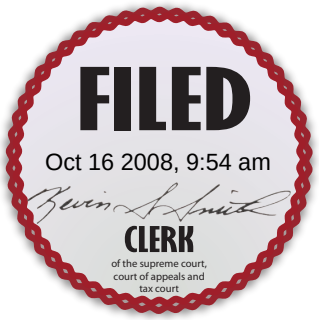

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IN THE
COURT OF APPEALS OF INDIANA

JOHN M. NWANNUNU, M.D.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0802-CV-72
	)	
JOSHUA WAYNE GIDLEY and MARY GIDLEY,	)	
	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
Cause No. 45C01-9704-CT-1017

October 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Dr. John Nwannunu appeals a judgment in favor of J.G. on J.G.'s medical malpractice claim against Dr. Nwannunu. Dr. Nwannunu raises three issues, which we consolidate and restate as:

I. Whether the trial court abused its discretion by admitting the testimony of Dr. Philip Kellar; and

II. Whether the trial court erred by denying Dr. Nwannunu's motions for judgment on the evidence.

We affirm.[1]

The relevant facts follow. J.G. was born on November 28, 1989, and J.G.'s mother, Mary Catherine Shirley, did not notice anything unusual about his penis at his birth. On May 7, 1990, Dr. Nwannunu performed a circumcision on J.G. and told Shirley to follow up in two weeks. On May 10, 1990, Shirley observed that the Plasti-Bell[2] fell off because it was in the bottom of the diaper. J.G.'s penis looked "[w]ay different" and there was "[a] lot of blood and it looked like [J.G.]'s penis was cut off." Transcript at 150, 164. Shirley took J.G. to the emergency room the next day. Id. at 150. Shirley was told to put antibiotic cream on J.G. and keep his penis "clean and dry." Id. at 152.

[1] We note that the record does not include an electronic version of the transcript. We remind the court reporter that Ind. Appellate Rule 28(C) provides: " All paper Transcripts generated on a word processing system shall be accompanied by a copy of the Transcript in electronic format."

[2] Dr. Kellar defined a Plasti-Bell as a "little piece of equipment which is made out of plastic. It has this kind of a handle and you take this portion and place it into here, tie a suture around the outside, excise or cut off the skin and then break off the handle and allow it to heal over a ten, twelve day period." Transcript at 273.

On May 21, 1990, Shirley and J.G. visited Dr. Nwannunu, and Dr. Nwannunu told Shirley to follow up "with what they told [Shirley] at the hospital." Id. at 153. After this visit, Shirley took J.G. to the hospital the next day. Shirley told the emergency room staff that J.G.'s penis had closed up and that he could not urinate. J.G. could not urinate "at all" and "it would drip and you had to push on it to get him to go a little bit." Id. at 155. Dr. B. Atassi told Shirley that he had to perform another surgery on J.G. Dr. Atassi's operative report stated that, before the surgery, he could not "see the head of the penis anymore." Id. at 156.

When J.G. was almost a year old, Shirley noticed that J.G.'s penis "stuck straight out" and he had a lot of scarring on his penis. Id. at 159. When J.G. was twelve or thirteen, Shirley noticed that J.G. had "a lot of hair" on his penis, and J.G. complained about the length of his penis. Id. at 162. In high school, other boys would "ma[k]e fun" of J.G. because his penis "just sticks straight out." Id. at 231. J.G. wore underwear when he took showers. J.G. wears a "smaller size underwear" to hold his penis down and it is uncomfortable. When J.G.'s penis is not erect and sticking out, it is approximately one inch long. When J.G. has an erection, his penis is "about three to four inches." Id. at 233. J.G. experiences pain in his penis approximately two times a month.

J.G. is able to ejaculate but, approximately fifty percent of the time he wants to have an orgasm he cannot get an erection. J.G. has hair growing on the shaft of his penis. In J.G.'s opinion, his biggest problem is that his penis "sticks straight out." Id. at 235.

The length of his penis bothers J.G. because "it's not even average size for a male." Id. at 236. J.G. has scarring on his penis.

