care board exams, and (5) the jury's verdict was against the manifest weight of the evidence. The circuit court denied plaintiff's posttrial motion. Plaintiff filed a timely notice of appeal.

¶ 15 ANALYSIS

¶ 16 On appeal, plaintiff argues that the circuit court abused its discretion by denying her posttrial motion. Specifically, plaintiff contends that the circuit court abused its discretion by (1) barring Bryant from offering any causation opinions, (2) sustaining defendant's objections to plaintiff's questions related to informed consent and denying plaintiff's motion for a mistrial, (3) barring plaintiff from questioning defendant about twice failing his surgical board exams, and (4) denying plaintiff leave to amend her complaint to assert a theory of *res ipsa loquitor*. She

also argues that she established defendant's negligence at trial and that, coupled with the circuit court's alleged errors, the jury's verdict was against the manifest weight of the evidence. We address these arguments in turn. We will only reverse the circuit court's ruling on a motion for a new trial where the moving party affirmatively shows the circuit court abused its discretion. *Velarde v. Illinois Central R.R. Co.*, 354 Ill. App. 3d 523, 537-38 (2004).

¶ 17 Plaintiff's first argument is that Bryant should have been allowed to offer his opinions regarding causation. Plaintiff argues that Bryant would have testified based on his expertise as a pathologist that plaintiff's injury was caused by inflammation from a foreign object lodged in her neck in proximity to the left laryngeal nerve for over five weeks. Plaintiff quarrels with the circuit court's decision to bar Bryant's causation testimony but makes little effort to demonstrate how Bryant was actually qualified to give the opinion he sought to offer.

¶ 18 The circuit court has broad discretion in determining the admissibility of expert opinion testimony, and we review the circuit court's decision for an abuse of discretion. *Baley v. Federal Signal Corp.*, 2012 IL App (1st) 093312, ¶ 75. The proponent of the expert testimony has the burden of demonstrating that the opinions should be admitted. *Id.* The proponent " 'must demonstrate that the witness is properly qualified as an expert based on his education, training, experience, or a combination of each [citation] and that the witness'[s] opinion is not [to be] based on speculation or conjecture [citation]." ' *Id.* (quoting *Volpe v. IKO Industries, Ltd.*, 327 Ill. App. 3d 567, 576 (2002)).

“ ‘An expert is qualified where (1) his opinion relates to a science, profession, business, or occupation and is beyond the knowledge or experience of the average person; (2) he has sufficient skill, knowledge or experience so that his opinion will aid the trier of fact; and (3) the state of the art or scientific knowledge permits

a reasonable opinion to be asserted by an expert.’ ” *Baley*, 2012 IL App (1st) 093312, ¶ 76 (quoting *Pease v. Ace Hardware Home Center of Round Lake No. 252c*, 147 Ill. App. 3d 546, 562 (1986)).

¶ 19 Here, we find that the circuit court did not abuse its discretion in barring Bryant from offering his causation opinions. The only excluded opinion that plaintiff complains of is Bryant’s purported opinion that plaintiff’s injury was caused by inflammation from a foreign object lodged in plaintiff’s neck in proximity to the left laryngeal nerve for over five weeks. We first observe that Stephens, plaintiff’s surgical expert, was permitted to offer this exact same causation opinion to the jury. Therefore, plaintiff was not prejudiced by the circuit court’s order barring Bryant from offering an identical causation opinion.

¶ 20 Second, the circuit court properly exercised its discretion in concluding that Bryant was not qualified to offer any causation opinions because Bryant failed to demonstrate sufficient knowledge such that his opinion would aid the jury. Bryant’s opinion was premised on the general principle that when a foreign object is left in a wound, scarring occurs as a result of inflammation. At his discovery deposition, Bryant was asked “are you familiar with vocal cord paralysis and the causes for vocal cord paralysis?” His response was “No, I’m not.” Bryant was asked, “Would you agree *** that unilateral vocal cord paralysis is a known and recognized complication of a thyroid lobectomy?” His response was “I don’t know.” Bryant had never treated a patient that sustained unilateral vocal cord paralysis after a foreign body was left a wound. He was not familiar with postoperative care of patients or wound care after a thyroidectomy. Nor did Bryant consider any other potential causes of vocal cord paralysis other than the gauze that was eventually removed from plaintiff’s neck. From these facts, the circuit court could reasonably conclude that Bryant was not qualified to offer an expert opinion that the

gauze left in plaintiff's neck caused her vocal cord paralysis, particularly where Bryant was not familiar with the injury at issue or the causes of the injury. In sum, the circuit court did not abuse its discretion in barring Bryant from offering causation opinions.

