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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEBORAH E. SMITH,)
) Appeal from the
) Circuit Court of
 Plaintiff-Appellee/Cross-Appellant,) Cook County
)
 v.) No. 2004 L 14580
)
 DEBORAH KROLIK and JOSEPH RUBNELLI, Co-) The Honorable
 Executors of the Estate of Paul P. Krolik, D.D.S.,) Sheldon Harris,
 Deceased,) Judge Presiding.
)
 Defendants-Appellants/Cross-Appellees.)

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in denying a motion *in limine* seeking to bar: (1) expert testimony by a specialist regarding the standard of care applicable to general dentists; (2) testimony regarding lost time and medical expenses that a dental patient incurred to receive subsequent dental treatments associated with the negligent care provided by a dentist; and (3) expert testimony regarding the standard of care associated with a general dentist's recordkeeping requirements. The circuit court did not err in denying a motion for a directed verdict where a dental patient provided evidence establishing the elements necessary for a medical malpractice cause of action. The circuit court also did not err in granting a motion for a directed verdict relating to a timeliness affirmative defense where a dental patient received continuous care by a dentist. The instructions tendered to the jury were not misleading and were supported by the evidence in the record. Finally, the jury's verdict in the patient's favor was not against the manifest weight of the evidence and the jury's damages award was not unreasonable. The dentist's trial was fair and

the alleged errors individually or in the aggregate did not warrant the granting of a new trial.

¶ 2 Deborah Krolik and Joseph Rubnelli, as co-executors of Dr. Paul Krolik's estate, appeal the jury's verdict of \$206,304 in favor of Deborah Smith relating to her dental malpractice cause of action. On appeal, Dr. Krolik¹ contends that the circuit court erred in: (1) admitting the standard of care testimony offered by Smith's expert; (2) admitting Smith's testimony addressing lost wages and medical expense; (3) admitting testimony addressing the standard of care required by a general dentist in charting information in a patient's medical record; (4) denying his motion for directed verdict on the basis that Smith failed to establish the elements of a medical malpractice claim; (5) denying his motion for a directed verdict on the basis that Smith failed to establish that he breached the standard of care associated with recordkeeping; (6) granting Smith's motion for a directed verdict relating to his timeliness affirmative defense; and (7) tendering to the jury instructions that were misleading or not supported by the evidence. Dr. Krolik also claims that the circuit court's errors in the aggregate deprived him of a fair trial warranting a new trial. Dr. Krolik further claims that the jury's verdict was against the manifest weight of the evidence and that an order of remittitur should be entered because the jury's award exceeded reasonable or proven damages. For the reasons stated below, we affirm.

Background

¶ 3 Dr. Krolik provided dental services to Smith from 1994 to 2004. Following Dr. Krolik's death, Smith consulted with other dentists for treatment and in doing so, learned that she had severe dental problems. Smith received subsequent treatment to remedy the dental issues that she learned about from these dentists. Smith filed a dental malpractice complaint on December

Even though Dr. Krolik's estate is presenting the defense in this case, for ease of understanding, defendant will be referred to hereinafter as Dr. Krolik.

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30, 2004, against Dr. Krolik relating to the alleged negligent dental care that he continuously provided to her from 1994 to 2004. On November 9, 2005, Dr. Krolik filed an answer and affirmative defense, which claimed that the complaint was not filed within the time limited by law. During the course of the underlying litigation, Dr. Krolik filed approximately 33 motions *in limine*, some of which were granted and some of which were denied. The motions *in limine* that Dr. Krolik filed included, but were not limited to, barring testimony from Smith's expert regarding the applicable standard of care of a general dentist and the recordkeeping requirements of a general dentist, as well as barring Smith's testimony addressing lost wages and medical expenses. Trial testimony in Smith's case occurred over four days.

¶ 4 Smith testified on her own behalf at trial. Smith became Dr. Krolik's patient in 1994, and was his patient until 2004 when he died. Smith spent approximately 557 hours either traveling to and from the dentist's office, in the dentist's office, or recuperating from a dental procedure. During the time that Smith received dental care, she was required to get her manager's approval for the days and time off. When Smith was absent from work, her employer scheduled someone to handle any crisis that may occur, but that individual would not do Smith's work. Once Smith returned to work, she was required to complete the work that accumulated while she was gone. Smith was required to use either vacation or personal days when she took a day off of work for dental treatment. If Smith needed additional time off, it was possible for her to work weekends or stay at work later to make up the absent time, which was a frequent occurrence. Dr. Krolik cancelled Smith's July 2004 appointment because he was ill, and he subsequently passed away.

¶ 5 On August 3, 2004, Smith saw another dentist, Dr. Ronkin, because her front tooth fell out of her mouth. Dr. Ronkin took an x-ray and examined Smith's mouth, but he was unable to reattach the tooth. After talking with Dr. Ronkin, Smith learned that she had serious dental

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problems.

¶ 6 Smith then consulted with Dr. Malenius, a general dentist, who first informed her that she had periodontal disease. Dr. Malenius examined her mouth and took an x-ray. Dr. Malenius also re-cemented her front tooth, and removed the implant in her lower jaw on the right side because Smith was complaining of severe pain in that area.

¶ 7 Smith next consulted with Dr. Levine, a periodontist, who examined Smith's mouth and took an x-ray. Dr. Levine did a deep-root cleaning and scaled the four quadrants of her mouth. This treatment took several appointments, and Smith was anesthetized. Dr. Levine referred Smith to Dr. Caruso, a general dentist.

¶ 8 Smith consulted with Dr. Caruso in September 2004. Dr. Caruso examined Smith's mouth, took x-rays and photographs of her mouth. All of Smith's crowns needed to be removed so the health of her upper teeth could be evaluated. Dr. Caruso removed the upper crowns in October 2004. Dr. Caruso removed all of the restorations on Smith's teeth in her lower jaw in November 2004. Smith learned that she was going to lose all of her lower teeth in August or September 2005. Dr. Caruso referred Smith to Dr. Sisto, an oral surgeon.

¶ 9 Dr. Sisto extracted all of Smith's bottom teeth on September 14, 2005. After Smith's teeth were pulled, she could wear a prosthetic once her gums healed after approximately 11 days. During the time her mouth healed, Smith worked from home. Smith wore the prosthetic for approximately 16 - 18 months until she was able to get prosthetic teeth.

¶ 10 Smith also discussed her monetary loss during her testimony. Smith testified that she incurred lost time for dental appointments starting from Dr. Krolik's death of approximately 380 hours. Smith calculated the monetary value of her lost time by multiplying the 380 hours she spent receiving dental care by her calculated \$30 hourly rate. Smith calculated an hourly rate

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because she was a salaried employee at the Department of Children and Family Services. Smith paid for Dr. Caruso's treatments occurring from 2004-2009, which totaled approximately \$60,000. Smith had documentation for all of Dr. Caruso's bills except for one bill totaling \$21,515.

¶ 11 Before a fixed prosthesis was placed on the bottom of Smith's jaw, Smith had difficulty talking and eating. Smith was required to talk a lot in her employment position, but her speech often was slurred and she drooled because she was unable to control her saliva. Smith's diet was very limited and she could only eat very soft foods or soup. After the final fixed prosthesis was placed, her speech improved, she able to eat everything and her diction was accurate. During cross-examination, Smith acknowledged that she is not paid an hourly rate and that during the time she took off for dental treatment, she received her salary. Smith was not claiming lost wages as damages.

¶ 12 Dr. Louis Scannicchio testified as an expert witness on Smith's behalf. Previously, Dr. Scannicchio was a faculty member of the Loyola University Medial Center, and was an assistant professor in maxillofacial prosthetics and otolaryngology. Dr. Scannicchio taught medical students, dental students and residents. Dr. Scannicchio taught students how to perform an examination of a patient, how to take a patient's history and how to document dental findings and procedures.

