

2012 IL App (2d) 110575-U
No. 2-11-0575
Order filed October 26, 2012

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

CAROLYN DAVIS, as Special Administrator of the Estate of Roger Davis, Deceased, and as Guardian for Benjamin L. Davis and Matthew A. Davis, Minors,)	Appeal from the Circuit Court of Winnebago County.
)	
Plaintiff-Appellant,)	
)	
v.)	No 07-L-329
)	
SWEDISHAMERICAN HOSPITAL and JEFFREY S. ROYCE,)	
)	Honorable
)	J. Edward Prochaska,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hudson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err either in the timing or the substance of its *in limine* rulings on Dead-Man's Act issues; the trial court did not abuse its discretion in allowing cross-examination and limiting redirect examination of plaintiff's expert witness; and the trial court did not abuse its discretion in precluding examination and comment about certain items in decedent's medical chart.

¶ 2 Plaintiff, Carolyn Davis, as special administrator of the estate of Roger Davis, deceased, and as guardian for Benjamin and Matthew Davis, minors, sued defendants, Dr. Jeffrey S. Royce and

SwedishAmerican Hospital for professional negligence in the decedent's death from an undiagnosed pulmonary embolus. Following a jury verdict in favor of defendants, plaintiff appeals, arguing that the trial court erred by issuing a ruling *in limine* on whether plaintiff waived certain protections of the Dead-Man's Act (735 ILCS 5/8-201 (West 2010)) before trial commenced and evidence had been offered; the trial court erred in allowing cross-examination of plaintiff's proximate cause expert on the topic of the standard of care while restricting the redirect examination; and the trial court erred by precluding plaintiff from questioning and arguing about missing or tardily produced medical records. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On September 6, 1996, decedent made an appointment with his primary care physician, Dr. Royce, at the Valley Clinic in Rockford, Illinois, because he was not feeling well that day. This appointment came one week after the decedent had undergone a physical, recorded on a Department of Transportation (DOT) physical examination form, which yielded normal results. This DOT physical examination form was never produced by defendants.

¶ 5 At approximately noon on September 6, 1996, decedent appeared for his appointment, and Wendy Adams, an employee of Valley Clinic and a patient care assistant, placed him in an examination room. Royce testified that he fit decedent into his schedule because of his relationship with decedent and his family, all of whom he treated. Royce further testified that decedent and he developed a warm relationship over time as he brought his children in for check-ups and other appointments, and Royce enjoyed interacting with decedent.

¶ 6 After placing decedent in the examination room, Adams recorded his complaints and why he wanted an examination. Adams noted that decedent complained of shortness of breath, denied

experiencing chest pains, and complained that his mouth was dry and his stomach felt full. Adams further noted that decedent stated that he thought he was coming down with a cold. Decedent also denied that he had any numbness or tingling in his arms or hands. Adams took defendant's vital signs which were normal. Specifically, decedent's blood pressure was 128/80, his temperature was 97.7° F, and his pulse rate was 74.

¶ 7 Thereafter, Royce examined decedent. Royce took a history and conducted a physical examination. Royce recorded: "Patient comes in not feeling well. He has had some dyspnea [shortness of breath] on exertion. He has had a bloated feeling in his stomach, just feels like his stomach is cold and full." The physical examination was generally reassuring and Royce recorded:

"Lungs: Clear without rales or wheezes.

Heart: Regular S1 and S2, no murmurs or extra sounds.

Abdomen: Obese, soft, nontender. Bowel sounds are present. No CVA tenderness [*i.e.* no kidney pain upon palpation].

Legs: Demonstrate trace edema."

¶ 8 Royce ordered some diagnostic studies and labwork to further evaluate decedent's condition. Specifically, Royce ordered a chest x-ray which showed a "borderline" enlargement of the heart, but no pulmonary edema or infiltrates. A strep screen gave a negative result. Blood was drawn and tested. A complete blood count was ordered to look for infection or anemia, and a blood-chemistry panel was ordered to obtain a metabolic look at decedent's body. The blood work showed a high white cell count, indicative of an infection, a "left shift," meaning lowered lymphocytes (viral fighting cells) and elevated segmented neutrophils ("segs"—infection fighting cells), further

suggesting the presence of an infection. A urine sample was taken and analyzed, showing a “large amount” of red blood cells and 4+ protein.

