2019 IL App (1st) 181193-U
No. 1-18-1193
Order filed October 7, 2019

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DAVID ECCLESTON, Administrator of the Estate of CYNTHIA GAYLE-THOMAS, Plaintiff-Appellant, v. EVANSTON HOSPITAL a/k/a NORTHSHORE UNIVERSITY HEALTH SYSTEM, a corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 14 L 3434 Honorable Ann Collins-Dole, Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Griffin and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment affirmed; trial court's evidentiary rulings were not an abuse of discretion and a new trial was not warranted as jury's verdict was not against the manifest weight of the evidence.

¶ 2 Cynthia Gayle-Thomas died from a pulmonary embolism 11 days after undergoing spinal surgery. As administrator of her estate, her son, David Eccleston, brought a wrongful death complaint alleging that after Thomas underwent surgery, Evanston Hospital was negligent in failing to prescribe a "systemic" dose of the anticoagulant medication Heparin rather than a

lower "prophylactic" dose. Eccleston contended that systemic Heparin could have prevented a blood clot in her leg from traveling to her lungs and causing the pulmonary embolism.

¶ 3 At trial, the hospital presented three expert witnesses who testified that Thomas's treating physicians met the standard of care in withholding systemic Heparin for 14 days after surgery given the risk of an epidural hematoma. The treating physicians also testified that their treatment met the standard of care. Eccleston presented one expert witness on the physicians' breach of the standard of care. The trial court precluded another expert from testifying about the standard of care because he lacked experience prescribing post-surgical anticoagulant medication and had not performed surgery in years. During the jury instruction conference, the trial court denied Eccleston's proffered issues instruction to ask the jury whether the hospital was negligent on four separate dates for failing to prescribe systemic Heparin. Instead, the trial court asked the jury to decide if the hospital was negligent in failing to prescribe systemic Heparin from the day after surgery until the day Thomas died.

¶ 4 The jury returned a verdict for the hospital. Eccleston argues the trial court abused its discretion in: (i) refusing his issue instructions; (ii) refusing to admit autopsy photographs into evidence; (iii) misapplying Illinois Supreme Court Rule 213; (iv) improperly allowing the hospital's expert witnesses to discuss undisclosed literature; (v) barring one of his expert witnesses from testifying as to the neurological standard of care; (vi) allowing the hospital to present cumulative opinion testimony regarding the standard of care; and (vii) refusing to consider several of his post-trial allegations of error.

¶ 5 We affirm. The trial court's evidentiary rulings were not an abuse of discretion. Further, because the jury's verdict was not against the manifest weight of the evidence, Eccleston was not entitled to a new trial.

¶ 6 Background

¶ 7 Cynthia Gayle-Thomas underwent spinal fusion surgery at Evanston Hospital on December 22, 2010. Dr. Ivan Ciric and Dr. Hamad Farhat performed the surgery, and Dr. Farhat managed Thomas's postoperative care. Thomas was at risk for developing blood clots (or deep vein thrombosis (DVT)), a recognized complication following surgery, so after surgery Dr. Farhat ordered that a sequential compressive device (SCD) be placed on her legs, along with compression stockings, and that she remain mobile.

¶ 8 Despite these measures, an ultrasound the day after surgery showed Thomas had developed a blood clot below her right knee. After consulting with a vascular surgeon, Dr. Farhat decided to place an inferior vena cava (IVC) filter to prevent the blood clot from traveling to Thomas's lungs, where it could cause a pulmonary embolism and possibly death. A vascular surgeon placed the IVC filter on December 24, 2010.

¶ 9 Dr. Farhat also prescribed a "prophylactic" dose of the anticoagulant medication Heparin. Dr. Farhat did not order a higher therapeutic dose of "systemic" Heparin, because of the increased risk of an epidural hematoma (bleeding in the spine), a known complication from spinal surgery that can cause paralysis. (Prophylactic Heparin is administered through an injection at a lower dose than systemic Heparin, which is administered intravenously.) Dr. Farhat planned to withhold systemic Heparin until 14 days after surgery to decrease the risk of an epidural hematoma.

¶ 10 On December 27, Thomas was transferred to the hospital's rehabilitation unit, where Dr. Miledones Eliades took over her care. Thomas had ultrasounds on her legs on December 27 and 29. The December 29 ultrasound showed that Thomas had developed additional DVTs in her right leg, some of which had migrated, and that she had a new DVT in her left leg. After consulting with Thomas's care team, Dr. Eliades decided to continue with the existing prophylactic measures and to hold off on a systemic dose of Heparin until 14 days after surgery, which would have been January 5.

