2016 IL App (2d) 150671-U
Nos. 2-15-0671 & 2-15-0924
Order filed June 20, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BRIDGETT KEDZIE, Administrator of the Estate of Gloria J. Ormond, deceased, Plaintiff-Appellee, v. DeKALB CLINIC CHARTERED, an Illinois Corporation, ANESTHESIA ASSOCIATES, LTD., an Illinois Corporation, and KISHWAUKEE COMMUNITY HOSPITAL, an Illinois Corporation, Defendant-Appellant.	)	Appeal from the Circuit Court of DeKalb County. No. 10-L-113 Honorable William P. Brady, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Because Anesthesia Associates, Ltd. (AA) did not satisfy the prejudice exception to the rule stated in section 2-1201(d) of the Code of Civil Procedure (735 ILCS 5/2-1201(d) (West 2014), we need not decide whether the trial court erred by instructing the jury on plaintiff's theory of *res ipsa loquitur*; the jury instructions fairly, fully and comprehensively apprised the jury of the relevant legal principles; plaintiff presented evidence to a degree of medical certainty to establish proximate causation under the "lost chance" theory of recovery on her specific allegations of negligence; the trial court's evidentiary rulings and plaintiff's conduct during closing argument do not warrant a new trial; and the jury's award was not excessive. We affirm the jury's verdict and award.

¶ 2 This case involves a wrongful death action brought by plaintiff, Bridgett Kedzie, as administrator of the Estate of Gloria J. Ormond, deceased, against Anesthesia Associates, LTD (AA), Kishwaukee Community Hospital (KCH), and DeKalb Clinic Chartered (DeKalb Clinic). A jury returned a verdict in favor of plaintiff and against AA and KCH, jointly and severally, in the amount of $4,300,000. KCH was subsequently dismissed from the case after agreeing to pay plaintiff $2,400,000. AA brings this appeal, raising the following contentions: (1) the trial court erred by allowing plaintiff to instruct the jury on her theory of *res ipsa loquitur*; (2) the trial court delivered confusing and misleading jury instructions; (3) plaintiff failed to establish the element of proximate causation; (4) a new trial is warranted due to the trial court's improper evidentiary rulings and plaintiff's improper conduct during closing argument; and (5) the jury's award was excessive. AA requests that we enter judgment in its favor notwithstanding the jury's verdict (JNOV). In the alternative, AA requests that we remand the case for a new trial on all issues, remand the case for a trial on the sole issue of damages, or grant a remittitur of the excess verdict.

¶ 3 I. BACKGROUND

¶ 4 Due to the voluminous record in this case, our recitation of the background will be limited to the basic facts. We will discuss additional details as necessary during the course of our analysis.

¶ 5 On October 18, 2010, Gloria Ormond was admitted to KCH to undergo a laproscopic hiatal hernia repair. It had been revealed that a portion of her stomach had risen through her hiatus and into her chest. The purpose of the surgery was to permanently stitch her stomach into the correct anatomical position. This procedure is known as a Nissen fundoplication. Dr. Roger Maillefer performed the surgery, following which Ormond was transported to KCH's post-

anesthesia care unit (PACU). Dr. Mark Nessim, an anesthesiologist, was the primary doctor in charge of Ormond's care while she was in the PACU. Ormond was also being monitored by nurse Laurie Schweitzer. Ormond became unresponsive approximately two hours and twenty minutes after she arrived in the PACU. She never regained consciousness. A massive amount of blood was discovered in her abdomen during an emergency surgery. Ormond was taken off life support the next day.

¶ 6 Plaintiff proceeded to trial on her second amended complaint, which included counts alleging specific acts of negligence against: (1) the surgeons employed by DeKalb Clinic, including Dr. Maillefer, who were involved in Ormond's surgery and her care immediately following the surgery; (2) Dr. Nessim, who was employed by AA while he was involved with Ormond's care in the PACU; and (3) the nurses employed by KCH, including Schweitzer, who were involved with Ormond's care in the PACU. Plaintiff also included a count alleging that each of the defendants was negligent under the doctrine of *res ipsa loquitur*.

¶ 7 The evidence introduced at trial established the following timeline of events on the day of Ormond's surgery. Prior to her surgery, Ormond's systolic blood pressure was measured at 162 and her diastolic blood pressure was measured at 86 (162/86). The surgery began at 2:27 p.m. and ended at 3:50 p.m. Ormond's blood pressure was 106/49 when she arrived at the PACU at 4:05 p.m. However, by 4:15 p.m., her blood pressure had dropped to 75/45. Nurse Schweitzer alerted Dr. Nessim of the situation by telephone, as Nessim was administering anesthesia to a patient having a pacemaker procedure in a different room. In an attempt to elevate Ormond's blood pressure, Nessim ordered the intravenous administration of fluids and 10 milligrams of ephedrine. Schweitzer called Nessim a second time at 4:25 p.m., when Ormond's blood pressure was measured at 76/46. Nessim ordered that Ormond be given another 50 milligrams of

ephedrine. By 4:55 p.m., Ormond's blood pressure had dropped to 63/34. Schweitzer called Nessim a third time. Nessim responded that he would be in the PACU as soon as he finished with the other patient.

¶ 8 Dr. Nessim arrived in the PACU shortly after 5:00 p.m. and immediately administered a dose of Vasopressin. Ormond's blood pressure elevated to 92/55 at 5:08 p.m., but dropped to 83/47 at 5:10 p.m. By 5:35 p.m., it had dropped to 62/32. Nessim administered a dose of Neo-Synephrine, but Ormond's condition did not improve to Nessim's satisfaction. At 5:51 p.m., Nessim directed the nursing staff to phone the on-call surgeon, Dr. Steven Goldman, who ordered a complete blood count (CBC), a comprehensive metabolic panel, and chest x-rays. Around 6:00 p.m., Nessim directed the nursing staff to phone Goldman a second time and ask that he come to the PACU immediately.

¶ 9 Ormond became unresponsive at 6:25 p.m. Dr. Goldman arrived in the PACU at 6:35 p.m. and began preparing Ormond for a second surgery. Goldman also called Dr. Maillefer to assist in the second surgery, which began around 7:10 p.m. Goldman and Maillefer discovered that a pulsatile arterial bleed had filled Ormond's abdomen with blood. Although they were able to stop the arterial bleed, the loss of blood caused Ormond to experience disseminated intravascular coagulation, meaning that she began spontaneously bleeding from multiple locations. Ormond was placed on life support until such measures were discontinued at 1:10 a.m. the next day.