¶ 13 Dr. Scannicchio testified that he practices prosthodontics, and is a clinical professor of biology and director of the postbaccalaureate at Dominican University. Dr. Scannicchio is also the current chief of the dentistry section at Rush Oak Park Hospital. His practice is limited to prosthetics and he treats patients with cancers of the head and neck, specifically oral and maxillofacial cancers. A prosthodontist is a specialist who works with patients in replacing both

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hard and soft tissues of the mouth and face along with restoring their dentition. His practice focuses on patients who have been afflicted with cancers of the mouth, palate, tongue, jaws and sinuses. Dr. Scannicchio also performs prosthetic rehabilitation, which consists of replacing what has been surgically resected with an artificial prosthesis replacing the palate, teeth, the dentition, parts of the jawbone, and things of a similar nature. Dr. Scannicchio is licensed in Illinois in the field of general dentistry and he is board certified in prosthodontics.

¶ 14 Regarding the definition of the term “standard of care,” Dr. Scannicchio stated, “the standard of care is held out as the proper care and treatment that a prudent physician, dentist within the community would be practicing within those parameters. And I am familiar with that because during the years 1994 and 2004 I was practicing in the Chicagoland area. I am familiar with that standard of care.” When Dr. Scannicchio was in dental school and during his residency and fellowship, he was taught the standard of care relating to the examination of teeth, gums, pocket depths and bones. Knowledge of the “standard of care” is part of a dentist's education and training. The concept of standard of care is discussed in dental school when school is started and continues all the way through the clinical training program. Dr. Scannicchio learned about the standard of care relating to treatment planning, clinic examinations, use of x-rays or radiographs, putting on crowns, bridges, restorations of a similar type, diagnosing periodontal disease, treatment of periodontal disease, placing restorations, crowns, bridges, implants in a patient with active periodontal disease, reporting clinical findings, performing an examination of other teeth, gums, pocket depths, hard tissue and soft tissue, performing an examination to determine clinical findings regarding gums, bone and teeth and about the documentation of clinical findings in a patient's medical record or dental record.

¶ 15 Dr. Scannicchio defined a "dental record" as "a history of one's care and treatment

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throughout the course of whenever it begins, in many cases it is as a child, of what type of condition your mouth is in, from the breakdown of decay to replacement with restorations, to the loss of part of your dentition, to the various treatment phases of periodontal disease, even simple prophylaxis." Dr. Scannicchio further stated that a patient's dental record "is a documentation of [the] care and treatment throughout [his] lifetime."

¶ 16 Dr. Scannicchio stated that the standard of care for a dentist requires documentation of clinical examination findings and for a dentist to document pathology found during the clinical examination in the teeth, roots, gums or bone. Dr. Scannicchio also stated that a dentist must evaluate the status and progression of periodontal pockets measuring greater than 3 millimeters in depth. Dr. Scannicchio further stated that the standard of care requires documentation of abnormal physical findings in the record.

¶ 17 Dr. Scannicchio indicated that after reviewing the records for the approximate 10 years that Dr. Krolik treated Smith, he did not find a recording in Smith's chart of any clinical physical findings. Dr. Scannicchio also did not find in the record the following information: (1) testing of the mobility of Smith's teeth; (2) probing of pocket depths; (3) diagnosis of periodontal disease; (4) treatment of periodontal disease; and (5) referral to another practitioner or specialist for the diagnosis, management and treatment of periodontal disease.

¶ 18 Dr. Scannicchio opined that Dr. Krolik deviated from the standard of care by failing to explain why Smith's bridge need replacement. Dr. Scannicchio further testified that Dr. Krolik's September 3, 1999, entry stating "re-cement" was a deviation from the standard of care because the record does not detail what was re-cemented. Dr. Scannicchio testified that the overhang and margins relating to the crowns and bridges placed by Dr. Krolik were a deviation from the standard of care.

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¶ 19 Dr. Scannicchio based his standard of care opinion on his review of the records, x-rays, photographs, models and depositions. Dr. Scannicchio was familiar with the standard of care as it related to Dr. Krolik based on his education, training and experience. Dr. Scannicchio rendered the following opinion regarding Dr. Krolik's treatment of Smith:

"It is my opinion that Dr. Krolik was negligent in placing ill-fitting restorations, failure to properly chart a treatment plan, and diagnose periodontal disease, and I believe it was ongoing from 1994 through the years 2004. I believe it's a direct causation to Ms. Smith's dental problems and subsequent treatment by her subsequent treaters. That is my opinion."

Dr. Scannicchio continued his opinion by stating the following:

"Well, in my opinion, his initial workup from the first time he saw her because there is no record or indication that a periodontal examination was performed. So it was initial treatment, from his initial visit, again, through her last."

Dr. Scannicchio's opinion was that Dr. Krolik's treatment of Smith was a continuous deviation from the standard of care from 1994 until July 2004. Dr. Scannicchio also stated the following:

"My opinion is that had the standard of care been held to this point throughout her tenure with Dr. Krolik that she would have maintained a good part of her dentition. I can't speak to it as it is here right now, but she - just by the fact of looking at restorations when I reviewed this and my opinion and I look at these, I say here's a patient who's compliant, who has - who's invested in her oral health care, and in order to do that, has a reason to keep it going. So this is somebody who's invested in their health care, and I don't see no reason why it shouldn't have continued forward."

Dr. Scannicchio opined that Smith's condition worsened while she was Dr. Krolik's patient "to

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the point of where she wound up, the loss of her dentition, failure of the implants, and I think she went from mild to moderate periodontitis to severe periodontitis, bone loss, and the ultimate loss of her dentition in her lower jaw." If Dr. Krolik had given Smith appropriate treatment, Dr. Scannicchio opined that based on his observation and "25 years of clinical experience that more likely than not she should have been able to maintain her oral health, meaning maintaining her dentition."

¶ 20 Regarding Smith's dental treatment after Dr. Krolik's care, Dr. Scannicchio opined that the subsequent care and treatment she received by Drs. Ronkin, Malenius, Levine, Caruso and Sisto were reasonable and necessary due to Dr. Krolik's negligence. Moreover, in Dr. Scannicchio's opinion, the fees charged by those dentists were reasonable and customary for the work that was done. Dr. Scannicchio also stated that Dr. Krolik's negligence caused Smith to incur significant costs for dental remediation and treatment, and Smith lost time when she was in the dental chair having work done during the remedial phase. Dr. Scannicchio further opined that the need for a final bridge and the related costs were a direct consequence of Dr. Krolik's negligence.

¶ 21 Dr. Scannicchio continued by opining that Dr. Krolik's recordkeeping failed to meet the standard of care because there was no treatment planning, diagnosis of a disease, and indication of periodontal probing in Smith's medical record. Based on Dr. Krolik's recordkeeping, Dr. Scannicchio stated that it is impossible for subsequent treaters to look at Smith's record and determine what was done by Dr. Krolik to treat Smith. More specifically, Dr. Scannicchio expressed the following opinion regarding Dr. Krolik's recordkeeping:

"And I think it's a deviation of the standard of care for any health care provider to not properly document a person's treatment and care. And in this case, there was a deviation

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in my opinion because of the lack of documentation, and it shows that the work wasn't done. That's my opinion on that as far as the recordkeeping is concerned."

According to Dr. Scannicchio, Dr. Krolik's recordkeeping deviated from the standard of care because the record lacks documentation regarding a comprehensive treatment plan, charting, probing and Smith's periodontal health was not indicated in the record. Dr. Scannicchio stated that "it's a lack of not only not documenting it, if it's not documented it, it could be to a reasonable degree of certainty that it wasn't done." Dr. Scannicchio stated that systematic documentation of procedures and findings in the record is extremely important, and it is the unfolding of a patient's history. The proper preparation of the record and the recording of clinical findings, such as probings, condition of gums, presence of inflammation, and mobility of teeth is taught in dental school and is what Dr. Scannicchio was taught and what he taught to others.

¶ 22 During cross-examination, Dr. Scannicchio acknowledged that he did not practice general dentistry. Dr. Scannicchio performed fillings in patients during his training, but has not filled a tooth during his practice. During re-direct examination, Dr. Scannicchio stated, however, that the fact that he did not practice general dentistry did not restrict him from testifying about the standard of care in this case because general dentistry was an extensive part of his training. For his speciality, knowledge of general dental care is required to treat his patients. In his practice, Dr. Scannicchio must know the overall care of periodontal conditions and mobility of teeth. Dr. Scannicchio reiterated that it was not necessary to be a general dentist to be familiar with the standard of care that applies to general dentists.

¶ 23 Dr. Michael Schmerman, a periodontist, also testified as an expert at trial on Smith's behalf. Dr. Schmerman stated that based on his review of Dr. Krolik's records of Smith, Dr.

