2015 IL App (4th) 140294-U

NO. 4-14-0294

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 15, 2015
Carla Bender
4th District Appellate
Court, IL

CLIFFORD E. COZAD,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Piatt County
CHW DISPLAYS, INC., an Illinois Corporation,	)	No. 10L12
Defendant-Appellee.	)	
	)	Honorable
	)	Richard L. Broch,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Pope and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Refusing to instruct the jury on *res ipsa loquitur* was an abuse of discretion that seriously prejudiced plaintiff's right to a fair trial.

(2) The trial court abused its discretion, and committed reversible error, by refusing to bar the testimony of a medical expert, retained by the defense, who, in preparation for his testimony, had reviewed *ex parte* depositions of mental-health professionals who had provided treatment to plaintiff.

¶ 2 Defendant, CHW Displays, Inc., is an Illinois corporation that is in the business of putting on fireworks shows. The evening of July 3, 2008, at Lodge Park, near Monticello, Illinois, defendant was launching fireworks from mortars when a shell landed in the midst of spectators, exploding and allegedly injuring plaintiff, Clifford E. Cozad. He sued defendant for negligence, and the jury returned a verdict against him and in favor of defendant.

¶ 3 Plaintiff appeals on three grounds. First, he argues the trial court abused its discretion by refusing to instruct the jury on the doctrine of *res ipsa loquitur*. We agree with this

argument, and we find that the omission of an instruction on *res ipsa loquitur* seriously prejudiced plaintiff's right to a fair trial. The remedy for a prejudicial error in the jury instructions is a new trial.

¶ 4 Because of his poor health, however, plaintiff prefers a default judgment or a judgment *n.o.v.* over a new trial, and he believes that such would be a reasonable remedy for his second ground of appeal: allowing an expert witness to testify despite his review of confidential information obtained *ex parte*, in violation of the *Petrillo* rule. See *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 593 (1986) ("[E]*x parte* conferences between defense counsel and a plaintiff's treating physician threaten the fiduciary nature of the physician-patient relationship. Therefore, *ex parte* conferences should be barred as being against public policy."). Plaintiff contends that the trial court abused its discretion by refusing to bar the testimony of defendant's medical expert, Norman V. Kohn, who, in preparation for his testimony, had reviewed some depositions of plaintiff's mental-health counselors that defendant's attorney had taken *ex parte*, without serving reasonable advance notice on plaintiff's attorney. We agree that the defense violated *Petrillo* by taking these *ex parte* depositions, and we agree that the court abused its discretion by refusing to bar Kohn from testifying, considering that the *ex parte* depositions were among the materials he reviewed when preparing for his testimony. The *Petrillo* violations appear to be mistakes, however, not willful misconduct, and therefore a default judgment or a judgment *n.o.v.* would be too severe a sanction. An ordinary reversible trial error calls for the ordinary remedy of a new trial.

¶ 5 Plaintiff's third ground of appeal is that the trial court failed to strike a previously undisclosed opinion that defendant's president, Clarence H. Wittig, Jr., gratuitously expressed on the stand: an opinion that the low-bursting firework might have been defective. The trial court

sustained plaintiff's objection to the opinion but neglected to strike the opinion, as plaintiff had requested in the objection. Because we are ordering a new trial on the basis of instructional error and the error of allowing Kohn to testify, we do not reach this third ground of appeal. Therefore, we reverse the trial court's judgment, and we remand this case for a new trial.

¶ 6 I. BACKGROUND

¶ 7 A. The Violations of *Petrillo* and the Resulting Sanction

¶ 8 On August 28 and 29, 2012, defendant's attorney, John H. Brooke, took the evidence depositions of Charles Wilson, Paul McGinnis, and William Johnson of Region 8 Mental Health (Region 8) in Mississippi. These three persons had provided mental-health services to plaintiff. Plaintiff's attorney, Jude M. Redwood, did not attend the depositions, which were recorded on digital video disc. She wanted to attend the depositions in person, and the notice, faxed to her, did not allow her enough reaction time. In any event, she had expressly refused to consent to receiving notices by electronic facsimile.

¶ 9 On March 26, 2013, Redwood filed a motion to bar the use of these three evidence depositions in the trial because Brooke had taken them without serving reasonable advance notice upon her, thereby violating *Petrillo*. Plaintiff had signed a document authorizing Region 8 to release his *medical records* to Brooke—and, using the authorization, Brooke had obtained the records from Region 8—but plaintiff never authorized Brooke to have *ex parte* communications with any of his medical providers.

¶ 10 On April 2, 2013, because of defendant's failure to comply with Illinois Supreme Court Rule 206(a) (eff. Feb. 16, 2011) ("A party desiring to take the deposition of any person upon oral examination shall serve notice in writing a reasonable time in advance on the other parties."), the trial court granted plaintiff's motion to exclude the three evidence depositions,

holding that they had been "conducted *ex parte* and without reasonable notice given to plaintiff's counsel [and without] any reasonable opportunity *** to make objections."

¶ 11 B. The Jury Trial

¶ 12 Plaintiff moved for a summary judgment as to liability, and the trial court denied that motion on March 14, 2013. The court took under advisement plaintiff's alternative request to "raise the doctrine of *res ipsa loquitur* for consideration by the jury." Before ruling on the applicability of *res ipsa loquitur*, the court wanted to hear the evidence in the jury trial.