¶ 10 Dr. Maillefer testified that he performed the Nissen fundoplication using an instrument called a "harmonic scalpel." The instrument has blades that vibrate around 30,000 times per second, creating enough heat to cauterize a blood vessel after it has been dissected. Maillefer did not notice that Ormond was bleeding from any blood vessels at the end of the surgery. He

estimated that she lost about a teaspoon of blood during the surgery, which was typical for a Nissen fonduplication. Maillefer testified that, pursuant to KCH policy, Dr. Nessim became the primary doctor in charge of Ormond's care once she was taken to the PACU. Although Maillefer was no longer responsible for Ormond's care, he checked on her in the PACU just before 4:50 p.m. Ormond was awake and alert. Maillefer was aware of Ormond's low blood pressure, but he was not concerned, as it is not unusual for a patient to have low blood pressure following a surgery involving anesthesia. Furthermore, Maillefer had been informed by the PACU nurses that Dr. Nessim had ordered interventions to address Ormond's low blood pressure. Maillefer did not perform a surgical consultation in the PACU, nor was he asked to perform one. He left KCH after visiting with Ormond for approximately one minute. He later returned to KCH after being called by Dr. Goldman sometime after 6:00 p.m. Maillefer opined that there was a spasm in one of Ormond's arteries that had been sealed with the harmonic scalpel, which caused it to begin bleeding shortly after the first surgery. Maillefer further opined that Ormond had gone into shock at 4:55 p.m., just minutes after he left the PACU, when her blood pressure was measured at 63/34. Maillefer believed it was probable that Ormond would have lived if he had been notified when she went into shock. Over objection, Maillefer answered that a patient who was being carefully monitored in the PACU would not normally die from an internal bleed.

¶ 11 Nurse Schweitzer testified that she had been assigned as the PACU nurse to care for Ormond from 4:05 p.m. onward. Schweitzer charted Ormond as being "lethargic" from 4:05 p.m. to 6:25 p.m. Schweitzer testified that Ormond repeatedly awakened to answer questions before falling back asleep. Ormond consistently told Schweitzer that she was not in pain. Schweitzer remembered at one point discussing with Dr. Nessim the possibility that Ormond's

low blood pressure could be the result of an internal bleed. She noted, however, that Ormond had been taking medication for her high blood pressure prior to her surgery, called an ACE inhibitor. According to Schweitzer, Nessim believed that Ormond's persistent low blood pressure was caused by the combination of anesthesia and the ACE inhibitor.

¶ 12 Dr. Nessim testified that it was never his goal to return Ormond to her baseline blood pressure level of 162/86, which he considered very high. Rather, Nessim desired for Ormond's systolic blood pressure to be measured somewhere between 120 and 130 before she left the PACU. Nessim expected that this would happen within about 30 minutes from the time that Ormond was given 10 milligrams of ephedrine. He ordered the 50 milligrams of ephedrine when he learned that Ormond's blood pressure still had not elevated. Nessim testified that, when he received the third phone call from the nursing staff, he was told that Dr. Maillefer had examined Ormond and had not recommended any new orders. At this point, Nessim believed that Ormond was not responding to the ephedrine because of a reaction between the ACE inhibitor and the anesthesia. Nessim contemplated a higher likelihood of internal bleeding after it became apparent that the doses of Vasopressin and Neo-Synephrine had not been effective; he had previously considered internal bleeding to be unlikely. Nessim did not order a CBC prior to 5:51 p.m. because he did not believe it would have been determinative of internal blood loss. Nessim testified that an earlier CBC would not have changed his differential diagnosis (a list ranking possible causes) or his decision to administer the Vasopressin and Neo-Synephrine. In hindsight, Nessim believed that Ormond's internal bleed began shortly after the completion of the Nissen fundoplication.

¶ 13 Three experts testified on plaintiff's behalf: Dr. Robert Bell, a surgeon; Dr. Ronald Sacher, a hematologist; and Dr. Lars Helgeson, an anesthesiologist.

¶ 14 Dr. Bell testified that he had performed the Nissen fundoplication on roughly 600 patients and he was familiar with the standard of care that applied to the doctors and nurses in the PACU. Bell explained that a patient is considered hypotensive if their systolic blood pressure is 90 or lower, or their diastolic blood pressure is 60 or lower. He considered Ormond to have been "profoundly" hypotensive from 4:15 p.m. onward. Bell opined that Nessim should have recognized the increased possibility of internal bleeding after it became apparent that the initial interventions had not improved Ormond's hypotension. Nessim should have responded by calling Dr. Maillefer between 5:05 p.m. and 5:25 p.m. to inform him of Ormond's persistent hypotension. In Bell's opinion, this would have resulted in a much earlier return to the operating room, and Ormond would not have died. Bell believed that Ormond had reached the "point of no return" when she became unresponsive at 6:25 p.m. Over objection, Bell opined that Ormond's death "[was] not something that would happen in the absence of negligence."

¶ 15 Dr. Sacher opined that Ormond died from hemorrhagic death, explaining that she "basically bled out." Sacher concluded that Ormond had experienced only minimal blood loss during the Nissen fundoplication. However, she had lost between 50 and 60 percent of her blood volume by the time of the second surgery. Sacher explained that a person can generally lose up to 15 percent of their blood volume without consequence. However, once a person has lost more than 15 percent, the body begins releasing chemicals that constrict the blood vessels in an effort to maintain blood pressure. Once there is not enough blood to circulate oxygen throughout the body, the body releases a chemical called "tissue factor" in an attempt to clot the blood. This eventually causes massive tissue damage and leads to disseminated intravascular coagulation, where blood begins oozing from multiple locations, as was the case with Ormond. Finally,

Sacher opined that Ormond's persistent hypotension in the PACU indicated that she had low blood volume and was likely hemorrhaging.

¶ 16 Dr. Helgeson testified that he had cared for thousands of patients in the PACU or similar settings during the course of his career. This included approximately 40 Nissen fundoplication patients. Helgeson opined that Dr. Nessim's actions complied with the standard of care through 4:55 p.m., at which point Ormond's condition had become "dire" and "alarming." In Helgeson's opinion, Nessim should have ordered a CBC after he received the third phone call from the PACU, as it was clear that the initial interventions had not been successful. Furthermore, an internal bleed should have been at the top of Nessim's differential diagnosis by 5:20 p.m. at the latest, as it was apparent that Ormond continued to be profoundly hypotensive despite the dose of Vasopressin. Nessim should have responded by calling Dr. Maillefer back to the hospital. Helgeson further opined that the ACE inhibitor should have been "very low" on Nessim's differential diagnosis. Over objection, Helgeson opined that a patient would not ordinarily bleed to death if the members of the PACU team had used reasonable care in their treatment of Ormond.

¶ 17 Dr. Michael Ujiki, a surgeon, appeared on behalf of DeKalb Clinic. Ujiki testified that he performed the Nissen fundoplication between 50 and 60 times per year. He reviewed photographs that were taken during Ormond's Nissen fundoplicaiton and concluded that Ormond was not actively bleeding after her surgery was completed. Ujiki opined that the standard of care for a surgeon following a Nissen fundoplicaiton required Dr. Maillefer to be available, but that Maillefer had no duty to examine the patient in the PACU absent a request from a PACU team member. In Ujiki's opinion, Maillefer did not violate the standard of care for the operative surgeon when he left the PACU just after 4:50 p.m. Ujiki explained that it was common for a

patient to be hypotensive after a procedure involving anesthesia. Moreover, unless a problem is detected relating to the surgery, it is important for the operative surgeon to "step back and let the anesthesiologist and PACU nurses * * * run the patient."