¶ 9 Royce considered all of the information at hand—the test results, positive and negative findings, his examination of decedent, and decedent’s reported history. Royce determined that all of the symptoms plus the lab results (including the proteins and blood cells found in his urine) were consistent with acute glomerulonephritis (GN), a kidney problem. Royce ordered follow-up testing and labwork for that condition.

¶ 10 Royce testified that the diagnosis of GN explained why decedent did not feel well, because it causes inflammation. Similarly, because GN affects the kidneys, and the kidneys are located in the abdominal cavity, a patient can experience feelings of bloatedness and nausea with GN. Shortness of breath is a nonspecific symptom and can occur when a person does not feel well, and this fact, according to Royce, accounts for decedent’s report of shortness of breath on exertion. In addition, the fact that decedent weighed over 300 pounds also helped to explain the symptom of shortness of breath. In addition to Royce, plaintiff’s expert witnesses agreed that shortness of breath is a nonspecific symptom that relates to hundreds of diseases as well as pulmonary embolus. The clincher for Royce was the presence of blood and protein in decedent’s urine: those symptoms are consistent with GN and other kidney problems, but are never related to pulmonary embolism. Royce and defendant’s experts further noted that, in light of how decedent presented during his September 6, 1996, examination, the diagnosis of GN was reasonable. All noted that decedent did not exhibit shortness of breath or chest pain during the time he was with Royce.

¶ 11 Defendants’ experts and witnesses also testified that, based on the examination results and test results, a diagnosis of pulmonary embolus did not fit. Contrarily, plaintiff’s experts testified

that, because pulmonary embolus had not been conclusively ruled out, it still should have been considered and that Royce should have ordered the specific testing that would have ruled it out. Plaintiff's experts, Dr. Wayne Blount, a family medicine physician and expert, and Dr. Harold Palevsky, a pulmonologist and expert in pulmonary diseases, agreed that a diagnosis of pulmonary embolus is difficult to make. Both further agreed that decedent did not present with classic symptoms of pulmonary embolus like pleuritic chest pain, elevated heart rate, coughing blood, and feelings of doom or foreboding. Both testified that other symptoms, like abnormal lung sounds (rales, or crackles), an S4 sound in the heart, and "increased P2" were also common symptoms. Both experts acknowledged that decedent did not present at his examination with any of the usual symptoms.

¶ 12 Palevsky testified that, in his own studies, most of the time a patient with a pulmonary embolism will present some type of x-ray abnormality, like atelectasis (lung collapse), pulmonary parenchymal abnormalities (opacity showing up on the radiograph), or pleural effusion (a build-up of fluid between the lung and the chest wall). In addition, both Blount and Palevsky testified that decedent did not have common risk factors associated with pulmonary embolus, including previous episodes of venous thromboembolism; major surgery to the hip or knee; congestive heart failure; pelvic, hip, or leg fracture; high-dose estrogen therapy; age greater than 40 years; prolonged bed rest; an active episode of cancer; leg paralysis; recent immobilization; or leg pain.

¶ 13 By contrast, defendant's expert witnesses, Dr. Peter Kiefer, a family practice physician and expert, and Dr. Howard Katz, a pulmonologist and pulmonology expert who had been a team physician for the Chicago Bears, testified that GN was an appropriate diagnosis based on decedent's presentation, the examination, history, and lab results developed during decedent's visit with Royce.

Both Katz and Kiefer testified that Royce met the applicable standards of care in diagnosing decedent during the September 6, 1996, visit. Both testified that pulmonary embolus did not appear to be a reasonable possibility based on decedent's presentation during his examination on that date.

¶ 14 Following the presentation of evidence, the jury issued a verdict in favor of defendants. Plaintiff filed a posttrial motion which the trial court denied. Plaintiff timely appeals.