¶ 11 On January 2, 2011, 11 days after surgery, Thomas suffered a pulmonary embolism and died. Eccleston, as administrator for Thomas's estate, filed a wrongful death complaint, which he later amended, against the hospital and Drs. Ciric, Farhat, and Nauth. (Shortly before trial, Eccleston dismissed the doctors as defendants and proceeded against the hospital alone.) Eccleston's primary contention was that the hospital was negligent in failing to prescribe systemic Heparin to prevent the pulmonary embolism, which caused Thomas's death.

¶ 12 Motions *in Limine*

¶ 13 Before trial, the parties filed four motions *in limine* that are relevant to the issues Eccleston raises on appeal. The hospital sought to exclude photographs of the blood clots taken during Thomas's autopsy and a diagram showing where the blood clots were found during the December 29 ultrasound. Eccleston argued that because the photos and diagram were part of Thomas's medical records, they should be admitted as the hospital's business records. The hospital asserted that although Thomas's medical record included the autopsy report, the autopsy photos were not a part of the medical record. Eccleston obtained the photos by subpoena from the doctor who performed the autopsy; he was not a hospital employee. The hospital argued that

for the photos to be admitted into evidence Eccleston had to present a witness who could testify as to their authenticity or accuracy, and because he failed to disclose that witness, the photos should be excluded. The trial court granted the motion *in limine* and excluded the photos and diagram unless Eccleston presented a witness to authenticate them.

¶ 14 The hospital also moved *in limine* to bar Eccleston's expert witnesses from "reading, paraphrasing, or summarizing texts on direct examination" and from using post-occurrence literature at trial. On agreement, the trial court made those motions *in limine* reciprocal.

¶ 15 Eccleston moved *in limine* to prevent the hospital from presenting cumulative expert testimony regarding its compliance with the standard of care. Specifically, Eccleston sought to prevent Thomas's treating physicians from testifying that they complied with the standard of care. Eccleston argued the testimony would be cumulative because the hospital was presenting three standard of care expert witnesses. The trial court denied the motion.

¶ 16 Before trial, Eccleston disclosed that he intended to present Dr. Gary Skaletsky as an expert witness. The hospital moved *in limine* to bar Dr. Skaletsky from testifying because he had no experience with Heparin or with formulating a plan for postsurgical anticoagulation and had not practiced as a surgeon since 2001, nine years before Thomas's surgery. The trial court ruled that Dr. Skaletsky could not testify as to whether defendants were negligent having no experience with Heparin, but could testify that in prescribing an anticoagulant, a neurosurgeon should consult with an internist or other expert. Eccleston did not call Dr. Skaletsky.

¶ 17 The Trial

¶ 18 At trial, Drs. Ciric and Farhat testified about the surgical procedure they performed on Thomas. (Dr. Ciric did not appear in court, but his evidence deposition was read to the jury.) Dr.

Ciric first performed a laminectomy or decompression surgery after which Dr. Farhat performed fusion surgery on vertebrae in Thomas's lower back. The procedures took about 10 hours. Dr. Farhat testified that after an ultrasound the day after surgery revealed a blood clot in Thomas's right leg, he ordered that an IVC filter be placed to try to prevent the clot from moving to the lungs. He also ordered that Thomas be given prophylactic Heparin. Dr. Farhat planned to wait 14 days to give her systemic Heparin to avoid the risk of developing an epidural hematoma. Over objection, both Dr. Ciric and Dr. Farhat testified that not administering systemic Heparin less than 14 days after surgery complied with the standard of care. Five days after surgery, Dr. Farhat transferred Thomas to the hospital's rehabilitation unit.

¶ 19 Dr. Eliades testified he was Thomas's attending physician in the rehabilitation unit. On December 29, Thomas complained of pain in her left leg, and Dr. Eliades ordered an ultrasound, which revealed she had new DVTs in her left leg and that the DVTs in her right leg had moved. Dr. Eliades consulted with Dr. Farhat and they agreed to continue with the prophylactic Heparin and to withhold systemic Heparin until 14 days after surgery. Dr. Eliades testified that from December 29 until her death, Thomas did not display symptoms of a pulmonary embolism, such as shortness of breath or chest pains, and nothing indicated the IVC filter was failing. Over objection, Dr. Eliades testified that in his opinion, he complied with the standard of care in treating Thomas and did not ignore the risks of her developing a fatal pulmonary embolism or an epidural hematoma.