¶ 18 Finally, Dr. William Soden, an anesthesiologist, testified on behalf of AA. Soden opined that Dr. Nessim complied with the standard of care in his treatment of Ormond. First, it was reasonable for Nessim to suspect that Ormond's hypotension was being caused by problems related to the ACE inhibitor. Second, when Nessim arrived in the PACU, he was aware that Dr. Maillefer had recently visited with Ormond and had not raised any concerns that her condition was related to surgical complications. Soden further noted that Ormond had not complained of any pain. Under these circumstances, it was appropriate for Nessim to administer Vasopressin and Neo-Synephrine after he arrived in the PACU. In Soden's opinion, it was within the standard of care for Nessim to call Dr. Goldman at 5:51 p.m., at which point there became an increased likelihood that Ormond was suffering an internal bleed. Soden believed that Nessim also responded appropriately between 5:51 p.m. and 6:25 p.m., as he coordinated Ormond's care and requested that Goldman come to KCH.

¶ 19 KCH filed a motion for directed verdict, joined by AA, on plaintiff's count alleging negligence under a theory of *res ipsa loquitur*. In Illinois, a plaintiff seeking to rely on the *res ipsa loquitur* doctrine must plead and prove that he or she was injured: (1) in an occurrence that ordinarily does not happen in the absence of negligence; and (2) by an agency or instrumentality within the defendant's exclusive control. *Heastie v. Roberts*, 226 Ill. 2d 515, 531-32 (2007). KCH and AA argued that the *res ipsa* doctrine is inapplicable to the circumstances surrounding Ormond's death. The trial court denied the motion and later delivered a jury instruction which separated plaintiff's various allegations and labeled them by count. Count I, which included

plaintiff's *res ipsa loquitur* allegations, stated that plaintiff had the burden of proving that Ormond's injury "occurred as a result of her care in the [PACU]." Count II included plaintiff's allegations that KCH had been negligent through its employee, nurse Schweitzer. Count III included plaintiff's allegations that AA had been negligent through its employee, Dr. Nessim, in that Nessim had: (1) inadequately communicated with other members of the [PACU] team; (2) failed to take timely steps to investigate the possibility of internal bleeding; (3) failed to timely request a surgical consultation; and/or (4) failed to timely order preparation of the operating room for a return to surgery. Finally, Count IV included plaintiff's allegations that DeKalb Clinic had been negligent through its employee, Dr. Maillefer. None of the defendants presented a special interrogatory or verdict form for the purpose of determining whether the jury's verdict was based on plaintiff's *res ipsa loquitur* allegations, her specifically alleged acts of negligence, or both.

¶ 20 The jury returned a general verdict form indicating its findings for Ormond's estate and against KCH and AA. The jury also found the total amount of damages suffered by Ormond's estate to be $4,300,000. This included $3,000,000 for loss of society, grief, sorrow, and mental suffering, as well as $1,300,000 for Ormond's conscious pain and suffering. KCH and AA filed post-trial motions seeking the entry of a judgment notwithstanding the jury's verdict, a new trial, or, alternatively, a remittitur. Before the trial court ruled, KCH reached a settlement agreement with plaintiff whereby it agreed to pay plaintiff $2,400,000. After entering an order dismissing KCH from the case, the trial court denied AA's post-trial motion. AA timely appeals.

¶ 21 II. ANALYSIS

¶ 22 *General Verdict*

¶ 23 AA's primary contention on appeal is that the trial court erred by instructing the jury on plaintiff's *res ipsa loquitur* allegations. As noted, a plaintiff seeking to rely on the *res ipsa* doctrine must plead and prove that he or she was injured: (1) in an occurrence that ordinarily does not happen in the absence of negligence; and (2) by an agency or instrumentality within the defendant's exclusive control. *Heastie*, 226 Ill. 2d at 531-32. AA argues that *res ipsa* is not applicable to the circumstances surrounding Ormond's death, taking particular issue with the notion that Ormond's "care in the PACU" could be deemed an "instrumentality" within Dr. Nessim's exclusive control, as it was stated in the jury instruction. AA asserts that, because the jury was erroneously instructed on the *res ipsa* issue, it is entitled to a JNOV or a new trial.

¶ 24 In response, plaintiff not only maintains that the *res ipsa loquitur* instruction was correct, but also contends that AA is precluded from obtaining relief on the *res ipsa* issue on appeal, citing section 2-1201(d) of the Code of Civil Procedure (Code) 735 ILCS 5/2-1201(d) (West 2014). That section provides:

> "If several grounds of recovery are pleaded in support of the same claim, whether in the same or different counts, an entire verdict rendered for that claim shall not be set aside or reversed for the reason that any ground is defective, if one or more of the grounds is sufficient to sustain the verdict; nor shall the verdict be set aside or reversed for the reason that the evidence in support of any ground is insufficient to sustain a recovery thereon, unless before the case was submitted to the jury a motion was made to withdraw that ground from the jury on account of insufficient evidence and it appears that the denial of the motion was prejudicial." 735 ILCS 5/2-1201(d) (West 2014).

Plaintiff also points to *Dillon v. Evanston Hospital*, 199 Ill. 2d 483 (2002), where our supreme court applied section 1201(d) in upholding a general verdict for the plaintiff against a hospital

and a doctor. The *Dillon* court stated in pertinent part:

> "When there is a general verdict and more than one theory is presented, the verdict will be upheld if there was sufficient evidence to sustain either theory, and the defendant, having failed to request special interrogatories, cannot complain." *Id*. at 492 (quoting *Witherell v. Weimer*, 118 Ill. 2d 321, 329 (1987)).

Plaintiff argues that, pursuant to the general verdict rule stated in *Dillon*, AA failed to "properly preserve" the issue of *res ipsa loquitur* for appellate review by failing to propose a verdict form or special interrogatory that would have clarified the basis for the jury's verdict.

¶ 25 AA does not squarely address *Dillon* it its reply brief, but rather focuses on the last clause of section 1201(d). AA notes that it made a motion to withdraw plaintiff's *res ipsa loquitur* count from the jury. AA argues that, because it was prejudiced by the trial court's denial of this motion, it satisfied the exception to section 1201(d), and therefore it is not precluded from obtaining relief on the *res ipsa* issue.