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Krolik did not chart periodontal probing depths for any of Smith's teeth during the 10 years he treated Smith. Without recording periodontal probing in the record, it is not determinable what the pocketing was during the treatment period. Also, during the 10 year treatment period, Dr. Krolik never charted that Smith had any mobility of any of her teeth. Dr. Schmerman opined that based upon a reasonable degree of dental and scientific certainty and on a probability basis more probably true than not true that Dr. Krolik in his care and treatment of Smith from 1994 to 2004 deviated from the applicable standard of care of a reasonably well qualified dentist.

¶ 24 During cross-examination, Dr. Schmerman acknowledged that he is a periodontist, which is a gum doctor. Dr. Schmerman does not currently perform any general dentistry work. During redirect, Dr. Schmerman stated that approximately 80% of his professional practice involves the diagnosis and treatment of periodontal problems and 20% of his professional practice involves placing implants.

¶ 25 Dr. Schmerman is familiar with the fair, reasonable and customary charges for restoration work, such as the work Smith needed to convert temporary restorations to permanent restorations, which would approximate \$24,000 for 12 teeth.

¶ 26 Dr. Joseph Toljanic testified as an expert on Dr. Krolik's behalf. Dr. Toljanic is a restorative dentist and prosthodontist. Dr. Toljanic is licensed in Illinois as a general dentist, and has practiced as a prosthodontist and a general dentist continuously since 1985. Dr. Toljanic stated that restoring teeth includes procedures such as placing a crown and a filling on a tooth. Prophy and prophylaxis are synonymous and is what is commonly understood as getting teeth cleaned. Dr. Toljanic stated that Dr. Krolik's care of Smith was ongoing at the time of his death in 2004. Dr. Toljanic described the process of "preparing a tooth" and replacing a crown as consisting of using a hand drill and grinding a tooth 360 degrees all the way around creating a

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smaller version of the tooth. A cap covering or a crown is placed on the tooth and it is cemented into place. Dr. Toljanic described a bridge as a more extended version of a crown. A bridge is used for individuals who are missing one tooth or several teeth. The teeth next to the missing tooth are prepared in the same manner as for a crown. The restoration here would be fabricated with an artificial tooth fused between the existing teeth, which is called a pontic. This procedure is called a bridge because when the piece is glued in, the two crowns are bridged together by the artificial tooth or pontic. Dr. Toljanic described an implant as "an artificial root that's surgically placed in the jaw bone. It takes the place of a root and allows us then to make a crown not unlike the crowns we make for natural teeth. When the implant is placed, the bone locks the implant into place in a way similar to the roots of our teeth are locked into place, and then a crown can be fabricated and be attached to an implant or implants." Dr. Toljanic opined that the x-rays relating to Smith's dental health prior to Dr. Krolik's care suggests defective fits for her crowns, the restorations in her mouth, or as Smith's expert testified, these restorations had overhanging margins. By looking at Smith's records and x-rays, Dr. Toljanic concluded that Dr. Krolik's treatment of Smith consisted primarily of restorative work, crowns, some filing work, replacement of some implants to place bridge work predominantly in the mandible, which is the lower jaw. It appeared to Dr. Toljanic that Dr. Krolik replaced all of the restorations that Smith had when she became his patient in 1994. Dr. Toljanic described a "defective restoration" as "a restoration that no longer fits the tooth or provides the service, the chewing function or the protective function that the restoration or the filling or crown was originally designed to provide." Dr. Toljanic stated that defective restorations do not fall below the standard of care because fillings and crowns have finite life spans. A dentist can fix a tooth, but doing so does not prevent more decay or the filling from wearing down developing a defective fit. Dr. Toljanic

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opined that Smith had defective crowns when she was first treated by Dr. Krolik. Based on his review of Smith's x-rays, her medical record and depositions, Dr. Toljanic opined that the restorations that were placed by Dr. Krolik were within the standard of care. Dr. Toljanic also opined that Dr. Krolik identified Smith's dental problems that she had in 1994 and properly addressed those problems. Dr. Toljanic agreed with Dr. Schmerman's finding that Smith had defective restorations that needed to be replaced when Dr. Krolik first treated her. Dr. Toljanic opined that Dr. Krolik's actions or inactions did not lead to subsequent dental difficulties for Smith.

¶ 27 During cross-examination, Dr. Toljanic agreed that only one clinical finding was charted in Smith's medical records for the 10 year period that Dr. Krolik treated Smith. Dr. Toljanic stated that Smith's teeth were restorable when Dr. Krolik began his care of Smith and she did not need to have teeth extracted at that time. Smith's teeth in 1994 were also sufficient to support crowns and bridges.

¶ 28 Dr. Toljanic acknowledged that there was nothing in the record as to why a crown came off and had to be reset in August 1996. The record also did not provide enough information as to why Dr. Krolik put a "temp" in the area where synthetic bone was located. It was unclear whether the "temp" was a temporary bridge or three temporary crowns. In an x-ray in February 1999, a tooth demonstrated significant changes around the root of one of the molars. The medical record, though, did not contain any clinical findings correlating to that tooth and whether the tooth was infected or if there was inflammation. Dr. Krolik's notes on June 29, 2000, indicated that several teeth were set and then on July 2000, those same teeth were re-prepped. Dr. Toljanic could hypothesize and speculate regarding an explanation why those teeth needed to be re-prepped. On March 28, 2002, Dr. Krolik performed a gingivectomy, but Dr.

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Toljanic acknowledged that Smith's medical record did not describe a finding relating to the gingivectomy or why she had that procedure performed. Dr. Toljanic further acknowledged that there is no documentation in the record of a bridge being removed or remade between the implant of December 15, 1999 and the re-prepping of that area on August 9, 2002. Dr. Toljanic also could not state after looking at Smith's records why a new bridge was being undertaken in 2002 when one was placed in 1999. Dr. Toljanic agreed that the tooth that fell out prompting Smith to see another dentist after Dr. Krolik's death had four crowns put on it since Smith began treatment with Dr. Krolik in 1994. Dr. Toljanic agreed with Dr. Caruso's findings of defective crowns on 12 of Smith's teeth. Dr. Toljanic also agreed with the finding of recurrent tooth decay in four of Smith's teeth. Dr. Toljanic further agreed with Dr. Caruso's findings of tooth mobility. Dr. Toljanic also did not dispute Dr. Caruso's findings of failing implants, and findings of a periodontal abscess with bone involvement in a tooth. Dr. Toljanic stated that Dr. Caruso's treatment plan to extract all of Smith's lower teeth was an acceptable treatment plan. Dr. Toljanic acknowledged that Smith's dental problems progressed from May 1994 to November 2004.

¶ 29 During redirect examination, Dr. Toljanic opined that Dr. Krolik's restorative work on teeth 18 - 22 did not deviate from the standard of care. Similarly, nothing in the record suggested that Dr. Krolik deviated from the standard of care regarding prepping of those teeth. Dr. Toljanic opined that nothing deviated from the applicable standard of care regarding Smith's lower left teeth from May 31, 1994 to April 26, 2002. Also, nothing indicated any deviation from the standard of care regarding Smith's lower right teeth, upper left teeth, and treatment of tooth number 6. Dr. Toljanic stated that none of the treatments asked about during cross-examination performed by Dr. Krolik deviated from the standard of care.

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¶ 30 During re-cross examination, Dr. Toljanic acknowledged that all of the defective crowns and bridges that were in Smith's mouth in September through December 2004 were placed by Dr. Krolik and that all of Dr. Krolik's restorations from 1994 to 2004 failed. Dr. Toljanic stated that the defective restorations were the unfortunate result of wear and tear. Also, Dr. Toljanic stated that when the implants failed, the restorations on the implants failed. Dr. Toljanic stated that all of the restorations that Dr. Krolik placed in Smith's mouth were defective and failed because the restorations were at the end of their life span. Dr. Toljanic reiterated that restorations do not last forever and wear down. Dr. Toljanic acknowledged that it was unusual to have as many failures as occurred in Smith's mouth, but that it can happen.