¶ 15 II. ANALYSIS

¶ 16 On appeal, plaintiff challenges the trial court's ruling on her motion *in limine* to determine whether certain of decedent's conversations with Royce would be barred by the Dead Man's Act. Specifically, plaintiff contends that the trial court erred in definitively ruling before any evidence or testimony had been offered. Plaintiff also contends that the trial court improperly allowed her expert witness, Palevsky, to be cross-examined regarding the standard of care despite the fact that she maintains that she did not address that topic during the direct examination of Palevsky; further, the trial court compounded its error by limiting her redirect examination of Palevsky to preclude questioning on the standard of care. Specifically, plaintiff objects to the limitation because she asserts that the cross-examination opened the door to the standard-of-care redirect examination. Last, plaintiff argues that the trial court erred in prohibiting testimony about a missing medical record relating to decedent's DOT physical examination a week before his fatal complaint. In addition, plaintiff contends that the trial court erred in precluding her challenge to the reliability of decedent's medical chart when, according to plaintiff, two pages were somewhat tardily produced, namely six years after decedent's death, two years after they were first requested, and 14 months after this suit was initiated. We address each contention in turn.

¶ 17 We begin, as we are wont, with our standard of review. Plaintiff's issues on appeal all involve the trial court's evidentiary rulings. The decision whether to admit evidence rests within the trial court's sound discretion. *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 28. Likewise, the extent and scope of cross-examination is also within the trial court's sound discretion. *Doe v. Lutz*, 281 Ill. App. 3d 630, 639 (1996). We review the trial court's evidentiary decisions for an abuse of discretion. *Law Offices*, 2011 IL App (1st) 101849, ¶ 28.

¶ 18 Plaintiff is seeking a new trial based upon the trial court's purported errors in its evidentiary rulings. A party in such a situation is not entitled to a new trial unless the trial court's evidentiary error was substantially prejudicial and affected the outcome of the trial. *DiCosolo v. Janssen Pharmaceuticals, Inc.*, 2011 IL App (1st) 093562, ¶ 40. The party seeking the new trial bears the burden of establishing prejudice and showing that the trial court's erroneous evidentiary ruling affected the outcome of the trial. *DiCosolo*, 2011 IL App. (1st) 093562, ¶ 40. An example of the sort of error requiring the remedy of the grant of a new trial is where erroneously excluded evidence deprived the party of the opportunity to prove its theory of the case. *Schmidt v. Ameritech Illinois*, 329 Ill. App. 3d 1020, 1041 (2002). Thus, to summarize, we consider the trial court's evidentiary rulings for an abuse of discretion; if erroneous, a new trial will be granted only where the evidence prejudiced the opposing party and affected the outcome of the trial. With these principles in mind, we turn to plaintiff's particular contentions.

¶ 19 Plaintiff tries to frame her first issue as a misapplication of the Dead-Man's Act, arguing, effectively, that the trial court decided the issue too early (before trial and before any evidence had been elicited). Plaintiff also minimizes the fact that the trial court's ruling came in response to her

motion *in limine* seeking to preclude defendants from testifying about anything decedent told Royce during his office visit. Plaintiff emphasizes that the cases she relied upon in litigating her motion *in limine* arose as a result of the waiver of the Dead-Man's Act occurring during trial, and not before trial. Plaintiff concludes that the trial court erred by resolving the Dead-Man's Act issue before any evidence had been offered. We disagree.

¶ 20 In the first place, it was plaintiff who submitted the issue to the trial court before trial using a motion *in limine* to attempt to resolve the issue. A motion *in limine* allows a party to obtain a ruling on the admissibility or inadmissibility of evidence in advance of the trial. *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 871 (2004). The moving party will know whether he or she can ask questions concerning the subject matter of the ruling *in limine* and whether that issue is subject to comment during opening statement and closing argument. See *Compton*, 353 Ill. App. 3d at 871. It is true that the trial court is somewhat disadvantaged when considering a motion *in limine*, because the motion is considered in a vacuum before the full evidence is presented which may require a different result regarding the admission or exclusion of the evidence at issue. *Compton*, 353 Ill. App. 3d at 871. Despite this difficulty, courts are urged to provide rulings on motions *in limine* before trial. See, e.g., *People v. Patrick*, 233 Ill. 2d 62, 70 (2009) (ruling on a motion *in limine* before trial allows party to plan its case).