¶ 20 Dr. Justin Nauth, a hospital internist, testified that he reviewed Thomas's December 29 ultrasound results and was aware that she had new DVTs and that some of the DVTs had moved. Dr. Nauth examined Thomas several times from December 29 through January 1, and said that

she had no symptoms of a pulmonary embolism. Thomas reported that her rehab was going well and that she had improved strength. Dr. Nauth said he conferred with Dr. Eliades and Dr. Farhat regarding Thomas's care, and agreed with the plan to withhold therapeutic Heparin until 14 days after surgery. Over objection, Dr. Nauth testified that he complied with the standard of care in his treatment of Thomas and that the standard of care did not require him to change the anticoagulation plan put into place by the neurosurgeons.

¶ 21 Eccleston presented one standard of care witness, Dr. Richard Sweet, an internist who specializes in nephrology (treatment of the kidneys). Dr. Sweet testified that the standard of care requires a patient who has developed DVTs be given systemic Heparin. He acknowledged a higher dose of Heparin would not have dissolved Thomas's existing clots, but it would have stopped new clots from forming and prevented the pulmonary embolism. He opined that by the fourth or fifth day after surgery Thomas had a low risk of developing an epidural hematoma and a high risk of a pulmonary embolism, and the hospital should have given her systemic Heparin by then. He said Drs. Farhat, Eliades, and Nauth violated the standard of care by failing to give Thomas systemic Heparin on December 26 or 27, which constituted the proximate cause of Thomas's death. Further, that Thomas complained of chest pains when Dr. Nauth examined her on December 31, shows Dr. Nauth violated the standard of care by failing to order a perfusion scan of Thomas's lungs.

¶ 22 On cross-examination, Dr. Sweet acknowledged that while in the rehabilitation unit, Thomas had no symptoms consistent with pulmonary embolism. He also acknowledged that Dr. Nauth's notes from December 29 through January 1, do not mention that Thomas complained of chest pain and indicate her rehabilitation was progressing well. Dr. Sweet acknowledged that

Thomas complained of chest soreness after surgery, during which she was laying on her chest for more than 10 hours, and conceded that she had not complained of continuing chest pain.

¶ 23 The hospital presented three expert witnesses.

¶ 24 Dr. Martin Herman, a board certified neurosurgeon, testified that Thomas had risk factors for epidural hematoma and giving her systemic Heparin would have increased her risk by 30%. Thomas also was at risk of developing a pulmonary embolism after surgery but did not exhibit symptoms of pulmonary embolism before January 2, 2011. And, Drs. Farhat and Ciric complied with the standard of care by treating Thomas with an IVC filter and prophylactic Heparin and withholding systemic Heparin for 14 days after surgery.

¶ 25 Dr. Victor Tapson, an expert in anticoagulation, DVTs, and pulmonary embolisms, testified that the purpose of prophylactic Heparin is to prevent blood clots from forming in high risk patients like Thomas. She was at a high risk for both blood clots and an epidural hematoma due to her weight and the long back surgery she had undergone. Even if Thomas had been given systemic Heparin, she could have had a pulmonary embolism. According to Dr. Tapson, Drs. Farhat, Nauth, and Eliades complied with the standard of care by withholding systemic Heparin until 14 days after surgery even though Thomas developed several DVTs after surgery and some of the DVTs had moved. In addition, Drs. Eliades and Nauth complied with the standard of care by consulting with Dr. Farhat regarding the amount of time to withhold systemic Heparin.

¶ 26 Dr. David Kushner, a hospital internist, opined that Drs. Eliades and Nauth complied with the standard of care by deferring to Dr. Farhat in management of Thomas's anticoagulation treatment.

¶ 27 Issues Instruction

¶ 28 At the jury instructions conference, Eccleston proposed an issue instruction that divided the hospital's alleged negligence into four different time periods. The hospital objected, and the trial court declined the requested instruction in favor of the hospital's instruction, which stated: "The plaintiff claims that the decedent died, and that the defendant's agents were negligent in the following respects: Failed to prescribe systemic Heparin to Cynthia Gayle-Thomas from December 26, 2010 through January 1, 2011." Relying on *Signa v. Alluri*, 351 Ill. App. 11, 19-20 (1st Dist. 1953), the trial court found that an issues instruction should be in simple form without undue emphasis or repetition of plaintiff's allegations regarding defendant's negligence and that the offered instruction better met that standard.

¶ 29 After deliberating, the jury returned a verdict for the hospital. Eccleston filed a motion for a new trial under section 2-1202 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1202 (West 2016)). After a hearing, the trial court denied the motion. The court refused to address several of Eccleston's claimed evidentiary errors because Eccleston failed to "provide any case, rule or prior motion" to support his argument that the trial court erred. Eccleston asks that we reverse the trial court's judgment and the jury verdict, and remand for a new trial.