¶ 13 The jury trial began on April 9, 2013, and concluded on April 12, 2013. We need not exhaustively recount the trial. The following summary should suffice for purposes of the issues in this appeal.

¶ 14 1. *Plaintiff's Testimony*

¶ 15 a. Direct Examination

¶ 16 Plaintiff testified that on July 3, 2008, he and some family members went to Lodge Park to watch the fireworks show. There were some antique cars at the park, and plaintiff and his nephew, Jared Cozad, walked by them and looked at them. Plaintiff then headed toward the portable toilets.

¶ 17 As he walked toward the portable toilets, the fireworks already had begun, and now and then he looked up at them and watched them exploding in the sky. He was across the road from the portable toilets, walking around the front of a pickup truck, when he saw what appeared to be a fuse falling from the sky. The fuse was lit: it was sparkling like a child's sparkler. It bounced off a tree branch and spiraled down toward him. Trying to gauge where it would land, plaintiff stopped and reversed course.

¶ 18 Redwood asked him:

"Q. Then what happened?

A. As far as I could tell, it started exploding right beside my head, and I believe it finished exploding on the ground beside my foot, approximately a foot, foot an[d] a half away from my foot.

Q. Then what happened? What did you see with your eyes?

A. When it started going off beside my head, a great flash.

Q. How far did it light things up?

A. All the way to the porta potties and the trees. I could see my shadow on the trees and the porta potties.

Q. What did you hear?

A. Like a hand grenade."

¶ 19 The explosion drove plaintiff back a few steps, and he "started vomiting and fell into it." Other people were on the ground, screaming, with their hands over their ears, or they were getting up and falling down again. Plaintiff lay on the ground. The explosion had made a hole in the ground big enough to put his head in. Jared Cozad approached and spoke with him, but it was hard to hear, and communication was difficult. Plaintiff could not remember what they told each other. A paramedic arrived, helped him into a golf cart, and transported him to a tent.

¶ 20 Redwood asked him:

"Q. What injuries do you believe that you got as a result of the fireworks going off next to you?

A. A pretty bad loss of hearing, loss of balance. I have a lot of trouble walking now because my balance is so bad. Sometimes I use two canes now even, not just one.

Q. Besides the loss of hearing, is there anything else about your ears that happened to you as a result of the fireworks going off?

A. Yes, ma'am. The ringing is terrible.

Q. When did that ringing start?

A. Probably a couple of seconds after the explosion. Like right now it's about like a car horn going off, and it's in this room.

Q. Since that fireworks exploded next to you on July 3, 2008, has the ringing or other noises in your ears stopped?

A. Not completely stopped. Never. It changes. Sometimes it's like crickets or chirping. Like I say, kind of like a car horn. Even the pitch has changed sometimes. It's very distracting. Makes it almost impossible to think clearly."

¶ 21 Plaintiff testified that ever since the explosion, he had become more irritable, and he had troubling hearing. Hearing aids had not entirely remedied the hearing problem: they "reproduce[d] the sound too sharply." He had done almost no work since the explosion because his balance had been so bad. He no longer could drive. He was not very social anymore. He was startled by noises, especially by thunder. He had threatened suicide to get away from the tinnitus, and a psychiatrist in Mississippi had put him on pills, which had transformed him into a "walking zombie."

¶ 22 Before the fireworks explosion, plaintiff had Type 2 diabetes, which he had been controlling with his diet, and he also had high blood pressure, which he had been controlling with medication.

¶ 23 b. Cross-Examination

¶ 24 On direct examination, plaintiff testified he was walking around the front of a pickup truck when the explosion knocked him down. On cross-examination, however, he testified he was near the tailgate of the pickup truck. When impeached with testimony from his deposition that he was three to five feet away from the driver's door when he fell, he changed the location to the opposite side of the truck, near the passenger's door.

¶ 25 Plaintiff contradicted his deposition testimony again when he testified, on both direct and cross-examination, that Jared Cozad came over to him after the explosion. In his deposition, plaintiff testified he did not remember his nephew's coming over to him.

¶ 26 On direct examination, plaintiff described the hole left by the explosion as "big enough to put [his] head in," whereas, in his deposition, he testified that the explosion merely left a "divot."

¶ 27 On direct examination, plaintiff testified that the explosion began near his head and continued down toward his feet, as if this were a phenomenon he himself had seen. In his deposition, however, he seemed to say he had learned of this phenomenon from what other, unspecified witnesses had told him.

¶ 28 2. *The Testimony of Jared Cozad*

¶ 29 Jared Cozad, who was 21 years old, testified that on July 3, 2008, he attended a picnic with plaintiff and other relatives at Lodge Park. He was coming up a hill, from the river, and was on his way to the portable toilets when the fireworks began. Plaintiff, his uncle, who

was about seven truck-lengths ahead of him, went over the hill, out of his line of vision. Jared Cozad then heard a loud explosion, which shook the ground, and he saw a bright flash. There was a smell of gunpowder. When he went up over the brow of the hill, he saw plaintiff "on the ground[,] curled up like a ball, and he was holding his ears, and his face was kind of like, puke a little." He asked plaintiff if he was all right, and plaintiff did not respond: he appeared to be "out of it." Jared Cozad ran back and fetched plaintiff's wife, Rosie Cozad. He told her that plaintiff was hurt and that she should go to him.