¶ 21 Plaintiff next argues that the circuit court abused its discretion by sustaining defendant's objections to plaintiff's questions related to informed consent and by denying plaintiff's motion for a mistrial. At trial, the circuit court sustained defendant's objections to plaintiff's question about whether plaintiff's written consent to the December 28, 2010, thyroidectomy permitted defendant to allegedly leave a piece of gauze in plaintiff's neck following the January 19, 2011, hematoma extraction. Plaintiff contends that defendant was permitted to argue in its opening statement that defendant advised plaintiff of the risks of the thyroidectomy, and therefore plaintiff should have been permitted to rebut that evidence by showing that plaintiff did not consent to defendant leaving any gauze in her neck or consent to defendant committing malpractice. She relies on *Legestee v. Days Inn Management Co.*, 303 Ill. App. 3d 935, 942 (1999) to argue that "rebuttal evidence and testimony is admissible if it tends to explain, repel, contradict, or disprove the evidence of the defendant." She relies on *Flanagan v. Redondo*, 231 Ill. App. 3d 956, 967 (1991) to argue that "[i]f a defendant presents in its case in chief an affirmative matter to support its defense, the plaintiff then has the right to introduce evidence in rebuttal as to such affirmative matters."

¶ 22 We review a circuit court's evidentiary rulings for an abuse of discretion. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 92 (1995). Likewise, we review the circuit court's decision on a motion for mistrial for an abuse of discretion. *Lovell v. Sarah Bush Lincoln Health Center*, 397 Ill. App. 3d 890, 899 (2010). A circuit court abuses its discretion only if it acts arbitrarily without the employment of conscientious judgment, exceeds the bounds of reason and

ignores recognized principles of law, or if no reasonable person would take the position adopted by the court. *Schmitz v. Binette*, 368 Ill. App. 3d 447, 452 (2006).

¶ 23 We find no abuse of discretion. First, the only issues at trial were related to defendant's extraction of the hematoma and the follow-up treatment from that procedure. Plaintiff never asserted that defendant left a piece of gauze in the surgical cavity during the December 28, 2010, thyroidectomy, and never asserted that defendant was negligent in performing the thyroidectomy. Therefore, whether plaintiff consented to the thyroidectomy and the scope of her consent to that procedure were not relevant or material to any issue in plaintiff's case, and evidence concerning plaintiff's informed consent to the thyroidectomy was not admissible. See Ill. R. Evid. 401 (eff. Jan. 1, 2011) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); see also Ill. R. Evid. 402 (eff. Jan. 1, 2011) ("Evidence which is not relevant is not admissible.").

¶ 24 Second, we disagree with plaintiff's contention that her questions were attempts to rebut defendant's "evidence," and find her reliance on *Legestee* and *Redondo* misplaced. Those cases involved the circuit court's refusal to allow a party to present rebuttal evidence in response to testimony elicited at trial. *Legestee*, 303 Ill. App. 3d at 943-44 (finding reversible error where the plaintiff was not permitted to present rebuttal evidence to explain, discredit, or impeach the defendant's testimony on an affirmative matter); *Redondo*, 231 Ill. App. 3d at 967 (explaining that "when an occurrence witness presents newly discovered evidence, and the trial court allows one party's expert to respond to that evidence, the court must allow the other party's expert to comment on the evidence unless the court finds that that party acted in bad faith in its presentation of the evidence"). Here, defense counsel made comments in her opening statement

that defendant informed plaintiff of the risks of a thyroidectomy. This was an uncontroverted factual statement about the course of events leading to plaintiff's alleged injury and was not an attempt to show that plaintiff consented to being injured or that plaintiff's consent permitted defendant to be negligent. Defendant never argued or presented any evidence that one of the risks of the initial thyroidectomy was that defendant might leave a foreign object in the surgical cavity during a subsequent hematoma extraction, or that plaintiff consented to such a risk at the time she consented to the thyroidectomy. Thus, plaintiff's attempt to question defendant on issues regarding informed consent to the thyroidectomy did not rebut any evidence presented by defendant.