¶ 31 Dr. Krolik moved for a directed verdict on all allegations on the basis that Smith failed to meet her burden of proof regarding the elements necessary to establish her negligence case against Dr. Krolik. The circuit court denied the motion. Dr. Krolik moved for another directed verdict motion on the recordkeeping issue claiming that no causal connection between recordkeeping and Smith's alleged injury existed. The circuit court denied the motion stating that Dr. Scannicchio's testimony presented a causal connection creating the necessary evidence, and that it could not weigh the evidence at that juncture.

¶ 32 During the jury instruction conference, Smith tendered to the circuit court the long jury instruction addressing circumstantial evidence. Dr. Krolik objected to the tendered instruction. The circuit court stated that use of the long form was within its discretion and if Smith wanted it, the circuit court was going to allow it. Dr. Krolik also objected to the issues instruction provided to the jury, as well as the circuit court's use of jury verdict form A.

¶ 33 On December 15, 2009, the jury returned a verdict in favor of Smith and awarded damages in the amount of \$206,304. Dr. Krolik filed a post-trial motion on February 5, 2010

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requesting a new trial claiming that errors committed at trial were prejudicial and affected the outcome of the trial, or in the alternative, the entry of a remittitur order reducing the \$206,304 damages award. The circuit court denied the post-trial motion on March 22, 2010. Dr. Krolik timely appealed.

Analysis

A. Standard of Care Testimony

¶ 34 Dr. Krolik first contends on appeal that the circuit court abused its discretion in allowing Smith's expert to testify regarding the standard of care applicable to a general dentist. Dr. Krolik claims that the circuit court should not have allowed Dr. Scannicchio to testify regarding the standard of care because he is a prosthodontist who never practiced general dentistry and did not perform the procedures about which he rendered a standard of care opinion. For an expert to testify regarding the standard of care in a medical malpractice action, the following three part test must be satisfied: "(1) the expert must be a licensed member of the school of medicine about which the expert proposes to express an opinion; (2) the expert must be familiar with the methods, procedures, and treatments ordinarily observed by other physicians;" and (3) if the first two prongs are met, the circuit court has the discretion to then determine whether the witness is competent to testify to regarding the standard of care. *Alm v. Loyola University Medical Center*, 373 Ill. App. 3d 1, 5 (2007). Dr. Krolik claims that Dr. Scannicchio failed to meet the familiarity and competency prongs because Dr. Scannicchio did not perform the procedures that Smith claims Dr. Krolik performed negligently. Specifically, Dr. Krolik contends that during his trial testimony, Dr. Scannicchio testified that he did not: (1) practice general dentistry; (2) perform a prophylaxis cleaning; or (3) perform fillings on teeth. Dr. Krolik claims that those treatments form the basis of the negligence malpractice claim against him, and thus, Dr. Scannicchio should

not have been permitted to testify.

¶ 35 The circuit court did not abuse its discretion in denying Dr. Krolik's motion *in limine* seeking to bar Dr. Scannicchio's testimony regarding the applicable standard of care. This court applies a *de novo* standard of review to determine whether a proffered expert satisfies the familiarity requirement necessary to testify as an expert. *McWilliams v. Dettore*, 387 Ill. App. 3d 833, 844 (2009). A circuit court's ruling allowing an individual to testify as an expert is reviewed for an abuse of discretion. *Hubbard v. Sherman Hospital*, 292 Ill. App. 3d 148, 153 (1997). In rendering the ruling whether to allow an individual to testify as an expert, "the trial court should consider the proposed expert's education and employment background to ensure that the witness is familiar with the medical issues in the case." *Id.* A two prong test consisting of a "licensure" and "familiarity" prong is used to determine whether an individual is qualified to render standard of care testimony. *McWilliams*, 387 Ill. App. 3d at 843. According to the "licensure" prong, "the expert must be a licensed member of the school of medicine about which he or she proposes to opine." *Id.* According to the "familiarity" prong, "the expert must be familiar with the methods, procedures, and treatments that similarly situated physicians as the defendant would ordinarily observe." *Id.* The failure to satisfy this inquiry must result in the circuit court not allowing the proposed expert to testify regarding the medical standard of care. *Id.*

¶ 36 The parties agree that Dr. Scannicchio met the licensure requirement since he was licensed in the state as a general dentist. Dr. Krolik contends that because Dr. Scannicchio does not perform the procedures at issue in this case that Dr. Scannicchio's experience fails to satisfy the "familiarity" requirement. While it is true that Dr. Scannicchio does not perform general dentistry, he was educated as a general dentist and then continued his education to specialize as a prosthodontist. Regarding his qualifications, Dr. Scannicchio stated that he is the current chief of

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the dentistry section at Rush Oak Park Hospital. Dr. Scannicchio also testified that he was familiar with the standard of care applicable to a general dentist because that concept was part of a dentist's education and training. Dr. Scannicchio was taught the standard of care relating to the examination of teeth, gums, pocket depths and bones during dental school and during his residency. Dr. Scannicchio also stated that he was taught about the standard of care relating to treatment planning, clinic examinations, putting in crowns, bridges, diagnosing periodontal disease, and about the documentation necessary in a patient's medical record. These procedures were at issue in the instant case. Dr. Scannicchio also stated that even though he did not practice in the area of general medical, general dentistry was an extensive part of his training and that a knowledge of general dental care was required to treat his patients. Dr. Scannicchio further stated that an individual did not have to be a general dentist to be familiar with the standard of care that applies to general dentists.

¶ 37 Dr. Krolik relies on *McWilliams v. Dettore*, 387 Ill. App. 3d 833 (2009), *Hubbard v. Sherman Hospital*, 292 Ill. App. 3d 148 (1997), and *Northern Trust Company v. Upjohn Company*, 213 Ill. App. 3d 390 (1991) to establish that Dr. Scannicchio was not qualified as an expert to render standard of care opinions. The cases that Dr. Krolik relies on, however, are distinguishable. In *McWilliams*, the proffered expert failed to satisfy the familiarity prong because the expert was an oncologist that orders biopsies, but he does not make the decision about whether to perform a biopsy, which was the issue giving rise to the malpractice claim. *McWilliams*, 387 Ill. App. 3d at 845. The *McWilliams* court concluded that the decision whether to perform a biopsy is not made by all physicians, including an oncologist, but is a decision made between a surgeon and a patient. *Id.* at 847. The *McWilliams* court stated that the decision whether to perform a biopsy did not concern a matter that "every doctor out of medical school

should probably know." *Id.* Since the proffered doctor was not a surgeon, the doctor was not qualified to testify as an expert. *Id.* at 848.

¶ 38 In *Hubbard*, this court held that the proffered expert was not qualified because the doctor had little emergency room experience and did not perform the appendectomy procedure at issue in the case. 292 Ill. App. 3d at 153. The proffered expert was an attending physician and not a surgeon as was the defendant doctor. *Id.* Thus, this court held that the attending physician failed to meet the familiarity requirement to testify as an expert against a surgeon. See *Id.* at 155.

¶ 39 In *Northern Trust*, the proffered expert failed to satisfy the familiarity prong because the expert never used the drug at issue in that case, never performed an abortion and never worked in an obstetrical or gynecological ward similar to the defendant doctor. 213 Ill. App. 3d at 406-07. The *Northern Trust* court held that the proffered expert was not qualified to testify because he did not know what was the customary practice relating to the actions taken by the defendant doctor or for a doctor in the same place and time as the defendant doctor. *Id.*

¶ 40 In *McWilliams*, *Hubbard* and *Northern Trust*, the plaintiffs offered the testimony of doctors who did not have specialized training or experience to testify against doctors who were specialized, or surgeons. The instant case presents the converse situation where a specialized dentist is rendering an opinion regarding procedures performed by a general dentist and procedures that the proffered specialist received training for and has previously performed. Based on Dr. Scannicchio testimony addressing his training in and familiarity of the procedures at issue in this case, the circuit court did not err in ruling that he was qualified to testify about the standard of care applicable to a general dentist and the procedures performed by such a dentist.

