2013 IL App (3d) 120366-U

Order filed May 20, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

STANLEY McCOMBS and LAVONNE McCOMBS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiffs-Appellants,	)	
v.	)	Appeal No. 3-12-0366
	)	Circuit No. 06–L–88
J. KEVIN PAULSEN, M.D., and PEORIA SURGICAL GROUP, LTD.,	)	
	)	Honorable Scott A. Shore,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial judge did not abuse his discretion by denying plaintiffs' motion to compel summaries of depositions, prepared by defense counsel, under attorney-client and work product privileges. The judge did not abuse his discretion by refusing to give the jury the missing witness instruction. The trial judge did not abuse his discretion by denying plaintiffs' motion for new trial because the jury verdict was not against the manifest weight of the evidence.

¶ 2 Plaintiffs originally filed a medical negligence action against defendants Dr. Scott Wu and Gastroenterology, Ltd., and named Dr. J. Kevin Paulsen and Peoria Surgical Group, Ltd.,

(Peoria Surgical) as respondents in discovery. The complaint alleged that, after a first surgery to remove plaintiff's gallbladder, an unnecessary second surgery, a gastrojejunostomy, was performed incorrectly. After some discovery, defendants Dr. Wu and Gastroenterology, Ltd., moved to be dismissed from the lawsuit. Before the motion to dismiss was decided by the trial court, within six months of the original complaint, plaintiffs filed a motion to voluntarily dismiss Dr. Wu and Gastroenterology, Ltd., from the lawsuit and additionally moved to convert the named respondents in discovery, Dr. Paulsen and Peoria Surgical, to designate them as named defendants in the lawsuit. The court allowed the dismissal of Dr. Wu and Gastroenterology, Ltd., and converted Dr. Paulsen and Peoria Surgical to defendants in this case.

¶ 3 During the seven-day jury trial, the court denied plaintiffs' motion to compel summaries of depositions, prepared by defendants' attorneys, based on attorney-client and work product privileges. The court also refused to give plaintiffs' missing witness jury instruction, IPI 5.01. The jury returned a verdict in favor of defendants. Thereafter, the court denied plaintiff's posttrial motion alleging the verdict was against the manifest weight of the evidence and the court abused its discretion by denying the motion to compel and the missing witness jury instruction. Plaintiffs appeal these decisions by the trial court. We affirm.

¶ 4 BACKGROUND

¶ 5 Plaintiff Stanley McCombs (plaintiff) was born on March 24, 1927, married Lavonne McCombs (Lavonne) (collectively referred to as "plaintiffs"), and worked as a laborer until he retired in 1979. On February 16, 2004, plaintiff suffered abdominal pain and sought emergency medical treatment at the Methodist Medical Center (Methodist Hospital) in Peoria, Illinois. At that time, doctors detected a large gallstone in plaintiff's gallbladder and also diagnosed plaintiff

with pancreatitis. After being discharged from the hospital on February 22, 2004, plaintiff suffered more abdominal pain and doctors readmitted him to Methodist Hospital on February 23, 2004. After more tests, plaintiff was again discharged from the hospital on February 28, 2004.

¶ 6 Plaintiff continued to experience abdominal pain and, on March 24, 2004, defendant Dr. Paulsen performed surgery to remove plaintiff's gallbladder. Dr. Paulsen made notations in plaintiff's medical records that plaintiff was a high risk for surgery but "leaving the gallbladder puts the patient at even greater risk for recurrence of his pancreatitis." Plaintiff suffered a common medical complication, a "paraduodenal hematoma," after the gallbladder surgery and remained hospitalized until his discharge on April 5, 2004. At the time of discharge, Dr. Paulsen noted plaintiff's condition was guarded due to this hematoma and "it is uncertain how long it will take this to resolve."

¶ 7 After April 5, 2004, plaintiff developed worsening abdominal distention, nausea, vomiting and abdominal pain causing him to be readmitted to the hospital on April 15, 2004. On April 28, 2004, plaintiff was unable to pass food due to stomach inflammation and a gastric outlet obstruction. The treating gastroenterologist, Dr. Wu, inserted a feeding tube (J-tube) and a tube to release bloating (G-tube) to address plaintiff's medical issues. On May 1, 2004, the physician on duty, Dr. David Crawford, noted in the medical records that plaintiff's feeding tube had "fallen out," which was not an uncommon occurrence with feeding tubes. On May 3, 2004, doctors administered another CT scan of plaintiff's stomach, and the results showed that plaintiff's duodenal hematoma had minimally reduced in size.

¶ 8 On May 5, 2004, Dr. Paulsen decided to perform a gastrojejunostomy on plaintiff. This surgical procedure bypassed the inflamed area of the stomach and the duodenal hematoma and

created a surgical connection between the stomach and jejunum. This procedure was described as an "open" surgery that involves slicing the stomach tissue, making a hole in the mesocolon, pulling 18 inches of small bowel up through the mesocolon, and connecting it to the stomach. The wound then remains open for a period of time to prevent infection. Plaintiff's gastrojejunostomy was unsuccessful and did not allow the stomach material to leave the stomach without manual palpitations. After this surgery, plaintiff remained in Methodist Hospital and suffered persistent nausea, vomiting and weight loss (60 pounds between February 2004 and June 1, 2004).