On March 10, 1994, J.G. filed a proposed complaint with the Indiana Department of Insurance alleging medical malpractice against Dr. Nwannunu. On April 14, 1997, a Medical Review Panel issued an opinion that Dr. Nwannunu failed to meet the applicable standard of care but that the conduct complained of was not a factor in the resultant damages.

On April 18, 1997, J.G. filed a complaint against Dr. Nwannunu alleging that as a result of Dr. Nwannunu's negligent actions J.G. "was required to undergo a second corrective surgery, has incurred substantial medical, surgical, hospital, and nursing expenses and further, suffered severe mental anguish and embarrassment[,] . . . has suffered severe and permanent damage to his penis which, more probable than not, will require additional surgery in the future as well as incur future medical expenses and loss of earnings and further, will cause [J.G.] future psychological damages due to the permanent injuries suffered to his penis." Appellant's Appendix at 112.

On June 14, 2001, Dr. Nwannunu filed a motion for summary judgment and argued that "the Medical Review Panel Opinion negates the conduct of [Dr. Nwannunu] as the proximate cause of the damages alleged." Appellant's Appendix at 115. On September 25, 2001, J.G. filed a response to Dr. Nwannunu's motion for summary judgment. J.G. designated the affidavit of Dr. Philip Kellar. Dr. Kellar's affidavit

indicated that he reviewed medical records and photographs of J.G. and concluded that Dr. Nwannunu failed to properly perform the circumcision. The trial court initially granted Dr. Nwannunu's motion for summary judgment, but later reconsidered, and vacated the summary judgment, and then denied the motion for summary judgment.

On November 8, 2007, shortly before the jury trial, Dr. Nwannunu filed a motion to exclude the expert testimony of Dr. Kellar and argued, in part, that Dr. Kellar's "causation opinions are not based on scientific principles or any reasonable investigation and are therefore unreliable under Evid. R. 702(b), and inadmissible under Evid. R. 104(a)." Appellant's Appendix at 183. Dr. Nwannunu also argued:

> There is no scientific basis for the opinions expressed by Philip E. Kellar, M.D. regarding causation and damages. As Dr. Kellar's deposition testimony indicates, he is not qualified to render such opinions since he is not a urologist or a plastic surgeon, and is no longer board certified or actively performing circumcisions. Further, Dr. Kellar is unfamiliar with the Plastibell procedure and the aftercare required subsequent to such a procedure. Finally, and most importantly, Dr. Kellar has never performed a physical examination of [J.G.], has never discussed [J.G.]'s physical condition or alleged problems with [J.G.], and bases his opinions upon speculation and conjecture rather than any medical literature or research.

Appellant's Appendix at 183.

In November 2007, at the beginning of the jury trial and before the jury was selected, the trial court addressed Dr. Nwannunu's motion to exclude the testimony of Dr. Kellar. After argument, the trial court denied Dr. Nwannunu's motion and stated, "I'm

going to deny it because I just think that it doesn't go to the admissibility of his testimony, as much as it does the weight." Transcript at 23.

On direct examination, Dr. Kellar testified that he specialized in family practice and had performed about 3,500 circumcisions. Dr. Kellar reviewed the panel submissions of the parties and photographs, visually examined J.G., told J.G. to move his penis, and looked at it from "both the front and the side views." Id. at 277-278. Dr. Kellar testified that Dr. Nwannunu removed too much of the foreskin during the circumcision and explained how the error occurred mechanically.

Dr. Nwannunu's attorney cross examined Dr. Kellar regarding the standard of care and the following exchange occurred:

> Q And in your opinion, Doctor, the standard of care, I want to make sure we're on the same page when we talk about that, you believe the standard of care is care that should avail someone of a decent or good outcome; isn't that your definition of the standard of care?
>
> A Yes.
>
> Q Well, that's not the legal definition, is it?
>
> A I don't know the legal definition.
>
> Q Well, Doctor, would you read me your definition? I took these words right out of your deposition – care that should avail someone a decent or good outcome. That's not the standard of care at all because that doesn't allow for complications or bad outcomes, does it?
>
> A I don't understand.