¶ 26 As we will explain, we agree with plaintiff that we need not decide whether the *res ipsa loquitur* doctrine is applicable in this case. "It is settled law that where several causes of actions are charged and a general verdict results, the verdict will be sustained if there are one or more good causes of action or counts to support it." *Moore v. Jewel Tea Co.*, 46 Ill. 2d 288, 294 (1970). This principle can be seen in *Chem-Pac, Inc. v. Simborg*, 145 Ill. App. 3d 520, 523 (1986), where the appellate court applied 1201(d) to the plaintiff's "*res ipsa loquitur* theory." The plaintiff's complaint in that case included specific negligence allegations and *res ipsa* allegations, each relating to damages sustained in a fire. The defendants appealed after the jury returned a verdict in favor of the plaintiff, contending that the trial court erred by instructing the jury on the plaintiff's *res ipsa* allegations because the *res ipsa* doctrine was inapplicable. The

appellate court rejected this contention, citing section 1201(d) and concluding that the evidence was sufficient for the jury to find that the defendants' negligence was the proximate cause of the fire. *Id*. at 523-24. The appellate court concluded in relevant part, "[b]ecause of our finding that the evidence supports the verdict on general negligence grounds, we need not decide whether the *res ipsa loquitur* instruction was proper." *Id*. at 524.

¶ 27 Similar circumstances were present in *Dillon*, where the plaintiff had a catheter inserted during the course of her treatment for breast cancer. The catheter was later removed by the same doctor who had inserted it, but unbeknownst to the plaintiff, a segment of the catheter remained in her heart. *Dillon*, 199 Ill. 2d at 487-88. The plaintiff's amended complaint included counts alleging various specific acts of negligence relating to the catheter procedure, as well as a count alleging that the doctor's actions should be considered negligent under the doctrine of *res ipsa loquitur*. *Id*. at 490-91. On appeal, one of the contentions raised by the defendants was that the trial court erred by instructing the jury on the plaintiff's *res ipsa* allegations. The *Dillon* court noted, however, that the verdict form showed the jury had returned separate verdicts against the doctor on both the specifically alleged acts of negligence and the plaintiff's "theory of *res ipsa loquitur*." Because the evidence supported the verdict based on ordinary negligence, the court cited section 1201(d) and rejected the defendants' contention without considering whether *res ipsa* was applicable. *Id*. at 492.

¶ 28 As we will discuss more fully below, we believe the evidence in this case was sufficient to support the jury's verdict based on any or all of the plaintiff's specific negligence allegations; namely, that Dr. Nessim: (1) inadequately communicated with other members of the PACU team; (2) failed to take timely steps to investigate the possibility of internal bleeding; (3) failed to timely request a surgical consultation; and/or (4) failed to timely order preparation of the

operating room for a return to surgery. This brings us to AA's argument that it is not precluded from obtaining relief on the issue of *res ipsa loquitur* because it was prejudiced by the trial court's denial of its motion to withdraw plaintiff's *res ipsa* allegations from the jury. This exception to section 1201(d) was not addressed in *Chem-Pac* or *Dillon*.

¶ 29 AA asserts that it was prejudiced by the "deluge" of *res ipsa loquitur* testimony, but points only to the testimony from Drs. Bell, Helgeson and Maillefer that a patient would not ordinarily die from an internal bleed if the members of the PACU team had exercised reasonable care. Given the expansive nature of the evidence in this case, this testimony hardly constitutes a "deluge." Of course, another way that AA could show prejudice would be to show that the jury's verdict was based on plaintiff's *res ipsa* theory. This brings us back to plaintiff's argument that AA failed to "properly preserve" the *res ipsa* issue by failing to propose a special interrogatory or verdict form that would have clarified the basis for the jury's verdict.

¶ 30 In *Great American Insurance Co. of New York v. Heneghan Wrecking & Excavating Co.*, 2015 IL App (1st) 133376, ¶ 15, the appellate court concluded as follows:

> "[T]he [Illinois] supreme court's rulings with regard to general verdicts provide that when multiple claims, theories, or defenses were presented to the jury, without the submission of special interrogatories or separate verdict forms, the return of a general verdict creates a presumption that the evidence supported at least one of the claims, theories, or defenses and will be upheld."

We believe that this is an accurate statement of the law regarding general verdicts in Illinois. An example of a party's duty to clarify the basis for the jury's verdict can be seen in *Foley v. Fletcher*, 361 Ill. App. 3d 39 (2005). Unlike the courts in *Chem-Pac* and *Dillon*, the *Foley* court considered the prejudice exception to section 1201(d). The trial court in *Foley* delivered jury

instructions on each of the plaintiff's four specific negligence allegations. *Foley*, 361 Ill. App. 3d at 45. The defendants unsuccessfully moved to withdraw the fourth instruction, but failed to request a special interrogatory. The jury later returned a general verdict in favor of the plaintiffs. *Id*. On appeal, the defendants contended that the entire verdict must be set aside, arguing that the exception in section 2-1201(d) was applicable because they were prejudiced by the trial court's denial of their motion to withdraw the fourth jury instruction. *Id.* at 49. However, the *Foley* court held that the defendants were unable to show prejudice because they could not show that the jury had based its verdict on the fourth instruction. Citing *Dillon* and *Witherell*, the *Foley* court stated: "A defendant cannot expect recourse where a plaintiff presents more than one theory of her case, the defendant does not request special interrogatories and the jury returns a general verdict. [Citations.] Nor can it be presumed that reversal is warranted because the jury was misled by the court's instruction unless there is some indication that the jury was improperly influenced." *Id.* at 50. The *Foley* court concluded that, without the jury's answer to a special interrogatory, it could not conclude that the defendants were prejudiced. *Id.*

¶ 31 Here, the only special interrogatory that was issued by the defendants asked whether the sole proximate cause of Ormond's death was something other than the conduct of the defendants. However, none of the defendants proposed any special interrogatories to address the issue of *res ipsa loquitur*. AA's appellate counsel asserted during oral argument that, due to the separate theories of negligence and *res ipsa*, there was "not a way to test the verdict with a special interrogatory" on the issue of *res ipsa*. AA's trial counsel made a similar assertion during the jury instructions conference, stating that he was unable to draft a special interrogatory "to ferret out whether the jury is deciding the case on negligence or on *res ipsa*." These comments speak to the requirements that govern the use of special interrogatories. To wit, a special interrogatory

is in proper form only if it "relates to an ultimate issue of fact upon which the rights of the parties depend," and "an answer responsive thereto is inconsistent with some general verdict that might be returned." *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002). "A proper special interrogatory consists of a single, direct question that, standing on its own, is dispositive of an issue in the case such that it would, independently, control the verdict with respect thereto." *Northern Trust Co. v. University of Chicago Hospitals & Clinics*, 355 Ill. App. 3d 230, 251 (2004). Where a plaintiff alleges multiple theories of negligence, and a special interrogatory does not address all of the theories, the special interrogatory is not in proper form because an answer contrary to a general verdict would not be inconsistent with the remaining theories of negligence. See *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360, ¶¶ 70-72 (holding that the defendant's proposed special interrogatory was improper because it could have been understood by the jury to address less than all of the theories of willful and wanton conduct that had been asserted by the plaintiff).