¶ 21 Here, for purposes of the motion *in limine*, the parties provided the trial court with a summary of what they believed the evidence admitted at trial would be; the trial court had a clear understanding of what the evidence to be offered by plaintiff and defendant was likely to be. The evidence admitted at trial was, in fact, in agreement with the summaries provided in the hearing on the motion *in limine*. In addition, plaintiff did not ask the trial court to delay its ruling until evidence

had been delivered at trial; rather, plaintiff participated fully in the hearing on the motion *in limine* without any qualification. Thus, we hold that the trial court's decision to rule on the motion *in limine* when it was presented before trial was not an abuse of discretion.

¶ 22 In addition, we hold that plaintiff's argument fails because her claimed error was invited. Under the invited-error doctrine, a party cannot request to proceed in one manner and then contend on appeal that the course of action constituted error. *Fleming v. Moswin*, 2012 IL App (1st) 103475-B, ¶ 92. Here, plaintiff filed a motion *in limine* seeking a pretrial ruling on the admissibility of certain evidence regarding conversations between Royce and the decedent during the decedent's office visit. By filing a motion *in limine*, plaintiff was specifically seeking a ruling in advance of trial. The trial court complied and issued a ruling, albeit adverse to plaintiff's position, before trial. Plaintiff cannot now be heard to complain that the trial court should have deferred its ruling until after evidence had been admitted at trial. Accordingly, we reject plaintiff's contention that the trial court's ruling was premature.

¶ 23 Plaintiff argues that the authority cited by both parties applies only to the in-trial use of the Dead-Man's Act. For the reasons discussed above, we reject plaintiff's argument. Plaintiff also specifically relies on *Groce v. South Chicago Community Hospital*, 282 Ill. App. 3d 1004, 1010 (1996), for the proposition that, in the proceeding on a motion for summary judgment, the Dead-Man's Act will prohibit the adverse party (here, the defendant) from offering evidence relating to conversations between the decedent and the defendant. While *Groce* may stand for such a proposition, it is procedurally inapposite to the circumstances of this case. In *Groce*, the trial and appellate courts were precluding testimony within the ambit of the Dead-Man's Act from being considered during a motion for summary judgment. Here, by contrast, the challenged evidence was

being offered during trial; further, the plaintiff filed a motion *in limine* to determine, ahead of trial, the admissibility of the challenged evidence. We also again note that the evidence that was admitted at trial was substantially the same as the summary of the evidence that was provided during the hearing on the motion *in limine*. Thus, the expected evidence actually was admitted, and that evidence was substantially similar to the evidentiary summary on which the pretrial motion *in limine* was granted. Accordingly, we hold that *Groce* is inapposite and does not control the outcome here.

¶ 24 Next, plaintiff argues that the Dead-Man’s Act bars evidence that was not contained in the medical records admitted at trial. Plaintiff contends that Royce’s testimony about statements and conversations with the decedent that were not directly included or referenced in the medical records should have been precluded by operation of the Dead-Man’s Act. In support, plaintiff cites *Theofanis v. Sarrafi*, 339 Ill. App. 3d 460 (2003), *Groce*, 282 Ill. App. 3d 1004, and *Vazirzadeh v. Kaminski*, 157 Ill. App. 3d 638 (1987), all for the proposition the Dead-Man’s Act bars evidence of conversations with the decedent that were not included in the medical charts. While plaintiff has accurately cited the cases, they are nevertheless distinct from the factual situation here.

