

FRIEDLANDER, Judge

Janet Greenwell appeals from a negative judgment in her medical malpractice action against Drs. Gregory J. Loomis and Matthew B. Kern. Greenwell presents three issues for review, all of which involve the admission of evidence. We restate those issues as follows:

1. Did the trial court abuse its discretion by disallowing the testimony of one of Greenwell's experts on grounds that the opinions and bases for those opinions were not disclosed prior to trial?
2. Did the trial court abuse its discretion by excluding evidence related to allegedly fraudulent billing by Drs. Kern and Loomis?
3. Did the trial court abuse its discretion in restricting cross-examination of one of the appellees' expert witnesses on the basis of medical records prepared by another physician?

We affirm.

On July 18, 1997, Greenwell engaged the services of neurological surgeon Gregory Loomis, M.D. for treatment of an unstable condition of the lowest level of her lumbar spine. The condition was diagnosed as an L5-S1 spondylolisthesis, which results when the lumbar five vertebral body slides forward on the first sacral vertebra due to a bony defect in the *pars interarticularis*. After the initial evaluation, Greenwell was transferred to the care of Kern, who was Loomis's associate. Kern ordered additional flexion and extension x-rays of Greenwell's lumbar spine.

On August 18, 1997, Kern performed lumbar surgery upon Greenwell. Loomis assisted. The surgery was summarized in an Operative Report, which indicated that the

operation concentrated upon the L4-5 and L5-S1 areas.¹ Greenwell was seen on approximately a monthly basis after the surgery. X-rays of the operative site taken a short time after surgery showed early evidence of healing along the fusion sites, but x-rays of the lumbar spine showed a new bony defect in posterior elements of L4. Kern noted a defect in the *pars interarticularis* at L4-5 in his office note of November 18, 1997. For billing purposes, Ladonna Livers, the medical practice office manager for Loomis and Kern, performed the coding for the August 18, 1997 surgery. The computerized records generated therefrom indicated that four levels of the lumbar spine were treated, whereas the operative note indicated only two levels were operated upon.

Greenwell continued to experience back pain and numbness with buckling of her left leg. Therefore, on April 28, 1998, she was seen by Dr. Gregory McComis of Tri-State Orthopaedic Surgeons (Tri-State). Thereafter, Greenwell was under the care of several physicians for her low-back condition, including Drs. Cannon and Winniger, Tri-State, and Deaconess Clinic Welborn. Dr. Whitacre, a pain management specialist at Tri-State, treated Greenwell with morphine patches. Radiological examinations performed in 2008 and 2009 revealed that the lowest level of the lumbar spine, L5-S1, had fused.

Greenwell filed a proposed complaint with the Indiana Department of Insurance alleging that Loomis and Kern acted negligently in treating her back condition. A Medical Review Panel found that there was a question of fact whether Loomis and Kern complied

¹ “L4-5” refers to lumbar vertebral level four to five, whereas “L5-S1” refers to the fifth lumbar level to the first sacral vertebral level.

with the applicable standard of care. On March 3, 2005, Greenwell filed a medical complaint for damages alleging that she had suffered injury as a result of the August 18, 1997 surgery performed by Loomis and Kern. A jury trial in the matter commenced on February 1, 2010. The jury returned a verdict in favor of Loomis and Kern.

1.

Greenwell contends the trial court abused its discretion by disallowing the testimony of one of Greenwell's experts on grounds that the opinions and bases for those opinions were not disclosed prior to trial.

Trial courts enjoy broad discretion in ruling on the admissibility of evidence. *W.S.K. v. M.H.S.B.*, 922 N.E.2d 671 (Ind. Ct. App. 2010). We review such rulings for an abuse of discretion and the trial court's decisions in this respect are afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id.* We will not reverse because of the erroneous admission of evidence unless the complaining party demonstrates the evidence impacted the decision. *Strack & Van Til, Inc. v. Carter*, 803 N.E.2d 666 (Ind. Ct. App. 2004).

At trial, Greenwell called Dr. Robert Lieberman, a neurosurgeon, as an expert witness to assess Loomis's and Kern's treatment of Greenwell. After extensive testimony, Lieberman stated his conclusion that the instability at Greenwell's L4-5 was "caused by removal of too much facets and laminae" during the August 18 surgery. *Transcript at 255.* Lieberman was

then asked the following question: “Now, you have reviewed various post treatment records. When you reviewed those records what ... what is the status line so far as the use of pain medicine.” *Id.* At that point, Kern’s attorney objected to the question on grounds that “it’s not within his disclosure. It’s not within his deposition.” *Id.* Counsel’s objection referred to the fact that pain treatment and pain medication were not previously identified as areas within Lieberman’s medical expertise and he had not been asked about those matters during pretrial deposition. Although Greenwell’s counsel offered that Lieberman had reviewed the pertinent records detailing Greenwell’s pain treatment, which were admitted into evidence, the trial court sustained the objection, stating, “the records speak for themselves. He doesn’t have to regurgitate the records.” *Id.* Greenwell’s counsel then asked, “Do patients with an unstable spine often become chronic users of hard narcotics, Doctor”, to which Lieberman responded, “I’m not sure.” *Id.* at 256. Counsel then asked, “Is that the case with Mrs. Greenwell?” *Id.* Kern’s counsel lodged another objection asking, in effect, how Lieberman would know the answer to that question.