¶ 30 Analysis

¶ 31 Issue Instruction

¶ 32 Eccleston contends the trial court erred in denying his four-part issue instruction and instead giving the hospital's one sentence instruction. Eccleston argues his instruction was based on the evidence, namely the testimony of his expert witness, Dr. Sweet, that each doctor violated the standard of care by not starting systemic Heparin on different dates and under different circumstances and by not giving Thomas a perfusion scan, and that those violations were the

proximate cause of Thomas's death. He also contends the trial court overstated the significance of *Signa* and ignored cases distinguishing it, but that even under *Signa*, the instruction was in simple form and did not place undue emphasis on or repeat allegations.

¶ 33 Generally, litigants possess the right to have the jury instructed on each theory supported by the evidence. *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007). But, a trial court does not need to give an instruction "concerning issues not raised by the pleadings." *Blackburn v. Johnson*, 187 Ill. App. 3d 557, 564 (1989). The determination of which issues are raised by the evidence and pleadings and which jury instructions are warranted falls within the trial court's discretion. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 549 (2008); *LaSalle Bank v. C/HCA*, 384 Ill. App. 3d 806, 827 (2008). "An abuse of discretion standard requires this court to determine whether the instructions, taken as a whole, are sufficiently clear so as not to mislead the jury and whether they fairly and correctly state the law." *Smart v. City of Chicago*, 2013 IL App (1st) 120901, ¶ 45. A reviewing court "will not disturb the trial court's determination unless the trial court has abused its discretion, and a new trial will be granted only when the refusal to give a tendered instruction results in serious prejudice to a party's right to a fair trial." *Heastie*, 226 Ill. 2d at 543.

¶ 34 An issues instruction informs the jury of the points contested by the parties and simplifies the task of applying the law to the facts. See Illinois Pattern Jury Instructions, Civil No. 20.00, Introduction at 20-4 (2011). The issues instruction should inform the jury of the issues raised by the pleadings in a plain and precise manner by providing a summary of the pleadings, succinctly stated, without repetition or undue emphasis. *Signa*, 351 Ill. App. at 19-20.

¶ 35 Eccleston contends the trial court overstated the significance of *Signa* and ignored other cases permitting instructions similar to what he offered. In *Signa*, the court examined a lengthy

instruction—nearly 800 words and over three-pages—that purported to summarize the allegations of the complaint. The court noted the inappropriateness in Illinois of sending the complaint to the jury room or embodying the pleadings in an instruction, which effectively accomplishes the same thing. We agree with Eccleston that his proposed issue instruction was concise, unlike the lengthy instruction in *Signa*, but it repeats three times the allegation that the hospital was negligent for failing to prescribe systemic Heparin to Thomas.

¶ 36 Moreover, the cases on which Eccleston relies do not support his contention that the trial court abused its discretion in refusing to give his proposed instruction. In both *Melford v. Gaus*, 17 Ill. App. 2d 497 (1958) and *Smith v. Illinois*, 20 Ill. App. 2d 312 (1959), the court distinguished *Signa* based on the length of the instruction alone, not addressing whether the instruction was repetitive or unduly emphasized a particular allegation. Similarly, in *E.J. McKernan v. Gregory*, 252 Ill. App. 3d 514 (1993), the court found a lengthy instruction—13 pages—acceptable because the case was uniquely complex, included multiple claims and numerous defendants. Here, we have only one defendant and one claim. As noted, Eccleston's proposed instruction might be tidy but, as the trial court found, and we agree, it contains unnecessary repetition when the case boils down to a single question—whether Evanston Hospital was negligent in not giving Thomas systemic Heparin.

¶ 37 Eccleston also contends the trial court's instruction did not inform the jury that it could find the hospital was negligent in failing to order a perfusion scan on January 1, which Eccleston says differs from the allegation regarding systemic Heparin. We disagree. Dr. Sweet testified that the hospital was negligent in failing to give Thomas systemic Heparin several days before she died. Indeed, Dr. Sweet testified that "regardless of the results of the perfusion scan, systemic anticoagulation should have been ordered *** on December 24th or 25th." Thus, Dr. Sweet's

opinion attaches the proximate cause of Thomas's death to the failure to start systemic Heparin well before January 1, when he asserts the perfusion scan should have been done. Dr. Sweet also testified that Thomas's complaints of chest pain on December 31 should have prompted Dr. Nauth to order a perfusion scan. But, Dr. Sweet conceded that Thomas complained of chest discomfort after the surgery, but once admitted to the rehabilitation unit, she neither complained of chest pain, nor showed signs or symptoms of a pulmonary embolism. Again, it rests within the trial court's discretion to determine what issues are raised by evidence and whether an instruction should be given. See *LaSalle Bank v. C/HCA Development Corp*., 304 Ill. App. at 827. The trial court did not abuse its discretion in deciding to decline the instruction on the failure to order a perfusion scan.