¶ 25 In the cases plaintiff cited, it was the defendant who first sought to provide testimony about uncharted conversations with the decedent. For example, in both *Theofanis* and *Vazirzadeh*, the courts expressly noted that the plaintiff had not asked questions that would have opened the door and called for the defendant to provide information about uncharted and unwitnessed discussions with the decedent. *Theofanis*, 339 Ill. App. 3d at 478 (the “plaintiffs had not introduced any evidence about the conversation,” so the Dead-Man’s Act did not “justify [the trial court’s] admission into evidence [the defendant’s] testimony about his notes [concerning the conversation]”); *Vazirzadeh*, 157 Ill. App. 3d at 645 (“Nothing in the record can be construed to have opened the door to the

defendant's testimony regarding his discussion with his deceased patient"). Here, by contrast, it was plaintiff who first broached the topic of what the decedent had discussed with defendant, so neither *Theofanis*, *Groce*, nor *Vazirzadeh* are applicable to this situation. Because plaintiff initially inquired about the testimony she now seeks to bar, she opened the door to defendant's examination and testimony about the decedent's discussions with defendant. *Beard v. Barron*, 379 Ill. App. 3d 1, 12-13 (2008) (distinguishing *Theofanis* on the ground that the defendant first raised the Dead-Man's Act issue and holding that testimony that would otherwise violate the Dead-Man's Act becomes fair game when the plaintiff opens the door in the adverse examination of the defendant). Accordingly, we reject plaintiff's contention.

¶ 26 Plaintiff next contends that she did not waive her objections under the Dead Man's Act simply because she acquiesced to the trial court's judgment on the motion *in limine*. We have considered plaintiff's substantive arguments regarding the Dead-Man's Act as well as her claims that evidence should have been excluded pursuant to the Dead-Man's Act. In considering the substance of her arguments, we have impliedly agreed with plaintiff that her contentions were not waived. Accordingly, we do not need to further address this point, as above, we have considered plaintiff's substantive contentions. Further, plaintiff's argument on the lack-of-waiver point seeks to justify the remedy of a new trial for the errors in the application of the Dead-Man's Act. Because we have determined there was no cognizable error, we similarly reject the necessity of the remedy of a new trial.

¶ 27 We also discern that plaintiff attempts to insinuate an argument along the lines of: because the trial court improperly issued an *in limine* ruling on the Dead-Man's Act issues, plaintiff's examination of Royce on issues arguably precluded by the Dead-Man's Act was an attempt to

mitigate the prejudice flowing from the trial court's erroneous decision; as such, she should not be deemed to have opened the door to Royce's testimony concerning his conversations with decedent. We disagree. First, plaintiff does not actually expressly articulate this contention and she does not offer any authority to support the contention. Accordingly, plaintiff has forfeited our consideration of the issue on appeal. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 38.

¶ 28 Second, plaintiff cites to authority that does not support this line of contention. Plaintiff cites to *Theofanis*, which is distinguishable. In *Theofanis*, the court held that the plaintiff had not opened the door retroactively to the testimony under the purview of the Dead-Man's Act where, after the defendant first elicited the testimony about the decedent's conversations, plaintiff elicited further testimony about the decedent's conversations in an attempt to mitigate the defendant's use of the evidence. *Theofanis*, 339 Ill. App. 3d at 478. In other words, when the defendant elicited improper testimony, the plaintiff's attempt to mitigate or cure the prejudice did not serve to open the door to the improper testimony after the fact. *Theofanis*, 339 Ill. App. 3d at 478-79. Here, by contrast, plaintiff was the first to elicit the testimony concerning decedent's conversations with Royce during decedent's office visit. *Theofanis* does not stand for the proposition that, after a motion *in limine* has determined the admissibility of evidence, the plaintiff will not be deemed to have opened the door to that evidence even if the plaintiff were to elicit it first. Rather, for such a conclusion to apply, the defendant has to first broach the improper evidence and any follow-up questioning by the plaintiff seeking to mitigate the effect of the improper evidence will be deemed not to have opened the door to the evidence. Here, as we have noted, plaintiff first raised the conversations between Royce and decedent, not the other way around. Accordingly, we find no merit in this contention.

¶ 29 Next, plaintiff contends that the trial court erred in allowing defendants to cross-examine Dr. Palevsky beyond the scope of her direct examination. Specifically, plaintiff argues that Palevsky was her proximate-cause expert, but defendants were erroneously allowed to cross-examine him regarding the standard of care. Plaintiff further contends that her redirect examination of Palevsky was erroneously limited because defendants' cross-examination opened the door to standard-of-care issues, like a doctor's duty to perform diagnostic testing if the doctor were considering pulmonary embolus as a potential diagnosis. Plaintiff contends that these errors entitle her to a new trial.