During a subsequent conference with counsel, it became clear that Greenwell’s counsel wished to use Lieberman’s testimony in this regard in order to dilute the importance of a videotape apparently depicting Greenwell washing a car after her surgery. The trial court again sustained the objection on grounds that Lieberman was not qualified in this case to offer an opinion on that matter. Greenwell’s counsel asked, “Do patients under the influence of narcotics, are they able to bend, twist and lift?” *Id.* at 258. The court sustained the ensuing objection. Greenwell contends the trial court erred in preventing Lieberman from testifying as described above.

Greenwell's argument in this regard fails for several reasons. Among them are the provisions of Ind. Trial Rule 26(B)(4)(a)(i), which provides as follows:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

The duty to supplement discovery responses after the initial response is absolute and is not predicated upon a court order. *P.T. Buntin, M.D., P.C. v. Becker*, 727 N.E.2d 734 (Ind. Ct. App. 2000). More specifically, T.R. 26(E)(1)(b) provides that a party is under a duty to supplement discovery responses "with respect to any question directly addressed to ... the identity of each person expected to be called as an expert witness at trial, *the subject-matter on which he is expected to testify, and the substance of his testimony.*" (emphasis supplied). "If a party fails to conform to the requirements of T.R. 26(E) and does not supplement discovery responses concerning experts to be utilized at trial, the trial court can in its discretion, exclude the testimony of the witness." *P.T. Buntin, M.D., P.C. v. Becker*, 727 N.E.2d at 738.

It is clear from the comments exchanged in the relevant portion of the trial transcript that Greenwell identified Lieberon in pretrial discovery as an expert, but pain management and pain medication were not among those topics identified as areas upon which he would or could provide expert testimony.² Although the trial court did not cite T.R. 26(E)(1)(b) in

² When objecting to a question posed to Lieberon concerning a videotape apparently depicting Greenwell engaging in physical activity inconsistent with her claim of physical disability or pain, defense counsel claimed it was "not in [Greenwell's] disclosure of expertise." *Transcript* at 258. Counsel made similar

sustaining the objection and excluding the testimony in question, the ruling may be affirmed on this basis. *See Scott v. State*, 883 N.E.2d 147, 152 (Ind. Ct. App. 2008) (appellate court “may affirm the trial court’s ruling if it is sustainable on any legal basis in the record, even though it was not the reason enunciated by the trial court”).

In addition, the ruling is sustainable on grounds that Greenwell has not demonstrated the requisite prejudice. *See Hite v. Haase*, 729 N.E.2d 170, 178 (Ind. Ct. App. 2000) (“[e]rroneously excluded evidence requires reversal only if the error relates to a material matter or substantially affects the rights of the parties”) (quoting *Indianapolis Podiatry, P.C. v. Efroymsen*, 720 N.E.2d 376, 383 (Ind. Ct. App. 1999), *trans. denied*). Greenwell contends the testimony was essential because, although there was evidence about Greenwell’s pain treatment history in relation to this condition, there was no evidence presented about Greenwell’s *recent* pain management treatments. Leaving aside for the moment the fallacious premise inherent in Greenwell’s argument, i.e., that it was the duty of Loomis or Kern – not Greenwell – to present such evidence,³ there was ample evidence presented at trial that Greenwell’s condition caused significant pain and that she had undergone treatment for that pain more or less continuously following the August 18 surgery.

Accordingly, Greenwell has not enlightened us as to how the excluded testimony would have conveyed a fact or circumstance regarding Greenwell’s condition that was not already

comments when he objected to Liberson’s responding to questions about Greenwell’s use of pain medicine. Those objections were sustained.

³ Greenwell states in her appellate brief, “Although both defendants were represented by counsel, no defense counsel inquired of Greenwell’s recent treatments. So that Lieberon could opine at trial, plaintiff’s counsel had to ask the neurological surgeon [questions regarding Greenwell’s recent pain treatments.]” *Appellant’s*

then known to the jury by virtue of other properly admitted evidence. Moreover, as Loomis and Kern observe, Greenwell has failed to provide a complete record with respect to other evidence that would be relevant in assessing the prejudice, if any, flowing from the exclusion of the evidence in question. The trial court did not abuse its discretion in prohibiting Lieberon from testifying on the matters discussed above.