¶ 30 3. *The Testimony of John D. Russell*

¶ 31 A Piatt County deputy sheriff, John D. Russell, testified he was on foot patrol at Lodge Park on July 3, 2008, and that about halfway to two-thirds of the way through the show ("[a] rough estimate at best"), something went wrong. He was "just to the south of the line of porta potties" when he heard an "extremely loud" explosion to the north. The blast seemed to be about six to eight feet off the ground. Some 30 people ran in his direction, and a cloud of smoke, about 20 yards wide, rolled toward him.

¶ 32 According to Russell, one man had a burnt pants leg, and another man had a headache and nausea. Several people remarked "that the concussion of the detonation [had] caused their legs to buckle." Approximately 29 people were treated at the scene, and 3 people were taken to the hospital.

¶ 33 The next day, as Russell and another police officer, Donahue, were inspecting the area, Donahue pointed out a "small crater," stripped of vegetation, where he thought one of the shells had hit the ground. In the crater were fragments of paper, which, an investigator from the Illinois Department of Natural Resources (Department) said, had come from the firework. The

crater was "approximately halfway between the lowest part of the lake and the road where *** the porta potties were situated."

¶ 34 4. *The Testimony of Michael L. Jones*

¶ 35 Michael L. Jones testified that on July 3, 2008, he was a paramedic with Kirby Ambulance Service in Monticello when he was called to Lodge Park because of a reported fireworks explosion. He found plaintiff sitting on a chair at the first-aid tent on the park grounds (another paramedic had already brought plaintiff there). Jones noted plaintiff's symptoms and vital signs in a Kirby Ambulance Service report. Jones did not recognize plaintiff in the courtroom, and he had no independent recollection of treating him. Jones was entirely dependent on what he had written in the report. He was trained, though, to "document everything."

¶ 36 Jones testified that, evidently, he saw on plaintiff no visible physical evidence of having been near an explosion, because if Jones had seen such visible physical evidence, he would have so noted in his report, in the category of "trauma." He had written down, however, that plaintiff was complaining of ringing in his right ear, a headache, and dizziness.

¶ 37 Jones attributed the headache and dizziness to plaintiff's high blood pressure and high blood sugar. His blood pressure was 220/110, which Jones characterized in his testimony as being "pre-stroke blood pressure," the blood pressure of someone in a "hypertensive crisis." According to a finger-prick test on site, plaintiff's blood sugar also was "extremely high."

¶ 38 Jones admitted that excitement could raise a person's blood pressure and blood sugar, but he had never known adrenaline to raise blood sugar to that extent. And besides, plaintiff had admitted to Jones he had not been taking his medicine.

¶ 39 Jones was so concerned about plaintiff's blood pressure and blood sugar that he wanted to transport him immediately to Kirby Medical Center in Monticello. At first, plaintiff

declined. In light of this refusal, protocol dictated that Jones confer with a physician. So, Jones telephoned a physician at Provena Hospital, and the physician was adamant that plaintiff needed to be taken to the hospital right away. Jones passed on this advice to plaintiff, who then agreed to be taken to the hospital.

¶ 40 5. *The Testimony of Clarence H. Wittig, Jr.*

¶ 41 Clarence H. Wittig, Jr., testified that on July 3, 2008, he was the president of defendant and he was at Lodge Park during the fireworks display. He remembered that right after the show started, during the first volley, there were some low explosions: some six-inch shells fell, with a report, into the lower part of the lake region. He did not see any shells fall in the vicinity of the portable toilets. He did not learn until later that something happened near the portable toilets.

¶ 42 Wittig did not know which of the workers launched the six-inch shells. Nor did he know exactly what caused the mishap. The spectators and the portable toilets were where they were supposed to be: on the other side of the yellow caution tape. Wittig did not personally check on the workers to make sure they were doing their jobs correctly.

¶ 43 He explained that the fireworks were launched from mortars, which were either stuck in the dirt or mounted in wooden racks, and that the fireworks went wherever they were aimed. If the mortar were not planted securely enough in the dirt or if too small a shell were put in too large a mortar tube, the shell could go astray. But Wittig had no information that the workers committed either of those errors.

¶ 44 The Department performed an investigation, and Wittig identified plaintiff's exhibit No. 4 as a letter he afterward received from the Department. The letter is dated August 19, 2008; it bears the Department's logo; and it is signed by Michael L. Woods, the manager of

the Office of Mines and Minerals. In the letter, admitted in evidence, Woods writes to Wittig that on July 4, 2008, two employees of the Department—Jeff Steiner, a blasting specialist, and Jim Haflinger, a technical-explosives specialist—performed an investigation at Lodge Park, where defendant put on a fireworks show the previous evening. Woods continues:

> "2. During that inspection and subsequent investigation the Department has determined that [defendant] used explosive materials in a manner that endangered the public health, safety and welfare in violation of Section 3004(a)(9) of the [Illinois Explosives] Act [(225 ILCS 210/3004(a)(9) (West 2008))].
>
> Specifically the Department found that:
>
> (a) at least two fireworks shells detonated at or near ground level within the crowd gathered to watch the display, causing spectators to receive medical attention at the scene and/or the local hospital;
>
> (b) six, eight and ten inch shells were launched within the minimum setback distances to the crowd required by commonly accepted industry practices; and
>
> (c) the ten inch mortars, along with the northernmost mortar row in the main launch area failed to have sufficient overhead clearance from the adjacent tree line."