¶ 25 Furthermore, defendant introduced evidence that plaintiff's alleged injury—vocal cord paralysis resulting from an injury to her left recurrent laryngeal nerve—was a known risk of the initial surgery, and offered expert testimony as to how that injury could have occurred. Loren, defendant's surgical expert, explained that an injury to plaintiff's left recurrent laryngeal nerve was a known and recognized complication of a both a thyroidectomy and the development of a hematoma following a thyroidectomy. In other words, defendant's theory was that plaintiff's left recurrent laryngeal nerve was injured before the hematoma extraction and the packing of plaintiff's surgical wound. Plaintiff's own expert Stephens conceded that recurrent laryngeal nerve injuries are a known and recognized complication of a thyroidectomy and that such injuries can occur in the absence of negligence. Plaintiff's attempt to question defendant about the scope of the informed consent to the initial thyroidectomy therefore did not rebut any of defendant's actual trial evidence and was therefore neither relevant nor material to any issue in this case. The circuit court properly exercised its discretion in sustaining defendant's objections

to plaintiff's questions about plaintiff's consent to the thyroidectomy, and for the same reasons, properly denied plaintiff's motion for a mistrial.

¶ 26 Next, plaintiff argues that the circuit court abused its discretion by barring plaintiff from questioning defendant about twice failing his critical care board exams. She argues that "Illinois law is unambiguous in that when a defendant-physician who is being sued for malpractice testifies as an expert, evidence about his age, practice, and failure to pass board certification examinations is relevant and admissible." She primarily relies on *Rockwood v. Singh*, 258 Ill. App. 3d 555 (1993) to support her argument.

¶ 27 We again find that the circuit court did not abuse its discretion by denying plaintiff the opportunity to elicit testimony that defendant twice failed his critical care board exams. *Rockwood* stands for the proposition that "[g]enerally, when a physician sued for malpractice testifies as an expert, evidence as to his age, practice, and like matters relating to his qualifications as an expert is admissible." *Id.* at 557. Other cases have held, however, that when an expert witness in fact holds a license, the fact that the witness previously failed a licensure examination has scant probative value that is outweighed by its prejudicial impact. *O'Brien v. Meyer*, 196 Ill. App. 3d 457, 464 (1989); see also *Gossard v. Kalra*, 291 Ill. App. 3d 180 (1997) (finding no abuse of discretion where the circuit court barred any reference to the defendant's previous board examination failures where the defendant eventually passed the board examinations and possessed a board certification for six and a half years at the time of his treatment of the plaintiff).

¶ 28 As an initial matter, plaintiff's appellate brief makes no effort to show that defendant testified as expert, as she does not cite to any portion of defendant's trial testimony in which he offered any opinions regarding the applicable standard of care or causation. Plaintiff thus fails to

demonstrate that the principles governing expert witnesses' qualifications apply to defendant. Regardless, the situation before us is more analogous to *O'Brien* and *Gossard* than it is to *Rockwood*. Here, defendant passed his critical care board exam five years before the treatment at issue in this case. Any reference to defendant's previous failures of critical care boards would have little probative value and would be heavily outweighed by the prejudicial effect. Furthermore, the area of medicine at issue in this case was general surgery and not critical care. It is undisputed that defendant passed his surgical board exam on the first try. Thus, whether defendant had previously failed the critical care board exam was irrelevant to any issue in this case. The circuit court did not abuse its discretion by denying plaintiff the opportunity to question defendant about having previously failed his critical care board exams.

¶ 29 Plaintiff next argues the circuit court abused its discretion by denying plaintiff leave to amend her complaint to include a theory of *res ipsa loquitur*. She contends that the gauze at issue was subcutaneous and was thus removed from a location over which she had no control, and that gauze is not ordinarily left in a wound absent negligent conduct by a doctor. She also complains that as a result of the circuit court's denial of her motion for leave to amend, she was not permitted to have the jury instructed on *res ipsa loquitur*.

¶ 30 Pleadings may be amended "[a]t any time before final judgment*** on just and reasonable terms." 735 ILCS 5/2-616(a) (West 2016). Motions to amend under section 2-616 are to be "liberally construed to allow cases to be decided on their merits rather than on technicalities." *Lawry's The Prime Rib, Inc. v. Metropolitan Sanitary District of Greater Chicago*, 205 Ill. App. 3d 1053, 1058 (1990). The circuit court's decision on a motion for leave to amend falls within its sound discretion, "and the test for determining whether it has abused that discretion is whether its decision furthers the ends of justice." *Id.* In order to determine