2.

Greenwell contends the trial court abused its discretion by excluding evidence related to allegedly fraudulent billing by the office of Drs. Kern and Loomis concerning the August 18 surgery.

Greenwell introduced Exhibits 54 and 59. The former was a computer-generated summary of Greenwell's billing history for services rendered by Drs. Kern and Loomis. The latter was a handwritten summary reflecting the coding, for billing purposes, of procedures performed during the August 18 surgery. Kern and Loomis acknowledged at trial that Exhibit 59 indicates that Greenwell was, as Greenwell describes it, billed for "a four level surgery when only a two level surgery was performed." *Appellant's Brief* at 11. The importance of this evidence, according to Greenwell, is that it tended to prove not only that the appellees attempted to defraud Greenwell (i.e., "the unnecessary surgery and the excess billing were part of a scheme to produce income", *id.* at 14), but it also tended to impair Loomis's and Kern's credibility.

Greenwell acknowledges that the complaint for damages she filed against Loomis and Kern alleged specifically and only that they did not meet the requisite standard of medical

Brief at 8.

care in performing L4-5 surgery upon her. Yet, her argument upon this issue is permeated with references to the theory of fraud. Indeed, she notes, “in negligence, Indiana requires only notice pleading and the complaint can be amended to conform to the evidence. Greenwell should have been able to amend the complaint to match the evidence.” *Id.* at 10. It appears, therefore, that Greenwell’s claim of error is based, at least in part, upon the contention that she was foreclosed thereby from adding a claim for fraud.⁴ Yet, we note that in arguing about the relevance of Exhibits 54 and 59, Greenwell’s counsel stated:

It goes directly to what was done in the surgery, and what was not done in the surgery. Now, Your Honor, has a point about collateral issues. *We’re not charging here with fraud*, but I think we ought to be able to discuss what ... that there is a disparity between the very office record of Dr. Kern and Loomis and what was done in surgery.

Transcript at 164 (emphasis supplied). It is one thing to fail to request an amendment to the complaint for purposes of adding a claim of fraud, but it is a different thing altogether to affirmatively *disclaim* the desire to do so at trial. Greenwell cannot present different

⁴ Greenwell also offers the following in favor of admissibility: “[T]he records in question are part of the “*res gestae*” of the case itself and are hardly outside the facts of the case.” *Appellant’s Brief* at 14. Noting that her research revealed no cases in which this concept was applied in civil – as opposed to criminal – cases, Greenwell speculates that this is because “the admission of such evidence is routine and probably not appealed in civil matters.” *Id.* at 13. Whether this speculation was or was not true once upon a time, we note that our Supreme Court long ago determined “that the admissibility of evidence heretofore claimed admissible as part of the *res gestae* should henceforth be analyzed by reference to the Indiana Rules of Evidence. The *res gestae* rule itself has not survived the adoption of those rules.” *Swanson v. State*, 666 N.E.2d 397, 397 (Ind. 1996). We therefore decline to further address Greenwell’s *res gestae* argument.

arguments on appeal than were offered to the trial court with respect to the admissibility of the evidence. *Cf. Taylor v. State*, 710 N.E.2d 921, 923 (Ind. 1999) (noting that in arguing that the trial court erred in refusing to admit evidence, the proponent “is limited to the specific grounds argued to the trial court and cannot assert new bases for admissibility for the first time on appeal. It is well settled that a party cannot raise one ground in the trial court and a different ground on appeal”). In this case, Greenwell waived the claim on appeal that excluding the evidence was error because it prevented her from adding an allegation of fraud, when she affirmatively indicated during trial that she was not alleging fraud in this case.⁵ *See Taylor v. State*, 710 N.E.2d 921.

Finally on this issue, we note that there is no evidence in the record to contradict the testimonies of Drs. Kern and Loomis that they did not prepare the billing statement, did not direct its preparation, nor indeed did they even know of its existence until the day before trial commenced. As such, it could not possibly be used to impeach their credibility on any relevant question of fact with respect to the manner in which they performed the August 18 surgery, or serve any other useful purpose that we can perceive. The trial court did not abuse its discretion in excluding the evidence in question.

3.