¶ 9 On June 1, 2004, at plaintiff's request, plaintiff was transferred by ambulance to the Mayo Clinic (Mayo) in Rochester, Minnesota, for further evaluation and treatment. According to plaintiff, the doctors at Mayo determined the gastrojejunostomy was unnecessary, was performed incorrectly by Dr. Paulsen, and resulted in an infected open wound at the time of plaintiff's admission to Mayo. Plaintiff claimed he incurred permanent injuries and continuing pain as a result of the gastrojejunostomy. Plaintiff was discharged from Mayo on June 13, 2004.

¶ 10 On March 23, 2006, plaintiffs filed an initial complaint in Peoria County circuit court against defendants Dr. Scott Wu and Gastroenterology, Ltd., alleging medical negligence. This complaint also named Methodist Hospital, Dr. Paulsen, and Peoria Surgical as respondents in discovery. After completing some discovery, defendants Dr. Wu and Gastroenterology, Ltd., filed a joint motion to dismiss with prejudice on August 25, 2006. Defendants scheduled the motion to dismiss for hearing on October 3, 2006.

¶ 11 On September 21, 2006, plaintiffs filed a motion to voluntarily dismiss Dr. Wu and Gastroenterology, Ltd., as defendants in this case and, on the next day, also filed a motion to

convert Dr. Paulsen and Peoria Surgical Group, Ltd., from respondents in discovery to defendants in the complaint. Plaintiffs scheduled both motions for the same hearing date of October 3, 2006.

¶ 12 On October 3, the court granted Dr. Wu's and Gastroenterology, Ltd.'s motion to dismiss with prejudice and also granted plaintiffs' motion to voluntarily dismiss Dr. Wu and Gastroenterology, Ltd., as defendants in the case. The court did not conduct a hearing on plaintiff's motion to convert but, rather, granted Dr. Paulsen and Peoria Surgical fourteen days to file a response to plaintiffs' motion to convert them to defendants in this cause of action.

¶ 13 On October 26, 2006, Dr. Paulsen and Peoria Surgical filed their joint response to plaintiffs' motion to convert. In this response, Dr. Paulsen and Peoria Surgical argued that, since the original defendants in the complaint were dismissed, there were no longer any named defendants to the cause of action and the trial court could no longer properly convert respondents in discovery to newly designated defendants. On November 28, 2006, the court rejected this position and granted plaintiffs' motion to convert by designating Dr. Paulsen and Peoria Surgical as defendants in the instant case.

¶ 14 Consequently, on December 14, 2006, plaintiffs filed an amended complaint alleging Dr. Paulsen, acting under the agency of Peoria Surgical, committed acts of medical negligence. Specifically, count 1 of the amended complaint alleged that, on May 5, 2004, Dr. Paulsen negligently performed the gastrojejunostomy, and Dr. Paulsen's negligence was the proximate cause of permanent injury to plaintiff. Count 2 of the amended complaint alleged that Dr. Paulsen's negligence proximately caused Lavonne to suffer an injury to her husband-wife relationship with plaintiff and to become obligated for the expenses of plaintiff's medical care.

The amended complaint included the requisite affidavit and report wherein Dr. Herbert Shapiro, a certified general surgeon, stated he reviewed the medical records in this case and concluded that the medical claim against Dr. Paulsen was reasonable and meritorious; that the gastrojejunostomy was performed incorrectly; that the obstruction from the procedure was caused by Dr. Paulsen's incorrect placement of the jejunum to the stomach, and that Dr. Paulsen's performance of the second surgery fell below the proper standard of care.

¶ 15 On January 9, 2007, defendants filed a motion to dismiss the amended complaint and again claimed the trial court lost subject matter jurisdiction on October 3, 2006, by dismissing Dr. Wu and Gastroenterology, Ltd., the only named defendants in the original complaint, prior to ruling on the motion to covert on November 28, 2006. On May 22, 2007, the court denied defendants' motion to dismiss the amended complaint based on the trial court's purported lack subject matter jurisdiction.

¶ 16 Defendants filed a "Motion for Interlocutory Appeal," on June 18, 2007, challenging the trial court's denial of their motion to dismiss. The court certified the following question for interlocutory appeal:

> "Did the trial court lose subject matter jurisdiction on October 3, 2006, when the only defendants in the lawsuit were dismissed with prejudice, and was the trial court thus prohibited from converting respondents in discovery to defendants on November 28, 2006?"

On January 11, 2008, this court issued a mandate with an order, dated November 19, 2007,

denying defendants' application for leave to appeal the interlocutory order.[1]

¶ 17 On July 1, 2011, the defense filed a 20-page motion *in limine*. The relevant portion of that motion requested the court, in paragraph 17, to order that no "missing witness" jury instruction be given regarding defendants' failure to call Dr. Samir Gupta as a witness. Defendants claimed that Dr. Gupta would be on vacation in Europe when the jury trial was scheduled; that Gupta was minimally involved in the case before the court; that Gupta had not been deposed by either party in preparation for the case; and that:

> "The parties have agreed that Plaintiff will not seek a jury instruction regarding Defendants' failure to call Dr. Gupta as a witness so long as Dr. Paulsen does not testify that he relied upon Dr. Gupta's opinion when Dr. Paulsen decided to perform the gastrojejunostomy. The parties have agreed that Dr. Paulsen will not offer this testimony."