¶ 30 We begin our consideration with the trial court's ability to limit cross-examination. Generally, evidentiary issues are within the sound discretion of the trial court. *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶ 70. This includes determining the scope of the cross-examination of a witness (*Sekerez*, 2011 IL App (1st) 090889, ¶ 70), as well as determining the limits of redirect examination (*In re Parentage of Kimble*, 204 Ill. App. 3d 914, 917 (1990)). With these principles in mind, we turn to plaintiff's specific contentions.

¶ 31 Plaintiff objects to defendants' cross-examination concerning the risk factors for pulmonary embolus and whether pulmonary embolus is difficult to diagnose and detect. Plaintiff concludes that defendants' goals in asking these questions was to buttress their defense. Plaintiff's argument on this point is almost too broad. Any question, either on a direct- or a cross-examination, is designed to help the party's case; thus, plaintiff effectively is complaining that defendants' cross-examination was improper because it was designed to help defendants' case and weaken her case.

¶ 32 Additionally, plaintiff apparently views that the elicitation of testimony about risk factors for and the difficulty of diagnosing pulmonary embolus stands as a proxy for questioning on the standard of care, or else that such testimony specifically defines the standard of care. To the contrary of

plaintiff's contention, our review of the record shows that plaintiff actually elicited testimony from Palevsky regarding the symptoms of pulmonary embolus and whether decedent's symptoms were consistent with pulmonary embolus. In addition, plaintiff examined Palevsky about the nature, signs, symptoms, and risk factors for pulmonary embolus and deep venous thrombosis. The trial court held, pursuant to plaintiff's argument in support of her objection, that the examination on these topics had nothing to do with the standard of care. We agree. While the interpretation of a constellation of symptoms may relate to the standard of care, plaintiff has not pointed to any authority to suggest that the recitation of symptoms and risk factors defines the standard of care. Obviously the presentation of symptoms to and the interpretation of symptoms by a doctor may implicate the standard of care, but they do not define it. Here, defendant cross-examined about the type of symptoms present in cases of pulmonary embolus and deep venous thrombosis, as well as other topics covered by plaintiff during her direct examination. There is nothing in the record that shows that defendants attempted to elicit any standard-of-care opinions from Palevsky. Rather, the evidence shows that defendants mirrored the plaintiff's direct examination as well as attempted to obtain Palevsky's agreement to certain information that was favorable to defendants' theory of the case. For example, defendants focused on symptoms, such as shortness of breath, and questioned whether questioned such a symptom is a specific symptom for pulmonary embolus, or is a nonspecific symptom. Additionally, defendants elicited testimony about whether certain symptoms were predictive of pulmonary embolus. Defendants did not ask Palevsky to elucidate the standard of care expected in the treatment of an instance of pulmonary embolus. Accordingly, we discern no merit to plaintiff's contention on this point.

¶ 33 Plaintiff contends that defendants' exploitation of Palevsky's cross-examination testimony about the "Wells Criteria" illustrates that defendants were actually eliciting testimony from Palevsky on the standard of care. We disagree. The testimony about the "Wells Criteria" showed that it was a diagnostic tool listing risk factors for forming a deep venous thrombosis and assisting in the diagnosis of a deep venous thrombosis and pulmonary embolus. At the time of decedent's death, the Wells Criteria had been recently formulated, and it had not been finalized until well after decedent's death. However, it had been sufficiently established at the time of decedent's death that it offered assistance in assessing symptoms and risk factors related to pulmonary embolus.

¶ 34 Defendants cross-examined Palevsky regarding the Wells Criteria following plaintiff's direct examination regarding symptomology of pulmonary embolus, but defendants did not relate the Wells Criteria to the standard of care. Rather, defendants related the testimony about the Wells Criteria to the symptoms that decedent presented and to the issue of whether those symptoms were consistent or inconsistent with pulmonary embolus or deep venous thrombosis (which is itself another risk factor for developing pulmonary embolism). Further, the Wells Criteria were presented as a sort of reference or codification of the various risk factors associated with pulmonary embolus or deep venous thrombosis. Defendants did not actually link the Wells Criteria to the standard of care during Palevsky's cross-examination. Accordingly, the claim has no merit.