Q Well, according to your definition, Doctor, every time you don't have a decent or good outcome, you believe that's a violation or deviation from the standard of care, correct?

A Yes.

Q So, your –

A Well, maybe not every time but, yeah, go ahead.

Q Well, under your definition, you don't allow for the circumstance where patients have complications, isn't that true?

A True.

Q So, under your definition every time a physician in treating a patient has a complication, that physician has breached or violated the standard of care?

A Correct.

Transcript at 333-334.

Dr. Nwannunu moved for a "mistrial and/or directed verdict." Id. at 334. Dr. Nwannunu argued in part, "We're not talking about 702 now, we're talking about someone who is sitting here offering all these expert opinions on standard of care that are based on an absolutely illegally incorrect definition of what the standard of care is." Id. at 335. Dr. Nwannunu also argued, "I think it's a matter of law and we're entitled to judgment on the evidence for failure to have admissible expert testimony." Id. at 336. The trial court denied Dr. Nwannunu's motion and stated, "My research indicates that this is a question, and it goes to the weight. It's a question for the jury. You can argue all

you want about, you know, about the fact that he did not have a – you know, the legal definition, deviation of standard of care, and you know, you can draw that out from your own experts." Id. at 339-340.

After J.G. rested, Dr. Nwannunu again moved for a "directed verdict for judgment on the evidence." Id. at 392. Dr. Nwannunu's attorney argued that J.G. failed to establish the breach of the standard of care as well as the causation. Dr. Nwannunu also argued that Dr. Kellar's opinions were based on his "subjective beliefs." Id. at 394. Specifically, Dr. Nwannunu's attorney stated:

> But now, [Dr. Kellar] went on through the remainder of my examination, to make quite a few concessions that most – the most fatal of which for the Plaintiff's case and for the admissibility and the ability for any jury to be able to rely on this testimony, were the answers to the final two or three questions I asked on cross examination, which – where the doctor agreed with me that the opinions he was offering were based on his subjective beliefs.
>
> Read Rule 702. Read the cases again that we have cited in our Rule 702 motion to bar at the outset and it makes it absolutely clear under Indiana law an expert cannot come into court, as Dr. Kellar has done here, and offer expert testimony that's based on his or her subjective belief.

Id. at 393-394. The trial court denied Dr. Nwannunu's motion and stated "I think all this goes to the weight and so, I'm just going to rule that way." Id. at 397.

The jury returned a verdict for J.G. in the amount of $112,500. Dr. Nwannunu filed a motion to correct error and argued that the trial court erred by "denying [his] Motion in Limine pursuant to Indiana Evidence Rules 104 and 702 in which he sought to exclude the testimony of [Dr. Kellar]" and by "denying [his] Trial Rule 50 Motion for

Judgment on the Evidence after [Dr. Kellar]'s testimony that demonstrated he had applied a legally incorrect standard of care in formulating his opinions and/or that all of his opinions were based on his subjective beliefs." Appellant's Appendix at 201. After a hearing, the trial court denied Dr. Nwannunu's motion to correct error.

I.

The first issue is whether the trial court abused its discretion by admitting the testimony of Dr. Kellar. Ind. Evidence Rule 702 governs the admissibility of expert testimony and provides:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

"The trial court's determination regarding the admissibility of expert testimony under Rule 702 is a matter within its broad discretion, and will be reversed only for abuse of that discretion." Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 459 (Ind. 2001).

Dr. Nwannunu does not challenge the qualifications of Dr. Kellar as an expert.[3] Rather, Dr. Kellar appears to base his argument on Ind. Evidence Rule 702(b) and argues

[3] In his reply brief, Dr. Nwannunu states in a footnote that "Plaintiffs' reliance on the opinion of the medical review panel is particularly ironic, given that the alleged breach involved the failure to refer

that Dr. Kellar's methodology for arriving at his opinions was "exposed" on cross examination and is simply "insufficient as a matter of law" to admit Dr. Kellar's testimony that Dr. Nwannunu breached the standard of care and that this breach caused injuries to J.G. Appellant's Brief at 25.