¶ 32 We express no opinion here as to whether AA's trial counsel could have drafted a proper special interrogatory to address the issue of *res ipsa loquitur*. We note, however, that the verdict form in this case provided the jury only with the opportunities to select which defendants it found against and the amount of damages suffered by Ormond's estate. This is noteworthy because, in addition to challenging AA's failure to propose a special interrogatory, plaintiff also asserts that AA failed to propose a verdict form "that would have called for the jury to specify if it was finding against AA on the specific acts of negligence theory, the *res ipsa loquitur* theory, or both." Thus, plaintiff concludes, "the basis of the jury's liability finding can never be known." We agree with plaintiff. We note the *Foley* court's statement that, where a plaintiff presents multiple theories of a case, a defendant cannot "expect recourse" if the defendant "does

not request special interrogatories *and the jury returns a general verdict*." [Emphasis added.] *Foley*, 361 Ill. App. 3d at 50. Thus, although *Foley* did not involve *res ipsa* allegations, and although the *Foley* court focused on the lack of a special interrogatory, we believe that *Foley* nonetheless supports our conclusion in this case. Regardless of whether a special interrogatory was available to test the basis for the jury's verdict, it remains that AA cannot expect recourse because it agreed to the return of a general verdict. This point brings us full circle back to *Dillon*. Similar to this case, *Dillon* involved separate "theories" of specific negligence and *res ipsa loquitur*. *Dillon*, 199 Ill. 2d at 492. However, the glaring difference between this case and *Dillon* is that the jury in *Dillon* returned a verdict form that provided for separate verdicts on the allegations of specific negligence and *res ipsa loquitur*. *Id.* As we have explained, the jury in this case was given no such opportunity.

¶ 33 In sum, we have thoroughly reviewed the record and the reports of proceedings from the trial, and we are not convinced that the jury's general verdict in this case was based on the trial court's *res ipsa loquitur* instruction. Furthermore, we have found no indication that the jury was influenced by the *res ipsa* instruction. Therefore, just as in *Foley*, we decline to apply the prejudice exception to section 1201(d). *Foley*, 361 Ill. App. 3d at 49-50. As a result, even if we were to conclude that the trial court erred by instructing the jury on plaintiff's *res ipsa* theory, we would decline to set aside or reverse the jury's verdict for that reason. See 735 ILCS 5/2-1201(d) (West 2014). We therefore need not address whether the *res ipsa loquitur* doctrine is applicable in this case. See *People v. Campa*, 217 Ill. 2d 243, 269 (2005) ("As a general rule, a court of review will not decide moot or abstract questions or render advisory opinions.").

¶ 34 *Jury Instruction*

¶ 35 In addition to challenging the trial court's rulings on the issue of *res ipsa loquitur*, AA argues that that plaintiff's *res ipsa* allegations and her specific negligence allegations were improperly separated and labeled by count within the same instruction. AA's contention is that this rendered the instruction incoherent, and that it is entitled to a new trial on that basis.

¶ 36 The trial court has discretion in deciding which jury instructions will be given, and a reviewing court will not disturb such a determination absent a showing that the trial court abused its discretion. *Naleway v. Agnich*, 386 Ill. App. 3d 635, 640-41 (2008). The function of jury instructions is to convey the correct principles of law applicable to the submitted evidence; as a result, jury instructions must state the law fairly and distinctly, and must not mislead the jury or prejudice a party. *Dillon*, 199 Ill. 2d at 507. An abuse of discretion will not be found where, taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles. *Schultz v. Northeast Illinois Regional Commuter Railroad Corp.*, 201 Ill. 2d 260, 273-74 (2002). A reviewing court will only reverse the trial court for giving faulty jury instructions only where the instructions "clearly misled the jury and resulted in prejudice to the appellant." *Naleway*, 386 Ill. App. 3d at 641.

¶ 37 The instruction at issue here began by stating that plaintiff had claimed the defendants were negligent "in one or more of the following respects." The instruction proceeded to set forth the elements of plaintiff's *res ipsa loquitur* allegations (Count I), then tracked the language from the pattern jury instruction on *res ipsa loquitur*. This included language on the need for a finding of proximate cause in relation to the *res ipsa* allegations. See Illinois Pattern Jury Instructions, Civil, No. 105.09 (2014). Without any transition, the instruction next set forth plaintiff's specific allegations of negligence in separate counts against each of the three defendants (Counts II-IV). The end of the instruction stated that plaintiff had claimed that "one or more of the foregoing

was a proximate cause of [Ormond's] death." There was also a statement that each of the defendants had denied that they were negligent, and each further denied that any claimed act or omission on their part was a proximate cause of plaintiff's claimed injuries. AA argues that the absence of any transition language between the various counts rendered the instruction confusing and misleading, and asserts that the jury was not adequately informed of plaintiff's burden to establish proximate causation in connection with any findings on the individual allegations.

¶ 38 We first note AA's admission that it did not tender any alternative language on the *res ipsa loquitur* portion of the instruction. AA also acknowledges that it did not contest the description of the specific negligence allegations in the second portion of the instruction. KCH's trial counsel discussed the instruction before closing arguments, commenting that the parties had agreed to deliver the *res ipsa* allegations and the specific negligence allegations in separate instructions. Although the specific negligence allegations were never placed in a separate instruction, the record reflects that AA had multiple opportunities to address the issue. However, regardless of whether AA waived its ability to challenge the instruction at issue, we conclude that, when taken as a whole, the instructions fairly, fully and comprehensively apprised the jury of the relevant legal principles. See *Schultz*, 201 Ill. 2d at 273-74. The jury was informed that the rights of each defendant were separate and distinct, that plaintiff had the burden of proving negligence in any one of the ways it had claimed, and that plaintiff was further burdened with proving that the claimed negligence was the proximate cause of Ormond's injury. The jury was also instructed that each of the defendants denied that any claimed act or omission on their part was a proximate cause of Ormond's injuries. For these reasons, we reject AA's argument that the trial court's instructions misled the jury regarding plaintiff's burden to establish the element of proximate causation. See *Naleway*, 386 Ill. App. 3d at 641.

¶ 39 *Proximate Cause*

¶ 40 AA's next contention is that it is entitled to a JNOV because the evidence was insufficient to establish the element of proximate causation. AA argues that plaintiff established "only the mere possibility of a causal connection between Dr. Nessim's conduct and Ormond's death." In support, AA asserts that none of plaintiff's experts provided any more than speculation that Nessim could have taken steps to prevent Ormond's death. We disagree.

¶ 41 A JNOV should be granted only when "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern Railroad Co.*, 37 Ill. 2d 494, 510 (1967). A defendant's request for a JNOV presents a question of law as to whether, when all of the evidence is considered in the light most favorable to the plaintiff, together with all reasonable inferences drawn in favor of the plaintiff, there is a "total failure or lack of evidence to prove any necessary element" of the plaintiff's case." *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006). Our standard of review is *de* novo, and when the trial court has erroneously denied a motion for JNOV, we will reverse the verdict without a remand. *Lawlor v. North American Corporation of Illinois*, 2012 IL 112530, ¶ 37.