¶ 38 Further, Eccleston cannot show he was prejudiced by the instruction given, as he was permitted and did argue throughout the trial that Evanston Hospital was negligent on each date specified in his proposed instruction.

¶ 39 Autopsy Photographs

¶ 40 Eccleston argues the trial court erred in excluding photographs purportedly showing Thomas's blood clots and a diagram purportedly showing the location of those blood clots. Eccleston contends the photographs and diagram were part of Thomas's medical record and should have been admitted as the hospital business records. According to the hospital, however, (i) a non-Evanston Hospital employee took the photos, (ii) Eccleston obtained the photos from that person by subpoena and outside of discovery, and (iii) Eccleston needed that person or another witness to testify that the photographs and diagram depicted what was seen on autopsy.

¶ 41 Before introducing a document into evidence, a party must lay the proper foundation. *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 348, (2010).

Authentication requires the proponent to demonstrate that the item is what the proponent claims it to be. *Id*. at 348-49; see also Ill. R. Evid. 901 (eff. Jan. 1, 2011). A party can authenticate a document by either direct or circumstantial evidence. *Piser*, 405 Ill. App. 3d at 349. "Routinely, the proponent establishes a document's identity 'through the testimony of a witness who has sufficient personal knowledge to satisfy the trial court that a particular item is, in fact, what its proponent claims it to be.' " *Id*. (quoting *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 415 (2005)). We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680 (2001). A trial court abuses its discretion only if it " 'act[s] arbitrarily without the employment of conscientious judgment, exceed[s] the bounds of reason and ignore[s] recognized principles of law [citation] or if no reasonable person would take the position adopted by the court.' " *Schmitz v. Binette*, 368 Ill. App. 3d 447, 452 (2006) (quoting *Popko v. Continental Casualty Co.*, 355 Ill. App. 3d 257, 266 (2005)).

¶ 42 Eccleston sought to admit into evidence as hospital business records photographs that purportedly depicted the blood clots removed from Thomas during autopsy. Medical records are admissible "as long as a sufficient foundation is laid to establish that they are business records." *Troyan v. Reyes*, 367 Ill. App. 3d 729, 733 (2006); see also Ill. R. Evid. 803(6) (eff. Jan. 1, 2011). "Satisfying foundational requirements to admit business records requires that the party tendering the record establish that the record was made in the regular course of business at or near the time of the event or occurrence." *Werner v. Nebal*, 377 Ill. App. 3d 447, 457 (2007). Any person familiar with the business and its mode of operation may provide testimony establishing the foundational requirements of a business record. *In re Marriage of Fields*, 283 Ill. App. 3d 894, 905 (1996). "A document the authenticity of which is not established is not

admissible evidence." *Gardner v. Navistar Int'l Transportation Corp*., 213 Ill. App. 3d 242, 248 (1991).

¶ 43 Eccleston failed to establish a proper foundation for authentication of the photographs as hospital business records. Eccleston obtained the photos from Dr. Michael Kaufman, who performed Thomas's autopsy and was not a hospital employee. To have the photographs admitted as a business record, Eccleston needed to lay the foundation by presenting a witness or other evidence to show they were taken in the regular course of the hospital's business at or near the time of the autopsy. He could have called Dr. Kaufman or Dr. Karan Saluja, a hospital employee who signed the autopsy. *Werner*, 377 Ill. App. 3d at 457. In the absence of a witness or other evidence to lay a proper foundation, the trial court did not abuse its discretion in excluding the photographs.

¶ 44 Similarly, Eccleston sought to admit a diagram of Thomas's leg veins. The diagram was a part of Thomas's medical records, but Eccleston did not present a witness to lay a foundation and testify that it was created in the regular course of the hospital's business at or near the time of Thomas's death. *Id.* Eccleston offered no evidence as to who created the diagram, why it was created, and what it was intended to depict. Absent proper foundation, the trial court did not abuse its discretion in denying Eccleston's request to admit the diagram into evidence. *Gardner*, 213 Ill. App. 3d at 238.

¶ 45 Rule 213

¶ 46 Next, Eccleston contends the trial court misapplied Rule 213 to the parties' expert witnesses throughout the trial. Ill. S.Ct. R. 213(f)(3) (eff. Jan. 1, 2018). More precisely, he asserts the trial court applied the Rule unfairly because when the hospital raised a Rule 213

objection to his expert witness's testimony, often the court required him to show that he had made a proper disclosure under Rule 213 while the court did not impose the same requirement on the hospital when he objected to the testimony of the hospital's expert witnesses.