¶ 45 As a result of these violations, the Department imposed a fine upon defendant in the amount of $2,500. Also, before allowing defendant to conduct another fireworks display, the Department required 10 named persons, including Wittig, along with anyone else who participated in the fireworks display of July 3, 2008, to undergo "additional training (pre-approved by the Department) regarding the commonly accepted industry practices for safely detonating fireworks."

¶ 46 6. *The Testimony of Steven Martin*

¶ 47 A physician's assistant, Steven Martin, testified that he treated plaintiff at Kirby Medical Center on July 3, 2008. In his examination of plaintiff, he found (among other conditions) erythema, or redness, of the right ear and a questionable perforation of the right eardrum. With respect to plaintiff's hearing, he diagnosed plaintiff as suffering from tinnitus caused by a firework shell that had exploded too close to his ear.

¶ 48 7. *The Testimony of Andy R. Bierbaum*

¶ 49 Andy R. Bierbaum, a board-certified hearing instrument specialist, tested plaintiff's hearing on October 17, 2011. He testified that V-notches in the audiogram indicated that plaintiff had suffered noise-induced hearing loss. Bierbaum opined that plaintiff had moderate hearing loss, tinnitus, and recruitment (an abnormally strong response to increased loudness).

¶ 50 8. *The Testimony of William Panje*

¶ 51 A treating physician, William Panje, testified he had reviewed plaintiff's medical records. According to the records from Barnes Jewish Hospital, plaintiff was examined there on April 26, 2010, and he was diagnosed with bilateral mild to moderate sensorineural hearing loss

and tinnitus secondary to noise trauma. In his review of plaintiff's medical records, Panje did not find any complaints of tinnitus or hearing loss predating July 3, 2008.

¶ 52 Panje opined that exposure to a single event of extremely loud noise, such as the detonation of a firework one foot away, could inflict permanent hearing loss and tinnitus.

¶ 53 9. *The Testimony of Robert Beatty*

¶ 54 Another physician, Robert Beatty, testified as an expert retained by plaintiff. He had not examined plaintiff, but he had reviewed his medical records.

¶ 55 On the basis of his review of plaintiff's medical records, including the written records from Region 8 (but not the evidence depositions from Region 8), Beatty offered five opinions. First, a stroke plaintiff suffered in 2012 had nothing to do with the fireworks explosion in 2008. Second, there was a 50/50 chance that plaintiff suffered a concussion from the fireworks explosion. Third, because of his need to avoid noises, plaintiff had trouble coping with daily life. Fourth, plaintiff suffered from post-traumatic stress disorder as a result of the fireworks explosion. Fifth, at the time of the fireworks explosion, plaintiff had preexisting egg-shell conditions, which made him more vulnerable to stressors than other persons.

¶ 56 10. *The Testimony of Norman V. Kohn*

¶ 57 Norman V. Kohn was a physician retained by the defense (for $17,000), and he never examined plaintiff. After eliciting from Kohn his qualifications (he specialized in neurology and psychiatry), Brooke asked him a series of leading questions so as to quickly and efficiently inform the jury what materials Kohn had reviewed in preparation for his testimony. There were a lot of records from many sources. For example, Brooke asked Kohn:

> "Q. Did you review the *records* from the St. Dominic Jackson Memorial Hospital?

A. The Medical Arts Clinic, I think, spanned actually 2009 to 2010. What was the last? Jackson?

Q. St. Dominic, Jackson Memorial Hospital?

A. I did.

Q. *Did you review doctors from Region 8 Mental Health in 2010 to 2011?*

A. Yes.

Q. And did you review *records* from Madison County Medical Center, 2010 to 2012?

A. Yes." (Emphases added.)

¶ 58 After some more leading questions about the materials Kohn had reviewed, Brooke asked him:

"Q. Will you agree for purposes of trial that any other records that you may have reviewed, which have been subject to a Motion in Limine that we have instructed you about, that you will not discuss those matters in this case?

A. Certainly.

Q. And Doctor, I would ask that if you feel that from one of my question[s] I've accidentally posed, would you just refuse to answer that question?

A. Yes. Well let me say, I agree with all the things thank [*sic*] you listed recently, and the things you have asked me not to

use, I actually haven't gone back to in a long time, so I have no clear recollection of what was in those."

¶ 59 In his testimony, Kohn expressed essentially seven opinions.

¶ 60 First, since 2004, plaintiff had suffered from alcoholic pancreatitis, which had worsened his diabetes.

¶ 61 Second, when plaintiff arrived at Kirby Medical Center on July 3, 2008, his blood pressure was dangerously high, and he had "turn on the siren blood sugar." His diabetes was more than momentarily "out of tune"; it was so out of control that he was dehydrated and was suffering from peripheral neuropathy, which in turn had impaired his balance.

¶ 62 Third, plaintiff suffered no concussion on July 3, 2008.

¶ 63 Fourth, plaintiff did not have post-traumatic stress disorder.

¶ 64 Fifth, diabetes was a "contributing factor" to his inner ear disease because diabetes could harm the blood vessels to the ear. Diabetes was "an added factor *** to whatever else contribute[d] to hearing loss."