When scientific testimony is involved, "Rule 702(b) imposes an additional requirement that, in order for the testimony to be admitted, the court must be satisfied that the expert scientific testimony is based on reliable scientific principles." Doe v. Shults-Lewis Child & Family Services, Inc., 718 N.E.2d 738, 748-749 (Ind. 1999).

"To be admissible, an expert's opinion that an event caused a particular injury must be based on something more than coincidence." Clark v. Sporre, 777 N.E.2d 1166, 1170-1171 (Ind. Ct. App. 2002). "An expert's opinion on causation in a medical malpractice case must rest on an application of particular scientific facts to particular data about the instant case." Id. at 1171 (internal quotation marks omitted). "An expert witness who lacks detailed knowledge of a plaintiff's current medical condition and past medical history has no basis to give an opinion on causation under Rule 702." Id. (internal quotation marks omitted).

[J.G.]'s case to a urologist, and rather than retain a urologist to review the case, plaintiffs chose Dr. Kellar, a family physician." Appellant's Reply Brief at 12 n.6. To the extent that Dr. Nwannunu is arguing whether Dr. Kellar was not qualified as an expert, Dr. Nwannunu has waived this argument by raising it for the first time in his reply brief. See Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 977 (Ind. 2005) (holding that appellant waived issue by raising it for the first time in their reply brief); Ind. Appellate Rule 46(C).

Dr. Nwannunu argues that Dr. Kellar's testimony was inadmissible because: (A) Dr. Kellar applied a legally deficient standard of care in formulating his opinions; and (B) Dr. Kellar's testimony constituted subjective beliefs that were legally insufficient to constitute scientific expert testimony under Ind. Evidence Rule 702(b).

A. Standard of Care

Dr. Nwannunu correctly points out that a plaintiff must provide expert testimony to establish the standard of care in a medical malpractice case. See Narducci v. Tedrow, 736 N.E.2d 1288, 1292 (Ind. Ct. App. 2000) ("To establish the applicable standard of care and to show a breach of that standard, a plaintiff must generally present expert testimony."). Dr. Nwannunu also argues that the standard applied by Dr. Kellar in formulating his expert opinions is legally wrong and thus "as a matter of law this witness was incompetent to testify as to the applicable standard of care in this case." Appellant's Brief at 20. Dr. Nwannunu does not develop this argument or cite to authority that an expert's testimony is not admissible unless the expert applies the correct standard of care. Thus, Dr. Nwannunu has waived this argument. See, e.g., Loomis v. Ameritech Corp., 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding argument waived for failure to cite authority or provide cogent argument), reh'g denied, trans. denied.

Waiver notwithstanding, we will attempt to address Dr. Nwannunu's argument. Initially, we note that the Indiana Supreme Court has imposed the following standard of care upon physicians in a medical malpractice context: "a physician must exercise that

degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which he belongs, acting under the same or similar circumstances." Vergara v. Doan, 593 N.E.2d 185, 187 (Ind. 1992). "Physicians are not held to a duty of perfect care." Syfu v. Quinn, 826 N.E.2d 699, 703 (Ind. Ct. App. 2005).

Dr. Nwannunu argues that "[a]ccording to Dr. Kellar, the 'standard of care' requires a 'good result.'" Appellant's Brief at 19. Dr. Nwannunu argues that because Dr. Kellar applied a legally wrong standard in formulating his opinions "as a matter of law [Dr. Kellar] was incompetent to testify as to the applicable standard of care in this case." Appellant's Brief at 20.

On direct examination, Dr. Kellar testified that Dr. Nwannunu deviated from the standard of care in performing J.G.'s circumcision by removing too much of the foreskin. Dr. Nwannunu points to the following exchange that occurred during cross examination of Dr. Kellar:

> Q And in your opinion, Doctor, the standard of care, I want to make sure we're on the same page when we talk about that, you believe the standard of care is care that should avail someone of a decent or good outcome; isn't that your definition of the standard of care?
>
> A Yes.
>
> Q Well, that's not the legal definition, is it?
>
> A I don't know the legal definition.