The court granted paragraph 17 on July 5, 2011.

¶ 18 The multi–day jury trial on the amended complaint began on July 11, 2011. Plaintiffs first called Dr. Paulsen, as an adverse witness.[2] Dr. Paulsen testified to the facts surrounding plaintiff's medical condition, the gallbladder surgery, and the gastrojejunostomy performed on

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[1] Defendants did not file a cross appeal in the pending appeal, after the jury verdict, to challenge the court's ruling converting them to defendants in this appeal.

[2] During pretrial discovery, defendants disclosed Dr. Paulsen not only as a defendant and occurrence witness in this case, but also as one of expert witnesses for the defense, under Rule 213(f)(3) (Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007)), thereby allowing Dr. Paulsen to also testify to his required standard of care and his own opinion as to whether he complied with that standard of care. In defendants' discovery disclosures, defendants represented that Dr. Paulsen had read and relied upon several transcripts of depositions as the bases for his expert opinion regarding whether his actions fell within the appropriate standard of care.

plaintiff on May 5, 2004. Plaintiffs asked Dr. Paulsen several times if he had spoken to Dr. Gupta about plaintiff prior to performing the gastrojejunostomy, and the following testimony occurred regarding that topic:

"Q. So you had discussions with Gupta about Stan [plaintiff] back there when Stan was in Methodist; right?

A. What discussions I had with Doctor Gupta were very brief. He's my partner. I would have met him in the hallways. There may have been a brief discussion regarding Stan, but there was no extensive discussions.

Q. What did you and he discuss back there when Stan was in Methodist?

A. That he was in the hospital and that he had – had – had this problem that Samir [Gupta] had been consulted on and that his consultation stood as he saw it." [3]

Regarding a deposition Dr. Paulsen gave a week before trial, plaintiffs' attorney asked:

"Q. Do you remember being asked this question last – I guess it was last Thursday. Question, "Did you – do you have any recollections of ever having any discussion with Gupta, your partner, concerning Stan prior to performing the gastrojejunostomy? Answer: I didn't have any discussion with Doctor Gupta regarding that. Did you give that answer?

A. Yes.

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[3] Part of the record contains Exhibit 19, which is entitled "Consultation Report," dictated on May 4, 2004, and lists Dr. Sebastian as the "requesting physician," Dr. Gupta as the "consultant," and the report was "dictated by" Dr. Gupta's nurse and copied to Dr. Sebastian, Dr. Gupta, and Dr. Wu. In the consultation report, Dr. Gupta recommended to "Continue present management." That consultation report also provided: "The patient's condition was discussed with Dr. Gupta, as well as Dr. Lisa Whitty."

Q. *** I was asking about your first dep where you thought you might have, and you said – and I was directing your attention to that, and I said, "In retrospect, is that an error?" And your answer was last Thursday, "I probably discussed with him since that time, but I hadn't discussed it with him at that time." Question, "Okay. You mean like since the claim was filed or something?" Answer, "Yes." Did you give those answers?

A. Yes.

Q. Were those accurate?

A. Well, obviously since this case has come up, we've had to discuss taking call[s] and dealing with – with coverage of the – of the– of the group, and this obviously came up when I talked to Doctor Gupta that I was going to have to be here for this malpractice trial this week. So yes, we did discuss it at that point in time.

Q. Since last Thursday?

A. Last Thursday or last week when we were getting ready to start in on this malpractice trial. We have to make arrangements for coverage ***

Q. Okay. Was that the first time you'd ever discussed Stan's case with Gupta?

A. To my honest recollection, yes.

Q. All right. Now, let's go back to about 10 questions ago, and maybe I misheard you. I was discussing about the fact that we got into the second opinion of Gupta back then, and my question was, I thought, "Did you ever have any discussions with Gupta during the time that Stan was in Methodist?" What's your answer at this moment?

A. Well, my answer at this moment is that you had a dictated consultation, which I saw, and I honestly don't remember if I had any – any discussion with him regarding this – this – this patient.

Q. At least as of last Thursday, you were comfortable that you had no recollection of ever discussing Stan with Gupta when he was there, right?

A. I don't believe I discussed with Gupta at that point in time, that's correct.

Q. Now, in terms of that – that second opinion, you said?

A. Correct.

Q. And what did you say it was? It was a typed – typed consultation?

A. That's correct.

Q. *** Showing you what's been marked as Exhibit 19, Doctor, is this what you're talking about?

A. Yes, sir.

Q. And is this what you're – when you refer to a second opinion by Gupta, I mean, we heard that everybody – and I don't mean to misstate what Mr. Pretorius said. If I do, I'll probably hear the word "objection," but I think he said everybody agreed that the G.J.J. [gastrojejunostomy] was the way to go. Do you remember that statement earlier this morning?

A. Yes.

Q. Okay. And you don't recall any discussions with Gupta. Is this – is this what you recall in terms of this being a consultation by Gupta where there's a recommendation – was this – is this the second opinion by Gupta that you're familiar

with?

A. Yes, sir."

When questioned by his own attorneys, Dr. Paulsen gave the following testimony:

"Q. [In early May] [o]f 2004. Do you have any recollection of talking with Dr. Gupta during that time period?

A. Obviously, Dr. Gupta is my partner, but I don't have any specific recollection of talking to him about this case. I may or may not have. It certainly wasn't a long discussion, if it was a discussion at all.