B. Lost Wages and Medical Expenses

¶ 41 Dr. Krolik's next issue is that the circuit court erred in denying his motion *in limine* #5

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seeking to bar Smith's testimony concerning her lost wages and dental expenses because her testimony was not based on the evidence. Dr. Krolik contends that the circuit court abused its discretion in allowing Smith's testimony because it was based on speculated lost wages since Smith did not lose any wages and was still paid her full salary when she was not present at work due to dental treatments. Dr. Krolik contends that the circuit court erred in allowing Smith to testify regarding the time she missed from work and assigning an hourly rate to the missed time even though she was not paid an hourly rate. Since no evidence was presented supporting Smith's testimony regarding the number of days missed from work or the calculated hourly rate, Dr. Krolik contends that this court should enter a remittitur of \$11,400 calculated as 380 hours multiplied by \$30 per hour awarded as damages to Smith.

¶ 42 The circuit court did not abuse its discretion in denying Krolik's motion *in limine* regarding Smith's testimony addressing her compensation for lost time. In medical malpractice cases, the law in Illinois allows a plaintiff "to recover the full value of time lost from work, without regard to benefits received from his employer." *Cummings v. Jha, M.D.*, 394 Ill. App. 3d 439, 456 (2009). The principle underlying this rule " 'is that the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured party and third persons.' " *Id.* (quoting *Wilson v. Hoffman Group, Inc.*, 131 Ill. 2d 308, 320 (1989)). Smith testified at trial that the amount of lost time that she spent receiving dental care and treatment subsequent to Dr. Krolik's death was approximately 380 hours. Since 2004, Smith testified that she was a salaried employee at the Department of Children and Family Services. To compute an hourly rate, Smith divided her annual salary by 52 representing the number of weeks in a year and then divided that amount by 37½, which represents the hours she works per week. The computed hourly rate was \$30. Smith then

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described to the jury that she multiplied the computed \$30 hourly rate by the 380 hours of lost time that she spent receiving medical care subsequent to Dr. Krolik's death to arrive at a lost time value of \$11,400. During cross-examination, Smith acknowledged that her employer paid her salary to her regardless of her time off. Smith also acknowledged that she was not claiming any lost wages. Smith also provided to Dr. Krolik her tax return as support for her annual salary

¶ 43 The fact that Smith received an annual salary and was not paid hourly is irrelevant because an hourly rate is easily computed based on her annual salary. The methodology that Smith used to compute an annual salary was logical and not fundamentally flawed, nor was the computed rate speculative. To compute her hourly rate, Smith divided her annual salary by 52 weeks in a year and then divided that figure by the number of hours she worked per week. Even though Smith is a salaried employee, her hourly rate is easily computed. Smith was entitled to lost time despite receiving her normal compensation from her employer. In *Cummings v. Jha, M.D.*, the plaintiff was allowed to testify that he used 280 hours of sick time associated with his medical malpractice claims against a doctor. 394 Ill. App. 3d at 443, 457. The *Cummings* court held that based on Illinois law, the plaintiff "was entitled to recover the value of the time lost from his employment, despite his employer's allowance of sick time. The record supports the jury's award." *Id.* at 457. Similarly here, even though Smith continued to receive her salary, she was nonetheless entitled to payment for lost time because benefits received from her employer through the continued compensation were irrelevant. See *Id.* at 456. Moreover, because Smith was employed during the period that she was receiving the subsequent dental care and her income was known, her computed hourly wage was not based upon conjecture or speculation, which are "an improper basis for a determination of lost income." *Turner v. Chicago Transit Authority*, 122 Ill. App. 3d 419, 429 (1984) (holding that evidence regarding the salary that an unemployed

plaintiff may have earned if employed was erroneously admitted to establish lost income.)

¶ 44 Dr. Krolik also claims that the circuit court erred in admitting evidence regarding unpaid dental expenses for Drs. Caruso and Krolik without establishing their reasonableness. Dr. Krolik contends that the circuit court erred in allowing Smith to testify that she made a payment to Dr. Caruso for \$21,515 and a payment to Dr. Krolik for \$54,917 even though she did not have supporting documentation for the payments. Dr. Krolik maintains that because Smith testified to payments that she made that were not substantiated with receipts, a new trial is warranted or a remittitur of \$76,432 should be entered.

¶ 45 During the jury instruction conference, the circuit court ruled that Smith could not include Dr. Krolik's billings as damages because the only billings that could be included as damages are billings caused by Dr. Krolik's negligence, which consisted of bills for treatment after Dr. Krolik's death. Thus, Dr. Krolik suffered no prejudice relating to any testimony addressing \$54,917 of unpaid bills since the circuit court stated that the unsupported amount paid to Dr. Krolik could not be included as damages.

¶ 46 Dr. Caruso's \$21,515 invoice, however, represented an amount incurred by Smith for dental treatment after Dr. Krolik's death. Dr. Scannicchio testified that he reviewed Dr. Caruso's billings, as well as the billings of Drs. Malenius, Ronkin and Levine, that were in the record and opined that the charges were reasonable and customary for the work that was done. Dr. Scannicchio also opined that the treatments Smith received following Dr. Krolik's care were "reasonable and necessary because of the injury she sustained as a result of Dr. Krolik's negligence." Thus, contrary to Dr. Krolik's contention, Smith did in fact present expert testimony that the treatments provided by other dental professionals were necessitated by the negligent care and treatment provided by Dr. Krolik. The treatments provided by Dr. Ronkin, Dr. Malenius and

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Dr. Levin, as well as the two CT scans, exceeded routine work provided by general dentists, such as cleaning, x-rays and prophylactics. These dentists were specialists and provided specialized treatment that was necessitated by Dr. Krolik's negligence. The related treatment costs would not have been incurred absent Dr. Krolik's negligence, and thus, the circuit court did not err in admitting these costs into evidence since Dr. Scannicchio testified as to the reasonableness of the fees charged and the need for the services rendered based on Dr. Krolik's negligent care. Moreover, based on the jury's award of damages totaling \$42,689 representing subsequent dental care, the damages award unlikely included the \$21,515 Dr. Caruso bill or the \$54,917 bill. As such, no prejudice resulted to Dr. Krolik regarding admission of testimony relating to those bills.

C. Recordkeeping

¶ 47 Dr. Krolik's third issue on appeal is that that the circuit court erred in denying his motion *in limine* to bar Dr. Scannicchio's testimony addressing whether Dr. Krolik's professional recordkeeping, known as charting, breached the standard of care. Dr. Krolik contends that Smith failed to present expert testimony supporting an allegation that the lack of charting caused or contributed to her injuries. Dr. Krolik maintains that Dr. Scannicchio's testimony did not address the connection of how the failure to chart resulted in an injury to Smith. By Smith presenting overgeneralized testimony concerning Dr. Krolik's failure to chart, he claims that the recordkeeping issue was confusing and mislead the jury. Dr. Krolik also contends that Smith failed to establish that the failure to document was casually connected to her injuries because she did not present testimony that Dr. Krolik or another dentist relied on Dr. Krolik's medical records to treat Smith. Dr. Krolik contends that the circuit court erred in admitting Dr. Scannicchio's testimony addressing the standard of care relating to charting.

¶ 48 The circuit court did not abuse its discretion in denying Dr. Krolik's motion *in limine*

seeking to exclude Dr. Scannicchio's testimony addressing the standard of care associated with recordkeeping. Dr. Scannicchio testified that he was familiar with the standard of care regarding documentation of clinical findings in a patient's dental record. Dr. Scannicchio stated that it is within the standard of care for a dentist to document the findings of a clinical examination, and to document abnormal physical findings. Smith's dental record did not include charting of any clinical physical findings. According to Dr. Scannicchio, also absent from Smith's dental record were the following: (1) testing for the mobility of Smith's teeth; (2) probing pocket depths; (3) periodontal disease diagnosis; (4) periodontal disease treatment; or (5) referral to a specialist for the diagnosis, management and treatment of periodontal disease. Dr. Scannicchio opined that Dr. Krolik's records did not meet the standard of care. Dr. Scannicchio also stated that "[t]here wasn't even any reason for some of the procedures that he did. Consequently, it's impossible for anybody to have that kind of memory or the subsequent treaters to look at this record and be able to determine what was done." Dr. Scannicchio explained that "it's a deviation of the standard of care for any health care provider to not properly document a person's treatment and care. And in this case, there was a deviation in my opinion because of the lack of documentation, and it shows that the work wasn't done. That's my opinion on that as far as the recordkeeping is concerned." Dr. Scannicchio's testimony regarding charting was not overgeneralized. In fact, Dr. Scannicchio specified that some of the information that was missing from Smith's medical records included: (1) a comprehensive treatment plan; (2) Smith's periodontal condition; (3) charting; and (4) indication that any probing was performed.