Q Well, Doctor, would you read me your definition? I took these words right out of your deposition – care that should avail someone a decent or good outcome. That's not the standard of care at all because that doesn't allow for complications or bad outcomes, does it?

A I don't understand.

Q Well, according to your definition, Doctor, every time you don't have a decent or good outcome, you believe that's a violation or deviation from the standard of care, correct?

A Yes.

Q So, your –

A Well, maybe not every time but, yeah, go ahead.

Q Well, under your definition, you don't allow for the circumstance where patients have complications, isn't that true?

A True.

Q So, under your definition every time a physician in treating a patient has a complication, that physician has breached or violated the standard of care?

A Correct.

Transcript at 333-334. However, on redirect examination, the following exchange occurred:

Q Now, Doctor, would you describe this as, you talked a little bit about your knowledge of the deviation of the standard of care, correct?

A Yes.

Q And there are cases where there's a complication that's nobody's fault?

A Correct.

Q And there's bad outcomes that are nobody's fault?

A Correct.

Q So, to be clear in this case, is this either a complication or a bad outcome or is this malpractice?

A This is malpractice.

Id. at 379-380. Based on the record[4] and in light of Dr. Kellar's clarification, we cannot say that Dr. Kellar used the wrong standard of care or that his testimony was inadmissible.[5]

B. Subjective Beliefs

[4] We note that the trial court instructed the jury on the standard of care as follows: "The plaintiff has the burden of proving the following propositions. First, that Dr. Nwannunu was negligent in that he failed to exercise reasonable skill and diligence in his treatment and care in the performance of circumcision surgery of plaintiff . . . ." Transcript at 623. The trial court also stated, "A physician commits an act of malpractice when the physician fails to exercise the degree of reasonable care and skill in providing health care to a patient as would a reasonably careful skillful and prudent physician acting under the same or similar circumstances." Id. at 624.

[5] Dr. Nwannunu argues that "[i]t is generally accepted in the law that a party cannot rehabilitate their own sworn testimony by later contradicting it." Appellant's Reply Brief at 7 n.3. Dr. Nwannunu relies upon Gaboury v. Ireland Road Grace Brethren, Inc., 446 N.E.2d 1310, 1314 (Ind. 1983), in which the Indiana Supreme Court addressed a summary judgment motion and held that the non-moving party's affidavit contradicting his statements in a deposition could not create an issue of fact. Here, we are not within the context of a summary judgment and Dr. Nwannunu clarified his testimony on redirect examination. See Coffer v. Arndt, 732 N.E.2d 815, 823 (Ind. Ct. App. 2000) (holding that Gaboury did not apply because ophthalmologist's second affidavit clarified rather than contradicted his first affidavit), reh'g denied, trans. denied.

Dr. Nwannunu correctly points out that scientific knowledge is more than subjective belief or unsupported speculation. See Lytle v. Ford Motor Co., 696 N.E.2d 465, 472 (Ind. Ct. App. 1998), reh'g denied, trans. denied. Dr. Nwannunu points to various portions of Dr. Kellar's testimony and essentially argues that Dr. Kellar's testimony was based on subjective beliefs.

Dr. Nwannunu argues that Dr. Kellar: did not physically touch J.G. during his examination or ask J.G. questions; failed to perform a pull test on J.G.'s penis; testified that he did not disagree, based upon his physical examination of J.G., with Dr. Stonehill's opinion that J.G.'s penis did not have traction;[6] and testified that his opinion was merely his subjective beliefs.

The record reveals that Dr. Kellar reviewed the panel submissions of the parties and photographs, visually examined J.G., told J.G. to move his penis, and looked at it

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[6] We note the following exchange that occurred during a videotaped deposition of Dr. Stonehill:

> Q Doctor, when you mentioned that there's no traction on [J.G.'s] penis, that's another term I want to make sure that we define. When you – when you're talking about traction, you'd be talking about there being no – no skin pulling on the penis restricting it, right?
>
> A Right. . . . [I]n the normal penis, you've got skin covering it like this . . . sleeve on a shirt. And it would be – a traction would be if – if this was pulling on it and pulling the arm or the penis to the side, to the top, to the other side, downward. On that I – I did not notice any issue with for [sic] him.