¶ 42 A plaintiff in a medical malpractice case must prove: (1) the standard of care against which the medical professional's conduct must be measured; (2) that the defendant was negligent by failing to comply with that standard; and (3) that the defendant's negligence proximately caused the injuries for which the plaintiff seeks redress. *Walton v. Dirkes*, 388 Ill. App. 3d 58, 60 (2009). "The proximate cause element of a medical malpractice case must be established by expert testimony to a reasonable degree of medical certainty." *Krivanec v. Abramowitz*, 366 Ill. App. 3d 350, 356-57 (2006). In Illinois, a plaintiff may proceed under the "lost chance" theory

of recovery to satisfy the proximate cause element. See *Perkey v. Portes-Jarol*, 2013 IL App (2d) 120470, ¶ 61. This theory applies where medical providers are alleged to have negligently deprived the plaintiff of a chance to survive or recover from a health problem, or where the malpractice has lessened the effectiveness of treatment or increased the risk of an unfavorable outcome to the plaintiff. *Hemminger v. LeMay*, 2014 IL App (3d) 120392, ¶ 16.

¶ 43 In *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 119 (1997), our supreme court held that a plaintiff proceeding under the "lost chance" theory of recovery is not required to prove a greater than 50 percent chance of survival or recovery absent the alleged malpractice. The court reasoned that holding otherwise would "free health care providers from legal responsibility for even the grossest acts of negligence, as long as the patient upon whom the malpractice was performed already suffered an illness or injury that could be quantified by experts as affording that patient less than a 50 percent chance of recovering his or her health." *Id.* The court further noted the inherent inequity of barring recovery even though no expert could be certain of whether the plaintiff would have lived or died. *Id*. at 120. However, the rule in *Holton* does not absolve a plaintiff in a medical malpractice case from satisfying the requirement that proximate cause must be established by expert testimony to a reasonable degree of medical certainty; the causal connection must not be contingent, speculative, or merely possible. *Townsend v. University of Chicago Hospital.*, 318 Ill. App. 3d 406, 413 (2000).

¶ 44 AA argues that this case is similar to *Aguilera v. Mount Sinai Hospital Medical Center*, 293 Ill. App. 3d 967, 969 (1997), and *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289 (2008). We find those cases distinguishable.

¶ 45 In *Aguilera*, the alleged deviation from the standard of care was an emergency room physician's failure to order an earlier CT scan. The plaintiff's expert witnesses, a physician and

a neurologist, both opined that an earlier CT scan would have led to a surgical intervention that would likely have saved the patient's life. However, both experts admitted on cross-examination that they would have deferred to a neurosurgeon to decide whether surgical intervention was appropriate. *Aguilera*, 293 Ill. App. 3d at 968-70. The appellate court noted that the only two neurosurgeons who testified agreed that surgery would not have been appropriate or ordered because the patient's bleed was deep within his brain. The appellate court thus concluded that the plaintiff had failed to offer evidence to a reasonable degree of medical certainty on the element of proximate causation. *Aguilera*, 293 Ill. App. 3d at 975-76.

¶ 46 In *Wiedenbeck*, the alleged deviation of the standard of care was an urgent care doctor's failure to order a CT scan when he saw the patient two days before she suffered a brain hernation. *Wiedenbeck*, 385 Ill. App. 3d at 295. Although the plaintiff had presented expert testimony that the urgent care doctor deviated from the standard of care by failing to order a CT scan, the appellate court noted that the plaintiff had failed to present any expert testimony suggesting that an analysis of a CT scan would have led to earlier surgical intervention. On that basis, the appellate court held that the expert evidence was inadequate to show that the alleged deviation from the standard of care by the urgent care doctor had caused the patient's injuries or lessened the effectiveness of her medical treatment, and the plaintiff had therefore failed to establish the element of proximate causation. *Id*. at 295-99.

¶ 47 AA argues that this case is similar to *Aguilera* and *Wiedenbeck*, because the testimony provided by plaintiff's experts here was "too speculative" to establish the element of proximate causation. As discussed above, Ormond's surgery ended at 3:50 p.m. Plaintiff's expert hematologist, Dr. Sacher, opined that Ormond's artery spasmed and began bleeding around 4:00 p.m., shortly before she arrived in the PACU. Plaintiff's expert anesthesiologist, Dr. Helgeson,

opined that Nessim was in compliance with the standard of care until 4:55 p.m., when he received the third phone call from the PACU. According to Helgeson, Nessim should have recognized that Ormond's condition had become "dire" and "alarming" after he learned that the first two interventions with ephedrine had been unsuccessful. Helgeson further opined that Nessim should have ordered a CBC "stat," meaning that he needed the results quickly. The results of the CBC, Ormond's continuing hypotension, and her failure to respond to additional interventions should have led Nessim to place an internal bleed at the top of his differential diagnosis by 5:20 p.m. at the latest. Nessim should have responded by immediately calling the operative surgeon, Dr. Maillefer, to come back to the hospital. When asked during cross-examination to specify the latest point in time that the second surgery needed to begin for Ormond's life to be saved, Helgeson answered that he would defer to a surgeon. To that end, plaintiff's expert surgeon, Dr. Bell, opined that Ormond would have survived if the second surgery had started at any point before she became unresponsive at 6:25 p.m. Bell noted that this provided a "very large window" for a correct diagnosis and timely intervention.

¶ 48 AA argues that there was no basis for the conclusions that an earlier CBC would have been helpful in diagnosing Ormond's condition, or that an earlier diagnosis would have resulted in lifesaving surgery. In support, AA points to Dr. Sacher's testimony during cross-examination that he believed Ormond had could have lost up to 30 percent of her blood by 4:15 p.m. On re-direct examination, Sacher explained that the dramatic drop in Ormond's blood pressure by 4:15 p.m. indicated that something "catastrophic" had happened, and that the blood loss was "more vigorous" immediately after the artery spasmed. AA asserts that, in light of Sacher's testimony regarding Ormond's initial rapid blood loss, the opinions offered by Drs. Helgeson and Bell amounted to mere conjecture.

¶ 49 We acknowledge that this testimony from Dr. Sacher weighed in favor of the defendants. The inference drawn by the defendants was that Ormond's initial rapid blood loss would have diminished her chances of survival. We note, however, that the jury also heard testimony from Dr. Nessim that Ormond was "alert and oriented," and "able to converse" when he arrived in the PACU shortly after 5:00 p.m. Nessim also testified that Ormond "developed some anxiety" around 6:15 p.m., and she did not become unresponsive until 6:25 p.m. Drawing all reasonable inferences in favor of plaintiff, we believe the timeline of events in this case tends to negate any weight that the jury attached to Sacher's testimony regarding Ormond's initial rapid blood loss. See *York*, 222 Ill. 2d at 178. Regardless, we do not believe that this undermined the proximate causation element of plaintiff's case to the same extent as the plaintiffs in *Aguilera* and *Wiedenbeck*.