¶ 47 The rule is to be liberally construed to do substantial justice between or among the parties." Ill. S.Ct. R. 213(k) (eff. Jan. 1, 2018). The party offering the testimony "has the burden to prove that the opinions were provided in an answer to a Rule 213 interrogatory or in the witness's discovery deposition." *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 850 (2010); Ill. S.Ct. R. 213(g) (eff. Jan. 1, 2018). Witnesses may elaborate on their properly disclosed opinions; that their trial testimony contains more precision than the originally-disclosed opinion does not violate the rule. *Wilbourn*, 398 Ill. App. 3d at 849. The testimony "must be encompassed by the original opinion," and it "cannot state new reasons for the opinion." *Id.* at 849-50. Yet, "a logical corollary to an opinion or a mere elaboration of the original statement is acceptable." *Id*. at 850.

¶ 48 Eccleston contends the trial court applied Rule 213 unfairly when the hospital raised a Rule 213 objection by requiring him to show that he had made a proper Rule 213 disclosure. Eccleston did not allege bias before the trial court, and we will not address for the first time on appeal the contention that the trial court impartially applied Rule 213. *Haudrich v. Howmedia*, 169 Ill. 2d 525, 536 (1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal"). We will, however, address Eccleston's contentions that the trial court erred in overruling his Rule 213 objections to the hospital's expert witnesses.

¶ 49 Eccleston contends the trial court failed to properly apply Rule 213 when he objected to testimony from Dr. Tapson's about the frequency of epidural hematomas when giving systemic

anticoagulants. The record shows the trial court asked the hospital's attorney to rephrase the question and struck part of the answer. Eccleston's attorney then objected when the hospital's attorney asked Dr. Tapson about his own experience regarding the frequency of epidural hematomas, and the trial court overruled the objection. This testimony draws on Dr. Tapson's own experience and the trial court did not abuse its discretion in permitting him to testify about his personal observation. *Saunders v. Norfolk & Western Ry. Co*. 54 Ill. App. 3d 307, 316 (1977) ("[a]n expert may base his opinion on personal observation."). Eccleston also contends the trial court improperly overruled his Rule 213 objection to Dr. Tapson's testimony about how often IVC filters fail and the frequency of failure in a study he had recently completed. The record shows that Dr. Tapson answered this question in his deposition and said that one-to-three percent of IVC filters fail.

¶ 50 Next, Eccleston argues the trial court improperly overruled his Rule 213 objection to Dr. Kushner's testimony about DVTs in surgical patients. The record shows, however, that on cross-examination, Eccleston's attorney asked Dr. Kushner whether he agreed that pulmonary embolism is the most common cause of preventable death in hospitals. The hospital objected and the trial court overruled the objection. In response, Dr. Kushner said medical and surgical patients differ and that because surgeons are aware of the risks of pulmonary embolism after surgery, surgeons are more likely to take action to prevent them. On redirect, in response to a question from the hospital's attorney asking him to elaborate, Dr. Kushner explained the difference between medical and surgical patients and their risks for pulmonary embolisms. Because Eccleston's attorney elicited this testimony, he cannot claim a Rule 213 violation when defense counsel sought to follow up.

¶ 51 Lastly, Eccleston argues the trial court erred in overruling his objections to Dr. Ciric's testimony that (i) based on the cumulative experience of neurosurgeons, and "hashing out" the issue month after month, systemic Heparin is not given until 14 days after surgery, and (ii) systemic Heparin may or may not work. The record shows that Eccleston's attorney did not raise Rule 213 objections to either question, so those objections were waived. *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 467 (2001) ("To preserve an issue for appellate review, a party must make a timely objection.").

¶ 52 Undisclosed Literature

¶ 53 Eccleston contends the trial court erred in allowing the hospital's opinion witnesses to reference undisclosed literature despite motions *in limine* (i) barring the use of literature absent proper foundation, (ii) barring the use of post-occurrence literature, and (iii) precluding experts from "reading, paraphrasing, or summarizing texts of direct examination." Eccleston refers to this as improperly "bootstrapping" undisclosed literature into its expert witness testimony. But, Eccleston fails to present any example of this happening during the trial.

¶ 54 First, Eccleston argues the trial court erred in permitting Dr. Ciric to testify that his general approach to systemic anticoagulants had evolved based on the collective wisdom of other neurosurgeons about their dangers and that by 2010, he was waiting two weeks to give post-surgical patients systemic Heparin. Notably, this testimony was unrelated to post-occurrence literature, and Dr. Ciric was not an opinion witness. Thus, the motions *in limine* to which Eccleston refers do not apply. Nonetheless, Eccleston argues the trial court should not have allowed this testimony because it improperly references the opinions of other colleagues. For support, Eccleston relies on *Kim v. Nazarian*, 216 Ill. App. 3d 818 (1991). In *Kim*, two

radiologists testified as expert witnesses for the defendants that they had shown X-rays to colleagues in their radiology department, who agreed with their interpretation of the X-rays. *Id.* at 822-25. The court held the testimony to be improper as the agreement of the expert's colleague with the expert's opinion "is of dubious value in explaining the basis of the opinion." *Id*. Further, the opposing party cannot cross-examine the corroborative opinion of the expert's colleague so would be prejudiced by its admission. *Id*. at 827-28.