Q. Do you have any recollection of anything?

A. No."

Dr. Paulsen testified he did not recall having any conversation with Dr. Crawford and any knowledge Dr. Paulsen had of these doctors' care of plaintiff were included in plaintiff's medical records and progress notes, dictated by these doctors, which he reviewed when making his decision.[4] Dr. Paulsen testified that, as plaintiff's surgeon, the ultimate decision to perform the second surgery was his, alone, and he did not consult with the other doctors when making this decision, although he did recall having conversations with Dr. Wu prior to the second surgery.

¶ 19 Dr. Paulsen testified that he performed the gastrojejunostomy correctly, that he was not negligent, and that, in his expert opinion, he met the requisite standard of care in deciding to perform the surgery as well as in the actual performance of the surgery. Dr. Paulsen testified, at the jury trial, he read and reviewed the transcripts of the other doctors' depositions before reaching this opinion as an expert witness.

[4] These medical records, with notations, were admitted into evidence during the jury trial.

¶ 20 During his testimony before the jury, Dr. Paulsen admitted that he did not see or read the actual transcripts of the depositions of any of the other medical professionals, but read summaries of those transcripts that were prepared by his attorneys. When plaintiff's counsel asked Dr. Paulsen what he read and relied upon before forming the opinion that he met the requisite standard of care, defense counsel objected on the basis of attorney/client privilege. The court overruled defendant's objection. Dr. Paulsen described the summaries of transcripts that he relied upon, in part, as the bases to forming his expert opinion.

¶ 21 The next witness, Dr. William Kenny, plaintiff's treating psychiatrist, testified regarding how plaintiff's physical condition, after the gastojejunostomy, affected plaintiff psychologically, and how plaintiff's physical condition left plaintiff feeling helpless and hopeless and affected his mental health resulting in depression.

¶ 22 Next, Dr. Frederick Von Bun testified that he was plaintiff's treating physician, in 2003 and 2004, and discussed plaintiff's multiple medical problems prior to surgery, including: congestive heart failure, prior heart bypass surgery, asthma, obstructive sleep apnea, diabetes, shortness of breath, atrial fibrillation, acid reflux, a prior peptic ulcer, obesity, and COPD. According to the doctor, all of these conditions made plaintiff a high risk candidate for surgical procedures and plaintiff's condition seemed to worsen after the 2004 surgery.

¶ 23 Plaintiffs next called Dr. Herbert Shapiro to testify as an expert witness. Dr. Shapiro testified that Dr. Paulsen was negligent in electing to perform the gastrojejunostomy and that this surgery should never have been performed on plaintiff. Dr. Shapiro said, after plaintiff underwent the March 24, 2004 gallbladder surgery, plaintiff's stomach was distended and lacked the necessary motility to withstand the second surgery. In Dr. Shapiro's opinion, hematomas

generally resolve themselves with time and rest and plaintiff's stomach most likely would have gradually recovered without further surgery. In plaintiff's case, Dr. Shapiro stated plaintiff's swelling and hematoma were starting to shows some improvement on May 3, 2004. Dr. Shapiro testified that Dr. Paulsen's performance of the gastrojejunostomy breached the appropriate standard of care because Dr. Paulsen placed the tube incorrectly in the backside of plaintiff's stomach and, as a result, the tube kinked and the stomach "squashed" the tube causing a complete blockage of the outflow of the stomach at times. Dr. Shapiro stated that the gastrojejunostomy tube should have been placed at the bottom part of the stomach, but proper placement was not possible at the time of plaintiff's surgery due to the inflammation in plaintiff's stomach, which strengthened Dr. Shapiro's opinion that the second surgery should not have been attempted at that time.

¶ 24 Finally, both plaintiff and Lavonne testified about the effects plaintiff's stomach condition had on his lifestyle. Plaintiff testified that he basically could not do any activities he enjoyed in the past due to his condition after the second surgery. Lavonne stated this affected their marital relationship and resulted in substantial medical expenses associated with the second surgery.

¶ 25 At the close of plaintiffs' evidence, the court denied defendants' motion for directed verdict. The defense presented both Dr. Michael Uzer and Dr. Todd Howard as expert witnesses, in addition to defendant Dr. Paulsen. Defendants also presented an evidence deposition of Dr. Jonathan E. Clain, a gastroenterologist at the Mayo Clinic, who performed a endoscopy on

plaintiff on June 4, 2004.[5]

¶ 26 Dr. Uzer testified that he reviewed the medical records and other doctors' statements and he felt that Dr. Paulsen did not breach his standard of care when performing the gastrojejunostomy. Dr. Uzer stated that other medical options were also available at the time of the surgery, such as continuing plaintiff on intravenous feeding to allow the hematoma and inflammation to heal spontaneously.

¶ 27 Dr. Howard testified that, in his opinion, after reading all of the medical reports and documents and other doctor's testimony, Dr. Paulsen did not breach his standard of care in his decision to perform the gastrojejunostomy on May 5, 2004. Dr. Howard said he reviewed Dr. Paulsen's operative report and X-rays from Mayo and, in his opinion, Dr. Paulsen also did not perform the gastrojejunostomy incorrectly and did not breach the proper standard of care. Dr. Howard testified that the gastrojejunostomy did not cause further injury to plaintiff and, although medical problems persisted after the second surgery, those were the same problems that existed before the second surgery. Dr. Howard also stated there were risks associated with continuing plaintiff on intravenous feedings for an extended period of time without the second surgery, and Dr. Paulsen had to weigh those risks against the risks of going forward with the surgery in early May 2004.