¶ 50 In *Aguilera*, it was established that an earlier CT scan would not have mattered because surgery would not have been appropriate. *Aguilera*, 293 Ill. App. 3d at 975. Here, Dr. Helgeson testified to a reasonable degree of medical certainty that Dr. Nessim violated the standard of care by failing to properly diagnose Ormond's condition or request a surgical consultation between 4:55 p.m. and 5:20 p.m. But unlike in *Aguilera*, Dr. Sacher's testimony did not conclusively establish that the actions discussed by Helgeson would have been futile. In *Wiedenbeck*, the plaintiff failed to present any expert testimony suggesting that the urgent care doctor lessened the effectiveness of the patient's medical treatment by failing to order a CT scan. *Wiedenbeck*, 385 Ill. App. 3d at 299. Here, Dr. Bell opined to a reasonable degree of medical certainty that, if called during the window discussed by Helgeson, a surgeon would have properly diagnosed Ormond and returned her to the operating room in time to prevent her death. Moreover, Bell believed that Ormond would have survived if the second surgery had started at any point before

she became unresponsive at 6:25 p.m. Thus, unlike in *Aguilera* and *Wiedenbeck*, we believe the expert testimony in this case was offered to a reasonable degree of medical certainty that at least one of Nessim's alleged deviations from the standard of care proximately caused Ormond an increased risk of harm or lost chance of recovery. See *Holton*, 176 Ill. 2d at 119. We therefore decline to grant AA's request for JNOV, as we do not believe that all of the evidence, when viewed most favorably to plaintiff, so overwhelmingly favors AA that the jury's verdict could never stand. See *Pedrick*, 37 Ill. 2d at 510.

¶ 51 *Evidentiary Rulings*

¶ 52 AA next contends that it was deprived of a fair trial due to a series of erroneous evidentiary rulings. "The admission of evidence is within the sound discretion of the trial court and a reviewing court will not reverse the trial court unless that discretion was clearly abused." *Snelson v. Kamm*, 204 Ill. 2d 1, 33 (2003). A trial court abuses its discretion only where the ruling is "arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court." *Lovell v. Sarah Bush Lincoln Health Center*, 397 Ill. App. 3d 890, 900 (2010).

¶ 53 AA first takes issue with comments made by plaintiff's trial counsel his during cross-examination of Dr. Nessim and nurse Schweitzer. Counsel suggested that Nessim should not have been doing anything that distracted him from the patient in the pacemaker procedure. Counsel also suggested that Schweitzer wished Nessim had been in the PACU by 4:35 p.m., when Ormond was "increasingly a hot potato." The trial court sustained objections to both of these comments. Counsel later asked Schweitzer whether the "relative experience or lack of experience" of a doctor that she was working with might influence her decision whether to seek a second opinion. Over objection, the trial court allowed Schweitzer to respond that Nessim had

never done anything to cause Schweitzer to question his judgment. Counsel proceeded to ask if Schweitzer continued to feel that way at the time of the trial, and the trial court sustained an objection.

¶ 54 Plaintiff argues that these questions were not improper, as they were relevant to the allegations that nurse Schweitzer should have asked for more help, that Dr. Nessim inadequately communicated during the relevant timeframe, and that Nessim failed to take appropriate steps to save Ormond's life. However, even if we determined that plaintiff's questions were improper, we find that any prejudicial impact by counsel's comments was cured when the trial court sustained the objections. See *First National Bank of La Grange v. Glen Oaks Hospital & Medical Center*, 357 Ill. App. 3d 828, 838 (2005) (noting that a trial court generally cures the prejudicial impact of improper questions by sustaining objections).

¶ 55 AA next argues that it was unfairly prejudiced by the erroneous admission of testimony on the standard of care from unqualified witnesses. See *Hubbard v. Sherman Hospital*, 292 Ill. App. 3d 148, 153 (1997) (noting that, in a medical malpractice case, a testifying physician must possess the necessary expertise in dealing with the plaintiff's medical problem by demonstrating familiarity with the procedures and treatments ordinarily observed by similarly situated physicians). AA complains that Dr. Sacher, a hematologist, Dr. Bell, a surgeon, and Dr. Maillefer, also a surgeon, were permitted at various times to testify to the standard of care pertaining to Dr. Nessim, an anesthesiologist.

¶ 56 The record reflects that Dr. Sacher was asked on direct examination for his opinion as to what accounted for Ormond's persistent hypotension. Sacher responded by explaining the correlation between Ormond's internal bleed and her low blood pressure. Sacher then added his unsolicited opinion that an internal bleed should have been suspected when Ormond's blood

pressure briefly peaked and subsided after the dose of Vasopressin around 5:10 p.m. AA's trial counsel objected, arguing that Sacher was a causation expert and his opinion was going toward the standard of care. The trial court did not expressly rule on the objection, but directed plaintiff's counsel during to refrain from asking Sacher about any actions that should have been taken by Dr. Nessim.

¶ 57 We note that Sacher never explicitly opined that Nessim had breached the standard of care by failing to diagnose Ormond's internal bleed. Regardless, the jury was later instructed to consider each of the experts' qualifications when considering the weight attached to their respective opinions. The jury was also instructed that an anesthesiologist must possess and use the knowledge, skill and care ordinarily used by a reasonably careful anesthesiologist, and that the determination of how a reasonably careful anesthesiologist would act must be based on opinion testimony from qualified witnesses. Thus, we do not believe that AA suffered any prejudice attributable to Sacher's opinion that an internal bleed should have been suspected around 5:10 p.m., and we find no abuse of discretion by the trial court. See *Bergman v. Kelsey*, 375 Ill. App. 3d 612, 632, 873 (2007) (noting that the jury instructions advised of the distinction between standard of care and causation, and rejecting the defendants' argument that they were prejudiced by the introduction of evidence for an improper purpose).

¶ 58 AA next challenges the trial court's decision to allow Dr. Bell's opinion that Dr. Nessim violated the standard of care by failing to timely contact the operative surgeon. This followed Bell's testimony that he was familiar with the standard of care for the communications between the various members of a PACU team. The trial court allowed this line of questioning, noting that Bell had given similar "communications" testimony during his deposition. We find no abuse of discretion in the trial court's ruling. See *Wingo by Wingo v. Rockford Memorial*

Hospital, 292 Ill. App. 3d 896, 906 (1997) (holding that a physician should be entitled to testify about a nurse's standard of care in the communication of an obstetrical team; *Petryshyn v. Slotky*, 387 Ill. App. 3d 1112, 1121 (2008) (holding that a board-certified physician in obstetrics and gynecology was qualified to testify that the failure of a surgical team nurse to communicate information was a breach of the nurse's standard of care).

¶ 59 Finally, AA argues that the trial court abused its decision in allowing Dr. Maillefer's opinion that a CBC should have been ordered by 4:55 p.m. The record reflects, however, that this testimony was elicited by plaintiff's trial counsel during cross-examination, as plaintiff was attempting to establish Maillefer's negligence. As noted, Maillefer testified that he checked on Ormond in the PACU around 4:50 p.m. and visited with her for approximately one minute before leaving KCH. The trial court allowed plaintiff's trial counsel to impeach Maillefer with his previous deposition testimony that, if he had stayed with Ormond until 4:55 p.m., he would have recognized that she was in shock and ordered a CBC. Under these circumstances, and considering the above-mentioned jury instructions, we find no abuse of discretion in the trial court's decision to allow Maillefer's opinion.