Transcript at 418.

from "both the front and the side views." Transcript at 277-278. Dr. Kellar testified that Dr. Nwannunu removed too much of the foreskin and explained how the error occurred mechanically. On redirect examination, Dr. Kellar testified that the fact that he did not physically touch J.G. did not change his opinion in the case. Id. at 382. Dr. Kellar testified that he disagreed with Dr. Stonehill's conclusion that there was no traction on J.G.'s penis. Specifically, Dr. Kellar testified that J.G.'s penis had traction based upon Dr. Kellar's understanding of the mechanics of scarring. While Dr. Kellar conceded that he did not perform a pull test on J.G., Dr. Kellar found that J.G.'s penis was taut, scarred, stuck straight out, and had scrotalization[7] as a result of Dr. Nwannunu's surgery. Dr. Kellar clarified that his objective beliefs were based on the records and photographs that he reviewed, and his examination of J.G., which is "how most physicians come to their opinions." Id. at 376.

In support of his argument that Dr. Kellar's testimony was merely subjective belief and unsupported speculation, Dr. Nwannunu relies upon Messer v. Cerestar USA, Inc., 803 N.E.2d 1240 (Ind. Ct. App. 2004), trans. denied; Hannan v. Pest Control Serv.,

[7] The following exchange occurred during the direct examination of Dr. Stonehill:

> Q The – the scrotalization that you talked about, it . . . is skin from the scrotum that's sort of pulled up onto the shaft the penis?
>
> A Yes, sir.

Transcript at 406.

Inc., 734 N.E.2d 674 (Ind. Ct. App. 2000), reh'g denied, trans. denied; and Clark v. Sporre, 777 N.E.2d 1166 (Ind. Ct. App. 2002). These cases concluded that the testimony of proposed experts was inadmissible. See Messer, 803 N.E.2d at 1248 (holding that expert's opinion was unsupported speculation or subjective belief when "[t]here was no indication that [the expert] took any measurements, performed any analysis, or even viewed the gate and accident scene"); Hannan, 734 N.E.2d at 683 (approving a trial court's rejection of three expert opinions purporting to diagnose plaintiffs' illness because the purported experts were not qualified to testify as to medical causation and their methods and opinions: (1) were unreliable; (2) were not grounded in scientific knowledge; (3) were not generally accepted in the relevant scientific community; and (4) failed to negate other possible causes of the plaintiffs' illnesses and were based on a mere, alleged temporal relationship); Clark, 777 N.E.2d at 1169-1171 (holding that trial court did not err when it prohibited a purported expert from testifying that it was his opinion that plaintiff's brain injury was caused by a hypoxic event where nothing in the plaintiff's record indicated that a hypoxic event occurred and expert never reviewed any of the record of plaintiff's hospitalization). Given Dr. Kellar's qualifications, which Dr. Nwannunu does not challenge on appeal, Dr. Kellar's testimony that he examined J.G., reviewed the medical records and photographs, and Dr. Kellar's explanation of how Dr. Nwannunu breached the standard of care and J.G. was injured, we find these cases

distinguishable and conclude that Dr. Kellar's testimony was not based upon unsupported speculation or subjective belief.

II.

The next issue is whether trial court erred by denying Dr. Nwannunu's motions for judgment on the evidence. Initially, we note that Dr. Nwannunu presented evidence after the trial court denied his motion for judgment on the evidence and did not renew his motion for judgment on the evidence at the close of the evidence. Thus, Dr. Nwannunu has waived any appeal of the denial of his motion for judgment on the evidence. See Wolfe v. Estate of Custer ex rel. Custer, 867 N.E.2d 589, 595 n.5 (Ind. Ct. App. 2007) (holding that appeal of the denial of defendant's motion for judgment on the evidence was waived by his subsequent presentation of evidence), trans. denied; Davidson v. Bailey, 826 N.E.2d 80, 87 n.9 (Ind. Ct. App. 2005) (noting that a defendant waives any alleged error regarding the denial of a motion for judgment on the evidence when he moves for judgment on the evidence and then introduces evidence on his own behalf after the motion is denied); F.W. Woolworth Co., Inc. v. Anderson, 471 N.E.2d 1249, 1253 n.3 (Ind. Ct. App. 1984) (addressing the defendant's argument that the trial court erred by denying their motion for judgment on the evidence made at the conclusion of the plaintiff's case-in-chief by holding that when the appellants chose to present their case they waived any error occasioned by the trial court's ruling), reh'g denied, trans. denied; see also Ind. Trial Rule 50(A)(6) ("A motion for judgment on the evidence made at one