¶ 28 For the defense, Dr. Paulsen testified, in his opinion, he did not breach the standard of care when he decided to perform the gastrojejunostomy due to concerns about continuing

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[5] Dr. Clain stated that he was merely testifying as an occurrence witness who performed a procedure on plaintiff at Mayo during which he noted an improperly placed feeding tube. Dr. Clain said these tubes can migrate on their own and he did not have an expert opinion as to whether Dr. Paulsen's gastrojejunostomy was performed incorrectly.

plaintiff solely on intravenous feeding for more than two weeks, as well as plaintiff's continuing weight loss. Dr. Paulsen said that, to date, the conservative measures were not working and the less intrusive procedures available at that time would not have corrected the nausea, vomiting, distention, and discomfort. Additionally, Dr. Paulsen stated that, although plaintiff's "numbers" showed slight improvement prior to the second surgery, "from a scientific point of view, they hadn't changed much." He also testified that he did not fall below the proper standard of care in performing the second surgery.

¶ 29 During defendants' case in chief, on July 18, 2011, plaintiffs filed a "Motion to Compel Compliance with Plaintiffs' Rule 237 Request RE: Summaries Furnished to Dr. Paulsen." This motion requested copies of the summaries of the other doctors' depositions, prepared by the defense attorneys, which Dr. Paulsen relied upon in forming his expert opinion in lieu of the actual complete transcripts of the depositions.[6] The defense objected to producing these summaries based on attorney-client privilege and work product privilege. The court denied *instanter* the motion to compel on the basis of attorney-client privilege. The court reserved ruling on the work product privilege until he could conduct an *in camera* review of the defendants' summaries.

¶ 30 The next morning, after reviewing the summaries, the court found that the documents were prepared by Dr. Paulsen's attorneys and the facts detailed in the documents summarized what defense counsel felt were the most important parts of the other doctors' testimony. As such, the summaries represented defense counsels' mental impressions of the testimony and,

[6] During Dr. Paulsen's testimony in plaintiffs' case in chief, Dr. Paulsen admitted he relied on these summaries and never received or reviewed copies of the complete transcripts of depositions of the other doctors.

consequently, were protected by both the attorney-client privilege and the work product privilege. The trial court denied plaintiffs' motion to compel.

¶ 31 The court then resumed the jury trial. During the jury instructions conference, plaintiffs offered "Plaintiff's Instruction No. 20," containing instruction 5.01 (Illinois Pattern Jury Instructions, Civil, No. 5.01 (4th ed. 2000) (hereinafter IPI 5.01)), as it related to the two other doctors, Dr. Gupta and Dr. Crawford, both treating physicians for plaintiff in 2004 during his stay at the Methodist Hospital. The defense objected to the admission of this instruction contending that, through defendants' pretrial motion *in limine*, the court granted defendants' request to bar plaintiffs from tendering this instruction regarding Dr. Gupta, who had been scheduled to be out of the country when the jury trial commenced. Plaintiff's argued that agreement was based on anticipated testimony of Dr. Paulsen that he did not consult with Dr. Gupta regarding the gastrojejunostomy but, based on the evidence before the jury, Dr. Paulsen said he may have had a conversation with Dr. Gupta, and that instruction should now be given.[7]

¶ 32 The court refused to give the missing witness instruction, IPI 5.01, to the jury, finding: "The adverse presumption for 5.01 depends on the lack of a reasonable excuse for the non-production or the willful withholding of evidence, and there is most certainly reasonable excuse for the non-production of this witness [Dr. Gupta]. So, I'm not going to allow the use of 5.01, because it doesn't fit the mold," but the judge determined that he would allow limited mention about the lack of testimony from these treating physicians in closing arguments because their names were mentioned briefly by Dr. Paulsen during his testimony.

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[7] Dr. Crawford was not listed as a possible witness for either the plaintiffs or defendants during discovery, he was not deposed by either party, and he was not mentioned in the defendants' motion *in limine*.

¶ 33 On July, 19, 2011, the jury returned a verdict finding in favor of defendants and against plaintiffs. Plaintiff's filed a posttrial motion alleging errors in the court's rulings during the jury trial, which preserved the issues presented in the instant appeal. On April 4, 2012, the trial court denied plaintiffs' posttrial motion. Plaintiffs filed a timely notice of appeal. Defendants did not file a cross appeal to challenge the trial court's ruling that it had subject matter jurisdiction of the instant case.

¶ 34 ANALYSIS

¶ 35 On appeal, plaintiffs argue the trial court erred by denying their motion to compel defendants to produce the summaries of transcripts that Dr. Paulsen relied upon to reach his own expert opinion that his actions did not breach the requisite standard of care. Plaintiffs also contend the court erred by refusing to instruct the jury according to plaintiffs' missing witness instruction regarding Drs. Gupta and Crawford. Finally, plaintiffs submit the jury's verdict was against the manifest weight of the evidence.