Greenwell contends the trial court abused its discretion in limiting cross-examination during the videotaped testimony of one of the appellees’ experts concerning a certain medical record relating to Greenwell’s post-surgery treatment by another physician. Greenwell

⁵ In an apparent preemptory strike against waiver, Greenwell contends, “There is little doubt that the trial court would *not* have permitted amending the complaint based on the above ruling.” *Appellant’s Brief* at 12

claims the medical record in question was designated as “Exhibit 40” at trial. *Appellant’s Appendix* at 171. At this point, it would be useful to examine Exhibit 40’s atypical origin.

Dr. Gregory McComis, an orthopedic surgeon at Tri-State Orthopaedic Surgeons, Inc., treated Greenwell after the August 18 surgery. Almost six years before the complaint in the instant case was filed, Dr. McComis was deposed in conjunction with a previous lawsuit Greenwell filed against her employer. On October 28, 2009, Greenwell filed a “Memorandum on Scope of Cross-examination and Admissibility of Medical Records” in the instant case. *Id.* at 6. In that memorandum, Greenwell argued in favor of admitting into evidence certain portions of a videotaped deposition of Dr. Gary Dennis in which he was cross-examined about medical records pertaining to Dr. McComis’s treatment of Greenwell. Specifically, Greenwell sought to question Dr. Dennis about a certain matter referenced in Dr. McComis’s written records, which were recorded in April 1998. The reference in question appears on Exhibit 40, which was admitted into evidence at the previous trial against Greenwell’s employer under a different designation.⁶

Greenwell makes several assertions of error with respect to Exhibit 40 and its contents. Greenwell frames one of those issues as follows: “Whether [Exhibit 40] is otherwise admissible because defendant’s expert has ‘opened the door’”. *Appellant’s Brief* at 16. Greenwell does not direct our attention to a place in the record where she sought the admission of this exhibit into evidence, nor does our perusal of the record reveal one. It is axiomatic that the trial court cannot be deemed to have erred in refusing to admit evidence

(emphasis in original). Regardless, the fact remains that Greenwell did not submit such a request.

⁶ It evidently was marked “Plaintiff’s Exhibit 2” in that trial.

that was never offered into evidence in the first place.

The second allegation of error concerning the subject matter addressed in Exhibit 40 is that the trial court erred in refusing to permit Greenwell's counsel to cross-examine Dr. Dennis about the contents of Dr. McComis's report. Greenwell contends this was error because Dr. Dennis opened the door to the admission of the evidence when he indicated that his opinion was based in part upon Dr. McComis's records.

We have held that, to be admissible into evidence, medical records that are not excluded by the hearsay rule must nonetheless be otherwise admissible. *See Wilkinson v. Swafford*, 811 N.E.2d 374 (Ind. Ct. App. 2004) *abrogated on other grounds by Willis v. Westerfield*, 839 N.E.2d 1179 (Ind. 2006). In a similar context, we explained: "hospital records may not be excluded as hearsay simply because they include opinions or diagnoses. *But, and this is a substantial but, for medical opinions and diagnoses to be admitted into evidence, they must meet the requirements for expert opinions set forth in Evid. R. 702.*" *Id.* at 391 (quoting *Schlott v. Guinevere Real Estate Corp.*, 697 N.E.2d 1273, 1277 (Ind. Ct. App. 1998)) (emphasis in original). Indiana Evidence Rule 702 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.

Two requirements must be met for a witness to be qualified as an expert within the meaning of Evid. R. 702: (1) "the subject matter must be distinctly related to some scientific field, business, or profession beyond the knowledge of the average person"; and (2) "the witness

must have sufficient skill, knowledge, or experience in that area so that the opinion will aid the trier of fact.” *Wilkinson v. Swafford*, 811 N.E.2d at 391.

We understand that Greenwell is contending that McComis’s records would have arguably refuted Dr. Dennis’s expressed opinion on the subject of “when the vertebrate [sic] in question would slip following removal of key supporting bone.” *Appellant’s Reply Brief* at 8. Even assuming this is true, the fact remains that Dr. McComis’s records must have been admissible under Evid. R. 702 in order to be admitted or utilized, and they were not. Greenwell did not establish Dr. McComis’s qualifications to offer expert testimony on these matters.⁷ For this and other reasons that we need not discuss here, the trial court did not abuse its discretion in restricting the scope of Dr. Dennis’s cross-examination as it did. *See Wilkinson v. Swafford*, 811 N.E.2d 374.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.

⁷ Interestingly, when discussing the admissibility of this portion of Dr. Dennis’s videotaped deposition, the trial court asked Greenwell’s attorney why he did not call Dr. McComis to testify about the records that he had prepared. Counsel’s reasons had nothing to do with Dr. McComis’s professional credentials, viz.: “I felt that Dr. McComis would be adverse to me because I had sued him in other medical malpractice actions, and I don’t think it would be my client’s best interest to call him as a witness.” *Transcript* at 374-75.