¶ 60 AA's last argument pertaining to the trial court's evidentiary rulings is that it should have been permitted to cross-examine Dr. Helgeson on his prior unsuccessful attempts to pass the anesthesia board examination. We find no merit to this argument. At the time of the trial, Helgeson had been a board-certified anesthesiologist for approximately 14 years. Once the threshold issue of an expert's qualifications is met, matters of schooling and licensing have an attenuated relevance to the medical opinion in issue, and are thus of limited significance. *O'Brien v. Meyer*, 196 Ill. App. 3d 457, 462-63 (1989). Hence, we find no abuse of discretion in

the trial court's decision to bar evidence regarding Helgeson's past attempts at the anesthesia board examination. See *Jones v. Rallos*, 384 Ill. App. 3d 73, 91 (2008).

¶ 61 *Closing Argument*

¶ 62 AA next contends that a new trial is warranted due to plaintiff's improper closing argument. Counsel is afforded wide latitude in closing argument and may comment on the evidence and any reasonable inferences that can be fairly drawn from the evidence. *Drakeford v. University of Chicago Hospitals*, 2013 IL App (1st) 111366, ¶ 50. "Even where improper comments are made during closing argument, reversal is appropriate only where the comments substantially prejudiced the challenging party." *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 873 (2004). Decisions regarding the prejudicial effect of remarks made during closing argument are within the discretion of the trial court, and determinations regarding such issues will not be reversed absent a clear abuse of discretion. *Id*. In determining whether there has been an abuse of discretion, we may not substitute our judgment for that of the trial court, or even determine whether the trial court exercised its discretion wisely. *Simmons*, 198 Ill. 2d at 568.

¶ 63 Here, plaintiff's trial counsel utilized a slide show during closing argument. One of the slides stated, "compensate means to balance, this is your call to action." The trial court sustained an objection by AA's trial counsel and the slide was immediately removed. The trial court determined that the "call to action" language was equivalent to asking the jury to "send a message," which has been deemed improper. See *Zoerner v. Iwan*, 250 Ill. App. 3d 576, 586 (1993) ("Suggestions of being rewarded for driving drunk or sending messages that drunk driving is wrong had no place in the jury's deliberations about a factual issue, and counsel was ill advised to insinuate that they did."). Shortly thereafter, plaintiff's trial counsel presented a slide containing a list of "improper factors." The list read: "The money won't do any good. The

plaintiff doesn't need that much money. A large verdict will drive up prices. I'm afraid of what my neighbors will think. I've seen worse. No matter what the evidence was, I won't award more than a certain amount. The claim was not proved beyond a reasonable doubt." AA's trial counsel immediately requested a sidebar and moved for a mistrial. The trial court denied the motion, commenting that it did not find anything "particularly menacing" in the "list of factors." The trial court further reasoned that neither of the slides in question had appeared long enough for plaintiff's trial counsel to recite the language, or even make any arguments pertaining thereto.

¶ 64 We find no abuse of discretion in this ruling. The trial court was in the best position to determine the extent of any prejudice caused by the slides in question. See *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 109. Even if we were to find error in the particular slides of which AA complains, we would decline to substitute our judgment for that of the trial court. See *Simmons*, 198 Ill. 2d at 568.

¶ 65 AA also argues that plaintiff made an improper "per diem" argument concerning the calculation of damages. Plaintiff presented evidence during the course of the trial that Ormond, who was 57 when she died, had a 27.1-year life expectancy. Plaintiff also presented evidence that Ormond experienced pain over a period of two hours and twenty minutes. During closing argument, plaintiff's trial counsel asked the jury to award $5,420,000 for loss of society and $2,200,000 for pain and suffering. AA points out that this equates to $200,000 annually for loss of society and approximately $15,000 per minute for pain and suffering.

¶ 66 Although it is permissible for counsel to suggest a total sum for compensation to the jury, it is improper to suggest a mathematical formula to calculate damages, such as an award of a specific sum per day, as this may discourage reasonable and practical consideration. *Caley v. Manicke*, 24 Ill. 2d 390, 393 (1962). However, such an improper request only requires reversal

where it is deemed to have prejudiced the defendant; thus, reviewing courts must consider the likely effect upon the jury. *Ramirez v. City of Chicago*, 318 Ill. App. 3d 18, 29-30 (2000). Here, we note that the jury awarded plaintiff only $4,300,000, even though her trial counsel requested a total of $7,620,000. Therefore, we do not find the requisite level of prejudice in the jury's award to warrant reversal.

¶ 67 *Excessive Verdict*

¶ 68 AA's final contention is that it is entitled to a remittitur to reduce the jury's excessive award. "The purpose of a remittitur is to correct excessive jury verdicts in limited and appropriate circumstances." *Clarke v. Medley Moving & Storage, Inc.*, 381 Ill. App. 3d 82, 96 (2008). A jury's award will not be subject to remittitur where it falls within the flexible range of conclusions which can be reasonably supported by the facts, as the assessment of damages is primarily an issue of fact for a jury's determination. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 412 (1997). A remittitur should be ordered only when a jury's award falls outside the range of fair and reasonable compensation, appears to have resulted from passion or prejudice, or is so large that it shocks the judicial conscience. *Klingelhoets v. Charlton–Perrin*, 2013 IL App (1st) 112412, ¶ 67. A reviewing court will set aside a jury's verdict only if it is against the manifest weight of the evidence, meaning that it is unreasonable, arbitrary and not based on the evidence presented, or the opposite conclusion is clearly apparent. *Id*.

¶ 69 The jury's award in this case is not so large that it shocks the conscience, and we do not believe that it is against the manifest weight of the evidence. We reject AA's argument that the jury was unable to infer conscious pain and suffering because Ormond was charted as being merely "lethargic" in the PACU. Ormond was conscious for over two hours in the PACU while she slowly bled to death. While Ormond may not have complained of pain, it was also

established that she was went into shock at 4:55 p.m. Furthermore, the jury heard the testimony of a PACU nurse who described Ormond as "restless" and seemingly uncomfortable at 5:15 p.m. Finally, Dr. Bell opined that a patient whose blood pressure is dropping experiences sensations of "impeding doom." Regarding the jury's award for loss of society, grief, sorrow and mental suffering, AA argues only that Ormond had limited contact with her son, Brian Ormond. We decline to address AA's conclusory assertion that the physical distance between Brian and his mother, and the limited contact that resulted, somehow precluded the two from having a meaningful relationship. Moreover, AA overlooks Ormond's relationship with the plaintiff in this case: her daughter, Bridgett Kedzie.

¶ 70 III. CONCLUSION

¶ 71 For these reasons, we affirm the judgment of the circuit court of DeKalb County to deny AA's post-trial motion, and we affirm the jury verdict and damages award.

¶ 72 Affirmed.