¶ 36 In addition, in their appellate briefs, both parties address whether the trial court had subject matter jurisdiction to rule on the pending motion to convert Dr. Paulsen and Peoria Surgical to defendants before plaintiff filed the amended complaint. We question whether the trial court's decision to deny the defendants' motion to dismiss the amended complaint on those grounds should be addressed by this court. We note that defendants have not filed a notice of cross-appeal challenging the trial court's decision to allow the motion to convert in November 2006 and, subsequently, to deny their 2007 motion to dismiss the amended complaint. Further, defendants have not challenged this court's jurisdiction by filing a motion to dismiss this appeal with this court.

¶ 37 However, in the interest of a conducting a thorough examination of all matters addressed by both parties in this appeal, we elect to briefly explain our view that the trial court properly exercised its jurisdiction to decide the motion to convert on November 28, 2006. A recitation of the procedural history is in order at this junction.

¶ 38 Plaintiff filed the original complaint on March 23, 2006, naming only Dr. Scott Wu and Gastroenterology, Ltd., as defendants, while identifying Dr. Paulsen and Peoria Surgical as "respondents in discovery," pursuant to section 2-402 of the Code of Civil Procedure (Code) (735 ILCS 5/2-402 (West 2004)).

¶ 39 Section 2-402 of the Code provides, in pertinent part, as follows:

> "A person or entity named as a respondent in discovery in any civil action may be made a defendant in the same action at any time within 6 months after being named as a respondent in discovery, even though the time during which an action may otherwise be initiated against him or her may have expired during such 6 month period. 735 ILCS 5/2-402 (West 2004).

In *Coyne v. OSF Healthcare System*, 332 Ill. App. 3d 717, 719 (2002), this court stated:

> "A respondent in discovery is a hybrid litigant: not an actual party defendant, but more than simply a witness. The purpose of section 2-402 is to enable a plaintiff, through liberal discovery procedures, to determine whether the respondent should be made a defendant. *Id*. (citing *Hugley v. Alcaraz,* 144 Ill. App. 3d 726, 734 (1986)).

On August 25, 2006, Dr. Wu and Gastroenterology, Ltd., filed a joint motion to dismiss the complaint against them with prejudice. On September 21, 2006, plaintiffs filed a "Motion for Voluntary Dismissal Without Prejudice" regarding Dr. Wu and Gastroenterology, Ltd.

The next day, September 22, 2006, plaintiffs filed an additional motion to convert Dr. Paulsen and the Peoria Surgical from respondents in discovery to named defendants under the original complaint. As required by statute, the motion to convert was filed within 6 months of the original complaint naming them as respondents in discovery. 735 ILCS 5/2-402 (West 2004).

¶ 40 All three motions were scheduled for a hearing before the court on October 3, 2006, while defendants Wu and Gastroenerology Ltd. remained in the case. On that date, the court's written order in the file states, "Respondents Paulsen and Peoria Surgical are given 14 days to respond to Plaintiffs' Motion to Convert," and this order was initialed by all counsel. Additionally, on that date, the court granted the pending motions to dismiss Dr. Wu and Gastroenterology, Ltd. Dr. Paulsen and Peoria Surgical filed their responses to the pending motion to covert on October 26, 2006. The hearing on the contested motion to convert occurred on November 28, 2006. On that date, the trial court granted plaintiff's motion to convert.

¶ 41 Consequently, plaintiffs filed an amended complaint naming Dr. Paulsen and Peoria Surgical as defendants on December 14, 2006. On January 9, 2007, defendants filed a motion to dismiss the amended complaint on the grounds that the trial court improperly allowed the pending motion to convert after dismissing the only named defendants subject to the original complaint.

¶ 42 Here, plaintiffs' motion to convert was timely filed and would have been ruled upon on October 3, 2006, but for the court's decision to allow respondents fourteen days to prepare a response for the court's consideration. Based on this procedural history, and the plain statutory language, we reject the notion that the trial court divested itself of jurisdiction to decide a pending motion to convert, which was filed before the original defendants were dismissed from

the complaint. Based on this record, we conclude we are not required to question our own jurisdiction *sua sponte*. We now turn to the issues raised by plaintiff in this appeal.

¶ 43 I. Motion to Compel - Summaries of Deposition Transcripts

¶ 44 Plaintiff first challenges the trial court's denial of its mid-trial motion requesting the defense to produce copies of the summaries of the deposition transcripts, prepared by defense counsel for Dr. Paulsen's review. Dr. Paulsen's attorneys objected to this disclosure based on attorney-client and work product privileges.

¶ 45 Rulings regarding discovery issues are reviewed under an abuse of discretion standard of review. *Regency Commercial Associates, LLC, v. Lopaz, Inc.,* 373 Ill. App. 3d 270, 285 (2007). In the instant case, plaintiffs are challenging the court's denial of their request to have defendants disclose copies of summaries of the deposition transcripts, prepared by defense counsel, based on work product doctrine and attorney client privilege.

¶ 46 Supreme Court Rule 201(b) outlines the scope of discovery in civil cases and subsection (b)(2) describes information that is deemed privileged and work product. Ill. S. Ct. R. 201(b)(2) (eff. July 1, 2002). Rule 201(b)(2) provides:

> "All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through *any* discovery procedure. [Emphasis added.] Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Ill. S. Ct. R. 201(b)(2) (eff. July 1, 2002).