whether the circuit court abused its discretion in denying plaintiff leave to file an amended pleading, we consider whether (1) the proposed amendment would cure the defective pleading, (2) defendant would sustain prejudice or surprise by virtue of the proposed amendment, (3) the proposed amendment is timely, and (4) previous opportunities to amend the pleading could be identified. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 31 We find no abuse of discretion. First, even assuming that plaintiff was capable of asserting a negligence claim against defendant on a theory of *res ipsa loquitur*, plaintiff did not seek to assert such a claim until the first day of trial despite amending her complaint on two occasions over the course of four years of litigation. When considering all four of the *Loyola* factors, the circuit court could have reasonably concluded that a last-minute amendment to the complaint asserting a new theory of defendant's negligence for the first time in the fourth year of litigation would be prejudicial to defendant and would not further the ends of justice. Under these circumstances, we cannot say that the circuit court's decision to deny leave to amend was an abuse of discretion.

¶ 32 Furthermore, plaintiff's *res ipsa loquitur* theory was unlikely to succeed. Under the doctrine of *res ipsa loquitur*, "the facts of the occurrence show *prima facie* the defendant's negligence if the plaintiff establishes (1) that the occurrence is one that ordinarily does not occur in the absence of negligence and (2) that the defendant had exclusive control of the instrumentality that caused the injury." *Dyback v. Weber*, 114 Ill. 2d 232, 242 (1986). Upon such a showing, the occurrence itself "affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from want of proper care." (Emphasis omitted.) *Id.* (citing *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446, 449 (1965)). The plaintiff "need only

present evidence reasonably showing that elements exist that allow an inference that the occurrence is one that does not occur without negligence.” *Id.*

¶ 33 Here, plaintiff could not demonstrate that defendant had exclusive control over her wound site. It was undisputed that following the hematoma extraction, plaintiff was given instructions on how to change the bandages and gauze covering the wound site, that she purchased her own gauze, and that she changed the gauze and bandages covering her wound every day between visits to defendant’s office. It is clear that both plaintiff and defendant had some degree of control over the gauze that was placed on and around plaintiff’s wound site. Plaintiff thus could not demonstrate that defendant had exclusive control over the injury-causing instrument. Therefore, the circuit court could reasonably conclude, along with the other factors discussed above, that permitting plaintiff to amend her complaint to assert a theory of negligence premised on the doctrine of *res ipsa loquitor* would not further the ends of justice.

¶ 34 Finally, plaintiff contends that the jury’s verdict was against the manifest weight of the evidence. She argues that she established defendant’s negligence by showing that defendant packed plaintiff’s wound on January 19, 2011; defendant removed the packing five weeks later; plaintiff’s injury was the result of an injury to the laryngeal nerve, which was near where defendant packed plaintiff’s wound with gauze; and that there was no evidence that plaintiff packed her own wound. She also contends that, in addition to establishing defendant’s negligence, the circuit court’s alleged errors discussed above render the jury’s verdict against the manifest weight of the evidence.

¶ 35 “A new trial should be granted only when the verdict is contrary to the manifest weight of the evidence.” *York v. Rush-Presbyterian-St. Luke’s Medical Center*, 222 Ill. 2d 147, 178-79 (2006). “A verdict is contrary to the manifest weight of the evidence when the opposite

conclusion is clearly evident or when the jury's findings prove to be unreasonable, arbitrary and not based upon any of the evidence." *Id.* at 179. "[I]t 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). A court of review "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." *Id.* at 452-53.

¶ 36 The jury's verdict was not against the manifest weight of the evidence. Plaintiff's argument on appeal focuses solely on the facts that are most favorable to her position. But the jury heard evidence that called into question whether the gauze removed from plaintiff's neck was the same gauze used by defendant on January 19, 2011, following the hematoma extraction. The jury heard evidence that the gauze extracted from plaintiff's neck was not deep enough to have caused any injury to plaintiff's left recurrent laryngeal nerve. The jury also heard evidence from plaintiff's own expert that injuries to the left recurrent laryngeal nerve are a known complication of a thyroidectomy and that such injuries can occur in the absence of any negligence. This case involved factual disputes and a classic battle of the experts on the issue of causation. It was for the jury to make determinations regarding the facts and the witnesses' credibility. Based on the record before us, we cannot say that the jury's verdict was unreasonable, arbitrary, or not based on the evidence. We find that that the jury's verdict was not against the manifest weight of the evidence. Therefore, the circuit court did not abuse its discretion by denying plaintiff's motion for a new trial.

¶ 37

CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 39 Affirmed.