¶ 65 Sixth, plaintiff's medical records included "imaging evidence of earlier strokes" that plaintiff suffered before his clinical stroke of 2012: strokes that "were subclinical, meaning they didn't take him to the hospital, but they represent[ed] stroke changes in the brain from these sorts of diseases, and those [could] show up as changes in hearing and/or tinnitus."

¶ 66 Seventh, since 2012, plaintiff has experienced memory problems and confusion as a consequence of his alcoholism and uncontrolled diabetes. He had not even been able to cope with everyday life.

¶ 67 11. *Brooke's Closing Argument*

¶ 68 In his closing argument, Brooke argued to the jury:

> "There is no testimony that anybody stuck a shell in the wrong size tube here. There is no testimony that somebody angled a gun or mortar at the crowd. There is no testimony that a tube fell over. There is no testimony that a rack exploded. There is no testimony that a pot or mortar tube was cracked. There is none of that. That's the plaintiff's burden, and they didn't do it. There is no testimony about any of that. But they want you to make this leap of faith, because [plaintiff's] self reporting, has this problem, and [plaintiff's] a cripple now because of what their negligence was. I think that's even more of a leap of faith than normal."

¶ 69 The jury returned a verdict in defendant's favor and against plaintiff.

¶ 70 II. ANALYSIS

¶ 71 A. *Res Ipsa Loquitur*

¶ 72 1. *The Question of Forfeiture*

¶ 73 On September 4, 2012, plaintiff filed a document entitled "Motion for Summary Judgment as to Liability and/or To Raise the Doctrine of *Res Ipsa Loquitur*." Therein, plaintiff moved for a summary judgment against defendant on the question of liability. Alternatively, plaintiff requested permission to "raise the doctrine of *res ipsa loquitur* for consideration by the jury."

¶ 74 On March 14, 2013, the trial court denied plaintiff's motion for summary judgment. The court decided to take plaintiff's alternative request under advisement. The court wanted to wait until it heard all the evidence in the jury trial before ruling on the applicability of *res ipsa loquitur*.

¶ 75 The jury trial began on April 9, 2013, and on April 12, 2013, immediately after the close of the evidence, the trial court reiterated its denial of plaintiff's motion for summary judgment, and the court refused to instruct the jury on *res ipsa loquitur*. The court said:

> "Show first, the motion of plaintiff for the court to enter summary judgment against the defendant with regard to liability, again, when that issue first came up. We do have issues of genuine fact for the jury to decide. With regard to plaintiff's request for a jury instruction as to *res ipsa loquitur,* show also that that motion is denied at this time."

So, the court interpreted plaintiff's request to raise *res ipsa loquitur* to the jury as a request to instruct the jury on that doctrine, and at the close of the evidence, the court declined to instruct the request.

¶ 76 The proceedings were recessed until the morning of April 15, 2013, at which time the trial court held a jury instruction conference. It does not appear that, in the jury instruction conference, plaintiff tendered any instructions on *res ipsa loquitur*. See Illinois Pattern Jury Instructions, Civil, No. 22.02 (4th ed. 2006) (*res ipsa loquitur* and negligence as alternative theories of recovery).

¶ 77 Cases say that unless a party actually tenders a proposed jury instruction to the trial court—that is, gives the court the proposed instruction in writing—the party is in no position to complain, on appeal, of the court's failure to give such an instruction. *Deal v. Byford*, 127 Ill. 2d 192, 202-03 (1989); *Oldenstedt v. Marshall Erdmann & Associates, Inc.*, 381 Ill. App. 3d 1, 14 (2008); *American Pharmaseal v. TEC Systems*, 162 Ill. App. 3d 351, 358 n.1 (1987). If the proposed instruction could have been tendered in a jury instruction conference, merely an oral

proposal to give the instruction generally does not preserve an issue for review. The purpose of a jury instruction conference is to scrutinize proposed written instructions, not vague unwritten ideas for instructions. See Ill. S. Ct. R. 451(d) (eff. April 8, 2013) ("The court shall be provided an original and a copy of each instruction, and a copy shall be delivered to each opposing counsel.").

¶ 78 Cases also say, however, that if the trial court clearly and unequivocally refuses to instruct the jury on a given theory, a party need not thereafter perform the futile exercise of tendering an instruction to the court. *Department of Public Works & Buildings v. Ass'n of Franciscan Fathers*, 69 Ill. 2d 308, 319 (1977); *People v. Rosario*, 166 Ill. App. 3d 383, 395 (1988); *In re Estate of Payton*, 79 Ill. App. 3d 732, 739 (1979). On April 12, 2013, the trial court clearly and unequivocally refused to instruct the jury on *res ipsa loquitur*. After the refusal, tendering a proposed jury instruction on *res ipsa loquitur* would have been futile. We conclude, therefore, that even though plaintiff tendered no instruction on *res ipsa loquitur*, plaintiff has not forfeited his contention that the trial court erred by refusing to instruct the jury on *res ipsa loquitur*.