¶ 47 Our supreme court has held that counsel's notes and memoranda of witnesses' oral

statements which are not verbatim and are not reviewed, altered, corrected, or signed by these individuals are protected work-product because, "whether in the form of attorney's mental impressions or memoranda, these documents necessarily reveal in varying degrees the attorney's mental processes in evaluating the communications." *Consolidation Coal Co. v. Bucyrus-Erie Co*., 89 Ill. 2d 103, 108-109 (1982); *Monier v. Chamberlain*, 35 Ill. 2d 351, 359 (1966). Our supreme court created a limited exception to this blanket rule holding, when an attorney's notes contain a mixture of unprivileged factual material and privileged opinion work product, the notes will be subject to discovery only if a party can show that it is absolutely impossible to secure the factual information from other sources. *Consolidated Coal*, 89 Ill. 2d at 110-111; *Mlynarski v. Rush Prebyterian - St. Luke's Medical Center*, 213 Ill App. 3d 427, 433 (1991).

¶ 48 During pretrial discovery, Dr. Paulsen revealed he had read and relied upon several transcripts of depositions as the bases for his expert opinion. It was not until Dr. Paulsen testified at the jury trial that plaintiffs learned Dr. Paulsen relied upon summaries of those transcripts tendered to him by his attorneys and did not view the actual depositions.

¶ 49 Plaintiffs rely solely on the *Jackson* case (*Jackson ex rel. Jackson v. Reid*, 402 Ill. App. 3d 215 (2010)), and its application of the Rule 213(f)(3) expert witness disclosure requirements (Ill. S. Ct. Rule 213(f)(3) (eff. Jan. 1, 2007))[8] to support their position that the summaries became discoverable once Dr. Paulsen, as an expert witness, testified that he relied on these summaries,

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[8] Section 213(f)(3) provides: A "controlled expert witness" is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.

without receiving or reading the complete deposition transcripts, in forming his expert opinion. We conclude that the holding in *Jackson* is distinguishable from the facts in the instant case, but the language used in that case actually supports defendants' position. In *Jackson*, plaintiffs sought to discover medical journal articles, relied on by the expert witness but not authored by the defense counsel. This court, in *Jackson*, stressed that the "work product rule protects documents prepared *by counsel*." (Emphasis in original). *Id* at 234. Since the articles which the *Jackson* plaintiffs sought to discuss during cross-examination were not prepared by defense counsel, the court held the work product rule did not apply. *Id*. at 232. In the case at bar, not only were the summaries prepared by defendants' counsel in preparation for trial, but there were other sources available to the plaintiffs to secure the factual information contained in the summaries, specifically, the actual deposition transcripts themselves as well as medical records. See *Consolidated Coal*, 89 Ill. 2d at 110-111.

¶ 50 As to privileged attorney-client communications, these summaries of the depositions, by their nature, reveal the attorney's mental processes in evaluating the communications and determining the important aspects of the depositions. These documents were shared only with Dr. Paulsen and his defense counsel in preparation for trial. As such, this is a communication that falls under the attorney-client privilege. See *In re Himmel*, 125 Ill. 2d 531, 541-42 (1988). The trial court reviewed the summaries *in camera*, prior to ruling, and found that the summaries of the testimony did, in fact, represent defense counsels' mental impressions of the testimony and were protected by both the attorney-client privilege and the work product privilege. We agree. Therefore, the trial court's decision to deny plaintiffs' motion to compel on the basis of work product and attorney-client privilege was not an abuse of discretion.

¶ 51 II. Jury Instruction IPI 5.01

¶ 52 IPI jury instruction 5.01, "Failure to Produce Evidence or Witness," can be given to the jury when a party fails to call a witness who is under his or her control and has relevant information to the case. Illinois Pattern Jury Instructions, Civil No. 5.01 (4th ed. 2000) (hereinafter, IPI 5.01). Initially, we note that the court granted a motion *in limine* that plaintiffs would not request this missing witness instruction in respect to Dr. Gupta, who was scheduled to be out of the country at the time of the jury trial. The pretrial agreement is set forth below:

> "The parties have agreed that Plaintiff will not seek a jury instruction regarding Defendants' failure to call Dr. Gupta as a witness so long as Dr. Paulsen does not testify that he *relied* upon Dr. Gupta's opinion when Dr. Paulsen decided to perform the gastrojejunostomy. The parties have agreed that Dr. Paulsen will not offer this testimony." (Emphasis added)

Contrary to this agreement, plaintiffs tendered IPI 5.01 regarding the absence of two doctors, Drs. Gupta and Crawford, who were members of defendant Peoria Surgical and cared for plaintiff during the times he was hospitalized at Methodist Hospital. The court refused the request to allow the jury to receive the missing witness instruction which provides, in relevant parts:

> "If a party to this case has failed to produce a witness within his power to produce, you may infer that the testimony of the witness would be adverse to that party if you believe each of the following elements:
>
> The witness was under the control of the party and could have been produced by the exercise of reasonable diligence.
>
> The witness was not equally available to an adverse party.

A reasonably prudent person under the same or similar circumstances would have produced the witness if he believed the testimony would be favorable to him. No reasonable excuse for the failure has been shown." IPI 5.01.

Plaintiffs contend that Dr. Paulsen's testimony during trial varied from the discovery statements and negated the pretrial agreement not to request this instruction.