¶ 55 Unlike in *Kim*, Dr. Ciric did not testify that other experts reviewed his plan for treating Thomas and agreed with it. Instead, he explained why his general approach to treating post-operative patients with Heparin had changed based on his own experience and the experience of other neurosurgeons. In short, Dr. Ciric did not claim that other physicians agreed with the hospital's approach to Thomas's treatment but rather, how the opinions of neurosurgeons with regard to post-surgical anticoagulants had evolved over time.

¶ 56 Eccleston also argues that Dr. Tapson testified about an undisclosed study he had recently completed on the effectiveness of IVC filters. Dr. Tapson was not discussing literature written by someone else but his own experience with patients and IVC filters. Similarly, Eccleston's objection to Dr. Kushner's testimony about the risks of pulmonary embolism in surgical patients as opposed to other patient groups does not involve literature, as it too concerned his own experiences. Thus, the trial court did not abuse its discretion by allowing this testimony.

¶ 57 Plaintiff's Expert Witness

¶ 58 Eccleston argues the trial court committed a prejudicial error by barring Dr. Gary Skaletsky as an expert witness on the neurological standard of care.

¶ 59 A three-step analysis determines whether a medical expert should be allowed to testify. *Purtill v. Hess*, 111 Ill. 2d 229, 243 (1986). First, the plaintiff must show the expert is a licensed member of the area of medicine about which the expert proposes to express an opinion. *Gill v. Foster*, 157 Ill. 2d at 316-17 (citing *Purtill v. Hess*, 111 Ill. 2d at 243). Second, the expert must be familiar with the methods, procedures, and treatments ordinarily observed by other physicians. *Id*. Unless both threshold requirements are met, the analysis ends and the trial court disallows the expert's testimony. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 115 (2004). Otherwise, the third step gives the trial court discretion to determine the expert's competence to testify in the particular case. This third step, the so-called "competency" requirement, involves the trial court exercising its discretion in deciding whether the expert witness is competent to testify to the particular medical "issues at hand." *Ruiz v. City of Chicago*, 366 Ill. App. 3d 947, 953 (2006).

¶ 60 The hospital does not dispute that Dr. Skaletsky satisfied the first foundational requirement. Rather, in its motion *in limine* and in its brief, the hospital contends Dr. Skaletsky is not familiar with the methods, procedures, and treatments ordinarily observed by other physicians, including defendant physicians. We agree.

¶ 61 Eccleston relies on *Sendarek v. Mitchell*, 282 Ill. App. 3d 881 (1996) to support his argument that Skaletsky's standard of care testimony should have been admitted. In *Sendarek*, the plaintiff sued her physician after complications arose after a procedure to remove lesions in her reproductive tract. The plaintiff's expert witness, while familiar with the procedure, had not performed it in nine years. The trial court found that the expert was competent to testify and the appellate court affirmed, finding that the expert met both foundational requirements and that his

lack of recent experience with the procedure went to the weight his testimony would be given, not to its admissibility.

¶ 62 Eccleston contends that because Skaletsky had performed about 3,000 lumbar surgeries, he should have been allowed to testify as to the neurological standard of care. But, the issue before the trial court was not the surgical procedure but rather the post-surgical care and specifically, the administration of anticoagulants. Dr. Skaletsky acknowledged he had never ordered post-operative systemic Heparin, and thus, unfamiliar with that treatment to testify as an expert.

¶ 63 This case resembles *Northern Trust v. Upjohn Co.*, 213 Ill. App. 3d 390 (1991). In *Northern Trust*, doctors treated the patient with an abortion-inducing drug that later resulted in cardiac arrest and brain damage. The plaintiff's expert witness was not an obstetrician and never used the drug, seen it used, or observed the reactions of a patient receiving the drug. *Id*. at 407. The appellate court determined that the expert failed the second prong of the test and was not competent to testify on the standard of care. *Id.*

¶ 64 Similarly, Dr. Skaletsky had never prescribed anticoagulants and had no experience with Heparin. He testified that he would have to defer to another specialist regarding the effects of systemic Heparin on a patient with a DVT or who recommended that it be prescribed. His lack of experience with the drug or knowledge about its effects made him unqualified to testify as an expert about the standard of care in ordering it after surgery.