¶ 79 2. *Pleading Res Ipsa Loquitur*

¶ 80 The appellate court has held that to invoke the doctrine of *res ipsa loquitur*, "no special form of words is necessary" (*Darrough v. Glendale Heights Community Hospital*, 234 Ill. App. 3d 1055, 1060 (1992)) but the complaint must allege general negligence, not merely specific negligence (*Boersma v. Amoco Oil Co.*, 276 Ill. App. 3d 638, 647 (1995)). A general, nonspecific allegation of negligence puts the defendant on notice that the plaintiff intends to rely, at least alternatively, on *res ipsa loquitur*. *Deming v. Montgomery*, 180 Ill. App. 3d 527, 532

(1989); see also *Collgood, Inc. v. Sands Drug Co.*, 5 Ill. App. 3d 910, 915-16 (1972) (a complaint may include "alternative allegations of specific negligence and *res ipsa loquitur*").

¶ 81 The complaint in this case alleges not only specific negligence (defendant "negligently *** [e]rected and installed the *** mortars and shells inside the minimum setback distances to the crowd control line"), but also general negligence (defendant "negligently *** [u]sed explosive materials (fireworks) in a manner which endanger[ed] the public health, safety, or welfare"). The general allegation of negligence is sufficient to invoke the doctrine of *res ipsa loquitur*. See *Erckman v. Northern Illinois Gas Co.*, 61 Ill. App. 2d 137, 144 (1965).

¶ 82 3. *Some Evidence To Support an Instruction on Res Ipsa Loquitur*

¶ 83 Our initial task is to decide whether the trial court abused its discretion by refusing to instruct the jury on the doctrine of *res ipsa loquitur*, and only then will we take up the question of prejudice. See *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, ¶ 216. We should keep in mind that this standard of review is deferential and that our mere disagreement with a decision would not make the decision an abuse of discretion. Rather, a decision is an abuse of discretion only if the decision is arbitrary, unreasonable, or clearly illogical. *State Farm Fire & Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080, 1083 (2000).

¶ 84 Was the refusal to instruct the jury on *res ipsa loquitur* reasonable in light of the evidence? Only a little evidence justifies the giving of an instruction. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 406 (1998). The supreme court has said:

> "The threshold for giving an instruction in a civil case is *** not a high one. Generally speaking, litigants have the right to have the jury instructed on each theory supported by the evidence. Whether the jury would have been persuaded is not the question. All that is

> required to justify the giving of an instruction is that there be some evidence in the record to justify the theory of the instruction. The evidence may be insubstantial." *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007).

Was it reasonable to conclude that the record was devoid of even the slightest evidence to support an instruction on *res ipsa loquitur*? To answer that question, we must be clear on what *res ipsa loquitur* is.

¶ 85 *Res ipsa loquitur*, which is Latin for "the thing speaks for itself," "is a rule of evidence that allows an inference of negligence to be raised by circumstantial evidence." 1 Robert J. Steigmann & Lori A. Nicholson, Illinois Evidence Manual § 3:19, at 84 (4th ed. 2006). According to this doctrine, the defendant's negligence may be inferred if two propositions hold true: "(1) the occurrence is one that ordinarily does not occur in the absence of negligence[,] and (2) the defendant had exclusive control of the instrumentality that caused the injury." *Id.*

¶ 86 For two reasons, defendant argues that plaintiff was not entitled to an instruction on *res ipsa loquitur*. First, defendant argues that the doctrine of *res ipsa loquitur* is inapplicable if two opposing inferences would be equally reasonable: that the accident resulted from the defendant's negligence and that the accident resulted from some cause other than the defendant's negligence. See *Britton v. University of Chicago Hospitals*, 382 Ill. App. 3d 1009, 1012 (2008); *Napoli v. Hinsdale Hospital*, 213 Ill. App. 3d 382, 388 (1991). This argument is somewhat enigmatic in that defendant does not specify what alternative, nonnegligent cause could be reasonably inferred. If defendant ropes off an adequate setback distance from the crowd, makes sure there is enough overhead clearance from trees, aims the mortars in the right direction, and otherwise does everything a reasonably competent fireworks operator would do, what would

cause the firework shell to fall into the crowd and explode? Defendant offers no explanation. Surely, defendant does not mean to suggest it would be just as likely the firework's fault as the operator's fault. As Wittig testified, fireworks go where they are aimed. Surely, defendant does not mean to say, in effect: "Even if we, as fireworks professionals, do everything we are supposed to do on our end, fireworks are temperamental, and there is always a possibility that a shell will fall into the crowd and blow up some spectators. What a pity, but that's the price you pay for entertainment."

¶ 87 Evidently, the Department, which regulates explosives (225 ILCS 210/5001 (West 2008)), dismissed any nonnegligent possibility out of hand—and as the statutorily designated regulator, the Department presumably has expertise in fireworks. In its letter to Wittig, the Department seems to apply *res ipsa loquitur*. The letter says:

> "[T]he Department has determined that [defendant] used explosive materials in a manner that endangered the public health, safety and welfare in violation of Section 3004(a)(9) of the [Illinois Explosives] Act.
>
> Specifically the Department found that:
>
> (a) at least two fireworks shells detonated at or near ground level within the crowd gathered to watch the display, causing spectators to receive medical attention at the scene and/or the local hospital[.]"

It is true that the letter goes on to make additional findings (*i.e.*, not enough setback distance and not enough overhead clearance from the trees), but the text quoted above appears to draw an

inference of negligence merely from the explosion of firework shells among the spectators. This letter alone would support a jury instruction on the doctrine of *res ipsa loquitur*.