¶ 49 Dr. Scannicchio also testified regarding the importance of recordkeeping by stating that "recordkeeping is an intricate part of a patient's care, and it's part of the medical record. It's a personal chronology of what treatment you've had." Smith presented evidence concerning not

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only the importance of charting so that the treatments that she received would be reflected in her medical record, but also presented Dr. Scannicchio's testimony that subsequent dentists relied on the information in her medical record to create a comprehensive treatment plan for Smith. Dr. Scannicchio stated that the systematic documentation of procedures and findings are vital because that is how dental professionals treat patients. Dr. Scannicchio's rationale was rooted in the question, how is a dental professional to "know what was going on in 2004 when it's 2009 if I don't have a chance to go back and see the record? How do I refer to another health care provider or another doctor or health care practitioner to say this was done in 2005, here's where we are now? It is the unfolding of a patient's history. It's the complete - the importance of the medical record is paramount. It's extremely important." Thus, Dr. Scannicchio's testimony demonstrates the importance of adequate recordkeeping and the significance of the information contained in the medical records may have on the patient's care in the future. Accordingly, the circuit court did not err in denying Dr. Krolik's motion *in limine* seeking to preclude Dr. Scannicchio's testimony addressing recordkeeping.

D. Directed Verdict

¶ 50 Dr. Krolik's fourth issue on appeal is that the circuit court erred in denying his motion for a directed verdict because Smith failed to establish a cause of action for medical malpractice. Dr. Krolik also claims that the circuit court erred in denying his other motion for a directed verdict based on the recordkeeping allegations. In a medical malpractice cause of action, the plaintiff must establish: (1) the relevant standard of care; (2) the defendant's deviation from the standard of care; and (3) that the deviation was a proximate cause of plaintiff's injury. *Saxton v. Toole*, 240 Ill. App. 3d 204, 210 (1992). Dr. Krolik contends that Smith failed to meet her burden of proof regarding the three elements necessary to establish a medical malpractice cause of action. Dr.

Krolik again claims that Dr. Scannicchio's testimony regarding the standard of care was erroneously admitted into evidence since he was a prosthodontist who did not practice in general dentistry. Absent Dr. Scannicchio's testimony, Dr. Krolik contends that Smith failed to establish that he breached the standard of care. Dr. Krolik also contends that Smith failed to present evidence that Dr. Krolik's negligence proximately caused an injury to Smith that she would not have otherwise sustained. Since Smith failed to meet her burden of establishing the necessary elements of a medical malpractice cause of action, Dr. Krolik contends that the circuit court erred in denying his motion for a directed verdict.

¶ 51 Since a directed verdict completely removes an issue from the jury's province, it is proper where "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Robbins v. Professional Construction Co.*, 72 Ill. 2d 215, 224 (1978). A court considers the evidence and related inferences in the light most favorable to the opponent and it "does not weigh the evidence, nor is it concerned with the credibility of the witnesses." *Serrano v. Rotman*, 406 Ill. App. 3d 900, 908 (2011). A circuit court errs in granting a directed verdict where the evidence and related inferences demonstrate the existence of a substantial factual dispute, or where the assessment of witnesses' credibility or the determination regarding conflicting evidence is determinative of the case's outcome. *Id.* A *de novo* standard of review is applied when reviewing a circuit court's ruling on a motion for directed verdict. *Lawlor v. North American Corp. of Illinois*, 409 Ill. App. 3d 149, 161 (2011).

¶ 52 Viewing the evidence in an aspect most favorable to Smith, as we must, the evidence did not so overwhelmingly favor Dr. Krolik that no contrary verdict based on that evidence could ever stand. As previously discussed, the circuit court did not err in allowing Dr. Scannicchio's

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testimony establishing the standard of care of a general dentist. Also, Dr. Scannicchio opined that Dr. Krolik's treatment of Smith deviated from the standard of care. Dr. Scannicchio further opined that the treatment Smith received by Drs. Ronkin, Malenius, Levine, Caruso and Sisto after Dr. Krolik's death was reasonable and necessary based on Dr. Krolik's negligence. Dr. Scannicchio continued by stating that Dr. Krolik's negligence caused Smith to incur significant costs for dental remediation and treatment, and lost time while she received the necessary dental treatments. Thus, Smith met her burden of presenting evidence regarding the three elements necessary to establish her medical malpractice claim. Accordingly, viewing this evidence in a light most favorable to Smith, the circuit court did not err in denying Dr. Krolik's motion for a directed verdict based on the medical negligence claim.

¶ 53 Similarly, the circuit court did not err in denying Dr. Krolik's motion for directed verdict regarding the recordkeeping issue. Smith presented Dr. Scannicchio testimony establishing that the standard of care required charting of clinical findings, a treatment plan and a diagnosis. Dr. Scannicchio also testified that significant treatment information was lacking in Smith's medical record because Dr. Krolik failed to chart required information. Dr. Scannicchio further testified that subsequent treaters could not rely on Smith's medical records to determine what procedures Dr. Krolik performed or to determine the progression of Smith's periodontal disease during the course of Dr. Krolik's treatment. Dr. Scannicchio also opined that procedures not documented in a patient's record signifies that the procedure may not have been performed. Again, viewing this evidence in a light most favorable to Smith, the circuit court did not err in denying Dr. Krolik's motion for a directed verdict addressing the failure of Dr. Krolik to maintain adequate records.

E. Affirmative Defense

¶ 54 Dr. Krolik's fifth issue on appeal is that the circuit court erred in granting Smith's motion

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for a directed verdict regarding his statute of limitations affirmative defense. Dr. Krolik contends that Smith knew or should have known of a potential malpractice cause of action before December 30, 2000 because of her declining oral health even though Dr. Krolik treated her from May 27, 1994 through June 27, 2004. Dr. Krolik contends that the determination of when Smith should have known of a potential medical malpractice cause of action and whether the care that she received from Dr. Krolik was continuous care were questions of fact for the jury. As such, Dr. Krolik claims that the circuit court erred in granting the directed verdict in Smith's favor on the statute of limitations issue.

¶ 55 The circuit court did not err in granting Smith's motion for directed verdict regarding Dr. Krolik's affirmative defense. Dr. Krolik raised an affirmative defense that Smith failed to bring the claims against him in the complaint within the time limited by law. Dr. Krolik's last treatment of Smith occurred on June 27, 2004. Smith filed her complaint on December 30, 2004, and pleaded a continuous course of negligent conduct from May 24, 1994 to July 27, 2004. In the complaint, Smith alleged that Dr. Krolik provided ongoing dental treatment and care to her. Smith also alleged in her complaint that Dr. Krolik engaged in a continuous course of negligent treatment because he restored Smith's teeth with grossly ill-fitting restorations and improper implants, continuously failed to timely diagnose, treat or refer her for appropriate diagnoses and treatment of massive decay, chronic root pathology, improper implants, periodontal and ill-fitting restorations.

¶ 56 Under the continuous course of negligent treatment doctrine, a plaintiff must establish that "(1) there was a continuous and unbroken cause of *negligent* treatment, and (2) that the treatment was so related as to constitute one continuing wrong." *Cunningham v. Huffman*, 154 Ill. 2d 398, 406 (1993). This doctrine addresses situations where "the cumulative results of continued

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negligence is the cause of the injury.” *Mauer v. Rubin*, 401 Ill. App. 3d 630, 639 (2010) (citing *Cunningham*, 154 Ill. 2d at 406). The law in Illinois establishes that "defendants have the burden of proof for a statute of repose, because it is an affirmative defense, while plaintiffs have the burden of proving the existence of facts that would toll the repose period or constitute an exception to the general repose rule." *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 635-36 (2006). Once a defendant establishes that the statute of repose applies, the plaintiff then bears the burden "to show facts that operate to toll or create an exception to the repose period." *South Side Trust & Savings Bank of Peoria v. Mitsubishi Heavy Industries, Ltd.*, 401 Ill. App. 3d 424, 438-39 (2010).