¶ 35 Plaintiff additionally points to defendants' closing argument, with the idea that defendants' use of the Wells Criteria resulted in prejudice. While defendants did include statements about the Wells Criteria in their closing argument, they were tied to Royce's evaluation of decedent's symptoms. Further, as we have above determined that the trial court did not abuse its discretion in

allowing the cross-examination, defendants' use of the testimony in closing argument was not improper.

¶ 36 Relatedly, plaintiff contends that the trial court abused its discretion in limiting her redirect examination of Palevsky following defendant's claimed improperly expansive cross-examination. Plaintiff argues that defendants' cross-examination of Palevsky opened the door to her attempted elicitation of undisclosed standard-of-care opinions from Palevsky. Plaintiff further argues that she was prejudiced by the preclusion of the standard-of-care evidence from Palevsky on redirect examination because she could not rebut the improper standard-of-care testimony defendants elicited during Palevsky's cross-examination. We disagree.

¶ 37 Plaintiff correctly notes that, once the door has been opened, the party who opened that door cannot complain about the opposing party's examination exploiting that opened door. *Bryant v. LaGrange Memorial Hospital*, 345 Ill. App. 3d 565, 578 (2003). In that case, the plaintiff opened the door to certain testimony and, when the defendant sought to elicit further testimony on the topic, the court affirmed the trial court's denial the plaintiff's objection, reasoning that, once the plaintiff opened the door to the topic, the plaintiff could not complain that the defendant's cross-examination on that topic was improper and prejudicial. *Bryant*, 345 Ill. App. 3d at 578. Plaintiff's argument fails, however, because here, defendants did not attempt to elicit from Palevsky any standard-of-care testimony. Rather, defendants' cross-examination mirrored the topics raised in plaintiff's direct examination. Thus we can discern no abuse of discretion on the trial court's part in refusing to allow plaintiff to question Palevsky on the standard of care where defendants' cross-examination did not open the door to standard-of-care testimony. For this same reason, plaintiff's citation to *Bryant* is

unavailing because defendants did not open the door to plaintiff's redirect examination on the standard of care. Accordingly, we reject plaintiff's contention on this point.

¶ 38 In her final contention on appeal, plaintiff argues that the trial court erred in precluding her from eliciting testimony about "missing" records from the decedent's medical chart. Specifically, plaintiff complains about two pages from the medical chart that were not produced until the time Royce was deposed, although the record demonstrates that those pages were produced in time to allow plaintiff's experts to review them and they were produced years in advance of trial. Plaintiff also complains Royce never produced the DOT physical form from decedent's August 30, 1996, examination. Plaintiff argues that the "late" production and non-production of the challenged documents goes to the issue of defendants' credibility, and plaintiff also attempts to insinuate that defendants' improperly changed, lost, or destroyed (as the case may be) the challenged records. Defendants, by contrast, point to the fact that the records were the subject of a defense motion *in limine* to preclude plaintiff from eliciting testimony and commenting about the challenged records. Defendant argues that the DOT physical examination form was simply not relevant to this matter particularly because plaintiff alleged negligence stemming only from decedent's September 6, 1996, office visit. As to the "late" records, defendant argues that their purported lateness is not relevant any issues in the case and, even if relevant, plaintiff's proposed claims about the records are far more prejudicial than probative.

¶ 39 We note initially, as an aside, that plaintiff wholly fails to mention that the challenged records were the subject of a motion *in limine* and also ignores the trial court's reasoning in granting defendants' motion. Further, plaintiff persists in that position in her reply brief, even after defendants had set forth the factual and procedural circumstances surrounding the challenged

records. We emphasize this because plaintiff's argument is presented in a fashion that attempts to suggest that the trial court acted inexplicably, without conscientious judgment. This, of course, is one of the standards under which a reviewing court may conclude that the trial court abused its discretion. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 22 (the test for abuse of discretion is formulated in a number of ways, including whether the trial court "acted arbitrarily without the employment of conscientious judgment"). Unmooring the trial court's decision from its procedural context certainly makes it easier to argue that the trial court lacked conscientious judgment in deciding the issue regarding the challenged records, but such a course is, at best, misleading.