¶ 88 Again, to be entitled to an instruction on *res ipsa loquitur*, the plaintiff "need not conclusively prove all the elements of *res ipsa loquitur*." *Dyback v. Weber*, 114 Ill. 2d 232, 242 (1986). All the plaintiff has to do is present *some* evidence supporting the elements. "The evidence may be insubstantial." *Heastie*, 226 Ill. 2d at 543. The record contains some evidence that the fireworks were under defendant's exclusive control and that, but for the negligence of the fireworks operator, shells ordinarily do not land in the crowd and explode. One may infer that, ordinarily, spectators in a fireworks show do not come under mortar fire unless the fireworks operator is doing something wrong.

¶ 89 The second reason, according to defendant, why plaintiff was not entitled to an instruction on *res ipsa loquitur* is that he contradicted himself and other witnesses in his testimony. But such contradictions are irrelevant to the question of whether plaintiff was entitled to an instruction. "The jury has the duty of resolving contradictory evidence. All that is required in order to justify the giving of an instruction is that there is some evidence in the record to support the theory set out in the instruction." *Biggerstaff v. New York, Chicago & St. Louis R. Co.*, 13 Ill. App. 2d 85, 94 (1957). There is no requirement that the evidence be uncontradicted. "Whether the jury would have been persuaded is not the question." *Heastie*, 226 Ill. 2d at 543. The record contains "some evidence" to justify a theory of *res ipsa loquitur*, and refusing to instruct the jury on that doctrine was an abuse of discretion.

¶ 90 4. *Prejudice From Refusing To Instruct the Jury on Res Ipsa Loquitur*

¶ 91 "While the threshold for permitting an instruction in a civil case is modest, the standard for reversing a judgment based on a failure to permit an instruction is high. *** [A]

new trial will be granted only when the refusal to give a tendered instruction results in serious prejudice to a party's right to a fair trial." *Id.*

¶ 92 Instead of asking whether the trial was unfair without an instruction on *res ipsa loquitur*, defendant poses the question of whether the verdict is against the manifest weight of the evidence. That would be the question if plaintiff had moved for a new trial on the ground that the verdict lacked evidentiary support. See 28A Ill. L. & Prac., *New Trial* § 26 (2012). But plaintiff moved for a new trial on a different ground: because the trial court refused to instruct the jury on *res ipsa loquitur*. It is true that, in a case that defendant cites, *Maple v. Gustafson*, 151 Ill. 2d 445, 456 (1992), the supreme court said: "If the trial judge, in the exercise of his discretion, finds that the verdict is against the manifest weight of the evidence, he should grant a new trial; on the other hand, 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." In *Maple*, however, there was no allegation of instructional error—and the supreme court also said, in *Maple*, that when deciding whether the trial court abused its discretion by denying a motion for a new trial, the reviewing court should consider not only "whether the jury's verdict was supported by the evidence," but also "whether the losing party was denied a fair trial." *Id.* at 455. When the asserted ground for a new trial is an error in the jury instructions, the question is whether the error deprived the losing party of a fair trial, not whether the verdict is against the manifest weight of the evidence. *Heastie*, 276 Ill. 2d at 543; 28A Ill. L. & Prac., *New Trial* § 12 (2012).

¶ 93 A party's right to a fair trial is seriously prejudiced if the instructional error could have affected the verdict. See *Netto v. Goldenberg*, 266 Ill. App. 3d 174, 184 (1994). In other words, we apply the doctrine of harmless error. See *People v. Washington*, 2012 IL 110283, ¶ 60

("[I]nstructional errors are deemed harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed."); *Johnson v. Royal Neighbors of America*, 253 Ill. 570, 577 (1912) ("[T]he refusal of the instruction was harmless error ***."). There is no serious prejudice if other instructions adequately conveyed the substance of the omitted instruction (*Bevelheimer v. Gierach*, 33 Ill. App. 3d 988, 994-95 (1975)) or if the evidence supporting the verdict was so strong that giving the omitted instruction could not have made any difference (*Standard Oil Co. of Indiana v. Daniel Burkhartsmeier Cooperage Co.*, 333 Ill. App. 338, 356 (1948)). In short, we consider both the strength of the evidence (*id.*) and the potential of the jury instructions to be misleading in the absence of the omitted instruction (*Weisman v. Schiller, Ducanto & Fleck, Ltd.*, 368 Ill. App. 3d 41, 59 (2006)).

¶ 94 Apparently, defendant does not dispute the Department's finding that "at least two fireworks shells detonated at or near ground level within the crowd gathered to watch the display." Defendant disputes, however, that either of these detonations caused any injury to plaintiff. According to defendant, various self-contradictions and incongruities, which we have previously discussed, make plaintiff unbelievable.

¶ 95 It may well be that plaintiff came across to the jury as an unreliable witness, but the case does not depend entirely on his credibility. He has been diagnosed with hearing loss and tinnitus, and defendant did not dispute Panje's testimony that a firework exploding close to the ear could cause tinnitus. Nor did defendant dispute Panje's testimony that plaintiff's extensive medical records lacked any mention of tinnitus prior to July 3, 2008. And there are some corroborating circumstances. Jared Cozad testified he saw a bright flash just over the hill, where plaintiff had walked ahead of him, and that he heard a ground-shaking explosion. Russell testified to an explosion six to eight feet off the ground, in the vicinity of the portable toilets, and

he described a crater in the ground. The Department found that aerial shells had exploded among spectators.