¶ 53 Upon our careful review of the transcripts of Dr. Paulsen's trial testimony, Dr. Paulsen testified that he "may" have spoken to Dr. Gupta about plaintiff's condition during plaintiff's hospital stay. Importantly, Dr. Paulsen stated he did not "rely on" or recall the details of any conversation that "may" have occurred between the two doctors. Dr. Paulsen emphasized during the jury trial that he did not consult with Dr. Gupta prior to making the decision to perform surgery, and did not rely on any other input from any other physician. Dr. Paulsen did not recall talking to Dr. Crawford at all. Thus, his testimony at trial did not vary from the expectations expressed in the agreed response to the motion *in limine* with reference to plaintiffs' pretrial agreement to forego a request for the missing witness instruction.

¶ 54 The court's determination of which jury instructions should be given to the jury lies within the sound discretion of the trial court, and a reviewing court will not disturb this determination absent a clear abuse of discretion. *Stift v. Lizzadro*, 362 Ill. App. 3d 1019, 1025-26 (2005). Based on this record, we conclude the trial court did not abuse its discretion in light of the pretrial agreement of the parties addressed in the agreed approach to the motion *in limine*.

¶ 55 Further, it is well established that the missing witness instruction (IPI 5.01) will only be given when some evidence is presented on each of the four following elements: (1) the evidence was under the control of the party and could have been produced with the exercise of due

diligence, (2) the evidence was not equally available to the adverse party, (3) a reasonably prudent person under the same or similar circumstances would have produced the evidence if he believed it would have been favorable to him and (4) there was no reasonable excuse for the failure to produce the evidence. *Tuttle v. Fruehauf Div. of Fruehauf Corp.*, 122 Ill. App. 3d 835, 843 (1984); *Weatherell v. Matson*, 52 Ill. App. 3d 314, 318 (1977). The instruction should not be given when the evidence which has not been produced is merely cumulative of the facts already established. *Tuttle*, 122 Ill. App. 3d at 843. In refusing to give the jury the missing witness instruction, the trial court found:

> "[T]he adverse presumption for 5.01 depends on the lack of a reasonable excuse for the non-production or the willful withholding of evidence, and there is most certainly reasonable excuse for the non-production of this witness. So, I'm not going to allow the use of 5.01, because it doesn't fit the mold.

Additionally, all of plaintiff's medical records were admitted into evidence and Dr. Paulsen testified regarding some of the medical notes of Drs. Gupta and Crawford. Therefore, we conclude the testimony of these two doctors would have been cumulative because their medical notes were already admitted into evidence. Accordingly, the trial court did not abuse its discretion by refusing to give the jury IPI 5.01.

¶ 56 III. Court's Denial of Posttrial Motion for New Trial

¶ 57 Finally, plaintiffs argue the jury's verdict was against the manifest weight of the evidence and the trial court should have granted plaintiffs a new trial. A court's ruling on a motion for a new trial will not be reversed unless it is affirmatively shown that the trial court clearly abused its discretion. *Maple v. Gustafson,* 151 Ill. 2d 445, 455 (1992). In exercising its discretion, if the

trial court finds that the verdict is against the manifest weight of the evidence, he should grant a new trial; however, where there is sufficient evidence to support the verdict of the jury, it constitutes an abuse of discretion for the trial court to grant a motion for a new trial. *Id.* at 456. A verdict is against the manifest weight of the evidence where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary, and not based on any of the evidence. *Maple,* 151 Ill.2d at 454.

¶ 58 Here, the trial court denied plaintiffs' posttrial motion asking for a new trial alleging the jury verdict was against the manifest weight of the evidence. In this case, all the medical experts testified there were risks associated with performing the second surgery, as well as risks associated with continuing plaintiff on his current course of treatment, including intravenous feeding for an extended period of time. Dr. Paulsen, as the surgeon, had to balance the risks against the potential benefits of the surgery. Defendants' three medical experts, Drs. Howard, Uzer, and Paulsen, explained that Dr. Paulsen adhered to the appropriate standard of care in deciding to perform the gastrojejunostomy on plaintiff, on May 5, 2004. These experts further concluded that Dr. Paulsen did not breach his standard of care in performing the surgery itself. Dr. Shapiro, plaintiff's expert, testified Dr. Paulsen breached his standard of care and should not have performed the gastrojejunostomy based on the risk factors. Additionally, in Dr. Shapiro's opinion, Dr. Paulsen also breached his requisite standard of care in performing the gastrojejunostomy.

¶ 59 It is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide the weight to be given to the witnesses' testimony. *Maple*, 151 Ill. 2d at 452; *Stapleton ex rel. Clark v. Moore* , 403 Ill. App. 3d 147, 165 (2010). A

reviewing court should not usurp the function of the jury or substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence. *Maple*, 151 Ill. 2d at 452-53.

¶ 60 In the case at bar, the jury had the opportunity to hear the evidence, observe the witnesses and their testimony, determine the witnesses' credibility, resolve inconsistencies and conflicts in the expert witnesses' testimony, and draw inferences from the evidence before reaching its verdict. There was ample evidence in the record to support the jury's verdict finding in favor of defendants and against plaintiffs, and the jury's findings were not unreasonable or arbitrary. Therefore, the trial judge did not abuse his discretion in denying plaintiffs' motion for new trial on these grounds.

¶ 61 CONCLUSION

¶ 62 For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County.

¶ 63 Affirmed.