¶ 40 Turning to the substantive arguments, we first consider the "late" records. Plaintiff's presentation of the circumstances surrounding the disclosure of the two pages from decedent's chart again illustrates the concerns we raised in the foregoing paragraph. Plaintiff takes what is at most a minor discovery issue and seemingly attempts to manufacture a fraudulent concealment claim. The record indicates that the two challenged pages were not turned over in the initial discovery production. They were, however, turned over during Royce's deposition, the records were available to the parties and their experts relatively early in the litigation of this matter, and the challenged records were available well before the time that was set for the disclosure of expert opinions. This is clearly a non-issue. Plaintiff levels the insinuation that the two pages were deliberately withheld and tries to infer that they are somehow tampered with to present a better picture than the original copies. At least, we suppose, this is what plaintiff would have tried to argue. Unfortunately, there is absolutely no evidence (and certainly nothing that would support the necessary inferential chain) that substantiates the smallest portion of plaintiff's position. Defendants note that the trial court is

obligated to weigh the probative nature versus the prejudicial effect of all evidence (Ill. R. Evid. 403 (eff. Jan. 1, 2011); *Haight v. Aldridge Electric Co.*, 215 Ill. App. 3d 353, 361 (1991)), and that it did so here, concluding that the prejudicial effect of questioning about the “late” records far outweighed the probative value of such testimony. We have carefully reviewed the record and conclude that the trial court did not abuse its discretion in precluding testimony relating to the purported “late” records. Accordingly, we reject plaintiff’s claim on this point.

¶ 41 Plaintiff also argues that she should have been allowed to present testimony about the missing DOT physical examination form as well as the missing evidence jury instruction (see Illinois Pattern Jury Instructions, Civil, No. 5.01 (2008) (hereinafter IPI Civil (2008) No. 5.01) (missing evidence instruction stating that failure to present certain evidence under its control leads to the inference that the missing evidence was adverse to the party)). Plaintiff, however, cites absolutely no authority in support for her position on this point, thereby forfeiting the issue. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Forfeiture aside, plaintiff’s argument is without merit.

¶ 42 As an initial matter, for evidence to be admissible, it must be relevant, meaning that it is “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 that it would be without the evidence.” Ill. R. Evid. 401 (Eff. Jan. 1, 2011). The DOT physical examination occurred on August 30, 1996, whereas this case involves the September 6, 1996, examination of decedent. The examination form does nothing to show that defendants were negligent during the September 6, 1996, examination of decedent, especially since plaintiff testified in her discovery deposition that the DOT examination physical examination form had been given to decedent and it showed that the examination was normal and did not reveal any health issues. Thus, the DOT physical examination form was not

relevant (it did not make it more or less likely that defendants were negligent in failing to diagnose pulmonary embolus), and the trial court properly precluded testimony concerning it as a missing record based on its lack of relevancy.

¶ 43 Second, the missing evidence instruction, IPI Civil (2008) No. 5.01, was properly refused because the evidence in the record shows that the prerequisites of the instruction were not fulfilled. In order to give IPI Civil (2008) No. 5.01, the party attempting to offer the instruction must show, among other things, that the evidence was under the control of the adverse party and was not equally available to that party. Here, the record demonstrates that, not only did Royce testify that he gave a copy of the DOT physical examination form to decedent, but plaintiff, in her discovery deposition, acknowledged that decedent had returned from the DOT examination with a copy of the form, and that the results of the examination were normal. Thus, plaintiff was unable to fulfill the requirements that the form was under the control of defendants and that plaintiff did not have access to the form. In fact, the record demonstrates that decedent was given the form after his examination and brought it home, making plaintiff aware of its existence and its contents. Accordingly, we hold that the trial court properly determined that the missing evidence instruction should not be given even if it would have allowed testimony about the missing DOT physical examination form. As a result, we reject plaintiff's argument on this point as well.

¶ 44 III. CONCLUSION

¶ 45 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 46 Affirmed.