stage of the proceedings is not a waiver of the right of the court or of any party to make such a motion . . . except that error of the court in denying the motion shall be deemed corrected by evidence thereafter offered or admitted.").[8]

Despite Dr. Nwannunu's waiver of the denial of his motion for judgment on the evidence, we will address his argument as a sufficiency challenge. See Wolfe, 867 N.E.2d at 595 n.5 (addressing plaintiff's arguments as a sufficiency challenge).[9] In reviewing the sufficiency of evidence in a civil case, we will decide whether there is substantial evidence of probative value supporting the judgment. Jamrosz v. Resource Benefits, Inc., 839 N.E.2d 746, 758 (Ind. Ct. App. 2005), trans. denied. We neither weigh the evidence nor judge the credibility of witnesses but consider only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom. Davidson v. Bailey, 826 N.E.2d 80, 87 (Ind. Ct. App. 2005). "The verdict will be affirmed unless we conclude that it is against the great weight of the evidence." Id.

[8] We note that Dr. Nwannunu's statement of facts only mentions Dr. Nwannunu's motions for judgment on the evidence during the presentation of J.G.'s evidence and after J.G. rested. In his argument section, Dr. Nwannunu states that "at the close of evidence on November 14, 2007, Dr. Nwannunu moved for judgment on the evidence . . . ." Appellant's Brief at 30-31. Dr. Nwannunu does not cite to the record for this statement, and our review of the record does not reveal that Dr. Nwannunu moved for judgment on the evidence after the close of Dr. Nwannunu's evidence.

[9] Dr. Nwannunu mentions the denial of his motion to correct error, but does not provide argument specifically addressing this denial. Rather Dr. Nwannunu focuses on the trial court's denial of his motion for judgment on the evidence. Thus, we will review his allegations of error in the context of a challenge to the sufficiency of the evidence. See, e.g., Wolfe, 867 N.E.2d at 595 n.5 (noting that the plaintiff mentioned the denial of his motion to correct error in passing and reviewed the allegations of error in the context of a challenge to the sufficiency of the evidence).

In general, a plaintiff must prove each of the elements of a medical malpractice case, which are that: (1) the physician owed a duty to the plaintiff; (2) the physician breached that duty; and (3) the breach proximately caused the plaintiff's injuries. Mayhue v. Sparkman, 653 N.E.2d 1384, 1386 (Ind. 1995). According to Dr. Nwannunu, J.G. failed to present evidence establishing that: (A) Dr. Nwannunu breached the standard of care; (B) and Dr. Nwannunu's breach proximately caused J.G.'s injuries.

A. Breach of Standard of Care

Dr. Kellar testified that Dr. Nwannunu made an "error." Transcript at 279. The following exchange occurred during the direct examination of Dr. Kellar:

> Q Let's go through, Doctor, the basis of your opinion. First of all, with respect to the deviation of the standard of care. Can you tell the jury what Dr. Nwannunu did or did not do which fell below the standard of care?
>
> A He actually removed too much of the foreskin. If it would be easier for the jury to understand, I can show you, hopefully, through the graphic of how it occurred.
>
> * * * * *
>
> Q Okay, Doctor, how – what did you – what was the basis of your opinion that too much foreskin removed?
>
> A Just doing this for fifteen years, everything, you know, from Monday through Sunday, we do circumcisions at the hospital. I also taught these residents how to do these circumcisions. I taught the interns how to do the circumcisions.
>
> * * * * *

> [Dr. Kellar]: . . . .What transpired, the surgeon or the physician made this part, accomplished this part. When he placed these two clamps here, if you notice there's an inside, sort of tissue, which is called the mucosa. And then the dermaware which is the outside. So, they're actually sliding like this. He placed this clamp, he actually grabbed the inside tissue further down that [sic] should have been. When he brought it out, he now everted or moved out the tissue allowing this skin then to fall back this way. Now, when he was excising it, he actually stretched the skin and he removed too much. . . .