¶ 57 Here, Smith testified that Dr. Krolik provided continuous treatment from 1994 to 2000. During that time period, Smith did not consult with another dentist or specialist and was under Dr. Krolik's exclusive care. Smith first learned of Dr. Krolik's negligent continuous care after consulting with other dentists and specialists after Dr. Krolik's death, which required her to consult with another dentist.

¶ 58 Dr. Krolik contends on appeal that the issue of when Smith should have known of the alleged negligent treatment was a question of fact for the jury to decide and the circuit court erred in granting Smith's motion for a directed verdict on this issue. While it is true that the timeliness of a plaintiff's complaint and when the statute of limitations begins to run are questions of fact, such questions transform into questions of law "if the crucial facts are undisputed and only one conclusion can be drawn from the undisputed facts." *Jones v. Dettro*, 308 Ill. App. 3d 494, 498 (1999). During trial, Smith's and Dr. Krolik's attorneys agreed that the issue underlying the affirmative defense that Smith's claim was time barred should be ruled on as a matter of law. In response, the circuit court stated that it would rule on the affirmative defense after all of the

evidence was received. Thus, Dr. Krolik's position at trial was that the circuit court should rule on the affirmative defense issue as a matter of law, which is contrary to his position now that the issue should have been decided by the jury. Despite this contradiction in Dr. Krolik's position, we will address the merits of Smith's continuous care allegation.

¶ 59 Regarding Smith's contention that Dr. Krolik provided continuous negligent care, Dr. Scannicchio testified on her behalf that there was a continuous deviation from the standard of care from 1994 through July 2004. Dr. Scannicchio also stated that the constant or continuous lack of treatment was a direct causation for Smith's restorations to fail from the loss of tooth bone. Dr. Scannicchio further testified that the combination of ongoing problems contributed to the loss of Smith's mandibular teeth and the compromised state of her upper jaw. Dr. Krolik, however, contends that any crown work performed prior to August 2000, was time barred. Dr. Krolik's expert, Dr. Toljanic, testified that Dr. Krolik's treatment of Smith was ongoing, thereby lending support to Smith's position that Dr. Krolik provided continuous care. Also, Dr. Toljanic acknowledged that Smith's dental problems progressed from May 1994 to November 2004. Thus, Smith met her burden and established that Dr. Krolik provided continuous treatment found to be negligent, and the treatment constituted a continuous wrong. Based on the testimony presented and construing the evidence and inferences therefrom in a light most favorable to Dr. Krolik, we conclude that the evidence so overwhelmingly favors Smith that Dr. Krolik provided continuous care, that no contrary verdict based on the evidence could stand. As such, the circuit court did not err in granting her motion for a directed verdict regarding Dr. Krolik's affirmative defense.

F. Jury Instructions

¶ 60 Next, Dr. Krolik contends that the circuit court abused its discretion regarding the jury instructions tendered to the jury. Jury instruction are “to provide the jury with the correct legal

principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence.” *Clarke*, 391 Ill. App. 3d at 625. A circuit court “has the discretion to determine if a particular jury instruction is applicable, supported by evidence in the record, and an accurate statement of the law.” *Matarese v. Buka*, 386 Ill. App. 3d 176, 178 (2008). A circuit court does not abuse its discretion regarding the tendering of jury instructions if the instructions in their entirety “fairly, fully, and comprehensively apprised the jury of the relevant legal principles.” *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002). A circuit court is deemed to have abused its discretion regarding jury instructions if the instructions mislead the jury and result in prejudice to the litigant. *Id.*

¶ 61 Dr. Krolik claims that the circuit court erred in providing to the jury the following jury instructions: (1) issues instruction (Illinois Pattern Jury Instructions, Civil, No. 20.01); (2) verdict form A (Illinois Pattern Jury Instructions, Civil, IPI Civil No. B45.01.A); and (3) long form of circumstantial evidence (Illinois Pattern Jury Instructions, Civil, No. 3.04).

¶ 62 The circuit court tendered the following issues instruction:

"The plaintiff claims that she was injured and sustained damage, and that the defendant was negligent in one or more of the following respects:

- (A) placed ill-fitting restorations, including crowns, bridges and fillings;
- (B) failed to timely treat, or refer for timely treatment, to diffuse periodontal pathology throughout Plaintiff's mouth;
- (C) improperly placed implants;
- (D) failed to remove and replace implants;
- (E) failed to refer plaintiff to dental health care providers capable of providing proper treatment.

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The plaintiff further claims that one or more of the foregoing was a proximate cause of her injuries.

The defendant denies all of the things claimed by the plaintiff, denies that he was negligent in doing any of the things claimed by the plaintiff and denies that any claimed act or omission on the part of the defendant was a proximate cause of the plaintiff's claimed injuries.

The defendant further denies that the plaintiff was injured or sustained damages to the extent claimed."

Dr. Krolik objected to this instruction claiming that the instruction raised duplicate issues and the evidence did not support a "failure to refer" instruction. Dr. Krolik contends that subsections (a) and (c) are duplicate and should have been combined into one line item. Dr. Krolik also claims that subsections (b), (d) and (e) should have been condensed and were not supported by the evidence. Due to the duplicate nature of the instruction, Dr. Krolik contends that this instruction was prejudicial and allowed for a double recovery for the same negligent act. Dr. Krolik further claims that Smith did not prove Dr. Krolik's failure to refer allegations set forth in subsections (b) and (e).

¶ 63 The circuit court did not abuse its discretion in tendering the issues instruction because there were no duplicate line items and the evidence supported the negligent acts itemized in the jury instruction. The evidence establishes that ill fitting restorations that includes crowns, bridges and fillings differ from the placement of tooth implants. Expert testimony supports the circuit court's discretion in itemizing negligent restorative work on a tooth from the negligent placement of an implant. It was within the circuit court's discretion not to condense line items (b), (d) and (e) as the treatment identified in each line item was distinct from one another and constituted

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different treatments. Moreover, Smith presented Dr. Scannicchio's testimony that established Dr. Krolik's failure to refer her to a periodontist or other specialist to consult with her regarding her periodontal issues and health of her mouth, which was a breach of the relevant standard of care. Dr. Krolik examined Smith exclusively from 1994 to 2004, and Dr. Scannicchio testified that Smith's medical record does not indicate that Dr. Krolik referred Smith to a specialist. Expert testimony also established that Dr. Krolik provided negligent dental care by failing to treat Smith's implants. Thus, the circuit court did not abuse its discretion in tendering this instruction to the jury as it is supported by the evidence presented at trial.

¶ 64 Dr. Krolik also contends that the circuit court erred in tendering to the jury verdict form A because the form contained four line items that were not supported by the evidence. Dr. Krolik contends that Smith did not present expert testimony regarding the following line items that were included on verdict form A:

"(1) pain and suffering (past or future);

(2) loss of a normal life (past or future);

(3) the reasonable expense of necessary medical/dental care, treatment and services received by Deborah Smith; or

(4) present cash value of time lost."

Dr. Krolik contends that the above line items were improper because the evidence failed to support the items, and inclusion of those line items resulted in prejudice to him.

¶ 65 Generally, "a party is entitled to a jury instruction on a certain theory of recovery if there is

'some evidence' in the record to support it." *Stift v. Lizzadro*, 362 Ill. App. 3d 1019, 1026 (2005).

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Future pain and suffering requires a showing that such pain and suffering are reasonably certain to occur in the future. *Id.* "Evidence required to support a jury instruction on future pain and suffering can be established by either expert or lay testimony." *Id.*

¶ 66 The evidence in the record supports the circuit court's tendering of verdict form A to the jury. Smith presented her own testimony and expert testimony regarding her pain and suffering related to the subsequent dental treatments necessitated by Dr. Krolik's negligent treatment, and in particular, to the extraction of her teeth. Smith also presented testimony regarding the loss of a normal life relating to Dr. Krolik's negligent treatment consisting of drooling, a speech impediment and the time required to heal from the rendered dental treatments. Additionally, Smith presented paid bills for subsequent dental expenses that she paid following Dr. Krolik's death, and Dr. Scannicchio testified that the fees charged by the subsequent treating dentists were reasonable and customary of the fees normally charged. Finally, Smith presented testimony addressing lost time through her own testimony and Dr. Scannicchio's testimony for time spent receiving subsequent dental treatment. Thus, the trial court did not abuse its discretion in tendering an itemized verdict form A to the jury because the evidence supported the itemized lines.