¶ 65 Cumulative Expert Testimony

¶ 66 Eccleston contends the trial court erred in permitting the doctors who treated Thomas to testify that they met the standard of care in treating her. Specifically, he alleges that by allowing

the treating physicians as well as the hospital's three expert witnesses to testify, the hospital was allowed to present cumulative evidence regarding the standard of care. We disagree.

¶ 67 The trial court has authority to control the questioning of witnesses and the presentation of evidence. Ill. R. Evid. 611(a) (eff. Jan. 1, 2011). The decision whether to exclude cumulative evidence comes within the sound discretion of the circuit court. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495 (2002). This discretion includes the ability to limit the number of expert witnesses a party may call on to testify and to bar cumulative testimony. *Dillon*, 199 Ill. 2d at 495. When multiple defendants are named, each defendant may present an expert in defense. *Taylor v. Cook*, 2011 IL App (1st) 093085 ¶¶ 34-35.

¶ 68 Shortly before trial, Eccleston dismissed the doctors as defendants. Nevertheless, his theory of the case revolves around each doctor being individually negligent for failing to prescribe systemic anticoagulants. Thus, the trial court did not abuse its discretion by permitting the hospital to present a separate expert witness as to each doctor. *Taylor*, 2011 IL App (1st) 093085 ¶¶ 34-35. Nor did the trial court abuse its discretion by permitting the doctors to testify that they believed they complied with the standard of care. The physicians were not expert witnesses but testified about their conduct in relation to Thomas's care. Eccleston alleged that the doctors violated the standard of care and asked them about the plan to hold off on giving Thomas systemic Heparin for 14 days after surgery.

¶ 69 Motion for New Trial

¶ 70 Eccleston argues the trial court erred in refusing to consider numerous allegations in his motion for a new trial because they were not adequately supported by a "case, rule or prior

motion." Eccleston contends his allegations of error had enough specificity and he was not obligated to support each alleged error with a case, rule, or prior motion.

¶ 71 Section 2-1202(b) of the Code provides that a post-trial motion "must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired, as for example, the entry of a judgment, the granting of a new trial or other appropriate relief." 735 ILCS 5/2-12-2(b) (West 2016). Illinois case law requires specificity in post-trial motions (i) "to allow the trial judge to review his [or her] own decisions," (ii) "to allow the reviewing court to determine whether the trial court has had an adequate opportunity to assess the allegedly erroneous rulings," and (iii) "to prevent litigants from stating general objections and then raising issues on appeal that the trial judge was never given an opportunity to consider." *Balsley v. Raymond Corp*., 232 Ill. App. 3d 1028, 1029, (1992). Without sufficient particularity, the errors are deemed waived. *Perez v. Baltimore & Ohio R. Co.*, 24 Ill. App. 2d 204, 210 (1960).

¶ 72 We have read Eccleston's post-trial motion. We agree that he sets forth sufficient particularity to permit identification of the alleged errors. But, we will not reverse the trial court's decision to deny the motion for a new trial because the jury verdict was not against the manifest weight of the evidence.

¶ 73 We review a trial court's decision to deny a motion for a new trial for an abuse of discretion. *Bosco v. Janowitz*, 388 Ill. App. 3d 450, 461 (2009). For a new trial, the verdict must be contrary to the manifest weight of the evidence. *Id*. That occurs "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." *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222

Ill.2d 147, 179 (2006). To determine whether the trial court abused its discretion, this court considers whether the evidence supports the jury's verdict and whether the losing party received a fair trial. *Maple v. Gustafson*, 151 Ill. 2d 445, 455-56 (1992).

¶ 74 The evidence supports the jury's verdict, and Eccleston received a fair trial. Three expert witnesses testified that the hospital's treatment plan for Thomas met the standard of care. They also testified as to the effectiveness of IVC filters and the possibility of Thomas suffering a pulmonary embolism even if the hospital had given her systemic Heparin. Although Eccleston's expert testified that the hospital did not meet the standard of care, he acknowledged that systemic Heparin would not have dissolved Thomas's existing blood clots and that Thomas never showed signs of a pulmonary embolism.

¶ 75 Litigants "are not entitled to error-free trials, but rather fair trials, free of substantial prejudice." *Netto v. Goldenberg*, 266 Ill. App. 3d 174, 184 (1994). We grant a new trial "when the cumulative effect of trial errors so deprives a party of a fair trial that the verdict might have been affected." *Id*. Nothing in the record suggests Eccleston was denied a fair trial, thus the trial court did not abuse its discretion in denying his motion for a new trial.

¶ 76 Affirmed.