Transcript at 279-282.

Dr. Kellar testified that Dr. Nwannunu deviated from the standard of care. Based upon this testimony, we conclude that J.G. presented evidence from which a jury could have reasonably inferred that Dr. Nwannunu breached the standard of care. See Wolfe, 867 N.E.2d at 598 (holding that the plaintiffs presented evidence from which the jury could have reasonably inferred that Wolfe's negligence was indeed a substantial factor in Donald's harm).

B. Proximate Cause

Dr. Nwannunu points to Dr. Kellar's testimony in which he acknowledged the importance of taking a physical exam and the fact that he did not physically examine J.G. However, the following exchange occurred during redirect examination of Dr. Kellar:

> Q Now, it's been making a big deal about the physical exam. You said, yeah, I should have probably brought gloves, correct?
>
> A Correct.
>
> Q Because the fact that you didn't physically examine him and had him manipulate, in any way change your opinion in this case?

A None.

Transcript at 382.

Dr. Nwannunu argues that "Dr. Kellar admits that he has no basis to disagree with Dr. Stonehill's objective conclusions which, of course, completely contradict his own subjective 'feeling' about the condition of [J.G.]'s penis." Appellant's Brief at 33. On redirect examination, Dr. Kellar testified that he disagreed with Dr. Stonehill in some aspects. Dr. Kellar "strongly" disagreed with Dr. Stonehill's statement that scrotalization was common after circumcision. Transcript at 366. Dr. Nwannunu's attorney asked Dr. Kellar, "Would you agree or disagree with a board certified urologist who says this situation of a penis sticking straight out is something he sees fairly frequently?" Id. Dr. Kellar answered, "He may see it, I don't see it frequently." Id.

Dr. Nwannunu also points to testimony of Dr. Kellar in which Dr. Kellar was asked if other doctors had found that the length of J.G.'s penis was in the normal range. On redirect examination, the following exchange occurred:

Q And this – and this thing they brought out, this chart from Dr. Reisman, you disagree that his penis is – do you disagree that his penis is below the normal size?

A It's closer to negative two deviations than it is closer to the mean. He's below on this graph.

Id. at 382.

The following exchange occurred during the direct examination of Dr. Kellar:

Q Doctor, based on your review of the records, your review of the photos, your examination of [J.G.], has – did Dr. Nwannunu's surgery in any way affect [J.G.]'s shaft of his penis?

A Yes.

Q And – and what happened?

A It caused shortening of the shaft, caused the shaft to be pulled inward or toward the mons pubis, the bone and then the subcutaneous fat, that fat tissue.

Q And how would that happen?

A It's like putting reins on a – on a puppy dog and you just pull them back in.

Q Did the use of the Plasti-Bell have anything to do with that?

A Well, the choice of the size, yes.

Q In your examination of [J.G.] and in the photos, does it appear that his penis is not going to a resting state, flaccid?

A Correct. It appears to be taught [sic]?

Q Is that something you would normally see in your years of family practice?

A No, never.

Q And what causes that, Doctor?

A The shaft is being tethered or pulled towards the center of the body. So, it's causing it, instead of being in a downward position, it's being brought up this way.

Id. at 298-299.

Based upon this testimony, we conclude that J.G. presented evidence from which a jury could have reasonably inferred that Dr. Nwannunu's actions proximately caused J.G.'s injuries. See Wolfe, 867 N.E.2d at 599 (holding that the trial court did not err by entering judgment against physician because the evidence was sufficient to support the jury's verdict).

For the foregoing reasons, we affirm the judgment in favor of J.G. on J.G.'s medical malpractice claim against Dr. Nwannunu.

Affirmed.

BAKER, C. J. and MATHIAS, J. concur