¶ 96 Maybe, if the jury had reached the issue of causation, it would have returned a verdict in plaintiff's favor and would have awarded him damages for hearing loss and tinnitus. It could be, though, the jury never got past the issue of negligence, because, without an instruction on *res ipsa loquitur*, the jury was under the impression that plaintiff had to prove specifically what defendant had done wrong with the fireworks—an impression that Brooke reinforced in his closing argument. In the absence of an instruction on *res ipsa loquitur*, Brooke was able to exploit the fact that plaintiff had failed to prove the particular negligent act or omission—x, y, or z—that had caused the aerial shells to fall into the crowd. Such proof was impossible for plaintiff, considering that the instrumentalities (the fireworks and the mortars) had been under defendant's exclusive control.

¶ 97 *Res ipsa loquitur* would have drawn an inference of negligence even though, because the instrumentalities had been under defendant's exclusive control, plaintiff could not prove the particular negligence: x, y, or z. See *Springfield Consolidated Ry. Co. v. Johnson*, 134 Ill. App. 536, 540 (1907) ("Under the rule of *res ipsa loquitur* it was unnecessary for the plaintiff to prove the particular negligence which caused the brake to swing loose."); 65A C.J.S. *Negligence* § 867 (2010) ("The res ipsa loquitur rule aids the injured party who does not know how the specific cause of the event that results in his or her injury occurs ***".). We are unable to confidently say the verdict would have been the same had the trial court instructed the jury on *res ipsa loquitur*. Therefore, we conclude that refusing to instruct the jury on *res ipsa loquitur* prejudiced plaintiff's right to a fair trial.

¶ 98 B. The Violation of *Petrillo*

¶ 99 According to *Petrillo*, defense counsel may communicate with a plaintiff's treating physician "*pursuant only to court authorized methods of discovery.*" (Emphasis in original.) *Petrillo*, 148 Ill. App. 3d at 595. *Ex parte* communications between the defense counsel and the plaintiff's treating physician are forbidden because they violate the confidentiality and sanctity of the relationship between the physician and the patient. *Id.* at 588. "[D]iscussions between defense counsel and a plaintiff's treating physician should be pursuant to the rules of discovery only." *Id.* at 610. The appellate court has applied *Petrillo* to the relationship between a mental-health therapist and his or her patient. *People v. Kaiser*, 239 Ill. App. 3d 295, 303 (1992).

¶ 100 Brooke took the evidence depositions of three mental-health professionals who had treated plaintiff: Wilson, McGinnis, and Johnson of Region 8. Illinois Supreme Court Rule 202 (eff. Jan. 1, 1996) and Illinois Supreme Court Rule 212(b) (eff. Jan. 1, 2011) contemplated the taking of evidence depositions. Nevertheless, as the trial court observed, Illinois Supreme Court Rule 206(a) (eff. Feb. 16, 2011) required Brooke to "serve notice in writing a reasonable time in advance" on Redwood. The court found that Brooke had failed to comply with Rule 206(a) in that respect. Rule 206(a) is a rule of discovery. Thus, to have a discussion with Wilson, McGinnis, and Johnson "pursuant to the rules of discovery only," Brooke had to comply with Rule 206(a). *Petrillo*, 148 Ill. App. 3d at 610. He did not do so. Therefore, his evidence depositions of Wilson, McGinnis, and Johnson (and any other medical discussions he had with those persons) violated *Petrillo*.

¶ 101 It is undisputed that Brooke provided these *ex parte* evidence depositions to Kohn, and yet, over plaintiff's objection, the trial court allowed Kohn to testify in the jury trial. "The determination of what sanction is appropriate [for a violation of *Petrillo*] is left to the sound

discretion of the trial court." *Pourchot v. Commonwealth Edison Co.*, 224 Ill. App. 3d 634, 637 (1992). Despite Kohn's promise to disregard the evidence depositions of Wilson, McGinnis, and Johnson in the formulation of his own opinions regarding plaintiff, his testimony was "tainted" by these *ex parte* communications he had been provided. *Id.* Brooke violated *Petrillo* not once, but three times, and each violation was extensive, consisting of taking a deposition *ex parte*. He then turned these depositions over to a hired gun, Kohn, further violating plaintiff's right of confidentiality. We conclude that barring the evidence depositions themselves was an insufficient sanction. The trial court abused its discretion and committed reversible error by allowing Kohn to testify. Allowing him to testify in return for his hollow assurance that he would purge his mind of the depositions from Region 8 undervalued "the sanctity and confidentiality of the doctor-patient relationship." *Id.*

¶ 102 Because of plaintiff's precarious mental and physical health, Redwood has doubts that plaintiff would be able to sit through another trial or even testify again. Therefore, instead of requesting a new trial as a remedy for allowing Kohn to testify, Redwood requests a "default judgment in favor of plaintiff or, alternatively, [a] judgment for plaintiff notwithstanding the verdict." Because we are aware of no authority approving such a harsh sanction for *Petrillo* violations and because the violations do not appear to be willful, we conclude that a new trial (without Kohn's testimony) would be sanction enough.

¶ 103 III. CONCLUSION

¶ 104 For the foregoing reasons, we reverse the trial court's judgment, and we remand this case for a new trial.

¶ 105 Reversed and remanded.