¶ 67 Dr. Krolik third claim of error regarding jury instructions was that the circumstantial instruction tendered to the jury was confusing. The circumstantial evidence instruction states the following:

"A fact or a group of facts, may, based on logic and common sense, lead you to a conclusion as to other facts. This is known as circumstantial evidence. A fact may be proved by circumstantial evidence. For example, if you are in a building and a person enters who is wet and is holding an umbrella, you might conclude that it was raining

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outside. Circumstantial evidence is entitled to the same consideration as any other type of evidence."

Dr. Krolik contends that including the sentence in the instruction above beginning with the words "For example" was optional language and the circuit court erred in including that sentence in the instruction over his objection. Dr. Krolik contends that this instruction was confusing and was prejudicial.

¶ 68 The circumstantial evidence instruction places brackets around the sentence beginning with the words "For example" signifying that inclusion of the sentence is discretionary with the circuit court. The circuit court exercised its discretion and included the example of circumstantial evidence set forth in the pattern jury instruction when it tendered the instruction to the jury.

During the jury instruction conference, the circuit court stated that use of the long instruction was discretionary and he chose to exercise that discretion. Including the example of circumstantial evidence set forth in the pattern jury instruction was not confusing or prejudicial, but further explained the concept of circumstantial evidence to the jury. Including the objected to language that was set forth in the pattern jury instruction fully and comprehensively informed the jury of the relevant legal principles regarding circumstantial evidence. The jury was not misled by the instruction and no prejudice resulted to Dr. Krolik through use of the long form of the circumstantial evidence jury instruction. Thus, the circuit court did not abuse its discretion in tendering this instruction to the jury.

G. Cumulative Errors

¶ 69 Dr. Krolik next contends that the commutative effect of the alleged errors was prejudicial. Dr. Krolik contends that in the aggregate, the errors deprived him of a fair trial. Thus, Dr. Krolik contends that a new trial is warranted.

¶ 70 A new trial is not warranted “where a movant fails to identify any evidentiary rulings which were either an abuse of discretion or error of law.” *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 47 (2010). A party is not entitled to an error-free trial, but reviewing courts are to ensure that parties “receive a fair trial, one free of substantial prejudice.” *Id.* A new trial should be granted “when the cumulative effect of trial errors so deprives a party of a fair trial that the verdict might have been affected.” *Id.*

¶ 71 Here, the record does not support the granting of a new trial because Dr. Krolik received a fair trial. The circuit court's rulings allowed Dr. Krolik to present a defense and to cross-examine Smith and her witnesses. Dr. Krolik failed to demonstrate that any error individually or in the aggregate prejudiced his case to support the granting of a new trial. None of the alleged individual errors claimed by Dr. Krolik amounted to reversible error and this is true even if the claimed individual errors are aggregated. Accordingly, a new trial is not warranted.

H. Jury's Verdict

¶ 72 Next, Dr. Krolik contends that the jury's verdict in Smith's favor was against the manifest weight of the evidence. Dr. Krolik claims that the jury disregarded evidence demonstrating that Smith had pre-existing dental issues when she became Dr. Krolik's dental patient, and that those dental issues would have existed even apart from the alleged negligence. Dr. Krolik also claims that Smith failed to meet her burden of establishing a duty, breach of that duty or damages that she sustained that she would not have otherwise sustained. Based on these errors, Dr. Krolik claims that he was entitled to a new trial because the jury's verdict was against the manifest weight of the evidence.

¶ 73 A new trial should be granted on when a jury verdict is against the manifest weight of the

evidence. *York, M.D. v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006). A jury's verdict is "contrary to the manifest weight of the evidence when the opposite conclusion is clearly evident or when the jury's findings prove to be unreasonable, arbitrary and not based upon any of the evidence." *Id.* at 179.

¶ 74 In the instant case, Smith presented sufficient evidence at trial to support the jury's verdict in her favor regarding her dental malpractice claim against Dr. Krolik. Smith met her burden of establishing the relevant standard of care, that Dr. Krolik breach the standard of care regarding his treatment of her and that his negligent dental treatment proximately caused her to suffer damages. Smith's experts provided extensive testimony regarding the negligent treatment that Dr. Krolik provided to Smith and the dental care that was necessary to restore Smith's mouth to a healthier state resulting from Dr. Krolik's negligent treatment. Smith's experts were cross-examined by Dr. Krolik. Dr. Scannicchio acknowledged that Smith had pre-existing dental issues when she first became a patient of Dr. Krolik, but he also testified that Dr. Krolik's negligent care of Smith caused a greater deterioration of Smith's dental health. The evidence in this case supports the jury's verdict, which was not unreasonable or arbitrary, and an opposite conclusion based upon the evidence presented is not clearly evident. Thus, the jury's verdict was not against the manifest weight of the evidence.

I. Remittitur

¶ 75 Lastly, Dr. Krolik contends that this court should enter a remittitur order because the jury's damages award incorporates unproven damages. Dr. Krolik contends that remittitur is required because the jury's award bears no reasonable relationship to the loss that Smith suffered and exceeds any reasonable or proven damages. Dr. Krolik claims that the jury's award was inflated because an unqualified expert provided standard of care testimony, the jury heard expert opinions

addressing irrelevant recordkeeping standards and evidence relating to Smith's lost wages and unpaid dental expenses were erroneously admitted into evidence.

¶ 76 A remittitur is proper "to correct an excessive jury verdict in limited and appropriate circumstances." *Estate of Oglesby*, 408 Ill. App. 3d 655, 661 (2011). "The trier of fact determines the amount of damages and, as a reviewing court, we give great deference to a jury's award of damages." *Id.* A verdict is set aside only when it is " 'so excessive that it indicates that the jury was moved by passion or prejudice or unless it exceeds the necessarily flexible limits of fair and reasonable compensation or is so large that it shocks the judicial conscience. ' " *Id.* (quoting *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 47 (2009)). If a jury's verdict "falls within the flexible range of conclusions reasonably supported by the evidence, a remittitur should not be granted." *Id.*

¶ 77 During the trial, Smith testified that she consulted with dentists and specialists because Smith was complaining of severe pain in her lower jaw. During the dental treatment provided to her following Dr. Krolik's care, Smith had procedures performed that required her to be anesthetized, all of her crowns required removal, all of her bottom teeth were extracted and she was required to wear a prosthetic. The procedures performed also required Smith to stay home to heal and recover. Based on evidence presented concerning pain and suffering, as well as the loss of a normal life experienced, the jury's award of \$25,000 for pain and suffering, \$125,000 for the loss of a normal life experienced, and \$5,000 for the future loss of a normal life was not excessive and was not so large that it shocks the judicial conscience. Smith also testified that she lost approximately 380 hours of time and her hourly work rate was \$30. Thus, the total value of lost time that Smith was alleging was \$11,400, computed as \$30 multiplied by 380 hours. The jury's award of \$7,500 was within the necessarily flexible limits of fair and reasonable compensation.

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Similarly, Smith testified and presented invoices for subsequent dental care totaling approximately \$42,689 consisting of payments to Dr. Caruso of \$38,485, to Dr. Ronkin of \$150, to Dr. Levine of \$700, to Dr. Malenious of \$2,004 and two CT scans at \$675 each. Dr. Scannicchio testified that the dental treatments that Smith received following Dr. Krolik's death were necessary due to his negligence and the charges for the dental work by the subsequent dentists were reasonable and customary. Thus, the jury's award of \$43,804 for the reasonable expense of necessary dental care, treatment and services rendered to Smith was also necessarily within the flexible limits of fair and reasonable compensation. The jury's award as a whole and the individual components comprising the total award was not so excessive indicating that the jury was moved by passion or prejudice. Accordingly, no basis exists to enter a remittitur order.

Conclusion

¶ 78 Based on a review of the record, the circuit court did not abuse its discretion regarding its evidentiary rulings. Also, the circuit court did not err in denying Dr. Krolik's motions for a directed verdict and granting Smith's motion for a directed verdict. Further, the circuit court did not abuse its discretion regarding the jury instructions tendered to the jury. The record supports the jury's verdict in Smith's favor, as well as the jury's award of damages.

¶ 79 Accordingly, we affirm the judgment of the circuit court.

¶ 80 Affirmed.